SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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681 M LLC,

Plaintiff(s),

DECISION AND ORDER

Index No: 27043/20E

- against -

IVES ALEXANDER HORT PENA,

Defendant(s).
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In this action for breach of contract, after an inquest, this Court awards plaintiff the damages discussed hereinafter.

According to the complaint, this action is for breach of contract. It is alleged that on or about September 28, 2015, plaintiff, owner and landlord of the premises located at 681 Melrose Avenue, Store 4, Bronx, NY 10455 (681), entered into a lease with defendant. The lease was for a term of five years. Defendant defaulted under the terms of the lease and vacated 681 on October 28, 2018. Plaintiff alleges that as a result of the breach of the lease by defendant, it has been damaged in the sum of $79,485.07. Plaintiff seeks a judgment in the foregoing amount plus attorney's fees incurred by plaintiff in the instant action.

On October 21, 2021, the Court (McShan, J.) issued a decision partially granting plaintiff's motion for the entry of a

default judgment. The Court noted that although plaintiff was entitled to a default judgment, the calculation of damages required extrinsic proof and therefore, a hearing.

On October 24, 2022, plaintiff appeared before this Court and an inquest was held on the record.

At inquest, plaintiff elicited testimony from Leo Porto (Porto), Commercial Portfolio Manager for Chestnut Holding, which Porto testified was plaintiff's managing agent at 681. Porto testified that in 2015, plaintiff leased commercial space at 681 to defendant. Per the lease, defendant was required to pay monthly rent, taxes, and water bills. In 2017, defendant defaulted by failing to pay the rent due. Plaintiff initiated a commercial nonpayment proceeding against defendant, and defendant vacated 681 on October 25, 2018. At the time defendant vacated he owed the foregoing sums - all required by the lease: $22,255.65 in rental arrears, $3,726.59 in taxes, $32.82 in water bills, and rental abatement recoverable upon defendant's default totaling $4,200. Because plaintiff did not relet 681 until August 2019, defendant owes $26,400 in accelerated rent under the lease, meaning rent for the unexpired term of the lease and for which 681 remained vacant. After applying defendant's security deposit, Porto testified that plaintiff is owed $48,215.16.

Plaintiff submitted and Porto laid the requisite business records foundation for the following documents[1].

The lease between the parties is dated September 28, 2015. It indicates that defendant leased 681. Per paragraph 2.01, the term of the lease was five years. Per paragraph 3.01, defendant was required to pay the rent prescribed by Exhibit B of the lease on the first of every month, which was $2,100 in 2015 and rose to $2,400 by 2018. The foregoing paragraph also prescribed additional rent, defining such sums as any other fees due under the lease. Paragraph 3.02 gave defendant a rent abatement totaling $4,200, which was payable by defendant if he breached the lease. Per paragraph 7.01, upon defendant's default under the lease and his surrender of 681, plaintiff had no obligation to relet 681 and if plaintiff did relet 681 to a new tenant, defendant remained liable for any difference between the rent due

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[1] Plaintiff's records are admissible insofar as Porto laid the requisite business records foundation. To be sure, the business record foundation only requires proof that (1) the record at issue be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). Accordingly, "[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" (*DeLeon v Port Auth. of New York and New Jersey*, 306 AD2d 146 [1st Dept 2003]).

under the lease and the rent paid by a subsequent tenant. Paragraph 30.01 made defendant responsible for any sums due for water service at 681. Paragraph 34.01 required defendant to reimburse plaintiff for portions of the real estate taxes assessed to 681.

The rent ledger evinces that as of October 1, 2018, approximately one month before defendant vacated 681, it owed $26,287.16 in rental arrears. A water bill for 681 indicates that as of April 4, 2018, defendant owed $32.92 for water service to 681. A tax bill dated July 13, 2018, evinces that defendant owed $3,726.59 in real estate taxes. A lease dated August 7, 2019, evinces that plaintiff relet 681 to another tenant with rent totaling $2,500 per month due beginning September 1, 2018.

It is well settled that "a defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *McClelland v Climax Hosiery Mills*, 252 NY 347, 351 [1930]; *Arent Fox Kinter Plotkin & Kahn, PLLC v Gmbh*, 297 AD2d 590, 590 [2d Dept 2002]). Moreover, "in a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be

accorded the evidence presented are entitled to great deference" (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Indeed, when findings of fact rest in large measure on considerations related to the credibility of witnesses, a trial court's determination on this issue is accorded great deference (*Ning Xiang Liu v Al Ming Chen*, 133 AD3d 644, 644 [2d Dept 2015]). Absent conclusions that cannot be supported by any fair interpretation of the evidence, a judgment rendered after a bench trial should not be disturbed (*Saperstein v Lewenberg*, 11 AD3d 289, 289 [1st Dept 2004]).

Here, plaintiff credibly established entitlement to damages totaling $48,215.16. Significantly, the rent ledger established that in October 2018, when defendant vacated 681, he owed $26,287.16, in rental arrears, in that he had failed to pay rent as prescribed by the lease. Moreover, the record establishes that per the lease, defendant was required to pay a portion of the real estate taxes at 681 and all amounts for water service. To that end, the documentary evidence established that defendant owes $3,726.59 for taxes and $32.92 for water. The lease also indicates that defendant owes plaintiff $4,200, representing a rent abatement that became payable upon defendant's default under the lease, which default was established by plaintiff. Lastly, Porto established that defendant owes $26,400 in accelerated

rent, authorized under the lease and which accrued from October 2018 through September 2019, while 681 remained vacant. Accordingly, plaintiff established entitlement to damages totaling $48,215.16, said sum representing the application of defendant's security deposit, namely a credit of $8,400. It is hereby

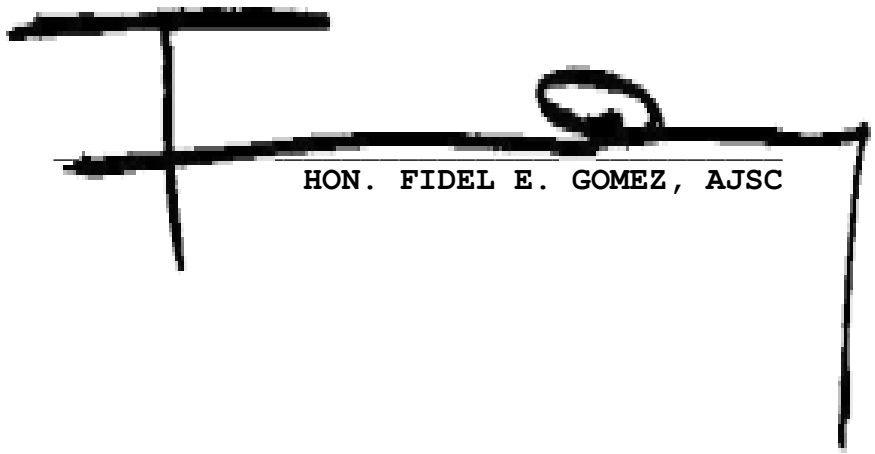
ORDERED that plaintiff is granted a judgment in the amount of $48,215.16, plus interest, costs and disbursements. It is further

ORDERED that plaintiff submit a judgment to the Clerk of the Court within 60 days hereof. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendant within 30 days hereof.

This constitutes this Court's decision and Order.

Dated : October 24, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC