

**Fuller Madison, LLC v Leo Kaplan Modern, Ltd.**

2009 NY Slip Op 32148(U)

September 17, 2009

Supreme Court, New York County

Docket Number: 105475/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART 10

Fuller MacLison  
- v -  
vs Kaplan

INDEX NO. 105475/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

**FILED**  
SEP 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 9/17/09

JUDITH J. GISCHE, J.S.C.  
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: PART 10

-----X

FULLER MADISON, LLC,

Plaintiff,

-against-

LEO KAPLAN MODERN, LTD. d/b/a LEO  
KAPLAN MODERN,

Defendant.

-----X

**Decision/Order**

Index No.: 105475/09

Seq. No. : 001

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/RLR affid, DRT affid, exhs .....	1
Pltf's affidavit of service .....	2

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

This is an action for breach of a real estate contract. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against the defendant. The defendant has not submitted any opposition, despite due proof of service of the instant motion. Therefore, the motion is considered on default.

Plaintiff has provided proof that it served each defendant with the summons and complaint. BCL § 306. Plaintiff has also provided proof of additional service complaint with CPLR § 3215 (g). The defendant has not answered the complaint nor otherwise appeared in this action. The defendants' time to answer has not been extended by the

court. Accordingly, the defendant has defaulted in this action.

Plaintiff is entitled to a default judgment against the defendants and in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3d Dept 2001). The defendants' default in answering the complaint constitutes an admission of the relevant factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984).

The facts are based upon the complaint and the affidavit of Ronald Lorusso, Vice President of Leasing at Vornado Realty Trust, which is a general partner of Vornado Realty L.P., which is the sole member of Fuller Madison LLC (plaintiff). Plaintiff is the owner of a building known as 595 Madison Avenue, New York, New York (the "building"). By an instrument dated June 4, 1998 (the "Lease"), and as amended by Amendment of Lease dated May 21, 2008, plaintiff and defendant agreed to the defendant's lease of the premises consisting of a portion of the 7<sup>th</sup> floor known at the building (the "premises") for a term commencing on October 1, 1998 and expiring on September 30, 2013. Copies of the Lease and the Amendment of Lease have been provided to the court.

The Lease required the defendant to pay fixed annual rent and additional charges, such as electricity, real estate tax escalation charges, operating escalation charges, and miscellaneous charges for the benefit of the defendant, each of which is deemed to be additional rent under the terms of the Lease, as well as attorneys fees incurred in connection with the prosecution of any claims arising out of the defendant's default under the Lease.

The defendant defaulted in the payment of rent and failed to cure such default pursuant to the applicable notice. As a result, plaintiff commenced a non-payment proceeding against the defendant on January 9, 2009 in the Civil Court of the City of New York, County of New York. Plaintiff has provided a copy of the Notice of Petition and Petition. The defendant, however, defaulted in appearing in the Civil Court proceeding, and the Civil Court then entered a judgment awarding the plaintiff possession of the Leased Premises and issued a warrant of eviction against the defendant. As a result of the issuance of the warrant of eviction, the Lease was cancelled effective as of the date of filing the Notice of Petition and Petition. The defendant vacated the Leased Premises on April 14, 2009. Plaintiff maintains that it has not yet re-let the premises.

Pursuant to Article 18 of the Lease, the defendant is liable to plaintiff for: all rent due up to the date of expiration of the lease term; and damages after January 9, 2009 including a deficiency in rent in the amount received, if any, by the plaintiff in the event of any re-letting. The rent due and owing though January 9, 2009 was \$187,464.16. Pursuant to Article 22B of the Lease, by virtue of the defendant's holding over in the premises after the expiration of the Lease and until April 14, 2009, the tenant is liable to plaintiff for: 1.5 times the rent due for the December 2008 fixed rent (\$33,576.67) and electricity charges (\$2,354.65), pro-rated for such period.

The sub-total of the aforementioned liabilities is \$320,410.03. On or about March 9, 2009, the defendant paid to plaintiff the sum of \$30,127.09. As a result, the total due and owing is \$290,282.92. Furthermore, plaintiff maintains that there is no security deposit under the Lease because the defendant's original deposit of \$57,560 lapsed in

Amendment of Lease.

Plaintiff has asserted the following causes of action: [1] breach of the Lease and Amendment of Lease resulting in damages through April 14, 2009; [2] account stated; and [3] breach of the Lease and Amendment of Lease resulting in damages after April 14, 2009; and [4] reimbursement for plaintiff's attorneys fees, costs and expenses.

### **Discussion**

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, 116 AD2d 694 (2d Dept 1986). Plaintiff's claims and the proof submitted on this motion establish the elements of a *prima facie* cause of action for breach of the Lease and Amendment of Lease against the defendant. Therefore, plaintiff is entitled to a default judgment on the first cause of action.

Plaintiff has voluntarily withdrawn its second cause of action, to the extent that it is pled in the alternative to its first cause of action. Accordingly, the second cause of action is hereby severed and dismissed.

Plaintiff is also entitled to a money judgment on its third cause of action in the sum of \$63,315.99 representing damages for the period May 2009 through July 2009, plus interest thereon from August 1, 2009. Plaintiff requests that the third cause of action seeking damages for any period of time commencing after July 31, 2009 be severed so that plaintiff may "apply to the Court at such time(s) as plaintiff may elect for the issuance and entry of a judgment as to any damages sustained by plaintiff for any period after July 31, 2009." This open-ended request for relief is unwarranted. This

open-ended request for relief is unwarranted, however, and is denied without prejudice to renew under a new index number upon a proper showing.

Also, since the lease expressly provides that the defendant is liable for plaintiff's reasonable attorneys fees, costs and expenses incurred in this action, plaintiff is entitled a judgment on the issue of the defendants' liability on the third cause of action. The court, therefore, refers the issue of plaintiff's damages on the third cause of action to a referee to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is granted to the extent that plaintiff is entitled to a default judgment on the first and third causes of action; and it is further

**ORDERED** that the clerk is directed to a enter a money judgment in plaintiff's favor and against the defendant, in the following amounts: \$290,282.93 with interest thereon from May 1, 2009; and \$63,315.99 with interest thereon from August 1, 2009; and it is further

**ORDERED** that the second cause of action is hereby severed and dismissed; and it is further

**ORDERED** that plaintiff is entitled a default judgment on the issue of the defendants' liability on the third cause of action. The court, therefore, refers the issue of plaintiff's damages on the third cause of action to a referee to hear and determine; and it is further


**ORDERED** that plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York  
September 17, 2009

So Ordered:

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

**FILED**  
SEP 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK