

<b>215 W. 91st St., LLC v Liberty House Two, Inc.</b>
2008 NY Slip Op 32116(U)
July 25, 2008
Supreme Court, New York County
Docket Number: 0602597/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

Justice

PART 55

Index Number : 602597/2007  
215 WEST 91ST STREET LLC  
vs  
LIBERTY HOUSE TWO  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/3/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers/ items \_\_\_\_\_ this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided together with motions 03 and 04 in accordance with the annexed memorandum decision and order.

N.B. -- Preliminary conference is scheduled for 8/18/08 at 12:00pm.

**FILED**  
JUL 29 2008  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/25/08

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----x

215 WEST 91st STREET, LLC,  
  
Plaintiff,

Index No. 602597/07

DECISION AND ORDER

-against-

LIBERTY HOUSE TWO, INC. and  
CATHY HAWKINS,

Defendants.

-----x

SOLOMON, JANE J.:

Plaintiff 215 West 91<sup>st</sup> Street, LLC (215 West 91<sup>st</sup>) moves for summary judgment in this action by a landlord against a commercial tenant, Liberty House Two, Inc. (Liberty House) and the tenant's principal, defendant Cathy Hawkins (Hawkins), who guaranteed Liberty House's obligation to pay rent under the lease. By separate motions, defendants seek default judgment on their counterclaims, and 215 West 91<sup>st</sup> seeks leave to file a late reply to the counterclaims.

BACKGROUND

The facts set forth in the complaint and motion for summary judgment show that there was a lease between 215 West 91<sup>st</sup> and Liberty House, dated March 13, 2003 and expiring on March 31, 2013. When Liberty House failed to make a timely July 2007 rent payment, its lawyer sent a default notice on July 12, 2007, stating that the lease would expire in three days, and

Liberty House would be required to surrender the premises. Liberty House responded with a letter dated July 13<sup>th</sup> rejecting the default notice, and stating that it was in the process of negotiating a surrender of the lease. Then, on August 17, 2007, Liberty House's attorney sent a notice under paragraph 81 of the lease and the "Limited Guaranty" that it intended to surrender the lease and deliver vacant possession of the premises back to the landlord (Affirmation of Edwin Roy Eisen, Esq. in support of plaintiff's motion for summary judgment, Ex. C) and, by a hand delivered letter dated August 30, 2007, it delivered the keys to counsel and stated that "the tenant hereby does surrender and give vacant possession of the leased premises, effective immediately" (Eisen Aff., Ex. D). Paragraph 81 of the lease states to whom notices must be sent. Annexed to the lease is a limited guaranty executed by Hawkins, whereby she agrees to guaranty payment of Liberty House's obligations under the lease. It includes a "good guy" provision, to the effect that, if the tenant gives the landlord a written notice stating that it will surrender its lease and deliver vacant possession not less than two months after the notice, and surrenders the lease and premises on or before the date set in the notice, then Hawkins is released from liability under the lease for any obligation arising after the surrender date in the notice (Lease, Eisen Aff., Ex. E).

215 West 91<sup>st</sup> sues both defendants to recover base rent, additional rent for electric charges, attorney's fees and costs, and additional security deposit. In December 2007, defendants served an answer with three counterclaims. The first counterclaim seeks a set off in the amount of its security deposit; the second counterclaim alleges that 215 West 91<sup>st</sup> wrongfully terminated the lease; and the third counterclaim alleges that 215 West 91<sup>st</sup> breached the covenant of good faith and fair dealing in connection with the lease.

#### THE MOTIONS

Approximately one month after defendants answered, 215 West 91<sup>st</sup> moved for summary judgment. The motion was defective in that it did not include copies of the pleadings, and it was made before issue was joined on the counterclaims (CPLR 3212[a]). On the merits, however, 215 West 91<sup>st</sup> might prevail at least in part because defendants do not meaningfully dispute that Liberty House surrendered the premises before the lease expired by its terms, some rent then was unpaid, and less than two months notice was given. Rather, they allege that because the surrender agreement was almost finalized, plaintiff's aggressive enforcement of the lease amounts to bad faith. Finally, 215 West 91<sup>st</sup> does not deny that the security deposit should be credited to the arrears.

Defendants' motion for default judgment is denied in light of 215 West 91<sup>st</sup>'s a reply. Defendants were not prejudiced by the delay. Accordingly, it hereby is

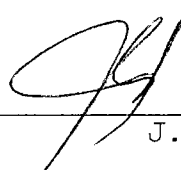
ORDERED that plaintiff's motion for summary judgment is denied; and it further is

ORDERED that defendants' motion for default judgment is denied, and plaintiff's motion for leave to serve a late reply to counterclaims is granted, and the proposed reply to counterclaims annexed to the moving papers is deemed served upon entry hereof; and it further is

ORDERED that counsel appear in Part 55 for a preliminary conference on August 18, 2008 at 12 noon.

Dated: July 25, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C  
JANE S. SOLOMON