

245 Park Ave. Prop. LLC v HNA Capital US LLC

2023 NY Slip Op 34140(U)

November 17, 2023

Supreme Court, New York County

Docket Number: Index No. 158173/2022

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

Under Section 1.04(a) of the Lease, the tenant must pay monthly fixed rent in the amount of \$236,695.17 for the period from January 2018 through December 2020 and \$252,668.08 for the period from January 2021 through January 2026. Section 1.04(b) of the Lease requires the tenant to pay additional charges consisting of, *inter alia*, “Operating Payments” (defined in Lease Article 3), electricity costs, taxes, and all other sums of money due from and payable by the tenant under the Lease. Section 22.02 permits the landlord to serve a notice to cure upon the tenant should the tenant default on its Lease obligations and then, further, to cancel and terminate the Lease should the tenant fail to cure the noticed default. Further, pursuant to Section 24.01(b) of the Lease, in the event of the termination of the Lease or re-entry of the Premises by the landlord following a default, the tenant must pay to the plaintiff as damages “sums equal to the Fixed Rent and the Additional Charges . . . which would have been payable by Tenant had this lease not so terminated . . . payable upon the due dates therefor specified herein following such termination . . .” In addition, Section 27.02 of the Lease provides that the tenant is obligated to pay “reasonable counsel fees[] involved in collecting or endeavoring to collect the Fixed Rent or Additional Charges or any part thereof or enforcing or endeavoring to enforce any rights against Tenant or Tenant’s obligations hereunder”

After making payments the first year of the Lease, the defendant defaulted in its obligations starting in December 2018. As of May 5, 2021, the defendant was in arrears of \$5,601,806.24 for the period from December 2018 to May 2021. On or about May 5, 2021, the plaintiff delivered to HNA a Notice to Cure pursuant to Section 22.02 of the Lease. The defendant failed to timely and fully cure the default in ten days as provided by Section 22.02. On or about June 2, 2021, the plaintiff delivered to the defendant a Notice to Cancel pursuant to Section 22.02 of the Lease, cancelling and terminating the Lease effective June 14, 2021.

On or about July 11, 2022, the parties executed an agreement (the July 2022 Agreement) wherein the defendant acknowledged, *inter alia*, that it failed to cure the default identified in the Notice to Cure, the Lease was duly terminated and that it would vacate the Premises on or before July 22, 2022. The same agreement also stated that, notwithstanding anything to the contrary contained in that agreement or in the Notice to Cancel, the plaintiff reserved all of its rights and remedies with respect to rent and additional rent that may be due or become due pursuant to the Lease on, before, and after the termination of the Lease. The defendant vacated the Premises on or about July 22, 2022.

From June 2021 to August 2022, the defendant accrued arrears of \$4,484,827.73.

The plaintiff commenced this action on September 22, 2022. The complaint includes five causes of action, all sounding in breach of contract and seeking money damages, save for the third cause of action which seeks declaratory relief in regard to future obligations. The plaintiff seeks \$10,348,444.34, plus interest, costs and attorney's fees, as follows:

- (1) Money damages of \$5,863,616.61 in rent and additional rent from December 2018 to June 2021.
- (2) Money damages of \$4,484,827.73 in rent and additional rent from June 2021 to August 2022.
- (3) A judgment declaring that the defendant is liable for \$10,360,211.28 in rent and additional rent from August 6, 2022, to January 31, 2026, the expiration date of the Lease.
- (4) Attorneys' fees and costs.
- (5) Contractual and statutory interest.

The defendant did not answer or appear in this action.

On January 30, 2023, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. The Notice of Motion merely cites the statute without specifying what causes of action it seeks judgment, the nature of the relief sought or the grounds for the relief. The defendant did not oppose the motion.

III. LEGAL STANDARD

"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). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477, 478 (1st Dept 2013); Beltre v Babu, 32 AD3d 722, 723 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested

relief, even on default.” Green v Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992). However, 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); see Paez v 1610 Saint Nicholas Ave. L.P., 113 AD3d 523 (1st Dept. 2014).

IV. DISCUSSION

Initially, the court notes that the plaintiff failed to submit a Memorandum of Law with its motion, in violation Rule No. 19 of the Part 42 Rules. This alone is basis to dismiss the motion, but the court may disregard irregularities, defects, mistakes, and omissions, if a substantial right of a party is not prejudiced. See CPLR 2001. As the plaintiff’s submissions sufficiently support its entitlement to partial relief and the defendant has defaulted, the court disregards the failure to submit a Memorandum of Law.

In support of the motion, the plaintiff submits, *inter alia*, the summons and complaint, an affidavit of service, an affirmation of counsel, an affidavit of Ken Padmore, Senior Vice President of Lease Administration/Collections for SL Green Realty Corp., the managing agent for plaintiff, the Lease, the Assignment of Lease, the Notice to Cure, and an arrears report dated August 15, 2022, showing arrears of \$10,086,633.97 in rent and additional rent for the period from December 2018 to August 2022.

The plaintiff provides adequate proof of service of the summons and complaint upon the defendant and proof of its default in answering or appearing. Limited Liability Company Law § 303(a) provides in part that “[s]ervice of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state.” The affidavit of service submitted shows that the plaintiff served the summons and complaint on a person authorized by the Secretary of State at the Office of the Department of State in Albany on September 27, 2022. See Limited Liability Company Law § 303(a); CPLR 311-a. It is well settled that “[a]n affidavit of service constitutes prima facie evidence of proper service” (Jones v Grooms, 209 AD3d 584, 584 [1st Dept. 2022]) and the defendant has not rebutted the presumption.

In addition, the plaintiff submits proof of the facts constituting its claims for the first, second, fourth, and fifth causes of action., as follows.

A. First and Second Causes of Action – Breach of Contract

The plaintiff establishes its breach of contract causes of action by demonstrating (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' 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 affidavit of Ken Padmore and the Notice to Cure establish that the plaintiff complied with Section 22.02 of the Lease by sending a Notice to Cure to the defendant on May 5, 2021, which provided ten days to cure the default. Furthermore, the Padmore affidavit and the arrears report establish the defendant's liability by further showing that the defendant failed to cure its default following the Notice to Cure and that it failed to pay \$10,086,633.97 in rent and additional rent due under the Lease for the period from December 2018 to August 2022.

As for damages, in the first cause of action the plaintiff seeks \$5,863,616.61 in unpaid rent and additional rent for the period from December 2018 to June 2021, when the Lease was terminated, which amount includes \$5,601,806.24 which was past due as of the plaintiff's May 2, 2021, Notice to Cure and \$261,810.37 for June 2021. In the second cause of action, the plaintiff seeks \$4,484,827.73 in unpaid rent and additional rent for the period from June 2021 to August 2022. The plaintiff improperly counts June 2021 twice, in both the first and second causes of action. Subtracting the June 2021 rent of \$261,810.37 from the sum demanded in the second cause of action results in \$4,223,017.36. Padmore, in his affidavit, states this amount sought for unpaid arrears from July 2021 to August 2022. Combining the amounts demanded in the first and second causes of action, less \$261,810.37, the total arrears for the period from December 2018 to August 2022 is \$10,086,633.97.

While the rent for the month of August 2022 came due after the defendant's vacatur of the Premises, pursuant to the July 2022 Agreement, the plaintiff is nevertheless entitled to this amount notwithstanding the defendant's vacatur. "Generally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender." Spinelli's Pizza, Inc. v G&T1 Corp., 208

AD3d 420 (1st Dept. 2022). However, where a landlord “expressly reserve[s] its rights under the lease” in spite of the tenant’s indication of intent to surrender the premises, no surrender of the lease occurs, whether express or by operation of law. Id. at 420-421; see Jimenez v Henderson, 144 AD3d 469 (1st Dept. 2016); Kottler v. New York Bargain House, Inc., 242 NY 28, 35-36 (1926). Further, even where the landlord and tenant agree to the tenant’s vacatur of leased premises, where there is no “clear and unambiguous waiver by [the plaintiff] of [its] right[] to recover under the terms of the lease” and “the parties clearly contracted to make defendant liable for damages following termination” and “the lease provides that defendant shall be liable for rent after eviction . . . that provision is enforceable.” Ring v Printmaking Workshop, Inc., 70 AD3d 480, 481 (1st Dept. 2010).

Here, the parties agreed that the defendant would vacate the Premises on July 22, 2022, and in the same agreement the plaintiff expressly reserved all of its rights and remedies with respect to rent and additional rent that may be due or become due pursuant to the Lease on, before, and after the termination of the Lease. In addition, the Lease explicitly provides that the defendant is obligated to pay rent and additional rent following any termination of the Lease or re-entry by the plaintiff onto the Premises. The Lease does not provide that the tenant’s obligation under Section 24.01(b) is abrogated by the defendant’s vacatur of the Premises. As such, the defendant’s vacatur of the premises did not operate as a surrender of the lease such that the plaintiff is entitled to the rent and additional rent for August 2022. See Spinelli's Pizza, Inc. v G&T1 Corp., supra; Jimenez v Henderson, supra; Ring v Printmaking Workshop, Inc., supra. Therefore, the plaintiff is entitled to a total money judgment in the amount of \$10,086,633.97, on the first and second causes of action.

B. Third Cause of Action – Declaratory Judgment

In the third cause of action, the plaintiff seeks a judgment declaring that the defendant is liable to the plaintiff rent and additional rent for the period from August 6, 2022, to January 31, 2026, the expiration date of the Lease, in the amount of \$10,360,211.28. However, the plaintiff is not entitled to that relief, for several reasons.

First, declaratory relief is improper here. “A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.” Apple Records v Capitol Records, 137 AD2d 50, 54 (1st Dept. 1988); see NMC Residual Ownership L.L.C. v U.S. Bank N.A., 153 AD3d

284 (1st Dept. 2017). The plaintiff "merely seek[s] a declaration of the same rights and obligations as [have already been] determined under the first and second causes of action." Id. Where there is no necessity for resorting to the declaratory judgment it should not be employed." Touro College v Novus Univ. Corp., 146 AD3d 679, 679-680 (1st Dept. 2017) (internal citations and quotations omitted), *quoting* James v Alderton Dock Yards, 256 NY 298, 305 (1931). Furthermore, the court presumes that its "determination of the breach of contract claim will 'sufficiently guide the parties on their future performance of the contract[], thereby obviating any need for' other alternative relief." 204 Columbia Hgts., LLC v Manheim, 148 AD3d 59, 70-71 (1st Dept. 2017), *quoting* Apple Records v Capitol Records, supra at 54.

Second, 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." 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). Here, the declaratory relief sought in the complaint is improper and the Notice of Motion states no particular cause of action or form of relief, monetary or declaratory. CPLR 2214(a) expressly requires that a Notice of Motion specify, *inter alia*, "the relief demanded and the grounds therefor." Nor does the attorney's affirmation or Padmore affidavit cure the defect in the Notice of Motion. Rule No. 23 of the Part 42 Rules provides that "if there is a discrepancy between the relief sought in the Notice of Motion and the relief sought in the supporting papers, the Notice of Motion is controlling." Thus, while the affirmation and affidavit in support seek monetary damages on the third cause of action, they are not controlling.

In any event, the plaintiff may not now recover future rent and additional rent since there is no acceleration clause in the Lease. It is well settled that "no action can be brought for future rent in the absence of an acceleration clause." 23 E. 39th St. Dev., LLC v 23 E. 39th St. Mgt. Corp., 172 AD3d 964 (2nd Dept. 2019) *quoting* Beaumont Offset Corp. v Zito, 256 AD2d 372 (2nd Dept. 1998); see Maflo Holding Corp. v S.J. Blume, Inc., 308 NY 570 (1955); Utility Garage Corp. v National Biscuit Co., 71 AD2d 578 (1st Dept. 1979). Although Section 24.01(b) of the lease provides that, in the event of the termination of the Lease, the tenant must pay rent that "would have been payable by Tenant had this lease not so terminated," it also provides that these sums are "*payable upon the due dates therefor specified herein following such termination.*" [emphasis added]. As the Lease requires payment of all obligations on a monthly schedule, logic dictates that this language in Section 24.01(b) refers to future monthly payments. Such a clause necessarily is not an acceleration clause. See 1995 Cam LLC v W.

Side Advisors, LLC, ___ AD3d ___, 2023 WL 7391761 (1st Dept. Nov. 9, 2023). “[W]hile the lease authorized the landlord to sue for deficiencies, it did not authorize suit for any deficiency in advance of its accrual.” Beaumont Offset Corp. v Zito, *supra* at 373 [citations omitted]. Accordingly, the plaintiff is not entitled to any amount that had not yet accrued as of the filing of the complaint. See 23 E. 39th St. Dev., LLC v 23 E. 39th St. Mgt. Corp., *supra*; Runfolo v Cavagnaro, 78 AD3d 1035 (2nd Dept. 2010); Barr v Country Motor Car Group, Inc., 5 AD3d 985 (4th Dept. 2005). The plaintiff is not precluded from seeking future damages in a separate action. See 23 E. 39th St. Dev., LLC v 23 E. 39th St. Mgt. Corp., *supra*.

C. Fourth Cause of Action – Attorney’s Fees

Attorney’s fees are recoverable, where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Section 27.02 of the Lease is that contractual provision. Thus, the plaintiff is entitled to recover attorney’s fees and costs incurred in this litigation. However, the plaintiff has not submitted any affirmation, billing records, or other proof to establish the amount of fees and costs incurred. The plaintiff shall submit such supplemental papers within 60 days.

D. Fifth Cause of Action – Interest

In the fifth cause of action, the plaintiff seeks interest on the unpaid rent and additional rent for the period from December 31, 2018, to August 5, 2022, as well as arrears that “continue to accrue”, at the contractually agreed upon rate of 1.5% per month (18% per annum). For the reasons that follow, interest on the judgment of \$10,086,633.97 is granted at the rate of 18% from October 1, 2020, through entry of judgment, and at the 9% statutory rate thereafter.

In a breach of contract action, interest “accrues from the time of an actionable breach.” Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). This is in keeping with CPLR 5001(b), which provides that interest is computed “from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred.” The statute further provides that “[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single

reasonable intermediate date.” Here, while the initial breach was in December 2018, the damages were incurred at various times thereafter, *i.e.* monthly from December 2018 to August 2022. Under these circumstances, and as prescribed by CPLR 5001(b), pre-judgment interest shall be awarded from the intermediate date of October 1, 2020. See Maurice Kassimir & Assocs, P.C. v Omri, 189 AD3d 581 (1st Dept. 2020); Solow Mgmt. Corp. v Tanger, 43 AD3d 691 (1st Dept. 2007); Sherbansky v 117 West 81st Street Tenants, 238 AD2d 246 (1st Dept. 1997); Hanover Data Svcs., Inc. v Arcata Natl. Corp., 115 AD2d 403 (1st Dept. 1985).

Although CPLR 5004 provides that statutory interest on judgments shall be 9% per annum, parties to a contract can select a rate other than the statutory judgment rate. See, e.g., IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd., 84 AD3d 637 (1st Dept. 2011); NYCTL 1998-2 Trust v. Wagner, 61 AD3d 728, 729 (2nd Dept. 2009); Marine Mgt. v Seco Mgt. 176 AD2d 252 (2nd Dept. 1991) *aff'd* 80 NY2d 886 (1992). Section 24.04 of the parties’ Lease provides for interest at 1.5% per month (18% per annum) “from the due date...until paid.” Thus, the plaintiff is entitled to an annual interest rate on arrears of 18%. However, that rate applies only through entry of judgment. The statutory rate applies thereafter. It is only where “there is a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied” that the contractual interest rate is applied through satisfaction of the judgment. Retirement Accounts, Inc. v Pacst Realty, LLC, 49 AD3d 846, 847 (2nd Dept. 2008); see NML Capital v Republic of Argentina, 17 NY3d 250 (2011). While the subject Lease provides that contractual interest shall accrue on any arrears “from the due date...until paid”, it does not ‘clearly and unequivocally’ specify a post-judgment rate.” IRB-Brasil Resseguros S.A. v Porobello Intl. Ltd., *supra* at 638 (1st Dept. 2011) *quoting Marine Mgt. v Seco Mgt.* *supra* at 253. Thus, the contractual rate applies only through entry of judgment. See Bd. of Mgrs. of 25th Charles St. Cond., 126 AD3d 547 (1st Dept. 2015); Retirement Accounts, Inc. v Pacst Realty, LLC, 49 AD3d 846 (2nd Dept. 2008).

In sum, the plaintiff is entitled to interest on the judgment of \$10,086,633.97 at the rate of 18% from October 1, 2020, through entry of judgment and at the 9% statutory rate thereafter. In the absence of a Memorandum of Law, the plaintiff has failed to advance any alternative argument or method of interest calculation and having failed to answer, the defendant proffers no opposing facts or legal argument. See Woodson v Mendon Leasing Corp., *supra*.

V. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is granted as to first, second, fourth and fifth causes of action, and the motion is otherwise denied, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, 24 Park Avenue Property LLC, and against the defendant, HNA Capital US LLC, in the sum of \$10,086,633.97, plus costs, interest and attorney's fees, as set forth herein, and the motion is otherwise denied, and it is further

ORDERED that the plaintiff is entitled to interest on the judgment at the contractual rate of 18% from October 1, 2020, through entry of judgment, and at the 9% statutory rate thereafter, and it is further

ORDERED that the plaintiff's application for attorney's fees is granted as to liability, with leave to file supplemental papers within 60 days of the date of this order as set forth herein and the plaintiff shall notify the Part 42 Clerk of any such filing, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

11/17/2023

DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER