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| LLD3 LLC v Symtic 10Ten LLC |
| 2014 NY Slip Op 31743(U) |
| July 1, 2014 |
| Sup Ct, New York County |
| Docket Number: 654284/2013 |
| Judge: Ellen M. Coin |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: HON. ELLEN M. COIN PART 63
A.J.S.C.

LLD3 LLC, Brandon C. Liu

INDEX NO. 654284/2013
MOTION DATE March 18, 2014
MOTION SEQ. NO. 001
E-FILED

-v-

Symtic 10Ten LLC d/b/a Spur Tree,
Sean John

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

| <u>Papers</u> | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits | <u>1</u> |
| Answering Affidavits - Exhibits | _____ |
| Reply Affidavits | _____ |
| Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No | |

This is an action to recover for breach of a sublease. Plaintiff LLD3 LLC alleges that it entered into a sublease agreement with defendant Symtic 10Ten LLC (Symtic), permitting Symtic to operate a bar and restaurant under a liquor license issued in plaintiff's name. The complaint alleges that Symtic filed sales tax returns in plaintiff's name but failed to remit collected sales tax monies to the State, failed to pay rent and failed to comply with a lease surrender agreement. In their first cause of action, plaintiffs seek from Symtic and individual Defendant Sean John (Symtic's owner and alleged alter ego) damages in an amount equal to the outstanding balance of LLD3 LLC's sales tax liability pursuant to paragraphs 3, 4 and 42 of the sublease agreement. The second cause of action seeks payment of rent arrears beginning in July

2013. The third cause of action is for breach of a lease surrender agreement dated October 22, 2013. The fourth cause of action seeks damages incurred as a result of plaintiff's inability to operate a restaurant in its own name at the subject location, as well as injunctive relief, enjoining Symtic from continuing to use plaintiff's liquor license.

Defendants have failed to respond to the complaint and have not been granted an extension of time to appear. Plaintiffs now move for a default judgment pursuant to CPLR §3215.

An application for a default judgment requires proof of service of the summons and complaint or summons with notice, proof of the facts constituting the claim and proof of the default. (CPLR 3215[f]; see also Siegel, *New York Practice*, sec. 295 [4th ed. 2005]). A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the court to enter a default judgment. (*PDQ Aluminum Products Corp. v Smith*, 20 Misc 3d 94, 96 [App Term, 2d Dept 2008], citing *Gagen v Kipany Prods.*, 289 AD2d 844 [3d Dept 2001]). Rather, plaintiff must support its motion with enough facts to enable the court to determine that a viable cause of action exists. (*PDQ Aluminum Products Corp.*, 20 Misc 3d at 96).

Here the Court cannot grant plaintiffs' motion as to the first cause of action. Plaintiff LLD3 LLC violated the law by permitting Symtic to operate under its liquor license, as Section 114(6) of the

Alcoholic Beverage Control Law provides that "[i]t shall be unlawful for any person holding a license to post such license or to permit such license to be posted upon premises other than the premises licensed, or upon premises where traffic in alcoholic beverages is being carried on by any person other than the licensee . . ." (emphasis added). As violations of Alcoholic Beverage Control Law are repugnant to public policy, this sublease arrangement was brazenly unlawful. Thus, the Court cannot lend its imprimatur to, and will not enforce, any portion of the sublease relating to liabilities arising from alcohol sales (see e.g. *Benjamin v Koepfel*, 85 NY2d 549, 553 [1995]).

On the remainder of the complaint, the Court may grant a default judgment as against Symtic only. Aside from conclusory statements tracking boiler-plate language of the elements of a claim for piercing a corporate veil, the complaint does not include sufficiently specific allegations to support a finding of alter ego liability in a breach of contract action (see e.g. *Cusumano v Iota Indus., Inc.*, 100 AD2d 892, 893 [2d Dept 1984]). In addition, the complaint does not contain a cause of action on Sean John's guaranty.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for a default judgment is granted on the second, third and fourth causes of action in favor of plaintiff LLD3 LLC and against defendant Symtic 10TenLLC d/b/a Spur

Tree only, and the motion is otherwise denied; and it is further

ORDERED that within 60 days from the date of this order, plaintiff LLD3 LLC shall file a note of issue and certificate of readiness and schedule an inquest on notice to determine appropriate amounts of damages on the second, third and fourth causes of action as against defendant Symtic 10Ten LLC d/b/a Spur Tree only; and it is further

ORDERED that the claim for injunctive relief as against both defendants is severed and continued; and it is further

ORDERED that so much of plaintiffs' claim for injunctive relief as seeks an order requiring defendants to cease and desist from any use of plaintiffs' liquor license is granted; and it is further

ORDERED and ADJUDGED that defendants Symtic 10Ten LLC d/b/a Spur Tree and Sean John are hereby permanently enjoined from using or operating under any license, permit or certificate, including but not limited to a liquor license issued by New York State Liquor Authority, bearing the name(s) of LLD3 LLC and/or Brandon C. Liu; and it is further

ORDERED that within 10 days from the date of being personally served with a copy of this order and partial judgment with notice of entry, defendants Symtic 10Ten LLC d/b/a Spur Tree and Sean John shall deliver by overnight mail all original licenses, permits and/or certificates bearing the name(s) of LLD3 LLC and/or Brandon C. Liu to the office of plaintiffs' counsel Marc M. Coupey, Esq. at

441 Saw Mill River Road, Millwood, New York 10546; and it is further

ORDERED that the balance of plaintiffs' claim for injunctive relief, seeking an order requiring defendants to vacate the subject premises, is denied without prejudice to refiling in the Civil Court, Commercial Landlord/Tenant Part, in the form of a proceeding for issuance of a warrant of eviction.

This constitutes the decision and order of the Court.

Dated: 7/1/14

Ellen M. Coin
Ellen M. Coin, A.J.S.C.

Check One:

CASE DISPOSED

NON-FINAL DISPOSITION