SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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VINCENZO PAMPILLONIA and ITALIAN ART IRON WORKS, INC.,

Plaintiffs,

- v -

MONTAGUE URGENT MEDICAL CARE, P.C., UMD WILLIAMSBURG, UMD ASTORIA d/b/a URGENT CARE ASTORIA, P.C., UMD L.I.C. d/b/a L.I.C. URGENT MEDICAL CARE, P.C., UMD NORTHERN d/b/a NORTHERN URGENT MEDICAL CARE, PLLC, UMD UNION SQUARE d/b/a UNION SQUARE URGENT CARE, P.C., and PATRICK KO

Defendants.

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INDEX NO. 650773/2019

MOTION DATE 11/13/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29

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

In this action to recover unpaid rent and additional rent from a former commercial tenant, the plaintiffs, Italian Art Iron Works, Inc., owner of real property at 109 Montague Street in Brooklyn, and Vincenzo Pampillonia, an officer of the corporate plaintiff, move pursuant to CPLR 3215 for leave to enter a default judgment against all defendants. The plaintiffs allege that they entered a ten-year commercial lease with defendant Montague Urgent Medical Care, P.C. in 2015 and that defendant Patrick Ko guaranteed the lease payments, including monthly rent of $13,368.57, and that those defendants defaulted on the lease since July 2018 and abandoned the property and removed all assets contained therein. The plaintiffs were thereafter awarded a judgment of possession in a summary proceeding in the Civil Court and the tenants were evicted on December 1, 2018. The remaining defendants are alleged to be related entities who may have improperly received assets of the former tenant.

In opposition, the defendants submit an affirmation of an attorney and, while they did not file any proper Notice of Cross-Motion, they also purport to move to extend their time to answer and compel acceptance of their late answer pursuant to CPLR 3012. Although the plaintiffs submit proof of service on defendants Montague Urgent and Ko on March 27 and 28, 2019, respectively, the defendants did not file their answer any time before they attached it as an exhibit to their opposition and cross-motion on June 25, 2019.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default." Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

The plaintiff has submitted, *inter alia*, the summons and complaint, verified by Vincenzo Pampillonia, the signed underlying lease and "good guy" guaranty agreement, and the affidavit of Vincenzo Pampillonia, which set forth details of the lease agreement and the defendants' default. The plaintiff also submits proof of service of the summons and complaint, and motion, upon the defendants. The plaintiffs' proof establishes the first cause of action of the complaint, breach of contract, by showing (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Further, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The terms of the subject guaranty agreement are clear, unambiguous,

absolute and unconditional and, having defaulted in this action, the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement. There is no dispute that upon the corporate defendant's default, the individual defendant failed to perform under the guaranty. See 4 USS, LLC v DSW MS, LLC, 120 AD3d 1049 (1st Dept. 2014). Indeed, having failed to timely answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). The plaintiffs request and are granted an inquest on damages and contractual attorney's fees.

However, the plaintiffs have met their burden only as to two defendants - Montague Urgent Medical Care, P.C. and Patrick Ko. As to the other defendants, who they accuse of being closely related entities and of participating in fraudulent transfers, their proof consists largely of allegations "upon information and belief." Where an allegation is based only upon information and belief, "without the slightest reference to the source of the information or the grounds for the belief" (Zelnik v Bidermann Indus. U.S.A., 242 AD2d 227, 228 [1st Dept. 1997]), it is insufficient to constitute proof of facts necessary to support a motion for leave to enter a default judgment. See id; see also Henriquez v Purins, 245 AD2d 337, 338 (2nd Dept. 1997). Thus, that portion of the motion that seeks a default judgment against the remaining defendants is denied without prejudice.

In determining a motion pursuant to CPLR 3012(d), the court must take into account the excuse offered for the delay, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of his defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001). The excuse offered by the defendants is that all corporate defendants purportedly served by service upon the Secretary of State did not received a forwarded copy from the Secretary of State and were unaware of the action. It is well settled that bare denials of receipt of service are insufficient to rebut eth presumption created by eth plaintiffs' affidavit of service. See Ultimate One Distr. Corp. v 2900 Stillwell Avenue LLC, 140 AD3d 1054 (2nd Dept. 2016); Baez v Ende Realty Corp., 78 AD3d 576 (1st Dept. 2010). Furthermore, the defendants' opposition makes no attempt to refute the affidavit of service stating that defendant Ko was served by service of a person of suitable age and discretion at his residence. The defendants also contend that they have meritorious

defenses, as asserted in their proposed answer. This contention is unpersuasive in that the proposed answer denies most allegations of the complaint and merely recites a list of common affirmative defenses in a conclusory manner. One affirmative defense that contains more than a conclusory ground is that of improper venue. The defendants allege that "County of Brooklyn", and not New York County, is the proper venue. However, this court already declined to sign an Order to Show Cause by the defendants seeking to change venue to Kings County.

Finally, the plaintiffs have demonstrated that, under the lease terms, they are entitled to recover contractual attorney's fees expended upon the defendant's breach of the lease.

Accordingly, and upon the foregoing papers, it is:

ORDERED that the plaintiffs' motion for leave to enter a default judgment pursuant to CPLR 3215 is granted as to defendants Montague Urgent Medical Care P.C. and Patrick Ko on the issue of liability only, damages to be determined at an inquest; and the motion is otherwise denied without prejudice, and it is further

ORDERED that the defendants' purported motion to extend their time to answer and to compel acceptance of their late answer pursuant to CPLR 3012 is denied, and it is further

ORDERED that the parties shall appear for a status/settlement conference on April 30, 2020, at 3:00 p.m. where a date may be set for an inquest on damages as against defendants Montague Urgent Medical Care P.C. and Patrick Ko.

This constitutes the Decision and Order of the court.

2/7/2020
DATE

NANCY M. BANNON, J.S.C.
HON. [illegible] BANNON

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

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