U.S. Court of International Trade

Slip Op. 16–83

UNITED STATES, Plaintiff, v. NYCC 1959 INC., Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 15–00111

[granting plaintiff's motion for default judgment]

Dated: September 7, 2016

Zachary J. Sullivan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Plaintiff. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Karen Hiyama*, Senior Attorney, U.S. Customs and Border Protection, of Detroit, MI.

OPINION

Pogue, Senior Judge:

The United States brings this action to recover unpaid duties and a civil penalty, as permitted by Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012) ("Section 1592").[1] Compl., ECF No. 3, at ¶ 1. Plaintiff claims that Defendant NYCC 1959 Inc. ("NYCC"), an importer of candles from the People's Republic of China ("China"), negligently entered merchandise into the commerce of the United States by means of materially false information, in violation of 19 U.S.C. § 1592(a)(1)(A)(i). *Id.* at ¶¶ 3–8, 14. Because NYCC failed to timely appear, plead, or otherwise defend, default was entered. Entry of Default, ECF No. 9. The Government now moves for default judgment pursuant to USCIT Rule 55(b). Pl.'s Mot. for Default J., ECF No. 12.

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1) (2012).

As further explained below, because the Government's well-pleaded complaint and supporting evidence adequately establish the defaulting Defendant's liability for negligent violations of Section 1592 as a matter of law, Plaintiff's motion for a default judgment is granted. Judgment shall be entered against the Defendant for the unpaid

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

duties owed as a result of these violations. In addition, because the Government's adequately documented, certain claim for a civil penalty against NYCC is in an amount that is within the statutory limit for such violations, judgment shall also be entered for the Plaintiff on its penalty claim.

DISCUSSION

Because a defendant who defaults thereby admits all well-plead factual allegations contained in the complaint, *e.g., City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an ancient common law axiom that a defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint.") (quotation marks and citation omitted), the court must enter judgment against NYCC if (1) Plaintiff's allegations establish NYCC's liability as a matter of law, *see id.*,[2] and (2) "the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation." USCIT R. 55(b).[3]

I. Admitted as True, the Government's Factual Allegations Establish NYCC's Liability as a Matter of Law.

Section 1592 prohibits the entry of merchandise into the commerce of the United States by means of "any document or electronically transmitted data or information, written or oral statement, or act which is material and false," if the responsible person acted with "fraud, gross negligence, or negligence." 19 U.S.C. § 1592(a)(1)(A)(i). Here, the Government adequately alleges that NYCC entered merchandise into the commerce of the United States using entry documents that falsely indicated to U.S. Customs and Border Protection ("Customs") that the merchandise in question was not subject to any antidumping duties. Compl., ECF No. 3, at ¶¶ 4–7 & Ex. A. In fact (accepting, as necessary in cases of default, the truth of the Plaintiff's factual allegations, *Mickalis Pawn Shop*, 645 F.3d at 137), the merchandise – candles from China containing petroleum wax – was covered by an antidumping duty order. Compl., ECF No. 3, at ¶¶ 4–5 (citing *Petroleum Wax Candles from [China]*, 51 Fed. Reg. 30,686 (Dep't Commerce Aug. 28, 1986) (antidumping duty order)).

---

[2] *See also, e.g., United States v. Freight Forwarder Int'l, Inc.*, __ CIT __, 44 F. Supp. 3d 1359, 1362 (2015) (relying on *Mickalis Pawn Shop*, 645 F.3d at 137).

[3] USCIT Rule 55(b) provides that "[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court – on the plaintiff's request with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person." Plaintiff's complaint alleges that NYCC is a corporation, not a minor or an incompetent person. *See* Compl., ECF No. 3, at ¶ 3 (averring that, "[u]pon information and belief," Defendant NYCC is "a New York corporation . . . engaged in the importation of candles").

The false entry information was material to Customs' evaluation of NYCC's duty liability for these entries because it affected Defendant's antidumping duties, *see* Compl., ECF No. 3, at ¶¶ 6, 8; *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) ("[T]he measurement of the materiality of the false statement is its potential impact upon Customs' determination of the correct duty for the imported merchandise.") (citations omitted). Therefore, the Government's factual allegations, deemed admitted by the defaulting Defendant, establish that NYCC entered merchandise into the commerce of the United States by means of information that was both material and false. Accordingly, admitted as true, the Government's factual allegations establish NYCC's liability under Section 1592 as a matter of law. *See* 19 U.S.C. § 1592(a)(1)(A)(i). Judgment must therefore be entered against NYCC for the underpayment of duties that resulted from these violations. *See* Compl., ECF No. 3, at ¶¶ 8–11.

Moreover, in the absence of any defense by the Defendant, the Government's uncontested factual allegations are also sufficient to establish NYCC's liability under Section 1592 for a monetary penalty based on negligence. *See* 19 U.S.C. § 1592(e)(4) ("Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under [Section 1592] . . . if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence."). Accordingly, the next question before the court is the claimed penalty amount.

II. The Penalty Amount

Section 1592 provides a maximum civil penalty amount for penalties based on negligent violations. 19 U.S.C. § 1592(c)(3). Where (as here) the material misrepresentation that forms the basis of the negligent violation concerned the assessment of duties, the amount of the penalty may not exceed the lesser of "the domestic value of the merchandise" or "two times the lawful duties, taxes, and fees of which the United States is or may be deprived." *See id.* at § 1592(c)(3)(A).

Here the Government alleges, providing supporting evidence, that the total domestic value of the entries in question was $270,611.26. *See* Compl., ECF No. 3, at ¶ 15 n.1 & Ex. A; Decl. of Elena Pietron, ECF No. 12–1 ("Pietron Decl."), at ¶¶ 4–6, 9 & Ex. 5. The Government also provides evidence that the potential antidumping duty loss was

$138,509.21. *See* Pietron Decl., ECF No. 12–1, at ¶ 7.[4] Two times this amount is $277,018.42. Accordingly, the maximum allowable penalty amount for NYCC's negligent violation of Section 1592 with respect to these entries is $270,611.26, which is the lesser of the two amounts. *See* 19 U.S.C. § 1592(c)(3)(A).

After taking appropriate preliminary steps, *see* Decl. of Wanda Vela, ECF No. 12–2 ("Vela Decl."), at ¶¶ 3–4, 8, Customs ultimately issued to NYCC a formal demand for payment of the $88,934.88 in unpaid antidumping duties and a penalty of $266,671.78, both of which remain unpaid. Compl. ECF No. 3, at ¶¶ 9–11. Because the amount of the claimed penalty falls within the statutory cap set by the lesser of the merchandise's domestic value and two times the potential duty loss, the Government's assessed penalty amount in this case is within the scope of authority provided by 19 U.S.C. § 1592(c)(3)(A). Because Defendant has defaulted, it raises no equitable claim, argument, or factual allegations supportive of a lesser penalty amount. Judgment shall therefore be entered for the unpaid antidumping duties and the penalty as claimed, plus post-judgment interest, *see* 28 U.S.C. § 1961(a), and pre-judgment interest on the unpaid duties,[5] *see United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1369–70 (Fed. Cir. 2008) (pre-judgment interest not available for penalties pursuant to 19 U.S.C. § 1592(c)); *United States v. Horizon Prods. Int'l Inc.*, __ CIT __, 82 F. Supp. 3d 1350, 1355 (2015) (awarding prejudgment interest solely on outstanding duty amount in a penalty action), plus costs. *See* USCIT Rule 55(b) (requiring the entry of judgment for the plaintiff, plus costs, when the plaintiff's claim is for a sum certain against a competent defendant who has been defaulted for not appearing); *supra* note 3 (providing relevant text of USCIT Rule 55(b)).

---

[4] $138,509.21 is the sum of the duties owed on each of the three entries at issue – $49,574.33 plus $46,127.14 plus $42,807.74. *See* Pietron Decl., ECF No. 12–1, at ¶ 7. Although $49,574.33 of this amount was paid by NYCC's surety, Compl., ECF No. 3, at ¶ 8, such that only $88,934.88 remains in actual lost revenue, the statute contemplates the full amount of the potential duty loss. *See* 19 U.S.C. § 1592(c)(3)(A)(ii) ("two times the lawful duties, taxes, and fees of which the United States is *or may be* deprived") (emphasis added).

[5] Pre-judgment interest on the outstanding duty amount shall be computed pursuant to 26 U.S.C. § 6621, *see* 19 U.S.C. § 1677g(b),from April 14, 2015 – the date of the summons in this action, Summons, ECF No. 1 – rather than the last formal demand for payment, *see* Vela Decl., ECF No. 12–2, at ¶ 8 & Ex. 3, in recognition of the Government's continued consideration of the matter in exchange for NYCC's waiver of the statute of limitations, *see id.* at ¶ 11 & Ex. 5 (Statute of Limitations Waiver Form) (stating that NYCC waived the statute of limitations, after Customs' formal demand for payment, to "obtain the benefits of the orderly continuation and conclusion" of the agency's continued review of the entries in question).As the evidence presented does not establish any other date for the conclusion of this additional review (and hence the true finalization of the demand for payment), the summons provides the earliest equitable date from which to compute pre-judgment interest.

