

Hudson Realty Assoc., LLC v New Generation Hair Desing, Corp

2018 NY Slip Op 33048(U)

December 5, 2018

Supreme Court, New York County

Docket Number: 152675/2018

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

-----X

HUDSON REALTY ASSOCIATES. LLC,

Plaintiff,

- v -

NEW GENERATION HAIR DESING, CORP, NEW GENERATION
LLC,FIOR RODRIGUEZ

Defendant.

INDEX NO. 152675/2018

MOTION DATE 08/03/2018

MOTION SEQ. NO. 001

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, 19

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents:

In this action for unpaid rent, additional rent, and damages pursuant to the parties' lease, plaintiff Hudson Realty Associates, LLC moves, pursuant to CPLR 3025 (c), for an order amending the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is determined. Plaintiff also moves, pursuant to CPLR 3215, for an order granting it a default judgment (1) against defendant New Generation LLC (New Generation), as tenant, on the first and second causes of action of the complaint for unpaid pre-vacatur rent and additional rent, plus post-vacatur rent and additional rent as liquidated damages, totaling \$95,539.71; (2) on the third and fourth causes of action, declaring that New Generation's corporate veil should be pierced, and that defendants Fior Daliza Rodriguez (Rodriguez) and New Generation Hair Desing Corp. (New Corp.) are personally liable for the rent and damages due from New Generation in the amount of \$95,539.71; and (3) on the fifth and sixth causes of action, declaring that Rodriguez and New Corp. have breached debtor creditor laws, and are

personally liable for rent and damages due from New Generation in the amount of \$95,539.71.

Plaintiff also seeks an order (1) setting the matter down for a hearing to determine its reasonable attorneys' fees and costs; (2) waiving the proof requirement of non-military service for Rodriguez; and (3) granting it statutory interest, fees and costs.

For the reasons set forth below, plaintiff's unopposed motion is granted.

BACKGROUND

Plaintiff is the owner and landlord of the subject commercial premises known as Store # 4 (the Premises) in the building located at 888 Amsterdam Avenue a/ka 203 West 103rd Street, New York, New York 10025 (the Building). New Generation was the commercial tenant of the premises under a written assignment and assumption of lease dated November 15, 2010 (the Assignment [affidavit of Ryan Mehra, a member of plaintiff, exhibit C]), pursuant to which New Generation became responsible for the lease agreement dated March 18, 2008 between plaintiff and Charm Hair Stylists Inc. for a ten-year term commencing April 1, 2008 and expiring March 31, 2018 (the Lease [*id.*, exhibit D]).

New Generation conducted business as "New Generation Hair Salon" (Mehra aff, ¶ 7). Rodriguez is the president and chief operating officer of New Generation, and the person directly responsible for New Generation's day to day operations (*id.*, ¶ 8).

New Generation failed to pay rent and additional rent due under the Lease (*id.*, ¶ 9). As a result, plaintiff commenced a proceeding in Civil Court to collect the sums owed. Before plaintiff could evict New Generation, it vacated the Premises without notice to plaintiff, and without paying the outstanding amounts (*id.*, ¶ 10).

Rodriguez removed some of New Generation's belongings from the Premises, mid-lease, and relocated to 924 Amsterdam Avenue to operate a different hair salon under the same name

which was formed by a newly created entity incorporated by her – defendant New Corp. (*id.*, ¶ 11). New Corp. was formed on May 22, 2017, at the same time that New Generation began failing to pay rent and additional rent under the lease (*id.*, ¶ 12). New Generation ultimately vacated the Premises, without plaintiff's permission, on January 25, 2018 (*id.*, ¶ 13).

Plaintiff contends that New Generation transferred its assets and receivables to New Corp. and Rodriguez to avoid its debts and liabilities (*id.*, ¶ 36). Indeed, most of the inventory was removed by New Generation and moved to the New Corp. premises (*id.*, ¶ 39).

Rodriguez is the president and chief operating officer of both New Generation and New Corp. She is the person who ran the business on a day to day basis, and with whom Mehra spoke on numerous occasions (*id.*, ¶ 40). She is listed on the New York State Department of State, Division of Corporations, Entity Information, as the person to whom the Secretary of State is to send service for New Corp. (*see id.*, exhibit H).

Mehra asserts that plaintiff never received any communication from Rodriguez or New Generation that it was vacating, never made any arrangements to settle the account, and took no steps to advise him where to send any forwarding mail or correspondence. Mehra further asserts that it is his understanding that Rodriguez has done nothing to legally close out New Generation, including filing with New York State to retire its tax identification number, and settle its tax liability (*see id.*, ¶ 44).

Pursuant to the Lease, New Generation agreed to pay the rent in equal monthly installments on the first day of each month. Pursuant to Article 40 of the Lease, New Generation agreed to pay base monthly rent for the term April 1, 2017 through March 31, 2018 in the amount of \$4,770.14 per month. According to plaintiff, through March 31, 2018, New

Generation owes \$48,085.12 in base rent (*see* Mehra aff, ¶ 27 [\$383.74 for May 2017 and \$4,770.14 monthly from June 2017 through March 2018]).

Pursuant to Articles 28 and 41.2 of the Lease, New Generation agreed to pay plaintiff, as additional rent, 100% of water consumed and metered at the Premises, and also agreed to be responsible for maintaining the water in good working order, and to repair any problems at its own cost and expense. According to plaintiff, there is due and owing from New Generation to plaintiff water meter usage and equipment charges totaling \$4,208.09 (*see id.*, ¶ 29 [\$493.20 for 3/16/17-6/6/17; \$414.45 for 6/14/17-9/13/17; \$355.24 for 9/7/17-12/6/17; and \$2,945.00 for installation of water backflow prevention device billed on 3/1/14]).

Pursuant to Article 42 of the Lease, New Generation agreed to pay, as additional rent, 10% of the increase of the real estate taxes assessed against the Building above the 2008 base tax year. According to plaintiff, there is due and owing from New Generation to plaintiff real estate tax escalation charges totaling \$31,976.95 (*see id.*, ¶ 28 [\$14,596.10 for 7/1/16-6/30/17 and \$17,280.85 for 7/1/17-6/30/18]).

Pursuant to Article 46 of the Lease, New Generation agreed to pay, as additional rent, a late of charge of five cents for each dollar remaining in unpaid fixed rent or additional rent after the seventh of each month. According to plaintiff, there is due and owing from New Generation to plaintiff late charges for the months of February 2017 through March 2018, totaling \$4,478.73 (*see id.*, ¶ 30 [\$729.80 for February 2017; 869.05 for July 2017; and \$238.51 for March 2017 through June 2017, and August 2017 through March 2018]).

Pursuant to Article 18 of the Lease, plaintiff is entitled to collect Lease damages, *inter alia*, of the rent due for the Lease balance as liquidated damages, as well as any expenses incurred in connection with re-letting. According to plaintiff, there is due and owing to from

New Generation to plaintiff out of pocket expenses totaling \$5,500 for demolition and carting charges in preparing the Premises for re-renting (*see id.*, ¶ 13, exhibit I [demolition invoice]).

Pursuant to Article 19 of the Lease, New Generation agreed to reimburse plaintiff such costs and fees expended by it in enforcing the terms of the Lease and/or prosecuting an action against the Tenant. Plaintiff asserts that there is due and owing from New Generation to plaintiff unreimbursed legal fees and costs expended in the Civil Court proceeding totaling \$1,290.80 (*see Mehra aff*, ¶ 32).

Plaintiff asserts that, due to New Generation's default, it is liable to plaintiff in the total amount of \$95,539.71, as all rent, additional rent and damages (*see id.*, ¶ 33 [\$48,085.14 in base rent; \$31,976.95 in real estate tax escalation charges; \$4,208.09 in water/sewer meter usage charges; \$4,478.73 in late charges; \$5,500 in demolition/carting charges; and \$1,290.80 in unreimbursed legal fees and costs]).

