

MEPT 757 Third Ave. LLC v SY 44 Food Corp.

2021 NY Slip Op 31743(U)

May 18, 2021

Supreme Court, New York County

Docket Number: 653821/2020

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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INDEX NO. 653821/2020

MEPT 757 THIRD AVENUE LLC,

Plaintiff,

MOTION DATE 03/12/2021

MOTION SEQ. NO. 001

- v -

SY 44 FOOD CORP., 206 B&B CORP., BYUNG PARK,
SOO KIM, YOUNG HONG,

Defendant.

**DECISION + ORDER ON
MOTION**

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YOUNG HONG

Plaintiff,

Third-Party
Index No. 595215/2021

-against-

SK47 CORP, SEOK KWANG HA, YOON KIM

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124

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

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by filing a summons and complaint on August 14, 2020, seeking to recover for a breach of a commercial lease. On August 19, 2020 defendants SY 44 Food Corp. and 206 B&B Corp were served pursuant to BCL 306. On August 20, 2020, defendants Byung Il Park, Soo Bok Kim and Young Soo Hong were served by delivering a copy of the summons and complaint to Samuel Ahne, Esq, said defendants' agent for service of process pursuant to the personal guarantees entered into by said defendants. On September 14, 2020,

defendant Soo Bok Kim interposed an answer. Thereafter on October 5, 2020, defendants were served with an amended complaint. On November 22, 2020, Byung Il Park interposed an answer with cross-claims. On August 27, 2020, the corporate defendants were served with an additional copies of the summons and complaint pursuant to CPLR 3215(g)(4) and defendant, Young Soo Hong was served with an additional copy of the summons and complaint pursuant to CPLR 3215(g)(3) at 239 Washington Avenue, Fort Lee, NJ 07024, the address specified in the personal guarantee

On February 25, 2021, plaintiff moved for an Order, (i) pursuant to CPLR §3025(c), deeming the Complaint amended to conform to the proof, reflecting damages in the amount of \$315,068.21, plus interest thereon from the date on which each payment obligation accrued; (ii) pursuant to CPLR §3212, granting summary judgment in favor of Landlord, and against Defendants, Byung Il Park a/k/a Byung Park (“Park”) and Soo Book Kim a/k/a Soo Bok Kim a/k/a Soo B. Kim (“Kim”), striking Park’s and Kim’s affirmative defenses and awarding Landlord the sum of \$315,068.21, plus interest thereon from the date on which each payment obligation accrued; (iii) pursuant to CPLR §3215, directing the entry of a default judgment against Defendants, SY 44 Food Corp. (“SY 44”), 206 B&B Corp. (“206 B&B”), and Young Soo Hong a/k/a Young S. Hong (“Hong”), in the amount of \$169,653.59, plus interest thereon from the date on which each payment obligation accrued; (iv) scheduling a hearing to assess the amount of attorneys’ fees and expenses incurred by Landlord for the commencement and prosecution of the within action to collect the sum due from the Defendants.

On March 10, 2021, this action was discontinued as against Byung Il Park, only.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427

N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of Anil Erdem, an Asset Manager of BentallGreenOak (U.S.) GP LLC, the General Partner of BentallGreenOak (U.S.) Limited Partnership, the Authorized Signatory of BGO Diversified US Property Fund REIT LLC, the Manager of MEPT 757 THIRD AVENUE LLC ("Landlord" or "Plaintiff"), the owner of the building located at and known as 757 Third Avenue, New York New York 10017, together with the relevant leases, assignments, personal guarantees, invoices, and statements of account, which establish as follows: The instant action arises out of a commercial lease, entered into between 206 B&B, a predecessor-in-interest of SY 44, as tenant, and 757 3rd Avenue Associates, LLC a predecessor-in-interest of Plaintiff, as landlord, dated February 27, 2012 (the "Original Lease"), under which 757 3rd leased the premises to 206 B&B. Contemporaneously with the execution of

the Original Lease, Park, as principal of 206 B&B, executed an unconditional personal guarantee of 206 B&B's obligations under the lease. On or about October 5, 2016, 206 B&B, as Assignor, and SY 44, as Assignee, entered into an Assignment and Assumption of Lease, dated October 5, 2016 pursuant to which 206 B&B assigned the lease to SY 44, with the consent of landlord. On or about December 12, 2016, Hong and Kim, as principals of SY 44, executed unconditional, personal guarantees of the assignment of the lease. Subsequently the lease term was extended to April 30, 2031. From June 2020 through and including January 2021, SY 44 failed to pay rent and additional rent due the Landlord under the Lease, in the amount of \$315,068.21, comprised of fixed rent in the amount of \$206,557.28, real estate taxes in the amount of \$19,553.11, electricity charges in the amount of \$21,574.93, water service charges in the amount of \$945.95, the cost of the Annual A/C Condenser Water Charge, in the amount of \$13,500.00 and late charges in the amount of \$47,536.94, together with attorney's fees. As such, plaintiff has established a *prima facie* entitlement to summary judgment as against Soo Book Kim and a default judgment as against SY 44, 206 B&B and Young S. Hong.

Defendant, Young S. Hong cross-moves for leave to interpose a late answer with a third-party complaint. In support of his motion, Hong submits an affidavit which alleges that he currently resides at 8 River St., Ext., Apt 121 Little Ferry, NJ 07643, and not at 239 Washington Avenue, Fort Lee, NJ 07024 and as such did not receive notice of the instant action in time to defend. The Court notes that Hong was properly served in this action pursuant to the personal guarantee. Hong further alleges that on December 30, 2019, the business was sold to SK47 Corp., and that an Assignment and Assumption of Lease was signed by the owner of SK47 Corp., Seok Kwang Ha and that as such he is relieved from the personal guarantee.

“To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense.” *Morrison Cohen LLP v. Fink*, 81 A.D.3d 467, 468, 917 N.Y.S.2d 155 (1st Dept. 2011). Here, Hong demonstrates a reasonable excuse for his failure to interpose a timely answer as despite the fact that he was properly served, he did not receive actual notice of the instant action. However, Hong fails to establish a meritorious defense to plaintiff’s causes of action as it is undisputed that plaintiff did not agree to the assignment of the lease nor did plaintiff agree to release Hong as guarantor. As such, the branch of Hong’s motion opposing the entry of a default judgment against him must be denied.

Despite denial of the branch of Hong’s cross-motion seeking to interpose a late answer, Hong’s proposed third-party action against the parties involved in the assignment of the lease does assert facially valid causes of action against same. As such, that branch of Hong’s motion will be granted.

ORDERED that pursuant to CPLR §3025(c) the ad damnum clause of plaintiff’s complaint is amended to \$315,068.21; and it is further

ORDERED that the branch of plaintiff’s motion for summary judgment on the complaint herein and dismissing defendant, Soo Book Kim’s affirmative defenses is GRANTED on default as against defendant, Soo Book Kim, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$315,068.21, with interest at the rate of 9% per annum from the date of June 1, 2020, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of plaintiff's motion seeking a default judgment against SY 44, 206 B&B and Young S. Hong is GRANTED, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants, SY 44, 206 B&B and Young S. Hong, in the sum of \$169,653.59, with interest at the rate of 9% per annum from the date of June 1, 2020, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant/third-party plaintiff Young S. Hong is GRANTED leave to file a third-party action in the form annexed to his moving papers.

5/18/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<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

