

Mill Rock Owners Corp. v Ezco, LLC

2013 NY Slip Op 33113(U)

December 9, 2013

Supreme Court, New York County

Docket Number: 151622/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

<u>MILL ROCK OWNERS CORP.,</u>	NDEX NO.	151622/2013
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>001</u>
<u>EZCO, LLC, NY ELECTRICAL SUPPLY & LIGHTING LLC, and EZRA SIMON,</u>	MOTION CAL. NO.	_____
Defendants.		

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answer — Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

This action was commenced by the filing of a Summons and Verified Complaint on February 22, 2013.

Plaintiff Mill Rock Owners Corp. (“Plaintiff”) moves for an Order (a) permitting a late filing of proof of service upon defendant Ezra Simon (“Simon”) of the summons and complaint and (b) pursuant to CPLR §3215, granting Plaintiff default judgment against defendants Ezco, LLC (“Ezco”), and Simon, in the amount of \$610,054.17, with interest in the amount of \$109,809.75 (representing interest at 9% per annum for period from August 1, 2011 through August 1, 2013) and costs based on Defendants’ failure to appear. Defendants do not oppose.

Plaintiff does not move with respect to defendant NY Electrical Supply & Lighting LLC. In support of its motion, Plaintiff submits the affidavit of Laura Krasner, the Assistant Secretary of the Board of Directors of Plaintiff.

Attached to Krasner’s affidavit is a copy of the Verified Complaint, an Affidavit of Service attesting to service on Ezco pursuant to BCL §306(b) on March 1, 2013, an Affidavit attesting to service on Simon pursuant to CPLR

§308(2) on March 4, 2013, and proof of additional mailing to Defendants pursuant to CPLR §3215(g) on April 5, 2013.

As set forth in Krasner's Affidavit, Plaintiff is the owner of the property and building located at 345 East 93rd Street, New York, NY 10128. By written lease dated September 19, 2005, Ezco became the named tenant of record of commercial space in the Building for a term that was to continue through and including September 30, 2015 ("the Lease"). By agreement dated March 20, 2006, the parties agreed to modify the Lease and expand the area leased by Ezco ("Lease Modification").

Simon executed a guaranty dated September 29, 2005 with respect to Ezco's obligations under the Lease. The Personal Guaranty provides:

1. I undersigned, Ezra Simon, . . . unconditionally individually guarantees to Landlord, its successors and assigns and hereby covenants and agrees that if there shall occur any default by Tenant in the payment of the "Rent", then Guarantor, within five (5) days after written demand by Landlord, shall in each an every instance up to and including the "Release Date" (as defined below), pay the Rent to Landlord. The "Release Date" shall mean the date (i) which is specified as the Release Date in a written notice of surrender of possession of the Premises received by Landlord from Tenant at least one hundred eighty (180) days prior to the Release date and (ii) upon which Tenant returns to Landlord the keys to the Premises and surrenders possession of the Premises to Landlord in the condition required by the Lease as of the expiration or termination thereof, free of all tenancies or rights or claims of occupancy by Tenant or any party claiming through Tenant and with all Rent and all sums due under this Guaranty fully paid to and including the Release Date. The "Rent" shall mean and include (i) base rent and all additional rent and other sums, fees, costs and charges de Landlord under the Lease, and (ii) all reasonable attorneys' . . . fees and disbursements including the Release Date, at which time, if all the provisions hereof have been satisfied by Guarantor, the Guarantor's obligations hereunder shall cease.

12. The Release Date herein refers and relates solely to the Guarantor. The aforementioned notice by Tenant of surrender of possession of the Premises and the delivery of the Premise to Landlord shall not be construed to limit, diminish or otherwise reduce any liability or obligations that Tenant would

otherwise have under the Lease, or any rights and remedies of Landlord under the Lease or at law or equity, and the same shall constitute a material breach of the Lease by Tenant, as Tenant's obligation is to perform its obligations under the Lease until its stated expiration date.

Simon further executed the Lease Modification in his personal capacity which stated, "The Guarantor made a Personal Guaranty dated September 29, 2005, Ezra Simon, consents to this Agreement (including all the Exhibits thereto) and acknowledges and agrees that the Personal Guaranty continues in full force and effect with respect to the Lease as modified by this Agreement."

Krasner avers, "Ezco failed to pay rent and additional rent due pursuant to the Amended Lease for the period of February 2008 through and including September 2008, and as a consequence of a Three Day Demand (the "Demand") was served upon Ezco ... The Demand sought arrears" of \$95,945.40.

According to the Verified Complaint and Krasner's affidavit, Ezco abandoned the Premises on or about October 30, 2008, and as of the date Ezco abandoned the Premises, Ezco owed Plaintiff for rent and additional rent in the sum of \$115,154.20. Following Ezco's abandonment of the Premises, Plaintiff incurred brokerage fees in re-letting the Premises, which totaled \$52,956.76. The Premises remained vacant until August 1, 2011, at which time the Premises were leased by Sheridan Fencing Academy LLC. For the period of November 1, 2008 through September 30, 2009, unpaid rent for the Premises pursuant to the Amended Lease totaled \$135,828.00. For the period of October 1, 2009 through September 30, 2010, unpaid rent for the Premises to the Amended Lease totaled \$152,616.00. For the period of October 1, 2010 through July 31, 2011, unpaid rent for the Premises pursuant to the Amended Lease totaled \$132,270.00. Furthermore, as per the Amended Lease, upon its default, Ezco is liable to Plaintiff for the rent concession of \$12,000 that had been provided to Ezco, for a prorated portion of the real estate broker's commission paid in connection with the Lease Modification in the amount of \$3,368.42, and additional rent under the real estate tax escalation provisions of the Lease totaling \$52,282.79.

There is no evidence that Ezco, as tenant, acted in a manner to trigger the effect of a "Release Date" as defined by the terms of the Personal Guaranty.

Krasner avers that after applying the security deposit of \$46,422.00 to the sums owed, Defendants owe Plaintiff the total sum of \$610,054.17, with interest,

in addition to attorneys' fees.

Wherefore, it is hereby,

ORDERED that Plaintiff is permitted to file a late proof of service of the Summons and Complaint upon defendant Ezra Simon within 20 days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiff's motion for default judgment is granted as against defendants Ezco, LLC, and Ezra Simon without opposition; and it is further


ORDERED that the Clerk enter judgment in favor of Plaintiff Mill Rock Owners Corp. and against defendants Ezco, LLC, and Ezra Simon in the amount of \$610,054.17, together with interest as prayed for allowable by law (at the rate of 9% per annum from August 1, 2011) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs owed by Defendants to Plaintiff is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: DECEMBER 9, 2013


HON. EILEEN A. RAKOVER
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE