

Ninth Ave. Realty LLC v JHawaii Corp.

2022 NY Slip Op 30191(U)

January 12, 2022

Supreme Court, New York County

Docket Number: Index No. 651597/2021

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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NINTH AVENUE REALTY LLC,

Plaintiff,

INDEX NO. 651597/2021

MOTION DATE 09/07/2021

MOTION SEQ. NO. 001

- v -

JJHAWAII CORPORATION a/k/a JAY CLEANERS
WASH & FOLD, JAEWOO LEE, DENISE LEE
ABC CORP., JOHN DOE, and JANE DOE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26

were read on this motion for DEFAULT JUDGMENT.

LOUIS L. NOCK, J.

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

Background

In this action for breach of a commercial lease and ejectment, plaintiff Ninth Avenue Realty LLC (“plaintiff”) moves for entry of a default judgment of possession and on liability for money damages pursuant to CPLR 3215 against defendants JHawaii Corporation a/k/a Jay Cleaners Wash & Fold (“JHawaii”), Jaewoo Lee (“Jaewoo”), and Denise Lee (“Denise”).

Plaintiff also requests an inquest on damages, and a writ of assistance.

Plaintiff is the record owner of the building located at 617 Ninth Avenue, New York, New York (NYSCEF Doc. No. 15 at 10-11). On October 27, 2011, plaintiff and JHawaii

entered into a lease for ground floor retail space and basement space at 617 Ninth Avenue (the “premises”) for a term of ten years (NYSCEF Doc. No. 16). Pursuant to the lease, JHawaii is obligated to pay plaintiff fixed rent in the amount of “\$121,609.92 per annum (\$10,134.16 per month) during [2020]; and \$125,258.16 per annum (\$10,438.18 per month) during [2021] (*id.*, ¶ 2.2, Exhibit A), 60% of any real estate tax escalation over the term of the lease (*id.*, ¶ 6.1, Exhibit F), and any water and sewage charges (*id.*, ¶ 8.1). Any failure to pay these obligations is a default under the lease, entitling plaintiff to terminate the lease on at least five days’ written notice (*id.*, ¶ 18.1, 18.2). In addition, the lease provides for 12% interest on unpaid rent or additional charges (*id.*, ¶ 19.7), and for plaintiff to recover its reasonable attorney’s fees (*id.*, ¶ 19.5). In the event that JHawaii remains in the premises past the expiration of the lease, plaintiff is entitled to per diem use and occupancy at twice the rate of the fixed rent for 2021 (*id.*, ¶ 24.2). Further, Jaewoo and Denise entered into a personal guaranty of the lease, pursuant to which they guaranteed “the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations under the Lease ... (including, without limitation, Landlord's reasonable attorneys' fees and disbursements)” (NYSCEF Doc. No. 18).

JHawaii ceased paying rent in September 2020 (NYSCEF Doc. No. 9, ¶ 8). On February 11, 2021, plaintiff served JHawaii with a notice of termination pursuant to the lease (NYSCEF Doc. No. 19). Accordingly, the lease terminated on March 6, 2021 (*id.*). Plaintiff contends that JHawaii failed to vacate the premises and has not paid any of the outstanding rent or additional charges set forth in the rent ledger attached to the moving papers (*id.*, ¶¶ 10-11; NYSCEF Doc. No. 22). Plaintiff seeks entry of a default judgment of possession against JHawaii, and a writ of assistance pursuant to RPAPL § 221. Plaintiff also seeks entry of a default judgment on liability against JHawaii for unpaid rent and attorney’s fees on its third, eighth, ninth, and twelfth causes

of action, against Jaewoo and Denise on its fourth through seventh, tenth, and eleventh causes of action, and an inquest as to monetary damages.

Plaintiff commenced this action by filing a summons and complaint on March 10, 2021 (NYSCEF Doc. No. 1). Affidavits of service filed on April 21, 2021 attest to service on JHawaii via the Secretary of State pursuant to BCL 306(b) on March 22, 2021 (NYSCEF Doc. No. 4), and service on Jaewoo and Denise by in-hand delivery to Jaewoo at the premises on April 7, 2021, and sending a follow-up mailing to Denise at the same address pursuant to CPLR 308(2) (NYSCEF Doc. No. 3). Affidavits of additional service filed on June 2, 2021 attest to service by mail on JHawaii at its last known address at the premises and on Jaewoo and Denise by mail at the premises and their place of residence on June 2, 2021 (NYSCEF Doc. Nos. 5-6). 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, plaintiff has met its burden on the motion by submission of the affidavits of service demonstrating service of the summons and complaint on JHawaii, Jaewoo, and Denise (NYSCEF Doc. Nos. 3, 4), the verified complaint (NYSCEF Doc. No. 1), the affirmation of its counsel, Irina Svetlichnaya, Esq., attesting to the default (NYSCEF Doc. No.8, ¶¶ 14-16), and the affidavit of Mitchell Rothken, plaintiff’s manager, which attests to the facts constituting plaintiff’s claims (NYSCEF Doc. No. 9). In his affidavit, Rothken reaffirms the allegations of the verified complaint. As set forth in the verified complaint, JHawaii is obligated under the lease with plaintiff to pay fixed rent, water bills, and 60% of any real estate tax escalations on the premises (NYSCEF Doc. No. 1, ¶¶ 22-28). Further, Jaewoo and Denise entered into a personal guaranty of JHawaii’s payment obligations under the lease (*id.*, ¶¶ 16-18).

As set forth in the verified complaint and confirmed in Rothken’s affidavit and the accompanying documents, JHawaii owes unpaid Fixed Rent, water bills, and real estate taxes of \$131,798.70, as set forth in plaintiff’s ledger attached to the moving papers, together with use and occupancy as provided for in the lease while JHawaii continues to hold over in the premises (NYSCEF Doc. No. 1, ¶¶ 22-28; NYSCEF Doc. No. 9, ¶¶ 13-23; NYSCEF Doc No. 16, ¶¶ 2.2, 6.1, 8.1, 24.2, Exhibits A, F). Moreover, both the lease and the guaranty provide for plaintiff to recover its reasonable attorney’s fees in the event of a default (NYSCEF Doc. No. 1, ¶¶ 17, 88; NYSCEF Doc. No. 9, ¶¶ 35-40; NYSCEF Doc. No. 16, ¶ 19.5; NYSCEF Doc. No. 18). The court also notes that, pursuant to the New York State Department of Economic Development Guidance attached to plaintiff’s moving papers, JHawaii is considered an essential service, in the category of “laundromats and other clothing/fabric cleaning services” (NYSCEF Doc. No. 23

at 3). Accordingly, the provisions of New York City Administrative Code § 22-1005 do not bar enforcement of the guaranty against Jaewoo and Denise. Therefore, plaintiff's motion for entry of a default judgment as to liability on its third through twelfth causes of action against JHawaii, Jaewoo, and Denise is granted. The issue of the total amount of plaintiff's damages, including reasonable attorney's fees, will be set down for an inquest.

Finally, with regard to the issue of possession, as set forth in the verified complaint, plaintiff is the record owner of the premises, and JHawaii's lease was terminated as of March 6, 2021 (NYSCEF Doc. No. 1, ¶¶ 3, 20; NYSCEF Doc. No. 2). As set forth in the verified complaint and confirmed in Rothken's affidavit, JHawaii has failed to vacate the premises upon the termination of the lease (NYSCEF Doc. No. 1, ¶ 21; NYSCEF Doc. 9, ¶¶ 10-11). However, plaintiff has not satisfied the requirements of the "Covid-19 Emergency Protect Our Small Businesses Act of 2021" (the "Act") (2021 Sess. Law News of N.Y. Ch. 73 [S. 471-A] [McKinney's]). Specifically, the Act, which went into effect on March 9, 2021 (*id.*, Part A, § 13), requires that a hardship declaration form, as such form is described in the Act, be provided to the tenant in any proceeding to recover possession of real property related to a commercial unit (*id.*, Part A, § 1[1]) as an attachment to the summons and complaint (*id.*, Part A, § 4). This action was commenced by electronic filing of the summons and complaint on March 10, 2021 (NYSCEF Doc. No. 1), and, therefore, plaintiff was required to attach a hardship declaration form to the complaint served on defendants. The record does not reflect that plaintiff included a hardship declaration form in its papers. Accordingly, that branch of plaintiff's motion seeking a default judgment of possession is denied, and plaintiff is directed to serve a hardship declaration upon defendants within ten days of filing of this order. Plaintiff is further directed to file an affidavit of service of the hardship declaration upon defendants.

Accordingly, it is hereby

ORDERED that the motion is granted in part, and to the extent set forth herein; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Ninth Avenue Realty LLC and against defendants JHawaii, Jaewoo Lee, and Denise Lee on the issue of liability for the third through twelfth causes of action set forth in the verified complaint, with the issue of damages, including reasonable attorney's fees, to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of Plaintiff's said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon 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), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that branch of plaintiff's motion for entry of a default judgment of possession and writ of assistance on the first and second causes of action for ejectment is denied; and it is further

ORDERED that plaintiff shall serve a hardship declaration form as provided for pursuant to the "Covid-19 Emergency Protect Our Small Businesses Act of 2021" (the "Act") (2021 Sess. Law News of N.Y. Ch. 73 [S. 471-A] [McKinney's]) within ten days of filing of this order, and file an affidavit of service of the hardship declaration form upon defendants; and it is further

ORDERED that the first and second causes of action for ejectment are severed and shall continue.

This constitutes the Decision and Order of the court.

ENTER:



1/12/2022

DATE

LOUIS L. NOCK, J.S.C.

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