SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

----------X

DEZER PROPERTIES II, LLC,

Plaintiff,

- v -

WEST 20TH ENTERPRISES CORP., d/b/a VIP CLUB, and "XYZ CORP.,"

Defendants.

----------X

INDEX NO. 157199/2020

MOTION DATE 01/25/2021

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 (Motion 001)

were read on this motion to/for DEFAULT JUDGMENT.

I. INTRODUCTION

This is an action to recover unpaid rent, use and occupancy, and related expenses in connection with commercial real property located at 20 West 20th Street in Manhattan (hereinafter the premises), and for ejectment of the entity occupying the premises. The plaintiff owner moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant West 20th Enterprises Corp., doing business as VIP Club (hereinafter West 20th): (a) awarding the plaintiff rent and unpaid use and occupancy, and (b) directing West 20th to pay additional use and occupancy that has accrued, and will continue to accrue, during the pendency of the action. The plaintiff also seeks a judgment of ejectment against West 20th and any subtenant or occupant of the premises, and an award of attorneys' fees and expenses incurred in prosecuting this action. West 20th has failed to answer, and, thus, is in default.

The motion is granted to the extent that the plaintiff is granted leave to enter a money judgment against West 20th in the sum of $921,630.54, plus an award of attorneys' fees in the sum of $2,000. The motion is denied as premature in connection with the cause of action for ejectment, and that cause of action is stayed for a period of 60 days to provide West 20th an

opportunity to serve and file a hardship statement in accordance with L 2021, ch 73. The complaint is dismissed as to "XYZ Corp.," a fictitious entity named as a defendant that the plaintiff alleges may be West 20th's subtenant or other occupant of the premises. The motion is otherwise denied.

II. PROCEDURAL HISTORY

On January 6, 1993, the plaintiff, as landlord, and West 20th, as tenant, entered into a commercial lease with respect to the premises, with a term commencing on January 1, 1993 and terminating on December 31, 2002. The term of the lease thereafter was extended four times, with the last extension, dated March 25, 2010, extending the term of the lease from January 1, 2014 until March 31, 2020. The fourth extension also afforded an option to West 20th to extend the term of the lease one more time, from April 1, 2020 until March 31, 2025. The plaintiff has not submitted any evidence that West 20th exercised that option.

The plaintiff commenced the current action on September 8, 2020. On September 18, 2020, the plaintiff properly served West 20th pursuant to CPLR 311 and Business Corporation Law § 306 by delivering two copies of the summons and verified complaint, with notice of electronic filing, to the New York State Secretary of State. In addition, the plaintiff properly served a CPLR 3215(g) notice upon West 20th by first-class mail on October 20, 2020. "XYZ Corp." is a fictitious name of a subtenant that purportedly occupies the premises. West 20th has not answered the complaint or otherwise appeared in the action, nor has it opposed this present motion for leave to enter a default judgment. The plaintiff made the instant motion for leave to enter a default judgment on November 5, 2020.

III. DEFAULT JUDGMENT

Where a plaintiff moves for leave to enter a default judgment, it must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the facts

constituting the claim, and proof of the defendant's default (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The affidavits of service that were filed by the plaintiff establish that West 20th was served with process, as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]). In addition, the affirmation by the plaintiff's attorney established that West 20th did not answer the complaint.

With respect to the proof of the facts constituting the claim,

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, 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]). In other words, the proof submitted must establish a prima facie case (*see id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [2d Dept 1983]).

"Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Green v Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]; *see Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must "state a viable cause

of action" (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 71). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (*see Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]). Proof that the plaintiff has submitted "enough facts to enable [the] court to determine that a viable" cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *see Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (*see* CPLR 105[u]; *Woodson v Mendon Leasing Corp.*, 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc.*, 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; *see also Michael v Atlas Restoration Corp.*, 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 AD3d 552, 553 [2d Dept 2012]).

IV. DISCUSSION

A. Unpaid Rent and Use and Occupancy

In support of its claim, the plaintiff submits the affidavit of its manager, Richard Angel, the initial lease with subsequent amendments, a rent demand, and the rent ledger as proof of loss. The original lease, dated January 1993, was modified and extended three times. The fourth, and final, modification extended the lease from January 1, 2014 until March 31, 2020. As of May 31, 2020, West 20th owed $95,420.94 as base rent, plus certain additional expenses set forth in the lease, that accrued during the term of the fourth lease modification. Thus, as to the outstanding rent and expenses that were owed pursuant to the lease up until March 31,

2020, when the lease expired, the plaintiff established its entitlement to recover the sum of $117,508.22.

In Section 2A of the fourth modification, the parties included an option to extend the lease subject to certain conditions, which provided that:

> "So long as Owner does not sell the Demised Premises or decide to convert the usage of the Demised Premises from the existing commercial usage to residential usage and Tenant is not in default of any requirements hereunder including the full and timely payment of all rent and additional rent and other charges due pursuant to this lease then Tenant shall have an option to renew this Lease then Tenant shall have an option to renew this Lease for an additional period of sixty (60) months commencing on 4/1/20 and terminating on 3/31/25 upon prior written notice to the Owner via certified mail, return receipt requested, delivered to the Owner no less than one hundred and eighty (180) days prior to the expiration of the Lease term."

To be effective, West 20th would have had to exercise this option to extend the lease on or before October 3, 2019. If it exercised the option, the base rent would have increased to $98,760.67 per month. In its submissions, the plaintiff asserts that a lease remains in effect, and that West 20th is in default for unpaid rent subsequent to March 30, 2020. As set forth in the rent ledger submitted by the plaintiff, the plaintiff's rent demand thus increased from $95,420.94 per month to $98,760.67 as of April 1, 2020. However, the plaintiff has provided no evidence establishing that West 20th exercised the option to renew the lease. Consequently, the court cannot conclude that a valid lease existed beyond March 31, 2020, when the fourth modification to the original lease expired. Thus, the court deems the plaintiff to have alleged, in effect, that West 20th is continuing to use and occupy the premises beyond the expiration of the lease without authorization.

In his uncontested affidavit, Angel asserts that West 20th remained in possession of the premises as of November 3, 2020, an allegation that is sufficient to establish that West 20th continued to use and occupy the premises beyond the expiration of the lease without authorization. Real Property Law § 232-c provides that the creation of a holdover tenancy requires a tenant to pay, and a landlord to accept, at least one month's rent after a lease has

expired. Inasmuch as the plaintiff has submitted no evidence that West 20th paid, or that it accepted, one month's rent after the expiration of the lease, West 20th's continued occupancy of the premises did not create a holdover tenancy.

Where, as here, "no holdover tenancy was created, . . . the landlord's remedy is limited to removal of the tenant and damages, both incidental and for use and occupation" (*Jaroslow v Lehigh Val. R. Co.*, 23 NY2d 991, 993 [1969]). Therefore, the plaintiff is only entitled to recover use and occupancy damages equal to the reasonable value of the premises, as agreed upon in the most recent modification of the lease, rather than the increased base rent offered in the extension option (*see Matter of First Am Tit. Ins. Co. v Cohen*, 163 AD3d 814 [2d Dept 2018] [damages attributable to the former tenant's continued occupation of the premises were not due "under the lease," but, rather, were due as use and occupancy for the reasonable value of the premises]; *Andejo Corp. v South St. Seaport Ltd. Partnership*, 35 AD3d 174, 174 [1st Dept 2006]; *2641 Concourse Co. v City Univ. of N.Y.,* 137 Misc 2d 802, 804-805 [Ct Claims 1987], *affd* 147 AD2d 379 [1st Dept 1989]). "The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant" (*Eighteen Assocs. v Nanjim Leasing Corp.*, 257 AD2d 559, 559 [2d Dept 1999]). "Rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties" (*id.* at 559-560 [internal quotation marks omitted]).

The plaintiff is, thus, entitled to recover "reasonable use and occupancy" beginning on April 1, 2020 to compensate it for West 20th's continued use of the premises. Reasonable use and occupancy here includes a monthly obligation to pay $95,420.94 in lieu of rent as and for a portion of "the reasonable value of the premises," along with obligations to pay for the provision of water at $200 per month and sprinkler maintenance services at $200 per month, in addition to real property tax escalation obligations at an average of $4,694.35 per month, for a total of $100,515.29 per month. The plaintiff established that West 20th owed this monthly obligation

for a period of eight months, commencing on April 1, 2020, when the lease expired, until the end of November 2020, the month in which it made the instant motion. The plaintiff also established that West 20th was still in possession of the premises as of that date. Hence, West 20th is liable to the plaintiff for use and occupancy in the total sum of $804,122.32 from April 1, 2020 until November 30, 2020.

