255 Butler Assoc. LLC v 255 Butler, LLC
2022 NY Slip Op 34306(U)
December 5, 2022
Supreme Court, Kings County
Docket Number: Index No. 511560/15
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16
--x
255 BUTLER ASSOCIATES LLC,
Plaintiff,

Decision and order

- against -

Index No. 511560/15

255 BUTLER, LLC, ARIEL AKKAD, NATHAN AKKAD, SOLOMON AKKAD and BENJAMIN AKKAD,
Defendants,

December 5, 2022
--x
PRESENT: HON. LEON RUCHELSMAN

A bench trial was conducted by the court. While the parties were given the opportunity to submit post-trial briefs the Appellate Division rendered decisions in this case. Based upon those decisions the plaintiff has moved seeking to enter judgement in the amount of $38,340,703. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In 255 Butler Associates LLC v. 255 Butler LLC, 208 AD3d 831, 173 NYS3d 672 [2d Dept., 2022] the Appellate Division struck the answer of the defendants. Specifically, the court held that "the defendants' behavior was willful and contumacious. The tenant demonstrated that the defendants 'repeated[ly] fail[ed] to comply with court-ordered discovery' over 'an extended period of time[,]' and the court itself found that the defendants offered 'inadequate explanations for their failures to comply'" (id). The court concluded that "under the circumstances presented here,

we find that the court should have granted that branch of the tenant's motion which was pursuant to CPLR 3126 to strike the defendants' answer and counterclaims in its entirety" (id).

Further, in 255 Butler Associates LLC v. 255 Butler LLC, 208 AD3d 834, 174 NYS3d 730 [2d Dept., 2022]) the Appellate Division affirmed a lower court determination that the plaintiff did not default pursuant to the lease and exercised due diligence converting the property.

Based on those determinations the plaintiff has now sought the entry of a judgement. The plaintiff argues these decisions essentially resolved all factual issues that were explored at trial. The only remaining issue, namely damages, is now sought by the plaintiff. The plaintiff insists the amount they seek was never contested by the defendants at trial, thus the court should enter judgement in the uncontroverted amount of $38,340,703. As noted, the defendants oppose the motion.

Conclusions of Law

It is well settled that upon a damages trial where a party's answer has been stricken, such party may "cross-examine witnesses, give testimony and offer proof in mitigation of damages" (Rokina Optical Co., Inc., v. Camera King, 63 NY2d 728, 480 NYS2d 197 [1984]). This is true because "a defendant whose answer is stricken as a result of a default admits all

traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (id). In Rokina, (supra) the plaintiff obtained a judgement regarding merchandise it sent the defendant for which defendant never paid. The defendant's answer presented three defenses, that some payments were in fact made, that some payments were offset by advertising plaintiff's merchandise and that some of the merchandise was returned. The defendant's answer was subsequently stricken and a trial concerning damages was conducted. Notwithstanding the stricken answer, the Court of Appeals permitted the defendant to introduce evidence "intrinsic to the transactions at issue that, if proven, will be determinative of the plaintiff's real damages, which cannot be established by the mere fact of the defendant's default" (id). Thus, the court permitted evidence of payments made and credits earned because that evidence "relates to the transactions at the heart of plaintiff's cause of action" (id). The court noted that "the existence or degree of 'fault' on the part of defendant—against whom liability has been conclusively established and who is precluded from asserting setoffs and counterclaims against plaintiff as a result of his default—is of no relevance to the question of plaintiff's real damages" (id).

Thus, upon a damages trial or inquest, liability is not an issue (Haberman v. Weissberg, 131 AD2d 331, 516 NYS2d 925 [1st

Dept., 1987]) and no evidence may be introduced tending to defeat the plaintiff's causes of action (Hussein v. Rachter, 272 AD2d 446, 708 NYS2d 337 [2d Dept., 2000]). Indeed, in Hussein, (supra) the court held the referee improperly dismissed the complaint after admitting evidence the referee believed defeated the plaintiff's cause of action.