On April 10, 2018, service of the summons, complaint and notice of electronic filing was made on Rodriguez by delivering a copy of these documents to Rodriguez personally (affirmation of David B. Rosenbaum, Esq., ¶ 11; *see Mehra aff*, exhibit A [proof of service]). On April 10, 2018, New General and New Corp. were served with the summons, complaint, notice of electronic filing and CPLR 3215 notice via the New York Secretary of State, pursuant to Business Corporation Law § 306 (Rosenbaum affirmation, ¶¶ 12-13; *see Mehra aff*, exhibit A [proofs of service]). In response to the process server's questions, Rodriguez expressly stated that she is not in the military or dependent on anyone in the military (*Mehra aff*, ¶ 16; *see exhibit A*).

Defendants have failed to answer the summons and complaint, or otherwise appear in this action, and their time to do so has expired (Rosenbaum affirmation, ¶ 3).

In the first and second causes of action of the complaint, plaintiff seeks damages for pre-vacatur and post-vacatur rent. In the third cause of action, plaintiff seeks a declaration that New Corp. is the alter ego and successor to New Generation, and that New Corp. is liable to plaintiff for the payment of all damages owed by New Generation to plaintiff pursuant to the Lease. In the fourth cause of action, plaintiff seeks a declaration piercing the corporate veil to hold Rodriguez liable for the New Generation's debts and liabilities. In the fifth cause of action, plaintiff seeks a judgment that the transfer of all of New Generation's assets to New Corp. or Rodriguez without fair consideration violates Debtor Creditor Law (DCL) § 272, and seeks a judgment against New Generation's alter ego in the amount of \$95,539.71. In the eighth cause of action, plaintiff seeks a declaration that the transfer of New Generation's assets to Rodriguez or New Corp. without fair consideration violated DCL § 274, and for the recovery of assets in an amount not less than \$95,539.71. In the ninth cause of action, plaintiff seeks a judgment, pursuant to DCL § 276, that the transfer of assets from New Generation to Rodriguez or New Corp. without fair consideration rendering New Generation insolvent was done with intent to hinder plaintiff's rights to enforce its claims under the Lease, and the recovery of those assets in an amount not less than \$95,539.71.

Plaintiff asserts that, in addition to the losses totaling \$95,539.71, it has incurred legal fees and costs in commencing and prosecuting this action (*id.*, ¶ 18). Plaintiff seeks an order granting judgment for reasonable legal fees, and scheduling a hearing to determine the amount that plaintiff can recover.

DISCUSSION

In the complaint, plaintiff originally sought damages in the amount of \$105,861.31. Plaintiff now seeks damages in the lesser amount of \$95,539.71, and moves, pursuant to CPLR 3025 (c), to amend the pleadings to conform to the evidence, and to reflect this lesser amount.

A motion to conform the pleadings to the proof “may be made at any time and should be liberally granted ‘unless doing so results in prejudice to the nonmoving party’” (*Lakshmi Grocery & Gas, Inc. v GRJH, Inc.*, 138 AD3d 1290, 1291 [1st Dept 2016] [citation omitted]; *accord Noble v Slavin*, 150 AD3d 1345 [3d Dept 2017]). It is clear that defendants cannot be prejudiced by the grant of the motion, as plaintiff is seeking a lesser amount of damages. Moreover, no opposition to the motion has been submitted. According, plaintiff’s motion to amend the pleadings to conform to the proof adduced herein is granted.

Plaintiff’s unopposed motion for a default judgment is also granted. Pursuant to CPLR 3215 (f), “[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to answer or appear” (*HSBC Bank USA, N.A. v Clayton*, 146 AD3d 942, 944 [2d Dept 2017] [citation omitted]; *accord 154 E. 62 LLC v 156 E. 62nd St. LLC*, 159 AD3d 498, 498 [1st Dept 2018]; *Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 [2d Dept 2017]). The plaintiff can satisfy this requirement through an affidavit of a party with personal knowledge of the facts (*Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]; *Goodman v New York City Health & Hosps. Corp.*, 2 AD3d 581, 581 [2d Dept 2003]).

Plaintiff has clearly satisfied the first and third of these requirements by submitting the affidavits of service and the affirmation of David B. Rosenbaum, its attorney, in which Rosenbaum asserts that the defaulting defendants have not answered or appeared. Plaintiff has also submitted proof of the facts constituting its claims through the affidavit of Ryan Mehra, one of its members.

