

**Northern Star Textile, Corp. v Micro Off. Solutions 4
LLC**

2022 NY Slip Op 30355(U)

February 8, 2022

Supreme Court, New York County

Docket Number: Index No. 156175/2020

Judge: Debra A. James

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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. DEBRA JAMES

PART 59

Justice

-----X

NORTHERN STAR TEXTILE, CORP.,

Plaintiff,

- v -

MICRO OFFICE SOLUTIONS 4 LLC and WELLIE CHAO,

Defendants.

-----X

INDEX NO. 156175/2020

MOTION DATE 07/23/2021

MOTION SEQ. NO. 001

CORRECTED ORDER - AMENDED (MOTION RELATED)

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 81

were read on this motion to/for JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the Amended Order of February 8, 2022 resolving motion sequence 001 in this action is VACATED, RESETTLED AND CORRECTED PURSUANT TO CPLR § 5019(a) [see Kiker v Nassau County, 85 NY2d 879 (1995)], as follows:

ORDERED that the cross motion of defendant Micro Office Solutions 4 LLC to vacate its default and to permit it to serve a late answer is DENIED; and it is further

ORDERED that the motion of plaintiff to amend the complaint to allege accrual of ongoing rent is GRANTED to the extent that this court deems such motion as one to conform the pleadings to the proof pursuant to CPLR 3025(c); and it is further

ORDERED that the motion of plaintiff for a default judgment against defendants Micro Office Solutions 4 LLC and Wellie Chao to the extent that such relief is sought against defendant Micro Office Solutions 4 LLC only, is GRANTED, but the disposition of such motion with respect to defendant Wellie Chao is held in abeyance;

This matter having come on before this court on July 23, 2021, on motion of the plaintiff for an order granting a default judgment for breach of rental lease, and the plaintiff having been represented in connection therewith by Lewis A. Lindenberg, Esq.; the defendant Micro Office Solutions 4 LLC, having been represented in connection therewith by Craig P. Gambardella, Esq. (and which corporate defendant is now unrepresented); and the defendant Wellie Chao, having been represented in connection therewith by Maxwell Breed, Esq., pursuant to CPLR 4317, it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR § 4317 (b) in that an issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

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

- (1) the issue of the **total sum** of damages with regard to the total amount of Fixed Rent plus Additional Rent that accrued under the Lease dated August 30, 2006, as modified by the First Lease Modification and Partial Surrender Agreement dated August 31, 2018, from April 2020 to date, which defendant Micro Office Solutions 4 LLC shall pay plaintiff;

plus

- (2) the issue of the amount of damages that defendant Micro Office Solutions LLC shall pay plaintiff under the Lease dated August 30, 2006, as modified by the First Lease Modification and Partial Surrender Agreement dated August 31, 2018 as to the total amount of reasonable Attorney's Fees, costs and disbursements, incurred by plaintiff in the prosecution of the herein action ;

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 counsel shall immediately consult one another and counsel for plaintiff shall, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible 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 30 days from the date of this order and the defendant 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 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 with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, 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 on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED and ADJUDGED that pursuant to CPLR § 4319 the Clerk is directed to enter judgment in favor of plaintiff and against defendant in accordance with the report of the aforesaid Special Referee without any further application; and it is further

ORDERED that a copy of this Order with notice of entry shall be served by plaintiff upon defendants within 20 days after entry hereof; and it is further

ORDERED that the claims against defendant Wellie Chao are severed and shall continue; and it is further

ORDERED that the cross motion of defendant Wellie Chao to dismiss the complaint against him for lack of personal jurisdiction or for an extension of time to interpose an answer is held in abeyance and the issue of whether process was properly served upon such defendant is referred to a Special Referee to hear and report pursuant to CPLR 4320;

This matter having come on before this court on July 23, 2021, on motion of plaintiff Northern Star Textile Corp., having appeared by Lewis A. Lindenberg, Esq. and on cross motion of the defendant Wellie Chao, having appeared by Maxwell Breed, Esq., pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, it is now hereby

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:

the issue of whether personal jurisdiction was obtained over defendant Wellie Chao pursuant to CPLR 308(2), to wit, whether substituted service of process was effectuated by delivery of process at 153 East 57th Street, #6E, New York, New York 10022, to a person of suitable age and discretion at the **actual** dwelling place or **usual** place of abode of defendant Wellie Chao by delivery of the summons and complaint by process server upon John "Doe" (Doorman) on September 1, 2020;

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 hear and report as specified above; and it is further

ORDERED that counsel for the plaintiff and the defendant Wellie Chao shall immediately consult with each other and counsel for plaintiff shall, within fifteen (15) days from the service of this order with notice of entry, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information, the Special Referee Clerk shall advise counsel for the plaintiff and defendant Wellie Chao 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 parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, 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, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made, by show cause order, within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Courts, and further proceedings with respect to the motion of defendant Wellie Chao, pursuant to CPLR , shall be heard with respect to

such motion seeking dismissal or extension of time to interpose an answer, with the oral argument on the motion to confirm or disaffirm; and it is further

ORDERED that upon filing, no less than two days and not more than five days before the return date specified in the show cause order to confirm the Report of the Special Referee with respect to the traverse hearing, of the standard request for conference form (SFC-Part59-Clerk@nycourts.gov 59nyef@nycourts.gov), counsel for plaintiff and counsel for defendant Wellie Chao are directed to appear for oral argument via Microsoft Teams; and it is further

ORDERED that oral argument on the application to confirm/disaffirm the Report of the Special Referee, as well as continued oral argument on the motion of defendant Wellie Chao to dismiss the complaint or extend his time to interpose an answer shall proceed on such return date.

DECISION

On defendant Micro Office Solutions 4 LLC's cross motion, the arguments about frustration of purpose or impossibility of performance arising out of the governmental shutdowns of businesses due to the global pandemic fail to state meritorious defenses. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dept 2021). Lacking a meritorious defense, defendant Micro Office Solutions 4 LLC is not entitled to an

extension of time to file an answer pursuant to CPLR 317, even though its failure to keep a current address on file with the Secretary of State is not per se inexcusable. See Simon & Shuster, Inc. v Howe Plastics & Chemicals Co., Inc., 105 AD2d 604, 605 (1st Dept 1984) and Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 143 (1986).

As plaintiff's action is not for a sum certain, for example e.g., an action on a note or money judgment, a trial with respect to damages against defendant Micro Solutions 4 LLC is necessary. See Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v American International Group, Inc., 66 NY2d 878, 880 (1985). In regard to the assessment of damages hearing, plaintiff may present evidence that defendant Micro Office Solutions 4, LLC, did not pay rent that accrued after July 31, 2020, and the pleadings dated July 31, 2020 may be conformed to any such proof pursuant to CPLR 3025(c). See Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 23 (1981).

On his cross motion to dismiss the complaint for lack of personal jurisdiction over him, defendant Wellie Chao, by his affidavit, has raised an issue of fact about whether the process server delivered the papers at an address that was defendant Chao's "actual dwelling place or usual place of abode", which must be resolved at a traverse hearing. See Feinstein v

Bergner, 48 NY2d 234, 241 (1979) and Finkelstein Newman Ferrara LLP v Manning, 67 AD3d 538 (1st Dept 2009).

Debra A. James
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2/8/2022
DATE

DEBRA JAMES, 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