

22 W. 34th St. LLC v Ohayon

2017 NY Slip Op 31106(U)

May 19, 2017

Supreme Court, New York County

Docket Number: 652360/2015

Judge: Eileen A. Rakower

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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: PART 15

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 22 WEST 34TH STREET LLC,

Plaintiff,

Index No.
 652360/2015

**DECISION and
 ORDER**

- against -

Mot. Seq. #001

ISSAC OHAYON,

Defendant.

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

This is an action for breach of a guarantee agreement. Plaintiff 22 West 34th Street LLC (“Plaintiff”) formerly known as Darby Realty Co. entered into a commercial lease agreement (the “lease”) with tenant Hertal Ovadia for the premises known as 22-30 West 34th Street, Commercial Space, New York, NY 10001 (“the premises”). (plaintiff’s exhibit 1) The lease, dated July 19, 1993, was for ten years, commencing on August 1, 1993 and expiring on July 31, 2003. (plaintiff’s exhibit 1) On September 1, 2003, the lease was assigned from Hertal Ovadia to Midtown Camera Corp. (plaintiff’s exhibit 2) Pursuant to this assignment agreement (“assignment agreement”), Midtown Camera Corp. assumed Hertal Ovadia’s obligations under the lease. (plaintiff’s exhibit 2) Hertal Ovadia was released and relieved of all liability. (plaintiff’s exhibit 2) Thereafter Midtown Camera Corp. and Plaintiff entered into a lease modification and extension agreement (“extension agreement”) that extended the lease for a period of 7 years and 5 months as of May 2, 2003. (plaintiff’s exhibit 3) Plaintiff only agreed to this extension because Defendant Issac Ohayon (“Ohayon”) entered a guarantee agreement (the “guarantee agreement”) with Plaintiff on May 8, 2003 guaranteeing Midtown Camera Corp.’s performance under the lease and extension agreement. (plaintiff’s exhibit 4) After Midtown Camera Corp.’s extension expired, Plaintiff regained legal possession of the premises on January 4, 2011. (plaintiff’s exhibit 5) However Plaintiff claims that Ohayon breached the guarantee agreement by failing to pay rental arrears and real estate taxes owed by Midtown Camera Corp.

Plaintiff therefore commenced this action by summons and verified complaint on July 2, 2015 against Ohayon. Plaintiff seeks damages for Ohayon's failure to pay rental arrears in the amount of \$172,953.32 plus interest from August 1, 2010 together with costs and disbursements. Plaintiff also seeks damages for Ohayon's failure to pay real estate taxes in the amount of \$6,258.42 plus interest from July 1, 2010 with costs and disbursements. Plaintiff now moves for a default judgment pursuant to CPLR 3215 (b) against Ohayon seeking the relief requested in its verified complaint.

In support, Plaintiff submits the affirmation of attorney Laila Elsharkawi, Esq. dated January 3, 2017; the affidavit of Estralda Tudor-Davis dated November 23, 2016; the Lease Agreement dated July 26, 1993; the Assignment of Lease agreement between Hertal Ovadia and Midtown Camera Corp; the lease Modification and Extension Agreement dated May 3, 2003 between Plaintiff and Midtown Camera Corp., Isaac Ohayon's guarantee agreement dated May 8, 2003; the Marshal's Legal Possession document dated January 4, 2011 detailing that Plaintiff has legal possession of the premises; the summons and verified complaint dated June 24, 2015; Qazi Haider's affidavit of service with respect to the summons and verified complaint served on Ohayon; Brian Chiantella's affidavit of service with respect to the Notice of Motion served on Ohayon and a ledger prepared and kept by Plaintiff in the regular course of business evidencing the \$179,211.74¹ owed by Midtown Camera Corp. from February 1, 2007 to January 18, 2011.

Plaintiff's counsel, Laila Elsharkawi, Esq., avers that Ohayon was served the summons and verified complaint on September 30, 2015. Additionally, licensed process server, Qazi Haider, affirms in an affidavit of service that on September 20, 2015 Haider served Ohayon by delivering the summons and verified complaint to a male of suitable age residing at Ohayon's usual place of abode. On October 2, 2015, Haider mailed a copy of the summons and verified complaint in a first class postpaid envelope to Ohayon's residence. Haider also mailed a second copy of the summons and verified complaint in a first class postpaid envelope to Ohayon as additional notice. The envelope bore the legend "personal and confidential" and did not indicate that the communication was from an attorney. (plaintiff's exhibit 7)

¹ This sum is comprised of the amounts Midtown Camera Corp. owes Plaintiff, specifically \$32,953.32 for the month of August 2010 and \$35,000 per month for the months of October 2010 through and including January 2011. The sum is also comprised of the \$6,258.42 Midtown Camera Corp. owes Plaintiff for real estate taxes. (aff of Elsharkawi at 3)

Proof of service was filed on October 15, 2015. Lastly, Brian Chiantella avers in his affidavit of service that on January 3, 2017 he served the Notice of Motion on Ohayon. (aff of Chiantella)

With respect to the guarantee agreement, it provides that, "Isaac Ohayon . . . does hereby personally guaranty and warrant the payment and performance of all covenants, obligations and agreements on the part of Tenant to be paid or performed under the Lease and all modifications and extensions thereof." (plaintiff's exhibit 4) The guarantee further provides that, "Guarantor waives . . . any right to require that action first be brought against Tenant." (plaintiff's exhibit 4)

Defendant Ohayon does not oppose.

CPLR 3215 (a) provides that "When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . ." (CPLR 3215 [f]) The standard of proof on an application for judgment by default is not stringent, "amounting only to some firsthand confirmation of the facts". (*Feffer v Malpeso*, 210 A.D.2d 60, 61 [1st Dept 1994])

"Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." (CPLR 3215 [f])

CPLR 3215 (g) (3) (i) provides that "When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt."

Here, Plaintiff files proof of service of the summons and verified complaint by producing the affidavit of the process server Qazi Haider. Plaintiff also files proof of the facts by appending the lease (plaintiff's exhibit 1), the assignment agreement (plaintiff's exhibit 2), the extension agreement (plaintiff's exhibit 3), the

guarantee agreement (plaintiff's exhibit 4) and a ledger prepared and kept by Plaintiff in the regular course of business evidencing the \$179,211.74 owed by Midtown Camera Corp. from February 1, 2007 to January 18, 2011.

Additionally, Plaintiff submits the verified complaint filed July 2, 2015 detailing the facts constituting the claim and the amount due of \$179,211.74. As to the default, Plaintiff provides the affidavit of its attorney Laila Elsharkawi, Esq. dated January 3, 2017. Because this is an action for breach of contract against Ohayon, who is a natural person, Plaintiff provides the affidavit of Qazi Haider. Therein Haider affirms that Ohayon was served a second copy of the summons and verified complaint by first class mail in an envelope bearing the legend "personal and confidential" and not indicating that the communication was from an attorney in compliance with CPLR 3215 (g) (3) (i).

Wherefore, it is hereby,

ORDERED and ADJUDGED that Plaintiff 22 West 34th Street LLC's motion pursuant to CPLR 3215 for a default judgment against Defendant Isacc Ohayon is granted in the amount of \$172,953.32 with interest at the statutory rate of 9% per annum from August 1, 2010 until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED and ADJUDGED that Plaintiff 22 West 34th Street LLC's motion pursuant to CPLR 3215 for a default judgment against Defendant Isacc Ohayon is granted in the amount of \$6,258.42 with interest at the statutory rate of 9% per annum from from July 1, 2010 until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

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

DATED: May 17, 2017



EILEEN A. RAKOWER, J.S.C.