

Matter of Avant Guard Props., LLC v City of New York

2012 NY Slip Op 32655(U)

October 18, 2012

Supreme Court, New York County

Docket Number: 115209/2010

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 115209/2010
IN RE: AVANT GUARDS
vs.
CITY OF NEW YORK, ET AL.
SEQUENCE NUMBER : 003
DEFAULT JUDGMENT CAL. # 57

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

OCT 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/18/12
OCT 18 2012

BARBARA JAFFE, J.S.C.
(Signature)

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

In the Matter of the Application of AVANT GUARD
PROPERTIES, LLC

Petitioner,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
INDUSTRIAL DEVELOPMENT AGENCY, NEW
YORK CITY ECONOMIC DEVELOPMENT
CORPORATION, and SETH PINSKY, in his Official
Capacity as Chair of the New York City Industrial
Development Agency and President of the New York
City Economic Development Corporation,

Respondents.

AVANT GUARD, INC., BARRY BORGEN, PAUL
ROUHANI, and ZADOK ZVI,

Additional Counterclaim Respondents.

115209/10

Index No. 104910/10

Argued: 5/22/12
Motion seq. nos.: 003, 004, 005, 006

DECISION & ORDER

FILED

OCT 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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For NYCIDA:
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By notice of motion dated January 17, 2012, NYCIDA moves pursuant to CPLR 3212 for
an order granting it summary judgment on its counterclaims and dismissing the complaint.

Petitioner Avant Guard Properties, Inc. and counterclaim respondents Avant Guard, Inc., Borgen,

and Zvi oppose.

By notice of motion dated January 17, 2012, NYCIDA moves pursuant to CPLR 3215 for an order granting it a default judgment against counterclaim respondent Zvi. Zvi opposes.

By notice of motion dated January 17, 2012 and submitted on default, respondent/ counter-claimant New York City Industrial Development Agency (NYCIDA) moves pursuant to CPLR 3215 for an order granting it a default judgment against counterclaim respondent Rouhani, and pursuant to CPLR 102, for an order amending the caption.

The motions are consolidated for decision.

I. MOTION FOR SUMMARY JUDGMENT

The parties' submissions raise triable issues as to whether petitioner and counterclaim respondents Avant Guard, Inc., Borgen, and Zvi defaulted under their lease and/or breached their contracts with NYCIDA by improperly altering the use of the premises at issue when they installed a gym on the premises, and by illegally subletting the premises and failing to make payments timely, and whether NYCIDA is thus entitled to damages upon its termination of the parties' lease. No discovery has yet been conducted.

II. MOTION FOR A DEFAULT JUDGMENT AGAINST ZVI

While Zvi's verification of his reply to NYCIDA's counterclaims is untimely, NYCIDA has it and has demonstrated no resulting prejudice from the delay. (*Kommeh v City of New York*, 96 AD3d 476 [1st Dept 2012]; *D & R Global Selections, S.L. v Pineiro*, 90 AD3d 403 [1st Dept 2011]). Moreover, there is a preference for resolving actions on the merits, and as triable issues exist as to whether NYCIDA is entitled to judgment on its counterclaims (*see supra*, I), Zvi has established a meritorious defense. (*See Med. Facilities, Inc. v Pryke*, 172 AD2d 338 [1st Dept

1991] [merits of plaintiff's claim demonstrated by denial of defendant's summary judgment motion]).

III. MOTION FOR A DEFAULT JUDGMENT AGAINST ROUHANI

NYCIDA has demonstrated that it properly served Rouhani with its verified answer with counterclaims and that Rouhani failed to appear or answer timely. However, its investigation as to Rouhani's military status was conducted before the default, and thus, the motion for a default judgment may not be granted absent a military affidavit reflecting a post-default investigation as to his military status. (8B Carmody-Wait 2d § 63:181 [2010] [affidavit must be based on investigation after default]; *Sunset 3 Realty v Booth*, 12 Misc 3d 1184[A], 2006 NY Slip Op 51441[U] [Sup Ct, Suffolk County 2006]; *U.S. Bank v Coaxum*, 2003 WL 22518107, 2003 NY Slip Op 51384[U] [Sup Ct, Westchester County]; *Citibank, N.A. v McGarvey*, 196 Misc 2d 292 [Civ Ct, Richmond County 2003]). Moreover, as discussed above, triable issues exist as to the merits of NYCIDA's counterclaims. (*See supra*, I).

IV. AMENDMENT OF CAPTION

The parties have stipulated to amend the caption to reflect that this proceeding, originally commenced as an Article 78 proceeding, is now solely a plenary action for damages and declaratory relief. Moreover, they agree that petitioner, now plaintiff, will discontinue the action against all defendants other than NYCIDA, and that the notice of petition will be converted to and deemed a summons.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondent/counterclaimant New York City Industrial Development

Agency's motion for summary judgment is denied (sequence no. 006); it is further

ORDERED, that respondent/counterclaimant New York City Industrial Development Agency's motion for a default judgment against counterclaim respondent Zadok Zvi is denied (sequence no. 005); it is further

ORDERED, that that respondent/counterclaimant New York City Industrial Development Agency's motion for a default judgment against counterclaim respondent Paul Rouhani is denied without prejudice to renew (sequence no. 003); it is further

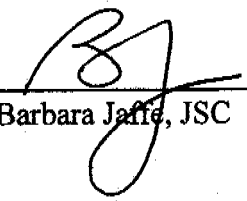
ORDERED, that that respondent/counterclaimant New York City Industrial Development Agency's motion to amend the caption is granted (sequence no. 004); it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by: (1) substituting Avant Guard Properties, LLC as the plaintiff for Avant Guard Properties, LLC as the petitioner, (2) substituting New York City Industrial Development Agency as the defendant for New York City Industrial Development Agency as the respondent, (3) substituting Avant Guard, Inc., Barry Borgen, Paul Rouhani, and Zadok Zvi as additional counterclaim defendants for Avant Guard, Inc., Barry Borgen, Paul Rouhani, and Zadok Zvi as additional counterclaim respondents, (4) removing The City of New York, New York City Economic Development Corporation, and Seth Pinsky as respondents from the caption and action, and (5) converting the notice of petition to and deeming it to be a summons, without prejudice to the proceedings heretofore had herein; it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED, that the matter is referred to the Case Management Office for the scheduling of a preliminary conference.

ENTER:



Barbara Jaffe, JSC

DATED: October 18, 2012
New York, New York

FILED
OCT 22 2012
NEW YORK
COUNTY CLERK'S OFFICE