

<b>J.S.B. Props. LLC v Drons</b>
2022 NY Slip Op 31611(U)
May 13, 2022
Supreme Court, New York County
Docket Number: Index No. 652519/2021
Judge: Sabrina 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.S.B. PROPERTIES LLC

Plaintiff,

- v -

THERESA DRONS,

Defendant.

-----X

INDEX NO. 652519/2021

MOTION DATE 05/09/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - DEFAULT

**BACKGROUND**

Plaintiff commenced this action seeking rent due under a lease agreement with defendant for the premises located at 208 West 23<sup>rd</sup> Street, Apartment 305, New York, New York 10011 (Subject Premises). Plaintiff also seeks attorneys' fees.

Plaintiff asserts that defendant, pursuant to a lease last renewed for a term ending on June 30, 2021, agreed to pay rent and additional rent for the Subject Premises and that defendant defaulted on her payment obligations under the Lease and owes plaintiff a total of \$31,885.52.

The summons and complaint were filed on April 15, 2021.

On May 17, 2021, plaintiff's counsel and defendant, *pro se*, executed a stipulation agreeing to extend defendant's time to file an answer to June 12, 2021.

Defendant has not filed an answer.

**PENDING MOTION**

On March 8, 2022, plaintiff moved for a default judgment as against defendant, for rent arrears and attorneys' fees.

On March 4, 2022, defendant, appearing *pro se*, submitted a request for an adjournment, to obtain counsel. A second request for an adjournment was filed on April 5, 2022, by defendant's counsel.

On May 9, 2022, defendant, by counsel, cross moved to dismiss the action pursuant to CPLR §3211(a)(1) and (a)(4) as there is another action pending between the same parties for the same cause of action and in opposition to plaintiff's motion for a default. Plaintiff filed opposition to the cross motion, and the motions were submitted to this court for determination.

### **DISCUSSION**

#### ***Plaintiff's motion for a default judgment is denied***

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).

Defendant, a permanently-disabled, 34 year-old woman, did appear in July 2021, *pro se* and plaintiff agreed to extend her time to answer. Although defendant failed to file an answer by the date in the stipulation, she has established an excusable default, in that there was a pending housing court action, under index LT 301324/20/NY, in which defendant had submitted a Covid hardship affidavit and was confused between her responsibilities in both actions. Defendant, upon receiving the instant motion, found counsel and sought to correct her default. In addition, defendant has a meritorious defense in that there are two actions currently pending seeking the same relief. Based on the forgoing, plaintiff's application for a default judgment is denied.

***Defendant's Cross Motion to dismiss is granted without prejudice***

C.P.L.R. § 3211(a)(4) authorizes dismissal where “there is another action pending between the same parties for the same cause of action.”

“Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*see Whitney v. Whitney*, 57 N.Y.2d 731, 732, 454 N.Y.S.2d 977, 440 N.E.2d 1324; *Kent Dev. Co. v. Liccione*, 37 N.Y.2d 899, 901, 378 N.Y.S.2d 377, 340 N.E.2d 740; *Cherico, Cherico & Assoc. v. Midollo*, 67 A.D.3d 622, 622, 886 N.Y.S.2d 914; *Liebert v. TIAA-CREF*, 34 A.D.3d 756, 757, 826 N.Y.S.2d 339). “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs” (*Cherico, Cherico & Assoc. v. Midollo*, 67 A.D.3d at 622, 886 N.Y.S.2d 914 [internal quotation marks omitted]; *see Kent Dev. Co. v. Liccione*, 37 N.Y.2d at 901, 378 N.Y.S.2d 377, 340 N.E.2d 740).

*DAIJ, Inc v Roth* 85 AD3d 959 (2<sup>nd</sup> Dept 2011).

On August 26, 2020, plaintiff filed a non-payment petition in New Your County Housing Court under index 301324/20/NY (Nonpayment Proceeding) against defendant seeking \$11,924.00 in rent arrears for April 2020 through and including August 2020, at a monthly rent of \$2428.00. On February 19, 2021, defendant filed a Covid Hardship Declaration, which stayed the Nonpayment Proceeding until January 15, 2022. On October 21, 2021, defendant filed an Emergency Rental Assistance Program Application (ERAP), which further stayed the nonpayment proceeding, until a determination was made. On August 27, 2021, defendants ERAP application was approved for \$36,420.00, to satisfy rent arrears from July 2020 through September 2021.

On April 6, 2022, plaintiff filed a motion in the Nonpayment Proceeding, seeking to lift the stay and amend the petition to include rent arrears for October 2021 through and including April 2022. That motion has not yet been calendared by Housing Court.

In the instant action, plaintiff filed a summons and complaint on April 15, 2021, seeking \$31,885.52 in rent arrears for an undefined period of time, as well as \$5000.00 in attorneys' fees.

There is substantial identity of the parties in both the Nonpayment Proceeding and the instant action in that they are exactly the same. The court further finds that the Nonpayment Proceeding and the instant action are sufficiently similar in that they both seek rental arrears for the same or overlapping periods of time.

As to the relief sought, the court agrees with defendant that it is substantially the same in both the Nonpayment Proceeding and the instant action. Plaintiff argues that the instant action seeks different relief than the Nonpayment Proceeding in that the Nonpayment Proceeding is only for possession. However, the Nonpayment Proceeding also seeks a money judgment for the rental arrears, which is the same as the relief sought herein.

Plaintiff further argues the relief sought herein is different because plaintiff cannot seek attorneys' fees in housing court, pursuant to RPAPL § 702. In the instant action, plaintiff is seeking a total of \$36,885.52, of which \$5000.00 is sought in attorney's fees. Plaintiff was aware of the inability to seek attorneys' fees when they filed their petition in the Nonpayment Proceeding and did so anyway. Plaintiff could have sought relief in Supreme Court, wherein they could have obtained possession, a money judgment and attorneys fees. Instead plaintiff first sought relief in housing court. As that action is still pending and has not been discontinued, the court finds the relief sought herein is substantially the same. If plaintiff was to discontinue the Nonpayment Proceeding, they could then proceed in Supreme Court.

As stated by the court in *Cherico, supra* “[t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs.” It is clear that both the Nonpayment

Proceeding and the instant action arise out of the nonpayment of rent, due under a lease between the parties, for the Subject Premises, for the same period of time.

**CONCLUSION**

Wherefore, it is hereby

ORDERED plaintiff’s motion for a default is denied; and it is further

ORDERED defendant’s cross motion to dismiss is granted without prejudice; and it is further


ORDERED the action is dismissed without prejudice; and it is further

ORDERED that the Clerk shall enter judgment accordingly;

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on defendants and 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/suptmanh](http://www.nycourts.gov/suptmanh)); and it is further

This constitutes the decision and order of the court.

<p><u>5/13/2022</u> DATE</p>			 <hr/> <p>SABRINA KRAUS, J.S.C.</p>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		