

**Partnership 1995, II, L.P. v B&D Convenience Store,
Inc.**

2007 NY Slip Op 30329(U)

March 20, 2007

Supreme Court, New York County

Docket Number: 0603202

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISONI
J.S.C.
Justice

PART _____

Index Number : 603202/2004
PARTNERSHIP 1995 II, L.P.
vs
B&D CONVENIENCE STORE
Sequence Number : 002
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (a) and cross-motion(s)
decided in accordance with
the annexed declaration/order
of even date.**

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

MAR 20 2007

Dated: _____

HON. JUDITH J. GISONI J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION [* 1]
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

-----X
PARTNERSHIP 1995, II, L.P.,

Plaintiff,

-against-

B&D CONVENIENCE STORE, INC. d/b/a
ESPECIALLY FOR YOU,

Defendant.
-----X

Decision/Order

Index No.: 603202/04

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Pltf's motion [d j/mt] w/LPW affirm, affid in support (ZS), exhs 1

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff-landlord seeks a default judgment against defendant B&D Convenience Store, Inc. d/b/a Especially For You ("B&D"), the tenant, for recovery of damages arising from an alleged default of a commercial lease. Before the court is plaintiff's motion to renew its prior motion for entry of a default judgment against B&D for its failure to answer. The prior motion was denied, by order dated November 2, 2006, because plaintiff failed to provide proof that the motion was properly served on the defendant and "because the papers submitted do not form the basis for the entry of any judgment." Since the denial was without prejudice, permission to renew is granted. CPLR 2221(d)(2), Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979).

Although defendant has not appeared, or answered the complaint within the time provided under the CPLR, the motion for entry of a default judgment must be denied, and the complaint dismissed in its entirety, for the reasons that follow.

Discussion

This action is against B&D, a corporate defendant. However, on the Summons, under Defendant's Address, Bharat Patel ("Patel") is listed. The address on the Summons for Patel is 8023 254th Street, Floral Park, New York ("Summons Address"). While Patel is not a party to this action, he is identified in several documents in the record as President of B&D.

As to service, there is no proof that the Summons and Complaint were served on defendant. As a matter of law, plaintiff has therefore failed to establish *prima facie* entitlement to a default judgment.

There are additional service defects with respect to the instant motion. Based on the affirmation of Lawrence P. Wolf, plaintiff states that this motion was served on Patel, at both the Floral Park Location and 27 Minebrook Road, Apt. 91X, Edison, New Jersey ("New Location"). While a corporation may be served via any director or corporate officer, pursuant to CPLR 311 [Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265 (1980)], plaintiff's affidavit of service for the instant motion states that service was made on Patel only at the Second Location, and not the Summons Address. By the court's prior order, plaintiff's first motion for default judgment was denied, in part, because it failed to provide proof of service of the instant motion on defendant at the Summons Address. Here, plaintiff's failure to serve defendant at the Summons Address, or provide an adequate explanation to the court for its failure to do so, provides the court another reason to deny plaintiff the relief it seeks. In addition, plaintiff did not comply with CPLR § 3215(g)(4).

As to the merits of this motion, plaintiff fails to state a *prima facie* cause of action. While a default in answering the complaint constitutes an admission of the factual

allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001)].

Based upon the sworn affidavit of Robert Rapuano ("Rapuano"), plaintiff contends that on May 8, 2000, B&D breached a commercial lease, entered into by the by B&D and plaintiff on January 9, 1985, when B&D vacated 1198-1200 Broadway a/k/a 1-3-5 Franklin Avenue, Hewlett, New York (the "Premises"). Based upon a schedule of amounts owed, plaintiff states that B&D owes plaintiff: (1) base rent in the amount One Hundred Twenty Six Thousand, Five Hundred Eighty Seven and 72/100 Dollars (\$126,587.72) (first cause of action); (2) additional rent for taxes in the amount of Five Thousand Nine Hundred Ninety Six and 56/100 Dollars (\$5,996.56) (second cause of action); and (3) legal fees (third cause of action).

In support of its claims, plaintiff has provided a deed dated August 5, 1998, establishes that it is the owner of the Premises. Also, plaintiff has provided an Assignment and Assumption of Lease ("Assignment"), dated June 29, 1992, which assigned the lease dated January 9, 1985 ("1985 Lease") from New World Import Export Corp. to B&D. The Assignment was signed by Patel.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990).

Plaintiff has not provided the 1985 Lease. Plaintiff cannot prove breach of the lease without providing the subject lease or providing an reasonable explanation to this

court for its failure to do so. Instead, plaintiff has provided a Lease Abstract, dated December 18, 1998, which references the 1985 Lease. The Lease Abstract merely identifies B&D as the tenant of the Premises and is unsigned by anyone on behalf of B&D. Given that plaintiff has failed to provide the 1985 Lease, plaintiff has failed to establish a *prima facie* cause of action for breach of the 1985 Lease.

For the reasons set forth above, and in the previous decision of this court dated November 2, 2006, plaintiff has failed to prove its case. The complaint and this case is hereby dismissed with prejudice.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant is denied; and it is further


ORDERED that the complaint and each cause of action against defendant is dismissed, with prejudice.

Any relief not expressly addressed herein has been nonetheless considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 20, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE