

Net Leased v Air Chef, Inc.

2014 NY Slip Op 31592(U)

June 20, 2014

Sup Ct, New York County

Docket Number: 650286/2014

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 650286/2014
NET LEASED, REAL ESTATE
vs
AIR CHEF, INC. AKA AIR
Sequence Number : 001
DEFAULT JUDGMENT

PART 15

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 6/20/14


_____, J.S.C.
HON. EILEEN A. RAKOWER

- 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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

NET LEASED, REAL ESTATE PROPERTIES,
OPERATING PARTNERSHIP as successors in interest
of 215 AFRICAN & HISPANIC AMERICAN REALTY
OF NEW YORK LLC,

Plaintiff,

- v -

AIR CHEF, INC., aka AIR CHEFS, LLC, and RAKESH
K. AGGARWAL and SHEELI AGGARWAL,

Defendants.

INDEX NO. 652704/2013

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1, 2

Answer — Affidavits — Exhibits 3, 4

Replying Affidavits 5

Cross-Motion: Yes No

Plaintiff, Net Leased, Real Estate Properties, Operating Partnership as successors in interest of 215 African & Hispanic American Realty of New York, LLC., (“Plaintiff”), brings this action, *pro se*, for breach of contract based on a lease agreement (the “Lease Agreement”) allegedly entered into between Plaintiff, as net lessee, and defendant, Air Chef, Inc., aka Air Chefs, LLC (“Air Chef”), as tenant, for the premises located at 102 Washington Place, New York, New York 10014, to be used as a restaurant. Plaintiff claims that Air Chef failed to pay rent, real estate taxes, water charges, and attorneys fees, costs and expenses, as required under the Lease Agreement, and further claims that Air Chef’s obligations under the Lease Agreement are guaranteed by individual defendant, Rakesh K. Aggarwal (“Mr. Aggarwal”). Plaintiff also claims that Rakesh K. Aggarwal transferred his real property rights to his wife, Sheeli Aggarwal (and together with Mr. Aggarwal and Air Chef, collectively, “Defendants”).

Plaintiff claims that Defendants failed to answer Plaintiff's summons and complaint by March 25, as required.

Plaintiff now moves, pursuant to CPLR § 3215(a), for a default judgment on the basis of Defendants' failure to answer Plaintiff's summons and complaint.

Defendants oppose.

Defendants argue that, on or about March 11, 2014, Plaintiff agreed to extend the time for Defendants to respond to Plaintiff's complaint to May 5, 2014. Defendants further argue that Plaintiff filed the instant motion on March 26, 2014, before Defendants' time to serve an answer had expired. Additionally, Defendants argue that Plaintiff failed to serve individual defendant, Sheeli Aggarwal, with process.

Defendants attach an email exchange between the parties confirming their agreement to extend the time for Defendants to respond to Plaintiff's complaint through and including May 5, 14. Therefore, Plaintiff's motion for a default judgment on the basis of Defendants' failure to answer the complaint is denied.

Defendants cross-move for an Order, pursuant to CPLR § 3211(a)(5), dismissing Plaintiff's complaint on the basis of Plaintiff's failure to appear by counsel, as required by CPLR § 321(a).

CPLR § 321(a) permits parties to prosecute or defend civil actions in person or by an attorney, "except that a corporation or voluntary association shall appear by attorney" (CPLR § 321[a]).

"When the party to an action is a fictional person—a legal entity with limited liability—the general rule is that it cannot represent itself but must be represented by a licensed practitioner, whether outside counsel or staff counsel, answerable to the court and other parties for his or her own conduct in the matter." (*In re Sharon B.*, 72 N.Y.2d 394, 398 [1988]).

"The reason corporations are required to act through attorneys is that a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the court." (*Austrian, Lance & Stewart, P.C. v. Hastings Properties, Inc.*, 87 Misc. 2d 25, 26 [Sup. Ct. N.Y. Cnty. 1976]).

Professional corporations of attorneys are exceptions to the general rule against corporate self-representation. “This reasoning [for requiring corporation to act through attorneys] does not apply in the case of a professional corporation where personal liability attaches and each member . . . is qualified to appear before the court and argue its case.” (*Austrian, Lance & Stewart, P.C. v. Hastings Properties, Inc.*, 87 Misc. 2d 25, 26 [Sup. Ct. N.Y. Cnty. 1976; see also *Gilberg v. Lennon*, 212 A.D.2d 662, 664 [2d Dep't 1995]).

Furthermore, if a corporation assigns its cause of action to an individual, the non-corporate assignee may represent itself, and need not appear by an attorney. (*Kinlay v. Henley*, 57 A.D.3d 219 [1st Dep't 2008] [finding corporation's assignment of its claims to individual plaintiff, “admittedly to evade CPLR § 321(a), [to be] a perfectly legitimate tactic.”]; *Medical Facilities, Inc. v. Pryke*, 568 N.Y.S.2d 406 [1st Dep't 1991]).

An LLC, like a corporation, shields its members from liability and, once formed, is a legal entity distinct from its members. (LLC §§ 102[m], 203[d]). It follows that, consistent with the “general rule” against corporate self-representation, an LLC may not represent itself in a civil action under CPLR § 321(a). (*Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592 [2d Dep't 2007] [finding that CPLR 321(a)'s prohibition against corporate self-representation extends to LLC's]).

A partnership, on the other hand, does not necessarily shield its individual partners from personal responsibility. Rather, unless the partnership is a registered limited liability partnership, all partners are liable “jointly and severally for everything chargeable to the partnership under sections twenty-four and twenty-five” of the New York's Partnership Law, and “jointly for all other debts and obligations of the partnership.” (P'ship Law § 26[a][1]-[2]). Moreover, unlike a corporation, a partnership is not a legal entity separate and distinct from the partners therein. (*In re Peck*, 206 N.Y. 55, 60 [1912]). Thus, a partnership that is not a registered limited liability partnership may appear *pro se* in a civil action. (*Walker & Bailey v. We Try Harder, Inc.*, 123 A.D.2d 256, 257 [1st Dep't 1986] [citation omitted] [partnership of attorneys]).

Here, Plaintiff is not a corporation or a voluntary association. Rather, Plaintiff's complaint alleges that Plaintiff is “an operating partnership appearing Pro Se as successors in interest for 215 African & Hispanic American Realty of New York, LLC” (“215 African”). Plaintiff's complaint does not plead the nature of

Plaintiff's business, or identify any individual members of Plaintiff entity. Nor does Plaintiff's complaint plead the circumstances whereby Plaintiff allegedly succeeded in interest to 215 African's claims.

However, accepting Plaintiff's allegations as true, "[t]he plaintiff partnership is not subject to the rule against corporations and voluntary associations appearing pro se in civil actions set forth in CPLR section 321(a)." (*Gilberg v. Lennon*, 212 A.D.2d 662, 664 [2d Dep't 1995]).

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' cross motion is denied; and it is further

ORDERED that Defendants shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

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

DATED: June 20, 2014


EILEEN A. RAKOWER, J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: DO NOT POST REFERENCE