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United States District Court,
S.D. New York.

WORLD MAGIC INTERNATIONAL AVV, Plaintiff,
v.
EDDY INTERNATIONAL LTD.
and Eddy Au, Defendants.

No. 09 Civ. 1447(DC). | Nov. 1, 2010.

Attorneys and Law Firms

Feldman Law Group P.C., by: Kalpana Nagampalli, Esq., Stephen E. Feldman, Esq., New York, NY, for Plaintiff.

Shechtman Halperin Savage, LLP, by: Lynn E. Judell, Esq., White Plains, NY, for Defendants.

Opinion

MEMORANDUM DECISION

CHIN, Circuit Judge Sitting by Designation.

***1** Plaintiff World Magic International AW ("World Magic") brought this suit on February 18, 2009, alleging that defendants Eddy International Ltd. and Eddy Au infringed World Magic's federal and state trademark rights. Defendants failed to answer or otherwise respond to the complaint; accordingly, I entered a default judgment against defendants on December 14, 2009. As a consequence of the judgment, U.S. Marshals seized certain of defendants' assets in February 2010. On June 1, 2010, defendants filed a motion to vacate the default judgment pursuant to Federal Rules of Civil Procedure 60(b)(1), (4), and (6), arguing that service was improper, the Court did not have personal jurisdiction over defendants, and defendants' failure to timely answer was inadvertent. At an evidentiary hearing on service of process held October 13, 2010, I found that, contrary to the account in his affidavits, Eddy Au had been personally served on February 18, 2009, at the International Toy Fair in New York; thus, I held that service was proper and that the Court had personal jurisdiction over defendants. I reserved decision on defendants' motion to vacate the default judgment. For the following reasons, the motion is denied. The judgment will stand.

DISCUSSION

A. *Motion to Vacate Standard*

Federal Rule of Civil Procedure 55(c) provides that a court may set aside a default judgment under Rule 60(b). The Second Circuit has long indicated its preference that "litigation disputes be resolved on the merits, not by default." *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir.1995) (collecting cases). Accordingly, when considering a motion to vacate a default judgment, a court shall consider whether (1) the default was willful; (2) the defendant has a meritorious defense to the original claim; and (3) setting aside the default would prejudice the opposing party. *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 166–67 (2d Cir.2004). "Other relevant equitable factors may also be considered," including "whether the failure to follow a rule of procedure was a mistake made in good faith and whether the entry of default would bring about a harsh or unfair result." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 93 (2d Cir.1993); *see Roberts v.. Keith*, No. 04 Civ. 10079(CSH), 2007 WL 2712853, at *2 (S.D.N.Y. Sept. 18, 2007). Any doubts as to whether a default should be set aside should be resolved in favor of the defaulting party. *Enron*, 10 F.3d at 98.

B. *Application*

I consider the three factors: willfulness, meritorious defenses, and prejudice. I conclude that defendants willfully defaulted; they may be able to present viable defenses; and vacating the default judgment would prejudice plaintiff. Overall, I conclude that the motion to vacate must be denied.

1. *Willfulness*

Defendants' default was willful. In the context of a default, a party's conduct is willful if it is "more than merely negligent or careless." *SEC v. McNulty*, 137 F.3d 732, 738 (2d Cir.1998). Thus, where the conduct of a litigant or its counsel is egregious and not satisfactorily explained, a court may find a defendant's default willful. *Id.* Here, defendants do not claim that the default was negligent or careless but, rather, that they were never served and were unaware of the suit. After an evidentiary hearing, however, I found that Au was personally served with a summons and complaint on February 18, 2009. (Tr. at 63). I also found that his affidavits stating "clearly and unequivocally" that he was never served were deliberately false. Accordingly, because Au was aware of the suit as early as February 2009 and has provided no legitimate

excuse for defendants' delay in responding, I conclude that defendants' default was willful.

2. *Meritorious Defenses*

***2** To show a meritorious defense for purposes of a motion to vacate a default judgment, a "defendant need not establish his defense conclusively, but he must present evidence of facts that, if proven at trial, would constitute a complete defense." *McNulty,* 137 F .3d at 740 (citations and internal quotation marks omitted). Plaintiff's complaint asserts four causes of action: (1) trademark infringement under the Lanham Act; (2) false designation of origin and false representation, unfair competition, and false advertising under the Lanham Act; (3) use of a name or address with intent to deceive under New York General Business Law ("NY GBL") § 133; and (4) deceptive business practices under N.Y. GBL § 349. Defendants assert the following defenses: plaintiff's trademark is descriptive and thus not protectable; plaintiff's trade dress is generic and thus not protectable; and defendants have not sold any allegedly infringing products in the United States. Defendants' assertions, if proven at trial, could constitute a defense to plaintiff's claims . [1] Thus, defendants have made a sufficient showing of the existence of meritorious defenses.

1 This conclusion is tempered by defendants' reliance on Au's affidavit—portions of which I found to be materially false—to establish the facts supporting its defenses.

3. *Prejudice*

"[D]elay standing alone does not establish prejudice." *Enron,* 10 F.3d at 98. For delay to constitute prejudice, it must "result in the loss of evidence, create increased difficulties of discovery, or provide a greater opportunity for fraud and collusion." *Davis v. Musler,* 713 F.2d 907, 916 (2d Cir.1983) (internal quotation marks omitted).

This case is not a case where "[d]elay stand[s] alone." *Enron,* 10 F.3d at 98. Twenty months have passed since plaintiff filed its complaint, and it has not yet had an opportunity to conduct any discovery. Vacating the default judgment would result in more delay and, consequently, additional fading of witness memories and loss of evidence. Moreover, defendants' willful deceit undermines the Court's confidence that defendants will cooperate in discovery. *See Badian v. Brandaid Commc'ns Corp.,* No. 03 Civ. 2424(DC), 2004 WL 1933573, *4 (S.D.N.Y. Aug. 30, 2004), *aff'd,* 165 Fed. App'x 886 (2d Cir.2006); *see also Am. Hotel Register Co. v. Am. Sales Brokerage Co.,* No. 1:07CV709, 2007 WL 4192205, at *6 (N.D.Ohio Nov. 21, 2007) (relying on defendants' submission of false affidavits in finding prejudice). Accordingly, plaintiff would suffer prejudice were I to vacate the default judgment.

4. *Whether the Default Judgment Should Be Vacated*

I find that defendants' willful conduct, standing alone, is sufficient to deny defendants relief. Negligent defaults may be excusable; *deliberate* defaults are not. *Gucci Am., Inc. v. Gold Ctr. Jewelry,* 158 F.3d 631, 635 (2d. Cir.1998) (reinstating default judgment, after concluding that defendant defaulted deliberately, where district court found no prejudice and existence of meritorious defenses); *In re Enron, Inc.,* 326 B.R. 46, 51 (Bankr.S.D.N.Y.2005). Here, because I conclude that defendants' default was calculated and deliberate, defendants' motion to vacate the default judgment is denied.

***3** That plaintiff will suffer prejudice if the default judgment were vacated bolsters this conclusion. While I consider it significant that defendants have meritorious defenses they may be able to prove at trial, in light of all the equities, this factor does not outweigh the prejudice to plaintiff and the willful default of defendants.

In addition to relying on Rule 60(b)(1) in support of their motion to vacate, defendants rely on Rules 60(b)(4) and (6). I rejected defendants' 60(b)(4) motion at the October 13, 2010, evidentiary hearing. Because defendants have not shown "extraordinary circumstances" or that a default judgment would "work an extreme and undue hardship," defendants' motion is denied to the extent it relies on Rule 60(b)(6) as well. *Nemaizer v. Baker,* 793 F.2d 58, 63 (2d Cir.1986).

CONCLUSION

For the foregoing reasons, defendants' motion to vacate the default judgment is denied.

SO ORDERED.

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