

Gioia Equities, Inc. v ONC Dev. LLC

2011 NY Slip Op 30727(U)

February 22, 2011

Supreme Court, New York County

Docket Number: 112451/2009

Judge: Lucy Billings

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

LUCY BILLINGS

PRESENT: J.S.C.

PART 46

Index Number : 112451/2009

GIOIA EQUITIES, INC.

vs

ONC DEVELOPMENT LLC

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

RECEIVED
MAR 29 2011
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The following papers, numbered 1 to 6 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-3, 5
Replying Affidavits	4, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants plaintiff's motion for a default judgment against defendant's to the extent set forth pursuant to the accompanying decision and otherwise denies plaintiff's motion. C.P.L.R. § 3215.

FILED

MAR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/22/11

Lucy Billings

LUCY BILLINGS 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 46

-----x

GIOIA EQUITIES, INC.,

Index No. 112451/2009

Plaintiff

- against -

DECISION AND ORDER

ONC DEVELOPMENT LLC, BYUNG H. CHUNG,
and HEATHER KIM,

Defendants

-----x

APPEARANCES:

For Plaintiff
Howard Stern Esq.
3 Barker Avenue, White Plains, NY 10601

For Defendants Chung and Kim
Byung H. Chung, Pro Se
Heather Kim, Pro Se

FILED

MAR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

Plaintiff sues defendants based on breach of a lease between plaintiff, the owner of commercial premises, and defendant ONC Development LLC, the tenant. Defendant Chung, a member of ONC Development, executed the lease, which he and defendant Kim, Chung's wife, each personally guaranteed. Plaintiff moved for a default judgment against defendants after they failed to answer the complaint. C.P.L.R. § 3215(e). Upon oral argument, for the reasons explained below, the court grants plaintiff's motion to the extent of a judgment on liability against ONC Development and Kim, but denies its motion against Chung.

I. APPLICABLE STANDARDS

To obtain a default judgment against non-answering defendants, plaintiff must support its motion with evidence of the facts constituting its claim. C.P.L.R. § 3215(f); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70 (2003). An affidavit, a personally verified complaint, or other admissible evidence establishing a viable claim satisfies this requirement. Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d at 71; Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007). To defeat a default judgment, defendants must show a reasonable excuse for defaulting and a meritorious defense. Johnson v. Deas, 32 A.D.3d 253, 254 (1st Dep't 2006); ICBC Broadcast Holdings-NY, Inc. v. Prime Time Adv., Inc., 26 A.D.3d 239, 240 (1st Dep't 2006); Estrella v. Herrera, 23 A.D.3d 320, 321 (1st Dep't 2005); 114 W. 26th St. Assoc. LP v. Fortunak, 22 A.D.3d 346 (1st Dep't 2005).

II. PLAINTIFF'S EVIDENCE

Plaintiff's president has personally verified its complaint, which plaintiff shows it served with a summons on defendant limited liability company (LLC) September 21, 2009, by delivery to the New York Secretary of State, N.Y. Ltd. Liab. Co. Law § 303, and on the individual defendants October 1, 2009. C.P.L.R. § 308(1) and (2). Plaintiff further shows that it mailed the summons and complaint to the LLC October 7, 2009, and to the individual defendants January 14, 2010, to comply with the

statutory second mailing requirements. C.P.L.R. § 3215(g)(3) and (4). Defendants did not answer.

Along with the verified complaint, the affidavit of plaintiff's president, Richard Gioia, attests that under the lease defendant LLC executed for commercial premises commencing February 1, 2009, for a term of 10 years, and guaranteed by the individual defendants, defendants failed to pay rent as of April 2009 as well as late fees of \$820.00 per month. Plaintiff re-let the premises for a rent lower than the \$8,200.00 per month defendants agreed to pay. Under the lease, if plaintiff re-let at a lower rent, defendants are obligated to pay the difference. Aff. of Howard Stern, Ex. A ¶ 18. Plaintiff thus supports its claim against defendants. C.P.L.R. § 3215(f).

III. DEFENDANTS' DEFENSES

The individual defendants rely on two letters to the court, dated June 14 and July 21, 2010, each signed but not sworn to by both Chung and Kim. At an appearance August 3, 2010, Chung swore to the truth of each letter in open court. The June 14 letter states that defendants leased the premises from plaintiff to operate a cafeteria-style restaurant, but requested to terminate the lease when defendants could not secure the permit necessary to operate that business. Defendants claim plaintiff agreed to terminate the lease and return \$20,000.00 of the \$38,000.00 deposit and then changed the lock and erected a sign advertising the premises for rent.

If Chung's evidence supports a surrender, it terminates the

parties' obligations under the lease. Riverside Research Inst. v. KMG, Inc., 68 N.Y.2d 689, 691-92 (1986); Sandra's Jewel Box v. 401 Hotel, 273 A.D.2d 1, 3 (1st Dep't 2000); Bay Plaza Estates v. New York Univ., 257 A.D.2d 472, 473 (1st Dep't 1999). A surrender may be accomplished by the parties' express agreement or impliedly by operation of law. A surrender by agreement requires that the landlord accept the premises and waive its right to recover damages pursuant to the lease. Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C., 77 A.D.3d 533, 534 (1st Dep't 2010); Ring v. Printmaking Workshop, Inc., 70 A.D.3d 480, 481 (1st Dep't 2010). See Hudson Towers Hous. Co., Inc. v. VIP Yacht Cruises, Inc., 63 A.D.3d 413, 414 (1st Dep't 2009); Connaught Tower Corp. v. Nagar, 59 A.D.3d 218 (1st Dep't 2009); Sandra's Jewel Box v. 401 Hotel, 273 A.D.2d at 2. A surrender by operation of law occurs when the parties to the lease act inconsistently with the landlord-tenant relationship, indicating an intent to consider the lease terminated. Riverside Research Inst. v. KMG, Inc., 68 N.Y.2d at 691-92; Forty Four Eighteen Joint Venture v. Rare Medium, Inc., 18 A.D.3d 237, 238 (1st Dep't 2005); Bay Plaza Estates v. New York Univ., 257 A.D.2d at 473.

While the lease's prohibition against oral modification, Stern Aff., Ex. A ¶ 98, may pose a barrier to demonstrating the parties' agreement for a surrender of the premises, N.Y. Gen. Oblig. Law § 15-301(1); Enjoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d 546, 548 (1st Dep't 2010); Aris Indus. v. 1411 Trizechahn-Swig, 294 A.D.2d 107 (1st Dep't 2002);

Gottlieb v. Newton, 253 A.D.3d 383, 384 (1st Dep't 1998), if proved true, Chung's evidence does show actions by plaintiff as well as defendants consistent with such an agreement and inconsistent with a continuation of their lease, to establish a surrender by operation of law. See Enjoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d at 548; Connaught Tower Corp. v. Nagar, 59 A.D.3d 218 (1st Dep't 2009); Aris Indus. v. 1411 Trizechahn-Swig, 294 A.D.2d 107; Joseph P. Day Realty Corp. v. Lawrence Assoc., 270 A.D.2d 140, 141-42 (1st Dep't 2000).

Plaintiff of course may claim defendants' request to terminate the lease amounted to its repudiation, entitling plaintiff to lock out defendants and re-rent the premises, but this version of events only raises a dispute for trial. Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C., 77 A.D.3d at 534; Sandra's Jewel Box v. 401 Hotel, 273 A.D.2d at 2-3. See Joseph P. Day Realty Corp. v. Lawrence Assoc., 270 A.D.2d at 142; Ford Coyle Props., Inc. v. 3029 Ave. V Realty, LLC, 63 A.D.3d 782 (2d Dep't 2009). Defendants' version indicates simply a request to terminate the lease that plaintiff accepted and, particularly in the absence of conclusive evidence regarding the sequence of the alleged oral termination agreement, lock-out, re-letting, and nonpayment, not necessarily any acts of repudiation or breach before plaintiff acted entirely incompatibly with the tenant's continued tenancy. See Carlin v. Jemal, 68 A.D.3d 655, 656 (1st Dept 2009); Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d 462, 463 (1st Dep't 2003); O'Reilly v.

NYNEX Corp., 262 A.D.2d 207, 208 (1st Dep't 1999). Defendants thus demonstrate a meritorious defense of surrender of the premises, whether by law or an oral modification of the lease providing for the surrender, through evidence, albeit partially disputed, of both the landlord's and the tenant's actions consistent with a surrender and inconsistent with a continuing lease.

IV. DEFENDANTS' EXCUSES FOR DEFAULTING

A. Chung

The July 21 letter explains that Chung traveled to Korea in August 2009 and remained there until he returned to the United States in February 2010, when he discovered the mail notifying defendants of this action and moving for a default judgment. This explanation furnishes a reasonable excuse for Chung's failure to answer. Obermaier v. Fix, 25 A.D.3d 327 (1st Dep't 2006); Wilson v. Sherman Terrace Coop., Inc., 14 A.D.3d 367 (1st Dep't 2005). His reasonable excuse for failing to respond to the complaint until after he received plaintiff's motion also constitutes grounds to deny a default judgment against him. Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008); Guzetti v. City of New York, 32 A.D.3d 234 (1st Dep't 2006); Rodriguez v. Dixie N.Y.C., Inc., 26 A.D.3d 199, 200 (1st Dep't 2006); Terrones v. Morera, 295 A.D.2d 254, 255 (1st Dep't 2003). See Mayerson Stutman, LLP v. Most, 30 A.D.3d 261 (1st Dep't 2006); Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999).

B. Kim

In an unsworn letter dated August 12, 2010, Kim explains that she did not open the mail received while Chung was in Korea because she had "no intention to sign with him." Reviewing any of the multiple copies of the summons and complaint, mailed or personally delivered, to her individually as well as to her husband and to his LLC, would have notified Kim that the action was against her in addition to defendants Chung and ONC Development. She does not dispute that the summons and complaint were personally delivered to her October 1, 2009. C.P.L.R. § 308(1); Koutrakos v. Vernon Sutton Realty, 40 A.D.3d 355, 356 (1st Dep't 2007). Her suggestion that she ignored the mailings of the pleadings because they concerned the leased premises is belied by defendants' affidavits that the mailings were in envelopes marked "personal and confidential" and not indicating "the communication was from an attorney or concerned and alleged debt". Stern Aff., Ex E at 4; C.P.L.R. § 3215(g)(3)(1).

Nor does Kim deny that the signature on the guaranty is hers or furnish any other defense to her liability based on the guaranty. While she signed the June 14 letter raising the surrender and oral modification defenses, she never swore to it, despite repeated instructions that her response be sworn, and never appeared in court where the oath could have been administered. In this inadmissible form, the letter does not provide her a meritorious defense. Banco Popular N. Am. v. Victory Taxi Mgt., 1 N.Y.3d 381, 384 (2004); Merrill/New York Co.

v. Celerity Sys., 300 A.D.2d 206, 207 (1st Dep't 2002). Assuming she presented a defense through the unsworn letter, since she was served by personal delivery, C.P.L.R. § 308(1), her failure to present an excuse for her default is fatal in any event to defeating plaintiff's entitlement to a default judgment against her. C.P.L.R. § 3012(d); Brayan v. 520 W. 158 St. Hous. Dev. Fund Corp., 74 A.D.3d 651 (1st Dep't 2001); Estrella v. Herrera, 23 A.D.3d at 321; C&H Import & Export, Inc. v. MNA Global, Inc., 79 A.D.3d 784, 786 (2d Dep't 2010); Maspeth Fed. Sav. & Loan Assn., 77 A.D.3d 889, 890 (2d Dep't 2010). See C.P.L.R. § 317.

