

<b>Fifty E. Forty Second Co. LLC v Meshinsky</b>
2011 NY Slip Op 30051(U)
January 5, 2011
Supreme Court, New York County
Docket Number: 115768/2008
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PART 12

Index Number : 115768/2008

FIFTY EAST FORTY SECOND

vs  
MESHINSKY, THOMAS

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

**FILED**

JAN 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/5/11

[Signature]

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: CIVIL TERM: PART 12

-----X  
FIFTY EAST FORTY SECOND COMPANY LLC,

Plaintiff,

Index Number 115768/2008

Mot. Seq. No. 002

against

THOMAS MESHINSKY,

Defendant.

**DECISION AND ORDER**

-----X

**For the Plaintiff:**  
Akerman Senterfitt LLP  
By: Michael S. Simon, Esq.  
335 Madison Avenue, Suite 2600  
New York NY 10017  
(212) 822-2293

**For the Defendant:**  
Thomas Meshinsky, *pro se*  
2305 Bay Terrace  
Ship Bottom, NJ 08008

**FILED**

**JAN 11 2011**

Papers considered in review of this motion for judgment on default:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affidavits, Exhibits	1

**NEW YORK  
COUNTY CLERK'S OFFICE**

**PAUL G. FEINMAN, J.:**

Plaintiff moves for a second time pursuant to CPLR 3215 for a default judgment against defendant, Thomas Meshinsky, in the sum of \$114,113.49, as well as for attorney's fees, costs and disbursements. Defendant has not opposed. For the reasons set forth below, the motion is granted without opposition.

This action arose from the breach of a lease agreement. Plaintiff, Fifty East Forty Second Company LLC, as landlord, entered into a lease agreement on October 28, 2005, with non-party Ultimate Fitness of NY, as tenant, to lease the basement and operate a gym at 50 East 42<sup>nd</sup> Street, New York, NY. (Ex. C, Compl. ¶ 3). Defendant Meshinsky executed a Limited Guaranty on the same date, wherein he guaranteed "full performance and observance of all covenants." (Ex. C, Compl. ¶ 4).

Plaintiff claims the gym defaulted in its lease obligations beginning in May 2008, and

that as of January 31, 2009, defendant owed a total of \$114,113.49 in rent and additional rent (Ex. C, Compl. ¶ 9; Mot., Rodriguez Aff. ¶¶ 5-6), and commenced its action thereafter by filing and serving a summons with notice on defendant at the 42<sup>nd</sup> Street address. Defendant, self-represented, filed a notice of appearance and demand for complaint in December 2008, indicating that his address was in Ship Bottom, New Jersey (Ex. B). Plaintiff then served the complaint by first class mail on January 9, 2009, to the Ship Bottom, New Jersey address (Ex. D). Defendant did not answer the complaint, and plaintiff moved for a default judgment. Defendant submitted an affidavit, and plaintiff's motion for a default judgment was denied by decision dated August 17, 2009 (Ex. F, Decision and Order, with Notice of Entry).

The first motion for a default judgment was denied because plaintiff had failed to provide a sufficient affidavit of non-military service as required by the Federal Soldiers' and Sailors' Civil Relief Act of 1940 as applied by New York courts. (*Id.* at p. 3). The necessary investigation of defendant's military service, which formed the basis of plaintiff's affidavit, was conducted on November 25, 2008—the date of service of the summons with notice—and thus prior to any actual default. As a non-military affidavit based on an investigation made prior to a defendant's default fails to meet the requirements of the Civil Relief Act, plaintiff's papers failed to satisfy the proof of notice requirements of CPLR 3215(f).

In addition, the court considered defendant's affidavit in which he proffered a number of defenses, including improper service and negligent behavior by the plaintiff landlord. The court deemed defendant's response to be an implicit request for leave to serve and file a late answer to the complaint. It thus vacated defendant's default and granted him leave to file a late answer, but required that defendant file his answer within 20 days of receiving notice of entry of the decision and order. Notice of entry of the decision and order was served on August 19, 2009.

(Ex. F).

Plaintiff renews its request for a default judgment pursuant to CPLR 3215, as more than 20 days have elapsed since service of notice of entry of the court's decision and order, and defendant has failed to serve and file an answer. Plaintiff submits a new affidavit of non-military service, which states that on March 1, 2010, licensed process server Carl Kornbluth visited the defendant's address in Ship Bottom, New Jersey, to ascertain defendant's military status (Ex. H, Aff. of Non-Military Service). Kornbluth spoke to "John' Meshinsky," who refused to provide his first name, but confirmed he was a "relative" of the defendant. (*Id.*). In response to Kornbluth's inquiry, this individual stated that defendant was not engaged in military service for United States in any capacity. (*Id.*) As defendant previously filed an appearance in the action and submitted an affidavit in opposition to the original motion, and as the process server spoke with "John" Melshinsky at defendant's New Jersey address, and the individual confirmed that defendant was not in the military in any fashion, the court is persuaded that plaintiff has sufficiently established service of process on defendant and that his failure to answer is not based on his active military service.

Accordingly, plaintiff's motion for a judgment on default is granted without opposition, and as the lease agreement provides for legal fees (Ex. C, Lease ¶ 19), the matter will be set down for a hearing on legal fees..

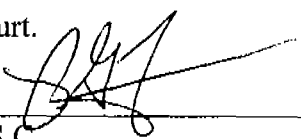
It is

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff in the sum of \$114,113.49, with interest at the rate of 6.88 % from June 1, 2008, until the date of this decision and order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment of attorney's fees. .

This constitutes the decision and order of the court.

Dated: 1/5/2011  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JAN 11 2011  
NEW YORK  
COUNTY CLERK'S OFFICE