

200 W. 80th St. Corp. v LWB Hospitality Group LLC
2021 NY Slip Op 32394(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 656596/2017
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

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200 WEST 80TH ST. CORP.,	INDEX NO. <u>656596/2017</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>001</u>

LWB HOSPITALITY GROUP LLC D/B/A TLV A/D/B/A TLV
MEDITERRANEAN RESTO-BAR AND LOUNGE, LARRY N.
WEISSFELD A/K/A LARRY WEISSFELD, YUVAL
BUTSORUN, OFER COHEN A/K/A OFER R. COHEN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion for SUMMARY AND DEFAULT JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion is granted.

Background

In an instrument dated May 1, 2011, plaintiff, 200 West 80th Street Corp. ("Landlord"), as landlord, leased the "corner store #2 and a portion of the basement" of 416 Amsterdam Avenue, New York, New York ("the Premises") for ten years to Hummus Kitchen Amsterdam Ave. Inc. ("Hummus Kitchen"), as tenant ("the Hummus Kitchen Lease"). NYSCEF Doc. No. 44.

On May 5th, 2011, defendant Ofer Cohen a/k/a Ofer R. Cohen ("Cohen") signed a Good Guy Guaranty ("the Cohen Guaranty") covering the Hummus Kitchen Lease. NYSCEF Doc. No. 44.

In an instrument dated May 26, 2015, Hummus Kitchen assigned, with Landlord's consent, the remainder of its lease to defendant LWB Hospitality Group LLC ("LWB") ("the LWB Assignment"). NYSCEF Doc. No. 45. Concurrently, defendants Yuval Butsorun ("Butsorun") and Larry N. Weissfeld a/k/a Larry Weissfeld ("Weissfeld") signed a Good Guy Guaranty covering the LWB Assignment. NYSCEF Doc. No. 46. Neither the LWB assignment nor the Good Guy Guaranty covering it released Cohen from the Cohen Guaranty.

In the beginning of 2016, LWB breached its rental obligations, and Landlord commenced a non-payment proceeding in New York County Civil Court, L&T Index No. 59848/2016. That action was subsequently settled by a so-ordered Stipulation dated June 7, 2016, and an Amendment to Stipulation of Settlement dated August 9, 2016 ("the Stipulations"). NYSCEF Doc. Nos. 47 and

48. Pursuant to the Stipulations, LWB and Weissfeld consented to a money judgement in favor of Landlord of \$105,002.99, reduced to \$90,955.20 if paid on a set payment schedule, as well as reduced real estate taxes from 2016 and 2017 of \$43,000. Id. The Stipulations also allowed Landlord to seek all amounts due and owing in the event of a breach of the settlement. Id.

On November 3, 2016, Landlord served a “Ten (10) Day Notice of Default” upon LWB as required by the Stipulations (“the Default Note”). NYSCEF Doc. No. 49. LWB did not cure its default, and on November 29, 2016, was evicted from the Premises. NYSCEF Doc. No. 51.

In an instrument dated February 17, 2017, Landlord leased the Premises to a new tenant, starting in June 2017, for terms less than in the Hummus Kitchen Lease. NYSCEF Doc. No. 52.

On October 27, 2017, Landlord filed the instant lawsuit, asserting six causes of action: (1) breach of lease against LWB; (2) attorney’s fees against LWB; (3) breach of guaranty against Weissfeld and Butsorun; (4) attorney’s fees against Weissfeld and Butsorun; (5) breach of guaranty against Cohen; and (6) attorney’s fees against Cohen.

On November 8, 2017, the Summons and Complaint were properly served upon LWB through corporate service; an affidavit of service was filed November 16, 2017. NYSCEF Doc. No. 3.

On November 7 and 10, 2017, the Summons and Complaint were properly served upon Cohen through service upon co-workers at his places of business and through the United States Postal Service; an affidavit of service was filed on November 16, 2017. NYSCEF Doc. Nos. 4 and 5.

On November 7, 2017, the Summons and Complaint were served upon a “building office clerk” at Weissfeld’s home; an affidavit of service was filed on November 21, 2017. NYSCEF Doc. No. 7.

On November 27, 2017, the Summons and Complaint were properly served upon Butsorun through nail-and-mail service upon his home; an affidavit of service was filed on November 30, 2017. NYSCEF Doc. No. 9.

On November 28, 2017, Weissfeld answered with a general denial and five affirmative defenses (laches and estoppel; failure of a condition precedent; guaranty not operative by alteration; failure to state a cause of action; and improper service). NYSCEF Doc. No. 8.

On January 23, 2018, Cohen answered with a general denial, three affirmative defenses (waiver, laches, and release) and one crossclaim seeking indemnification from the other defendants. NYSCEF Doc. No. 10.

On May 26, 2020, Landlord moved, pursuant to CPLR 3215, for default judgements against LWB and Butsorun, and, pursuant to CPLR 3212, summary judgements against Weissfeld and Cohen. NYSCEF Doc. No. 36. On the same day, Landlord served notice of the motion for summary judgement and default judgement upon all four defendants via the United States Postal Service. NYSCEF Doc. No. 68.

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form “sufficient to require a trial of material questions of fact on which he rests his claim ...mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

To obtain a default judgement, a plaintiff must submit proof of service of the summons and complaint, the facts constituting the claim, the default, and the amount due. CPLR 3215.

“Given that in default proceedings the defendant has failed to appear, and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists.” Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

Here, Landlord has met its burden of establishing a prima facie showing of entitlement to judgements for breach of lease as a matter of law by submitting: the summons, complaint, and answers; the deed to the Premises (NYSCEF Doc. No. 43); the Hummus Kitchen Lease; the LWB Assignment; the relevant rent ledger (NYSCEF Doc. No. 57); the relevant tax bills (NYSCEF Doc. No. 50); the Stipulations; the Default Note; and the affidavit of Frederick J. Rudd (“Rudd”), Landlord’s Vice President, explaining Landlord’s business practices and the evidence provided (NYSCEF Doc. No. 39).

Landlord has also met its burden of establishing a prima facie showing of entitlement to judgements for breach of guaranty by submitting: the summons, complaint, and answers; the Cohen Guaranty; the LWB Guaranty; acknowledgement of the guarantees in the answers of their signatories; and the Rudd affidavit.

Cohen’s affirmative defenses and Weissfeld’s first four affirmative defenses fail as they are insufficiently particular to give the court and parties notice of their material elements. CPLR 3013. Weissfeld’s fifth affirmative defense fails as his time to move for dismissal based on improper service has passed. CPLR 3211(e). And, Cohen’s crossclaim is barred by the clear language of Paragraph 5 the Cohen Guaranty: “Guarantor absolutely, unconditionally and irrevocably waives any and all right to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this Guaranty or the obligations of Guarantor under” it.

Despite multiple adjournments, neither appearing defendant has responded to the instant motion.

Finally, as Landlord has provided proof of service and additional notice to LWB and Butsorun, and as they have failed to appear, answer, or otherwise respond to the complaint, and as their time to do so has expired, plaintiff is entitled to a default judgement against them. CPLR 3215.

Conclusion

Therefore, the motion of plaintiff, 200 West 80th St. Corp., is granted. The Clérk is hereby directed to enter default judgements against LWB Hospitality Group LLC d/b/a TLV a/d/b/a

TLV Mediterranean Resto-Bar and Lounge and Yuval Butsorun, pursuant to CPLR 3215, and summary judgements against Larry N. Weissfeld a/k/a Larry Weissfeld and Ofer Cohen a/k/a Ofer R. Cohen, pursuant to CPLR 3212, jointly and severally, in the amount of \$405,129.08 (\$160,402.97 in remaining rental and real estate tax escalation arrears [\$91,969.00 in remaining arrears from the Stipulations, plus \$42,929.95 in remaining real estate tax escalation payments from the Stipulations, plus \$25,504.02 in fixed rent for the months of October 2016 and November 2016], plus \$29,256.03 in accrued arrears before the reletting of the Premises, plus \$224,470.08 in deficit fixed rents after the reletting, less \$9,000.00 in arrears credit for the sale/relinquishment of equipment and property within the Premises).

It is further ordered that plaintiff's request for attorney's fees 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 any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest date.



11/12/2021
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE