

**Kee Yip Realty Corp. v Win Tax Servs. Inc.**

2016 NY Slip Op 31471(U)

August 1, 2016

Supreme Court, New York County

Docket Number: 159064/2015

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  
KEE YIP REALTY CORP.,

Plaintiff,

Index No.  
159064/2015

**DECISION and  
ORDER**

- against -

WIN TAX SERVICES INC and WING LOK WANG,

Mot. Seq. 002

Defendants.

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

Plaintiff Kee Yip Realty Corp. ("Plaintiff") commenced this breach of contract action seeking to collect additional rents totaling \$110,242.07 from defendants Win Tax Services Inc. and Wing Lok Wang (collectively, "Defendants") allegedly due under a lease agreement (the "Lease") entered into by Plaintiff, as owner, and Win Tax Services Inc., as tenant, on August 1, 2005. Defendant Wing Lok Wang is the guarantor of the Lease.

On November 10, 2015, Defendants filed a motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), and CPLR 213(2). Defendants' motion to dismiss was granted without opposition on February 3, 2016.

Plaintiff now moves for an order, pursuant to CPLR 2001, 2005, and 5015, vacating the judgment and allowing Plaintiff to submit opposition papers to Defendants' motion to dismiss, and granting Plaintiff leave to amend the complaint pursuant to CPLR 3025. Plaintiff submits the affidavit of Pao C. Lee, President of Kee Yip Realty Corp., and the affirmation of Rina Milos, Esq. in support.

In opposition, Defendants submit the attorney affirmation of Renee Digrugilliers, Esq., annexing *inter alia* (i) a stipulation signed by the parties, dated October 13, 2015, extending the time to answer or move to November 16, 2015; (ii) e-mail service notification of the motion to dismiss sent to the parties, dated November 13, 2015; and (iii) rent checks written by Win Tax Services Inc. to Kee

Yip Realty Corp. in the amount of \$4,499.00, dated January 2011, January 2012, January 2013, January 2014, and January 2015.

Defendants argue that the motion to vacate should be denied because Plaintiff has failed to demonstrate an excusable default or a meritorious claim, as required under CPLR 5015.

In reply, Plaintiff submits the affirmation of Rina Milos, Esq., in which Milos avers that her law office “saw no email notification from the Court regarding the Defendant’s motion to dismiss” and that Plaintiff’s default was therefore unintentional and due to law office failure.

Pursuant to CPLR 5015, the court which rendered a judgment or order may, on motion, grant relief from the judgment or order upon the ground of “excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.” CPLR § 5015(a)(1).

In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under CPLR 5015(a)(1), the moving party must satisfy the burden of showing a “meritorious claim or defense” and “a reasonable excuse for the default.” *Sheikh v. New York City Transit Auth.*, 258 A.D.2d 347, 348 (1st Dep’t 1999); *Pena v. Mittleman*, 179 A.D.2d 607, 609 (1st Dep’t 1992); *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 (1st Dep’t 2007). The determination of what constitutes a reasonable excuse for a default lies within the motion court’s discretion. *Orimex Trading, Inc. v. Berman*, 168 A.D.2d 263 (1st Dep’t 1990).

Pursuant to CPLR 2005, upon an application satisfying the requirements of CPLR 5015(a), “the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.” CPLR § 2005. A claim of law office failure may be accepted as a reasonable excuse where the claim is supported by a “detailed and credible” explanation of the default at issue. *Henry v. Kuveke*, 9 A.D.3d 476, 479 (2d Dep’t 2004). Conclusory and unsubstantiated claims of law office failure are insufficient. *See Galaxy Gen. Contr. Corp. v. 2201 7th Ave. Realty LLC*, 95 A.D.3d 789, 790 (1st Dep’t 2012) (where the claimed law office failure is “conclusory and unsubstantiated” it cannot excuse default); *Piton v. Cribb*, 38 A.D.3d 741, 742 (2d Dep’t 2007) (“[A] conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse.”).

Here, Plaintiff's counsel alleges that the failure to submit opposition papers in response to Defendants' motion to dismiss was due to law office failure—namely, that Plaintiff's law office did not see the email notification from the Court regarding Defendants' motion to dismiss. Defendants submit proof that the email notification was sent to the email address of Plaintiff's counsel on November 13, 2015, in accordance with Section 202.5-bb(c)(1) of the Uniform Rules for New York State Trial Courts. Because Plaintiff's claim of law office failure is conclusory and not supported by a detailed and credible explanation, Plaintiff's request to excuse its delay in responding to Defendants' motion to dismiss is denied. *See Wells Fargo Bank, N.A. v. Gioia*, 114 A.D.3d 766, 767 (2d Dep't 2014) (“[L]aw office failure should not be excused . . . where allegations of law office failure are conclusory and unsubstantiated.”); *see also Bryant v. New York City Hous. Auth.*, 69 A.D.3d 488, 489 (1st Dep't 2010) (“[D]efendant's bare denial of receipt of the motion papers, and of a subsequent letter from plaintiff's counsel referring to the pending motion, was insufficient to rebut the proof that the motion papers were properly mailed and the presumption of receipt arising from that proof.”).

Moreover, even assuming a reasonable excuse, Plaintiff fails to set forth a meritorious claim. In the Verified Complaint, dated September 1, 2015, Plaintiff alleges that Defendants failed to pay additional rents (fixed rent increases and real estate tax escalation charges) between July 1, 2006 and July 1, 2015. Pursuant to CPLR 213(2), an action upon a contractual obligation or liability, express or implied, must be commenced within six years. Accordingly, Plaintiff's claim for the period from July 1, 2006 through August 31, 2010 is barred by the statute of limitations.

Furthermore, under the Lease's “Escalation for Increase in Real Estate Taxes” provision in the Rider, the Tenant's tax payment for each tax year “shall be due and payable in two equal semi-annual installments . . . based upon the written comparative statement furnished by Landlord prior to the commencement of such Tax Year.” There is no evidence in the record that Plaintiff furnished a written comparative statement or demanded additional real estate tax escalation charges prior to February 12, 2016. Plaintiff admits that the “comparative tax statement” was provided to Defendants on February 12, 2016, five months after the action was commenced, and does not allege in either the Verified Complaint or the Proposed Amended Verified Complaint that the comparative tax statement was regularly or timely furnished to Defendants during the lease period. Accordingly, Plaintiff failed to satisfy a condition precedent provided for in the Lease. *See Winfield Capital Corp. v. Mahopac Auto Glass, Inc.*, 208 A.D.2d 715 (2d Dep't 1994)

(affirming grant of summary judgment because the lease established a condition precedent to the tenant's duty to pay additional rent and landlord did not dispute tenant's allegation that landlord had failed to give notice of the amounts due for any of the years in question); *Mount Sinai Hosp. v. 1998 Alexander Karten Annuity Trust*, 110 A.D.3d 288 (1st Dep't 2013) (finding that the timely submission of a statement for additional rent—no more than two years after the expiration of that year—was a constructive condition precedent to tenant's obligation to pay such additional rent in a given year).

With respect to the allegation of unpaid "fixed rent" increases, Defendants assert that a renewal lease was never entered into between the parties, Win Tax Services Inc. continued to occupy the premises as a month-to-month tenant, and the parties never reached an agreement as to the amount of the fixed rent for the renewal term as required by Paragraph 65 ("Extension Option") subsection B.

The August 1, 2005 Lease was for an initial five (5) year term, with the option to extend the term of the lease for a renewal term of five (5) years (the "Renewal Term"). Paragraph 65 subsection C ("Continuation of Prior Rent") provides:

If, for any reason, the Renewal Term shall commence prior to the determination of the fixed rent for such term, Tenant, in the meantime, shall pay the monthly installments of fixed rent (the "Prior Rent") in effect under this lease on the last day of the term being renewed (in addition to any additional rent).

Pursuant to Paragraph 43 of the Lease, the fixed rent on the last day of the initial term was \$4,499.00 per month. Defendants submit rent checks demonstrating that for the years 2011–2015, Defendants paid \$4,499.00 per month as required by Paragraph 65 subsection C of the Lease. Plaintiff submits a statement, dated April 1, 2015, in which Win Tax Services Inc. is only credited with paying \$48,000 per year (\$4,000 per month) in the years 2011–2015. Plaintiff does not explain the discrepancy or dispute the authenticity of the rent checks submitted by Defendants. Because the documentary evidence plainly does not support Plaintiff's claim that Defendants failed to pay "fixed rent" increases due under the Lease, Plaintiff fails to raise a meritorious claim sufficient to support its motion to vacate the judgment and amend the complaint.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is denied in its entirety.

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

DATED: <sup>AUG</sup> ~~APR~~ 1, 2016

AUG 0 1 2016

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.