UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re: HO WAN KWOK, *et al.*, Debtors.	Chapter 11 Case No. 22-50073 (JAM) (Jointly Administered)
LUC A. DESPINS, CHAPTER 11 TRUSTEE FOR THE ESTATE OF HO WAN KWOK, Plaintiff, v. LAMP CAPITAL LLC, INFINITY TREASURY MANAGEMENT INC., HUDSON DIAMOND NY LLC, HUDSON DIAMOND HOLDING LLC, LEADING SHINE NY LTD., MEI GUO, and YANPING, A/K/A "YVETTE" WANG, Defendants.	Adv. P. No. 23-05023 (JAM) Re: ECF No. 30

APPEARANCES

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MEMORANDUM OF DECISION AND ORDER
GRANTING MOTION TO SET ASIDE DEFAULT

Julie A. Manning, United States Bankruptcy Judge

I. INTRODUCTION

Before the Court is the Motion to Set Aside Default (the "Motion to Set Aside Default") filed by defendant Leading Shine NY Ltd. ("Leading Shine"). (ECF No. 30.)[1] The Motion to Set Aside Default seeks to set aside the default (the "Default") entered against Leading Shine by the Clerk of Court. (ECF No. 13.) For the reasons stated herein, the Motion to Set Aside Default is **GRANTED**.

II. BACKGROUND

On February 15, 2022, Mr. Ho Wan Kwok (the "Individual Debtor") filed a voluntary Chapter 11 petition (the "Petition") in this Court. (Main Case ECF No. 1.) The Individual Debtor's case is jointly administered with two affiliated corporate Chapter 11 cases. (Main Case ECF Nos. 970, 1141.) For the reasons set forth therein, on June 15, 2022, the Court entered a memorandum of decision and order appointing a Chapter 11 trustee. (Main Case ECF No. 465.) *In re Kwok*, 640 B.R. 514 (Bankr. D. Conn. 2022). On July 8, 2022, Mr. Luc A. Despins was

[1] References to the docket in this adversary proceeding will be styled "ECF No. __." References to the docket in the main case, *In re Kwok*, Case No. 22-50073 (JAM), will be styled "Main Case ECF No. __."

appointed as the Chapter 11 trustee (the "Trustee") for the bankruptcy estate of the Individual Debtor. (Main Case ECF No. 523.)

On October 26, 2023, the Trustee initiated this adversary proceeding by filing a complaint (the "Complaint") alleging, in pertinent part, that Leading Shine is the *alter ego* of the Individual Debtor and/or it and/or its assets are beneficially owned by the Individual Debtor. (ECF No. 1.) On these bases, the Trustee seeks turnover of Leading Shine and its assets to the Individual Debtor's bankruptcy estate and delivery of Leading Shine and its assets to the Trustee. (*Id.*)

On October 31, 2023, a summons (the "Summons") was issued, which, among other things, directed the Trustee to serve the Summons and Complaint on Leading Shine. (ECF No. 4.) On November 9, 2023, the Trustee filed a certificate of service demonstrating service of the Summons and Complaint on Leading Shine on October 31, 2023. (ECF No. 6.) Leading Shine was served within a judicial district of the United States within seven (7) days of the issuance of the Summons and, therefore, had thirty (30) days from the issuance of the Summons to file an answer or responsive motion. Fed. R. Civ. P. 4; Fed. R. Bankr. P. 7004(a), (b), (e), 7012(a). Thirty (30) days from October 31, 2023 was November 30, 2023. Fed. R. Bankr. P. 9006(a). Leading Shine did not timely respond to the Complaint.

On December 8, 2023, the Trustee requested the Clerk of Court enter default against, among others, Leading Shine. (ECF No. 11.) On December 14, 2023, the Clerk of Court entered the Default. (ECF No. 13.)

On January 2, 2024, Leading Shine filed the Motion to Set Aside Default. (ECF No. 30.) On January 18, 2024, the Trustee objected to the Motion to Set Aside Default. (ECF No. 47.)

On January 23, 2024, a hearing on the Motion to Set Aside Default was held. At the conclusion of the hearing, the matter was taken under advisement.

This matter is ripe for decision.

III. JURISDICTION

The United States District Court for the District of Connecticut has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This Court has authority to hear and determine this matter pursuant to 28 U.S.C. § 157(a) and the Order of Reference of the United States District Court for the District of Connecticut dated September 21, 1984. The instant adversary proceeding in which the instant matters arise is a statutorily core proceeding. 28 U.S.C. § 157(b)(2)(A), (E), (O). The Court concludes its exercise of jurisdiction is not precluded by Constitutional concerns. *Cf. Stern v. Marshall*, 564 U.S. 462, 487–99 (2011).

Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

IV. LEGAL STANDARD

"The [C]ourt may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c), *made applicable by* Fed. R. Bankr. P. 7055. The party moving to set aside the default bears the burden of establishing "good cause." *Sony Corp. v. Elm State Elecs., Inc.*, 800 F.2d 317, 320 (2d Cir. 1986). "Good cause" is undefined, but the United States Court of Appeals for the Second Circuit has developed three criteria to determine whether good cause exists for setting aside an entry of default, namely, (1) whether the default was willful; (2) whether the defaulted party presents a meritorious defense; and (3) whether setting aside the default would prejudice the responding party. *Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 186 (2d Cir. 2015) (citing *Guggenheim Cap., LLC v. Birnbaum*, 722 F.3d 444, 455 (2d Cir. 2013) and *Enron Oil Corp. v. Diakuhara*, 10 F.3d

90, 96 (2d. Cir. 1993)); *New York v. Green*, 420 F.3d 99, 108 (2d Cir. 2005) (citing *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 166–67 (2d Cir. 2004)). In considering these criteria, courts are mindful that "[s]trong public policy favors resolving disputes on the merits." *Am. All. Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996).[2] For this reason, "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." *Enron*, 10 F.3d at 96; *see Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) ("While courts are entitled to enforce compliance with the time limits of the Rules by various means, the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort."); *Gill v. Stolow*, 240 F.2d 669, 670 (2d Cir. 1957) (same). Nevertheless, these policy interests must be balanced "against the competing interest in maintaining 'an orderly efficient judicial system' in which default is a useful weapon 'for enforcing compliance with the rules of procedure.'" *Sony*, 800 F.2d at 320 (internal citations omitted). Ultimately, determining a motion to set aside a default is a matter of discretion, reviewed for abuse of discretion. *See Bricklayers*, 779 F.3d at 186; *but see Davis v. Musler*, 713 F.2d 907, 913 (2d Cir. 1983) ("[A]n abuse of discretion 'need not be glaring' to justify reversal of a district court order denying a motion to vacate a default judgment . . .") (internal citations omitted).

[2] The same criteria are assessed in determining a motion to set aside a default judgment pursuant to Fed. R. Civ. P. 55(c) and 60(b) and, hence, the parties have cited and this opinion cites decisions regarding default judgment in addition to decisions on defaults. *See Bricklayers*, 779 F.3d at 186 n. 1 (stating that because the criteria were identical, application of default judgment caselaw was appropriate on the facts and circumstances before the court). However, as counsel for the Lamp Entities argued, a motion to set aside a default is subject to a "less rigorous standard" than a motion to set aside default judgment. *Am. All. Ins.*., 92 F.3d at 59.

V. DISCUSSION

The Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 are set forth below.

A. Willfulness

A willful default is established where a "defendant defaulted deliberately," regardless of whether such deliberate default was in "bad faith." *Gucci Am., Inc. v. Gold Ctr. Jewelry*, 158 F.3d 631, 635 (2d Cir. 1998) (holding district court made error of law in interpreting *Am. All. Ins.* to require a showing of bad faith to establish willfulness); *see Bricklayers*, 779 F.3d at 187. Willfulness is "more than merely negligent or careless" and may be found "where the conduct of counsel or the litigant was egregious and was not satisfactorily explained." *Sec. & Exch. Comm'n v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998); *see Bricklayers*, 779 F.3d at 186 (same) (citing *McNulty*). An inference of willful default is supported by the failure to deny that the defaulted party "received the complaint" and other relevant pleadings and orders, coupled with failure to contend that non-compliance "was due to circumstances beyond [the defaulted party's] control." *Guggenheim*, 722 F.3d at 455 (citing *Com. Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 243 (2d Cir. 1994)).

Leading Shine argues the Default was not willful because the delay in answering or otherwise responding to the Complaint was occasioned by its principal, Ms. Mei Guo ("Ms. Guo"), and her counsel performing due diligence to make sure that Ms. Guo was indeed the owner of Leading Shine before filing an answer or responsive motion. In particular, Leading Shine argues, Ms. Guo and her counsel sought to avoid circumstances similar to those that occurred in connection with Hudson Diamond NY LLC ("HDNY") in proceedings in the jointly

administered Chapter 11 cases, which circumstances were wasteful of the Court's and the parties' resources. (*See* Main Case ECF No. 2220.)

The Trustee argues the Default was willful because (i) Leading Shine was in receipt of the Summons and Complaint, (ii) Leading Shine failed to timely respond to the Complaint, and (iii) the confusion about Leading Shine's ownership was within Leading Shine's control.

The Court agrees with the Trustee. Leading Shine does not contest proper service of the Summons and Complaint and, indeed, its arguments evidence its receipt of them. Leading Shine also does not contest that it failed to timely respond to the Complaint. The only issue is whether Leading Shine chose to default, or it defaulted negligently or due to circumstances outside its control.

The Second Circuit's decision in *Pecarsky v. Galaxiworld.com, Ltd.* provides the Court with guidance on this issue. 249 F.3d 167 (2d Cir. 2001). In that case, the Second Circuit reversed an entry of default judgment due to the difficulty in securing successor counsel where prior counsel was withholding the case file on account of non-payment of legal fees and the defendant corporation, nevertheless, diligently kept the district court informed as to its efforts. *Galaxiworld.com*, 249 F.3d at 172–73. Here, unlike in *Galaxiworld*, Leading Shine, Ms. Guo, and/or her counsel did not inform the Court regarding their efforts to determine whether Ms. Guo truly owned Leading Shine and could authorize counsel to represent it. While it is understandable that Ms. Guo and her counsel would wish to avoid events similar to those that occurred regarding her control of HDNY, Leading Shine made a deliberate choice to not respond before the response deadline, seek an extension of time to respond before the response deadline, or inform the Court before the response deadline. Moreover, Leading Shine cannot argue both that Ms. Guo truly controls Leading Shine and that it is beyond her control to know whether she

controls it. The present record does not establish bad faith on the part of Leading Shine, but, under Second Circuit precedent, bad faith is not the gravamen of willful default. *Gucci*, 158 F.3d at 635.

The Court finds the Default was willful.

B. Meritorious Defense

In recognition of the effect of default, "a 'defendant must present more than conclusory denials when attempting to show the existence of a meritorious defense.'" *Green*, 420 F.3d at 110 (citing *Galaxiworld*, 249 F.3d at 173); *see In re Martin-Trigona*, 763 F.2d 503, 505 n. 2 (2d Cir. 1985) (holding burden is on defaulted party to present a meritorious defense, given the effect of default). The party seeking to set aside the default must present a defense that "is good at law so as to give the *factfinder* some determination to make." *Am. All. Ins.*, 92 F.3d at 62 (emphasis added). "Although in an answer general denials normally are enough to raise a meritorious defense, the moving party on a motion to reopen a default must support its general denials with some underlying facts." *Sony*, 800 F.2d at 320–21. A meritorious defense cannot be established by "mere conclusory statements," including "sworn conclusory denials" in affidavits or declarations. *Id.*; *see Bricklayers*, 779 F.3d at 187. When evaluating the presented evidence, "[w]hether a defense is meritorious 'is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense.'" *State Street*, 374 F.3d at 167 (citing *Enron*, 10 F.3d at 98); *see McNulty*, 137 F.3d at 740.

Leading Shine argues that it has presented a meritorious defenses. First, it argues that the Trustee is barred from recovery under *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991), and the related doctrine of *in pari delicto* because he stands in the shoes of the

Individual Debtor. Second, it argues that the Trustee has insufficiently pled *alter ego* under Delaware law.

The Trustee argues that Leading Shine ignores the effect of default and fails to bring factual material to contest the allegations in the complaint. Instead, the Trustee argues, Leading Shine makes meritless legal arguments that can be decided on a motion to set aside default.

The Court agrees with the Trustee. Lamp Capital LLC ("Lamp Capital") and Infinity Treasury Management Inc. (together, collectively, the "Lamp Entities") made substantially the same arguments in their motion to set aside default. The Court rejected those arguments as set forth in the Memorandum of Decision and Order Granting Motion for Default Judgment and Denying Cross Motion to Set Aside Default (the "Lamp Decision"). (ECF No. 63.) Like the Lamp Entities, Leading Shine fails to put forward factual material and instead argues, essentially, a motion to dismiss based on meritless legal arguments. Therefore, the Court concludes that Leading Shine has not presented a meritorious defense.

