

J&R Realty Group Ltd. v Eastern Fusion Food Corp.

2023 NY Slip Op 32806(U)

August 10, 2023

Supreme Court, New York County

Docket Number: Index No. 654761/2021

Judge: Sabrina Kraus

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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**

<p>PRESENT: <u>HON. SABRINA KRAUS</u> <i>Justice</i> -----X J&R REALTY GROUP LTD., Plaintiff, - v - EASTERN FUSION FOOD CORP., KENNETH KIM Defendant.</p>	<p>PART 57TR</p> <p>INDEX NO. <u>654761/2021</u></p> <p>MOTION DATE <u>04/08/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p>AMENDED DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29
 were read on this motion to/for JUDGMENT - DEFAULT.

BACKGROUND

Plaintiff commenced this action for breach of contract, unjust enrichment and attorney’s fees against defendants seeking rent due and owing on the premises located at 133 John Street, New York, New York (Subject Premises) pursuant to a lease.

On July 18, 2012, plaintiff and defendants executed a lease, for the Subject Premises (NYSCEF Doc. 2), which obligated defendant to pay \$11,000.00 per month, commencing August 1, 2012 and ending March 31, 2028. The lease was between plaintiff and Eastern Fusion Food Corp (Eastern) with Kenneth Kim (KK) signing as president of Eastern. Plaintiff asserts KK executed a personal guarantee. Plaintiff alleges that defendant stopped paying rent for the Subject Premises in April 2020.

The summons and complaint were filed on August 4, 2021. Defendants failed to appear of file an answer, and on February 16, 2022, plaintiff moved for a default judgment. On February 18, 2022, this court denied plaintiffs motion for failure to submit proof of a default notice sent pursuant to the lease, proof of the personal guarantee of Kenneth Kim, and an

issue with the affidavit of service. On February 25, 2022, pursuant to this court's order, plaintiff served and filed a notice of entry on defendants and the clerk of the court.

PENDING MOTION

On April 8, 2022, plaintiff moved a second time, pursuant to CPLR §3215, for a default judgment against Eastern and KK, in the amount of \$554,209.54, for breach of contract, unjust enrichment and attorney's fees. Defendants have failed to appear or submit opposition.

In support, plaintiff submits the affirmation of Jay S. Sahni, Esq (NYSCEF Doc. 19); the affidavit of Roger Ardston, an officer of plaintiff (NYSCEF Doc 20); a copy of the lease (NYSCEF Doc 21); a copy of the personal guaranty (NYSCEF Doc 22); a copy of the summons and complaint (NYSCEF Doc 23); revised affidavit of service (NYSCEF Doc. 24); proof of additional mailing (NYSCEF Doc 25); a copy of the default notice (NYSCEF Doc 26); and a copy of the rent ledger and real estate tax bills (NYSCEF doc 27).

The affirmation in support explains plaintiff had served KK at his known residence in Palisades Park, New Jersey on August 11, 2021. Plaintiff had originally filed an affidavit of service reflecting the city of the address served as "Palisades, NJ". Attached to the affidavit of service was a certified mailing receipt evidencing that the papers were in fact served to the Defendant/Guarantor's address at "21 Grand Avenue, #613, Palisades Park, NJ 07650". The re-filed affidavit correcting this typographical error was filed with this Court on March 10, 2022.

In addition, plaintiff submits a copy of a default notice, dated July 6, 2021, sent to plaintiff, advising that \$470,602.72 was due in rent and real estate taxes through July 2021. The Ardston asserts he has had several discussions with the defendants concerning this debt and they have repeatedly acknowledged the same, and that defendants have yet to relinquish the keys to the subject premises back to the plaintiff. Ardston states that as a result of the defendants' breach

of the lease agreement plaintiff has been damaged in the amount of Five Hundred Eighty-Two Thousand Seventy-Eight Dollars and 48/100 (\$582,078.48) through March 2022.

Plaintiff has established entitlement to a default judgment on the first cause of action for breach of contract, in the amount of \$582,078.48, representing rent and real estate taxes due through March 2022.

Plaintiff's motion for a default judgment on the second cause of action, a claim for unjust enrichment, is denied. A claim of unjust enrichment or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter (*Goldstein v CIBC World Markets Corp*, 6 AD3d 295 [1st Dept] citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190). Here, plaintiff is seeking enforcement of a lease and guarantee made between the parties. Plaintiff's motion for a default judgment third cause of action, a claim for attorneys' fees is denied, without prejudice, to renewal, by motion on notice, with documents supporting the amount claimed due, as well as a breakdown of hours worked with explanation of work performed by counsel.

CONCLUSION

Wherefore, it is hereby:

ORDERED that plaintiff's motion seeking a default judgment against defendants Eastern Fusion Food Corp and Kenneth Kim, for breach of contract is granted; and it is further

ORDERED plaintiff is awarded a judgment in the amount of \$582,078.48; and it is further

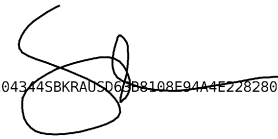
ORDERED that the clerk of the court shall enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of

this order with notice of entry on all defendants the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the ! procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the 1 1 address www.nycourts.gov/suptctmanh); and it is further

This constitutes the decision and order of the court.



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8/10/2023
DATE

SABRINA KRAUS, 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