

**Yee Shan Benevolent Socy., Inc. v Sophia Beauty
N.Y. Corp.**

2018 NY Slip Op 31448(U)

June 29, 2018

Supreme Court, New York County

Docket Number: 656356/2016

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

INDEX NO. 656356/2016

YEE SHAN BENEVOLENT SOCIETY, INC.,

MOTION DATE 02/05/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

SOPHIA BEAUTY NEW YORK CORP., JOSEPH KIM

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents,

The following facts are undisputed. Plaintiff Yee Shan as Landlord and defendant Sophia Beauty as Tenant entered into a written lease agreement for the Premises for a term commencing on April 1, 2015 and ending on March 31, 2020 (the "Lease"). Payments under the Lease were guaranteed by defendant Kim under a Guarantee dated April 5, 2015. Starting in April 2016, Tenant failed to pay rent and plaintiff commenced a summary proceeding. In September 2016, Tenant vacated the premises and plaintiff commenced this action seeking \$391,936.12 for rent due from April 2016 through March 2020. Plaintiff also seeks \$21,170.00 for attorneys fees. Defendant Kim answered but Tenant has not appeared. Plaintiff filed the instant motion seeking a default judgment against Tenant and summary judgment against Kim.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the

court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The Appellate Division recently held that a plaintiff seeking summary judgment succeeded in making “a *prima facie* showing for rent arrears accruing. . .by submitting the original lease. . .and a detailed statement documenting outstanding rent arrears” (*Dee Cee Assoc. LLC v 44 Beehan Corp.*, 148 AD3d 636, 641 [1st Dept 2017]).

Plaintiff argues that it is entitled to the full amount due from April 2016 through March 2020 as liquidated damages under an acceleration clause in the Lease. Specifically, Paragraph 18 of the Lease states:

“Tenant or the legal representatives of Tenant shall also pay Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease.”

However, plaintiff is incorrect. Paragraph 18 is not an acceleration clause. Rather, it permits plaintiff to collect “the net amount, if any, of the rents collected of the subsequent lease or leases of the demised premises.” Only upon coming due, can Plaintiff seek to recover the difference between what defendants owe under the Lease and the amount actually collected, if any.

Plaintiff has established through the submission of the exhibits to this motion, including but not limited to, the lease, guaranty, rent ledger and the affidavit of Hung-Kwan Cheung, a *prima facie* entitlement to summary judgment for only a portion of the amount sought. As the entirety of the Lease term has not occurred, plaintiff is not yet entitled to collect rent under the Lease.

As plaintiff has established its *prima facie* entitlement to summary judgment, to prevail, defendants have the burden to demonstrate by admissible evidence the existence of a factual issue requiring a trial (*see Zuckerman*, 49 NY2d at 557). Defendants has failed to do so. Defendant Kim's opposition spends considerable time discussing liquidated damages and the law of penalties in opposition to plaintiff's discussion about the same. However, as discussed above, Paragraph 18 of the Lease is not an acceleration clause or a penalty provision, but permits plaintiff to recover actual losses under the Lease because of Tenant's breach.

In addition, the opposition is completely devoid of any disputed facts. As found by the Court in *Dillenberger v Fifth Avenue Owners Corp.*, "...mere conclusory allegations regarding the existence of questions of fact are insufficient to defeat a motion for summary judgment" (155 AD2d 327 [1st Dept 1989]). Therefore, defendants have failed to meet their required burden demonstrating evidence of existing factual issues.

Finally, plaintiff's motion for attorneys fees is granted to the extent of setting the matter down for a fees hearing in front of a special referee. Accordingly, it is therefore

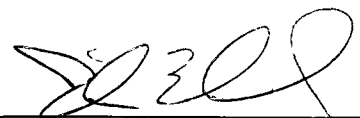
ORDERED that plaintiff is granted summary judgment and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Kim in the sum of \$216,881.35 for rent and late fees from April 2016 through June 30, 2018, with interest from July 1, 2018 at the statutory

rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Sophia Beauty is granted and the Clerk is directed to enter judgment in favor of plaintiff and against said defendant in the sum of \$216,881.35 for rent and late fees from April 2016 through June 30, 2018, with interest from July 1, 2018 at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's cause of action seeking attorney's fees is granted to the extent of setting down the issue for a hearing. A hearing is granted to determine the amount of fees to be awarded. Plaintiff shall cause the matter to be placed upon the calendar for such hearing. Plaintiff shall, within 20 days from the date of this order, serve a copy of this order upon (counsel for) all parties hereto by regular mail and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the decision and order of the Court.

| | | |
|--------------------------|--|--|
| <u>6/29/2018</u> DATE |  DAVID BENJAMIN COHEN, J.S.C. | |
| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> GRANTED | <input type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> DENIED | <input type="checkbox"/> OTHER |
| | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | <input type="checkbox"/> REFERENCE |

HON. DAVID B. COHEN
J.S.C.