C. ONC Development LLC

As a limited liability company, ONC Development was required to appear through an attorney. Michael Reilly Design, Inc. v. Houraney, 40 A.D.3d 592, 593 (2d Dep't 2007). See C.P.L.R. § 321(a). Although the court afforded defendants repeated opportunities for ONC Development to retain an attorney, it never did so and thus defaulted. Jimenez v. Brenilee Corp., 48 A.D.3d 351, 352 (1st Dep't 2008); Mail Boxes Etc. USA v. Higgins, 281 A.D.2d 176 (1st Dep't 2001); Pisciotta v. Lifestyle Designs, Inc., 62 A.D.3d 850, 853 (2d Dep't 2009); Lohmann v. Castleton Gallery, 252 A.D.2d 482 (2d Dep't 1998). The individual defendants were unqualified to answer on ONC Development's behalf. Id. at 483. See Gonzalez v. New York City Tr. Auth., 294 A.D.2d 130 (1st Dep't 2002); Johnson v. Marriott Mgt. Serv. Corp., 262 A.D.2d 141 (1st Dep't 1999); Drawhorn v. Iglesias, 254 A.D.2d 97 (1st Dep't 1998). ONC Development thus has failed to

furnish a reasonable excuse for the LLC's default. Jimenez v. Brenilee Corp., 48 A.D.3d at 352; Pisciotta v. Lifestyle Designs, Inc., 62 A.D.3d at 853; Lohmann v. Castleton Gallery, 252 A.D.2d at 483.

Even if the June 14 letter raised a potential defense of surrender or oral modification that would apply with equal force to ONC Development, the defense is of no consequence due to ONC Development's failure to present any excuse for its default. See American Tr. Ins. Co. v. Wilfred, 296 A.D.2d 360, 361 (1st Dep't 2002); Montoya v. Richmond County Ambulance Serv., Inc., 30 A.D.3d 385, 386 (2d Dep't 2006). Its failure to appear through an attorney, its only means of appearing, is again fatal to defeating a default judgment against it. Jimenez v. Brenilee Corp., 48 A.D.3d at 352; Mail Boxes Etc. USA v. Higgins, 281 A.D.2d 176; Pisciotta v. Lifestyle Designs, Inc., 62 A.D.3d at 853; Lohmann v. Castleton Gallery, 252 A.D.2d at 483.

V. CONCLUSION

On the grounds set forth, the court grants plaintiff's motion for a default judgment insofar as the motion seeks a judgment on liability against defendants Kim and ONC Development LLC, but denies plaintiff's motion against defendant Chung. Chung's explanation for failing to answer timely, absent any discernible prejudice to plaintiff, also satisfactorily excuses his late answer. Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540

(1st Dep't 2009); Jones v. 41 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008). Further, even though a meritorious defense against plaintiff's claims is unnecessary to support acceptance of a late answer, Chung nonetheless presents evidence demonstrating the merit of his defense. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Guzetti v. City of New York, 32 A.D.3d 234; Nason v. Fisher, 309 A.D.3d 526 (1st Dep't 2003). See Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 41 Equities LLC, 57 A.D.3d at 81; Terrones v. Morera, 295 A.D.2d at 255; Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229 (1st Dep't 1990). Although he does not expressly move to extend his time to answer, C.P.L.R. § 3012(d), particularly in the context of a motion for a default judgment, the court may extend the time to answer absent a cross-motion for that relief. Id.; Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229; Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Mufalli v. Ford Motor Co., 105 A.D.2d 642, 643 (1st Dep't 1984). See Spira v. New York City Tr. Auth., 49 A.D.3d 478; Tulley v. Straus, 265 A.D.2d at 401. On these grounds, the court extends his time to answer to the date he swore to the answer, August 3, 2010, having previously delivered it to plaintiff and the court.

Since plaintiff's re-rental of the leased premises may continue for the balance of the lease term, the issue of damages against the two defaulting defendants is reserved until the trial or other disposition of the action against defendant Chung.

C.P.L.R. § 3215(d). E.g., Dunne v. Village Commons Health & Racquet Club, 252 A.D.2d 535, 536 (2d Dep't 1998). Upon disposition of the action, and after delivering this order with notice of entry to the Clerk of Trial Support at 60 Centre Street, Room 158, and serving on defendants and filing a note of issue accompanied by a certificate, of readiness and any required fees, plaintiff may proceed to an assessment of damages against defendants ONC Development and Kim. 22 N.Y.C.R.R. § 202.21(a). The Clerk then shall place this action on the trial calendar for the assessment of damages. This decision constitutes the court's order.

DATED: February 22, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

MAR 29 2011

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