

33 Ninth Retail Owner LLC v 29-33 Ninth Ave., LLC

2022 NY Slip Op 30468(U)

February 8, 2022

Supreme Court, New York County

Docket Number: Index No. 655298/2021

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

-----X

33 NINTH RETAIL OWNER LLC,

Plaintiff,

- v -

29-33 NINTH AVENUE, LLC, and RICHARD AKIVA,

Defendants.

-----X

INDEX NO. 655298/2021

MOTION DATE 12/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33

were read on this motion to/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 is granted, on default and without opposition, based upon the following memorandum decision.

Background

In this action for breach of a commercial lease and accompanying personal guaranty, and for ejectment, plaintiff 33 Ninth Retail Owner LLC ("plaintiff") seeks entry of a default judgment against defendants 29-33 Ninth Avenue, LLC ("tenant") and Richard Akiva ("Akiva") for the amount of unpaid rent and additional rent, as well as deferred rent owed by tenant and guaranteed by Akiva. Plaintiff also seeks an inquest on damages for late charges and interest under the lease, fixed rent and additional rent accrued since the date of the motion, as well as its reasonable attorney's fees and expenses. Finally, plaintiff seeks a judgment of possession, warrant of eviction and/or writ of assistance pursuant to RPAPL 221.

Plaintiff is the record owner of the building located at 29-35 Ninth Avenue, New York, New York (NYSCEF Doc. No. 23, ¶¶ NYSCEF Doc. No. 24). Pursuant to a lease dated June 30, 2017, plaintiff leased to tenant a portion of the ground floor and lower level (the “premises”) for a term from January 10, 2018 through January 30, 2030 (NYSCEF Doc. Nos. 24-25). Tenant was to have opened a restaurant or lounge in the premises, but plaintiff asserts that they abandoned construction in December 2019 and, despite occasionally restarting construction, never opened for business (NYSCEF Doc. No. 23, ¶ 10). The Fixed Rent under the lease for the period from April 2020 through December 2020 was \$101,669.58, and from January 2021 through December 2021 was \$104,719.67, a total of \$2,171,662.56 (NYSCEF Doc No. 24, § 2[A][i]; NYSCEF Doc. No. 25, § 2[i]). The lease provides that tenant was also responsible for additional rent in the form of a proportionate share of real estate taxes and operating expenses (NYSCEF Doc. No. 24, § 8). Tenant’s total additional rent for the period from April 2020 through December 2021 was \$871,813.65, for a total Fixed Rent and additional rent obligation of \$3,043,476.21 (NYSCEF Doc. No. 23, ¶¶ 16-18). Any late payments of rent or additional rent bore interest and late charges at rates set forth in the lease (NYSCEF Doc No. 24, § 2[A][ii]). In conjunction with the lease, Akiva executed a guarantee of the lease in which he “unconditionally and irrevocably guarantees to Landlord . . .the full and prompt payment of Rent, including, but not limited to, the Fixed Rent, Additional Rent and any and all sums and charges payable by Tenant under the lease” (NYSCEF Doc. No. 29, ¶ 2).

In conjunction with abandoning construction, plaintiff asserts that tenant stopped paying rent. On April 9, 2020, plaintiff sent a default notice to tenant, informing it of the outstanding amounts owed (NYSCEF Doc. No. 26; *see also* NYSCEF Doc. No. 24, § 19[A]). When tenant failed to make payment, plaintiff sent a second default notice on April 20, 2020, informing tenant

that it had applied tenant's security deposit to the outstanding rent and required payment of the remaining balance (NYSCEF Doc. No. 26). When tenant again failed to make payment, plaintiff sent a third default notice on May 6, 2020, requiring payment of the rent and additional rent for May 2020 and the sums outstanding from the April 20, 2020 notice (NYSCEF Doc. No. 27). Following tenant's continued failure to pay, on September 17, 2020, plaintiff sent tenant a notice terminating the lease (NYSCEF Doc No. 28; *see also* NYSCEF Doc. No. 24, § 20), demanding payment of outstanding rent and that tenant vacate the premises by September 24, 2020. Additionally, upon default and termination, tenant became liable for the remainder of certain deferred rent payments in the amount of \$177,207.63 (NYSCEF Doc. No. 25, § 3[ii]). Tenant continues to occupy the premises and continues to accrue unpaid Fixed Rent, additional rent, and other damages as set forth in the lease (NYSCEF Doc. No. 23, ¶¶ 40-41, 49-54).

Plaintiff commenced this action by filing a summons and complaint on September 1, 2021 (NYSCEF Doc. No. 1). Affidavits of service filed on September 23, 2021 attest to service on tenant by service on the Secretary of State on September 15, 2022 pursuant to Limited Liability Company Law § 303, and service on Akiva by affixing the summons and complaint to the door of Akiva's place of business as set forth in the lease on September 21, 2022, with a follow-up mailing the same day pursuant to CPLR 308(4), and by leaving a copy with a person of suitable age and discretion at Akiva's residence pursuant to CPLR 308(2) on September 15, 2021 (NYSCEF Doc. No. 2). Affidavits of additional service filed on December 21, 2021 and January 20, 2022 attest to service by mail on tenant at its address for service as set forth in the lease on December 21, 2021, and on Akiva at the same address and his personal residence on January 19, 2022, pursuant to CPLR 3215(g) (NYSCEF Doc. Nos. 34-35). 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 tenant and Akiva (NYSCEF Doc. No. 2), the complaint (NYSCEF Doc. No. 1), the affirmation of its counsel, Rosemary Halligan, Esq., attesting to the default (NYSCEF Doc. No.8, ¶¶ 14-16), and the affidavit of Jack Cayre, plaintiff’s member, which attests to the facts constituting plaintiff’s claims (NYSCEF Doc. No. 23). As set forth in the lease and Cayre’s affidavit, tenant is obligated under the lease with plaintiff to pay fixed rent, additional rent in the form of a proportionate share of real estate taxes and operating expenses, and late charges as applicable under the lease (NYSCEF Doc. No. 23, ¶¶ 11-19; NYSCEF Doc No. 24, §§ 2[A][i-ii], 8; NYSCEF Doc. No. 25, § 2[i]). Further,

Akiva entered into a personal guaranty of tenant's payment obligations under the lease (NYSCEF Doc. No. 23, ¶¶ 55-64; NYSCEF Doc. No. 29).

As confirmed in Cayre's affidavit and the accompanying documents, tenant owes unpaid fixed rent and additional rent of \$3,043,476.21, as well as deferred rent payments of \$177,207.63, subsequent unpaid fixed rent and additional rent that has accrued since plaintiff moved for entry of a default judgment, and late charges and interest as set forth in the lease (NYSCEF Doc. No. 23, ¶¶ 49-53; NYSCEF Doc No. 24, §§ 2[A][i-ii], 8, 20[C][ii]; NYSCEF Doc. No. 25 § 3[ii]). 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. 24, § 21; NYSCEF Doc. No. 29, § 2). In addition, the provisions of New York City Administrative Code § 22-1005 do not bar enforcement of the guaranty against Akiva, as tenant never opened for business, and does not fall under the provisions of the bar on enforcing certain personal guarantees in commercial lease actions. Those provisions bar enforcement of personal guarantees only if certain conditions exist: (i) the actual cessation by the tenant of retail service; (ii) the actual functioning of the tenant as "a non-essential retail establishment"; or (iii) the required closure by the tenant to members of the public (*see*, New York City Administrative Code § 22-1005 [1] [a], [b], [c]). In this case, none of those conditions exist because construction was abandoned in December 2019 and the tenant never opened for business (*see*, NYSCEF Doc. No. 23, ¶ 10).

Finally, as the lease has been properly terminated, plaintiff has the right to recover possession of the premises.

The issues of the total amount of contractual interest, late charges, unpaid rent and additional rent that has accrued since plaintiff moved for entry of a default judgment, and plaintiff's reasonable attorney's fees and costs, will be set down for an inquest.

Accordingly, it is hereby

ORDERED that the motion of plaintiff for default judgment is granted as set forth herein; and it is further

ORDERED and ADJUDGED that plaintiff 33 Ninth Retail Owner LLC is entitled to possession of the above described portion of the ground floor and lower level of 29-35 Ninth Avenue, New York, New York as against defendant 29-33 Ninth Avenue, LLC, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of the above described portion of the ground floor and lower level of 29-35 Ninth Avenue, New York, New York, including entry thereto, as against defendant 29-33 Ninth Avenue, LLC; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff 33 Ninth Retail Owner LLC and against defendants 29-33 Ninth Avenue, LLC and Richard Akiva in the sum of \$3,220,683.84, representing the unpaid balance of fixed rent, additional rent, and deferred rent as of the date of the motion, with interest at the statutory rate from September 1, 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 issue of damages stemming from defendant's failure to pay rent and additional rent while this action has been pending, late charges and contractual interest on all unpaid sums, as well as plaintiff's reasonable attorney's fees, is to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of such damages and 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/suptctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the Decision and Order of the Court.

ENTER:



<u>2/8/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<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 checked="" type="checkbox"/> REFERENCE