SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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HARDY WAY, LLC,

Plaintiff,

- v -

ADDICTED BRANDS LLC,

Defendant.

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INDEX NO.	655175/2019
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-24 were read on this motion for DEFAULT JUDGMENT.

Plaintiff Hardy Way, LLC (Licensor) moves, pursuant to CPLR 3215, for a default judgment against defendant Addicted Brands LLC (Licensee). The motion is unopposed. For the reasons that follow, plaintiff's motion is granted.

This case arises from a license agreement dated September 28, 2017 between Licensor and Licensee, both Delaware LLCs (Dkt. 9 [Agreement]).[1] Rida Kahn signed the Agreement on behalf of Licensee as president (*id.* at 31). The Agreement, which is governed by New York Law (*id.* ¶ 22.1), granted to Licensee the right to use Licensor's "Ed Hardy" trademark in the United States and Canada in connection with the manufacture, marketing and sale of certain eyewear products (Licensed Products) through specified distribution channels (Agreement § 1). The term of the agreement was to end on December 31, 2021 (*id.* § 2). The Agreement obligated Licensee to develop and sell Licensed Products bearing the "Ed Hardy" trademark, subject to Licensor's prior

[1] "Dkt." followed by a number refers to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

written approval of all designs and products *(id.* §§ 3-6), and to remit to Licensor a 10% royalty—an 8% "sales royalty" and a 2% "advertising royalty")—of "net wholesale sales," as defined in the Agreement *(id.* §§ 8, 9). The Agreement also specified non-refundable minimum royalties according to the following schedule (Original Schedule) *(id.* §§ 7, 9; *id*. at 30):

Period	Minimum Sales Royalty[2]	Minimum Advertising Royalty
Effective Date -12/31/18	$48,000	$12,000
1/1/19-12/31/19	$96,000	$24,000
1/1/20-12/31/20	$120,000	$30,000
1/1/21-12/31/21	$144,000	$36,000

The minimum royalties for each period were to be paid to Licensor in four equal installments on the first day of each quarter of the calendar year (*id.* ¶¶ 7.2, 9.2). The entirety of the first period's minimum royalties, however, were due on October 1, 2018.

Paragraph 17.1(a) of the Agreement provides:

> If Licensee fails to make any payment due hereunder, (i) ***Licensee shall pay interest on the unpaid balance thereof from and including the date such payment becomes due until the date the entire amount is paid in full*** at a rate equal to the prime rate prevailing in New York, New York, U.S.A., as quoted in The Wall Street Journal ***as of the close of business on the date the payment first becomes due*** plus three (3) percentage points …, and (ii) if such default shall continue uncured for a period of five (5) days after notice thereof from Licensor, Licensor may terminate this Agreement forthwith by notice to Licensee (Dkt. 2 at 16).

It also provides that "Licensee shall be responsible for and shall reimburse Licensor for any and all costs incurred by Licensor in seeking to collect any sums due to Licensor hereunder, including attorneys' and collection agency fees and expenses" (*id.*.).

[2] The Agreement describes a "Minimum Royalty" on the "Minimum Net Wholesale Sales." For clarity, this decision refers to this sum as the "Minimum Sales Royalty."

Paragraph 18.1 provides:

> Upon Termination, Licensee shall pay to Licensor any sums then owed to it, including … any Minimum [Sales] Royalty payment pursuant to ¶7 and any … Minimum Advertising Royalty payment pursuant to ¶9. In addition, (a) the Minimum [Sales] Royalty and Minimum Advertising Royalty remaining unpaid for the Annual Period during which this Agreement terminates plus (b) the Minimum [Sales] Royalty and Minimum Advertising Royalty payable for the remaining Annual Periods under the Term shall be accelerated and shall become immediately due and payable to Licensor (*id.* at 17-18).

Paragraph 23.3 contains a "no oral modification" clause, as follows:

> This Agreement contains the entire understanding and agreement between the parties hereto with respect to the subject matter hereof, supersedes all prior oral or written understandings and agreements relating thereto and ***may not be modified, discharged or terminated, nor may any of the provisions hereof be waived, orally*** (*id.* at 22).

Paragraph 23.5 contains a "no waiver" clause, as follows:

> No waiver by either party, whether express or implied, of any provision hereof, or of any breach or default thereof, shall constitute a continuing waiver of such provision or of any other provision of this Agreement. Acceptance of payments by Licensor shall not be deemed a waiver by Licensor of any violation of or default under any of the provisions of this Agreement by Licensee. Also, if for any reason any acts or omissions by Licensee hereunder not in conformance with any of the requirements hereof are not objected to by Licensor from time to time, such a failure to object shall not be deemed a waiver by Licensor of any such requirement and Licensor may insist upon due performance thereof by Licensee at any time (*id.*).

Licensor submits an affidavit of Kyle Harmon, Executive Vice President and General Counsel of Iconix Brand Group, Inc. (Iconix), plaintiff's parent corporation (Dkt. 8) and a supplemental affidavit of Rosaria Rizzo, Brand Manager & Merchandiser at Iconix (Dkt. 21). According to Harmon and Rizzo, Licensee failed to make the first two quarterly payments. By email dated February 12, 2019, Licensor agreed to a new payment schedule (Modified Schedule) as follows (Dkt. 8 [Harmon Aff.] ¶ 7; Dkt. 22 [2/12/19 Rizzo email to Khan] at 2, 4):

Date	Payment Due
6/12/19	$5,000
7/12/19	$6,000
8/11/19	$9,000
9/10/19	$12,500
10/10/19	$18,000
11/9/19	$26,000
12/9/19	$37,000
1/8/20	$42,000
2/7/20	$54,500

The Modified Schedule, which extended into the first quarter of 2020, included the $180,000 in Minimum Sales and Advertising Royalties for 2018 and 2019 plus a $30,000 Minimum Sales Royalty that had been due on January 1, 2020 under the Original Schedule (Dkt. 21 [Rizzo Aff.] ¶ 11). Licensee made no payments under the Modified Schedule either. By letters dated June 17 and 26, 2019 (Dkt. 10), Licensor demanded $5,000 "plus interest on the unpaid balance (from and including the date such payment becomes due until the date the entire amount is paid in full)." Both letters stated that "[n]othing contained in this letter is intended to be or should be considered a waiver of any right, claim or defense, all of which are expressly reserved."

When no payment was forthcoming, Licensor terminated the Agreement by letter dated July 31, 2019 (Dkt. 11). The letter demanded payment of $120,000 as already outstanding plus the accelerated amount of $390,000 for the remaining periods of the terminated Agreement, demanding a total payment of $510,000 by August 9, 2019. The letter further stated that "[t]ermination of the Agreement is without prejudice to the various rights and remedies available to Licensor, all of which are fully reserved" (*id.* at 1) and the following reservation of rights:

> Licensor reserves all rights and remedies (including interest on the Licensee Debt and recovery for all costs and damages for any claim) in respect of the Agreement, whether arising during or subsequent to the term of the License Agreement.
>
> Nothing contained in this letter is intended to be or should be considered a waiver of any right, claim or defense, all of which are expressly reserved (*id.* at 2).

Plaintiff commenced this action by summons and verified complaint filed September 9, 2019. The complaint asserts a single cause of action for breach of contract. On September 11, 2019, service of process was made upon Licensee's registered agent pursuant to CPLR § 311-a(a)(iii) (Dkt. 5 [Affidavit of Service]). An additional mailing pursuant to CPLR § 3215(g) was sent on November 1, 2019 to Licensor's last known address in Illinois (Dkt. 15 [Affidavit of Mailing]). On November 13, 2019, plaintiff moved for a default judgment of $510,000, plus interest calculated as follows (Dkt. 8 ¶ 14):

Date from which interest computed	Amount on which interest computed	Interest Rate (per annum)
October 1, 2018	$60,000	8.25%
January 1, 2019	$30,000	8.50%
April 1, 2019	$30,000	8.50%
August 9, 2019	$390,000	8.25%

To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim (CPLR 3215[a]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]; *see Whittemore v Yeo*, 117 AD3d 544, 545 [1st Dept 2014]). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability" (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] ["defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them"]). The defaulting defendant does not, however, admit the plaintiff's conclusion as to damages (*see Rokina*, 63 NY2d at 730; CPLR 3215).

Licensor carried its burden, on this motion for a default judgment, to prove breach of the Agreement and its entitlement to an award of $510,000. As to the date from which interest is to be

calculated, the Agreement states that "Licensee shall pay interest on the unpaid balance thereof from and including the date such payment becomes due until the date the entire amount is paid in full" (Agreement ¶ 17.1). While Licensor never expressly waived interest charges per the Original Schedule, it admits that it agreed to the Modified Schedule with payments commencing only on ***June 12, 2019*** (*see* CPLR 5001[b] ["Interest shall be computed from the earliest ascertainable date the cause of action existed"]). Absent consideration, however, the Modified Schedule was at best an "executory accord" within the meaning of New York General Obligations Law § 15-501; that is, "an agreement embodying a promise ... to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, [or] obligation … and a promise ... to render such performance in satisfaction or in discharge of such claim, cause of action, contract [or] obligation ...." (*see Homayouni v Paribas*, 241 AD2d 375, 376 [1st Dept 1997]). General Obligations Law 15-501[3] further states:

> If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract [or] obligation … which is the subject of the accord, or to assert his right under the accord.

Licensee did not even perform under the Modified Schedule. Thus, Licensor is entitled to an award of interest on the first $120,000 under the ***Original*** Schedule: that is, (1) on the first $60,000 from October 1, 2018 at the rate of 8.25% per annum, (2) on the next $30,000 from January 1, 2019 at the rate of 8.50%; and (3) on the next $30,000 from April 1, 2019 at the rate of 8.50% per annum. Due to termination of the Agreement, Licensor is also entitled to interest on the final $390,000 from the date of August 9, 2019 at the rate of 8.25% per annum. Finally, Licensor is entitled to its reasonable attorneys' fees expended in connection with this action, as the Agreement clearly and unmistakably allows plaintiff to recover them (*see Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is granted; and it is further

ORDERED that within 14 days of the entry of this order on NYSCEF, plaintiff's counsel shall e-file an affirmation to the court, not exceeding five pages, setting forth its claimed attorneys' fees, explaining why such fees are reasonable and attaching documentary proof thereof, and defendant may e-file a five page letter in opposition within 14 days of plaintiff e-filing its submission, and the e-filing confirmation for any such submission shall be emailed to ekimmel@nycourts.gov; and it is further

ORDERED that if plaintiff fails to timely e-file its submission, plaintiff shall be deemed to have waived its claims for attorneys' fees; and it is further

ORDERED that plaintiff may expressly waive attorneys' fees and seek entry of judgment in accordance with this decision and order without further proceedings by e-filed letter attaching a proposed court order directing the Clerk to enter judgment, and the proposed order shall be emailed to ekimmel@nycourts.gov in Microsoft Word format along with the e-filing confirmation; and it is further

ORDERED that within 14 days of entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendant by overnight mail and shall e-file proof of service within three days thereafter.

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5/28/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER