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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
GERALD GARDNER WRIGHT, P.C. & ASSOCIATES,	**NASSAU COUNTY**
	Index No: 004354-08
Plaintiff,	**Motion Seq. Nos: 1,4 and 5**
	Submission Date: 9/24/10
-against-	
CHAMPION PROPERTY MANAGEMENT, LLC AS SUCCESSOR OF 50 CLINTON STREET ASSOCIATES MANAGEMENT CO., INC.,	
Defendant.	
----------x	

Papers Read on these Motions:

Order to Show Cause, Affidavit of G. Wright and Exhibits.....x
Affirmation in Support.....x
Notice of Motion, Affirmation in Support and Exhibits.....x
Notice of Motion, Affirmation in Support and Exhibits.....x

This matter is before the court on 1) the Order to Show Cause by Plaintiff Gerald Gardner Wright, P.C. & Associates ("Wright" or "Plaintiff") filed on March 7, 2008, [1] 2) the motion by Plaintiff filed on September 2, 2010, and 3) the motion by Plaintiff filed on September, all of which were submitted on September 24, 2010. For the reasons set forth below, the Court 1) denies Plaintiff's Order to Show Cause; 2) denies Plaintiff's motion for a default judgment; and 3) grants Plaintiff's motion to join 2701 Associates LLC as a party defendant to this action, and the corresponding amendment of the caption.

[1] The Court assumed responsibility for this matter in May of 2009.

BACKGROUND

A. Relief Sought

In its Order to Show Cause, Plaintiff moves for an Order, 1) holding Defendant Champion Property Management, LLC as Successor of KND Management Co., Inc. ("Defendant") in contempt for its alleged violation of a prior court order; and 2) granting summary judgment in favor of Plaintiff and awarding Plaintiff damages in the sum of $158,166.00.

In its motion filed September 2, 2010 (motion sequence number 4), Plaintiff moves, pursuant to 22 NYCRR § 202.70(g) and/or CPLR § 3215(a), for an Order directing the entry of a default judgment against Defendant. The Court has permitted Plaintiff to amend its motion to include an application by Plaintiff to strike the Answer of Defendant and, upon striking that Answer, granting Plaintiff a default judgment.

In its motion filed September 7, 2010 (motion sequence number 5), Plaintiff moves, pursuant to CPLR § 2001, for an Order directing the joinder of 2701 Associates LLC ("2701 Associates") as a party defendant to this action, and the corresponding amendment of the caption.

B. The Parties' History

The Parties' History, which is outlined in a prior decision of the Court dated May 27, 2010 ("Prior Decision"), is as follows:

Plaintiff is a law firm that has rented space at 50 Clinton Street, Hempstead, New York 11550 ("Building") since 1986. In 2001, 50 Clinton Street Associates Management Co., Inc. ("Clinton Street Associates") and Wright entered into a Second Amendment to Lease ("Second Lease Amendment") which provided that 50 Clinton Street Associates was renting Wright 3,516 square feet of rentable space in the Building in Suite 601 ("Suite") at the rate of 415 per square foot. The Second Lease Amendment also provided that 50 Clinton Street Associates would provide Wright with 15 parking spaces identical to those that had been provided to it previously, and would perform the following work: 1) change existing light fixtures in Tenant's suite; 2) install wall plates and covers; 3) re-paint, re-carpet and re-wallpaper Tenant's suite; 4) maintain all equipment installed by Landlord, including lighting fixtures, at no cost to Tenant; and 5) shampoo the carpet in the Suite at least three (3) times per year.

Plaintiff contended that, in violation of the Second Lease Amendment, 50 Clinton Street Associates 1) improperly reassigned to other tenants parking spaces to which Wright was entitled; 2) failed to complete certain work; and 3) provided Wright with only 2, 910 square feet of rentable space, resulting in Wright being overcharged for rent and taxes, the latter of which were based on an erroneous calculation of square footage. In 2003, Wright commenced an action against 50 Clinton Street Associates titled *Gerald Gardner Wright, P.C. & Associates v. 50 Clinton Street Associates Management Co., et al.*, Nassau County Index Number 008320/2003 ("2003 Action"). In settlement of the 2003 Action, Wright and 50 Clinton Street Associates entered into a stipulation ("Stipulation") that was so-ordered by the Court (Austin, J.) on February 6, 2004. Paragraph 8(b) of the Stipulation provided, in pertinent part:

> Within sixty (60 days) of the date of this Stipulation and confirming, in writing, whichever is later, Defendants shall stencil "GERALD GARDNER WRIGHT RESERVED" on each of the existing 15 parking spaces assigned on the lower level of the complex. If some of Plaintiff's original spaces had been reassigned to other tenants, the parties will cooperate to re-secure them for the Plaintiff.

The Stipulation also contained provisions regarding, *inter alia*, 1) the replacement of carpet, and 2) the installation of air conditioning and heating ducts.

On March 3, 2008, Champion filed a Notice of Petition ("Petition") (Ex. D to OSC) in the First District Court of Nassau County ("Eviction Action") in which it named Plaintiff as the Respondent-Tenant. In the Eviction Action, Champion alleged that Wright breached an agreement to pay the Landlord its proportionate share of real estate tax increases as additional rent. Champion sought a final judgment of eviction awarding Champion possession of the Building, and sought a judgment against Wright for $12,096.25, plus interest, for the rent arrears.

On March 7, 2008, Plaintiff filed the Order to Show Cause in the instant action. In his Affidavit in Support dated March 5, 2008, Mr. Wright affirms that Defendants violated the Stipulation by failing to comply with its provisions regarding shampooing the rug, restoring parking spaces and resolving the disputed issues regarding the square footage of the Premises. Mr. Wright avers that he made numerous efforts to resolve these issues, which included meeting with the new building manager in 2006 after the Building was sold, but that Defendant has refused to cooperate.

Mr. Wright also avers that in late September of 2007 he received a letter from Barry Ekstein ("Ekstein"), the Manager of 2701 Associates, requesting $5,731.59 for Plaintiff's alleged pro rata share of the taxes and $4,395 for July rent (Ex. C to Wright Aff. in Supp.). In response to the letter, Mr. Wright called and spoke with Esther Freedman and attempted to explain the issue regarding the square footage of the Building. Mr. Wright also disputed the $5,731.59 figure and offered to place $5,731.59 in escrow pending resolution of the issues. Ms. Freedman responded that too much time had elapsed and that the matter would have to be resolved in court.

Plaintiff submits that it is entitled to a "Yellowstone Injunction" tolling the running of the cure period because it has satisfied the criteria for the issuance of such an injunction by establishing that Plaintiff 1) is a commercial tenant with a valid lease; 2) did not receive a notice of default; and 3) is prepared to post an undertaking as proof that it is willing and able to pay any additional rental arrears deemed due and payable to the landlord. Mr. Wright affirms that Plaintiff is prepared to post an undertaking with the court in the sum of $12,096.25 pending resolution of this matter, representing the sum that Landlord seeks in the Petition for purported rent arrears, and affirms that the landlord never served a Notice to Cure.

Mr. Wright also submits that the Court should adjudge Defendants in contempt for their alleged violation of the Stipulation and argues that Defendant Champion has, or should have, knowledge of the terms of the Stipulation. In addition, he argues that Plaintiff has demonstrated its right to judgment by demonstrating that Defendant did not perform certain conditions of the Lease, and failed to obey the directives in the Stipulation regarding the square footage.

In her Affirmation in Support dated March 6, 2008, counsel for Plaintiff ("Counsel") affirms that, since 2003, Plaintiff has contended that the square footage of the Premises was miscalculated and Plaintiff has been overcharged over $158,000 in rent. Counsel also submits that the District Court Action was commenced in the wrong court, and that the issue of the square footage and alleged rent overcharge still has not been addressed.