CONCLUSION

For all of the foregoing reasons, the Government's motion for default judgment against NYCC for a negligent violation of 19 U.S.C. § 1592(a) is granted. Judgment shall be entered in the amount of $355,606.66 ($88,934.88 in unpaid antidumping duties plus $266,671.78 in penalty), plus post-judgment interest, computed in accordance with 28 U.S.C. §§ 1961(a)-(b), as well as pre-judgment interest solely on $88,934.88 (the outstanding duty amount), computed pursuant to 26 U.S.C. § 6621, from April 14, 2015 (the date of the unanswered summons), until the date of judgment, plus costs.

Dated: September 7, 2016
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 16–84

ALBEMARLE CORP., Plaintiff, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CALGON CARBON (TIANJIN) CO., LTD., CALGON CARBON CORP. and NORIT AMERICAS INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 11–00451

[Instructing the U.S. Department of Commerce in response to a mandate issued by the U.S. Court of Appeals for the Federal Circuit]

Dated: September 7, 2016

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff Albemarle Corp. and plaintiff-intervenor Ningxia Huahui Activated Carbon Co., Ltd. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, and *Sarah M. Wyss*.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for plaintiff Shanxi DMD Corp. With him on the brief were *John J. Kenkel* and *J. Kevin Horgan*.

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for plaintiffs Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd. and Cherishmet Inc. With him on the brief were *Mark E. Pardo, Andrew T. Schutz*, and *Kavita Mohan*.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Craig A. Lewis, Hogan Lovells U.S. LLP, of Washington, DC, for defendant-intervenor Calgon Carbon (Tianjin) Co., Ltd.

David A. Hartquist, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors Calgon Carbon Corp. and Norit Americas Inc. With him on the brief were *R. Alan Luberda* and *John M. Herrmann II*.

OPINION AND ORDER

Stanceu, Chief Judge:

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345 (Fed. Cir. 2016) ("*Albemarle III*"). CAFC Mandate in Appeal Nos. 2015–1288, 2015–1289, and 2015–1290 (June 23, 2016), ECF No. 130. This decision affirmed in part, and vacated in part, the judgment of the United States Court of International Trade ("CIT") in *Albemarle Corp. v United States*, 38 CIT __, 27 F. Supp. 3d 1336 (2014) ("*Albemarle II*"). To implement the mandate of the Court of Appeals, the court issues instructions to the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department").

I. BACKGROUND

In this consolidated case, several plaintiffs contested the final determination ("Final Results") Commerce issued to conclude the third periodic administrative review of an antidumping duty order on activated charcoal from the People's Republic of China. The contested decision was published as *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 Fed. Reg. 67,142 (Int'l Trade Admin. Oct. 31, 2011) ("*Final Results*"). Background on this case is presented in the opinions in *Albemarle III*, 821 F.3d at 1347–51, *Albemarle II*, 38 CIT at __, 27 F. Supp. 3d at 1339–40, and *Albemarle Corp. v United States*, 37 CIT __, __, 931 F. Supp. 2d 1280, 1283–84 (2013) ("*Albemarle I*").

The remaining issue in this litigation is the antidumping duty margin to be assigned to Ningxia Huahui Activated Carbon Company Ltd. ("Huahui"), which was a "separate rate," i.e., non-individually-examined, respondent in the third administrative review, at the conclusion of which Commerce assigned de minimis margins to the two mandatory respondents. In the Final Results, Commerce assigned Huahui the $0.44/kg margin it had assigned Huahui as an individually-examined respondent in the prior, i.e., the second, administrative review. *Final Results*, 76 Fed. Reg. at 67,145. Commerce assigned all other separate rate respondents a margin of $0.28/kg, which was the margin Commerce had assigned to separate rate respondents in the second review. *Id*.

In *Albemarle I*, the Court of International Trade ordered Commerce to reconsider its assignment of the $0.28/kg margin to the separate rate respondents. *Albemarle I*, 37 CIT at __, 931 F. Supp. 2d at 1296–97. Pending a remand redetermination by Commerce, the CIT reserved any decision on whether the $0.44/kg margin Commerce

assigned to Huahui in the Final Results was permissible, reasoning that "Commerce may or may not decide to assign Huahui a different margin based on other decisions it makes upon remand." *Id.*, 37 CIT at __, 931 F. Supp. 2d at 1293.

In the determination responding to the order the Court of International Trade issued in *Albemarle I*, Commerce again determined de minimis margins for the two mandatory respondents. *Final Results of Redetermination Pursuant to Court Remand*, at 25 (Jan. 10, 2014), ECF No. 96. Based on those de minimis margins, and under protest, Commerce assigned margins of zero to the parties other than Huahui who were separate rate respondents in the third review. *Id*. at 13, 25. Commerce "decline[d] to reconsider Huahui's dumping margin" and thereby continued to assign the $0.44/kg margin to Huahui. *Id*. at 22.

The Court of International Trade sustained the Department's assigning zero margins to the separate rate respondents other than Huahui as well as the assignment of the $0.44/kg margin to Huahui. *Albemarle II*, 38 CIT at __, 27 F. Supp. 3d at 1352. On appeal, the Court of Appeals affirmed the judgment as to the zero margins and reversed the judgment as to the $0.44/kg margin. The Court of Appeals remanded this case to the Court of International Trade "so that it may issue appropriate instructions to Commerce" on the question of the margin to be assigned to Huahui. *Albemarle III*, 821 F.3d at 1359. This opinion sets forth the instructions to effectuate the decision of the Court of Appeals.

II. DISCUSSION

In reviewing the CIT's affirmance of the $0.44/kg margin assigned to Huahui, the Court of Appeals considered the question of "whether Commerce's chosen method of carrying forward Huahui's data from the second period of review to the third was reasonable." *Albemarle III*, 821 F.3d at 1355–56. *Albemarle II* had noted that the $0.44/kg margin was based on Huahui's own data in the prior review and, in deciding that this method was reasonable, had concluded that Commerce acted permissibly in choosing specificity over contemporaneity. *Albemarle II*, 38 CIT at __, 27 F. Supp. 3d at 1348–50.

Reaching the opposite conclusion, the Court of Appeals relied upon 19 U.S.C. § 1677d(c)(5)(B) and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, vol. 1 at 873 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040, 4021, for the principle that, "when all individually examined respondents are assigned de minimis margins," an averaging of the de minimis margins of the individually examined respondents is the "preferred" and "expected method" for determining a margin for the respondents that were not individually examined. *Albemarle III*, 821 F.3d at 1352, 1354. The appellate court stated, further, that it was "guided by the statute's manifest preference for contemporaneity in

periodic administrative reviews," opining that "[t]here is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period." *Id.*, 821 F.3d at 1356. Citing the "established doctrine" that Commerce is expected to use current information when conducting an administrative review, the Court of Appeals concluded that "it is not open to Commerce to argue that prior review data is reliable simply because it is 'temporally proximate.'" *Id.*, 821 F.3d at 1357 (citation omitted). Further, the appellate court noted that "Huahui specifically requested leave to be individually examined as a voluntary respondent under 19 U.S.C. § 1677m(a), or alternatively to submit additional supplementary data, but Commerce denied both requests." *Id.*, 821 F.3d at 1358. The Court of Appeals concluded that "[i]t was unreasonable in this case for Commerce to choose to limit its review to the two largest volume exporters, refuse to collect additional data from Huahui, and then draw inferences adverse to Huahui based on the lack of data available in the record." *Id*. (citing *Albemarle I*, 37 CIT at __, 931 F. Supp. 2d at 1293).

III. CONCLUSION AND ORDER

To fulfill the mandate of *Albemarle III* that the Court of International Trade "issue appropriate instructions to Commerce," *id.*, 821 F.3d at 1359, the court is guided, as it must be, by the holding the Court of Appeals stated in its opinion. As to the $0.44/kg margin Commerce applied to Huahui, the Court of Appeals succinctly expressed that holding as follows: "We hold that Commerce could not on this record utilize data from the previous review." *Id.* "Rather, Commerce, having declined to collect additional information, was required to follow the 'expected method' of utilizing the de minimis margins of the individually examined respondents from the contemporaneous period." *Id.* The court considers the appropriate instructions to be that Commerce redetermine a margin for Huahui in accordance with the holding of the Court of Appeals in *Albemarle III*.

Therefore, upon consideration of the decision of the Court of Appeals in *Albemarle III*, and upon due deliberation, it is hereby

ORDERED that Commerce submit to the Court of International Trade a second remand redetermination in which it assigns to Huahui a dumping margin that is in accordance with the holding of the Court of Appeals in *Albemarle III*; it is further

ORDERED that Commerce shall file its second remand redetermination with the court within forty-five (45) days from the date of this Opinion and Order; and it is further

ORDERED that plaintiffs and defendant-intervenors shall have thirty (30) days from the date on which the second remand redetermination is filed with the court to file comments thereon; and it is further

ORDERED that defendant may file a response to the submitted comments within fifteen (15) days of the date upon which the last comment is filed.

Dated: September 7, 2016
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
CHIEF JUDGE