

30 E. 20 LLC v Westaub II LLC

2023 NY Slip Op 32236(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 151456/2021

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 8

30 East 20 LLC

INDEX NO. 151456-2021

- v -

MOT. DATE

MOT. SEQ. NO. 004

Westaub II LLC, 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 breach of a commercial lease. Plaintiff now moves for an order pursuant to CPLR § 3215 granting it a default judgment against the commercial tenant, defendant, Westaub II LLC ("Westaub"). Plaintiff seeks a money judgement of \$774,840.29 against the defendant for rent plus interest as well as recoupment of its reasonable legal fees, costs and expenses. Plaintiff also seeks an order severing the action as against defendant Francis Staub.

Previously, on January 25, 2022, Westaub filed an answer to the complaint. On June 3, 2022, Westaub's counsel filed an Order to Show Cause seeking to withdraw as counsel. The OSC was granted in an order and decision dated August 10, 2022. As part of that order and decision, the court directed Westaub to retain an attorney and gave it 30 days to retain new counsel. Defendant failed to retain an attorney in the time frame provided by the court and an LLC cannot appear pro se. Therefore, in an interim order dated December 8, 2022, the court ordered that Westaub was deemed in default, struck its answer, and gave plaintiff 90 days to move for a default judgment. Plaintiff filed this motion for default judgment on March 3, 2023. Therefore, the motion is timely. The motion has been submitted without opposition despite proof of service of notice of the motion on the defendants via regular mail. Therefore, the motion is considered on default.

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: 7/5/23

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

- 1. Check one: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [x] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Plaintiff is the owner of the premises located at 30 East 20th Street, New York, New York (the "premises"). In February 2014, plaintiff leased the ground floor space and basement space of the premises to Westaub pursuant to a written license agreement with a term of ten years and eight months expiring in October 2024. Plaintiff has provided a copy of the lease agreement to the court.

The lease states that:

The Fixed Annual Rent which Tenant agrees to pay Landlord throughout the Term of this Lease shall be as follows: Commencement Date to the last day of the month In which the first anniversary of the Commencement Date occurs (such period is hereinafter referred to as the "First Rent Year" and each ensuing twelve-month period is described as a "Rent Year") \$400,000.00 Second Rent Year \$412,000.00 Third Rent Year \$424,360.00 Fourth Rent Year \$437,090.80 Fifth Rent Year \$450,203.52 Sixth Rent Year \$463,709.63 Seventh Rent Year \$477,620.92 Eighth Rant Year \$491,949.55 Ninth Rent Year \$506,708.03 Tenth Rent Year \$521,909.2

Furthermore, the lease provides that a tenant is responsible for "tax escalation... [which] shall mean forty (40%) percent" of the tax escalation. The tenant is also responsible "to pay for the cost of all utilities being provided to the... premises" and this includes "water and sewer charges relating to the demised premises in accordance with the bills rendered by the Landlord under the sub-meter to be maintained."

With regard to failure to cure, the lease reads as follows:

Notwithstanding anything to the contrary contained herein, if at any time during the Term, after Tenant has been granted all or a portion of the Rent Credit, if Tenant is in default under this Lease and tenant fails to cure such default within applicable notice, grace or cure periods, then, in addition to all other damages and remedies herein provided and to which landlord may otherwise be entitled, Landlord shall also be entitled to the repayment of the Rent Credit (or portion thereof received by Tenant), which sum shall be Additional Rent hereunder and due upon demand by Landlord. The obligation of tenant to pay such Additional Rent damages to landlord shall survive the expiration or sooner termination of this Lease.

Finally, the lease states that:

In the event Tenant shall not timely vacate the Demised Premises after the expiration of the Tenn of this Lease, sooner termination of the Lease, or any renewal Term, then Tenant shall be responsible to pay use and occupancy equal to (i) the then current market value of this space, as determined by an independent expert in the real estate business; and (ii) all Additional Rentals, as specified herein (pro-rated on a monthly basis) and shall otherwise be on the terms and conditions herein specified, so far as same are applicable. It being specifically agreed and understood that the fair market value of this space during such hold-over shall in no event be less then two (2) times the aggregate rent being charged during the last year of the Term of this Lease

In its complaint, plaintiff asserts five causes of action. The first cause of action is for ejectment wherein plaintiff seeks to eject Westaub from the premises. The second cause of action is for a declaratory judgment and judgment against the guarantor on the lease, Francis Staub, for the rent owed. The third cause of action is for attorneys' fees against Westaub. The fourth cause of action is for attorneys' fees against the guarantor on the lease, Francis Staub. The fifth cause of action is for a declaratory judgment against Westaub for the rent owed, a temporary restraining order and a permanent injunction

prohibiting Westaub from removing or damaging any fixtures and equipment on the premises. Since the filing of the complaint, Westaub has evacuated the premises, and the complaint was never served upon the guarantor, Francis Staub. Therefore, the first, second and fourth causes of action are moot. Only the third and fifth causes of action will be considered.

First, the court recognizes that the relief requested in the complaint and in the notice of the motion does not match the relief requested in the affirmation and the affidavit annexed as exhibits to the motion. In the complaint and in the notice of motion, 30 East 20 LLC asks for \$774,840.29 in outstanding rent and additional payments. In the affidavit and affirmation annexed as exhibits to the instant motion, 30 East 20 LLC requests \$2,159,722.40 in outstanding rent and additional rent payments. However, pursuant to CPLR § 3025(c), "the court may permit pleadings to be amended before and after judgment to conform them to the evidence." Therefore, the court will conform the motion to the evidence.

The motion is supported by the sworn affidavit of Mr. Peter Weiss, a member of 30 East 20 LLC. Weiss states based upon personal knowledge that the plaintiff owns the premises, and that plaintiff leased the ground floor and basement space of the premises to Westaub by a written lease dated February 24, 2014 and First Amendment to Lease dated March 6, 2015. Pursuant to the lease, Westaub is liable to the landlord for fixed annual rent as follows: from July 1, 2019 through June 30, 2020, \$27,516.96 per month, \$450,203.52 annually; from July 1, 2020 through June 30, 2021, \$39,801.74 per month, \$477,620.88 annually; from July 1, 2021 through June 30, 2022, \$40,995.80 per month, \$491,949.55 annually; from July 1, 2022 through June 30, 2023, \$42,225.67 per month, \$506,708.03 annually; and from July 1, 2023 through June 30, 2024, \$43,492.44 per month, \$521,909.27 annually. Also, pursuant to the lease, Westaub is required to pay Real Estate taxes and for all utilities including water.

Weiss asserts that Westaub has not made rent or additional rent payments as required by the lease since April 23, 2020. For the period through October 20, 2020, the defendant has failed to pay rent and additional rent due in the total amount of \$363,502.30. On or about July 6, 2020, Plaintiff drew down Westaub's \$200,003.00 security deposit, applied it to the rent arrears owed and demanded that plaintiff replenish the security deposit pursuant to the lease. Defendant failed to replenish the security deposit. As a result of Westaub's failure to pay rent and additional rent, plaintiff served Westaub with a fifteen-day notice to cure default of lease by paying a sum of \$363,502.30 by October 31, 2020. The notice to cure also informed Westaub that pursuant to the lease, failure to cure would entitle plaintiff to repayment of \$366,666.67 in free rent that had previously been conditionally provided to Westaub. Plaintiff submitted a copy of the notice to cure to the court. The notice to cure also breaks down the rent, utility payments, and real estate taxes that are outstanding and demonstrates arrears in the total of \$163,499.30 plus the security deposit for a total of \$363,502.30. However, the lease states that the security deposit is taken to ensure "the faithful performance and observance by Tenant of the terms, provisions and conditions of this lease." It was used to pay for rental arrears. 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.

Plaintiff also served Westaub with a "Five Day Notice of Cancellation of Lease: Lease Termination Notice" dated November 30, 2020 which terminated the lease effective November 30, 2020 and required Westaub to vacate and surrender the premises by that date. Defendant did not surrender possession until May 27, 2022. Pursuant to the lease, Westaub is liable to plaintiff for two times the rent due under the lease during the time period in which it held over the premises after the lease was terminated. This means that for the period between December 1, 2020 and May 27, 2022, Westaub owes \$1,384,882.20 for holdover rent. The holdover rent plus the repayment of free rent, plus the rent and additional rent due (without the security deposit) leaves a total of \$1,915,048.17. Therefore, plaintiff is entitled to \$1,915,048.17 from Westaub in unpaid rent and additional rent under a theory of breach of contract.

Finally, plaintiff seeks \$31,087.94 in attorney's fees. Weiss states that plaintiff has incurred \$31,087.94 in attorney's fees through to date, in connection with this action. The lease agreement states that:

If Tenant shall default in the observance or performance of any... of the terms...in any article of this lease... Owner in connection with any default by Tenant in the covenant to pay rent thereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefore, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

Plaintiff has submitted the affirmation of its attorney, Kenneth E. Rosen who states that "The fees incurred to date for legal services provided by our firm, Rose & Rose, totals \$31,087.94 to date." Plaintiff also submits the billing records of its attorney which detail the hours worked, what work was performed in those hours, and the hourly charge for each of those hours. Therefore, plaintiff has demonstrated that the hours worked were reasonable and that the charges were commensurate with the work performed (*see i.e. Gamache v. Steinhaus*, 776 NYS2d 310 [2d Dept 2004]). Accordingly, plaintiff is entitled to legal fees in the amount of \$31,087.94.

In accordance herewith, it is hereby

ORDERED that the motion is granted to the extent that plaintiff is granted a default judgment on its third and fifth causes of action against Westaub II LLC; and it is further

ORDERED that the Clerk is directed to enter a money judgment for rent, additional rent and attorney's fees in favor of plaintiff 30 East 20 LLC and against defendant Westaub II LLC for \$1,946,145.47 together with interest from April 23, 2020.

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:

7/5/23
New York, New York

So Ordered:



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