

**CD 280, LLC v Rice**

2025 NY Slip Op 32593(U)

June 30, 2025

Supreme Court, New York County

Docket Number: Index No. 654912/2023

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

-----X

CD 280, LLC

Plaintiff,

- v -

STEVEN RICE,

Defendant.

-----X

INDEX NO. 654912/2023

MOTION DATE 05/20/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

Belkin Burden Goldman, LLP, New York, NY (Daniel P. Philips, Esq) for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this breach of contract action, plaintiff CD 280 LLC moves, by notice of motion (seq. no. 002), pursuant to CPLR § 3215, for an order granting it a default judgment against defendant STEVEN RICE in an amount no less than \$94,141.32. Defendant does not appear or submit opposition to the motion.

For the reasons set forth below, the motion is denied.

## BACKGROUND

Plaintiff CD 280, LLC (owner-landlord) is the owner and landlord of a residential apartment building located at 280 East 2nd Street, New York, New York. Landlord alleges that, on April 14, 2013, defendant STEVEN RICE (Rice) and it executed a written lease pursuant to which Rice rented apartment 8C in said building (the premises). According to landlord, at or around six years later, the parties renewed their lease for a term ending April 03, 2020 (see New York State Electronic Court Filing System [NYSCEF] Doc. No. 001, Complaint).

Landlord further contends that, following expiration of the lease term, Rice remained in possession of the premises and made no payments to landlord for such use. As a result, landlord commenced a residential non-payment proceeding against Rice in the New York City Civil Court, Housing Part, pursuant to CD 280, LLC v Steven Rice, Index No. LT-302426-21/NY. However, shortly thereafter, it discontinued that proceeding (see CD 280, LLC v Steven Rice, Index No. LT-302426-21/NY, NYSCEF Doc. No. 14, Stipulation of Discontinuance, dated November 18, 2022).

Landlord then commenced a second non-payment proceeding (see CD 280, LLC v Steven Rice, Index No. LT-304441-23/NY). There, recognizing that the lease between the parties expired three years earlier, landlord contended that its acceptance of a

COVID-19 Emergency Rental Assistant Program (ERAP) award on November 06, 2022 renewed the "lease" between the parties (see CD 280, LLC v Steven Rice, Index No. LT-304441-23/NY, NYSCEF Doc. No. 01, Petition, dated February 22, 2023).

The housing court (K. Bacdayan, J.) disagreed as to a renewed lease agreement between landlord and Rice, dismissing the petition for non-payment (see CD 280, LLC v Steven Rice, Index No. LT-304441-23/NY, NYSCEF Doc. No. 19, Decision and Order, dated September 22, 2023). The court (K. Bacdayan, J.) reasoned, among other things:

"the agreement [landlord] entered into upon accepting payment of ERAP monies is with the administering agency, . . . and not with Rice. The ERAP statute provides for an agreement between the recipient landlord and OTDA [the Office of Temporary and Disability Assistance], to which the occupant is an intended beneficiary. [In contrast a] valid contract comprises [of] 'an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound"

(id., at 3 [citations omitted]).

The same court continued:

". . . it was only [landlord] who could accept or reject the offer [of ERAP]. Rice did not provide consideration for payment; rather, it was [landlord] who forfeited its legal right to possession of the premises after expiration of the lease for a period of 12 months following [landlord's] acceptance of the ERAP funds"

(id.).

Having found no lease agreement between the parties for purposes of maintaining a proceeding for nonpayment under its terms, the court, in dicta, instructed "[landlord] may seek use and occupancy from respondent in a pending holdover proceeding, or, [in the alternative], commence a plenary proceeding where the ultimate relief does not comprise eviction" (id., at 4). Landlord did not appeal the decision and order of the housing part (K. Bacdayan, J.).

Instead, landlord commenced a residential holdover proceeding against Rice (see CD 280, LLC v Steven Rice, Index No. LT-301299-24/NY). However, in a document entitled "Stipulation of Settlement" signed by landlord's counsel, and endorsed by the housing part (F. Ortiz, J.), "th[e] proceeding [was] discontinued as [Rice] vacated the premises" (see CD 280, LLC v Steven Rice, Index No. LT-301299-24/NY, NYSCEF Doc. No. 07, Stipulation, dated March 20, 2024).

Landlord then commenced this action against Rice setting forth only two causes of action -- (1) breach of contract and (2) legal fees and disbursements -- and seeking damages of, at minimum, \$94,141.32 (see NYSCEF Doc. No. 001, Complaint, dated 05, 2023, at ¶ 11). Rice did not appear or file an answer.

Consequently, landlord filed a motion (seq. no. 001) for an order granting it leave to enter a default judgment against Rice

(see CPLR § 3215 [governing default judgments]). Again, Rice neither appeared nor filed a response.

However, the court (S. Adams, J.S.C.) denied landlord's motion without prejudice to renew, "upon submission of proof that the individual defendant was not in the military at the time of the default" (NYSCEF Doc. No. 14, Decision and Order, dated February 02, 2024, citing 50 USC § 3931 (b)(1) [requiring a party seeking a default judgment against an individual defendant to submit proof that the defendant was not in military service at the time of the default]).

Now, landlord renews its prior motion (seq. no. 002), pursuant to CPLR § 3215, for an order granting it a default judgment against Rice. In support of the motion, landlord submits an affidavit of service of the summons and complaint, dated October 30, 2023 (NYSCEF Doc. No. 18); an affidavit of additional mailing, dated January 09, 2024 (NYSCEF Doc. No. 19); the affidavit of landlord's managing agent, dated February 27, 2024 (NYSCEF Doc. No. 20); a copy of the parties' written lease, dated April 14, 2013, and written lease renewal, dated March 26, 2019 (NYSCEF Doc. Nos. 21, 22); plaintiff's rent ledger, dated February 12, 2024 (NYSCEF Doc. No. 23); an affidavit of military investigation, dated February 12, 2024 (NYSCEF Doc. No. 24); and an affidavit of service of the instant motion, dated February 27, 2024 (NYSCEF Doc. No. 25).

## ANALYSIS

Pursuant to CPLR § 3215 (a), a plaintiff may seek a default judgment where a defendant fails to appear, plead, or proceed to trial. In doing so, the moving party must strictly comply with the procedural requirements set forth in CPLR § 3215 (f), including proof of service of the summons and complaint, proof of the defendant's default, an affidavit of merit detailing the facts constituting the claim, and proof of damages (see generally CPLR § 3215 [f]).

Further, the Federal Servicemembers Civil Relief Act and New York State Soldiers' and Sailor's Civil Relief Act requires a party seeking a default judgment against an individual defendant to submit proof that the defendant was not in military service at the time of the default (see 50 USC § 3931 [b] [1]; see also Military Law § 309 [1]).

"A proper affidavit of nonmilitary service should include the date and location of the investigation and the facts gleaned from the investigation" (Benabi Realty Mgt. Co. v Van Doorne, 190 Misc2d 37, 38 [Sup Ct, Ny Cnty 2001]). Documentation provided directly from the Department of Defense Manpower Data Center -- "the official source of data on eligibility for military" -- is sufficient to enable the court to conclude that a respondent is not currently on active military duty, or was at

the time of the default (363 Assoc. v Sharhan, 2 Misc3d 928, 930 [Civ Ct, NY Cnty 2003]).

Applying the above principles here, landlord again fails to meet the requisites for a default judgment. First, landlord's "Affidavit of Investigation" repeats the same information as contained in the affidavit of service, dated October 30, 2023. The court (S. Adams, J.S.C.) found the allegations therein to be deficient, and landlord presents no argument why this Court should reach a contrary result (see NYSCEF Doc. No. 06, Exhibit 2 to Motion Sequence Number 001, Affidavit of Service; see also NYSCEF Doc. No. 14, Decision and Order, dated February 02, 2024).

As to an investigation, the subject affidavit provides that landlord's superintendent "knocked on the door of the subject premises" on "February 05, 2025, at 4:20 p.m.", and asked Rice directly if they were in active military duty (see NYSCEF Doc. No. 24, Affidavit of Investigation, at ¶ 3). As courts shall be "more meticulous with respect to the protection of the rights accorded to individuals potentially in active military status," these actions alone do not constitute sufficient inquiry of military service (U.S. Bank, 2003 NY Slip Op 51384 [U] [Sup Ct, Westchester Cnty 2003]).

Second -- while essentially purporting that the investigation took place at the "subject premises" and "home" of

Rice (see NYSCEF Doc. No. 24, Affidavit of Investigation, at ¶ 3) -- the affidavit lacks a specific identifier for the location "Benabi Realty Mgt. Co., supra, 190 Misc2d at 38 [providing, among other things, that a proper affidavit of nonmilitary service should include the date and location of the investigation]). In other words, the affiant provides no address or apartment number, if any, for where this exchange took place.

Further, while it can be explained as a typo or mishap, there is a discrepancy in the dates listed on the military affidavit, which the Court should not gratuitously overlook. The affidavit provides that affiant visited "the subject premises" in February 2025, but the affidavit was notarized a year earlier, and the signatory page and last paragraph therein are in a remarkably different font size and saturation than the rest of the affidavit (see NYSCEF Doc. No. 24, Affidavit of Investigation, at 2).

This presents a further issue with the lack of specificity in the location of the "subject premises." Rice's apartment in landlord's building is the only premises otherwise referred to on this record and the affiant identifies himself as working at that building's general address. Yet, Rice vacated his apartment on or before March 20, 2024, approximately 11 months prior to when the affidavit provides superintendent visited Rice

in his home (see id.; see also CD 280, LLC v Steven Rice, Index No. LT-301299-24/NY, NYSCEF Doc. No. 07, Stipulation, dated March 20, 2024 [discontinuing the holdover proceeding because Rice vacated the premises])).

In any event -- assuming a valid military affidavit, which is not presented here -- landlord's application would fail on the ground that it does not include an affidavit of merit detailing the facts constituting the claim, and proof of damages (see generally CPLR § 3215 [f]; see also St. Paul Fire & Mar. Ins. Co. v A.L. Eastmond & Sons, Inc., 244 AD2d 294 [1st Dept 1997] [CPLR § 3215 (f) requires that a party seeking to enter a default judgment submit "some firsthand confirmation of the facts"])).

Landlord submits only the affidavit of its managing agent, who attests to generally "[being] familiar with the facts and circumstances of this matter" (see NYSCEF Doc. No. 20). There is no indication that said person has independent, first-hand personal knowledge of Rice's alleged default, or Rice's payment history (see Cary v Cimino, 128 AD3d 1460, 1461 [4th Dept 2015] [holding that plaintiff, who commenced the action on behalf of his daughter, failed to submit adequate "proof of the facts constituting the claim" pursuant to CPLR § 3215 (f), where plaintiff's affidavit did not demonstrate personal knowledge of the incident, and complaint was not verified]; see also William

v N. Shore LIJ Health Sys., 119 AD3d 937 [2nd Dept 2014] [plaintiff failed to proffer affidavit of the facts by a party with personal knowledge as required by CPLR § 3215 (f); Zelnik v Bidermann Indus. U.S.A., Inc., 242 AD2d 227, 228 [1st Dept 1997] [plaintiff's affidavit of merit on a motion for a default judgment is deficient because it is wholly on information and belief]).

Further, the affidavit does not allege any facts to support, among other things, that, subsequent to the expiration of their lease, Rice and landlord entered into a contract setting forth a specific monthly amount for the payment of rent and/or agreeing to Rice's payment of landlord's attorneys' fees upon any default (see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445, 446 [1st Dept 2016] [recovery under breach of contract requires a plaintiff to demonstrate the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages]; see also Sage Sys., Inc. v Liss, 39 NY3d 27, 29 [2022], citing Hooper Assoc. v AGC Computers, 74 NY2d 487, 491 [1989] [holding that pursuant to the American rule, a prevailing party in litigation may not recover attorneys' fees from the losing party absent statute, agreement, or contract containing "'unmistakably clear' language" permitting a successful party to payment of attorneys' fees]). In gist, without personal

knowledge, the affiant attests that Rice "remained in the premises without [landlord's permission]" and that Rice owes arrears in the amount of \$94,141.32 (see id.).

The complaint, which only counsel verifies, does not require a different result. "A complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215" (Beltre v Babu, 32 AD3d 722, 723 [1st Dept 2006], citing Feffer v Malpeso, 210 AD2d 60, 61 [1st Dept 1994]).

Finally, as landlord only asserts a cause of action for breach of contract and for attorneys' fees, no other basis exists upon which this Court may grant default relief in the event landlord filed a proper affidavit of military investigation.

Accordingly, it is hereby

ORDERED that motion (seq. no. 002) is denied; it is further

ORDERED that the matter is dismissed; it is further

ORDERED that plaintiff CD 280, LLC, shall serve a copy of this order with notice of entry upon defendant within ten days from today, June 17, 2025; and it is further

ORDERED that the Clerk of the Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

6/30/2025  
DATE

Emily Morales-Minerva  
EMILY MORALES-MINERVA, 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