

<b>Wassfam, L.L.C. v Lall</b>
2010 NY Slip Op 31023(U)
April 22, 2010
Supreme Court, New York County
Docket Number: 100008/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_ J.S.C.  
*Justice*

PART 10

Index Number : 100008/2010  
WASSFAM LLC  
vs.  
LALL, ONGKAR  
SEQUENCE NUMBER : 001  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

**FILED**  
APR 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: APR 22 2010

J. Gishe  
HON. 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

WASSFAM, L.L.C.,

Plaintiff,

-against-

ONGKAR LALL,

Defendant.

-----X

**Decision/Order**

Index No.: 100008/10

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**

Pltf's n/m [§ 3215] w/JBI affirm. exhs ..... 1

**FILED**  
APR 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

This is an action for breach of a lease agreement. Presently before the court is plaintiff's motion for entry of a default judgment against defendant, pursuant to CPLR § 3215. This motion has been submitted to the court without opposition; it will be decided on default.

Plaintiff has filed proof of service of the summons and verified complaint. It was delivered to defendant at his residence on January 12, 2010 and accepted by a resident of the same address, a person of suitable age and discretion (CPLR § 308[4][i]). A copy of the summons and verified complaint was mailed to defendant at the same address on January 19, 2010. Plaintiff has also complied with the additional notice requirements of CPLR § 3215[g][3][i] by mailing a copy of the summons and verified complaint to the

defendant on February 1, 2010, more than twenty (20) days before seeking entry of a judgment on default.

Despite such notice and additional notice, defendant has not appeared, answered the complaint, or moved. His time to do so has expired and this motion is brought within one year of his default.

Plaintiff asserts three causes of action against defendant for breach of contract, account stated, and attorney's fees. Plaintiff claims that defendant owes plaintiff a balance of \$45,942.03 for rent and additional rent from November 1, 2008 through August 1, 2009.

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). 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 N.Y.2d 728 [1st Dept. 1984]).

An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

The complaint is verified by Joseph Wasserstein, who is the managing member of plaintiff. The following facts have been established by the plaintiff in the verified complaint:

## Discussion

On March 24, 2000, defendant and non-party Richard Mansing t/a Stitches ("Stitches"), as tenants, and non-party Wasserstein Bros., LLC, as landlord, entered into a Lease Agreement (the "Lease") for 320 West 37<sup>th</sup> Street, Suite 7B a/k/a 702, New York, New York 10018 (the "Premises"). The Lease expired on March 31, 2001 and it was renewed thereafter for consecutive terms. The first term commenced April 1, 2002 and ended March 31, 2004<sup>1</sup>. The next term commenced April 1, 2004 and ended March 31, 2006. In June 2006, plaintiff and defendant entered into a Lease Modification and Extension Agreement (the "Modified Lease"), which modified and extended the Lease for the term of April 1, 2006 through March 31, 2011.

The Modified Lease provides, in relevant part:

C. All of the hand written text appearing in Article 41 of the Lease shall be deleted and replaced with the following rent schedule:

...

(iii) For the period from April 1, 2008 to and including March 31, 2009, the sum of \$41,455.04 annually (\$3,371.25 monthly);

(iv) For the period from April 1, 2009 to and including March 31, 2010, the sum of \$41,668.70 annually (\$3,472.40 monthly);

...

Defendant defaulted in paying rent and additional rent under the Lease from November 1, 2008 through August 1, 2009 and now plaintiff seeks payment of rent and additional rent in the amount of \$45,942.03. The additional rent consists of real estate taxes, water/sprinkler charges, and legal fees, as specified in paragraphs 29 and 30 of the

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<sup>1</sup> No lease agreement or extension for April 1, 2001 through April 1, 2002 has been provided to the Court.

Lease and provisions E and I of the Modified Lease.

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. Furja, 166 A.D.2d 694 (2d Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract and plaintiff has therefore met its burden.

Plaintiff has established that defendant was obligated to pay rent of \$3,371.25 per month for the months of November 1, 2008 through March 31, 2009. Therefore, plaintiff is entitled to a money judgment in the principal amount of \$16,856.24. For the months of April 1, 2009 through August 1, 2009, plaintiff is entitled to \$3,472.40 per month, entitling plaintiff to a money judgment in the principal amount of \$13,889.60. Defendant owes plaintiff a total of \$30,754.85 in base rent for November 1, 2008 through August 1, 2009. Plaintiff is also entitled to \$50.00 per month for water/sprinkler, therefore plaintiff is entitled to \$450.00 for water/sprinkler charges. Plaintiff also seeks late fees and real estate taxes. The Lease and Modified Lease provide that plaintiff is entitled to real estate tax and late fees, however, plaintiff has not provided the Court with the appropriate documentation to calculate either amount. Therefore, such relief is hereby denied. Accordingly, plaintiff is entitled to a default judgment in the amount of \$31,195.85 against defendant plus interest from the date this action was commenced, January 4, 2010, at the statutory rate. The judgment represents base rent and water/sprinkler charges through July 2009.

While plaintiff prevails on its first cause of action for breach of contract, its second cause of action for account stated is duplicative of its first. Therefore, plaintiff's

second cause of action against defendant is hereby severed and dismissed.

### Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (2d Dept. 1986). Here, the Lease expressly provides that defendant is liable for plaintiff's reasonable attorneys fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiff may recover from defendant for its reasonable attorneys fees 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 the clerk is hereby directed to enter a money judgment in favor of plaintiff, Wassfam, L.L.C., and against defendant, Ongkar Lall, in the amount of thirty-one thousand one hundred ninety five dollars and eighty-five cents (\$31,195.85); and it is further

**ORDERED** that plaintiff's second cause of action against defendant is hereby severed and dismissed; and it is further

**ORDERED** that interest shall run from the date this action was commenced, January 4, 2010, at the statutory rate; and it is further

**ORDERED** that the issue of what plaintiff may recover from defendant, Ongkar Lall, for its reasonable attorneys fees is hereby referred to a Special Referee to hear and determine; and it is further

**ORDERED** that requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby denied; and it is further

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
April 22, 2010

So Ordered:

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

**FILED**  
APR 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE