

Abner Props. Co. v Chelsea Off. Park Inc.
2021 NY Slip Op 31363(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 159534/2020
Judge: Nancy M. Bannon
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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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INDEX NO. 159534/2020

ABNER PROPERTIES COMPANY,
Plaintiff,

MOTION DATE 03/26/2021

MOTION SEQ. NO. 001

- v -

CHELSEA OFFICE PARK INC. and ZEV LONDON
Defendants.

DECISION + ORDER ON MOTION

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

were read on this motion to/for JUDGMENT - DEFAULT

In this action to, inter alia, recover unpaid rent, additional rent and holdover use and occupancy owed by a commercial tenant through October 31, 2020, the plaintiff, owner of the property, moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant tenant, Chelsea Office Park, Inc. (the tenant), and defendant Zev London, the personal guarantor on the lease. No opposition is submitted. The motion is granted.

"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). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

The plaintiff has met this burden. It submits, inter alia, the summons and complaint, the underlying lease dated February 23, 2005, the underlying guaranty agreement dated February 2, 2005, and a lease modification agreement dated February 7, 2005, all signed by defendant London, a rent ledger dated November 1, 2020, and a New York City Real Estate Tax Notice applicable to the subject premises. The plaintiff also submits the affidavit of David Koepfel, a managing member of Koepfel Rosen, LLC, the plaintiff's managing agent. The plaintiff's submissions establish that the tenant owed rent and additional rent under the lease agreement totaling \$124,434.33 for the period of April 1, 2020, through September 30, 2020, and that the plaintiff applied the tenant's security deposit and accumulated interest earned from the security deposit to reduce the total amount owed through September 30, 2020, to \$95,665.33. The plaintiff also establishes that the tenant remained in possession of the subject premises after the

lease expired on September 30, 2020, until October 31, 2020, and that holdover use and occupancy, calculated pursuant to paragraph 54 of the lease, is owed by the tenant in the amount of \$50,511.59. The tenant has not paid any of the amounts sought.

The complaint alleges causes of action seeking rent, additional rent, and holdover use and occupancy owed under the lease and guaranty agreements. Thus, each of the first through sixth causes of action sounds in breach of contract against the defendants. The plaintiff has established a claim for breach of contract by showing (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendants' breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Moreover, "where 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 (1st Dept. 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 plaintiffs in regard to the agreement. Indeed, having failed to 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).

Further, the plaintiff is entitled to the contractual attorneys' fees it seeks in its seventh cause of action pursuant to paragraph 19 of the lease and the second paragraph of the guaranty agreement. However, the plaintiff has not submitted any proof of the amount of attorneys' fees to which the plaintiff is entitled. Therefore, the court refers the issue of the amount due to the plaintiff for attorneys' fees under the subject lease and guaranty agreements to a Judicial Hearing Officer or Special Referee.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendants pursuant to CPLR 3215 is granted, without opposition, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sums of (1) \$95,655.33 as and for rent and additional rent through September 30, 2020, and (2) \$50,511.59 as and for holdover use and occupancy through October 31, 2020, plus costs and disbursements, and statutory interest from April 23, 2021, and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. the issue of the amount due to the plaintiff from the defendants as and for reasonable attorneys' fees under the subject lease and guaranty agreements

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44), and it is further

ORDERED that the plaintiff shall serve a copy of this Decision and Order upon the defendants within 15 days.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/23/2021
DATE

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