

**Limestone Assoc., LLC v American Rest. Holdings,
Inc.**

2018 NY Slip Op 32986(U)

November 19, 2018

Supreme Court, New York County

Docket Number: 154469/2018

Judge: David Benjamin Cohen

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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

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INDEX NO. 154469/2018

LIMESTONE ASSOCIATES, LLC,
Plaintiff,

MOTION DATE 07/18/2018

- v -

MOTION SEQ. NO. 001

AMERICAN RESTAURANT HOLDINGS, INC., ROBERT MORGAN

Defendant.

DECISION AND ORDER

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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

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents:

In this action for unpaid rent and damages for breach of a commercial lease, plaintiff now moves, unopposed, for an order pursuant to CPLR 3025 (c) for leave to amend the pleadings to conform to the evidence submitted herein and for a default judgment pursuant to CPLR 3215.

Plaintiff is the owner of the building known as 2733-2737 Broadway, a/k/a/ 248 West 105th Street, New York, New York 10025 (Building)(Shalom Affidavit at 2, ¶ 5). Pursuant to a written lease dated December 7, 2015, defendant, American Restaurant Holdings, Inc. (American), is the former tenant of the store premises known as Store #1 at 2735 Broadway (Subject Premises) located in the Building (id., at 6). American agreed to pay rent and other expenses for a term commencing January 1, 2016 and ending December 31, 2025 (id.). Defendant, Robert Eugene Morgan, entered into a Guaranty of the Lease dated January 15, 2016.

Based upon American's failure to pay rent and additional expenses under the lease, plaintiff commenced a proceeding in the Civil Court to recover possession¹. Plaintiff claims it was awarded a default judgment of possession based upon American's failure to appear or answer the petition.

The complaint alleges the following causes of action: The first cause of action against American seeks \$73,832.34 in pre-eviction base rent and damages, \$2,126.70 for real estate tax escalation fees, \$9,109.96 for late charges and \$1844.15 in legal fees. The total amount sought by plaintiff in the first cause of action is \$96,913.15. The second cause of action against American is for post eviction accelerated rent in the sum of \$1,270,330.29. The third cause of action against defendant Robert Eugene Morgan seeks \$1,357,243.42 for rent, real estate taxes, damages and legal fees. Finally, plaintiff's fourth cause of action is for legal fees.

I. Plaintiff's motion to amend the complaint:

In the instant case, plaintiff seeks to amend the complaint to reflect the current amount of rent, additional rent and damages owed by defendants to include expenses and damages incurred by the plaintiff since filing the complaint. Plaintiff's proposed amendment of \$425,714.12 is less than the original amount demanded in the complaint and is supported by the affidavit of its member, Fred Shalom, who states that defendants breached the lease by failing to pay rent, additional rent, expenses, including late fees, real estate taxes and legal fees. The Lease and Guaranty, annexed as Exhibit C, provides for the payment of base rent, additional rent, and real estate tax assessments in Articles 42 & 43. Additionally, costs and fees are provided for in Lease Article 19 and Guaranty ¶60 and Lease ¶ 18 allows plaintiff to recover liquidated damages. Finally, defendants are obligated to pay plaintiff's reasonable attorneys' fees pursuant to Lease

¹Plaintiff does not annex either a copy of the Civil Court Order or provide the index number.

Article 19 and Guaranty ¶ 60. Mr. Shalom claims American currently owes \$68,911.44 on the first cause of action and \$356,802.68 on the second cause of action. Plaintiff argues that defendant Robert Eugene Morgan owes \$425,714.12 on the third cause of action.

CPLR 3025, entitled “Amended and supplemental pleadings”, reads in pertinent part, as follows:

“(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.”

“Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay” (*Rodriguez v Panjo*, 81 AD3d 805, 806 [2nd Dept 2011]; quoting *Alomia v New York City Tr. Auth.*, 292 AD2d 403, 406 [2nd Dept 2002]).

In the absence of any prejudice, the motion to amend the complaint is granted.

II. Plaintiff’s motion for default judgment:

Next, plaintiff seeks an order granting it a money judgment and attorneys’ fees.

CPLR 3215 entitled Default Judgment states, in relevant part:

“(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party....”

The complaint verified by plaintiff is sufficient to establish proof of the facts constituting the claim (CPLR 3215 [f]; see *DeVivo v Sparago*, 287 AD2d 535, 536 [2d Dept 2001]). The affidavit of Fred Shalom adequately demonstrates that defendants failed to pay rents and their share of other expenses due under the lease. The affidavit, as well as the verified complaint

alleges sufficient “facts to enable a court to determine that a viable cause of action exists” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]) and, thus, satisfied plaintiff’s burden of submitting non-hearsay proof confirming the factual basis for the amount due in support of the instant motion for a default judgment (see CPLR 3215 [f]). Plaintiff adequately supported the application for a default judgment with proof of service of the summons and the verified complaint dated May 21, 2018 for American and May 22, 2018 for Robert Eugene Morgan, proof of the facts constituting the claim, the default and proof of mailing the notice required by CPLR 3215 (g)(3)(I) & (f). The court is satisfied that plaintiff made the requisite showing entitling it to a default judgment (see CPLR 3215 [f]).

As to the issue of attorneys’ fees, issues of fact exist which require this matter be referred to a referee to hear and report on the issue.

Accordingly, it is hereby

ORDERED that plaintiff’s motion pursuant to CPLR 3025 (c), for leave to amend the complaint to include all amounts due through the date of this order, is granted; and it is further

ORDERED that plaintiff’s motion pursuant to CPLR 3215 for a default judgment against **American Restaurant Holdings, Inc.** is granted to the extent that plaintiff is awarded \$68,911.44 on the first cause of action for unpaid pre-eviction base and additional rent, from December 2017 through April 2018; and it is further

ORDERED that plaintiff’s motion pursuant to CPLR 3215 for a default judgment against **American Restaurant Holdings, Inc.** is granted to the extent that plaintiff is awarded \$356,802.68 on the second cause of action for unpaid post-eviction rent as liquidated damages, plus re-letting expenses; and it is further

ORDERED that plaintiff’s motion pursuant to CPLR 3215 for a default judgment against

Robert Eugene Morgan is granted to the extent that plaintiff is awarded \$425,714.12 on the third cause of action for rent and damages; and it is further

ORDERED plaintiff's motion for an award of reasonable attorney's fees is granted as against both defendants, and a Special Referee shall be designated to hear and report to this court on the issues of fact pertaining to an award, if any, of attorneys' fees, which are hereby submitted to the Special Referee; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourt.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Center Street, Room 119); and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on

Courthouse and County Clerk Procedures for Electronically Filed Cases [accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)].

11/19/2018
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"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
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.