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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X 11-CIV-1679 (DLC)

SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiffs

- against -

**ORDER TO SHOW CAUSE
FOR DEFAULT JUDGMENT
AGAINST DEFENDANT
CHARLES COWLES**

GAGOSIAN GALLERY, INC., and
CHARLES COWLES,

Defendants.

-----X

Upon the affidavit of Aaron Richard Golub, sworn to the 9th day of September, 2011 and the exhibits annexed thereto, and upon all prior papers and proceedings heretofore had herein, it is

ORDERED, that the above named defendant Charles Cowles show cause before a motion term of this Court, in courtroom 15B, United States Courthouse, 500 Pearl Street, in the City, County and State of New York, on October 14, 2011 at 12:00 o'clock in the noon thereof, or as soon thereafter as counsel may be heard, why an Order should not be issued pursuant to Rule 54(b) and Rule 55(b) of the Federal Rules of Civil Procedure in favor of plaintiffs Safflane Holdings Ltd., and Robert Wylde, for the following relief:

- i. Pursuant to FRCP Rule 55(b)(2), directing that a default judgment, as to liability, be entered against defendant Charles Cowles; and
- ii. That the inquest to determine the level of damages as to defendant Cowles shall await the time of trial and shall be consolidated with the damages aspect of the trial against non-defaulting defendant Gagosian Gallery, Inc.

GOLUB AFF.

AARON RICHARD GOLUB, ESQUIRE, PC
Attorneys for Plaintiffs
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ARG 6056

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X 11-CIV-1679 (DLC)

SAFFLANE HOLDINGS LTD., and
ROBERT WYLDE,

Plaintiff,

**AFFIDAVIT FOR
JUDGMENT BY DEFAULT**

-against-

GAGOSIAN GALLERY, INC., and
CHARLES COWLES

Defendants.

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AARON RICHARD GOLUB, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am the principal of Aaron Richard Golub, Esquire, P.C., attorneys for plaintiffs in the above-entitled action and I am familiar with all of the facts and circumstances in this action.

2. I make this affidavit pursuant to Rule 55.1 and 55.2(b) of the Civil Rules for the Southern District of New York and Rule 2 of the Default Judgment Procedure of this Court (Revised August 23, 2011), in support of plaintiffs' application for entry of a default judgment against defendant Charles Cowles ("CC"), who is

not an infant, and to the best of my knowledge is not in the military or an incompetent person.

FACTUAL BACKGROUND

3. This is an action to recover sums owed by defendant Gagosian Gallery, Inc. ("Gagosian") and against CC as alleged in the Corrected Second Amended Complaint ("Corrected SAC") (Ex. 7), in the second, fourth, sixth, eighth, tenth, twelfth, and fourteenth causes of action as more specifically stated in Ex. 7 pars. 42, 49, 55, 62, 72, 82, 88 and 95. To the extent that Gagosian may establish adequate facts in connection with any defense to the causes of action against it under which CC would be held liable, in whole or in part, for the acts, omissions, and/or statements of Gagosian, any judgment entered by the Court for plaintiffs in connection with any such causes of action, should be entered against Gagosian and/or CC, jointly and/or severally, or against CC.

4. Jurisdiction of the subject matter of this action is based on 28 U.S.C § 1332(a)(1). This is a civil action over which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1332(a)(2), as there is complete diversity of citizenship between all plaintiffs, on the one hand, and all defendants, on the other, and the amount in controversy exceeds seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs. Complete diversity exists between the parties in this action.

5. The allegations herein are made without prejudice to plaintiffs' claims and defenses in *The Metropolitan Museum of Art, et al. v. Safflane Holdings, Ltd., et al.*, S.D.N.Y. Case No. CV 11-3143 (DLC) (the "*Met v. Safflane* action").

6. This Court is respectfully referred to the Corrected Second Amended Complaint, dated July 23, 2011 ("Corrected SAC") (Ex. 7) for the background facts herein.

PROCEDURAL HISTORY

7. This action was commenced on March 10, 2011, by filing the Summons and Complaint ("Complaint") (Ex. 1). The Complaint did not name CC as a party and was duly served on defendant Gagosian.

8. On May 13, 2011, a pre-trial conference was held and this Court issued a Pre-Trial Scheduling Order dated May 16, 2011 ("Scheduling Order") (Ex. 2), which ordered, inter alia,

- i. Plaintiffs to file an amended complaint by May 27, 2011; and
- ii. No additional parties may be joined or pleadings amended after July 15, 2011.

9. On June 10, 2011, plaintiff filed and served the First Amended Complaint ("FAC") (Ex. 3) which was duly served on defendant Gagosian. The FAC did not name CC as a defendant.

10. Gagosian answered the FAC on June 27, 2011 (Ex. 4).

11. Plaintiffs filed the Second Amended Complaint dated July 15, 2011 ("SAC") (Ex. 5). The SAC named CC as a defendant.

12. Plaintiffs' requested and were granted permission by Order dated July 19, 2011 (Ex. 6) to serve and file the Corrected

SAC (Ex. 7) that corrected minor non-substantive typographical errors in the SAC. The Corrected SAC asserted claims against defendant CC.

13. Defendant Gagosian answered the Corrected SAC on August 8, 2011 (Ex. 8).

**PLAINTIFF PERSONALLY SERVED THE CORRECTED
SAC ON DEFENDANT CC**

14. CC was deposed on July 13, 2011 and he testified that his address is 84 Mercer Street, New York, New York 10012 (Ex. 9, p. 4:7-10).

15. On July 20, 2011, the Clerk of Court issued a Summons in a Civil Action, directed to defendant CC (Ex. 10).

16. On July 27, 2011, defendant CC was personally served at his Mercer Street address (Ex. 10).

17. On August 10, 2011, proof of service was filed via the Courts electronic filing system ("ECF"). The ECF confirmation of filing of the proof of service (Ex. 11), automatically calculated the date defendant CC's answer to the Corrected SAC was due - August 17, 2011 (Ex. 11). Between on or about July 27, 2011, to the present, CC has not contacted plaintiffs' counsel to request any extension and/or adjournment of the August 17, 2011 deadline to answer the Corrected SAC (Ex. 7). CC has not answered the Corrected SAC and is currently in default.

18. Plaintiffs are seeking a default against only defendant CC and a judgment against CC as to liability in favor of plaintiffs

pursuant to FRCP Rule 54(b)¹ and Rule 55(a)² for failing to answer the Corrected SAC by August 17, 2011 (Ex. 11).

**PLAINTIFFS ARE ENTITLED TO THE ENTRY
OF DEFAULT JUDGMENT AGAINST DEFENDANT CC
AS TO LIABILITY**

19. CC failure to answer the Corrected SAC (Ex. 7) within the time allotted renders him in default concerning causes of action against him and an entry of default against CC is appropriate. See Lite-up Corporation v. Sony Music Entertainment, Inc., 1999 WL 436563 (SDNY, June 24, 1999).³ Moreover, by defaulting, CC has admitted liability concerning plaintiffs' allegations against him. See Montcalm Publishing Corp. v. Ryan, et al., 807 F.Supp. 975 (SDNY, 1992).⁴

1 FRCP Rule 54(b) provides that:

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

2 FRCP Rule 55(a), provides that:

"Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."

3 Holding:

"..., it is appropriate to enter a default . . . , thereby barring his participation in further proceedings as to the merits." Id. 1999 WL 436563 at 2.

4 Holding:

19. As this action remains pending against the answering defendant Gagosian, plaintiffs respectfully request the following relief against CC:

- i. An Order, pursuant to FRCP Rule 55(b)(2), directing that a default judgment, as to liability, be entered against defendant CC; and
- ii. That the inquest to determine the level of damages as to defendant CC shall await the time of trial and shall be consolidated with the damages aspect of the trial against non-defaulting defendant Gagosian.

20. Plaintiffs are entitled to the foregoing relief as a judgment concerning damages against CC would be premature at this juncture, since the action against the remaining defendant Gagosian continues to proceed. See Lite-Up, supra;⁵ Garafola v. Ecker Restoration Corp., 1996 WL 312346 (SDNY, June 10, 1996);⁶

"A default constitutes admission as to liability; therefore, the effect of a defendants' default is that it is deemed to have admitted all of the well-pleaded allegations raised in the complaint pertaining to liability. [citation omitted]." Id. 807 F.Supp. 975 at 977.

5 Holding:

"Nonetheless, even if the liability is joint and several and thus a default judgment may be entered, it is appropriate to enter judgment solely as to liability and not as to the amount of damages to be assessed against the defaulting party, since a separate determination of damages would pose the prospect of inconsistent judgments. [citation omitted]." Id. 1999 WL 436563 at 3.

6 Holding:

"Nonetheless, even if the liability is joint and several and thus a default judgment may be entered, the courts have consistently held that it is appropriate to enter judgment solely as to liability and not as to the amount of damages to be assessed against the defaulting party, since a separate determination of damages would pose the prospect of inconsistent judgments. [citation omitted]."

* * *

In this case plaintiff seeks joint and several liability against the defendants, rather than pure joint liability. [citation omitted]. Frow

3947 Austin Boulevard Associates, LLC, v. M.K.D. Capital Corp.,
2006 WL 785272 (SDNY, March 24, 2006);⁷ Montcalm, supra;⁸ Friedman
v. Lawrence, 1991 WL206308 (SDNY, Oct. 2, 1991).⁹

is not directly applicable to plaintiff's claims, and under governing Second Circuit law, a determination of liability against the defaulting defendant is therefore not premature at this time." Id. 1996 WL 312346 at 3.

7 Holding:

". . . we conclude that plaintiff has adequately pled allegations sufficient to establish the defaulting defendants' liability under Counts One, Two, Three, Four, and Five.

* * *

However, any determination as to damages would be premature at this time. Rather, where there are answering defendants 'it is appropriate to enter judgment solely as to liability and not as to the amount of damages to be assessed against the defaulting part[ies], since a separate determination of damages would pose the prospect of inconsistent judgments.' [citation omitted]" Id. 2006 WL 785272 at 2.

8 Holding:

"However, in such a case where some but not all defendants have defaulted, the courts have consistently held that it is appropriate to enter judgment solely as to liability and not as to the amount of damages to be assessed against the defaulting party, since a separate determination of damages would pose the prospect of inconsistent judgments.

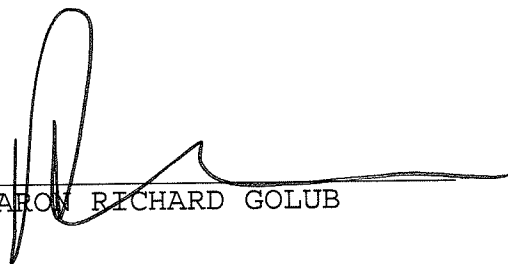
* * *

Instead, the proper procedure is to consolidate the inquest to determine the level of damages as to the Defaulting Defendants with the damages aspect of the trial against the non-defaulting defendants, Ryan and Progressive. [citation omitted]. The Defaulting Defendants may not participate in the merits aspect of the trial, as their default judgments stand as admissions of liability." [emphasis supplied]. Id. 807 F.Supp. at 978.

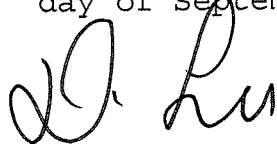
9 Holding:

"For the reasons stated, I deem the assessment of damages against the defaulting defendants to be premature at this time. Entry of a judgment of liability against those defendants is all the protection to which plaintiff is currently entitled." Id. 1991 WL206308 at 4.

WHEREFORE, plaintiffs' request this Court grant an Order (i) pursuant to FRCP Rule 55(b)(2) directing a default judgment, as to liability, be entered against defendant Charles CC in favor of plaintiffs; (ii) that the inquest to determine the level of damages as to defendant CC shall await the time of trial and shall be consolidated with the damages aspect of the trial against non-defaulting defendant Gagosian; together with such other and further relief as to this Court seems just and proper.


AARON RICHARD GOLUB

Sworn to before me this
9th day of September, 2011



NOTARY PUBLIC

DAVID LU
Notary Public, State of New York
Commission Expires Jan. 17, 2010
2014

=====NOTICE OF ENTRY=====

PLEASE take notice that the within is a (certified) true copy of a

duly entered in the office of the clerk of the within named court on

Dated,

Yours, etc.

Attorney for

Office and Post Office Address
Aaron Richard Golub, Esquire, P.C.
34 East 67th Street-3rd Floor
New York, New York 10065

To

Attorney(s) for

=====NOTICE OF SETTLEMENT=====
PLEASE take notice that an order of which the within is a true copy will be presented for settlement to the Hon. on

at M.

Dated,

Yours, etc.

Attorney for

Aaron Richard Golub, Esquire, P.C.
34 East 67th Street - 3rd Floor
New York, New York 10065

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11-CIV-1679 (DLC)

SAFFLANE HOLDINGS LTD., and
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Plaintiffs,

-against-

GAGOSIAN GALLERY, INC.,
CHARLES COWLES

Defendants.

**ORDER TO SHOW CAUSE
AND SUPPORTING AFFIDAVIT**

Attorneys for Plaintiffs

Office and Post Office Address, Telephone
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New York, New York 10065
212-838-4811

To

Attorney(s) for

Service of copy of the within is hereby admitted

Dated

.....
Attorney(s) for