

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JENNIFER N. HEIST,	:	4:08-CV-00484
	:	
Plaintiff,	:	(Judge McClure)
	:	
v.	:	
	:	
LAUREL BURCH ARTWORKS, INC.,	:	
	:	
Defendant.	:	

ORDER

July 3, 2008

BACKGROUND:

On March 17, 2008, plaintiff Jennifer N. Heist, proceeding pro se, instituted this civil action by filing a complaint against defendant Laurel Burch Artworks, Inc. (“Laurel”). Heist’s complaint stems from Laurel’s attempt to stop her from selling certain crafts on Ebay’s internet auction site that are made from fabrics containing its copyrighted and trademarked designs. Heist seeks a declaratory judgment that she has not infringed on Laurel’s copyright and trademark rights (Counts I and II). She also sets forth state law claims for tortious interference with a prospective business relation (Count III), product disparagement (Count IV) and a federal law claim for a violation of the Digital Millennium Copyright Act (Count V).

On April 9, 2008, Heist filed a waiver of service that was returned executed by Jay Burch, the president of Laurel. (Rec. Doc. No. 3.)

On June 6, 2008, plaintiff filed a “Motion for Default Judgment Pursuant to F.R.C.P. 56(a).” (Rec. Doc. No. 4.) On April 18, 2008, plaintiff filed a “Memorandum to the Court Concerning Motion for Summary Judgment.” (Rec. Doc. No. 5.) On July 1, 2008, plaintiff filed a “Summary Judgment Motion Reply.” (Rec. Doc. No. 6.) Finally, also on July 1, 2008, plaintiff filed a “Declaration . . . Supporting Plaintiff’s Reply Concerning Motion for Summary Judgment.” (Rec. Doc. No. 7.)

For the following reasons, we will direct the clerk to enter default against Laurel and will schedule a date for a hearing on damages.

DISCUSSION:

In her “Memorandum to the Court Concerning Motion for Summary Judgment,” plaintiff states that she filed a motion for summary judgment on June 6, 2008 and that she “accidentally mislabeled the Affidavit with a Default title.” (Rec. Doc. No. 5, at 1.) Despite the label of plaintiff’s various documents, it is clear that the appropriate remedy at this stage of the proceedings is the entry of default against defendant for failing to respond to the complaint. Because plaintiff

is proceeding pro se, we will liberally construe her motion as one for default.

Rule 55 of the Federal Rules of Civil Procedure governs default and default judgments and states that the clerk must enter default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend.” Rule 12(a)(1) governs the time for serving a response. It requires service of an answer within 20 days after being served with summons and complaint or within 60 days of waiving service. In the instant case, defendant waived service on April 3, 2008 and has yet to file an answer to the complaint. Thus, it is clear that entry of default is appropriate.

Rule 55(b)(1) further explains that default judgment may be entered at the same time as default if the claim is “for a sum certain or a sum that can be made certain by computation.” Rule 55(b)(2) discusses holding a hearing to determine damages if they are not for a sum certain. Because the monetary damages sought are not for a sum certain, we will schedule a hearing on damages. Yet, we believe that a hearing is not necessary to grant the declaratory judgment portion of plaintiff’s complaint and declare that plaintiff has not infringed upon defendant’s copyright and trademark rights.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's "Motion for Default Judgment" is GRANTED to the extent consistent with this opinion. (Rec. Doc. No. 4.)
2. The clerk is directed to enter default against defendant Laurel Burch Artworks, Inc.
3. A hearing on the issue of damages will be scheduled for July 23, 2008 at 10:00 a.m. in Courtroom No. 3, Third Floor, Federal Building, Williamsport, Pennsylvania.
4. It is declared that plaintiff has not infringed upon defendant's copyright and trademark rights. Defendant is ordered to instruct eBay to reinstate the listings that it ordered eBay to remove on copyright and trademark grounds and to refrain from challenging any future listings by plaintiff based on the same grounds.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge