

**233 Broadway Owners, LLC v Nathan A. Waxman  
PLLC**

2023 NY Slip Op 32211(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 654587/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

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233 BROADWAY OWNERS, LLC,

Plaintiff,

- v -

NATHAN A. WAXMAN PLLC DBA LAW OFFICES OF  
NATHAN A. WAXMAN, and GUERRERO YEE LLP,

Defendants.

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INDEX NO. 654587/2020

MOTION DATE 06/29/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for a default judgment against defendant Guerreo Yee LLP for its failure to appear and answer is granted; and it is further

ORDERED that an assessment of damages against defendant Guerreo Yee LLP shall take place at the trial of the claims against defendant Nathan A. Waxman PLLC; and it is further

ORDERED that to the extent it seeks summary judgment dismissing the third affirmative defense (surrender and termination) alleged in the answer of defendant Nathan A. Waxman PLLC, the motion of plaintiff is GRANTED, and third affirmative defense is stricken; and it is further

ORDERED that to the extent it seeks summary judgment dismissing the first (Governor Cuomo's Executive Orders Nos 202.28 and 202.48), second (partial payment) and fourth (mitigation of damages) affirmative defenses alleged in the answer of defendant Nathan A. Waxman PLLC, the motion of plaintiff is DENIED; and it is further

ORDERED that counsel are directed to post on NYSEF a proposed discovery preliminary conference order or competing proposed discovery preliminary conference order(s) at least two days before August 29, 2023, on which counsel are directed to appear via Microsoft Teams, unless such appearance be waived by the court.

#### DECISION

In this action for breach of commercial lease, plaintiff 233 BROADWAY OWNERS, LLC, moves for a default judgment based upon the failure of defendant GUERRERO YEE LLP to answer or appear. Plaintiff has submitted proof of service of the summons and complaint and proof of service of this motion upon such defendant. Plaintiff has submitted an affidavit of facts as well as an affirmation as to such defendant's default pursuant to CPLR 3215(f). Plaintiff has also submitted proof of the additional mailing of the summons required by CPLR 3215(g)(4). Finally, plaintiff has brought this motion within one year since such defendant defaulted, as required under CPLR 3215(c).

The statutory requisites having been established, the court

shall grant judgment against defendant GUERREO YEE LLP, as set forth in the notice of motion. However, plaintiff is not entitled to entry of judgment at this junction, as pursuant to CPLR 3215(a), its claim for rent requires extrinsic proof and is therefore not for a "sum certain", in contrast to a claim that seeks recognition of a money judgment or enforcement of a negotiable instrument. See Pikulin v Mikshakov, 258 AD2d 450 (2d Dept 1999).

With respect to defendant's third affirmative defense that it returned the keys, which plaintiff retained, and thereby surrendered the premises and terminated its tenancy, this court finds that documentary evidence, i.e., the provision of paragraph 25 of the lease that requires a writing signed by plaintiff, irrefutably defeats such defense. See Midorimatsu, Inc. v Hui Fat Co., 99 AD3d 680, 681-682 (2d Dept 2012).

With respect to defendant's first (Governor's pandemic moratorium executive orders) affirmative defense alleged in the answer of defendant Nathan A. Waxman PLLC, plaintiff fails to refute such defense. Executive Orders 202.28 and 202.48 created moratoriums on evictions of commercial tenants and provided commercial tenants with a "financial hardship due to COVID-19 defense". The conclusory assertions of plaintiff's managing agent are insufficient to establish that defendant suffered no financial hardship during the period in question. Moreover, the

affidavit in opposition of defendant's principal who describes defendant's inability to use the subject premises as an immigration law office for meeting with clients raises issues of fact with respect to such defense. See SRI Eleven 1407 Broadway Operator LLC v Mega Wear, Inc, 71 Misc3d 779 (NYC Civil Court, New York County 2021, Tsai, J).

With respect to the second affirmative defense (partial payment), the "Aged Delinquencies" ledger and "Tenant Adjustments" records attached to plaintiff's papers are insufficient to prima facie establish that plaintiff properly credited the security deposit to the amount of outstanding rent and/or additional rent that plaintiff contends defendant owes.

As for the fourth affirmative defense, defendant is correct that knowledge of the salient facts remains exclusively within possession of plaintiff, rendering defendant unable to address

the statement in the affidavit of plaintiff's manager that "No part of the Premises has been re-rented for any part of the time period for which rent is sought from Defendants". On such basis, summary dismissal of the fourth affirmative defense must be denied. See Gaughan v Chase Manhattan Bank, 204 AD2d 67 (1<sup>st</sup> Dept 1994).

*Debra A. James*

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6/30/2023

DATE

DEBRA A. JAMES, J.S.C.

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