

306 E. 49th LLC v Wadibia
2022 NY Slip Op 32987(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 150577-2022
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8306 E. 49th LLC

INDEX NO. 150577-2022

- v -

MOT. DATE

MOT. SEQ. NO. 001

Jean Paul Wadibia, et. al.The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This is an action for a breach of a commercial lease. Plaintiff now moves for an order pursuant to CPLR § 3215 granting it a default judgement against the guarantors, defendants Jean Paul Wadibia ("Wadibia") and Oguguo Obioha ("Obioha"). Plaintiff seeks a money judgement of \$374,967.31 against the defendants for rent plus interest as well as recoupment of their reasonable legal fees, costs and expenses. The motion has been submitted without opposition despite proof of service of notice of the motion on the defendants via first class mail. Therefore, the motion is considered on default.

Plaintiff, 306 E. 49th LLC ("306"), has provided proof of service of the summons and complaint upon both defendants Wadibia and Obioha via personal service to a Jane Doe, a person of suitable age and discretion, at Wadibia and Obioha's place of business, 306 East 49th Street, New York, New York, 10017. A copy of the summons and complaint were also mailed to each defendant at the same address in accordance with CPLR § 308(2). Despite such service, neither Wadibia nor Obioha have answered the complaint and their time to do so has not been extended by the court. Therefore, plaintiff has established that the defendants have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Dated: 9-6-22

 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

The following facts are alleged in the complaint verified by Bradley Rinzler, a member of 306, as well as Rinzler's sworn affidavit. Plaintiff is the current legal owners of the premises located at the ground floor and basement in the building at 306 East 49th Street, New York, New York (the "premises"). In August 2015, 306 leased the premises to non-party Lava 164 Corp. ("Lava") pursuant to a written lease with a term of ten years expiring on August 2025. The lease was assigned by Lava to non-party Cecil-Dolton LLC ("Cecil") by Assignment and Assumption of Lease dated April 2020. Concurrent with Cecil's execution of the assignment, Wadibia and Obioha executed personal guaranty agreements wherein they each unconditionally guaranteed Cecil's obligations under the lease. Plaintiff has provided copies of the original August 2015 lease, the April 2020 assignment, and the April 2020 guaranty.

Cecil operated a restaurant at the premises. Rinzler claims that Cecil breached the lease by failing to tender rent and additional rent in July 2020. Thereafter, Cecil only made sporadic payments from that point forward. Rinzler states that on September 9, 2021, 306 served a notice to cure on Cecil which advised Cecil of its substantial violation of the terms of the lease and gave Cecil until October 7, 2021, to cure those violations. He claims that Cecil failed to cure the violations and that on October 19, 2021, 306 served Cecil with a five-day notice of termination, advising Cecil that the lease would be terminated and that it had until November 19, 2021, to vacate the premises. Rinzler claims that Cecil never responded, but that in April 2022, he visited the premises to find that Cecil's belongings and fixtures had been removed from the premises and that the premises had been abandoned without the prior consent and/or notice to the plaintiff. Rinzler asserts that because 306 was not noticed and did not consent to the abandonment, Cecil owes unpaid rent, and additional rent through April 2022 when 306 became aware of the vacatur.

In its complaint, the plaintiff asserts six causes of action. All six causes of action are for breach of contract and seek to enforce the guaranty against Wadibia and Obioha. However, each of the causes of action seek different damages. The first cause of action seeks rental arrears. The second cause of action seeks unpaid items of additional rent. The third cause of action seeks unpaid additional rent due to violations. The fourth cause of action seeks damages for diminution of value of the property. The fifth cause of action seeks damages for failure to maintain the ventilation and exhaust system on the premises. Finally, the sixth cause of action seeks attorneys' fees.

However, in this default motion, plaintiff only seeks damages for causes of action one, two, three and six. Therefore, causes of action four and five which seek damages for diminution of value of the property and damages for failure to maintain the ventilation and exhaust system on the premises are deemed abandoned and are therefore severed and dismissed.

For any of these causes of action to be successful, 306 must be able to enforce the guaranties against Wadibia and Obioha. The motion is supported by the April 2020 guaranty signed by both Wadibia and Obioha, which states that:

As limited by the provisions of Section b of this Guaranty, Guarantor hereby unconditionally, absolutely and irrevocably guarantees to Landlord (i) the prompt payment when due of the Base Rent, Additional Rent (as defined In the Lease) and all other sums due in connection with or under the Lease, and (ii) to pay on demand any and all expenses (including without limitation, counsel fees and disbursements) incurred by Landlord in enforcing any rights under this Guaranty, and (iii) in the event that the Lease is terminated in accordance with the terms contained therein, Guarantor shall pay all sums equal to the Base Rent and Additional Rent which would have been payable by the Tenant if such termination had not occurred (collectively, the "Obligations"). This Guaranty is an absolute and unconditional guaranty of payment (and not of collection).

The only limitation of liability for the guarantor is detailed in Section b of the guaranty which states that:

Provided that the Landlord has received no less than ninety (90) days prior written notice specifying the Surrender Date (as hereinafter defined) and upon receipt by Landlord of a duly executed and acknowledged Surrender Declaration (the "Surrender Declaration")... together with all Base Rent, Additional Rent and any other monies due from the Tenant through the Surrender Date... then Guarantor shall be released from all individual liability with respect to any Obligations arising or accruing after the Surrender Date, but Guarantor shall continue to remain liable for (i) all Obligations which arose or accrued on or prior to the Surrender Date, (ii) all reasonable expenses... incurred by Landlord in enforcing any rights under this Guaranty or the Obligations, and (iii) all breaches of warranties and representations in the Surrender Declaration.

Based upon the foregoing, plaintiff has established that Wadibia and Obioha executed the guaranty and thereby personally guaranteed Cecil's performance of the lease. Wadibia and Obioha have failed to answer the complaint. Therefore, Wadibia and Obioha are personally liable under the guaranty for Cecil's breach of the lease and are responsible for any expenses incurred prior to the April 2022 vacatur and any expenses incurred by Landlord in enforcing any rights under this Guaranty.

Plaintiff seeks to rental arrears from Wadibia and Obioha in the amount of \$280,568.00 representing unpaid rent from July 2020 through April 2022. Rinzler states that the rent between July 2020- August 2020 was \$13,506.00/ month and that for July and August 2020, there are arrears of \$27,012.00. He asserts that between September 2020- August 2021, rent was \$13,911.00/month, but that Cecil paid \$21,000 during this period, so the arrears for September 2020- August 2021 are \$145,932.00. Finally, he claims that between September 2021- April 2022, rent was \$14,328.00/ month but that during this time, Cecil paid \$7,000, so the arrears for this period total \$107,624.00. Therefore, the total arrearage is \$280,568.00. Plaintiff has also submitted a rent ledger demonstrating these figures. Accordingly, this branch of the motion is granted.

As for additional rent, plaintiff seeks to collect various unpaid items of additional rent from the guarantors in the amount of \$16,082.06. In his affidavit, Rinzler states that Cecil agreed to, at all times during the lease, deposit additional sums in security to the plaintiff so that the plaintiff would retain at least three months' rent as a security deposit. He states that these sums were never tendered and thus that there are unpaid additional security deposit funds in the sum of \$2,466.00. While the lease rider that was incorporated into the April 2020 assignment does include a clause that provides that the tenant will "have deposited with Landlord an amount equal to three (3) months rent as security," this security deposit is intended to act, according to the lease, as:

security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this Lease; it is agreed that in the event Tenant defaults in respect of any of the terms, provisions and conditions of this Lease, Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any sum as to which Tenant is in default.

In this motion, plaintiff seeks to recover rental arrearage and additional rent that may have otherwise been covered by the security deposit. Allowing plaintiff to recover for these arrears in addition to the security deposit would be duplicative and would defeat the purpose of the security deposit as it is explicitly defined in the lease. Therefore, the branch of the motion that seeks additional rent in the form of the security deposit is denied.

Rinzler also states that Cecil agreed to pay 35% of the increase in real estate taxes over the real estate taxes charges to the building for the base fiscal year period 2015/2016, and any increase in the real estate taxes for the years subsequent to the base year. Rinzler asserts that Cecil failed to tender the real estate tax charges for the period of July 2021- January 2022. He states that there is unpaid additional rent for real estate taxes in the sum of \$10,906.06.

To support this assertion, plaintiff has submitted the real estate tax bills for the premises. The original August 2015 lease that was incorporated into the April 2020 assignment states in the lease rider that

Tenant agrees to pay Additional Rent in a sum equal to [35%] ("Proportionate Share") of the increase in real estate taxes over the real estate taxes charged to the building for the base fiscal year period 2015/2016 ("Base Year"). Tenant shall pay its Proportionate Share of any such increase in the real estate taxes for the years subsequent to the Base Year.

However, plaintiff fails to give any evidence of what the real estate taxes were for the base fiscal year period 2015/2016. In the lease rider, the number "\$134,451.72" is handwritten into the margin next to the clause that requires Tenant payment of a Proportionate Share of the increase in real estate taxes, but there is no evidence that this number represents the real estate taxes from the base fiscal year. Assuming arguendo that this is the real estate taxes from the 2015/2016 year, plaintiff has failed to provide evidence to support its calculation that defendants owe \$10,906.06. Therefore, the branch of the motion that seeks additional rent for real estate taxes is denied without prejudice to renewal within 90 days upon showing. Plaintiff's failure to renew the motion within the time provided will be deemed an unreasonable failure to prosecute and this branch of plaintiff's claims will be deemed dismissed pursuant to CPLR § 3216.

Rinzler then claims that Cecil agreed to pay to maintain the sprinkler system and failed to do so. He claims that as a result of Cecil's failure to maintain a sprinkler maintenance contract, plaintiff was caused to pay a sum of \$2,610.00 in order to maintain such a contract. Therefore, he claims that there is unpaid additional rent for sprinkler maintenance in the amount of \$2,610.00.

To support this assertion, plaintiff has submitted the invoices and proof of payment for sprinkler maintenance contracts. Additionally, plaintiff points to the original August 2015 lease that was incorporated into the April 2020 assignment. The lease rider of that lease states that "Tenant shall repair and maintain the existing sprinkler system in the Premises and arrange for periodic inspection(s) thereof by the governmental body with appropriate authority over same." Therefore, the tenant is responsible for maintaining the sprinkler system, including a sprinkler maintenance contract.

However, the invoices and proof of payment for the sprinkler maintenance contracts that were filed with the court include charges for the time period between March 2019 and February 2020, before Cecil took over the lease, and charges for the time period between March 2022 and February 2023, which was dated April 15, 2022, after plaintiff became aware that Cecil had abandoned the premises. It may be true that Cecil failed to maintain a sprinkler maintenance contract while leasing the premises, in violation of the lease agreement. However, plaintiff has submitted no evidence that it paid for such a contract while Cecil occupied the premises, and thus has not demonstrated the damages it seeks to recover from the defendants. Therefore, the branch of the motion that seeks additional rent for sprinkler maintenance is also denied without prejudice to renewal within 90 days upon showing. Plaintiff's failure to renew the motion within the time provided will be deemed an unreasonable failure to prosecute and this branch of plaintiff's claims will be deemed dismissed pursuant to CPLR § 3216.

Plaintiff also seeks to recover as additional rent a \$100.00 late fee for failing to pay rent on time. The lease was incorporated into the assignment, which states:

If Tenant shall fail to pay when due any installment of base Rent or any payment of Additional Rent for a period of five (5) days after such installment or payment shall have become due, Tenant shall pay a late fee equal to One Hundred Dollars (\$100) for each day that such base Rent or any payment of Additional Rent is past due

Plaintiff has demonstrated that Cecil's rent payment is past due, and therefore it is entitled to a late fee payment of \$100. This expense was incurred by Cecil prior to the April 2022 abandonment of the premises. Accordingly, plaintiff is entitled to \$100 jointly and severally from Wadibia and Obioha.

Plaintiff seeks to collect unpaid additional rent due to violations from the guarantors. In his affidavit, Rinzler asserts that Cecil owes \$7,731.25 for violations of the lease. Rinzler asserts that Cecil agreed to pay for any charges levied against the Building of which it was a part. He claims that Cecil blocked egress to the boiler room and permitted illegal ventilation and noise to emanate from the premises. As a result of these actions, Rinzler claims that the New York City Department of Health imposed fines totaling \$7,731.25. He states that these charges were presented to Cecil but that Cecil failed to pay them and thus that there is unpaid additional rent in violations totaling \$7,731.25.

To support this assertion, plaintiff has submitted the summons for civil penalty due to the violations as well as evidence of the plaintiff paid for the violation in the sum of \$7,731.25. The original August 2015 lease that was incorporated into the April 2020 assignment states in the lease rider that "tenant shall pay its Proportionate Share of any special, ordinary or extraordinary, foreseen, or unforeseen assessments or any other governmental charges which may... be assessed or levied against the land or building..." The charges resulted from Cecil's behavior. Therefore, Cecil's Proportionate Share is the entirety of the violation charges. These are expenses incurred by Cecil prior to the April 2022 abandonment of the premises. Accordingly, plaintiff is entitled to \$7,731.25 jointly and severally from Wadibia and Obioha.

Finally, plaintiff seeks a hearing on its reasonable attorney's fees, costs and expenses. Pursuant to the lease and guaranties, each provide that the parties agree to pay reasonable attorney's fees, costs and expenses incurred in connection with enforcement of these agreements. Therefore, plaintiff is entitled to recover these items from each of the defendants. However, a hearing is unnecessary where plaintiff can show on papers what its costs and expenses were, and plaintiff's counsel can establish the reasonableness of the attorney's fees sought through an affirmation of services and the underlying legal bills and/or timesheets. Therefore, that branch of the motion is denied without prejudice to renewal within 90 days. Plaintiff's failure to renew the motion within the time provided will be deemed an unreasonable failure to prosecute and this branch of plaintiff's claims will be deemed dismissed pursuant to CPLR § 3216.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiffs' fourth and fifth causes of action seeking damages for diminution of value of the property and damages for failure to maintain the ventilation and exhaust system on the premises are hereby severed and dismissed; and it is further

ORDERED that the portion of plaintiff's second cause of action that sought additional rent for security deposit funds is denied; and it is further

ORDERED that the portions of plaintiff's second cause of action that sought additional rent for real estate taxes, and to maintain the sprinkler system, and plaintiff's sixth are denied without prejudice to renew within 90 days upon a proper showing of entitlement to these damages or these claims will be deemed abandoned for unreasonable failure to prosecute pursuant to CPLR § 3216; and it is further

ORDERED that plaintiff's sixth cause of action seeking a hearing on attorney's fees, costs and expenses is denied without prejudice to renew upon papers within 90 days or these claims will be deemed abandoned for unreasonable failure to prosecute pursuant to CPLR § 3216; and it is further

ORDERED that the Clerk is directed to enter a money judgment in favor of plaintiff 306 E. 49th LLC and against defendants Jean Paul Wadibia and Oguguo Obioha, jointly and severally, for \$288,399.25 together with interest from April 1, 2022.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

9-6-22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.