With respect to the first and second causes of action, plaintiff contends that New Generation is liable for both for pre-vacatur rent and post vacatur rent through March 31, 2018, the end date of the lease. Paragraph 18 of the Lease provides that the tenant remains liable for all

rent throughout the term without regard to whether the Premises are vacated prior to the Lease's expiration. In addition, under New York law, it is well settled that a commercial tenant's duty to pay rent through the term of the lease is fixed, even if the tenant vacates during the term of the lease (*Holy Props., Ltd. v Cole Prods., Inc.*, 87 NY2d 130, 133 [1995]) ["Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages"]; accord *BP 399 Park Ave. LLC v Pret 399 Park, Inc.*, 150 AD3d 507, 509 [1st Dept 2017]).

In his affidavit, Mehra establishes New Generation's failure to pay pre-vacatur and post-vacatur rent. In that affidavit, Mehra also sets forth the relevant lease provisions with respect to rent, and the calculation of the amounts due plaintiff under those provisions (*see* Mehra aff, ¶¶ 26-34). Accordingly, plaintiff has sufficiently set forth facts demonstrating that New Generation is liable for pre-vacatur and post-vacatur rent as liquidated damages totaling \$95,439.71.

With respect to the third and fourth causes of action, plaintiff requests a default judgment on the third and fourth causes of action, in the amount of \$95,539.71, representing the amount owed by New Generation, against New Corp. and Rodriguez, and finding that New Corp. and Rodriguez are alter egos of plaintiff, that Rodriguez improperly dominated New Generation for her personal benefit and improperly transferred or dissipated plaintiff's assets to herself and/or to New Corp., that the corporate veil should be pierced, and that Rodriguez and New Corp. are liable for New Generation's debts.

Generally, a corporation will be pierced and its principals held personally liable for corporate debts when (1) the corporation was dominated and controlled with respect to the transaction at issue; and (2) such domination and control was used to commit a wrong against the plaintiff which resulted in the plaintiff's injury (*see Cortland St. Recovery Corp. v*

Bonderman, 31 NY3d 30, 47 [2018], citing *Matter of Morris v New York State Dept. of Taxation & Finance*, 82 NY2d 135, 141 [1993]).

Principals of a corporation who improperly dominate the corporation are deemed its alter egos and are liable for unpaid rent. Alter ego occupants shall be liable for the rent when they use the tenant/corporation to avoid payment of rent (*CC Ming (USA) Ltd. Partnership v Champagne Video*, 232 AD2d 202, 202 [1st Dept 1996]; *Flushing Plaza Assocs. # 2 v Albert*, 102 AD3d 737, 7390 [2d Dept 2013]).

As set forth in the Mehra affidavit, New Generation operated a hair salon business at the Premises (*see Mehra aff*, ¶ 7). New Generation ceased doing business at the Premises, and vacated the Premises on January 25, 2018, mid-lease, owing rent and additional rent (*id.*, ¶ 13). New Generation relocated its business to 924 Amsterdam Avenue, and opened an identical store under the same name (*id.*, ¶ 36). In fact, New Generation posted a sign on the Premises informing its customers that it moved its store to 924 Amsterdam Avenue (*id.*, ¶ 37; *see exhibit E*). The new store contains signage using the same DBA name as New Generation used at the Premises (*see id.*, exhibit F).

Rodriguez is New Generation's president and chief executive officer who executed the assumption and assignment of Lease (*see id.*, ¶ 8). Rodriguez is also the president of New Corp. and is listed on the New York State Department of State. Division of Corporations, Entity Information as the person to whom the Secretary of State sends service of process (*see id.*, ¶ 42).

The Mehra affidavit avers that Rodriguez was the person who conducted business at the premises and to whom he was in contact concerning the Premises (*id.*, ¶ 40), and that Rodriguez took no steps to settle her account, or provide a forwarding address prior to her vacating the Premises (*id.*, ¶ 43).

These facts are sufficient to support plaintiff's claim that Rodriguez improperly dominated the corporation for her personal benefit, and that New Corp. is the alter ego of New Generation, such that New Corp. and Rodriguez are personally liable for all unpaid rent and damages to plaintiff in the amount of \$95,539.71. Accordingly, plaintiff has demonstrated that it is entitled to a default judgment on the third and fourth causes of action.

With respect to the fifth, sixth and seventh causes of action, plaintiff alleges that, in closing New Generation's business, Rodriguez transferred plaintiff's assets and receivables to herself and/or New Corp. without fair consideration to avoid New Generation's obligations to plaintiff, in violation of DCL §§ 272, 274 and 276. Plaintiff requests a default judgment against Rodriguez and New Corp. on the fifth, sixth and seventh causes of action for the total rent and damages due from New Generation in the amount of \$95,539.71.

DCL § 272 provides that:

“Fair consideration is given for property, or obligation,

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained.”

DCL § 274 provides:

“Every conveyance made without fair consideration when the person making it is engaged or about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonable small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.”

DCL § 276 provides:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

“ “[L]ack of fair consideration gives rise to a rebuttable presumption of fraudulent intent”” (*United States v Mazzeo*, 306 F Supp 2d 294, 311 [ED NY 2004] [citation omitted]). Moreover, “[c]ourts view intrafamily transfers without any signs of tangible consideration as presumptively fraudulent” (*United States v Alfano*, 34 F Supp 2d 827, 845 [ED NY 1999]; *see also Tube City IMS, LLC v Anza Capital Partners, LLC*, 2016 WL 5864887, *4 [SD NY 2016]).

As set forth in the Mehra affidavit, plaintiff alleges, that, in closing the business, New Generation transferred asserts and receivables to Rodriguez and New Corp., e.g., essentially to Rodriguez herself, without fair consideration, to avoid New Generation’s obligations to plaintiff (*see Mehra aff*, ¶¶ 11, 47). These facts are sufficient to establish potential violations of DCL §§272, 274 and 276. Accordingly, plaintiff is entitled to a default judgment on the fifth, sixth and seventh causes of action.

Article 19 of the Lease entitles plaintiff to collect from New Generation such costs and fees expended by it in enforcing the terms of the Lease and/or prosecuting an action against New Generation. Where, as here, a lease for real property provides for the payment of legal fees, a landlord who is a “prevailing party” in litigation is entitled to recover said fees (*see Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 280 [1st Dept 2007]; *Excelsior 57th Corp. v Winter*, 227 AD2d 146, 147-148 [1st Dept 1996]). The “prevailing party” is the party who obtains the central relief sought (*see Board of Mgrs. of Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [1st Dept 2004]; *Senfeld v I.S.T.A. Holding Co., Inc.*, 235 AD2d 345, 345 [1st Dept 1997]).

Plaintiff has set forth facts demonstrating its entitlement to a money judgment. There is a lease containing a legal fees clause obligating New Generation to reimburse plaintiff for its legal

fees. Accordingly, plaintiff is the prevailing party and this court will direct an inquest to determine the reasonable amount of the legal fees due plaintiff.

Finally, plaintiff is entitled to a waiver of proof of non-military status, as it has demonstrated that Rodriguez is not in the military. In response to the questions of process server Avatar Neal, Rodriguez specifically stated that she is not in the military, and is not dependent on anyone in the military (*see* Mehra aff, exhibit A [proof of service]).

Accordingly, it is

ORDERED that plaintiff's motion to amend the pleadings to conform to the evidence adduced herein is granted; and it is further

ORDERED that plaintiff's motion for a default judgment on the complaint is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against all defendants in the amount of \$95,539.71, together with interest at the rate of 9 % per annum from the date of March 1, 2018 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of the legal fees and costs that plaintiff has incurred in enforcing the terms of the Lease and prosecuting this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet¹ upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiff is directed to serve a copy of this Decision and Order with Notice of Entry upon defendants within 20 days.

12/3/2018
DATE

CHECK ONE:

☒

CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

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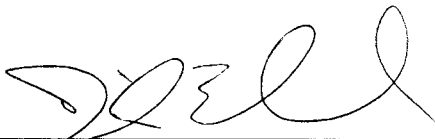
SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


DAVID BENJAMIN COHEN, J.S.C.

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

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.