

**Zexin (HK) Leather Co., Ltd. v Accessories Direct
Intl. USA, Inc.**

2020 NY Slip Op 32895(U)

September 1, 2020

Supreme Court, New York County

Docket Number: 657617/2019

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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ZEXIN (HK) LEATHER CO., LIMITED

Plaintiff,

- v -

ACCESSORIES DIRECT INTERNATIONAL USA, INC.,

Defendant.

-----X

INDEX NO. 657617/2019
MOTION DATE 08/01/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, and for the reasons set forth below, Zexin (HK) Leather Co., Limited's (Zexin) motion for default judgment against Accessories Direct International USA, Inc. (ADI) pursuant to CPLR § 3215 and ADI's cross motion for leave to file a late answer pursuant to CPLR § 3012(d) is decided in accordance with the below.

THE RELEVANT FACTS AND CIRCUMSTANCES

Zexin sued ADI on December 20, 2019 by summons and verified complaint for goods sold and delivered and account stated. The summons and verified complaint was served on the Secretary of State of the State of New York as agent for the service of process for ADI pursuant to Section 306(b) of the New York Business Corporation Law (NYSCEF Doc. No. 7) on December 24, 2019. On January 29, 2020, Felicity S. Kohn, counsel for Zexin, served an additional copy of the summons and verified complaint on ADI by first class mail on January 7, 2020, in satisfaction of the additional mailing requirement of CPLR § 3215(g)(4) (NYSCEF Doc. No. 8).

The gravamen of the complaint is that Zexin made six shipments of handbags to ADI at an agreed price of \$721,980.32, and that ADI received and accepted the handbags without complaint or objection but paid only \$150,041.92. Zexin alleges that, despite reaching an agreement with ADI whereby ADI agreed to pay \$20,000 to Zexin every two weeks until the balance was repaid, ADI failed to make any additional payments leaving a balance due of \$571,938.40.

ADI failed to file an answer, appear, or otherwise make a motion in this matter within 30 days of service of the summons and complaint. ADI then failed to appear for a preliminary conference in on February 10, 2020. As a courtesy, the court adjourned the preliminary conference for April 3, 2020 at 11:30 AM and issued an order (the **February 10 Order**) stating that “[i]f defendant fails to appear for the next preliminary conference, plaintiff may move for all appropriate relief.” The February 10 Order further states that: “Defendant has not responded to the complaint as per the CPLR. Plaintiff may move for default judgment on this basis” (*id.*).

The very next day, on February 11, 2020 and prior to the adjourned preliminary conference of April 3, 2020, Zexin filed a motion for default judgment (NYSCEF Doc. No. 17). On February 18, 2020, counsel for ADI filed an affirmation seeking an adjournment of the return date of Zexin’s motion for default judgment, indicating that ADI was not aware of this lawsuit until it received Zexin’s notice of motion and supporting papers by email on or about February 11, 2020, and requesting time to engage in settlement discussions or move for leave to file a late answer (NYSCEF Doc. No. 22). On March 11, 2020, ADI filed a cross-motion for leave to file a

late answer pursuant to CPLR § 3012(d) (NYSCEF Doc. No. 24). ADI does not attach a proposed answer to its papers.

DISCUSSION

To establish entitlement to default judgment under CPLR § 3215, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim and the amount due, and proof of the defendant's default in answering, appearing, or making a motion (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]). In support of its motion for default judgment, Zexin submits proof of service of the summons and verified complaint (NYSCEF Doc. No. 20 and 21), the affidavit of Liu Hua Bin, Zexin's owner, General Manager, and CEO and the exhibits thereto, including copies of the unpaid invoices and communications acknowledging the debt in the amount of \$571,938.40 (NYSCEF Doc. No. 2, 3, 34 and 35), and the affirmation of Zexin's counsel, Michael Goldberg (NYSCEF Doc. No 18). Zexin argues that it properly served the summons and complaint on the Secretary of State as agent for service of process for ADI and the additional mailing required by CPLR § 3215(g)(4), and ADI nevertheless failed to file an answer or notice of appearance or otherwise make a motion within 30 days after service of the summons and subsequently failed to appear for the preliminary conference. Zexin further argues that ADI knew of this lawsuit prior to receiving the notice of motion for default judgment and supporting papers on February 11, 2020 because counsel for Zexin emailed ADI's principal, Rody Moreira on February 6, 2020 regarding the February 10, 2020 preliminary conference, and Mr. Moreira responded to the email but still failed to appear (NYSCEF Doc. No. 32). Accordingly, Zexin argues it is entitled to the entry of

