

Stone & Broad Inc. v Nextel of N.Y., Inc.
2019 NY Slip Op 31600(U)
June 6, 2019
Supreme Court, New York County
Docket Number: 156297/2018
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X

STONE & BROAD INC.,

Plaintiff,

- v -

NEXTEL OF NEW YORK, INC., SPRINT CORPORATION,
88 BROAD REALTY CORP., LANA 28 CORP., BENJAMIN-
PARK, INC., GIULIANO-PARK 88 BROAD STREET
INC., GIULIANO GOURMET PIZZA & DELI, FRANK
RENEO, PETER RENELO, VITO RENELO, ADA
MIZUKOVSKI, ROBERT PARK, KUI SUN PARK, TECH
NEL ELECTRIC, INC.,

Defendants.

-----X

INDEX NO. 156297/2018
MOTION DATE 05/10/2019
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

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

OSTRAGER, BARRY R., J.S.C.:

Upon the foregoing documents, it is

ORDERED, that plaintiff's motion for a default judgment against certain defendants is denied without prejudice for the reasons stated below.

Background

According to the Complaint in this action, filed on July 6, 2018, plaintiff Stone & Broad, Inc. ("Stone") was the primary tenant of a commercial triple-net lease of the building at 88 Broad Street in lower Manhattan from 1970 until that lease terminated in April 2013 (NYSCEF Doc. No. 22). The landlord of the building is non-party 88 Broad Street, LLC ("the Landlord"), and the net lease at issue is referred to in the Complaint as the Over Lease. Since the inception of the

Over Lease in 1932 with Stone's predecessor, there were a series of assignments and renewals, as well as subleases and sub-subleases, conferring rights and obligations on various parties.

After Stone vacated the premises, the Landlord commenced an action in Supreme Court under Index Number 652833/14 entitled *88 Broad Street, LLC v Stone & Broad, Inc., et al.*, to recover compensation for damage to the building allegedly caused over the years by water, fire, and lack of maintenance and repair and for other alleged wrongdoing by Stone, including the failure to pay all rent and additional rent due under the lease and the fraudulent transfer of assets to impair the Landlord's rights. (See NYSCEF Doc. 24). That action was resolved by Stipulation So Ordered by Justice Shirley Kornreich and filed on September 13, 2017 pursuant to which Stone agreed to pay the Landlord \$750,000 in full settlement of all claims (NYSCEF Doc. No. 99 under Index No. 652833/14).

Claiming it was compelled by the terms of the Over Lease to compensate the Landlord for the alleged damages, even though Stone insisted that any damage had been caused by others, Stone commenced this action to recover the \$750,000 settlement sum paid plus \$184,000 in legal fees allegedly incurred from the parties that purportedly caused the damage.

Discussion

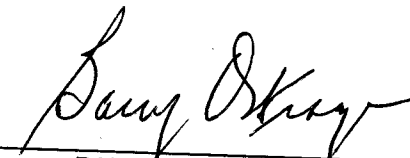
In this motion, plaintiff seeks a default judgment in that entire amount against defendants Benjamin-Park, Inc., Guliano-Park 88 Broad Street, Inc., Robert Park and Kui Sun Park ("the Defaulting Defendants"). Plaintiff has adequately established service of the Summons and Complaint on these parties and the failure of any of those defendants to answer. However, plaintiff has failed to establish that it served the moving papers or that it is entitled to a judgment for liability or damages against the Defaulting Defendants.

The procedure for obtaining a default judgment is governed by CPLR 3215. Pursuant to CPLR 3215(f), the application for a judgment by default must be accompanied “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ...” However, plaintiff has failed to provide any affidavit from an individual with personal knowledge, nor even a Verified Complaint. The sole support is the Affirmation from counsel, which merely documents the service of the Summons and Complaint on the Defaulting Defendants and their failure to answer. The papers do not even recite the background facts set forth at the beginning of this opinion; the Court relied on its March 1, 2019 decision granting a motion to dismiss by other defendants for that information (see NYSCEF Doc. No. 67).

Based on the lack of proof, the Court is compelled to deny the motion without prejudice. The Complaint asserts four causes of action, some of which apply to all defendants and some of which apply only to some of the defendants. Plaintiff has failed to indicate the claims on which it is relying for relief. Further, some of the causes of action are based in contract, but no contract has been provided. Nor has plaintiff provided the stipulation in the underlying action, any documentation of its right to attorney’s fees, or any proof of the amount claimed and its reasonableness. Further, many of the causes of action suffer from the same infirmities the Court discussed in its March 1 decision, but plaintiff has not explained how, if at all, the claims against the Defaulting Defendants escape the infirmities previously found by the Court. Plaintiff may move again on notice to the Defaulting Defendants by July 19, 2019. Proof of service of the motion by regular mail and overnight courier shall be efiled.

Accordingly, plaintiff's motion for a default judgment is denied without prejudice to renewal on the terms and conditions set forth herein no later than July 19, 2019.

6/6/2019
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE