

M&B Bldg. Owners I, LLC v Artglass Intl., LLC
2022 NY Slip Op 31687(U)
May 20, 2022
Supreme Court, New York County
Docket Number: Index No. 656464/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

THE M&B BUILDING OWNERS I, LLC

Plaintiff,

- v -

ARTGLASS INTERNATIONAL, LLC,

Defendant.

-----X

INDEX NO. 656464/2021

MOTION DATE 04/25/2022

MOTION SEQ. NO. 002

**DECISION, ORDER +
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for

JUDGMENT - DEFAULT

In this action to recover a money judgment for holdover rent and accelerated rent due under a commercial lease and for an ejectment, the plaintiff landlord moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant, the commercial tenant at the ground floor of the subject property known as "The M&B Building," located at 955 Third Avenue in Manhattan, on the first and second causes of action of the complaint. No opposition is submitted. The motion is granted in part.

"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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In support of the motion, the plaintiff submits, *inter alia*, the summons and verified complaint, an attorney's affirmation, an affidavit of Jagdish Shah, the Chief Financial Officer of the plaintiff's managing agent, the deed to the property, the subject lease agreement, notices of default and termination of lease mailed to the defendant, and documents filed in a prior action brought by the plaintiff against the defendant, captioned The M&B Building Owners I, LLC v Artglass International, LLC, Index No. 651326/2021 (the prior action).

The plaintiff's submissions establish that the parties entered into a written lease agreement (the lease) on April 29, 2013, for a term of ten years, set to expire on April 30, 2023. Pursuant to the lease, the defendant was to make fixed monthly rent and additional rent

payments to the plaintiff on the first calendar day of each month. In or about March 2020, the defendant ceased making complete rent and additional rent payments to the plaintiff, such that, through January 1, 2021, the defendant owed the plaintiff the total sum of \$286,817.16. On January 27, 2021, the plaintiff served a default notice on the defendant pursuant to Articles 19.1(a) and (b) of the lease. In accordance with such provisions, the plaintiff notified the defendant that it was obligated to cure its default by paying its arrears to the plaintiff by February 8, 2021. The defendant failed to do so. On February 9, 2021, the plaintiff served a termination notice on the defendant, as permitted by Article 19.2 of the lease, advising that the lease would terminate on February 17, 2021, based on the defendant's failure to cure its default. To date, the defendant has not vacated the premises or paid any rent or use and occupancy after February 17, 2021.

On February 25, 2021, the plaintiff commenced the prior action against the defendant, seeking a money judgment for unpaid rent, additional rent, and holdover rent pursuant to the lease. The defendant did not appear in the prior action. On August 10, 2021, the court (Love, J.) issued a decision and order on inquest and assessment of damages awarding the plaintiff a default judgment on all of its claims in the total sum of \$658,034.34. Such sum represented rent and additional rent arrears from March 1, 2020, through February 17, 2021, and holdover rent, calculated in accordance with Article 23.2 of the lease, from February 17, 2021, through July 19, 2021. On November 12, 2021, the plaintiff commenced the instant action.

The plaintiff's proof establishes its first cause of action, for ejectment, insofar as it demonstrates that the plaintiff "(1) ... is the owner of an estate in tangible property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate." Noamex, Inc. v Domsey Worldwide, Ltd., 192 AD3d 817, 819 (2nd Dept. 2021) [internal citations omitted]; see GMMM Westover, LLC v New York State Elec. & Gas Corp., 155 AD3d 1176 (3rd Dept. 2017); RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC, 144 AD3d 1125 (2nd Dept. 2016). Specifically, the proof shows that the parties' lease terminated as of February 17, 2021, and the defendant has remained in possession and continues to hold over without the plaintiff's permission. Under the circumstances, no further notice to the tenant is required. See Sheila Properties, Inc. v A Real Good Plumber, Inc., 74 AD2d 779 (2nd Dept. 2010); East 82 LLC v O'Gormley, 295 AD2d 173 (1st Dept. 2002); Alleyne v Townsley, 110 AD2d 674 (2nd Dept. 1985).

The plaintiff also establishes its second cause of action, seeking holdover rent at the rates described in Article 23.2 of the lease. Specifically, the plaintiff is contractually entitled to recover (a) 150% of the rent payable for the last full month of the lease term for 30 days from the date the defendant began to hold over and (b) 200% of such rent amount thereafter through the date the defendant vacates the premises. It is well-settled that commercial lease provisions providing for holdover rent at multiples of the monthly rent due under a lease are enforceable and recoverable as damages in an action to recover possession of real property where, as here, there is no showing that the amount fixed is plainly or grossly disproportionate to the probable loss. See Tenber Assocs. v Bloomberg, 51 AD3d 573, 574 (1st Dept. 2008); Fed. Realty Ltd. Partnership v Choices Women's Med. Ctr., Inc., 289 AD2d 439, 441-442 (2nd Dept. 2001).

Having recovered holdover rent through July 2021 in the prior action, the plaintiff seeks and is entitled to holdover rent from August 2021 through November 2021, when it commenced this action, in the sum of \$313,684.40.

Inasmuch as the plaintiff additionally seeks holdover rent that has accrued since the action was commenced, plus the ongoing accrual of holdover rent at a rate of \$78,421.10 per month until the instant motion is decided, the application is denied. CPLR 3215(b) expressly provides that a default judgment "shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served." CPLR 3215(b); see Mt. Hawley Ins. Co. v Am. States Ins. Co., 139 AD3d 497 (1st Dept. 2016); P & K Marble, Inc. v Pearce, 168 AD2d 439 (2nd Dept. 1990); Gluck v W. D. Allen Mfg. Co., 53 AD2d 584 (1st Dept. 1976); Lape v Lape, 23 AD2d 539 (1st Dept. 1965). The plaintiff did not file a proposed amended complaint, nor did it serve the defendant with an amended summons and complaint. The plaintiff provides no basis to depart from above-cited, well-settled law that a default judgment may not exceed the amount demanded in the complaint.

The plaintiff does not seek judgment on its third cause of action for accelerated rent.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is granted in part, without opposition, to the extent that the plaintiff is awarded judgment on the first cause of action in its entirety and on the second cause of action in the sum of \$313,684.40, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of \$313,684.40, plus costs and statutory interest from November 1, 2021, and it is further

ORDERED and ADJUDGED that plaintiff is entitled to possession of the commercial premises of 955 Third Avenue, New York, New York 10022, as against the defendant, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Decision, 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 Decision, Order and Judgment, the plaintiff may exercise all acts of ownership and possession of the real property located at 955 Third Avenue, New York, New York 10022, including entry thereto, as against the defendant and every person purporting to hold possession of the premises under the defendant, except that the right to re-entry shall be stayed for a period of 30 days after service of a copy of this Decision, Order and Judgment with notice of entry by regular first class mail upon the defendant; and it is further

ORDERED and ADJUDGED that the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Decision, Order and Judgment and payment of proper fees, is directed and authorized to take all necessary steps, including but not limited to the entry into the premises located at 955 Third Avenue, New York, New York 10022, to effect the removal and ejection of the defendant and every person purporting to hold possession of the premises or any part thereof under the defendant and adversely to the plaintiff, as the current owner of the premises, and the plaintiff shall be let into possession of said premises, and this Decision, Order and Judgment shall be executed by the Sheriff of the City of New York as though it were an execution for the delivery of possession of said premises, with the eviction and delivery of the premises to be stayed for a period of 30 days after service upon the defendant by regular first class mail of a copy of this Decision, Order and Judgment with notice of entry.

This constitutes the Decision, Order and Judgment of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/20/2022

DATE

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