

Masar Props. N.V. Ltd. v Social 34 LLC
2018 NY Slip Op 30042(U)
January 9, 2018
Supreme Court, New York County
Docket Number: 155680/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X
MASAR PROPERTIES N.V. LTD.

INDEX NO. 155680/2017

Plaintiff,

MOTION DATE _____

- v -

SOCIAL 34 LLC d/b/a SOCIAL APPAREL,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for

DEFAULT JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this action seeking damages for breach of a lease, plaintiff Masar Properties N.V. Ltd. moves, pursuant to CPLR 3215, for a default judgment against defendant Social 34 LLC d/b/a Social Apparel. After a review of the motion papers, as well as the relevant statutes and case law, the application, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2014, plaintiff Masar Properties N.V., Ltd., as landlord, entered into a lease with defendant Social 34 LLC d/b/a Social Apparel, as tenant, for premises consisting of Store #1

East Mezzanine in the building located at 147 West 35th Street, New York, New York for a term commencing September 1, 2014 and ending August 31, 2020. Doc. 7, at par. 3; Doc. 11.¹

Paragraph 18 of the lease provided, inter alia, that defendant was to be responsible to plaintiff for liquidated damages arising from its default. Doc. 11, at par. 18. Such damages included damages incurred as a result of re-letting the premises, including attorneys', brokerage, and advertising fees. Doc. 11, at par. 18.

Paragraph 19 of the lease provided, inter alia, that, if it was necessary for plaintiff to commence any proceeding against defendant arising from a breach of the lease, then plaintiff, if successful, was entitled to recover any reasonable fees, including attorneys' fees, from defendant in connection with the same. Doc. 11, at par. 19. Paragraph 71 of the lease also entitled plaintiff to attorneys' fees from defendant where defendant's actions caused plaintiff to "engage an attorney and/or incur any other expense." Doc. 11, at par. 71.

Paragraph 41 of the lease provided for the monthly and annual rent for the premises. Doc. 11, at par. 41. Paragraph 42 of the lease provided for the payment of taxes and operating expenses. Doc. 11, at par. 42.

Paragraph 47 of the lease required defendant to pay 12% interest per annum on any late payments. Doc. 11, at par. 47.

Paragraph 52 of the lease provided, inter alia, that if defendant defaulted in paying rent, then defendant would be responsible for paying plaintiff that portion of any real estate brokerage

¹ Although Joon Kim executed a "Limited Guaranty" of the base rent and additional rent payments, dated August 18, 2014, that individual has not been named as a defendant herein. This Court notes that, despite being labeled a "Limited Guaranty", the said document provides that it is "absolute and unconditional and, to the extent monetary obligations are contemplated hereunder, is a guaranty of payment, not of collection." Doc. 11, Limited Guaranty, at par. 3.

fee incurred by plaintiff based on the unexpired portion of the lease, as well as any brokerage commissions incurred by plaintiff as a result of having to re-let the premises. Doc. 11, at par. 52.

This action was commenced by filing of a summons and verified complaint on June 22, 2017. Doc. 1. The complaint was verified by David Zaga, plaintiff's managing director, and defendant was served via the Secretary of State pursuant to Limited Liability Company Law § 303 on July 10, 2017. Doc. 1; Doc. 9. Additional service of the summons and complaint was made pursuant to CPLR 3215(g) on July 19, 2017. Doc. 10. Defendant has failed to answer or otherwise move against the complaint and his time to do so has expired. Ginsburg Aff. In Supp., at par. 17.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant. In support of the motion, plaintiff submits an attorney affirmation; the affidavit of Zaga²; the summons and complaint (verified by Zaga); an affidavit of service; proof of service pursuant to CPLR 3215(g); the lease between plaintiff and defendant; proof of expenses incurred in re-letting the premises; proof of brokerage fees incurred in re-letting the premises; and the lease between plaintiff and its new tenant dated June 1, 2017.

In his affidavit in support of the motion, Zaga states, inter alia, that, on August 18, 2014, plaintiff, as landlord, entered into a commercial lease with defendant, as tenant, to rent Store #1 East Mezzanine in the building located at 147 West 35th Street, New York, New York. Doc. 7, at par. 3. Zaga further states that the lease term was September 1, 2014 until August 31, 2020 but that, on January 31, 2017, defendant breached its lease by surrendering possession of the premises and that it has not paid any rent or additional rent since February of 2017. Doc. 7, at pars. 5-6.

² Although Zaga represents in the verification of the complaint that he is plaintiff's managing director, he states in his affidavit that he is President of Real Estate of Falcon Properties, Inc., plaintiff's managing agent. In either event, he has sworn to his personal knowledge of the facts of giving rise to this matter.

Zaga urges that, as a result of defendant's breach, it owes plaintiff damages arising from the lease provisions set forth above.

LEGAL CONSIDERATIONS

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that "[o]n 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 Atlantic Cas. Ins. Co. v. R.J.N.J. Servs. Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 63 (2003).

Here, plaintiff submits proof of service of the summons and verified complaint, as well as proof of additional service of these documents. Docs. 8-9. Plaintiff's counsel also submits an affirmation in support of the motion attesting to the fact that defendant has neither answered the complaint nor moved to dismiss or requested an extension of time to answer. Ginsburg Aff. In Supp., at pars. 6-7. Further, the complaint, verified by Zaga, as well as Zaga's affidavit in support of the motion, sets forth the facts constituting the claim insofar as they establish defendant's breach of its lease obligation. Docs. 1, 7. Thus, plaintiff is entitled to a judgment of default against defendant on liability pursuant to CPLR 3215.

However, since plaintiff has not established its entitlement to recover a sum certain from defendant, this matter is referred to a Special Referee for an inquest in order to calculate plaintiff's

damages pursuant to the lease, including the amount of attorneys' fees owed to it by defendant. For instance, plaintiff claims that it is entitled to the payment of rent and additional rent from February 1, 2017, when defendant surrendered the premises, until August 31, 2017. Doc. 7, at par. 8. However, plaintiff concedes that it is entitled to "rent and additional rent as it accrues until the expiration of the [l]ease term or [when l]andlord re-rents the [p]remises, whichever occurs first" (Doc. 7, at par. 13) and it fails to explain why it is entitled to any rent through August 31, 2017 when the premises were re-let as of June 1, 2017. Doc. 15. Nor does plaintiff explain why the interest which it claims it is owed should be calculated daily (Doc. 7, at par. 17) when paragraph 47 of the lease requires that it be calculated "per annum". Doc. 7, at par. 8; Doc. 11, at par. 42. Further, although plaintiff claims that it had to make certain repairs in order to re-let the premises, it annexes as its purported proof of such repairs invoices written in Spanish. Doc. 13. Clearly it needs to provide an English interpretation by a translator accompanied by an affidavit stating the translator's qualifications and averring that the translation is accurate. Additionally, since plaintiff has submitted no proof regarding attorneys' fees it incurred, it must do so at the inquest.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Masar Properties N.V. Ltd. for a default judgment (Motion Sequence 001) against defendant Social 34 LLC d/b/a Social Apparel is granted as to liability, and it is further

ORDERED that an inquest on damages as to the rent and additional rent due, as well as for other damages arising from defendant's breach of the lease, including reasonable attorneys' fees, 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, plaintiff 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 sref-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

ORDERED that this constitutes the decision and order of the court.

1/9/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

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CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: