

1625 Broadway, Inc. v Green Apple Gourmet Inc.

2022 NY Slip Op 30077(U)

January 11, 2022

Supreme Court, New York County

Docket Number: Index No. 653408/2021

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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1625 BROADWAY, INC.,

Plaintiff,

- v -

GREEN APPLE GOURMET INC. and ERIC KIM,

Defendants.

-----X

INDEX NO. 653408/2021

MOTION DATE 08/10/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that plaintiff's motion for entry of a default judgment pursuant to CPLR 3215 is granted in part and denied in part, based upon the following memorandum decision.

Background

In this action for breach of a commercial lease, plaintiff 1625 Broadway Inc. ("plaintiff") moves for entry of a default judgment against defendants Green Apple Gourmet Inc. ("Green Apple") and Eric Kim ("Kim").

Plaintiff is the record owner of the building located at 1625 Broadway, New York, New York (the "premises") (NYSCEF Doc. No. 4, ¶ 3). Plaintiff leased the building to nonparty 1625 Market Corp. in 2009 (NYSCEF Doc. No. 5). 1625 Market Corp. then assigned the lease to Green Apple on June 6, 2014 (NYSCEF Doc. No. 6). Relevant to the instant motion, the lease provides that Green Apple shall pay plaintiff (i) Fixed Rent of \$60,476.24 per month for the period from May 1, 2019 through April 30, 2020, Fixed Rent of \$62,290.52 per month for the period from May 1, 2020 through April 30, 2021 and Fixed Rent of \$64,159.24 per month for the

period from May 1, 2021 through April 30, 2022 (NYSCEF Doc. No. 5, ¶ 3.2), (ii) water bills (*id.*, ¶ 3.1.1), and (iii) all real estate taxes on the premises (*id.*, ¶ 3.3.2). In addition, Kim signed a personal guaranty of the lease on June 6, 2014, pursuant to which he guaranteed to plaintiff “the full and prompt payment of all Fixed Rent and Additional Charges (as such terms are defined in the Lease) and all other charges and sums (including, without limitation, Landlord's reasonable attorneys' fees and disbursements) payable by Tenant under the Lease” (NYSCEF Doc. No. 7, ¶ 1).

As of the date of plaintiff's motion, plaintiff contends that Green Apple remains in possession of the premises (NYSCEF Doc. No. 4, ¶ 10), and that Fixed Rent, water bills, and real estate taxes remain outstanding, as set forth in the ledger and water and tax bills attached to the moving papers (NYSCEF Doc. No. 12-14). Plaintiff seeks entry of a default judgment on its first two causes of action against Green Apple for \$2,102,799.22, representing the total Fixed Rent, water bills, and real estate taxes outstanding as of August 31, 2021, the month in which plaintiff made its motion. Plaintiff also seeks entry of a default judgment against Kim for \$529,970.93, representing the amount of rent owed through March 6, 2020.

Plaintiff commenced this action by filing a summons and complaint on May 24, 2021 (NYSCEF Doc. No. 1). Affidavits of service filed on June 8, 2021 attest to service on Green Apple via the Secretary of State pursuant to BCL 306(b) on June 2, 2021, and service on Kim by affixing a copy of the summons and complaint to the door of his place of residence and sending a follow up mailing by mail to the same address pursuant to CPLR 308(4) (NYSCEF Doc. No. 2). Affidavits of additional service filed with the moving papers attest to service by mail on Green Apple at its last known address at the premises and on Kim by mail at his place of residence on

July 1, 2021 (NYSCEF Doc. No. 10). To date, neither defendant has answered the complaint or otherwise appeared in the action. There is no opposition to the motion.

Discussion

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are 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 62, 71 [2003]). Nevertheless, “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” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, with respect to Green Apple, plaintiff has met its burden on the motion by submission of the affidavit of service demonstrating service of the summons and complaint on Green Apple (NYSCEF Doc. No. 2 at 1), the verified complaint (NYSCEF Doc. No. 1), and the affidavit of Steven Marvin, the Executive Managing Director of plaintiff’s managing agent, which attests to the facts constituting plaintiff’s claim as well as defendants’ default (NYSCEF Doc. No. 4). In his affidavit, Marvin reaffirms the allegations of the verified complaint and attests to the amount owed. As set forth in the verified complaint, Green Apple is the assignee of the lease between plaintiff and 1625 Market Corp. for the premises, pursuant to which Green Apple is obligated to pay Fixed Rent, water bills, and real estate taxes on the premises (NYSCEF

Doc. No. 1, ¶¶ 6-10). As set forth in the verified complaint and confirmed in Marvin's affidavit, owes unpaid Fixed Rent, water bills, and real estate taxes of \$2,102,799.22, as set forth in plaintiff's ledger and the water bills and real estate tax bills attached to the moving papers (NYSCEF Doc. No. 1, ¶¶ 11-16; NYSCEF Doc. No. 4, ¶¶ 20-25; NYSCEF Doc Nos. 12-14). Therefore, plaintiff's motion for entry of a default judgment against Green Apple is granted.

With respect to Kim, plaintiff has not met its burden on the motion, as its service of the summons and complaint on Kim was defective. CPLR 308(4) provides that where service cannot, with due diligence, be made by personal delivery or delivery to a person of suitable age and discretion at a defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant, then service may be made by affixing a copy of the summons to the door of the defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant's last known residence or actual place of business. "[T]he due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008]). At minimum, the process server must make multiple attempts to deliver the summons in person on different days and at different times of day when the defendant or a person of suitable age and discretion are likely to be present (*see Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007]). Further, the process server must make some inquiry "to ascertain [the defendant's] whereabouts or [their] place of business" (*id.*).

Here, plaintiff's process server attests that he made two attempts to serve Kim in person, at 8:50 am and 7:07 pm on May 28, 2021 (NYSCEF Doc. No. 2 at 2). His affidavit does not set forth that he made any inquiries as to Kim's whereabouts or his place of business, or attempts on different days prior to affixing the summons to the door of Kim's residence. Accordingly, he did

not satisfy the “due diligence” requirement necessary for affix and mail service pursuant to CPLR 308(4) (see *Spath*, 36 AD3d at 413 [“The three previous attempts to serve Miller . . . were insufficient to satisfy the due diligence requirement. None of these attempts was made on a weekend, nor is there any indication that the process server made any inquiries to ascertain Miller's whereabouts or her place of business”]). Since service of the summons and complaint was defective, plaintiff cannot satisfy its burden to submit proof of service before entry of a default judgment (CPLR 3215). Therefore, plaintiff’s motion for a default judgment against Kim is denied. Accordingly, it is hereby:

ORDERED that the motion is granted in part and denied in part as set forth above; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff 1625 Broadway Inc. and against defendant Green Apple Gourmet Inc. in the sum of \$2,102,799.22, with interest at the statutory rate from May 24, 2021, 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 action against defendant Eric Kim is severed and shall continue.

1/11/2022
DATE

LOUIS L. NOCK, J.S.C.

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