The Complaint in the matter at bar (Ex. A to Isaac Aff. in Supp.), filed December 26, 2008, alleges that Champion purchased the Building from 50 Clinton Street Associates in or about 2003. The Complaint alleges that Champion failed to comply with the Stipulation and breached the Lease by failing to maintain the Building properly. The Complaint contains four (4) causes of action sounding in fraud, breach of contract (two counts) and partial actual

eviction. In the first cause of action, Plaintiff seeks judgment of at least $158,166 and an order barring and estopping Defendant from enforcing, on its own behalf, any of the terms of the Second Lease Amendment or the underlying lease. In the second cause of action, Plaintiff seeks judgment of at least $100,000 and an order refunding to Plaintiff a portion of rent paid in an amount to be determined at trial, and estopping Defendant from enforcing, on its own behalf, any of the terms of the Second Lease Amendment or the underlying lease. In the third cause of action, Plaintiff seeks judgment of at least $100,000. In its fourth cause of action, Plaintiff seeks judgment of at least 4100,000 and an order declaring that Plaintiff has no further liability for rent to Defendant. Plaintiff also seeks attorney's fees, costs, disbursements and interest "from the earliest date ascertainable."

The Court noted, in the Prior Decision, that Sovereign Bank commenced a foreclosure action ("Foreclose Action") against the owner of the Building. The Foreclosure Action is titled *Sovereign Bank v. 2701 Associates LLC, Dina Ekstein, David Ekstein et al.*, Nassau County Supreme Court Index Number 2669-09. In the Foreclosure Action, Justice Anthony Parga issued an Order dated July 30, 2009 appointing Steven Cohn ("Cohn") as Receiver of the Building. This Court previously denied Plaintiff's motion seeking the joinder of Sovereign and the substitution and/or joinder of Cohn in the instant action, with leave to renew.

At a conference on September 24, 2010, the Court addressed the motions *sub judice*. At that time, Cohn and Sovereign advised the Court that they take no position with respect to Plaintiff's motions designated motion sequence numbers 4 and 5. In addition, the Court permitted the amendment of motion sequence four to include an application by Plaintiff to strike the Answer of Defendant and, upon striking that Answer, granting Plaintiff a default judgment.

With respect to its motion for a default judgment, Counsel affirms that by decision dated February 11, 2010 (Ex. C to Isaac Aff. in Supp.), the Court granted the motion by counsel for Champion to be relieved and ordered Champion to appear by substitute counsel for a conference on March 29, 2010. Champion failed to appear for the March 29, 2010 conference and Plaintiff received no notice of appearance from any attorney on behalf of Champion. This matter was then before the Court on July 23, 2010 for oral argument on a different motion filed by Plaintiff, and Champion failed to appear on that date as well.

Plaintiff submits that, in light of these failures to appear, Champion is in default. Counsel provides an itemized list of Plaintiff's attorney's fees incurred in connection with this matter (Ex. D to Isaac Aff. in Supp.) and affirms that the Stipulation includes the agreement by 50 Clinton Street Associates, which Counsel characterizes as Champion's "predecessor-in-interest" (Isaac Aff. in Supp. at ¶ 10), to pay all reasonable attorney's fees arising out of a party's failure to abide by the terms of the agreement.

In light of the foregoing, Plaintiff requests an Order 1) striking the Answer of Defendant and, upon striking that Answer, granting Plaintiff a default judgment; 2) with respect to the first cause of action, granting Plaintiff judgment in the sum of $158,000 and declaring that Plaintiff has no liability for rent arising out of its tenancy or use and occupancy of the Premises subsequent to the date of the Stipulation; 3) with respect to the second cause of action, granting Plaintiff judgment in the sum of $10,000; 4) with respect to the third cause of action, granting Plaintiff judgment in the sum of $100,000; 5) with respect to the fourth cause of action, granting Plaintiff judgment in the sum of $100,000; and 6) granting Plaintiff judgment for attorney's fees, interest from the "earliest date ascertainable" (Isaac Aff. in Supp. at ¶ 11), costs and disbursements.

With respect to its motion for an Order directing the joinder of 2701 Associates, Counsel notes that Champion made the representation in the Eviction Action that it was the landlord of the Building and affirms that Champion has participated in "this and other Court proceedings" (Isaac Aff. in Supp. at ¶ 7) in which it has represented that it was the landlord and owner of the Building. Counsel affirms, however, that this representation was inaccurate and that 2701 Associates was the true owner and landlord of the Building at all times relevant to this action and notes that the Foreclosure Action identifies 2701 Associates as the owner of the Building. Counsel for affirms that "[u]pon information and belief, Champion was never the owner or landlord of the Building. 2701 [Associates] always was the owner and landlord. Champion apparently served as 2701's managing agent for the Building" (Isaac Aff. in Supp. at ¶ 9). Counsel avers, further, that "[i]t also appears that Champion and 2701 share common ownership and/or management and that David Ekstein is a principal of both companies. Upon information and belief the companies share an e-mail domain name" (Isaac Aff. in Supp. at ¶ 10). Counsel provides printouts from the website of the New York State Department of State ("DOS"),

Division of Corporations (Ex. B to Isaac Aff. in Supp.) reflecting that Champion and 2701 Associates have an identical address for service of process which is 134 Broadway, Brooklyn, New York 11211.

Plaintiff submits that, to afford Plaintiff complete relief with respect to its motion for a default judgment, 2701 Associates must be joined to this action because "it appears it was the owner of the Building and that Champion was, at most, acting as 2701's agent with respect to its dealings with Wright" (Isaac Aff. in Supp. at ¶ 11).

C. The Parties' Positions

With respect to its Order to Show Cause, Plaintiff seeks an Order adjudicating Champion in contempt for its allegedly wilful failure to comply with the terms of the Stipulation. Plaintiff also seeks a "Yellowstone Injunction" tolling the running of the cure period, submitting that it has satisfied the criteria for that relief. Plaintiff also contends that it has demonstrated its right to judgment against Defendant.

Plaintiff also moves for a default judgment against Champion based on its failure to appear at conferences before the Court as directed.

Plaintiff also seeks an Order directing the joinder of 2701 Associates LLC as a party defendant to this action, and the corresponding amendment of the caption, in light of information that Plaintiff has received demonstrating that 2701 Associates LLC is the true owner of the Building.

RULING OF THE COURT

A. Yellowstone Injunction

The purpose of a *Yellowstone* injunction is to enable a tenant confronted by a notice of default, a notice to cure, or a threat of termination of a lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. *M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Associates*, 215 A.D.2d 537, 538 (2d Dept. 1995). A tenant seeking *Yellowstone* relief must demonstrate that: 1) it holds a commercial lease; 2) it has received from the landlord a notice of default; 3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease; and 4) it has the desire and ability to cure the alleged default by any

means short of vacating the premises. *See Mayfair Super Mkts., Inc. v. Serota,* 262 A.D.2d 461, 461-462 (2d Dept. 1999).

The Court concludes that the Petition was not a notice of default that triggers relief in the form of a Yellowstone Injunction. *See Top-All Varieties, Inc. v. Raj Development Co.*, 151 A.D.2d 470 (2d Dept. 1989) and *M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Associates*, *supra*, (no need for injunctive relief where notice served by landlord was statutory prerequisite to summary nonpayment proceeding, rather than notice of default and notice to cure default within specified period).

B. Contempt

To sustain a finding of civil contempt based upon a violation of a court order, a movant must demonstrate the existence of an unequivocal mandate (*see Kawar v. Kawar*, 231 A.D.2d 681 (2d Dept. 1996)) and must establish a violation thereof by clear and convincing proof (*see Bickwid v. Deutsch*, 229 A.D.2d 533 (2d Dept. 1996)). Contempt requires a showing of willfulness. *Fox v. Fox*, 120 A.D.2d 488 (2d Dept. 1986).

The Court concludes that there are issues, including 1) whether Champion was aware of the Stipulation; and 2) whether its alleged violation of the Stipulation was wilful, that preclude a finding of contempt based on the submitted papers. Accordingly, the Court refers that issue to trial.

C. Default Judgment

Rule 12 of § 202.70 Rules of the Commercial Division of the Supreme Court, titled "Non-Appearance at Conference," provides as follows:

> The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27 of this Part, including dismissal, the striking of an answer, an inquest or direction for judgement, or other appropriate sanction.

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount

due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Although a defaulting defendant is deemed to have admitted all the allegations in the complaint, the legal conclusions to be drawn from such proof are reserved for the Supreme Court's determination. *McGee v. Dunn*, 75 A.D.3d 624, 624 (2d Dept. 2010), quoting *Venturella-Ferretti v. Ferretti*, 74 A.D.3d 792 (2d Dept. 1992) and citing, *inter alia*, CPLR § 3215(b). There is no mandatory ministerial duty to enter a default judgment against a defaulting party. *Id.*, citing *Resnick v. Lebovitz*, 28 A.D.3d 533, 534 (2d Dept. 2006), quoting *Gagen v. Kipany Prods.*, 289 A.D.2d 844, 846 (2d Dept. 2006) (internal citations omitted). Instead, the court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists. *Id.*, quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff. *Id.* at 625, quoting *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 627 (2d Dept. 2007).

In light of 1) the numerous factual disputes regarding the extent to which Plaintiff and the landlord of the Building have complied with their obligations under the Lease, 2) the fact that Champion, although the successor-in-interest to Clinton Street Associates, was not a party to the Stipulation, and 3) the related Eviction Action, the Court concludes that the imposition of a default judgment in favor of Plaintiff and against Defendant Champion based on the non-appearance of Champion at conferences before the Court following the Order relieving counsel for Champion would not be appropriate. Accordingly, the Court denies Plaintiff's motion for a default judgment.

D. Joinder of 2701 Associates LLC as a Party Defendant

CPLR § 1001, titled "Necessary joinder of parties," provides as follows at subdivision (a):

> (a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

Given that the Foreclosure Action reflects that 2701 Associates LLC is the owner of the Building, and the absence of any objection to Plaintiff's motion for joinder, the Court grants Plaintiff's motion to join 2701 Associates LLC as a party defendant in this action, and directs the Nassau County Clerk, upon service of a copy of this Order upon it, to amend the caption to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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GERALD GARDNER WRIGHT, P.C. &
ASSOCIATES,

Plaintiff,

- against -

CHAMPION PROPERTY MANAGEMENT, LLC and
2701 ASSOCIATES LLC,

Defendants.
----------x

The Court directs Plaintiff to serve a copy of this Order, with Notice of Entry, on Defendant Champion and newly-joined defendant 2701 Associates LLC via certified mail, return receipt requested, within thirty (30) days of the date of this Order, and directs Plaintiff to serve a copy of this Order on the Nassau County Clerk, via regular mail, within thirty (30) days of the date of this Order.

The Court directs counsel for Plaintiff, and counsel for Defendants Champion and newly-joined defendant 2701 Associates LLC to appear before the Court for a Preliminary Conference on January 26, 2011 at 9:30 a.m.

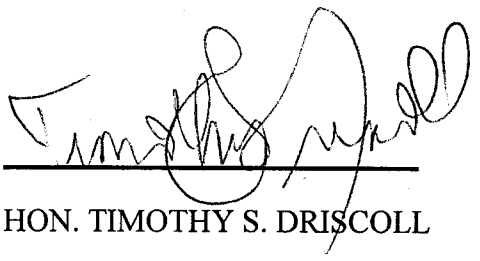
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

November 17, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.