The defendants argue the plaintiff must prove that the defendant's actually caused the damages allegedly sustained. Therefore, the plaintiff must prove a causal connection between the harms alleged and the damage that resulted. They assert the court may not merely "check the Tenant's math before entry of a $38 million judgment" (see, Affidavit in Opposition, ¶20 [NYSCEF Doc. No. 1115]). Rather, the connection between causation and damages must be proven. The defendants really present two overlapping arguments in support of this theory.

First, the defendants assert that even if the "Landlord acted unlawfully, the Tenant did not suffer any cognizable damages by virtue of those unlawful acts" (see, Affidavit in Opposition, ¶21 [NYSCEF Doc. No. 1115]). This is true because the plaintiff never obtained an SNDA and because the Yellowstone injunction tolled any cure periods so no constructive eviction was possible. Consequently, the defendants did not and could not have harmed the plaintiffs since in any event the plaintiffs

would have been unable to develop the property in conjunction with WeWork.

However, if such evidence were permissible then every defendant who has defaulted on liability could continue to introduce liability and causation evidence on the grounds such evidence merely mitigates the damages. Thus, Castaldini v. Walsh, 186 AD3d 1193, 127 NYS2d 917 [2d Dept., 2020] and Jihun Kim v. S & M Cateres Inc., 136 AD3d 755, 24 NYS3d 743 [2d Dept., 2016] specifically held a defendant participating at a damages trial may not re-litigate issues of causation. It cannot be disputed that if the defaulted defendant is permitted to argue they did not cause any harm they should not be liable for any damages. Nevertheless, issues of causation may not be raised at the damages trial at all (see, Arluck v. Brezinska, 180 AD3d 634, 115 NYS3d 716 [2d Dept., 2020]). The defendants argue those cases involved personal injuries and that in the personal injury "context, it is quite difficult to separate 'causation' from 'liability', and it may make some sense to prevent the defaulting defendant from attempting to relitigate the question of liability in the guise of challenging 'causation.'" (see, Affidavit in Opposition, ¶21 [NYSCEF Doc. No. 1115]). It is true that in many personal injury contexts the issues of negligence and whether the negligence was a substantial factor in causing the incident are so "inextricably interwoven" as to be logically impossible for

one finding but not the other (Schaefer v. Guddemi, 182 AD2d 808, 582 NYS2d 803 [2d Dept., 1992]). However, that does not permit a damages hearing to consider questions of causation. Indeed, in Jihun Kim, (supra) the court specifically prohibited the evidence at the damages trial to consider whether a duty was owed and whether causation was proven, both elements of any negligence finding. The court explained that "the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiffs" (id).

The defendants further seek to distinguish the above rules by assuming arguendo the defendants actually committed some wrongdoing, however, that such wrongdoing did not cause any damage, that the wrong committed was not the proximate cause of the damages, and they should be permitted to so argue at a damages trial. That distinction, whether no wrong was committed, and such evidence is impermissible, or whether a wrong was committed and no damages flowed thereby, where the evidence is permissible, is unpersuasive. There is really no difference between arguing the defendant did not cause the damage, which is impermissible (Castaldini, supra) or arguing a wrong may have been committed but that was not the cause of any injury. Either way these are both improper attempts to introduce evidence regarding causation. In essence, the defendants seek to present evidence regarding mitigation of damages by undermining the very

claims themselves, arguing that if there are no claims there can be no damages. The defendants cite two cases in support of this theory. The first is Rich-Haven Motor Sales v. National Bank of N.Y. City, 163 AD2d 288, 558 NYS2d 91 [2d Dept., 1990]). In that case the plaintiff sued the defendant bank for refusing to honor checks it had written. The bank defaulted and an inquest was held on damages. The appellate court held the inquest correctly excluded a loan the bank had given the plaintiff because even if the bank had not improperly dishonored checks the plaintiff would still have been required to pay back the loan. Thus, that loan was not included in damages. Notably, the plaintiff sought the inclusion of the loan as potential damages and such request was rejected. This case does not support the defendant's position that it may introduce causation evidence when such evidence will result in a total mitigation of damages owed. The existence of the loan, in that case, was not a cause of the bank's check-dishonoring practices. Rather, the loan was simply not appropriately included within damages. In fact, Rich-Haven further affirmed that "the trial court correctly concluded that the sole issue at the inquest was to determine the extent of the damages sustained by Rich-Haven and that the bank was precluded from contesting the fact that it caused those damages" (id). Therefore, Rich-Haven does not support the arguments advanced here.

