

<b>Goose Mtn. NYC, LLC v Manafort</b>
2017 NY Slip Op 32883(U)
January 5, 2017
Supreme Court, New York County
Docket Number: 656138/16
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: Hon. Nancy Bannon  
Justice

PART 42

**GOOSE MOUNTAIN NYC, LLC a New York limited liability company, and F9 PROPERTIES, LLC, a New Hampshire limited liability company**

INDEX NO. 656138/16

- v -

MOTION DATE 9/1/17

**JESSICA MANAFORT, individually, JEFFREY YOHAI, individually, and YOHAI REI, LLC, a New York limited liability company**

MOTION SEQ. NO. 001

The following papers were read on this motion for leave to enter a default judgment (CPLR 3215):

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law----- No(s). 1

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action to recover damages for breach of certain lease and guaranty agreements, the plaintiffs, Goose Mountain NYC, LLC, owner of real property located at 498 Broome Street in Manhattan, and its managing agent, F9 Properties, LLC, allege that defendants Yohai Rei, LLC, Jeffrey Yohai and Jessica Manafort, former tenants, rented three loft units in the building and failed to pay the plaintiffs rent while they unlawfully sublet the units and retained those proceeds. The individual defendants were signatories on the leases and personal guarantors of the leases, and are alleged to be principals in Yohai Rei, LLC. The plaintiffs seek damages in excess of \$700,000, and now move pursuant to CPLR 3215 for leave to enter a default judgment. No opposition is submitted.

According to the plaintiffs, the summons and complaint, dated November 22, 2016, were served on the defendants, and they failed to timely answer. By a stipulation of the parties' dated April 11, 2017, the plaintiff discontinued the action with prejudice and without costs as against defendant Jessica Manafort. By an order dated April 17, 2017, in a separate action (Index No. 158973/2016), this court (Edmead, J.) declared defendants Jeffrey Yohai and Yohai Rei, LLC to be in violation of their leases and enjoined them from violating their tenancies. The defendants thereafter vacated or were excluded from the premises, and this action proceeded.

By a stipulation dated June 21, 2017, the plaintiff agreed to extend the time for defendants Jeffrey Yohai and Yohai Rei, LLC to answer to July 7, 2017, and those defendants waived any defenses regarding service of process and consented to personal jurisdiction. The defendants filed an answer with counterclaims on July 31, 2017, more than three weeks after expiration of the agreed upon extension. An affidavit of service filed with the court states that the answer was served on the

plaintiffs' counsel on August 3, 2017. The plaintiffs filed the instant motion on August 8, 2017. In his affirmation in support of the motion, counsel for the plaintiffs alleges that the untimely answer was rejected by his clients. In his affidavit, Tom Sullivan, who claims to be "sui generis" and authorized to speak on behalf of the plaintiffs, states that the defendants never asked for an extension of time to answer beyond July 7, 2017. The defendants did not oppose the default motion. Nonetheless, on November 20, 2017, while their default motion was pending, the plaintiffs filed and served an answer to the defendants' counterclaims. The motion must be denied.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). The plaintiffs did not submit proof of service of either the summons and complaint or the instant motion on the defendants. See CPLR 3215[g]. While the defendants waived any defenses regarding service of process of the summons and complaint, they did not do so as to the motion. Thus, even assuming they presented proof of the facts constituting their claims, the plaintiffs cannot be granted relief under CPLR 3215. Nor did they expressly reject the late answer. Even if counsel's allegation in that regard were sufficient, the plaintiffs thereafter waived any objection to the late answer by serving a reply to the defendants' counterclaims. It is well settled that a plaintiff who serves a reply to a defendant's counterclaims after rejecting a late answer and moving for a default judgment waives any objection to the untimeliness of the answer. See Rossini Excavating Corp. v Shelter Rock Builders, LLC, 89 AD3d 467 (1<sup>st</sup> Dept. 2011); Oparaju v Duran, 18 AD3d 725 (2<sup>nd</sup> Dept. 2005). That is, service of their reply to the defendants' counterclaims effectively barred the default motion.

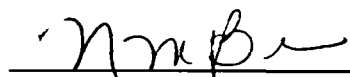
Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is denied, and it is further,

ORDERED that the parties shall appear for a preliminary conference on March 1, 2018, at 2:30 p.m.

This constitutes the Decision and Order of the court.

Dated: January 5, 2017

 JSC  
HON. NANCY M. BANNON

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER