

CAC Atl. LLC v Sandler-Sims

2023 NY Slip Op 32642(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 150166/2022

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

-----X

CAC ATLANTIC LLC,

Plaintiff,

- v -

EMILIE S. SANDLER-SIMS,

Defendant.

-----X

INDEX NO. 150166/2022

MOTION DATE 04/03/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32 were read on this motion to/for JUDGMENT - DEFAULT

In this action arising out of the breach of a residential lease, plaintiff CAC Atlantic LLC moves, pursuant to CPLR 3215 and 3212, for an order granting plaintiff (1) a default judgment against defendant Emilie S. Sandler-Sims or (2) summary judgment against said defendant.

I. Background

Pursuant to a lease agreement dated April 18, 2018, plaintiff, as landlord, leased Apartment 8A located at 241 Atlantic Avenue, Brooklyn, New York 11201, to defendant, as tenant, for a one-year term commencing July 1, 2018 through June 30, 2019 (NY St Cts Elec Filing [NYSCEF] Doc No. 2, summons with notice, exhibit at 4). The lease was renewed in May 2019 for second one-year term commencing July 1, 2019 through June 30, 2020, with yearly rent set at \$66,000 due in monthly installments of \$5,500 that were payable on the first day of each month, and a one month security deposit of \$5,500 (*id.* at 34). In the event monthly rent was not paid within 10 days of its due date, defendant agreed to pay plaintiff \$0.05 for every dollar of overdue rent (*id.* at 46 [¶ 54]). In addition, paragraph 53 of the lease, titled "Fees and Expenses," allows plaintiff to recover its "attorneys' fees, costs and expenses" incurred in connection with any default by defendant in the

terms, covenants or conditions of the lease (*id.*). Defendant vacated the apartment and failed to pay the monthly rent and other fees due beginning April 2020 through the end of the lease term (NYSCEF Doc No. 30, Alex Adjmi aff, ¶ 4).

Plaintiff commenced this action on January 6, 2022 by filing a summons with notice (NYSCEF Doc No. 1), and served defendant with the summons with notice at an address in Montclair, New Jersey (NYSCEF Doc No. 3). Plaintiff subsequently moved for a default judgment based on defendant's nonappearance (NYSCEF Doc No. 4), which prompted defendant to move by order to show cause to vacate the default and request an extension of time to answer (NYSCEF Doc No. 16). By stipulation dated May 4, 2022, plaintiff and defendant, now represented by counsel, agreed to withdraw both motions and to extend defendant's time to serve and file an answer to May 16, 2022 (NYSCEF Doc No. 20). Defendant also agreed to waive the defense of personal jurisdiction (*id.*). On May 16, 2022, defendant served an answer to the "petition" and asserted general denials (NYSCEF Doc No. 21). Plaintiff, though, had not yet served a complaint, waiting until August 8, 2022 to do so (NYSCEF Doc No. 27).

Plaintiff now moves for a default judgment based on defendant's failure to serve an answer to the complaint or, assuming issue has been joined, for summary judgment in its favor. Defendant has submitted no opposition.

II. Discussion

An application for a default judgment must be supported with "proof of service of the summons and complaint[,] ... proof of the facts constituting the claim, [and] the default." CPLR 3215 (f). CPLR 3212 (a) allows a party to move for summary judgment, provided that issue has been joined in the action.

As is relevant here, CPLR 3012 (b) provides, in part, that if the complaint is not served with the summons and the defendant does not serve a demand for a complaint, then “the complaint shall be served within twenty days after service of the notice of appearance.”

The stipulation signed by defendant’s counsel extending defendant’s time to answer or appear constitutes an appearance in this action. See *LL 1371 First Ave., LLC v Islam*, 2017 NY Slip Op 30634[U], *5 (Sup Ct, NY County 2017), citing *Nardi v Hirsh*, 245 AD2d 205, 205 (1st Dept 1997); *Lowell Hotel Assoc., L.P. v Jacobson*, 2010 NY Slip Op 33704[U], *3 (Sup Ct, NY County 2010) (stipulation extending the time to serve an answer constitutes an appearance under CPLR 2103 [c]). “Service of a notice of appearance will avoid a default, at least temporarily, and put the plaintiff to the task of serving a complaint within 20 days.” *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1008 (2d Dept 2020) (internal quotation marks and citation omitted). Thus, counsel’s appearance for defendant triggered plaintiff’s obligation to serve the complaint within the time set forth in CPLR 3012 (b).

Plaintiff, though, waited until August 2022 to serve the complaint, which is well beyond the 20-day period prescribed in CPLR 3012 (b), and defendant has not served an answer to the complaint. Plaintiff has acknowledged its delay in serving the complaint (NYSCEF Doc No. 29, Jason J. Rebhun affirmation, ¶ 10). Plaintiff has not offered a reason for the delay nor did it move for an extension of time to comply with the statute. Given plaintiff’s failure to comply with CPLR 3012 (b), its motion for a default judgment is denied.

Plaintiff’s request for summary judgment is also denied, as defendant’s service of an answer to the “petition” in May 2022, four months before the complaint was served, was premature.

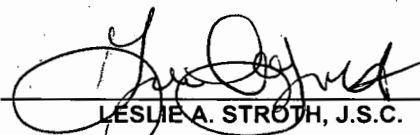
Accordingly, it is

ORDERED that the motion of CAC Atlantic LLC for a default judgment and/or summary judgment (motion sequence no. 003) is denied with leave to renew upon proof of its compliance with CPLR 3012 (b).

The foregoing constitutes the decision and order of the Court.

7/26/2023

DATE


LESLIE A. STROTH, 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