

**Kenneth Cole Prods., Inc. v Manhattan Beachwear, Inc.**

2022 NY Slip Op 30702(U)

March 4, 2022

Supreme Court, New York County

Docket Number: Index No. 654144/2020

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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KENNETH COLE PRODUCTIONS, INC. and KENNETH  
COLE PRODUCTIONS (LIC), LLC,

INDEX NO. 654144/2020

Plaintiffs,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 003

MANHATTAN BEACHWEAR, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is

Plaintiffs Kenneth Cole Productions, Inc. and Kenneth Cole Productions (LIC), LLC, move, pursuant to CPLR 3215, for a default judgment against defendant Manhattan Beachwear, Inc. for failure to appear in the action through counsel.

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, \*6-7 [Sup Ct, NY County 2018] [citations omitted].)

Proof of Service

Plaintiff provides proof of service of the summons and complaint upon

defendant, via the New York Secretary of State in accordance with BCL § 306, on September 3, 2020. (NYSCEF Doc. No. [NYSCEF] 2, Affidavit of Service of Summons and Complaint). Plaintiff also provides proof of service via first class mail as well as an additional proof of service on November 11, 2020. (NYSCEF 3, Affidavit of Service of Summons and Complaint [September 11, 2020]; NYSCEF 38, Affidavit of Service of Summons and Complaint [November 11, 2020].) Plaintiff also provides proof of service of this Order to Show for a default judgment and the related papers/exhibits in support. (NYSCEF 43, Affidavit of Service of OSC.)

#### Proof of Facts

When the complaint is not verified, “CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the [moving] party of the facts constituting the claim.” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003].) In their complaint, plaintiffs seek monetary damages for breach of contract and an injunction, restraining and enjoining defendant from selling articles bearing plaintiffs’ licensed marks.

Here, proof of the facts constituting plaintiffs’ claim against defendants for breach of a license agreement and the amounts due as a result of the breach are set forth in the affidavit of Marc Goldfarb, Kenneth Cole Productions, Inc.’s Senior Vice President and General Counsel Chief Legal Officer. (NYSCEF 29, Goldfarb Aff.)

Specifically, the affidavit and attached exhibits evidence that plaintiffs and defendant entered into a license agreement dated January 25, 2011, which granted defendant license to manufacture, distribute, and market wholesale swimwear in exchange for royalties and other calculated payments (Licensing Agreement).

(NYSCEF 29, Goldfarb Aff. ¶¶ 5, 7; NYSCEF 31, License Agreement and Amendments.) The parties negotiated a Royalty Damages provision that required defendant to pay a sum equal to the total Guaranteed Minimum Royalty and Advertising Fee based on the Guaranteed Minimum Net Sales as agreed upon in the License Agreement. (NYSCEF 29, Goldfarb Aff. ¶¶ 7-11.) Defendant failed to pay plaintiffs in the first quarter of 2020 (*id.* ¶ 13), and on May 28, 2020, plaintiffs sent defendant a default letter. (*id.* ¶ 14; NYSCEF 32, Default Letter.) As a result of the default, plaintiffs terminated the License Agreement on June 5, 2020. (NYSCEF 29 Goldfarb Aff. ¶ 16; NYSCEF 33, Termination Letter.)

Plaintiffs provide the court with sufficient evidence that defendant is liable for \$1,122,250 on an outstanding invoice for services and \$1,346,250 in liquidated damages as outlined in the License Agreement for a total of \$2,468,500. (NYSCEF 29, Goldfarb Aff. ¶ 17, n 1 and 2; NYSCEF 31, Licensing Agreement.)

In addition to their claims for breach of contract, plaintiffs also seek injunctive relief. “The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005] [citations omitted].)

Section 15.3 of the Licensing Agreement provides, in relevant part,

“[u]nauthorized sale or promotion of the Articles in the Territory or elsewhere upon termination or expiration would cause irreparable damage to Licensor and the prestige of the Licensed Marks. Any violation of this provision shall entitle Licensor to relief in the form of a temporary restraining order and preliminary injunction.”

(NYSCEF 31, Licensing Agreement at 25/54.) The parties clearly agreed that, if the agreement was breached, plaintiffs would suffer irreparable harm which is sufficient to satisfy the prong of irreparable harm. (*Vector Media, LLC v Go NY Tours Inc.*, 187 AD3d 531, 532 [1st Dept 2020] [citation omitted].) Furthermore, plaintiffs have shown a likelihood of success on the merits and the equities clearly favor plaintiffs.

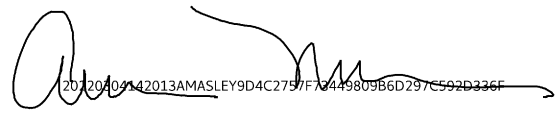
#### Proof of Default

On March 19, 2021, defendant replaced its original counsel with Robinson & Cole. (NYSCEF 35, Kohn Aff. ¶ 8; NYSCEF 8, Defendant's Consent to Change Counsel.) On August 18, 2021, Robinson & Cole filed a motion to withdraw as counsel. (NYSCEF 35, Kohn Aff. ¶ 9; NYSCEF 13, Notice to Withdraw as Counsel.) On September 22, the court ordered defendant, a corporation, to obtain new counsel by October 4, 2021. (NYSCEF 35, Kohn Aff. ¶ 10; NYSCEF 26, Tr. at 5:14-15, 6:4-8.) No attorney has filed a notice of appearance. Plaintiffs' attorney affirms that defendant has not been informed that defendant retained counsel. (NYSCEF 35, Kohn Aff. ¶ 11.)

Accordingly, it is

ORDERED that plaintiffs' motion for default judgment is granted and the Clerk of the Court is directed to enter judgment in favor of Kenneth Cole Productions, Inc., and Kenneth Cole Productions (LIC), LLC against defendant Manhattan Beachwear in the sum of \$2,468,500, with interest at the rate of 9% per annum from the date of June 5, 2020 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ADJUDGED that that defendant Manhattan Beachwear and its successors and assigns are permanently restrained and enjoined from using the marks KENNETH COLE NEW YORK and KENNETH COLE REACTION, including, without limitation, by manufacturing, selling, distributing, and promoting articles bearing the marks KENNETH COLE NEW YORK and KENNETH COLE REACTION.



3/4/2022  
DATE

\_\_\_\_\_  
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT  REFERENCE