

201 Cedar Ave, LLC v J.E.M. Shoe Corp.

2016 NY Slip Op 31073(U)

March 29, 2016

Supreme Court, New York County

Docket Number: 162297/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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201 CEDAR AVE, LLC,

Plaintiff,

- against -

J.E.M. SHOE CORP. d/b/a SHOE CLUB NYC,
MEI YEE CHAN a/k/a MEI YEE WANG and
DAVID CHAN a/k/a CHIKENGUNG CHAN,

Defendants.
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Index No. 162297/14
DECISION & ORDER
(Motion Seq. 001)

DONNA MILLS, J.:

Plaintiff 201 Cedar Ave, LLC (plaintiff or landlord) moves, pursuant to CPLR 3215, for a default judgment against defendants J.E.M. Shoe Corp. d/b/a Shoe Club NYC (Shoe Corp. or the tenant), Mei Yee Chan a/k/a Mei Yee Wang (Mei Chan) and David Chan a/k/a Chikengung Chan (David Chan). Mei and David Chan oppose the motion and cross-move for the following relief: (a) dismissal of the action pursuant to CPLR 3211 (a) (1), (5) and (7); (b) vacating their default in appearing and answering and compelling plaintiff to accept their answer with affirmative defenses pursuant to CPLR 5015 (a) (1) and scheduling this case for a preliminary conference; and (c) removing this action to the New York City Civil Court, New York County, pursuant to CPLR 325 (a).

This is an action to collect unpaid rent and other charges from plaintiff's former commercial tenant, Shoe Corp., and from defendants Mei Chan and David Chan, who each signed a personal guaranty of the lease's obligations. On June 25, 2009, plaintiff, as owner, leased commercial retail premises located at 207-215 West 98th Street, Commercial Unit 4, New York, New York (the premises) to Shoe Club, subject to the terms of a written lease and rider

(the lease), for a term of 10 years and 8 months, beginning June 25, 2009 and ending December 31, 2019 (Zarif aff, Ex. H). The monthly rent was initially set at \$11,333.33, with yearly increases.

Shoe Club took possession on or about June 25, 2009. However, Shoe Club defaulted under the lease by failing to make the payments of rent and additional rent due under the lease beginning on August 1, 2013 and continuing thereafter. At that time, the monthly rent was \$12,384.24. The landlord commenced a summary non-payment proceeding in the Civil Court to evict Shoe Corp. from the premises, captioned *201 Cedar Ave, LLC v J.E.M. Shoe Corp. d/b/a Shoe Club NYC*, L & T No. 063085/14. Shoe Corp. appeared by counsel, and entered into a written Stipulation of Settlement on May 30, 2014 (the Stipulation) (Zarif aff, Ex. K).

Pursuant to the Stipulation, the tenant agreed that the amount of unpaid rent, additional rent and late fees as of May 31, 2014 was \$56,592.58 (the Judgment Amount), and consented to the entry of a money judgment in that amount and to the entry of a judgment of possession and issuance of a warrant of eviction. The tenant further agreed, that provided that all payments required by the terms of this stipulation are made, with time being of the essence, the judgment of possession and warrant of eviction would be stayed. Paragraph 5 states, in full:

“Tenant shall make the following payments to Landlord to be applied as follows:

- (A) \$15,000 on or before June 4, 2014 representing \$10,000.00 towards June 2014 rent + additional rent + \$5,000.00 in reduction of the Judgment Amount;
- (B) \$12,898.15 on or before July 4, 2014 in reduction of the Judgment Amount;
- (C) \$12,898.15 on or before August 4, 2014 in reduction of the Judgment Amount;
- (D) \$12,898.15 on or before September 4, 2014 in reduction of the Judgment Amount; +
- (E) \$12,898.15 on or before October 4, 2014 in reduction of the Judgment Amount.”

[* 3]

(Zarif aff, Ex. K, ¶ 5). The Stipulation further provides that, in the event that the tenant makes all the payments provided in paragraph 5 and surrenders possession by June 30, 2014, the personal guaranty of Mei and David Chan would be terminated. Finally, the tenant agreed to surrender its \$34,000 security deposit to the landlord. The Stipulation was signed by counsel for Shoe Corp., and by both Mei and David Chan, as guarantors of the lease.

The tenant made the \$15,000 payment due on June 4, 2014. Thereafter, the parties signed an Amended Stipulation of Settlement (Amended Stipulation) on June 30, 2014 (*see* Chan aff, Ex. 5). The Amended Stipulation provides that the stay of enforcement of the judgment of possession and warrant of eviction would be extended through July 31, 2104, provided that the tenant continues to make the payments due under paragraph 5 of the original Stipulation and pays use and occupancy in the amount of \$8,000 per month. Paragraph 4 (a) specifically provides that the landlord was not waiving any default existing under the lease by entering into the Amended Stipulation.

The tenant made an \$8,000.00 use and occupancy payment on June 30, 2014 and a payment of \$12,898.19 was made on or about July 14, 2014, the payment due under paragraph 5 (B) of the Stipulation (*see* Zarif aff, Ex. J). On August 11, 2014, the parties entered into a third and final stipulation (Second Amended Stipulation) (*see* Chan aff, Ex. 5). The Second Amended Stipulation provides that the stay of enforcement of the judgment of possession and warrant of eviction would now be extended through December 31, 2014, provided that the tenant continues to abide by the Stipulation, the Amended Stipulation and the terms and conditions set forth therein. In consideration of this second extension of the stay, the tenant agreed to pay use and occupancy: (i) at the rate of \$8,000.00 per month on or before August 25, 2014 and September 25, 2014; and (ii) at the rate of \$8,500.00 per month on or before October 25, 2014, November

25, 2014 and December 4, 2014. In addition, the parties modified the remaining payments due under paragraphs 5 (C – E) of the Stipulation, and the tenant agreed, inter alia, to make a payment of \$6,449.08 upon execution of the Second Amended Stipulation, i.e., August 11, 2014 and two more payments of \$6,449.08 on or before September 4, 2014 and October 4, 2014, all of these payments in reduction of the Judgment Amount. Once again, the Second Amended Stipulation provides for the termination of Mei and David Chan's personal guaranty provided that the tenant makes all the payments due to reduce the Judgment Amount and surrenders possession by December 31, 2014. All three of the stipulations were signed by counsel for Shoe Corp. and by both Mei and David Chan, as guarantors of the lease, indicating their acceptance and agreement to the terms therein.

According to the uncontested documentary evidence, the tenant made a payment of \$6,449.08 on or about August 14, 2014 and another payment of \$8,000.00 on or about September 5, 2014 (*see Zariff aff*, Ex. J). These are the last two payments the tenant ever made, and there is no dispute that the tenant was once again in default by its failure to make the \$6,449.08 payment due on September 4, 2014 and any of the other payments thereafter due as required by the Second Amended Stipulation. There is also no dispute that the tenant voluntarily vacated the premises on October 31, 2014.

The landlord commenced this action on December 12, 2014 against the tenant Shoe Corp. and Mei and David Chan, as the guarantors of the lease and signatories of the three Civil Court stipulations. The complaint alleges that, by virtue of their default under the terms of the Second Amended Stipulation, defendants Mei and David Chan were not released from their obligations under the personal guaranty, and that all defendants remain liable for the rent and additional rent due under the lease, calculated to be \$89,337.62 as of the date of the complaint, plus all rents that

continue to accrue through the end of the lease term on December 31, 2019,¹ plus an award of attorneys' fees.

A party's right to recover upon a defendant's default in answering is governed by CPLR 3215, and, pursuant thereto, the moving party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR 3215 [f]; *Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 617 [1st Dept 2012]). However, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [McGuire, J., concurring], quoting *Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]).

The summons and complaint was served on Shoe Corp. on December 23, 2014, pursuant to Business Corporation Law § 306, by service on the Secretary of State. An additional copy of the summons and complaint was served by regular mail on January 5, 2015, addressed to Shoe Corp. c/o Mei Chan, 2606 Broadway, New York, New York 10025, in accordance with CPLR 3215 (g) (4). Both Mei and David Chan were served on December 26, 2014, pursuant to CPLR 308 (2), by delivery of a copy of the papers to a person identified as a relative at their residence in Brooklyn, and an additional copy was mailed on December 31, 2014. A second copy was mailed on January 5, 2015, in accordance with CPLR 3215 (g) (3) (i). There is no question that both Mei and David Chan were personally served in accordance with the CPLR, and, in fact, admit receiving the summons and complaint on December 26, 2014 (*see* Chan aff, ¶ 35). In

¹ According to the moving affidavit of plaintiff's principal, the premises were relet to a new tenant, who will start paying rent at the rate of \$10,500.00 on September 1, 2015 (*see* Zarif aff, ¶ 15). However, the moving papers only seek a judgment for unpaid rent and additional rent through August 1, 2015.

* 6]
addition, the landlord has clearly established a prima facie claim for breach of a commercial store lease which was personally guaranteed by the individual defendants.

The Chans cross-move for relief from their default in answering under CPLR 5015 (a) (1), however, no order or judgment of default has yet been entered. The court, therefore, treats that aspect of their cross motion as being made pursuant to CPLR 3012 (d), pursuant to which leave to extend a defendant's time to answer a complaint may be granted "upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]). "[A] showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered" (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008] [citations omitted]; *see also Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]; *Empire HealthChoice Assur., Inc. v Lester*, 81 AD3d 570, 571 [1st Dept 2011]).

"The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court" (*Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 1049 [2d Dept 2015], quoting *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904 [2d Dept 2008]). In this case, the Chans admit that they were properly served with the summons and complaint back in December 2014, admit that they read the papers, but claim that they "did not fully comprehend" the papers and believed that "this was an action by Landlord to recover possession of Premises and/or to collect the monies unpaid under the 5/30/14 'So Ordered' Settlement and subsequent 2 amendments" (Chan aff, ¶ 36). The Chans claimed that they had no money to hire a lawyer, but that David Chan went to court sometime in January 2015, and was told by an unidentified clerk to get a lawyer or "wait for court papers," and not specifically told that they needed to file a written answer to the complaint. The Chans make this claim even as

they freely admit that the summons clearly states that they must appear or answer the complaint, otherwise a judgment will be taken against them by default (*id.*, ¶¶ 36-41). It was not until November 9, 2015, after obtaining two lengthy adjournments of the motion, that the Chans finally appeared in this action, more than ten months after admittedly being served with process.

While the court is sympathetic to the financial plight facing the Chans after the failure of their shoe business, their contentions that they did not understand the meaning and import of the summons and complaint, the latter which clearly seeks to recover an amount of money well in excess of the arrears sought in the Civil Court stipulations, cannot be credited. Even so, a defendant's "[f]ailure to understand the need to defend or erroneous assumptions concerning the validity of an action do not constitute excusable neglect" (*Stoltz v Playquest Theater Co.*, 257 AD2d 758, 759 [3d Dept 1999]; *see also Wells Fargo Bank, NA v Besemer*, 131 AD3d at 1049; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 1167-1168 [2d Dept 2010]; *Dorrer v Berry*, 37 AD3d 519, 520 [2d Dept 2007]; *Pagano v U.W. Marx, Inc.*, 223 AD2d 817, 817-818 [3d Dept 1996]; *Voss Dental Lab v Surgitex, Inc.*, 210 AD2d 985, 985 [4th Dept 1994]; *Awad v Severino*, 122 AD2d 242, 242 [2d Dept 1986]). The court finds that the Chans' intentional failure to appear in this action until they were served with a motion for a default judgment is not an excusable default. According, that aspect of the cross motion by defendants Mei and David Chan to vacate their default and to compel the plaintiff to accept their late answer is denied.

In addition, the Chans have failed to state any legally cognizable grounds for dismissal of this action or removal to Civil Court. Their principal defense is that the lease and personal guaranties were terminated pursuant to the Stipulation, the Amended Stipulation and Second Amended Stipulation, contending that this was a "global settlement" which supercedes the terms of the lease, and the amount remaining due and owing to the landlord is only \$48,745.35. They

rely on an October 2, 2014 email from the landlord’s attorney, in which he acknowledged that the amount of arrears pursuant to the three stipulations was currently \$48,745.35 (*see* Chan aff, Ex. 7). However, this email clearly states that this amount of money must be paid in full, by certified check, at the time the tenant surrenders possession of the premises in order for the Chans to be released from their personal guaranties (*id.*). It is entirely consistent with the intent of all three stipulations, which provided that *if* the tenant surrendered possession by a date certain *and* timely paid the outstanding arrears as well as current use and occupancy, the Chans’ personal guaranties would be terminated. However, the Chans admittedly defaulted under the terms of all three stipulations and vacated the premises on October 31, 2014 without making *any* further payment towards reducing the rent arrears. According to the express terms of the Second Amended Stipulation, any failure to make the payments due thereafter, with “time being of the essence,” rendered the agreement void and that landlord was entitled to all of its remedies at law or equity (*see* Chan aff, Ex. 5, ¶ 5). In addition, paragraph 6 (a) specifically provides that the landlord was not waiving any default existing under the lease by entering into the Second Amended Stipulation. Thus, the Chans are asking the court to enforce only the favorable terms of a settlement agreement and to ignore not only their admitted default under that agreement, but the explicit provisions they agreed to with the advice of counsel regarding the consequences of a default.

The cross-moving defendants also claim that this action must be litigated in Civil Court, on the basis of the provision in the Second Amended Stipulation stating that the Civil Court would retain jurisdiction over the non-payment proceeding in order to enforce the terms of the stipulation. But, as stated above, the Second Amended Stipulation was rendered void when the tenant failed to make the payments due thereunder. And this action is not seeking to enforce the

terms of that failed settlement or a continuation of that proceeding, but is an independent action to enforce both the terms of the lease and the personal guaranties signed by the Chans, who were not named as defendants in the Civil Court action. The Chans' other defense, that a clerk's default pursuant to CPLR 3215 (a) is improper in this case since the amount sought by the landlord is not a sum certain and is contested by the Chans, is baffling since this is an application to the court pursuant to CPLR 3215 (b).

The moving affidavit of plaintiff's principal avers that the rent and additional rent due through August 1, 2015 is \$206,558.96, together with the \$11,504.96 allegedly incurred in prosecuting the Civil Court non-payment proceeding, for a total judgment of \$218,063.92 plus attorneys' fees incurred in this action (Zarif aff, ¶¶ 17-20). However, this figure does not take into account the tenant's \$34,000 security deposit, which was credited by the landlord as rental income on December 31, 2014 (*see id.*, Ex. J). In addition, the landlord claims entitlement to recover its attorneys' fees from the Civil Court non-payment proceeding pursuant to paragraph 19 of the lease and paragraph 5 of the personal guaranty. However, the lease provision provides for the collection of attorneys' fees only in the event that the landlord is the prevailing party. The parties reached a settlement before trial in Civil Court, and then the tenant voluntarily vacated the premises after breaching the terms of the settlement, and there is no evidence that the landlord ever proceeded to enter or enforce either the Civil Court money judgment against the tenant or the warrant of eviction. As for the personal guaranty, that document only provides for the collection of attorneys' fees incurred in enforcing the guaranty, not the lease. For these reasons, the landlord is only entitled to a judgment in the amount of \$172,558.96 plus attorneys' fees incurred in this action.

In conclusion, the landlord's motion for a default judgment is granted and the cross motion by defendants Mei and David Chan is denied. The Clerk is directed to enter a judgment in the amount of \$172,558.96 against the defendants, jointly and severally, and the plaintiff's request for an award of attorneys' fees in prosecuting this action is severed and referred to a Special Referee to hear and determine, pursuant to CPLR 4317 (b).

Accordingly, it is

ORDERED that the motion of plaintiff 201 Cedar Ave., LLC for a default judgment against defendants J.E.M. Shoe Corp. d/b/a Shoe Club NYC, Mei Yee Chan a/k/a Mei Yee Wang and David Chan a/k/a Chikengung Chan is granted and the Clerk is directed to enter judgment in favor of the plaintiff against said defendants, jointly and severally, in the amount of \$172,558.96 with costs and disbursements and legal interest from August 1, 2015; and it is further

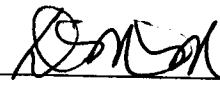
ORDERED that the cross motion of defendants Mei Yee Chan a/k/a Mei Yee Wang and David Chan a/k/a Chikengung Chan is denied; and it is further

ORDERED that the plaintiff's claim for reasonable attorneys' fees incurred in this action is severed and referred to a Special Referee to hear and determine; and it is further

ORDERED that plaintiff's counsel shall, within 20 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office in Room 119 at the courthouse located at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: March 29 2016


ENTER:



J.S.C.
DONNA M. MILLS