The plaintiff, however, has not provided evidence to show the nature of the expenses that it described in its rent ledger as "Miscellaneous" and "Reimb Water," or the necessity of those expenses; therefore, the plaintiff has not established that it is entitled to be reimbursed for these expenses as part of West 20th's obligation to pay it "reasonable use and occupancy." The plaintiff also has not shown its entitlement to the increased security deposit of $20,038.38 for which it billed West 20th on April 1, 2020, as per the terms of the renewal option, because the plaintiff did not show that West 20th exercised the option, or that a lease between the plaintiff and West 20th existed on April 1, 2020.

The plaintiff is thus entitled to a total award for rent plus use and occupancy in the sum of $921,630.54.

The court notes that, to the extent that West 20th has remained in possession of the premises beyond November 30, 2020, it also remained, and continues to remain, obligated to the plaintiff in the monthly amount of $100,515.29, an obligation that is not the subject of this motion or order. Any claim for leave to enter a default judgment for use and occupancy that accrued beyond November 30, 2020 is thus premature, as the plaintiff has not submitted any facts demonstrating that West 20th remained in possession of the premises beyond that date.

B. Ejectment

A cause of action for ejectment may be maintained by the owner of real property against a person who wrongfully remains in possession of the property, or who wrongfully claims superior title to the property (*see City of Syracuse v Hogan*, 234 NY 457, 462 [1923]; 5 Warren's Weed, New York Real Property § 41.16 [2018]). Thus, the proponent of an ejectment claim can

establish a prima facie case by demonstrating that it is the owner of the subject property with a present or immediate right to possession thereof, and that the defendant is in possession of that property (*see City of New York v Anton*, 169 AD3d 999, 1001-1002 [2d Dept 2019]). The issue of whether the plaintiff made that showing here, however, must await the completion of the procedures outlined by the Legislature in L 2021, ch 73, effective March 9, 2021.

On May 7, 2020, Governor Andrew Cuomo issued an executive order that provided, in relevant part, that:

> "[t]here shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020"

(Executive Order 202.28, May 7, 2020). The Governor extended the term of that moratorium pursuant to Executive Order 202.48, which provided that:

> "[t]he directive contained in Executive Order 202.28, as extended, that prohibited initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, is continued only insofar as it applies to a commercial tenant or commercial mortgagor, as it has been superseded by legislation for a residential tenant, and residential mortgagor, in Chapters 112, 126, and 127 of the Laws of 2020"

(Executive Order 202.48, Jul. 6, 2020). Pursuant to Executive Order 202.64, dated September 18, 2020, the Governor extended the moratorium as to commercial tenants until October 20, 2020. On October 20, 2020, the Governor issued an executive order extending the moratorium on the "eviction of any commercial tenant for nonpayment of rent . . . through January 1, 2021" (Executive Order 202.70, Oct. 20, 2020). On December 31, 2021, the Governor further extended the moratorium through January 31, 2021 (Executive Order 202.87, Dec. 31, 2020).

On March 9, 2021, the New York State Legislature enacted L 2021, ch 73, a statute that, among other things, codified all of the commercial anti-eviction provisions of the Executive Orders that the Governor had issued from May 2020 through December 2020. The statute

stayed all commercial evictions and ejectments until May 1, 2021. The statute also provided, in relevant part, that

> "Any eviction proceeding pending on the effective date of this act, including eviction proceedings filed on or before March 7, 2020, or commenced within thirty days of the effective date of this act shall be stayed for at least sixty days, or to such later date that the chief administrative judge shall determine is necessary to ensure that courts are prepared to conduct proceedings in compliance with this act and to give tenants an opportunity to submit the hardship declaration pursuant to this act. The court in each case shall promptly issue an order directing such stay and promptly mail the respondent a copy of the hardship declaration in English, and, to the extent practicable, the language in which the commercial lease or tenancy agreement was written or negotiated, if other than English"

(L 2021, ch 73, Part A, § 3). In other words, where, as here, a proceeding or action involving a commercial tenant may result in ejectment or eviction, the proceeding must be stayed for 60 days to provide the tenant with an opportunity to serve and file a declaration of hardship in the form annexed to this order. On April 12, 2021, the court mailed copies of the hardship declaration form to West 20th at its business address and at the residence address of its principal. Hence, all proceedings in connection with the ejectment cause of action are stayed until June 11, 2021 to permit West 20th to serve and file a completed hardship declaration.

Inasmuch as neither the Legislature nor the Governor imposed a stay on a commercial tenant's obligation to pay rent, and West 20th, by defaulting, has not availed itself of the opportunity to identify any contractual or statutory provision that would otherwise excuse it from that obligation, West 20th remains liable therefor, as well as for use and occupancy accruing after the lease expired. Without a severance, however, there can be only one judgment entered in a civil action (*see* CPLR 5012; *Bennett v Long Is. Lighting Co.*, 262 AD2d 437, 438 [2d Dept 1999]; *Kriser v Rodgers*, 195 App Div 394, 395 [1st Dept 1921]). Although the ejectment cause of action must be stayed by operation of law, the severance of that cause of action is warranted here to permit the court to direct the entry of a default money judgment on the cause of action to recover rent and use and occupancy.

C. Cause of Action Against Fictitious Corporation

As to "XYZ Corp.," there is no showing of any efforts by the plaintiff to identify the fictitious defendant. Since that defendant was never identified, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against that party (*see generally Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed against it.

D. Attorneys' Fees

The plaintiff is entitled to an award of attorneys' fees on a quantum meruit basis (*see Syracuse Assocs. v. Touchette Corp.*, 73 AD2d 813, 814 [4th Dept 1979] [court may award attorneys' fees on a quantum meruit basis against a tenant that remains in a leasehold after the expiration of a commercial lease, even when a holdover tenancy is not properly created]). The court concludes that the plaintiff is entitled to recover the sum of $2,000.00 as and for attorneys' fees associated with prosecuting this action.

E. Interest

The court concludes that August 15, 2020 is a "reasonable intermediate date" (CPLR 5001[b]) from which to compute interest on the award of damages, inasmuch as the damages arising from West 20th's failure to pay monthly rental and use and occupancy obligations were incurred "at various times" (*id.*) between March 1, 2020, and November 1, 2020 (*see Lager Assoc. v City of New York*, 304 AD2d 718, 723 [2d Dept 2003]; *Delulio v 320-57 Corp.*, 99 AD2d 253, 255 [1st Dept 1984]). Accordingly, prejudgment interest is to be awarded to the plaintiff at nine per cent per annum (*see* CPLR 5004) from August 15, 2020, to the date that the money judgment is entered herein

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that the plaintiff is granted leave to enter a default money judgment against the defendant West 20th Enterprises Corp., doing business as VIP Club, in the principal sum of $921,630.54, with statutory interest from August 15, 2020, on the cause of action to recover unpaid rent and, in effect, use and occupancy, along with an award of attorneys' fees in the sum of $2,000.00, the motion is denied on the merits as to any additional claim to recover damages, and the motion is otherwise denied as premature; and it is further,

ORDERED that the Clerk of the court shall enter a default money judgment in favor of the plaintiff, Dezer Properties II, LLC, 89 Fifth Avenue, 11th Floor, New York, New York 10003, and against the defendant West 20th Enterprises Corp., doing business as VIP Club, 20 West 20th Street, New York, New York 10011, in the principal sum of $921,630.54, with statutory interest from August 15, 2020, plus an award of attorneys' fees in the sum of $2,000.00, and it is further,

ORDERED that the complaint is dismissed insofar as asserted against fictitious defendant "XYZ Corp."; and it is further,

ORDERED that the cause of action for ejectment is severed, without the necessity of purchasing or assigning a new index number, and all proceedings on that cause of action are stayed for a period of 60 days from the date of entry of this order, to provide West 20th Enterprises Corp. with the opportunity to serve and file a hardship declaration in accordance with L 2021, ch 73.

This constitutes the Decision and Order of the court.

4/12/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE