UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
BOXOUT LLC,

Plaintiff,

-against-

REPORT AND RECOMENDATION
23-CV-05568-LDH-SJB

SVELTE BRANDS LLC,

Defendant.
----------X

BULSARA, United States Magistrate Judge:

Plaintiff Boxout LLC ("Boxout") commenced this action on July 24, 2023, against Defendant Svelte Brands LLC ("Svelte") for failure to pay amounts due under contracts for the sale of beauty products. (Compl. dated July 24, 2023 ("Compl."), Dkt. No. 1; Am. Compl. dated Nov. 15, 2023 ("Am. Compl."), Dkt. No. 17). Following Svelte's failure to obtain new counsel, Boxout moved for a default judgment against Svelte on May 14, 2024. (Minute Entry and Order dated Mar. 18, 2024; Second Mot. for Default J. with Incorporated Mem. of Law dated May 14, 2024 ("Second Default J. Mot. and Mem. of Law"), Dkt. No. 33). Judge LaShann DeArcy Hall referred the motion to the undersigned for a Report and Recommendation. (Order Referring Mot. dated Oct. 22, 2024). For the reasons stated below, it is respectfully recommended that the motion be granted and damages be awarded as indicated herein.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Boxout, a wholesale distributor of medical and dermatological goods, is an Ohio limited liability company with its principal place of business in Ohio.[1] (Am. Compl. ¶ 9;

[1] Boxout has two members: Boxout Holdings, LLC and Boxout Group, LLC. (Pl.'s Suppl. Rule 7.1 Disclosure Statement dated Dec. 27, 2023 ("Pl.'s 7.1 Statement"), Dkt.

Pl.'s 7.1 Statement ¶ 1). Svelte, an online retailer of fitness and beauty goods, is a New York limited liability company with its principal place of business in New Jersey. (Am. Compl. ¶¶ 5, 10; Decl. of Moses Hauer in Opp'n to Pl.'s Mot. for Default J. dated Sept. 27, 2023, attached as Ex. 1 to Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Default J. dated Sept. 27, 2023, Dkt. No. 15-1 ¶¶ 3, 16). Svelte's sole member is a citizen and resident of New York. (Def.'s Rule 7.1 Disclosure Statement dated Sept. 21, 2023, Dkt. No. 13).

On September 20, 2018, Svelte signed and submitted a credit application to open a $500,000 line of credit with Boxout. (Am. Compl. ¶ 12; Credit Application dated Sept. 20, 2018 ("Credit Agreement"), attached as Ex. A to Am. Compl., Dkt. No. 17-1). Throughout 2022, Svelte placed numerous orders drawing on the Credit Agreement, for a total of $327,040.24. (Am. Compl. ¶¶ 17–18). For each order, payment was due within 60 days of issuance of the order's invoice. (*Id.*; Boxout Invoices, attached as Ex. B to Am. Compl. ("Boxout Invoices"), Dkt. No. 17-2). Boxout delivered the goods and issued invoices, but never received any payment from Svelte. (Am. Compl. ¶¶ 15, 19).

Under the terms and conditions of the Credit Agreement, Svelte had 30 days from the date of an invoice to raise any disputes, after which any objections were deemed waived. (*Id.* ¶ 16; Credit Agreement at 2). Svelte did not dispute any of the invoices within the required 30 days. (Am. Compl. ¶ 16).

No. 21 ¶ 3). Both are formed under the laws of and headquartered in Ohio. (*Id.*). All members of Boxout Holdings are individuals who are residents and citizens of Ohio. (*Id.* ¶ 3(a)). Boxout Group has three members: Cody Creek LLC, Wild Salmon LLC, and the Ronald Meritt Harrington 2007 Trust. (*Id.* ¶ 3(b)). Cody Creek LLC and Wild Salmon LLC are limited liability companies formed under the laws of and headquartered in Ohio; they are each comprised of one sole member who is a resident and citizen of Ohio. (*Id.*). The Ronald Meritt Harrington 2007 Trust was formed under the laws of Ohio and its trustee is a citizen of Ohio. (*Id.*).

Boxout commenced this action on July 24, 2023. (Compl.). Following Boxout's first motion for default judgment, (Mot. for Default J. dated Aug. 30, 2023, Dkt. No. 8); Svelte's appearance in the case, (Notice of Appearance dated Sept. 11, 2023, Dkt. No. 10); Svelte's opposition briefing in response to Boxout's first motion for default judgment, (Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Default J. dated Sept. 27, 2023, Dkt. No. 15); and the Court's mooting of Boxout's first motion for default judgment due to Svelte's appearance and the parties' stipulation to that effect, (Order dated Oct. 25, 2023), Boxout filed an Amended Complaint on November 15, 2023. (Am. Compl.). Boxout alleges five causes of action. The first cause of action is for breach of contract for non-payment of goods totaling $327,040.24. (*Id.* ¶¶ 22–27). The other four causes of action—breach of implied contract, unjust enrichment, goods sold and delivered, and account stated—are pled in the alternative. (*Id.* ¶¶ 1, 28–49).

On December 14, 2023, Svelte filed a motion for a pre-motion conference, anticipating filing a motion to dismiss Boxout's second through fifth causes of action in the Amended Complaint, *i.e.*, the causes of action pled in the alternative. (Def.'s Mot. for Pre-Mot. Conference dated Dec. 14, 2023 ("Def.'s Mot. for Pre-Mot. Conference"), Dkt. No. 19). However, although the motion was granted and the pre-motion conference scheduled, (Order dated Dec. 20, 2023), neither the hearing nor the motion to dismiss came to fruition. (Order dated Jan. 10, 2024). On January 9, 2024, Svelte's counsel filed a motion to withdraw. (Mot. to Withdraw as Att'y dated Jan. 9, 2024, Dkt. No. 25). At the March 18, 2024, hearing on the motion to withdraw—at which a representative from Svelte was present—the undersigned granted the motion, and Svelte was directed to obtain new counsel and file a notice of appearance of the same by May 2, 2024. (Min. Entry and Order dated Mar. 18, 2024). Svelte was warned that, as a

corporation, it could not proceed *pro se*, and counsel was necessary to avoid a default being entered against it. (*Id.*).

Svelte failed to obtain new counsel or appear following the hearing, and ultimately failed to appear, answer, or otherwise respond to the Amended Complaint. Boxout sought a certificate of default against Svelte on May 3, 2024, (Req. for Certificate of Default dated May 3, 2024, Dkt. No. 31), which the Clerk of Court granted. (Clerk's Entry of Default dated May 10, 2024 ("Clerk's Entry of Default"), Dkt. No. 32). On May 14, 2024, Boxout filed its second motion for default judgment. (Second Default J. Mot. and Mem. of Law). All motion papers were mailed to Svelte's last known business address in compliance with Local Civil Rule 55.2(a). (Certificate of Service dated May 14, 2024 ("Certificate of Service"), Dkt. No. 34).

Boxout seeks recovery of $327,040.24 in damages, $402 in costs, and post-judgment interest. (Am. Compl. ¶ 27; Am. Aff. of Greg Riegsecker in Supp. of Pl.'s Mot. for Default J. dated Dec. 2, 2024 ("Riegsecker Aff."), Dkt. No. 35 at 2).

DISCUSSION

I. Entry of Default

Rule 55 of the Federal Rules of Civil Procedure establishes a two-step process for obtaining a default judgment. *See Shariff v. Beach 90th St. Realty Corp.*, No. 11-CV-2551, 2013 WL 6835157, at *3 (E.D.N.Y. Dec. 20, 2013) (adopting report and recommendation). First, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Second, after default has been entered, and the defendant fails to appear or move to set aside the default under Rule 55(c), the Court may, on plaintiff's motion, enter a default judgment

against that defendant. Fed. R. Civ. P. 55(b)(2). The Clerk of Court entered a default against Svelte on May 10, 2024. (Clerk's Entry of Default). And such entry of default was appropriate, since a corporation may not proceed *pro se* in federal court. *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 192 (2d Cir. 2006) ("[I]t is settled law that a corporation may not appear in a lawsuit against it except through an attorney[.]" (quotations omitted)); *La Barbera v. Fed. Metal & Glass Corp.*, 666 F. Supp. 2d 341, 348 (E.D.N.Y. 2009) ("Such a failure to obtain counsel constitutes a failure to defend because corporations cannot proceed in federal court *pro se*." (citing *Shapiro, Bernstein & Co. v. Cont'l Record Co.*, 386 F.2d 426, 427 (2d Cir. 1967) (per curiam))).

The next question, before reaching liability or damages, is whether Defendant's conduct is sufficient to warrant entry of a default judgment. In determining whether to enter a default judgment, the Court is guided by the same factors that apply to a motion to set aside entry of a default. *See Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993); *Pecarsky v. Galaxiworld.com, Ltd.*, 249 F.3d 167, 170–71 (2d Cir. 2001). These factors are "1) whether the defendant's default was willful; 2) whether defendant has a meritorious defense to plaintiff's claims; and 3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment." *Mason Tenders Dist. Council v. Duce Constr. Corp.*, No. 02-CV-9044, 2003 WL 1960584, at *2 (S.D.N.Y. Apr. 25, 2003).

First, Defendant's failure to respond to the second motion for default judgment or to obtain counsel demonstrates its default was willful. *See, e.g.*, *Indymac Bank, F.S.B. v. Nat'l Settlement Agency, Inc.*, No. 07-CV- 6865, 2007 WL 4468652, at *1 (S.D.N.Y. Dec. 20, 2007) (finding that the defendants' non-appearance and failure to respond "indicate willful conduct" and granting plaintiff default judgment). During the

motion hearing on March 18, 2024, Svelte was directed to obtain new counsel and informed that its failure to do so would permit Boxout to seek default judgment against Svelte. (Min. Entry and Order dated Mar. 18, 2024). Svelte failed to respond to the order or appear in the case thereafter. Boxout proceeded to seek a certificate of default and file a motion for default judgment, which was served on Svelte at its last known business address. (Certificate of Service). Notwithstanding the Court's directions at the hearing, the order following the hearing, and the service of Boxout's second motion for default judgment, Svelte did not respond or appear, and has not in any way attempted to defend itself against the second motion for default judgment. Its default is willful.

As to the second factor, Boxout would be prejudiced if the motion for default judgment is denied, "as there are no additional steps available to secure relief in this Court." *Bridge Oil Ltd. v. Emerald Reefer Lines, LLC*, No. 06-CV-14226, 2008 WL 5560868, at *2 (S.D.N.Y. Oct. 27, 2008), *report and recommendation adopted*, Order (Jan. 26, 2009); *Sola Franchise Corp. v. Solo Salon Studios Inc.*, No. 14-CV-946, 2015 WL 1299259, at *15 (E.D.N.Y. Mar. 23, 2015) (adopting report and recommendation) (finding the prejudice element was met because "[w]ithout the entry of a default judgment, Plaintiffs would be unable to recover for the claims").

Third, the Court cannot conclude there is any meritorious defense to Boxout's allegations because Svelte has failed to appear following the March 18, 2024, hearing, and no defense has been presented to the Court as to the breach of contract claim in the Amended Complaint, (*see* Def.'s Mot. for Pre-Mot. Conference), nor to the second motion for default judgment. *E.g.*, *United States v. Hemberger*, No. 11-CV-2241, 2012 WL 1657192, at *2 (E.D.N.Y. May 7, 2012); *Indymac Bank*, 2007 WL 4468652, at *1.

As a result, all three factors weigh in favor of the entry of default judgment. The Court now turns to the liability imposed, damages, and other relief to be awarded.

II. Liability

In deciding a motion for default judgment, a court "is required to accept all of the [plaintiff's] factual allegations as true and draw all reasonable inferences in its favor." *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009). A party's default is deemed an admission of all well-pleaded allegations of liability. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992); *Morales v. B&M Gen. Renovation Inc.*, No. 14-CV-7290, 2016 WL 1266624, at *2 (E.D.N.Y. Mar. 9, 2016), *report and recommendation adopted*, 2016 WL 1258482, at *2 (Mar. 29, 2016). "A default does not establish conclusory allegations, nor does it excuse any defects in the plaintiffs' pleading." *Mateo v. Universal Language Corp.*, No. 13-CV-2495, 2015 WL 5655689, at *4, *6–*7 (E.D.N.Y. Sept. 4, 2015), *report and recommendation adopted*, 2015 WL 5664498, at *1 (Sept. 23, 2015). For example, an allegation is not "well-pleaded" if is contradicted by other evidence put forth by the plaintiff. *See id.* at *6–*7. "[I]t remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." *LaBarbera v. ASTC Lab'ys Inc.*, 752 F. Supp. 2d 263, 270 (E.D.N.Y. 2010) (citation and quotations omitted); *see also* 10A Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 2688.1 (4th ed. 2016). "[P]rior to entering [a] default judgment, a district court is required to determine whether the plaintiff's allegations establish the defendant's liability as a matter of law." *Moore v. Booth*, 122 F.4th 61, 69 (2d Cir. 2024) (internal quotation marks omitted) (quoting *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011)). "In other words, 'a district court

may not enter a default judgment unless the plaintiff's complaint states a valid facial claim for relief.'" *Id.* (quoting *Henry v. Oluwole*, 108 F.4th 45, 55 (2d Cir. 2024)).

Boxout alleges Svelte breached the Credit Agreement by failing to pay for any of the $327,040.24 of goods Svelte received. (Am. Compl. ¶¶ 23–26). Under Ohio law,[2] a party establishes a breach of contract by proof that "(1) a contract existed, (2) one party fulfilled his obligations, (3) the other party failed to fulfill his obligations, and (4) damages resulted from that failure." *Iron Horse Bar & Grill, LLC v. GGJ Triune, PLL*, 234 N.E.3d 620, 627 (Ohio Ct. App. 2024) (internal quotation marks omitted) (quoting *Quest Workforce Solutions, L.L.C. v. Job1USA, Inc.*, 75 N.E.3d 1020, 1030 (Ohio Ct. App. 2016)); *accord Ross v. PennyMac Loan Servs. LLC*, 761 F. App'x 491, 495 (6th Cir. 2019).

Boxout alleges that "a written contract exists by virtue of the [Credit] Agreement, along with the purchase orders that followed[.]" (Second Default J. Mot. and Mem. of Law at 4). Svelte signed the Credit Agreement, agreeing to the terms contained therein, and proceeded to place orders using its line of credit. (Credit Agreement at 2; Am. Compl. ¶¶ 13–15; Boxout Invoices). Thus, the Credit Agreement's terms governed the subsequent purchases made by Svelte.[3]

---

[2] The Credit Agreement provides that "[a]ny dispute that arises between [Svelte] and [Boxout] . . . shall be interpreted and construed in accordance with the laws of the State of Ohio without regard to conflict of laws provisions applying the laws of other jurisdictions." (Credit Agreement at 2; *see also* Second Default J. Mot. and Mem. of Law at 4 n.4).

[3] "The terms and conditions stated herein shall apply to all product purchases and no terms or conditions additional to or different from those stated herein, oral or written, purporting to modify these Terms and Conditions of Sale, whether contained in Customer's purchase order or elsewhere, shall be binding on [Boxout] unless made in writing and accepted in writing by [Boxout]." (Credit Agreement at 2).

Svelte bought $327,040.24 of goods, drawing down on its line of credit under the Credit Agreement. (Am. Compl. ¶¶ 14, 18). The Credit Agreement required payment in full within 30 days from the date of invoice. (Credit Agreement at 2 ("Payment under open account terms is required within 30 days from date of invoice.")). Boxout's invoices for Svelte's purchases explicitly allowed a longer period—60 days—to pay. (Am. Compl. ¶ 18; Boxout Invoices (including on each invoice the clause "TERMS: 60 NET")). Regardless, Svelte never paid at all, (Am. Compl. ¶ 19), failing to fulfill its obligations under the Credit Agreement. Svelte then failed to raise any disputes within 30 days of the invoice as required under the Credit Agreement, thereby forfeiting its right to do so. (*Id.* ¶ 16; Credit Agreement at 2). Boxout suffered $327,040.24 in damages. (Am. Compl. ¶ 27). These well-pleaded allegations (supported by the Credit Agreement and Boxout Invoices, attached to the Amended Complaint) establish Svelte's liability: existence of a contract, performance by Boxout, breach by Svelte, and damages.[4]

III. Damages, Costs, and Interest

Having found Svelte liable for breach of contract, the Court now moves to the damages and other relief Boxout is entitled to. "While a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages." *Greyhound Exhibitgroup*, 973 F.2d at 158. "[A]lthough the default establishes a defendant's liability, unless the amount of damages is certain, the court is required to make an independent determination of the sum to be awarded." *Griffiths v. Francillon*, No. 10-CV-3101, 2012 WL 1341077, at *1 (E.D.N.Y. Jan. 30,

[4] The other claims in the Complaint, namely for breach of implied contract, unjust enrichment, goods sold and delivered, and account stated, are pled in the alternative. (Am. Compl. ¶¶ 1, 28–49). And as such, the Court recommends their dismissal.

2012) (citations and quotations omitted). "The court must conduct an inquiry to ascertain the amount of damages with reasonable certainty." *Joe Hand Promotions, Inc. v. El Norteno Rest. Corp.*, No. 06-CV-1878, 2007 WL 2891016, at *2 (E.D.N.Y. Sept. 28, 2007) (citing *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1992)). "Where, on a damages inquest, a plaintiff fails to demonstrate its damages to a reasonable certainty, the court should decline to award any damages even though liability has been established through default." *Lenard v. Design Studio*, 889 F. Supp. 2d 518, 527 (S.D.N.Y. 2012) (collecting cases). Under Rule 55(b)(2), "it [is] not necessary for the District Court to hold a hearing" to determine the amount of damages "as long as it ensured that there was a basis for the damages specified in the default judgment." *Fustok v. ContiCommodity Servs., Inc.*, 873 F.2d 38, 40 (2d Cir. 1989); *see Sec'y of U.S. Dep't of Hous. & Urb. Dev. v. Gilbert*, No. 20-CV-1441, 2022 WL 344270, at *3 (N.D.N.Y. Feb. 4, 2022) ("A hearing is not necessary where the record contains detailed affidavits and documentary evidence that enables the court to evaluate the proposed sum and determine an award of damages." (citing *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 54 (2d Cir. 1993))).

Boxout requests (1) $327,040.24 in damages; (2) $402 in costs; and (3) post-judgment interest. (Riegsecker Aff. at 2).

A. Damages

"Damages include the compensation a non-breaching party would have received if the contract had been performed, less the value received from release of further performance." *Rhodes v. Rhodes Indus., Inc.*, 595 N.E.2d 441, 448 (Ohio Ct. App. 1991). Boxout has established that it delivered $327,040.24 in goods to Svelte, which were never paid for, and payments of that amount were due under the Credit Agreement.

(Riegsecker Aff. ¶ 7; Boxout Invoices). Thus, the Court respectfully recommends that Boxout be awarded $327,040.24 in damages. *E.g.*, *Crown Equip. Corp. v. KeHE Distribs., LLC*, No. 17-CV-1711, 2019 WL 4889394, at *4–*5 (N.D. Ohio Oct. 3, 2019) (awarding seller damages in the amount due under a contract for the sale of a forklift, which was accepted and not paid for by buyer).

B. Costs

Boxout also seeks reimbursement for $402 in costs for the filing fee. (Riegsecker Aff. ¶ 9). Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, a prevailing party is entitled to recover certain taxable costs. These include court filing fees. 28 U.S.C. § 1920(1). Filing fees are recoverable without supporting documentation if verified by the docket. *E.g.*, *Shalto v. Bay of Bengal Kabob Corp.*, No. 12-CV-920, 2013 WL 867420, at *2 (E.D.N.Y. Mar. 7, 2013) (adopting report and recommendation in part); *Philpot v. Music Times LLC*, No. 16-CV-1277, 2017 WL 9538900, at *11 (S.D.N.Y. Mar. 29, 2017) (stating that the filing fee is "a fact of which the Court can take judicial notice"), *report and recommendation adopted*, 2017 WL 1906902, at *2 (May 9, 2017). The docket indicates the $402 filing fee was paid on July 24, 2023. (Dkt. No. 1). Thus, although Boxout did not submit a receipt, the filing fee is recoverable. Therefore, the Court respectfully recommends an award of $402 in costs.

C. Post-Judgment Interest

Finally, Boxout seeks post-judgment interest. (Riegsecker Aff. at 2). "The award of post-judgment interest is mandatory on awards in civil cases as of the date judgment is entered." *Lewis v. Whelan*, 99 F.3d 542, 545 (2d Cir. 1996) (quoting 28 U.S.C. § 1961(a)). In diversity cases in federal court, federal law determines the post-judgment interest rate. *See Cappiello v. ICD Publ'ns, Inc.*, 720 F.3d 109, 112 (2d Cir. 2013); *e.g.*,

Cabatech, LLC v. Nextlight, LLC, No. 22-CV-59, 2024 WL 3740593, at *4 (S.D. Ohio Aug. 8, 2024) (applying the federal statutory rate to the post-judgment interest awarded for a breach of contract governed by Ohio law in a diversity case). The Court therefore recommends a post-judgment interest award on the total damages, at the rate set forth in 28 U.S.C. § 1961, calculated from the date on which the Clerk of Court enters judgment until the date of payment.

CONCLUSION

For the reasons described above, the Court respectfully recommends that Boxout's motion for default judgment be granted, awarding Boxout $327,040.24 in damages, $402 in costs, and post-judgment interest in an amount to be calculated by the Clerk of Court pursuant to 28 U.S.C. § 1961(a).

Any objections to the Report and Recommendation above must be filed with the Clerk of Court within 14 days of service of this report. Failure to file objections within the specified time may waive the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); *see also Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate[] [judge's] report operates as a waiver of any further judicial review of the magistrate[] [judge's] decision." (quotations omitted)).

Boxout is directed to serve a copy of this Report and Recommendation on Svelte and file proof of such service on the docket by no later than December 30, 2024.

SO ORDERED.

/s/ *Sanket J. Bulsara* December 18, 2024
SANKET J. BULSARA
United States Magistrate Judge

Brooklyn, New York