judgment in the amount of \$571,938.40 and statutory interest in the amount of 9% accruing from the date of entry of the judgment.

In its opposition papers and in support of its cross motion, ADI argues that Zexin's motion is premature as the February 10 Order indicated that Zexin could "move for all appropriate relief" only if ADI failed to appear at the next preliminary conference. ADI further argues that it should be granted leave to file a late answer because its delay of two months was minimal, there is no prejudice to Zexin, and ADI has a reasonable excuse for its default in that it never actually received the summons and complaint because it was in the process of moving to a new office between January 5 and January 31, 2020.

Pursuant to CPLR § 3012(d), the court has discretion to extend a party's time to plead or compel the acceptance of an otherwise untimely pleading "upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR § 3012[d]; *Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]). The First Department has set forth certain factors that "must . . . be considered and balanced" in determining whether it is a provident exercise of the court's discretion to grant relief under CPLR § 3012(d) (*Emigrant Bank*, 156 AD3d at 472, quoting *Guzetti v City of New York*, 32 AD3d 234, 238 [1st Dept 2006] [McGuire, J., concurring]). These factors include: "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense" (*Guzetti*, 32 AD3d at 238). In addition the court notes that the First Department has recognized a "strong public policy in favor of resolving cases on the merits" (*Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]).

Accordingly, inasmuch as there is minimal to no prejudice to Zexin, and ADI indicates that it has several meritorious defenses, Zexin's motion for default judgment is held in abeyance for 20 days and ADI's cross-motion for leave to file and answer is granted solely to the extent that ADI is given one final opportunity to file an answer or other responsive pleading within 14 days of the date of this decision and order. If ADI files an answer or other responsive pleading within 14 days, Zexin's motion for default judgment will be deemed denied. In the event that ADI fails to file an answer or responsive pleading within such 14 days, Zexin shall notify the court by email at sfc-part53@nycourts.gov and shall cc counsel for all parties, and the motion will be granted, and the court will direct the Clerk to enter judgment in the amount of \$571,938.40, together with interest at the statutory rate of 9% per annum from the date of entry of the judgment, and costs and disbursements as allocated by the Clerk.

Accordingly, it is

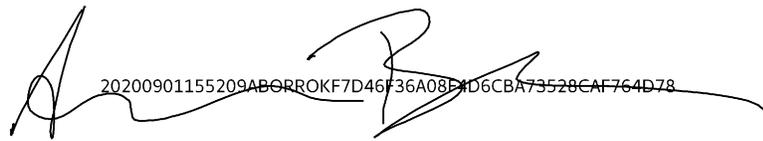
ORDERED that Zexin's motion for default judgment pursuant to CPLR § 3215 is held in abeyance for 20 days from the date of this decision and order; and it is further

ORDERED that ADI's cross-motion for an extension of time to file an answer pursuant to CPLR § 3012(d) is granted solely to the extent that ADI shall file an answer or other responsive pleading within 14 days of the date of this decision and order; and it is further

ORDERED that if ADI files an answer within 14 days, Zexin’s motion for default judgment will be deemed denied; and it is further

ORDERED that in the event that ADI fails to file an answer or other responsive pleading within 14 days, Zexin shall notify the court by email at sfc-part53@nycourts.gov and shall cc counsel for all parties, and the motion will be granted and the court will enter default judgment accordingly; and it is further

ORDERED that a conference is scheduled for September 24, 2020 @ 2 pm.



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9/1/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE