

**K's Intl. Polybags Mfg. Ltd. v M.T. Packaging Inc.**

2019 NY Slip Op 30333(U)

February 8, 2019

Supreme Court, New York County

Docket Number: 154420/2012

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  
NEW YORK COUNTY**

**PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM**

*Justice*

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INDEX NO. 154420/2012

K'S INTERNATIONAL POLYBAGS MFG. LTD.

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

Plaintiff,

MOTION SEQ. NO. 005

- v -

M.T. PACKAGING INC.,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is it is order that this motion is granted in part.

This motion seeks a default judgment against plaintiff for failing to appear at multiple court appearances. Plaintiff has not opposed this motion.

On July 13, 2018, this court granted Jeffrey Maidenbaum's motion to be relieved as plaintiff's counsel and directed the parties to appear for a conference on September 12, 2018. If plaintiff, a corporation, failed to appear by counsel, as required by CPLR 321, the court stated that the case would be dismissed (NYSCEF Doc. No. 95). On September 12, 2018, plaintiff failed to appear, and the complaint was dismissed (NYSCEF Doc. No. 101). Defendant was given 30 days to prosecute its counterclaims (*id.*). On November 13, 2018, defendant's counsel appeared at the scheduled status conference to address the counterclaims; plaintiff did not appear. On November 23, 2018, defendant filed this motion for a default judgment (NYSCEF Doc. No. 107). Defendant's counsel provided notice of this motion to plaintiff via email and Fed

Ex mailing (NYSCEF Doc. Nos. 109, 116, & 117). To date, plaintiff has not opposed this motion or otherwise appeared in this action since its counsel withdrew.

“When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him” (CPLR 3215[a]). While CPLR 3215 does not specifically mention counterclaims, “the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 [2d Dept 2011] [citations omitted]).

On a motion for a default judgment, the movant must submit proof of service of the pleadings, proof of the facts constituting the claim, proof of the default, and amount due by affidavit made by the party (CPLR 3215 [f]). “CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the party of the facts constituting the claim” (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]). However, a verified pleading “may be submitted instead of the affidavit when it has been properly served” (*id.*). Defendant has provided proof that plaintiff was not only served with a copy of defendant’s verified answer with counterclaims, but also, served with the September 12, 2018 order dismissing the complaint and a copy of this motion.

In its answer, defendant asserts counterclaims for (1) defective goods under UCC § 2-714; (2) failure to remove defective goods under UCC § 2-715; (3) breach of contract; (4) negligent misrepresentation; (5) damage to business reputation; (6) breach of express warranty; (7) breach of implied warranty of fitness for a particular purpose; (8) breach of implied warranty

of merchantability under UCC § 2-314; (9) breach of warranty of good faith; and (10) a declaratory judgment declaring that defendant does owe anything to plaintiff.

Defendant provides adequate proof of its claims arising out the defective goods that plaintiff delivered. In addition to its answer with counterclaims, verified by Jack Elefant, an employee of defendant, defendant attaches exhibits to its answer, showing that the goods, which were plastic bags, tested for high levels of lead, cadmium, chromium, and mercury despite plaintiff's certification that the bags contained levels of those toxins not exceeding a certain amount. Defendant also submits evidence that it informed plaintiff of the issue and demanded to stop production. Further, defendant's verified answer adequately states counterclaims for defective goods under UCC § 2-714; failure to remove defective goods under UCC § 2-715; breach of contract; negligent misrepresentation; damage to business reputation; breach of express warranty; breach of implied warranty of fitness for a particular purpose; breach of implied warranty of merchantability under UCC § 2-314; and breach of warranty of good faith.

Finally, defendant provides its attorney's affirmation, affirming that plaintiff has not appeared in this action since its counsel withdrew and plaintiff has not responded to defense counsel's communications. Thus, the motion for a default judgment on defendant's counterclaims seeking monetary damages is granted, and the court will hold a hearing on the issue of damages as to these claims.

In addition to its claims seeking monetary relief, defendant also seeks a declaratory judgment. However, New York courts rarely grant declaratory judgments on default "with no inquiry as to the merits" (*Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 [1st Dept 1978]). Declaratory judgments require that a "[party] establish a right to a declaration against [its adversary] and will not be granted on the default and pleadings alone" (*Levy v Blue Cross and*

Blue Shield of Greater New York, 124 AD2d 900, 902 [3d Dept 1986]). Therefore, a hearing is necessary on this claim.

Accordingly, it is

ORDERED that defendant's motion for a default judgment against plaintiff is granted as to their first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action and denied as to their tenth cause of action for a declaratory judgment; and it is further

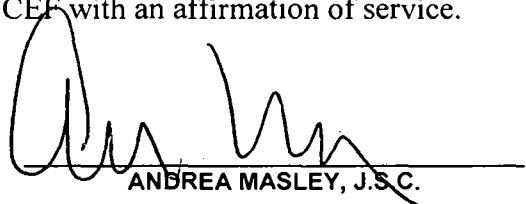
ORDERED that this matter shall be set down for an inquest on damages on defendant's first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action and a hearing on defendant's claim for a declaratory judgment; and it is further

ORDERED that defendant is directed to file a note of issue within 30 days of this order. A failure to file the note of issue will result in dismissal of the counterclaims; and it is further

ORDERED that defendant is directed to contact the Part 48 Part Clerk (bhanson@nycourts.gov or 646-386-3265) within 5 days of filing the note of issue to schedule a hearing date; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on plaintiff pursuant to the CPLR, as well as e-file on NYSCEF with an affirmation of service.

2/8/2019  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE