

**389 Assoc. v Pilotage N. Am., Inc.**

2016 NY Slip Op 32380(U)

December 2, 2016

Supreme Court, New York County

Docket Number: 151631/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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389 ASSOCIATES,

Plaintiff,

-against-

**DECISION/ORDER**  
Index No. 151631/2016  
Mot. Seq. No. 001

PILOTAGE NORTH AMERICA, INC. and  
WILLIAM DICKEY,

Defendants.

-----X  
**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED <sup>1</sup>
NOTICE OF MOTION, ATTY. AFF. IN SUPP., BREIMAN AFF. IN SUPP. AND EXHIBITS ANNEXED .....	16-33

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This is an action sounding in breach of a commercial lease in which plaintiff seeks to recover the alleged rent due to it, as well as additional rent that it claims has been accelerated in light of the breach. Defendant Pilotage North America, Inc., the lessee, neither joined issue nor made an appearance. Defendant William Dickey, the individual guarantor of the lease, has answered. Plaintiff now moves for a default judgment against Pilotage and partial summary judgment in its favor on the issue of liability against Dickey. After a review of the papers submitted, and the relevant statutes and case law, **the branch of the motion seeking a default judgment against Pilotage is denied, with leave to renew upon proper papers, and the branch of the motion**

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<sup>1</sup> Unless otherwise indicated, the documents are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

**seeking partial summary judgment in plaintiff's favor against Dickey is denied.**

## **FACTUAL AND PROCEDURAL BACKGROUND**

In September 2011, plaintiff and Pilotage, by Dickey, executed a lease with a commencement date of January 1, 2012, and an expiry date of December 31, 2021. (Doc. No. 2.) The yearly rent was set forth as follows: \$90,000 in 2012, \$92,700 in 2013, \$95,481 in 2014, \$98,345.43 in 2015, \$101,295.79 in 2016, \$110,334.60 in 2017, \$113,644.68 in 2018, \$117,054 in 2019, \$120,565.62 in 2020, and \$124,182.60 in 2021. On December 20, 2011, Dickey executed a good guy guaranty. (Doc. No. 3.) Although it is unclear from the motion papers, Pilotage apparently vacated the premises at some point and ceased to make payments pursuant to the lease. Despite the representation by Daniel Breiman, the managing agent for the property, who averred that, at the time of Pilotage's vacatur, it owed \$24,724.05 in rent, nothing in plaintiff's papers indicates precisely when the default occurred or when Pilotage vacated the premises. The verified complaint also suffers from a woeful lack of specificity regarding payments made by Pilotage, when the default actually occurred and when Pilotage vacated the premises. In support of the motion, plaintiff included what it titled a lease ledger. The ledger contains a lengthy series of entries with various denominations, but this Court is not able to determine with any precision what the entries correspond to. (Doc. No. 4.) Plaintiff has not provided any guidance, through either an affirmation or affidavit, to explain what the entries mean. As a result, it is impossible to conclude, on the papers submitted, if and when the alleged default occurred.

Plaintiff commenced this action in February 2016. Dickey joined issue in March 2016, and Pilotage has neither answered nor appeared. Plaintiff now moves for summary judgment against

Dickey and for a default judgment against Pilotage.

## LEGAL CONCLUSIONS

On a motion for summary judgment, the movant bears the initial burden to submit evidence in admissible form establishing entitlement to judgment as a matter of law, after which the burden shifts to the party against whom summary judgment is sought to establish the existence of a triable issue of material fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Here, plaintiff has failed to sustain its initial burden to establish entitlement to summary judgment as against Dickey. This Court is left to wonder when, precisely, Pilotage vacated the premises, when the alleged default occurred and when the alleged demand for payment was made. Plaintiff's request that this Court set the matter down for an inquest to determine the precise amount of damages misses the point that it is plaintiff's initial burden to establish liability by proving that there was a breach of the lease agreement, and when that breach occurred. Thus, the branch of the motion seeking summary judgment against Dickey is denied.

As for the branch of the motion for a default judgment against Pilotage, CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial. . . , the plaintiff may seek a default judgment against him [or her]." On such a motion, "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." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011); *see Liberty County Mut. v Avenue I Med. P.C.*, 129 AD3d 783, 784-785 (2d Dept 2015); *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 668 (2d Dept 2014); *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 (2d Dept 2010).

This branch of the motion must also be denied. For the same reasons as plaintiff failed to establish prima facie entitlement to summary judgment, it similarly failed to set forth the facts constituting the claim against Pilotage. Although the other elements are met, a default judgment cannot be granted on the papers submitted.

Therefore, in light of the foregoing, it is hereby:

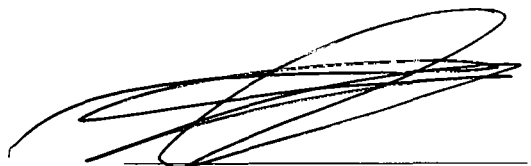
ORDERED that the branch of plaintiff's motion seeking entry of a default judgment against defendant Pilotage North America, Inc. is denied, with leave to renew upon proper papers; and it is further

ORDERED that the branch of plaintiff's motion seeking partial summary judgment in its favor on the issue of liability against defendant William Dickey is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: December 2, 2016

ENTER:



**KATHRYN E. FREED, S.C.  
HON. KATHRYN E. FREED  
JUSTICE OF SUPREME COURT**