The second case cited is Suburban Graphics Supply Corp., v. Nagle, 5 AD3d 663, 774 NYS2d 160 [2d Dept., 2004]. In that case the defendant defaulted and an inquest concerning damages was held regarding the allegations of misappropriation of trade secrets and unfair competition. The court held the inquest should not have dismissed any of the causes of action because whether the defendant "participated in the tortious conduct alleged in the second cause of action related to the issue of liability, not damages" (id). The court further noted that "the measure of damages in a case of unfair competition is the amount which the plaintiff would have made but for the defendant's wrong, and not the profits received by the defendants" (id) and that an element of this claim is proof the offending conduct was a substantial factor in causing the loss. The court therefore considered evidence regarding lost profits holding that defendant's conduct was not the sole cause of such lost profits but that customer satisfaction played a role as well. Thus, damages were fixed accordingly. The defendants argue this case supports the notion that causation evidence is permissible in a damages inquest where such evidence mitigates the damages. Indeed, evidence consisting of alternative reasons why profits decreased was admissible to consider a damages award.

However, the mitigation evidence in Suburban Graphics (supra) was "intrinsic to the transactions in issue" (Amusement

Business Underwriters v. American International Group, 66 NY2d 878, 498 NYS2d 760 [1985]). Stated more directly, mitigation evidence regarding claims of lost profits may include any evidence that defendants did not contribute to the lost profits as alleged. In this case the defendants do not present any evidence intrinsic to the damages claims at all. They merely assert they did not cause the damages alleged.

The defendants propose a hypothetical to highlight the unfairness of any contrary rule. They argue "if the plaintiff alleged in a complaint that the defendant punched him in the mouth on June 5, causing the loss of two teeth; and the inquest evidence established that the plaintiff went to the dentist on June 4 (the day before the assault) to have the necessary corrective work done, it is impossible to believe that the Court would nevertheless ignore the actual record and enter a default judgment against the defendant, based solely on the testimony that the plaintiff went to the dentist and the entry of the paid bills. This is analytically what the Tenant is trying to do here against the Landlord" (see, Affidavit in Opposition, Footnote 9 [NYSCEF Doc. No. 1115]). First, that hypothetical readily admits that the defendants are simply trying to argue their conduct did not cause any damage. Moreover, there is no evidence of any pre-existing condition that would necessarily relieve the defendants of any liability. However, and most importantly, those are

precisely the consequences that flow from a default or from striking pleadings. When a default occurs all traversable allegations of the complaint are deemed admitted. A traverse is a "formal denial of a factual allegation made in the opposing party's pleading" (Black's Law Dictionary 1506 [7th Edition 1999]). Thus, the allegation that the "Landlord liked the proposed WeWork Sublease so much that they wanted it for themselves, and wanted to cut Tenant out of its own deal by terminating the Lease so that either (i) Landlord and, by extension, the Akkads, would become WeWork's landlord and obtain directly the benefits of the proposed WeWork Sublease transaction or (ii) Tenant's terminated Lease would merge back into the fee, and the Akkads and Landlord could sell their fee simple interest in the Premises unencumbered by the Lease and with the proposed WeWork Sublease in place" is now admitted as true (see, First Amended Complaint, ¶ 154 [NYSCEF Doc. No. 331]). There is no unfairness imposing damages upon a defendant for breaching the covenant of good faith and fair dealing. To the extent any unfairness does exist, the same unfairness could be said about a defendant who defaulted and wishes to present evidence, at a damages inquest, that he did not strike the pedestrian or even if he was driving erratic that is not why the pedestrian was hurt. The court would of course "ignore the actual record" and proceed only on damages. To be sure, it is inaccurate to accuse the

court in the hypothetical presented of ignoring the actual record. Rather, the court would base its factual conclusions upon the pleadings as admitted. The inability to challenge those facts and to correct the record is only due to the default that occurred. There is no basis to impugn the court's role as an authority dispensing justice. Precedent has established that upon a default all allegations are deemed admitted. Those precedents will not be disturbed at this time.

The defendants next argue, and reiterate many of the earlier arguments, that they can introduce causation evidence at a damages trial based on Oakes v. Patel, 20 NY3d 633, 965 NYS2d 752 [2013]). In that medical malpractice action the court stated that "causation issues are relevant both to liability and to damages. Thus, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiffs injury...But even where liability is established, the plaintiff may recover only those damages proximately caused by the malpractice. More specifically, where a condition existing before the malpractice occurred may have contributed to the plaintiff's injury, the plaintiff is not entitled to recover those damages that the preexisting condition would have caused in the absence of malpractice" (id). Consequently, the defendants argue that "even if the striking of the Landlord's Answer

sufficed to establish 'liability causation', Oakes confirms that it does not conclusively bar the Landlord from contesting 'damages causation'" (id). The defendants further support this argument by citing to Rosengarten v. Born, 2021 WL 3264283 [Supreme Court New York County 2021] which, squarely based upon Oakes, (supra) permitted evidence of proximate causation of damages at a damages trial. The court in Rosengarten (supra) stressed that while a defaulted defendant could not re-litigate liability, it was proper to consider "whether damages asserted at the inquest can be awarded if they were not caused by Defendants" (id). However, a careful review of Oakes (supra) reveals that it did not intend to create a significant change in the law concerning damages inquests to the point of virtually overruling Rokina (supra). Rather, Oakes (supra) was merely reiterating the truism that to establish malpractice it must be demonstrated a doctor deviated from standard medical care and that such deviation proximately caused the injury (see, Manley v. State, 2018 WL 3821708 [Court of Claims, Albany County 2018]). Of course, included within that truism is the further truism that there can be no malpractice if the injury was pre-existing. The broad reading of Oakes (supra) espoused by Rosengarten (supra) would permit all evidence of causation to be presented at a damages trial, since proximate cause and actual cause are both necessary to establish liability. The dearth of any cases or

commentators noting this supposed change can only mean no such change occurred. Therefore, the court declines to follow Rosengarten. In fact, if such evidence could be presented in a damages trial then it is impossible to reconcile Castaldini v. Walsh, 186 AD3d 1193, 127 NYS2d 917 [2d Dept., 2020], Jihun Kim v. S & M Caterers Inc., 136 AD3d 755, 24 NYS3d 743 [2d Dept., 2016], Gonzalez v. Wu, 131 AD3d 1205, 13 NYS3d 768 [2d Dept., 2015] and Kouho v. Trump Village Section 4, Inc., 93 AD3d 761, 941 NYS2d 186 [2d Dept., 2012]. All those cases held the defaulted defendant could not introduce evidence of causation. Furthermore, if the plaintiff's position were correct and causation evidence could be introduced at a damages trial, even to mitigate damages entirely, one would expect at least a single appellate court to directly espouse that view. The fact the defendants must resort to inferences and indirect dicta from cases not really on point to support such a fundamental principal, really means no such principal exists.

Turning to the constructive eviction claim it is well settled that "a constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (Joylaine Realty Co., LLC v. Samuel, 100 AD3d 706, 954 NYS2d 179 [2d Dept., 2012]). Thus, Paragraph 180 of the First Amended Complaint states that "Landlord's pre-textual notices have completely

deprived Tenant of its use and enjoyment of the Premises; have left Tenant with a 100 year old empty warehouse that it cannot occupy, develop, sublease or use for any meaningful purpose; have caused Tenant to lose its ability to use the Building for any other purpose; have deprived Tenant of the essential right to develop the Building into a multi-unit commercial property, obtain financing and then sublease the Building for a profit, which it specifically contracted for in its Lease; and have forced Tenant to abandon substantial portions of the Premises" (id). Further, Paragraph 182 states that "Landlord's conduct and action, as aforesaid, have caused Tenant's partial if not total eviction of the Premises and the Building" (id). As noted, those allegations are deemed admitted.

The defendants argue that although the Appellate Division upheld the constructive eviction claim following a motion to dismiss the sufficiency of that claim must be tested by the actual trial record (see, Affidavit in Opposition, Footnote 14 [NYSCEF Doc. No. 1115]). The defendants offer another hypothetical. "For example, if the Court had previously denied a pre-answer motion to dismiss a complaint alleging damages on the theory that the defendant owned the house where the plaintiff fell, and the evidence at the inquest established that the defendant did not own the house, it is inconceivable that the

Court could nevertheless award damages on the theory that the claim had been 'properly stated' in the complaint" (id).

First, this hypothetical is no different in argument than the earlier one referencing the dental claims. This hypothetical, like the earlier one, fails to appreciate the impact and the legal posture of a party that has defaulted. The court has already addressed that no unfairness or injustice results when considering the facts and allegations of the complaint where a default occurs. This is particularly true where the default is the result of willful and contumacious conduct. Consequently, the trial record is no longer relevant and need not be considered.

However, even where facts are deemed admitted on default a distinction must be drawn, and no damages are appropriate, where no cause of action is alleged at all. Thus, in Zuniga v. BAC Home Loans Servicing L.P., 147 AD3d 882, 47 NYS3d 374 [2d Dept., 2017] the court explained that "where a valid cause of action is not stated, the pleading party moving for judgment on that cause of action is not entitled to the requested relief, even on default" (id). Indeed, the court does not maintain any subject matter jurisdiction to adjudicate the merits of such purported claims (Williams v. Barnes and Noble, Inc., 174 SW3d 556 [Missouri Court of Appeals Western District 2005]). The constructive eviction claim is surely a valid and recognized

cause of action and there is no basis to reject its validity in this case. The defendants provide yet a third hypothetical. "If a plaintiff alleges in a complaint that he fell down a flight of stairs because the defendant placed a hex on him, and the defendant then defaults, the Court cannot enter a money judgment for the medical bills and pain and suffering presented at an inquest because the legal theory that underlies the claim is not sustainable. So, too, here, where the theory of constructive abandonment based on the facts proven at trial by the Tenant do not set forth a viable cause of action" (see, Affidavit in Opposition, Footnote 16 [NYSCEF Doc. No. 1115]). There is no comparison between allegations that do not comprise any tort or any cause of action at all, over which the court maintains no jurisdiction, to a viable cause of action wherein the facts of the complaint are deemed admitted whereby the defendants cannot challenge them.

Second, any argument the facts do not support a constructive eviction cause of action are barred by the default. The defendants repeatedly and persistently attempt to soften the reality they face as a result of the striking of the answer by appealing to the natural reality that there are factual issues that require resolution. However, due to the default they simply are not permitted to contest any of the facts. The defendants have presented three scenarios all highlighting the same shock

and dismay how a court could adopt facts that are contested. Indeed, the crux of the opposition is really based upon the premise that it is fundamentally unfair to draw factual conclusions that are so disputed. However, the court is relying upon the allegations contained in the first amended complaint. Of course, without a default the defendants are permitted, even maintain a duty, to answer the complaint, engage in discovery and ultimately proceed to trial. When a default occurs, all the facts alleged in the complaint are now admitted to be true. For these very reasons it is contradictory to express outrage how a court could fail to consider contested facts. Upon a default there are no contested facts. As noted repeatedly, all the facts of the first amended complaint are deemed true. The only matter upon which the defendants may present evidence following a default is the quantum of damages. The court now turns to that portion of the motion.

The plaintiff presented evidence in the form of trial testimony Mark Dunec, a licensed real estate appraiser, who opined that the plaintiff suffered lost rent in the amount of $26,149,096[1]. That number represents the present value to the date the lease was signed in 2015 (<u>see</u>, Testimony of Mark Dunec, June 29, 2022, page 12). In addition, Mr. Dunec testified that

[1] On page 12 of Mr. Dunec's testimony he stated the amount of damage resulting from lost rent from the WeWork lease was $26,149,096. On page 29 Mr. Dunec testified the amount was $26,149,009, a negligible difference of $87.

conservatively, assuming WeWork would opt not to renew its lease, the plaintiff would be able to recover an additional $23,414,170 in lost rent upon repositioning the property as commercial space. That amount would run until the end of the plaintiff's ground lease. In reaching those conclusions Mr. Dunec considered "supply and demand, occupancies, market rents, reviewed comparable sales, reviewed comparable lease transactions" and utilized "a discount rate analysis" (see, Testimony of Mark Dunec, June 29, 2022, page 16). Further, Mr. Dunec conducted detailed analysis regarding the fifteen year WeWork lease, the forty-nine year ground lease, capital reserves, tenant costs, improvements, insurance, taxes and a management fee. Mr. Dunec concluded the plaintiff had expended an amount with a present value of $10,017,796.36 and considering interest a total amount of $16,191,263 (see, Testimony of Mark Dunec, June 29, 2022, page 23). Thus, according to Mr. Dunec the total damages plaintiff suffered in lost rent amounted to $36,241,836. Considering the accrual of interest, as of November 1, 2022 the amount of damages sought is $38,516,310 (see, Memorandum in Support, Footnote 3 [NYSCEF Doc. No. 1106]).

Upon cross-examination the defendants raised three distinct issues undermining the overall conclusions of Mr. Dunec. The first issue raised was the failure of Mr. Dunec to consider the fact the tenant could not enter into a sublease without the

landlord's consent and that the landlord did not have to consent to an SNDA. Second, the defendants questioned whether the tenant had the requisite financing to even engage with WeWork. Lastly, the defendants raised general questions whether the conclusions of Mr. Dunec were speculative.

The other witnesses, including James Wacht, further supported the plaintiff's position concerning the damages suffered and the plaintiff's ability to finance the project. Thus, the defendants basic opposition to the damages, rests, not upon an alternative calculation of damages but upon pointing to flaws in the testimony presented.

It is well settled that in a bench trial the credibility of witnesses and the weight to be given all evidence are within the province of the trial judge "and are entitled to considerable deference" (see, Continental Insurance Co. v. Lone Eagle Shipping Ltd. (Liberia), 134 F.3d 103 [2d Cir. 1998]). Further, "as trier of fact, the judge is entitled, just as a jury would be, to believe some parts and disbelieve other parts of the testimony of any given witness" (Krist v. Kolombos Rest. Inc., 688 F.3d 89 [2d Cir. 2012]). Thus, expert testimony may be admitted at a bench trial and such testimony "can be given only the weight that it deserves, or excluded in whole or in part, after the trial as necessary" (MPM Silicones, LLC v. Union Carbide Corporation, 2016 WL 11604974 [N.D.N.Y. 2016]).

Therefore, where an expert engages in an independent evaluation in conjunction with realistic assumptions of the parties then such evaluation may be considered (CIT Group/Business Credit, Inc., v. Graco Fishing and Rental Tools, Inc., 815 F.Supp2d 673 [S.D.N.Y. 2011]). Concerning lost profits "any award of lost profits necessarily includes some element of speculation" because "'any decision as to what events would have occurred in the absence of the [allision] and the detention for repairs involves a supposition based on inferences from events which did not occur. No such supposition can be certain'" (see, Great Lakes Business Trust v. M/T Orange Sun, 855 F.Supp2d 151 [S.D.N.Y. 2012]). Thus, lost profits are recoverable where they are "ascertainable with a reasonable degree of certainty" (North Main Street Bagel Corp., v. Duncan, 37 AD3d 785, 831 NYS2d 239 [2d Dept., 2007]). The plaintiff's experts demonstrated lost profits to a reasonable degree of certainty (see, Nature's Plus Nordic A/S v. Natural Organics Inc., 982 F.Supp2d 287 [E.D.N.Y. 2013]. The experts were detailed in their analysis and based their conclusions upon specific and measurable non-conclusory comparisons. Any inferences or challenges elicited on cross-examination to try and discredit their conclusions, really only raised unpersuasive questions regarding inconsequential and tangential matters and failed to significantly undermine the totality of the testimony. This is particularly true concerning

whether WeWork would have actually signed the lease. The court credits their testimony to extent indicated and awards judgement in the amount of $36,241,836 inclusive of all costs and interest.

So ordered.

ENTER:

DATED: December 5, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC