

SLG 48E43 LLC v Kovacs
2016 NY Slip Op 32509(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 653764/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SLG 48E43 LLC,

Index No.: 653764/2016

Plaintiff,

DECISION & ORDER

-against-

G. THOMAS KOVACS, D.C.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff SLG 48E43 LLC (SLG) moves for default judgment [Motion Seq 001] against defendant G. Thomas Kovacs, D.C. (Kovacs). CPLR § 3215. The motion is unopposed. For the reasons that follow, the motion is denied, without prejudice, and with leave to renew.

CPLR 3215(a) authorizes the court to enter a default judgment against a party who fails to appear. The moving party must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(f); *Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 (2nd Dept 2010) (“A verified complaint may be used as the affidavit of the facts constituting the claim...but it must allege enough facts to enable a court to determine that a viable cause of action exists.”); *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (party moving for default must offer firsthand confirmation of facts constituting claim); Siegel, *Practice Commentaries*, McKinney’s Cons Laws of NY, Book 7B, CPLR C3215:16, p 557, Thomson Reuters ©2014. “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.” *Feffer*, 210 AD2d at 61 (“Some proof of liability is...required to satisfy the court as to the prima facie validity of the uncontested cause of action.”). The evidentiary effect of a default is that the defendant is deemed to admit the

traversable allegations in the complaint, including liability. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984).

Here, SLG seeks default judgment on its two causes of action against Kovacs for breach of a commercial lease agreement. Dkt. 1 [Complaint] at 3-4. It submits an affidavit of merit by Jason Morello, an account manager for SLG's managing agent. Dkt. 5 [October 21, 2016 Affidavit of Jason Morello]. The affidavit contains a copy of a November 2004 lease between "48 East 43rd Street Assoc. LTD", as landlord, and Kovacs, as tenant, for office space located at 48 East 43rd Street in Manhattan. Dkt. 6 [Lease Agreement] at 2. "On or about November 12, 2004, Plaintiff's predecessor in interest, asd landlord, entered into a written lease agreement...with Defendant for the entire 4th floor of the building known as 48 East 43rd Street, New York, New York.... Dkt. 1 [Complaint] at 5.

The lease runs for fifteen years, from February 1, 2005 to January 31, 2020, and calls for a base rent of \$96,000 per year, to be paid in monthly installments of \$8,000. Dkt. 6 [Lease Agreement] at 2. Morello submits an itemization of Kovacs' alleged arrears under the lease agreement, which indicates that in February 2010, Kovacs stopped paying rent, thereby defaulting under the lease agreement. *See* Dkt. 7 [Statement of Arrears] at 2. In April 2011, Kovacs was evicted. Dkt. 5 ¶ 5. The landlord apparently never re-let the property, and, in January 2015, the building located at 48 East 43rd Street was vacated for demolition. *Id.* ¶ 9.

SLG's complaint, filed on July 18, 2016, seeks \$164,563.43 in damages under the lease agreement for Kovacs' various arrears accrued from the beginning of the lease to May 4, 2011 (the month after his eviction). *Id.* ¶ 8. SLG also seeks \$352,000 in damages for Kovacs' failure to pay rent for 44 months after his eviction, from June 2011 to January 2015 (the month that the leased property was demolished). *Id.* ¶¶ 8-9.

SLG submits ample proof of Kovacs' breach of the lease agreement and his default in appearing in this action.¹ However, although Morello states that under article 18 of the lease, "[Kovacs] remained liable for the payment of rent...until the expiration of the term of the [l]ease" [see Dkt. 5 ¶ 7], SLG cites no specific language from article 18 to that effect. In fact, Article 18 states that "[i]n the case of...default, re-entry, expiration² and/or dispossession[ion] by summary proceedings... the rent, and additional rent, shall become due thereupon and be paid **up to the time of such re-entry, dispossession[ion] and/or expiration...**" Dkt. 6 at 6.. (emphasis added). Thus, rent is due only until Kovacs' dispossession and reentry, that is, April 2011.

Further, "[t]he general rule applicable to contract actions is that a six-year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation. However, where a contract provides for continuing performance over a period of time, each **breach** may begin the running of the statute anew such that accrual occurs continuously.'" *Stalis v Sugar Creek Store, Inc.*, 295 AD2d 939, 940 (4th Dept 2002) (citations omitted). Here, the rent due from February 1, 2010 until July 18, 2010 is time-barred. In sum, damages should be calculated for the rent and additional rent for the period from July 18, 2010 to the April 2011 eviction and for reasonable attorney fees. Accordingly, it is

ORDERED that plaintiff SLG 48E43 LLC's motion to for a default judgment [Motion Sequence 001] against Kovacs is granted, on default, as to liability, and it is further

ORDERED that an inquest on damages as to the rent and additional rent due for the period from July 18, 2010 to the date of eviction and for reasonable counsel fees accrued during

¹On July 20, 2016, SLG properly served Kovacs with process under CPLR § 308(2). See Dkt. 2 [Affidavit of Service]. SLG later served Kovacs with supplemental notice of under CPLR § 3216(g). Dkt. 3 [Additional Mailing].

² "Expiration" appears to refer to the expiration of the landlord's termination notice set forth in the first part of the preceding section 17(1).

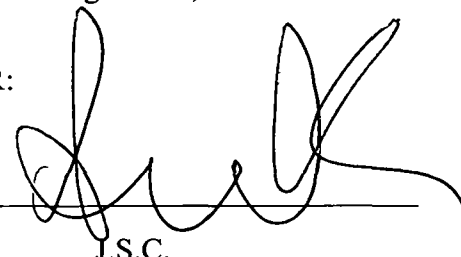
that period and on this motion is referred to a Special Referee to hear and determine; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiffs shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiffs shall serve a copy of this order upon defendant by overnight mail; and it is further

Dated: December 19, 2016

ENTER:

A handwritten signature in black ink, appearing to be 'Shirley', written over a horizontal line.

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C