

<b>Tang's Realty Inc. v La Vie En Szechuan Rest. Corp.</b>
2021 NY Slip Op 31074(U)
April 5, 2021
Supreme Court, New York County
Docket Number: 652029/2020
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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TANG'S REALTY INC.,

Plaintiff,

- v -

LA VIE EN SZECHUAN RESTAURANT CORP. A/K/A LA
VIE EN SZECHUAN INC., YI ZHANG

Defendant.

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INDEX NO. 652029/2020

MOTION DATE 10/28/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents and for the reasons set forth hereinbelow, the instant motion by plaintiff, Tang's Realty Inc., for a default judgment against defendants, La Vie En Szechuan Restaurant Corp. a/k/a La Vie En Szechuan Inc. and Yi Zhang, jointly and severally, is granted.

Background

Pursuant to a September 1, 2004 deed, plaintiff, Tang's Realty Inc., owns real property located at 14 E. 33rd Street, Unit #1 in New York, NY ("the Subject Unit"). On or about July 1, 2007, plaintiff entered into an Agreement of Lease ("the Lease," NYSCEF Doc. 10) pursuant to which it agreed to lease the Subject Unit to non-party Purple City Inc. for use as a restaurant. (NYSCEF Doc. 1.)

On April 25, 2012, plaintiff, as landlord, Purple City Inc., as assignor, and defendant La Vie En Szechuan ("the Corporate Defendant"), as assignee, entered into an "Assignment, Assumption and First Amendment of Lease" ("the Assignment," NYSCEF Doc. 11). Pursuant to the Assignment, Purple City Inc. assigned its rights, interest, and obligations as tenant under the Lease to the Corporate Defendant, effective May 1, 2012. The Assignment extended the Lease's term through April 30, 2022 with a base monthly rent of \$14,500.00 for the first two years after the Assignment's effective date with an increase at the rate of 3.5% annually for each of the Lease's subsequent years. The Assignment also provided, inter alia, the following: (1) the Corporate Defendant would pay "its proportionate share of increases in real estate taxes over the base year and its proportionate share of any increase in condominium maintenance charges" as additional rent; and (2) in the event that the Corporate Defendant did not pay rent and additional rent within ten days of their due date, the Corporate Defendant would be responsible for a 5% late penalty charge. (NYSCEF Doc. 1.)

Also on April 25, 2012, defendant Yi Zhang (“the Individual Defendant”) executed a Personal Guaranty (“the Guaranty”), pursuant to which he guaranteed the performance of the Corporate Defendant, as tenant (NYSCEF Doc. 1).

On February 5, 2020, pursuant to the Housing Stability and Tenant Protection Act of 2019, plaintiff notified the Corporate Defendant that rent and additional rent were due on or prior to February 12, 2020. On or about February 11, 2020, the Corporate Defendant vacated the Subject Unit, and, as of May 27, 2020, plaintiff had not obtained a new tenant. (NYSCEF Doc. 1.)

On May 27, 2020, plaintiff commenced the instant action, seeking a judgment (1) on the first cause of action, for rent and additional rent, in the amount of \$19,867.66, plus interest at the statutory rate from February 11, 2020; (2) on the second cause of action, for losses arising from tenant’s removal from the Subject Unit, in the amount of \$488,099.76 (\$134,834.33 in the Notice of Motion), plus interest at the statutory rate from February 11, 2020; (3) on the third cause of action, for attorney’s fees in the amount of \$30,000.00, plus interest at the statutory rate; and (4) awarding costs and disbursements to plaintiff (NYSCEF Doc. 1, at 9).

Plaintiff now moves for a default judgment against defendants, jointly and severally, (1) awarding plaintiff the sum of \$19,867.66, plus interest from February 11, 2020 on plaintiff’s first cause of action; (2) awarding plaintiff the sum of \$134,834.33, plus interest thereon from February 11, 2020, plus “any further damages which accrue” from September 25, 2020 to the entry of a Decision and Order on the instant motion; (3) scheduling a hearing on attorney’s fees and other sums arising out of the subject defaults; and (4) awarding plaintiff costs and disbursements (NYSCEF Doc. 4).

On December 14, 2020, the Individual Defendant e-filed an answer to the instant complaint and opposition to the instant motion (NYSCEF Doc. 14).

In his July 10, 2020 answer to the instant complaint, the Individual Defendant asserts, inter alia, the following: (1) on multiple occasions between March and September 2019, defendants negotiated with plaintiff to exit the Lease early; (2) pursuant to said negotiations, plaintiff sought new tenants and agreed to defendants’ exiting in March 2020; and (3) plaintiff breached its agreement to return the security deposit to defendants and requested an additional \$60,000.00 as a broker fee from defendants. The Individual Defendant asserts that plaintiff cannot “blame” defendant for losses arising from their vacating of the Subject Unit, “since no commercial tenants would come in restaurant business during COVID-19 pandemic.” The Individual Defendant requests a judgment against plaintiff in the amounts of \$60,000.00 for the security deposit and \$40,000.00 for kitchen equipment. (NYSCEF Doc. 14.)

In his September 25, 2020 opposition to the instant motion, the Individual Defendant alleges that plaintiff purposefully provided defendants with a different address than that filed with the Court in an attempt to “set up” a default by defendants. The Individual Defendant also asserts that, as the Corporate Defendant surrendered the subject property, plaintiff should not seek rent, water, Common Charge, and the late fee. The Individual Defendant seeks (1) the return of \$60,000.00 for the security deposit; (2) \$40,000.00 for kitchen equipment; and (3) a dismissal of the subject default judgment motion. (NYSCEF Doc. 14.)

By correspondence to the Court dated December 15, 2020, plaintiff informed the Court that it rejects the answer and opposition papers that the Individual Defendant e-filed on December 14, 2020 and requests that the Court do the same. Plaintiff submitted the following grounds, inter alia, for such a rejection: (1) on or about October 21, 2020, plaintiff received, by mail, the Individual Defendant's responses to the instant complaint and the instant motion; (2) on or about that same day, plaintiff spoke on the telephone with both this Court and our Part Clerk, who informed plaintiff that the Court had not received the Individual Defendant's papers and that papers must be filed electronically; (3) plaintiff left multiple voicemails for the Individual Defendant who did not return said calls; and (4) on October 22, 2020, plaintiff mailed a letter (NYSCEF Doc. 15) to the Individual Defendant to explain the court's electronic filing procedures and to suggest that the Individual Defendant retain counsel; in said correspondence, plaintiff also offered to withdraw the instant motion and/or adjourn the matter so that the Individual Defendant could interpose an Answer if he were to return plaintiff's calls and operate within court rules. Plaintiff requests that, should the Court accept the Individual Defendant's untimely submissions, this Court (1) grant plaintiff an opportunity to reply to the Individual Defendant's papers; and (2) grant plaintiff's motion for a default judgment, without opposition, as against the Corporate Defendant. (NYSCEF Doc. 15.)

On January 4, 2021, the Individual Defendant again e-filed its aforementioned July 10, 2020 answer to the instant complaint (NYSCEF Documents 17 and 18).

#### Discussion

Plaintiff has made out prima facie cases for breach of contract and breach of the Guaranty by submitting the following, among other documents: a copy of the Lease (NYSCEF Doc. 10); a copy of the "Assignment, Assumption and First Amendment of Lease" (NYSCEF Doc. 11); and the affirmation of Chaim Howard Berglas, Esq., plaintiff's attorney (NYSCEF Doc. 5).

Plaintiff has established that it is entitled to a default judgment against both defendants by complying with CPLR 3215(f) and (g) by submitting the following, among other documents: copies of the subject pleadings (NYSCEF Doc. 7); copies of the subject affidavits of service and CPLR 3215(g) notice (NYSCEF Documents 8 and 9); and the September 24, 2020 affidavit of facts of Xiao Ke Tang, plaintiff's president (NYSCEF Doc. 6).

To date, the Corporate Defendant has failed to answer the instant complaint and/or oppose or otherwise respond to the instant motion, and its time to do so has expired.

This Court rejects the Individual Defendant's answer to the instant complaint and opposition to the instant motion as untimely. On July 1, 2020, plaintiff served the Individual Defendant by delivering a copy of the subject pleadings to him personally (NYSCEF Doc. 8). The Individual Defendant failed to submit his papers to the court's electronic filing system until December 14, 2020, five months following service of process. Plaintiff has demonstrated its various attempts to contact the Individual Defendant both to explain the electronic filing system procedure and to extend offers to withdraw the instant motion and/or adjourn the matter should the Individual Defendant agree to comply with court rules. Having ignored plaintiff's attempts to reach out to

assist the Individual Defendant in responding properly to the compliant and motion, he is estopped from claiming that he was unable to do so.

Therefore, plaintiff is entitled to a default judgment against both defendants.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion by plaintiff, Tang’s Realty Inc., for a default judgment against defendants, La Vie En Szechuan Restaurant Corp. a/k/a La Vie En Szechuan Inc. and Yi Zhang, jointly and severally, is hereby granted, on plaintiff’s first and second causes of action, in the amount of \$154,701.99 (\$19,867.66 plus \$134,834.33), plus interest thereon at the statutory rate from February 11, 2020, plus costs and disbursements. Plaintiff’s request for attorney’s fees (plaintiff’s third cause of action in the instant complaint) is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and the payment of any necessary fees. The Clerk is hereby directed to enter judgment accordingly.

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4/5/2021  
DATE

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ARTHUR F. ENGORON, J.S.C.

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	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE