

| |
|--|
| J&R Realty Group Ltd. v Eastern Fusion Food Corp. |
| 2022 NY Slip Op 30564(U) |
| February 18, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 654761/2021 |
| Judge: Sabrina B. Kraus |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

J&R REALTY GROUP LTD.,

Plaintiff,

- v -

EASTERN FUSION FOOD CORP., KENNETH KIM

Defendant.

-----X

INDEX NO. 654761/2021

MOTION DATE 02/16/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for JUDGMENT - DEFAULT.

BACKGROUND

Plaintiff commenced this action for breach of contract, unjust enrichment and attorneys' fees seeking rent due and owing for the premises located at 133 John Street, New York, New York (Subject Premises) pursuant to a lease.

On July 18, 2012, plaintiff and Eastern Fusion Food Corp. (Eastern) executed a lease, for the Subject Premises (NYSCEF Doc. 2), which obligated Eastern to pay \$11,000.00 per month, commencing August 1, 2012 and ending March 31, 2028. The lease was between plaintiff and Eastern, with Kenneth Kim (KK) signing as president of Eastern. Plaintiff asserts KK executed a personal guarantee. Plaintiff alleges that Eastern stopped paying rent for the Subject Premises in April 2020.

Eastern was served by conspicuous place service on August 9, 2021, at 9:07 am, at the Subject Premises. Two prior attempts were made on August 5, 2021 at 4:02 pm and August 6, 2021 at 12:48 pm. A copy of the summons and complaint was mailed to the Subject Premises on

August 10, 2021. Eastern was also served by delivery to the Secretary of State of the State of New York, on August 6, 2021.

KK was served personally, on August 11, 2021, at 21 Grand Avenue in New Jersey. The affidavit of service indicates Palisades, New Jersey, however the attached certificate of mailing indicates Palisades Park, New Jersey (NYSCEF Doc. No 12). The city or town of Palisades, New Jersey does not exist.

The summons and complaint were filed on August 4, 2021. The time within which the defendants may answer or otherwise move to respond to said complaint has expired and has not been extended.

PENDING MOTION

On February 16, 2022, plaintiff moved pursuant to CPLR §3215, for a default judgment against Eastern and KK, in the amount of \$554,209.54, for breach of contract, unjust enrichment and attorney’s fees. Defendants have failed to appear or submit opposition.

DISCUSSION

CPLR § 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial... the plaintiff may seek a default judgment against [it].” “On a motion for leave to enter a default judgment pursuant to CPLR §3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

In support of the motion for a default judgment based upon breach of contract, plaintiff submits a copy of the lease (NYSCEF Doc. 10). Article 15(a), of the lease defines an event of default as, “[t]enant shall default in the payment when due of any Fixed Rent or Additional Rent

and shall not cure such default within five (5) days after Landlord sends written notice of such default to Tenant.” It is unclear if plaintiff sent Eastern a five (5) day notice of default as required under the lease, as the affirmation in support (NYSCEF Doc. No. 9) does not reference any default notice, nor was any attached in support of the instant motion. As plaintiff is unable to establish this necessary prerequisite to entitlement to a default judgment, the motion as to Eastern is denied.

Even assuming plaintiff could establish entitlement to a default judgment as to Eastern, plaintiff is unable to establish entitlement to a default judgment as to KK. Plaintiff asserts KK executed a personal guaranty, however, the same was not submitted in support of the instant motion. Without proof of a personal guaranty, the motion for a default judgment as to KK is denied. In addition, the affidavit of service for KK is defective.

Plaintiff’s motion for a default judgment on the second cause of action, a claim of unjust enrichment, is also denied. A claim of unjust enrichment or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter (*Goldstein v CIBC World Markets Corp*, 6 AD3d 295 [1st Dept] citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190).

CONCLUSION

Wherefore, it is hereby

ORDERED that plaintiff’s motion seeking a default judgment against defendants Eastern Fusion Food Corp and Kenneth Kim, is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on all defendants the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief sought not expressly addresses herein has nonetheless been considered and is denied.

This constitutes the decision and order of the court.

202202180908425BKRAUSCEF6340D96C4E2B87EB343EAB8AA0AA

2/18/2022
DATE

SABRINA KRAUS, J.S.C.

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