

**40 Wall St., LLC v Magna Group, LLC**

2020 NY Slip Op 30306(U)

February 5, 2020

Supreme Court, New York County

Docket Number: 155814/2019

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

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40 WALL STREET, LLC

**DECISION, ORDER &  
JUDGMENT**

INDEX NO: 155814/2019  
Mot Seq No: 001

-against-

MAGNA GROUP, LLC.

Present:  
Hon. Lynn R. Kotler, J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
N/Motion, Affirmations, Exhibits .....	23-38

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Plaintiff, 40 Wall Street (the "plaintiff") brought this breach of contract action arising from a commercial lease entered into between plaintiff as landlord and defendant, Magna Group LLC (the "defendant") as lessor. Previously, plaintiff filed a motion for default judgment. Plaintiff's original motion was denied by this court by order on September 25, 2019 because: (i) plaintiff failed to provide a legible copy of the lease on which its causes of action are based and (ii) plaintiff could not be awarded rent for the remainder of the lease term unless plaintiff provided an affidavit attesting to the fact that it would be leaving the premises vacant, thereby making defendant liable for rent through the remainder of the lease term.

Plaintiff's renewed motion ensued wherein plaintiff seeks: (i) a money judgment against defendant for \$651,375.60 representing all fixed base rent due through December 31, 2019 plus legal interest (ii) a money judgment against defendant for \$11,827.13 representing additional rent due through June 30, 2019 plus legal interest; and (iii) reasonable attorney's fees. The

motion is again submitted without opposition despite proof of service and is considered on default.

Plaintiff has submitted proof that the summons and complaint were served upon Magna Group, LLC pursuant to LLC Law § 303. Despite such service, the defendant has not answered the complaint nor has its time to do so been extended by the court. Accordingly, the defendant has defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]). A written lease is a contract. Pursuant to a written commercial lease, plaintiff rented to defendant the 57<sup>th</sup> and 58<sup>th</sup> floors of the building located at 40 Wall Street, New York, New York 10005 (the "premises"). A legible copy of the lease has been provided to the court.

The motion is supported by the affidavit of Adam L. Rosen, who claims that defendant vacated and abandoned the premises on June 3, 2019 and is owing base rent from March 2019 through December 2019. Defendant also owes additional rent for electricity and building

services from March 2019 through June 2019. The plaintiff has demonstrated its *prima facie* case for breach of contract.

Accordingly, the court grants the plaintiff its first and second causes of action for the sum of base rent due through December 31, 2019 plus interest and the sum of additional rent due through June 30, 2019 plus interest.

Plaintiff's third and fourth causes of action are for a declaration of anticipatory breach and demanded rent and additional rent from July 1, 2019 to September 27, 2027. In the prior decision, the court directed plaintiff to submit an affidavit attesting that the premises would be held vacant for the period which plaintiff sought future rent in order to avoid a double recovery. Instead of providing that affidavit, plaintiff now moves to "sever" the third and fourth causes of action without prejudice while reserving its right to commence a separate action against defendant for money damages for future rent. In support of this portion of the motion, Adam L. Rosen states that the premises has not been relet through December 6, 2019. Accordingly, the third and fourth causes of action are dismissed without prejudice.

Plaintiff's fifth cause of action is for the recoupment of attorney's fees. Paragraph 19 of the lease provides:

"If Owner ...in connection with any default by Tenant in the covenant to pay rent hereunder makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid, or obligations incurred, with interest and costs."

Defendant admitted its breach of the lease in a letter from defendant's counsel dated April 30, 2019 which states in relevant part that, "due to certain business and financial difficulties, [defendant] will be vacating [] premises on or about June 2, 2019." Therefore, under the contract, defendant is liable for reasonable attorney's fees incurred by plaintiff in bringing this action.

In accordance herewith, it is hereby

**ORDERED** that plaintiff's motion for a default judgment against Magna Group LLC is granted; and it is further

**ORDERED** that a money judgment against defendant be entered in the sum certain amount of \$651,375.60 representing all fixed base rent due through December 31, 2019 plus legal interest; and it is further


**ORDERED** that a money judgment against defendant be entered in the sum certain amount of \$11,827.13 for additional rent through June 30, 2019 plus legal interest; and it is further

**ORDERED** that all issues regarding attorney's fees will be determined at an inquest to be held March 10, 2020 at 2:15 P.M. in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 2/5/20  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.  
**HON. LYNN R. KOTLER**  
**J.S.C.**