

Excel Assoc. v Debi Perfect Spa, Inc.

2015 NY Slip Op 30890(U)

May 26, 2015

Supreme Court, New York County

Docket Number: 158795/2014

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

EXCEL ASSOCIATES,

Plaintiff,

Index No.
158795/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 001

DEBI PERFECT SPA, INC.
and SUN HEA KIM, a/k/a SUN HAE KIM,

Defendants.

-----X

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

Plaintiff Excel Associates (“Plaintiff” or “Excel”) brings this action for unpaid rent and additional rent allegedly owed under a written lease agreement dated June 4, 1998 (the “Lease”) between Plaintiff, as landlord, and non-party Tiffany II Beauty Care Corp. (“Beauty Care”), as tenant, for use of the street-level store premises in the building known as “The Excelsior”, located at 301-303 East 57th Street, New York, New York, 10022, (the “Premises”), for a term to expire on June 30, 2013. Plaintiff claims that Beauty Care assigned the Lease to defendant Debi Perfect Spa, Inc. (“Debi Perfect”) by assignment and assumption of lease dated September 29, 2005 (the “Assignment and Assumption of Lease”), and that defendant Sun Hea Kim a/k/a Sun Hae Kim (“Kim”) (and together with Debi Perfect, collectively, “Defendants”) personally guaranteed Debi Perfect’s obligations under the Lease and the Assignment and Assumption of Lease, pursuant to a guaranty agreement dated October 11, 2005 (the “Guaranty”).

Plaintiff commenced this action on September 9, 2014, by summons and complaint. Individual defendant Kim, *pro se*, interposed an answer on November 17, 2014, denying allegations and asserting counterclaims. Entity defendant Debi Perfect, which is required to appear by counsel (CPLR § 321[a]), has not appeared in this action.

Plaintiff now moves for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiff and against Debi Perfect in the sum of 88,940.33, plus interest thereon from January 15, 2014; and, for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff and against Kim in the amount of \$100,485.15, plus interest on \$11,544.82 of such sum from August 21, 2013, plus interest on \$88,940 of such sum from January 15, 2014, dismissing Kim's Answer and Counterclaim against Plaintiff, and scheduling a hearing to determine the amount of attorneys' fees for which Defendants are liable.

In support, Plaintiff submits: the attorney affirmation of Anthony Rella ("Rella"), dated February 3, 2015; the affidavit of Bruce S. Simon ("Simon"), a manager of Excel Associates Holdings LLC ("Holdings"), which is a general partner of Plaintiff, dated July 28, 2014; the affidavit of additional mailing upon Kim pursuant to CPLR § 3215(g); pages from the master lease (the "Master Lease"); the Lease; the Assignment and Assumption of Lease; the Guaranty (in redacted form); the Stipulation of Settlement; the Decision and Judgment; and, a copy of Debi Perfect's Tenant Ledger. Affidavits of service of Plaintiff's initiatory papers upon Defendants are e-filed.

Kim opposes. Debi Perfect does not submit opposition.

CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]). CPLR § 3215 does not contemplate that default judgments are to be "rubberstamped" once jurisdiction and a failure to appear have been shown. (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]; see also *Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 846 [3d Dep't, 2001] ["[T]he granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default."]). Rather, some proof of liability is required to satisfy the court as to the prima facie validity of the uncontested cause of action. (*Feffer*, 210 A.D.2d at 61). The standard of proof on an application for judgment by default "is not stringent, amounting only to some firsthand confirmation of the facts". (*Id.*).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue

remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

In the affidavit of Simon, Simon avers that Plaintiff, as landlord, demised to Beauty Care, as tenant, the Premises, by Lease made as of June 4, 1998, for a term to expire on June 30, 2013. (Simon Aff. ¶ 5). Simon further avers that Beauty Care assigned the Lease to Debi Perfect under the Assignment, and that Kim personally guaranteed Debi Perfect's obligations to Plaintiff under the Lease pursuant to the Guaranty. (Simon Aff. ¶¶ 6).

Simon further avers:

On or about May 17, 2013, Plaintiff, as Petitioner, commenced a summary proceeding (the "Proceeding") against Debi Perfect, as Respondent, in the Civil Court of the City of New York, County of New York, under the Index No. L&T 067451/2013, based on Debi Perfect's alleged default in the payment of rent and additional rent under the Lease.

(Simon Aff. ¶ 9). Simon avers:

Pursuant to a stipulation of settlement in the Proceeding, dated July 31, 2013 (the "Stipulation"), Plaintiff and Debi Perfect agreed, *inter alia*, that Debi Perfect's rent and additional rent in arrears, through the date of the Stipulation, equaled \$69,268.90, and to extend the term of the Lease through and including June 30, 2014, for a base monthly rent of \$16,336.83, with all other terms, conditions and obligations of the Lease remaining unchanged and in full force and effect.

(Simon Aff. ¶ 10). Simon further avers that, "[I]n the Stipulation, Kim acknowledged and affirmed, *inter alia*, that the Guaranty would remain in full force and effect in accordance with its terms upon and after the execution of this Stipulation" and that, "[p]ursuant to the Stipulation, on August 21, 2013, the Court in the Proceeding entered a money judgment (the "Proceeding Judgment") against

Debi Perfect in the amount of \$69,268.90, of which \$11,544.82, plus interest thereon from August 21, 2013, remains unsatisfied.”

Simon avers that Debi Perfect did not vacate and surrender legal possession of the Premises until July 21, 2014, and that an additional \$88,940.33 remains due and owing under the Lease, as amended by the Stipulation. (Simon Aff. ¶ 13-15, 18). In addition, Simon avers that Plaintiff is entitled to recover reasonable attorney’s fees pursuant to Article 19 of the Lease.

Accordingly, Plaintiff is entitled to a default judgment against Debi Perfect on the issue of liability. Additionally, Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law on the issue of liability for unpaid rent and additional rent as against Kim, pursuant to the Lease and Guaranty. In opposition, Kim does not dispute liability, but states that “Plaintiff gave [illegible] invoices was [sic] wrong”, and that the total unpaid amount under the Lease is \$44,279.84. (Kim Opp. ¶¶ 1, 3). An inquest is therefore warranted with respect to the amount of damages owed under the Lease and Guaranty.

Finally, with respect to Kim’s counterclaim, Kim’s counterclaim appears to allege that Plaintiff conducted repair work to the Building’s façade, which interfered with Debi Perfect’s business. Kim’s counterclaim also appears to allege that there were problems with the Premises’ water supply, and that there were water leaks into the Premises from the second floor. Here, Kim’s contentions “sounding in breach of contract are premised on allegations of misconduct by [P]laintiff *vis-a-vis* [Debi Perfect] alone and therefore belong to and may be asserted by [Debi Perfect] alone.” (*Hotel 71 Mezz Lender LLC v. Mitchell*, 63 A.D.3d 447, 448 [1st Dep’t 2009]). Furthermore, Kim’s counterclaim does not assert or suggest that Debi Perfect was forced to abandon the Premises as a result of the foregoing. Accordingly, Kim’s counterclaim as against Plaintiff is dismissed.

Wherefore, it is hereby,

ORDERED that Plaintiff’s motion for default judgment as against defendant Debi Perfect is granted on the issue of liability only; and it is further

ORDERED that Plaintiff’s motion for summary judgment as against individual defendant Kim is granted only the extent that summary judgment on the issue of liability is granted in favor of Plaintiff and against defendant Kim and Kim’s counterclaim is dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that an assessment of damages including the amount of reasonable attorney's fees and costs against Defendants is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: May 26, 2015



EILEEN A. RAKOWER, J.S.C.