

381-383 ES Realty LLC v Jumatic Corp.

2024 NY Slip Op 33797(U)

October 8, 2024

Supreme Court, New York County

Docket Number: Index No. 654926/2023

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

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INDEX NO. 654926/2023

381-383 ES REALTY LLC & 381-383 JS REALTY LLC,

MOTION DATE 03/29/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

JUMATIC CORP. D/B/A JUMATIC I SKIN BEAUTY SPA,
RUOJIN CAI

**DECISION + ORDER ON
MOTION**

Defendant.

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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, 19

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is

Plaintiffs, 381-383 ES Realty LLC and 381-383 JS Realty LLC (“Plaintiffs”), commenced the underlying action to recover amounts owed by defendants, Jumatic Corp. d/b/a Jumatic I Skin Beauty Spa (“Tenant”) and Ruojin Cai (“Guarantor”) (collectively, “Defendants”), asserting claims of breach of contract against both Tenant and Guarantor, arising out of a lease agreement between Plaintiffs and Tenant and an unconditional Guaranty of such lease, signed by Guarantor. Plaintiffs now move for an order, pursuant to CPLR § 3215, directing entry of a default judgment against Defendants, in the amount of \$300,948.52, the amount of the unpaid Fixed and Additional Rent, \$123,876.97, the amount of the Rent owed through the entirety of the lease term and accruing after Tenant’s breach, for the total amount of \$424,825.49, plus \$25,000.00 in attorney’s fees.

On October 18, 2023, plaintiffs, in accordance with the method proscribed by CPLR 308(2), validly served the Guarantor with the summons and complaint for this action; and on

October 23, 2023, plaintiffs validly served the Tenant in accordance Business Corporation Law § 306 (*see* NYSCEF Docs. No. 2; 3). Defendants have failed to answer or otherwise appear in this action.

Accordingly, Plaintiffs' application, filed on March 29, 2024, was made within one-year of the Defendants' default in responding to the complaint and Plaintiffs have filed proof of the required additional notice by mailing (*see* CPLR §§ 3215 [a]; [g][3][i]; [g][4][i]). Additionally, as required by CPLR § 3215 (f), Plaintiffs have provided proof of service of the summons and complaint, the facts supporting each of their claims, the defaults, and the amounts due, through the verified complaint and supplemental affidavit along with the supporting exhibits of Jan Solemani, Owner and Landlord of the premises in question, and a party with personal knowledge (NYSCEF Doc. No. 6-15; *see Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023] ["To demonstrate facts constituting the claim, the movant need only proffer proof sufficient to enable a court to determine that a viable cause of action exists"])).

However, under 50 USC § 3931, in seeking a default judgment against an individual, the plaintiff must file with the court, "an affidavit (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service" (50 USC § 3931). Although the absence of a valid nonmilitary affidavit may be considered a simple irregularity and not a jurisdictional defect (*see Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418, 31 NYS3d 864 [1st Dept 2016]), the nonmilitary affidavit is nonetheless a requirement, under federal law, in any civil action so as to protect military personnel from judgments on default. Thus, Plaintiffs were required to file an affidavit which states whether the Guarantor, Ruojin

Cai, is in military service, provides the necessary facts to support such affidavit, or, if Plaintiffs were unable to determine if said defendant is in military service, state so (*see Unitrin Advantage Ins. Co. v 21st Century Pharm.*, 158 AD3d 450, 451, 67 NYS3d 826 [1st Dept 2018]; *Avgush v De La Cruz*, 30 Misc.3d 133[A], 2011 NY Slip Op 50076[U], 2011 WL 255554 [App Term, 2d Dept, 2011]). Therefore, although Plaintiffs have established their entitlement to entry of a default judgment against Tenant, Jumatic Corp. d/b/a Jumatic I Skin Beauty Spa, the motion for entry of a default judgment as against Guarantor, Ruojin Cai, must be denied as no affidavit of nonmilitary service appears in the record (*Unitrin Advantage Ins. Co. v 21st Century Pharm.*, 158 AD3d 450, 451 [1st Dept 2018]). However, as this procedural infirmity may be cured, the motion is denied without prejudice to renew (*see Sykes v Ricardo LLC* [Sup Ct, New York County 2022]).

Accordingly, it is hereby

ORDERED that the motion by Plaintiffs, 381-383 ES Realty LLC and 381-383 JS Realty LLC, is GRANTED IN PART; to the extent that the portion of the motion seeking entry of a default judgment as against Defendant, Jumatic Corp. d/b/a Jumatic I Skin Beauty Spa, is GRANTED; and it is further

ORDERED that the motion by Plaintiffs, 381-383 ES Realty LLC and 381-383 JS Realty LLC, is otherwise DENIED without prejudice as to the portion seeking entry of a default judgment as against Defendant, Ruojin Cai, with leave to renew within 60 days of the date provided in this decision and order and upon the submission of proper proof of nonmilitary status; and it is further

ADJUDGED and ORDERED that Plaintiffs, 381-383 ES Realty LLC and 381-383 JS Realty LLC, their legal representative having an address at Attn: Nicholas R. Gross, Esq., Cornicello, Tendler & Baumel Cornicello, LLP, 29 Broadway, 25th Floor, New York, NY 10006,

is granted a default judgment against Defendant, Jumatic Corp. d/b/a Jumatic I Skin Beauty Spa, having an address at 133-22 39 Avenue, Basement, Flushing, NY 11354, in the amount of \$300,948.52, the amount of the unpaid Fixed and Additional Rent, \$123,876.97, the amount of the Rent owed through the entirety of the lease term and accruing after Tenant's breach, for the total amount of \$424,825.49, plus reasonable attorney's fees; and it is further

ADJUDGED and ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiffs and against said Defendant, Jumatic Corp. d/b/a Jumatic I Skin Beauty Spa, in the amount of \$300,948.52, the amount of the unpaid Fixed and Additional Rent, \$123,876.97, the amount of the Rent owed through the entirety of the lease term and accruing after Tenant's breach, for the total amount of \$424,825.49, plus interest at the statutory rate from March 28, 2024, to the date of this order, as calculated by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk upon the submission of an appropriate bill of costs, for the total judgment amount of \$ _____, and that the Plaintiffs have execution thereof.

This constitutes the judgment, decision, and order of the court.

10/8/2024
DATE


NICHOLAS W. MOYNE, J.S.C.

DATE

CLERK

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	