SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ J.S.C. PART 35
Justice

Index Number : 113912/2009
BIGGIO, MARCO
vs
PUCHE, GABRIEL JR.
Sequence Number : 004
CONFIRM/REJECT REFEREE REPORT

INDEX NO. 113912/09
MOTION DATE _____
MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion *(sequence 004)* pursuant to CPLR 4403 for an order confirming the determination and recommendation of Hon. Ira Gammerman, J.H.O. as to the attorneys' fees is granted and the award rendered in favor of plaintiff Marco Biggio against defendant Gabriel Puche, Jr. and defendant Gabriel Puche for attorneys' fees in the amount of $12,099.50 is confirmed; and it is further

ORDERED that the this court's Decision and Order dated January 3, 2013, as modified, is hereby amended to include the award of the attorneys's fees in the amount of $12,099.50; and it is further

ORDERED that the cross-motion (*denominated as sequence 002*) by defendants Gabriel Puche, Jr. and defendant Gabriel Puche to vacate and recall the Decision and Order dated January 3, 2013 is granted solely to the extent that the portion of the Decision and Order dated January 3, 2013 with respect to damages is hereby vacated; and it is further

ORDERED that the issue of damages sustained by plaintiff Marco Biggio as a result of defendants' respective breaches of the sublease and the guaranty is referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the above reference to a Special Referee (Hon. Ira Gammerman); and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within 20 days of entry upon counsel for plaintiff.

This constitutes the decision and order of the court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/13/2013

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARCO BIGGIO,

Plaintiff,

-against-

GABRIEL PUCHE, JR. and GABRIEL PUCHE,

Defendants.

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Index No.: 113912/2009

DECISION AND ORDER

Motions #002 and #004

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action by plaintiff landlord Marco Biggio ("plaintiff") for breach of a residential lease against defendant tenant Gabriel Puche, Jr. ("Puche, Jr.") and breach of guaranty against defendant guarantor Gabriel Puche ("Puche, Sr.") (collectively, "defendants") plaintiff moves (motion sequence 004) pursuant to CPLR 4403 for an order confirming the determination/ recommendation of Hon. Ira Gammerman, J.H.O. as to attorneys' fees in the amount of $12,099.50; and, pursuant to CPLR 2221(a), to modify this court's Order dated January 3, 2013, which granted summary judgment in plaintiff's favor, so as to include the attorneys' fees award.

Defendants oppose the motion and cross-move[1] to vacate and recall the January 3, 2013 Order.

Background Facts

Plaintiff brought this action against defendants alleging breach of a residential sublease by failing to pay rent and a breach of the related guaranty. On or about November 14, 2012, plaintiff moved (sequence 002) for summary judgment pursuant to CPLR 3212 (b) on his claims

[1] The court notes that defendants' "cross-motion," filed on or about June 13, 2013, six months after summary judgment was designated as a cross-motion to sequence 002.

against defendants and for dismissal of defendants' counterclaims pursuant to CPLR 3211 (a)(1). Defendants did not oppose the motion and by Order dated January 3, 2013, this court granted summary judgment in favor of plaintiff and against defendants in the amount of $77,623.25 together with statutory interest from August 18, 2009 (the "January 3, 2013 Order"). On March 4, 2013, the court amended said Order to the extent of referring to Hon. Ira Gammerman, J.H.O. (the "Referee") the issue of attorneys' fees for a hearing and determination of the amount of attorneys' fees. On or about April 11, 2013, upon conducting a hearing, the Referee determined the amount and recommended that defendants pay plaintiff $12,099.50 in attorneys' fees.

Defendants now move to confirm the Referee's determination and to modify this court's January 3, 2013 Order by including the award of said attorneys's fees.

In opposition, defendants cross-move to vacate the January 3, 2013 Order, arguing that they can show both a reasonable excuse and a meritorious defense.

As to his reasonable excuse in failing to oppose the summary judgment motion, defendants argue that first, at the time of the January 3, 2013 Order, they were not represented by an attorney (as their attorney was previously relieved by Court Order dated March 13, 2012) and plaintiff failed to serve a notice to appoint another attorney as required by CPLR 321 (c). Plaintiff's failure to comply with CPLR 321 (c) renders the subsequent proceedings against defendants without an attorney nugatory. Second, defendants claim that they "did not receive" plaintiff's summary judgment motion. Defendants submit an affidavit of Puche Sr., the guarantor on the lease at issue, stating that after their prior attorney was relieved as their counsel, he appeared in court on September 12, 2012 (when the note of issue date was issued). Defendants did not receive any papers in this action until he received a notice from the Court,

dated January 15, 2013, directing him to appear in Court on February 1, 2013. Defendant then received the January 3, 2013 Order "[a]round the end of January 2013."

As to his meritorious defense, defendants argue that plaintiff's claim is unenforceable as a matter of law because the amount of damages sought by plaintiff is "grossly unconscionable." The liquidated damages provision of the lease, imposing a late fee of $150 per day is unenforceable as impermissible penalty (see exhibit H to plaintiff motion sequence 002, p. 8, the lease Rider, ¶9). According to plaintiff's affidavit submitted in support of his summary judgment motion, defendants owe $3,600 in unpaid rent for June, July and August 2009, and $62,7000 in late fees for October 2008 through July 2009 at $150 per day. Such late fee is excessive and grossly disproportionate to the amount of the actual damages resulting from the nonpayment of rent. In any event, defendants do not owe plaintiff the asserted amounts because Puche Jr. moved out of the apartment in June 2009 and did not use cable services after his possession ceased, any "renovation" was not necessary, and legal fees are "merely a manifestation of plaintiff's greed."

In reply, plaintiff opposes defendants' cross-motion on the ground that defendants failed to provide a reasonable excuse for its failure to oppose the summary judgment motion. Plaintiff points out that defendants have not opposed plaintiff's request.

First, defendants were aware that plaintiff filed his summary judgment motion against them and were properly served, as shown by the Affidavit of Service (exhibit C). However, they failed to oppose the motion, even though they participated in depositions and a status conference after their counsel was relieved. Puche Sr.'s denial of "receiving" the motion is conclusory, and insufficient to rebut the *prima facie* proof of service, *i.e.*, the Affidavit of Service and Federal

Express Confirmation of Delivery. And, Puche Jr.'s affidavit merely swears that he has read his father's affidavit and that he confirms every statement made therein.

Further, CPLR 321(c), which stays proceedings where "an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled" has never been applied to the voluntary withdrawal of counsel due to a parties' failure to cooperate with and pay counsel, as is the case herein. On March 13, 2012, the court granted the application for withdrawal as counsel and directed that no action be taken against defendants until 30 days after the service upon them of the March 13, 2012 Order. Defendants were duly served with a copy of that Order (exhibit A) and subsequently, both defendants appeared for a status conferences on June 5, 2012, (where Puche Jr. appeared by phone) and September 12, 2012, and also appeared for their depositions.[2] Defendants cannot move to vacate the judgment approximately six months after the court's granting of the motion, and more than three months after defendants current counsel Michael Mantell, Esq. ("Mantell") filed a Notice of Appearance in this matter. And, in the absence of a reasonable excuse for failing to oppose the prior motion, the Court need not address whether defendants' have a meritorious defense.

And in any event, defendants failed to offer a meritorious defense as they do not dispute their liability under the lease and guaranty and only object to the amount of damages.

Discussion

At the outset, plaintiff's motion to confirm the Referee's determination of the amount of attorneys' fees is granted.

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[2] The court's record reflects that said motion was returnable December 3, 2012 and was adjourned by the court until December 20, 2012.

To begin, the Supreme Court is vested with discretion to "confirm or reject, in whole or in part, the ... report of [the] referee" and may "make new findings with or without taking additional testimony" or "order a new trial or hearing" (CPLR 4403). And, a referee's report should be confirmed if its findings are supported by the record (*Baker v Kohler*, 28 AD3d 375 [2006], *lv denied* 7 NY3d 885 [2006]; *Freedman v Freedman*, 211 AD2d 580 [1995]).

In the instant case, J.H.O. Gammerman's rulings as to plaintiff's attorneys' fees were cogent, well reasoned and supported by the record. And, defendants do not submit any meaningful arguments in opposition other than stating that plaintiff's claim for legal fees is "merely a manifestation of plaintiff's greed."

Therefore, the branch of defendants' motion to modify this court's January 3, 2013 Order to include the award to said attorneys' fees is granted.

Defendants' Cross-Motion

For the reasons stated below, defendants' cross-motion is granted in part and denied in part.

At the outset, the Court rejects defendants' application to vacate the January 3, 2013 Order based on the failure to comply with CPLR 321 (c). Such section, entitled, Death, removal or disability of attorney, provides that:

> If an attorney dies, becomes physically or mentally incapacitated, *or is removed*, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days *after notice to appoint another attorney has been served* upon that party either personally or in such manner as the court directs. (Emphasis added)

CPLR 321 (c) has been held applicable to nullify a court order where an attorneys'

motion for leave to withdraw as counsel was granted, and no subsequent notice to appoint another attorney had been served (*Leonard Johnson & Sons Enterprises, Ltd. v Brighton Commons Partnership,* 171 AD2d 1059, 569 NYS2d 40 [4th Dept 1991], *appeal dismissed* 77 NY2d 990, 571 NYS2d 915, 575 NE2d 401 [1991]).

In *Leonard Johnson & Sons Enterprises, Ltd.* (*supra*), corporate plaintiffs' attorney's motion to withdraw as counsel was granted on July 14, 1989, apparently on default. The order was served in August 1989 upon the officer of both corporate plaintiffs, "but he was not served with a notice to appoint another attorney." When plaintiffs failed to appear at a subsequent calendar call, defendant moved to dismiss plaintiffs' complaint. The Court noted that it did not appear that plaintiffs received notice of the motion. The Court granted dismissal by order dated November 14, 1989, and plaintiffs moved to vacate the dismissal order and sought restore the case to the calendar, which was denied. Plaintiffs' subsequent motion to renew was likewise denied. Thereafter, plaintiffs' motion to reargue on the ground that the dismissal order was entered in violation of CPLR 321(c). The court adhered to its dismissal. On appeal, the Fourth Department reversed, holding that "[f]ollowing removal of plaintiffs' attorney by court order, no further proceeding could be taken against plaintiffs without leave of the court until 30 days after notice to appoint another attorney had been served.

However, the stay provision of CPLR 321(c) has been held inapplicable where an attorney's removal from the matter is caused by the voluntary act of the attorney or where the removal results from the client's noncooperation (*see In re John L.P.,* 72 AD3d 828, 898 NYS2d 465 [2d Dept 2010] [affirming denial of appellant's request for an adjournment to obtain new counsel where the appellant consented to the withdrawal of attorney at the commencement of the

hearing, and stating that the interim stay under CPLR 321(c) was inapplicable where, as there, the attorney's removal was caused by the voluntary act of both the attorney and the client]; *see Blondell v Malone*, 91 AD2d 1201, 459 NYS2d 193 [4th Dept 1983] [rejecting defense counsel's request to adjourn the trial based on the claim that CPLR 321(c) applied so as to render service of a statement of readiness upon him invalid (due to his previous removal of himself as counsel), and holding that counsel continued to retain authority to receive such statement of readiness until a court order was issued granting him permission to withdraw]; *see also, Sarlo–Pinzur v Pinzur*, 59 AD3d 607, 608, 874 NYS2d 499 [2d Dept 2009] [upholding the denial of client's motion to stay the trial after granting his attorney's motion to withdraw based on the client's failure to cooperate with his counsel]).

Here, defendants' prior attorney Peter Kolodny, Esq. "removed" by order of this Court on March 13, 2012 upon counsel's motion for leave to withdraw, which was based on defendants' failure to cooperate with counsel, and of which defendants had notice (as indicated by the record). And, a stay was issued enjoining all proceedings against defendants for a period of 30 days. Although no proceedings were taken in this action during this proscriptive period, it does not appear that notice to appoint another attorney had ever been served upon defendants. While caselaw appears to forego the stay requirement where counsel's removal is precipitated by the client's noncooperation during the litigation, which was the primary basis of Mr. Kolodny's removal herein, there is no caselaw relieving the requirement of notice to appoint another attorney where counsel is removed by court order. Therefore, defendants were entitled to notice to appoint an attorney under CPLR 321(c) (*see Leonard Johnson & Sons Enterprises, Ltd. v Brighton Commons Partnership (supra*).

However, the statute is "intended to protect litigants faced with the unexpected loss of legal representation" (*Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 938 NE2d 980 [2010]), and there is no indication that defendants were unaware of counsel's removal (compare, *Feola v Moore McCormack Lines, Inc.*, 101 AD2d 784, 475 NYS2d 867 [1st Dept 1984] (holding that where plaintiff did not know of the disability of his counsel until after the failure to comply with the discovery notices resulted in the order dismissing plaintiff's complaint, and neither defendant complied with the requirements of CPLR § 312(c), such dismissal order and the subsequent long-form order and judgment entered upon it, must be vacated]).

Here, after the expiration of the 30-day stay period (*i.e.*, May 14, 2012), and before this Court granted judgment against defendants, defendants actively participated in this litigation by appearing at a compliance conference on June 5, 2012 (Puche Sr. in person, and Puche Jr. by phone), and for depositions on September 5, 2012. There is no indication that defendants opposed the continuance of the proceedings or the continuance of their participation in the absence of counsel. Therefore, under the circumstances, the absence of service of express notice to appoint another attorney does not warrant vacatur of this Court's January 3, 2013 Order.

As to defendants' remaining basis to vacate Court's January 3, 2013 Order, it is uncontested that in order to vacate the January 2013 order granting, without opposition, plaintiff's motion for summary judgment, defendants must demonstrate both a reasonable excuse for the failure to oppose the motion and a potentially meritorious defense (*see* CPLR 5015[a] [1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *New York City Housing Authority v Richardson*, 27 Misc 3d 1204(A), 910 NYS2d 406 (Table) [N.Y. City Civ. Ct. 2010] [a grant of summary judgment may be considered a default judgment if the opposing

party fails to submit written opposition], *citing 319 W. 48th St. Realty Corp. v Almeida*, 21 Misc 3d 129[A], 2008 NY Slip Op 51993[U] [App Term, 1st Dept 2008] ["Respondent-appellants' failure to submit papers in opposition to petitioner's motion to strike their answers constituted, as Civil Court properly found, a default on the motion."]; *State of New York v Bayramov*, 98 AD3d 811, 812, 949 NYS2d 840 [2012] [vacating a default judgment entered after defendant failed to oppose a summary judgment motion where he "proffered documentation supporting his claim that he is not liable on the underlying debt, and has affirmatively asserted that he did not receive the summary judgment motion"]). Notably, courts prefer resolving cases on the merits (*see State of New York v Bayramov*, 98 AD3d 811, 812, 949 NYS2d 840 [2012]),

Defendants established a reasonable excuse for not opposing the summary judgment motion, based on the lack of service.

It is well established that "properly executed affidavit of service is *prima facie* proof of proper service" *(Hanover Insurance Co. v Cannon Express Corp.*, 1 AD3d 358 [2003]; *Rox Riv 83 Partners v Ettinger*, 276 AD2d 782 [2000]).

While plaintiff submitted an Affidavit of service that the motion for summary judgment was delivered by "Federal Express" to defendants' residence at 2901 South Bayshore Drive, Unit 6D, Miami, Florida 33133, on November 15, 2012 at 10:12 a.m., the Federal Express delivery confirmation receipt was not signed for by either of the defendants. Instead, it is signed by "F. ESCOBAR" (exhibit C). Thus, such receipt, coupled with defendants' attestation that he did not receive the motion for summary judgment, raises an issue as to whether defendants had notice of the motion so as to excuse their failure to respond to same.

In light of defendants' reasonable excuse, and since the prior motion was for summary

judgment, the court proceeds to consider whether defendants have a meritorious defense to plaintiff's claims.

The court finds that, while defendants fail to raise an issue of fact as to *liability*, as they do not dispute the that Puche Jr. breached the lease and Puche Sr. breached the guaranty, they nevertheless raise an issue of fact as to whether a significant portion of the damages sought by plaintiff as liquidated damages constitute an impermissible penalty. Defendants argue that the liquidated damages provision of the lease is unenforceable as a matter of law because the late fee of $150 a day is excessive and grossly disproportionate to the amount of the actual damages resulting from the nonpayment of rent.

"Whether the [late] fee [provision] represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances" (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 828 NE2d 604 [2005]). "The burden is on the party seeking to avoid liquidated damages to show that the stated liquidated damages are, in fact, a penalty" (*id., citing P.J. Carlin Constr. Co. v City of New York*, 59 AD2d 847, 399 NYS2d 13 [1st Dept 1977]).

Courts have held that "[l]iquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract" (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 361 NE2d 1015 [1977], *citing Wirth & Hamid Fair Booking v Wirth*, 265 NY 214, 223, 192 NE 297, 301 [1934]). "Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy (*Truck Rent-A-Center*). However, if "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a

penalty and will not be enforced" (*id.* at 425). And, "[i]f the clause is rejected as being a penalty, the recovery is limited to actual damages proven" (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, *citing Brecher v Laikin*, 430 F Supp 103, 106 [SDNY 1977]).

The court holds that the liquidated damages clause contained in the lease at issue is unenforceable.

Here, the late fee provision of the lease states that "[i]f the rent is not received within [. . .] five days of the due date, a penalty of $150 will be imposed per day" (exhibit H to plaintiff motion sequence 002, p. 8, the lease Rider, ¶9). According to plaintiff's affidavit in support of his summary judgment motion, defendants failed to pay $3,600 in rent for June, July and August 2009, and $62,700 in late fees for the months from October 2008 through July 2009 for failing to pay rent on time during such period. The court finds such amount of late fees to be grossly disproportionate to the amount of actual damages of unpaid rent, in essence rendering the liquidated damages provision a penalty, and therefore, unenforceable (*see LeRoy v Sayers*, 217 AD2d 63, 635 NYS2d 2 [1st Dept 1995]). Thus, plaintiff's recovery should be limited to actual damages proven (*JMD Holding Corp. v Congress Financial Corp.,supra*).

Accordingly, the portion of this court's Decision and Order dated January 3, 2013 with respect to the award of damages is hereby vacated and the issue of damages sustained by plaintiff as a result of defendants's breach under the lease and guaranty is referred to the Referee to hear and determine.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion *(sequence 004)* pursuant to CPLR 4403 for an order

confirming the determination and recommendation of Hon. Ira Gammerman, J.H.O. as to the attorneys' fees is granted and the award rendered in favor of plaintiff Marco Biggio against defendant Gabriel Puche, Jr. and defendant Gabriel Puche for attorneys' fees in the amount of $12,099.50 is confirmed; and it is further

ORDERED that the this court's Decision and Order dated January 3, 2013, as modified, is hereby amended to include the award of the attorneys's fees in the amount of $12,099.50; and it is further

ORDERED that the cross-motion (*denominated as sequence 002*) by defendants Gabriel Puche, Jr. and defendant Gabriel Puche to vacate and recall the Decision and Order dated January 3, 2013 is granted solely to the extent that the portion of the Decision and Order dated January 3, 2013 with respect to damages is hereby vacated; and it is further

ORDERED that the issue of damages sustained by plaintiff Marco Biggio as a result of defendants' respective breaches of the sublease and the guaranty is referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the above reference to a Special Referee (Hon. Ira Gammerman); and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within 20 days of entry upon counsel for plaintiff.

This constitutes the decision and order of the court.

Dated: August 13, 2013

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.