

Wasserstein Enters. L.L.C. v Presher Fitness NY LLC
2023 NY Slip Op 33417(U)
September 28, 2023
Supreme Court, New York County
Docket Number: Index No. 653124/2022
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

WASSERSTEIN ENTERPRISES L.L.C.

Plaintiff,

- v -

PRESHER FITNESS NY LLC,

Defendant.

-----X

INDEX NO. 653124/2022

MOTION DATE 02/17/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

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

In this action to recover a money judgment for unpaid rent due under a commercial lease and for an ejectment, commenced on August 29, 2022, the plaintiff landlord moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant, the tenant at the subject property located at 113-133 West 18th Street in Manhattan. No opposition is submitted.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In support of the motion, the plaintiff submits, inter alia, the summons and complaint, an affidavit of Jenifer S. Brooks, a member of the plaintiff LLC, the deed to the property, the subject lease agreement dated August 24, 2018, providing for a term ending March 31, 2029, a "Rent Deferral Agreement" dated April 29, 2020, and "Second Lease Modification Agreement" dated October 2020, which deferred payment of but did not cancel any amount due under the lease,

which was to remain “in full force and effect” except as provided in the modifications. The agreement dated October 2020, also purports to extend the lease by six months, through September 30, 2029. The plaintiff also submits a default notice dated September 21, 2021, a notice of termination dated November 22, 2021, and a rent ledger showing unpaid rent and additional rent of \$1,420,693.02 as of December 1, 2022. In her affirmation, Brooks alleges that starting in May 1, 2020, the tenant failed to pay any rent or other amounts due under the lease, accruing \$454,762.79 as of September 1, 2021, the date of termination, failed to replenish the security deposit which the plaintiff had applied to the arrears in the sum of \$33,635.17, and remained in possession of the premises thereafter without paying use and occupancy through December 1, 2022 (filing of the motion), accruing a total of \$1,420,693.02.

The plaintiff’s proof establishes its *first* and *second* causes of action, breach of contract, by showing (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff’d 88 NY2d 716 (1996). The same applies to the subsequent “Rent Deferral Agreement” and “Second Lease Modification Agreement” signed by the parties. The subject lease here, in addition to the other obligations, required by Section 6.10(b) that, in the event of a holdover after the expiration or earlier termination of the lease, the tenant was to pay the landlord use and occupancy of 150 % of the monthly rent for the first month and 200% thereafter. Having failed to answer, the defendant is “deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them.” Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

The plaintiff is entitled to recover all amounts due under the lease and two modifications through September 1, 2022, but not beyond that. To the extent the plaintiff seeks amounts accrued after the filing of the complaint, that portion of the motion is denied. CPLR 3215(b)

expressly provides that a default “judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served.” CPLR 3215(b); see Mt. Hawley Ins. Co. v Am. States Ins. Co., 139 AD3d 497 (1st Dept. 2016); P & K Marble, Inc. v Pearce, 168 AD2d 439 (2nd Dept. 1990); Gluck v W. D. Allen Mfg. Co., 53 AD2d 584 (1st Dept. 1976); Lape v Lape, 23 AD2d 539 (1st Dept. 1965). The plaintiff provides no basis to depart from well-settled law that a default judgment may not exceed the amount demanded in the complaint. The amount of rent, use and occupancy, additional rent and fees accrued by the defendant from May 1, 2020, through September 1, 2022, are referred to a Special Referee or Judicial Hearing Officer for determination.

The plaintiff has also established its *third* cause of action, for ejectment. A plaintiff establishes entitlement to judgment as a matter of law on an ejectment cause of action by demonstrating “(1) it is the owner of an estate in tangible property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate.” Noamex, Inc. v Domsey Worlwide, Ltd., 192 AD3d 817, 819 (2nd Dept. 2021) [internal citations omitted]; see GMMM Westover, LLC v New York State Elec. & Gas Corp., 155 AD3d 1176 (3rd Dept. 2017); RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC, 144 AD3d 1125 (2nd Dept. 2016). The plaintiff meets that burden here. Specifically, it demonstrates that the defendant has failed to pay any rent since May 1, 2020, the parties’ lease was terminated as of December 10, 2021, and the defendant has remained in possession and continues to hold over without the plaintiff’s permission at least through the commencement of this action on August 29, 2022. Under the circumstances, no further notice to the tenant is required. See Sheila Properties, Inc. v A Real Good Plumber, Inc., 74 AD2d 779 (2nd Dept. 2010); East 82 LLC v O’Gormley, 295 AD2d 173 (1st Dept. 2002); Alleyne v Townsley, 110 AD2d 674 (2nd Dept. 1985).

The motion is also granted as to the *fourth* cause of action seeking attorney’s fees, on the issue of liability. Ordinarily, attorney’s fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, the plaintiff, as the prevailing party, has established

entitlement to contractual attorney's fees under Section 6.11 of the parties' lease, which provides that in any "legal proceeding [commenced] as a result of a breach of any covenant of this lease by the other part ... the non-prevailing party shall pay to the prevailing party all reasonable costs, expenses and reasonable attorney's fees and disbursements that the prevailing party reasonably incurred in connection therewith." The amount of fees and disbursements incurred shall be determined by a Special Referee or Judicial Hearing Officer.

For these reasons, the plaintiff's motion is granted as to all four causes of action as to liability, damages to be determined by a Special Referee or Judicial Hearing Officer.

Accordingly, upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 on the first and second causes of action, alleging breach of contract, and the fourth causes of action seeking attorney's fees, is granted, without opposition, on the issue of liability, damages to be determined by a Special Referee or Judicial Hearing Officer, and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of the amount of contractual rent, including use and occupancy as per the lease, additional rent, and reasonable attorney's fees and disbursements the plaintiff may recover from the defendant, Presher Fitness NY LLC, under the subject lease agreement for the period May 1, 2020, through September 1, 2022; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the branch of the plaintiff motion for leave to enter a default judgment pursuant to CPLR 3215 on the third cause of action for ejectment is granted, without opposition, and it is further

ORDERED and ADJUDGED that plaintiff, Wasserstein Enterprises LLC, is entitled to possession of the commercial premises of 113-133 West 18th Street in New York, New York, as conveyed and described in the lease dated August 24, 2018, as against the defendant, Presher Fitness NY LLC, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to take all necessary steps, including but not limited to the entry into the subject premises to effect the removal and ejection of the defendant and every person purporting to hold possession of the premises or any part thereof under the defendant and adversely to the plaintiff, as the current owner of the premises, and the plaintiff shall be let into possession of said premises; and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of the subject, including entry thereto, as against the defendant and every person purporting to hold possession of the premises under the defendant, and it is further

ORDERED that the plaintiff shall serve a copy of this order on the defendant within ten (10) days of the date of the order.

This constitutes the Decision and Order of the court.

Nancy M. Brown
20231002120503NBA1NON47E883BA046C44729FEE9A86AF91702

9/28/2023

DATE

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: