

News Broadcast Network, Inc. v Lexcap Funding Corp.

2010 NY Slip Op 33669(U)

December 22, 2010

Sup Ct, New York County

Docket Number: 112158/09

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 112158/2009
NEWS BROADCAST NETWORK, INC.
vs.
LEXCAP FUNDING CORP.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

DEC 28 2010

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 12/22/10

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 10**

-----X
NEWS BROADCAST NETWORK, INC.,

Plaintiff (s),

DECISION/ ORDER
Index No.: 112158/09
Seq. No.: 001

-against-

LEXCAP FUNDING CORPORATION
and DARON GIRMONTI,

Defendant (s).

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

-----X
Papers
Pltf n/m (3215) w/BRB affirm, MH affid, exhs 1

FILED Numbered
DEC 28 2010

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

NEW YORK
COUNTY CLERK'S OFFICE

GISCHE J.:

This is an action to recover unpaid rent and other amounts allegedly due pursuant to a written sub-lease agreement. Plaintiff News Broadcast Network, Inc. ("NBN") now moves, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in its favor and against defendants Lexcap Funding Corporation ("Lexcap") and Daron Girmonti ("Girmonti"). Neither Lexcap or Girmonti have submitted any opposition, despite due proof of service of the instant motion. Therefore, this motion is considered and decided on default against Lexcap and Girmonti.

Plaintiff has provided proof that it served each defendant with the summons with notice and verified complaint. This action was commenced by the filing of a summons with notice and verified complaint on August 26, 2009. Thereafter, the summons with

notice and verified complaint were served upon Lexcap by service on the Secretary of State on September 10, 2009 (BCL § 306).

Plaintiff served the summons with notice and verified complaint upon defendant Girmonti pursuant to CPLR § 308 (2), by serving a person of suitable age and discretion, the desk clerk, Adam "Doe" doorman, of Girmonti's residence on September 1, 2009, and thereafter by mailing an additional copy on September 3, 2009.

Additional mailing of the summons with notice and verified complaint was made upon the defendants by Plaintiff's Counsel, via first class mail, on October 21, 2009.

The Notice of Motion, Affirmation, Affidavits, exhibits and Request for Judicial Intervention were mailed, via first class mail, to Girmonti on October 15, 2010. Service of the Notice of Motion, Affirmation, Affidavits, exhibits and Request for Judicial Intervention was effected upon Lexcap by service upon the Secretary of State on October 21, 2010. Thus, the court has obtained jurisdiction over Lexcap and Girmonti pursuant to CPLR § 3215 (g) (3) and (4).

At no time prior to this decision have defendants CSG or Lopez interposed an answer to the complaint, nor have the defendants requested that their time to answer be extended by the court. Plaintiff NBN has shown that the defendants have defaulted in this matter and that it is entitled to a judgment if it can otherwise establish a *prima facie* case. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd Dept 2001); Zelnik v. Bidermann Industries U.S.A., Inc., 242 AD2d 227 (1997). Lexcap's and Girmonti's 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).

Discussion

The facts put forth by NBN in the verified complaint, the attached agreement of sublease, guaranty operative lease agreement, and through the sworn verification of Michael Hill, NBN's President, establish the following:

NBN was the lessee and sub-lessor of the entire seventh floor of the building 451-453 Park Avenue South, New York, New York ("the premises"). Defendant Lexcap entered into a written sub-lease agreement ("the sub-lease") on January 10, 2007 for a term commencing January 1, 2007 and ending on October 30, 2008. The agreed upon annual rent was \$140,400.00, payable in monthly installments of \$11,700.00. The lease also provides for certain Additional Rent, including, but not limited to electric service, real estate taxes, and cleaning. On December 22, 2006, defendant Girmonti executed a personal guaranty, by which he guaranteed prompt payment of the rent and additional rent and other sums and charges payable by Lexcap. In addition, the personal guaranty provided defendant Girmonti's consent that he might be joined in any action against Lexcap in connection with the sublease and that recovery might be sought against him individually.

Plaintiff claims that defendant Lexcap made no payments of rent for the month of December, 2007. The monthly rent for the month of December, 2007, was a base rent of \$11,700.00, plus \$500.00 for cleaning, plus \$1,191.66 for electric service, for a total of \$13,391.66. Plaintiff further claims that defendant Lexcap made no payments of rent for the months of January, February, April, May, June, July, August, September, and October, 2008. In 2008, the monthly rent was a base rent of \$11,700.00, plus \$500.00 for cleaning, plus \$1,191.66 for a total of \$13,391.66 per month or \$139,391.82 for all nine months. Three payments of rent were made in April, May, and June, 2008 of \$13,391.66 each for a total of \$40,174.68. Thus leaving an outstanding balance of \$99,217.14, to which a

security deposit of \$35,100.00 has not yet been applied.

Breach of Sub-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. Furia, 116 AD2d 694 (2d Dept 1986). A lease is a form of contract, as is a sub-lease.

Lexcap entered into a binding sub-lease agreement with NBN. Through the submitted documents, NBN has established that Lexcap subsequently breached the agreement by non-payment of the December 2007, January 2008, February 2008, July 2008, August 2008, September 2008, and October 2008 monthly rents and additional rents. This lack of performance on the part of Lexcap incurred an outstanding balance of \$99,217.14 (less a security deposit of \$35,100.00 that has yet to be applied). Thus, Lexcap is in default, in the amount of \$64,117.14, of its sublease agreement with NBN.

Personal Guaranty

A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guarantee and the guarantor is not a party to the principal obligation (Midland Steel Warehouse Corp. v. Godinger Silver Art, 276 A.D.2d 341, 343 [1st Dept 2000], *quoting* Shire Realty Corp. v. Schorr, 55 A.D.2d 356, 359-360 [2d Dept 1977]). Thus, the guarantor will be required to make payment only when the primary obligor has first defaulted (Weissman v. Sinorm Deli, 88 N.Y.2d 437, 446 [1996]).

As a guarantor of the sub-lease of Lexcap, Girmonti will be required to make payment only if Lexcap, as the primary obligor, has defaulted (Weissman v. Sinorm Deli, *supra*). Having established that Lexcap is in fact in default of its obligations under the sub-

lease, the court now finds that Girmonti, by operation of the executed personal guaranty to NBN, is personally liable to make the outstanding payments.

Thus, by the operation of the guaranty executed by Girmonti and the terms of the sub-lease executed by Lexcap, NBN has established that both Girmonti and Lexcap are liable fo Lexcaps breach and subsequent default of the sub-lease.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for a default judgment is granted; and it is further

ORDERED that the plaintiff is authorized to apply the security deposit against the outstanding indebtedness, and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment in favor of plaintiff and against the defendants in the amount SIXTY FOUR THOUSAND ONE HUNDRED SEVENTEEN DOLLARS AND FOURTEEN CENTS (\$64,117.14) plus interest from December 1. 2008 and the statutory costs and disbursement of this action; and it is further

ORDERED that any relief demanded but not expressly granted herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, New York
December 22, 2010

So Ordered:

FILED



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

DEC 28 2010

NEW YORK
COUNTY CLERK'S OFFICE