C. Prejudice

"[D]elay alone is not a sufficient basis for establishing prejudice" but "[r]ather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud or collusion.'" *Musler*, 713 F.2d at 916.

Leading Shine argues that the only prejudice to the Trustee – delay – is not cognizable and, in any event, is minimal. The Trustee argues that there is prejudice to him in granting the Motion to Set Aside because Leading Shine has defaulted on its discovery obligations regarding the Rule 2004 subpoena served on it.

While the Court understands the Trustee's argument, the balance of prejudice tips in favor of Leading Shine. "One of the primary purposes of a Rule 2004 examination is as a pre-

litigation device." *In re Wash. Mut., Inc.*, 408 B.R. 45, 53 (Bankr. D. Del. 2009). This is because a bankruptcy trustee (i) is a neutral outsider without knowledge of the debtor's assets, liabilities, and financial affairs and (ii) has a duty to maximize the bankruptcy estate, including by initiating litigation. *See Wash. Mut.*, 408 B.R. at 50; *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 707–12 (Bankr. S.D.N.Y. 1991) (discussing purpose of Rule 2004 in historical jurisprudential context). Rule 2004 discovery is exceptionally broad to serve this purpose; it is broader than discovery permitted in adversary proceedings. *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 626 (Bankr. D. Del. 2016); *compare* Fed. R. Bankr. P. 2004 *with* Fed. R. Civ. P. 26; Fed. R. Bankr. P. 7026. Nevertheless, the record of Leading Shine's compliance with the Rule 2004 subpoena – or lack thereof – is not presently before the Court and the Court has not previously found Leading Shine in contempt of Court.

Therefore, the Court concludes prejudice has not been established on the specific facts and circumstances surrounding Leading Shine's Default.

D. Public Policy

The Court has determined that Leading Shine has failed to establish that the Default was not willful and failed to present a meritorious defense, but that the Trustee has failed to establish prejudice to the Trustee if the Motion to Set Aside Default is granted. Nevertheless, in the interest of preventing abuse of process, the Court "need not reach the question of whether the plaintiff would suffer prejudice as [it is] 'persuaded that the default was willful and . . . [is] unpersuaded that the defaulting party has a meritorious defense.'" *Bricklayers*, 779 F.3d at 187 (citing *McNulty*, 137 F.3d at 738) (ellipsis in original). This is because even if "the record does not strongly support a finding of prejudice . . . willful default and the absence of meritorious defenses" are sufficient to deny a motion to set aside a default. *Rafidain Bank*, 15 F.3d at 244.

Therefore, it is within the Court's discretion to deny the Motion to Set Aside Default. *See Bricklayers*, 779 F.3d at 186.

Under the specific facts and circumstances, the Court grants the Motion to Set Aside Default. Ultimately, in determining the Motion, the Court must balance the public's competing interest in having matters determined on the merits and in preventing abuse of process and ensuring efficient and just administration of the judicial process. *Sony,* 800 F.2d at 320. Here, the efficiency interest in denying the Motion to Set Aside Default is limited because Ms. Guo has timely responded to the Complaint. Claim six is also brought against Ms. Guo and shares many of the same factual and legal issues as claim five. These matters will be litigated in this adversary proceeding even if the Motion to Set Aside Default were denied. Therefore, despite the Default being willful and Leading Shine failing to present a meritorious defense, the public's interest in having matters determined on the merits outweighs the public's interest in maintaining an efficient and orderly judicial process.

This determination is without prejudice to the Trustee to bring a motion to compel or for contempt against Leading Shine relating to the Rule 2004 subpoena. Further abuse of process may result in sanctions against Leading Shine, including potentially, the entry default judgment or imposition of the Trustee's attorneys' fees and costs.

VI. CONCLUSION AND ORDER

For the reasons stated, it is hereby

ORDERED: The Motion to Set Aside Default (ECF No. 30) is **GRANTED**. The Default (ECF No. 13) is set aside as it relates to Leading Shine.

Dated at Bridgeport, Connecticut this 6th day of March, 2024.

Julie A. Manning
United States Bankruptcy Judge
District of Connecticut