

86 Commercial LLC v 86 Avanti Nail & Spa, Inc.

2021 NY Slip Op 30956(U)

March 25, 2021

Supreme Court, New York County

Docket Number: 657177/2020

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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86 COMMERCIAL LLC

Plaintiff,

- v -

86 AVANTI NAIL & SPA, INC.,

Defendant.

-----X

INDEX NO. 657177/2020

MOTION DATE 03/23/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

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

Upon the foregoing documents, plaintiff's motion seeking to enter a default judgment is decided as follows:

Plaintiff commenced the instant action by the filing of a summons and complaint on December 21, 2020. On December 31, 2020, defendant was served with the Summons and Complaint pursuant to CPLR 311(1) and BCL 306. Defendant failed to timely interpose an answer or otherwise respond to the instant action. Plaintiff now moves for a default judgment.

Plaintiff demonstrated the merits of their claim by submitting the affidavit of Kevin Padgett, Vice-President of BMH Realty, Ltd. d/b/a Heller Realty, the managing agent for plaintiff 86 Commercial, LLC, together with a copy of the relevant lease, ledger and notice to cure and supporting documentation (see, CPLR 3215[f]; *Henriquez v. Purins*, 245 AD2d 337 [2nd Dept 1997]; *Rafiq v. Weston*, 171 AD2d 783 [2nd Dept 1991]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]), which establish as follows: Plaintiff is the owner of real property located at 110 West 86th Street, New York, New York 10024 commercial condominium store unit No. 3, which defendant, 86 Avanti Nail & Spa, Inc. leases pursuant to a certain lease dated March 21,

2002. The most recent extension of the lease expires on October 31, 2027. Defendant has failed to pay the monthly rent of since April, 2020. For the period of April, 2020 through November 4, 2020, after application of the security deposits, plaintiff is owed a total of \$96,958.60 in Fixed Rent, Additional Rent, Late Fees, and Interest through March 1, 2021.

Defendant opposes plaintiff's motion, seeking to compel the acceptance of a late answer. Pursuant to CPLR 2004, Courts can extend the time imposed by statute upon good cause shown. Pursuant to CPLR 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." It is well-established law that: "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when . . . moving . . . to compel the acceptance of an untimely answer." (*Lipp v. Port Authority of New York and New Jersey*, 34 AD3d 649 [2d Dept 2006]). Here, defendant's excuse of law office failure based upon Covid-19 infection is entirely undetailed and as such does not amount to a reasonable excuse (see *Grezensky v Mount Hebron Cemetery*, 305 AD2d 542 [2003]; *Solomon v. Ramlall*, 18 A.D.3d 461 [2005]).

Defendant's first argument alleging a meritorious defense is that this lawsuit was filed after plaintiff's filing of summary judgment motion in lieu of summons & complaints under the index 654221/2020 (*86 Commercial LLC v. An Sik Nam*) where plaintiff directly sued An Sik Nam as a guarantor for the subject lease. As the defendant in said action is different from the defendant in the instant action, plaintiff has not impermissibly split its causes of action. However, the Court notes that as defendant is a Nail Salon, the filing of the prior action against a guarantor violates New York City Administrative Code § 22-1005.

Defendant's argument that the lease has been frustrated is similarly without merit as “for a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law.” See *Robitzek Inv. Co. v. Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943); *Dr. Smood New York LLC v. Orchard Houston, LLC*, No. 652812/2020, 2020 WL 6526996 (N.Y. Sup. Ct. Nov. 02, 2020). As such, it is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff in the sum of \$96,958.60, with interest at the statutory rate from April 1, 2020, until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that the portion of plaintiff's motion which seeks to evict defendant from the premises is DENIED with leave to renew upon the expiration of the moratorium on evictions.

ORDERED that an assessment of damages against defendant on the issue of legal fees is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed

ORDERED that such service upon 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).

3/25/2021

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE