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| <b>Baumrind v Revitali Cafe</b>  |
| 2014 NY Slip Op 32756(U)   |
| October 23, 2014   |
| Sup Ct, New York County  |
| Docket Number: 653618/2013   |
| Judge: Eileen A. Rakower   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
MARTIN BAUMRIND and the ESTATE OF SEYMOUR  
BAUMRIND d/b/a 125-127 1<sup>st</sup> AVENUE LLC and  
125-127 1<sup>st</sup> AVENUE LLC,

Plaintiffs,

- v -

REVITALI CAFÉ, BAR AND RESTAURANT, LLC  
d/b/a REVITALI RESTAURANT and REVITAL MALCHI  
a/k/a REVITAL MUCHI

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Index No.  
653618/2013

**DECISION  
and ORDER**

Mot. Seq. 001

Plaintiffs Martin Baumrind and the Estate of Seymour Baumrind d/b/a 125-127 1st Avenue LLC and 125-127 1st Avenue LLC (collectively, "Plaintiffs") bring this action for damages pursuant to a commercial lease agreement (the "Lease Agreement") dated March 29, 2006, between 125-127 1st Avenue LLC as owner and Revitali Café, Bar and Restaurant LLC ("Defendant LLC" or "Tenant") and pursuant to a guarantee (the "Guarantee"), dated March 30, 2006 executed by Defendant LLC's principal member, defendant Revital Malchi, a/k/a Revital Muchi ("Malchi") (and together with Defendant LLC, collectively, "Defendants"). Plaintiffs seek additional accrued rent, various other expenses, per diem rent, and costs and repairs due to damage that defendant allegedly caused to the commercial premises located at 125 & 127 1st Avenue, the ground floor and basement, in the County and State of New York (the "Premises").

Plaintiffs commenced the instant action on October 18, 2013, by Summons with Notice. Plaintiffs filed a Supplemental Summons on November 14, 2013, adding Defendant LLC as a party defendant in this action. Plaintiffs now move for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment jointly and severally as against Defendants in the amount of \$145,054.81, representing

\$120,054.81 arrears in rent, plus \$25,000.00 in accrued attorneys' fees for services rendered in Housing Court, as well as current reasonable attorneys' fees for the prosecution of the instant action, in the amount of \$48,351.60 based on the Plaintiffs' retainer of one-third contingency, for a total amount of \$193,406.41.

In support, Plaintiffs submit the affirmation of merit of plaintiff Martin Baumrind ("Baumrind"), dated May 30, 2014; the attorney affirmation of Matthew A. Kaufman, Esq. ("Kaufman"), dated August 11, 2014; the Non-Military Affirmation dated Affirmation, dated August 15, 2014; the affirmation of Notice pursuant to CPLR § 3215(g) attesting to the additional mailing of Plaintiffs' supplemental summons upon Defendants; a copy of the Summons with Notice filed on October 18, 2013; a copy of the supplemental summons with notice filed on November 14, 2013; the affidavit of service of Plaintiffs' supplemental summons with notice upon Defendant LLC, dated December 31, 2013, via the Secretary of State; the affidavit of service of Plaintiffs' supplemental summons with notice upon Malchi, dated January 14, 2014, by personal delivery to a person of suitable age and discretion at Malchi's business address and first class mail to that address; a copy of the Lease Agreement, dated March 29, 2006; a copy of the Guarantee, dated March 30, 2006; a copy of the cover letter by Defendants' attorney with executed lease, dated March 30, 2006; a copy of the Modification of Lease, dated October 16, 2006; a copy of the Deed, dated May 31, 2007, transferring property between Plaintiffs; the stipulation of settlement from Civil Court, New York County, dated October 22, 2009; documentation from the Department of Environmental Protection for the water bill; documentation relating to Real Estate taxes; a bill for clean-up repair; a copy of the Notice of Default with copy of Summons with Notice; a copy of the Decision and Order dated July 15, 2011; a copy of an email, dated October 23, 2013, rejecting Default Judgment; the Notice of Voluntary Discontinuance dated October 18, 2013; and, copies of documentation purporting to confirm Malchi's non-military status.

No opposition is submitted.

In the affirmation of merit of Baumrind, Baumrind affirms that he is the managing member of Plaintiff LLC, and that this action arises from a commercial tenancy between Plaintiff LLC and Defendant LLC for the Premises. Baumrind further affirms that, at the time of the Lease Agreement, Baumrind and the Estate of Seymour Baumrind was doing business as Plaintiff LLC. Baumrind affirms that Malchi was the owner and principal of Defendant LLC, and that Malchi signed the Guarantee, personally guaranteeing Defendant LLC's obligations under the Lease Agreement. Baumrind affirms:

Pursuant to the terms and conditions of the Guaranty, Defendant promised:

“The undersigned Guarantor guarantees to Owner, owner’s successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached Lease, including the “Rules and Regulation” as therein provided, without requiring any notice to Guarantor of nonpayment, or nonperformance, or proof, or notice of demand, to hold the undersigned responsible under this guaranty, al of which the undersigned hereby expressly waives and expressly agrees that the legality of this agreement and the agreements of the Guarantor under this agreement shall not be ended, or changed”

In addition, Baumrind affirms that, on October 16, 2006, the Plaintiff LLC and Defendant LLC entered into a modification of the Lease Agreement, wherein the Plaintiff LLC agreed to a three year extension for Defendant LLC to pay \$25,000.00 in accrued rent. Baumrind affirms that on May 31, 2007, Baumrind and the Estate of Baumrind transferred its interest in fee to the property to Plaintiff LLC.

Baumrind affirms that, in 2009, Plaintiff LLC commenced a non-payment proceeding against Defendants in the Civil Court of the City of New York, New York County, the Commercial Landlord/Tenant part, and that, on October 22, 2009, the parties entered into a written stipulation. Baumrind affirms:

At the time of the “Stipulation”, the Defendants stipulated they owed \$144,807.00 in arrears through October 31, 2009. Defendants waived the right of the return of the \$38,000.00 security, which would be applied to the outstanding arrears, reducing the arrears to a net total of \$106,807.00 through October 31, 2009,

Baumrind further affirms:

On November 17, 2009, Defendants surrendered their keys to the Plaintiff, resulting in 17 additional days of accrued rent at a per diem rate of \$450.00, for an additional total of \$7,650.00, or a total amount of rent of \$114,457.00.

Pursuant to the ¶ 28 Lease, the Tenant was obligated to pay water and sewer bill, of which it failed to pay for the last two bills: 234.20 of April 16, 2009 \$281.20, was paid, leaving a balance of \$46.99; and, July 9, 2009, the entire bill is open 197.44 for a total of \$244.43, **Exhibit "I"**.

In addition to the Tenant was obligated to pay its proportionate share, 25%, of the Real Estate taxes. At the time it vacated the premises, the Tenant owed \$1,149.36 for July 1, 2008 through June 30, 2009; and, \$704.02 for the period of July 1, 2009 through November 17, 2009, for a total of \$1,853.38, **Exhibit "J"**.

In addition to these arrears, the Tenant failed to leave the premises in "broom clean" condition, requiring the Plaintiff to have the premises professionally cleaned, costing an additional \$3,500.00, **Exhibit "K"**.

Based on the above, the Tenant owes:

|                             |                     |
|-----------------------------|---------------------|
| Rental Balance due on Lease | \$114,457.00        |
| Water & Sewer Charges       | \$244.43            |
| Real Estate Taxes           | \$1,853.38          |
| Clean-up Charges            | \$3,500.00          |
| <b>Total</b>                | <b>\$120,054.81</b> |

In addition, Baumrind affirms:

Pursuant to ¶ 19 of the Lease, the Tenant is obligated to legal fees:

If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, after notice if required and upon expiration of any applicable grace period if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent thereunder, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any action or proceeding and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

Additionally, Baumrind affirms:

The Plaintiff has incurred legal fees in the amount of \$25,000.00 due to the Tenant's failure to properly pay rent. In addition, the Plaintiff has been and will be incurring a fee for the prosecution of the within collection action, which is a one-third (1/3) contingency fee.

Based on the foregoing, the Plaintiff is entitled to a Judgment against Defendant, as the Guarantor of the Tenant in the amount of \$120,054.81 plus \$25,000.00 incurred legal fees as well as the fees incurred in this case, which is one-third (1/3) of the collected amount, or \$40,018.27 on the rental arrears, and \$8,333.33 on the legal fees arrearage for a total judgment in the amount of \$193,406.41.

Wherefore, it is hereby,

ORDERED that Plaintiffs' motion for default judgment against Defendants is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiffs Martin Baumrind and the Estate of Seymour Baumrind d/b/a 125-127 1st Avenue LLC and 125-127 1st Avenue LLC, and against Defendants, Revitali Café, Bar and Restaurant LLC and Revital Malchi, a/k/a Revital Muchi, jointly and severally, in in the amount of \$120,054.81 plus interest from the date of entry of judgment until the date the judgment is paid, plus costs and disbursements, as calculated by the Clerk; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs under the Lease Agreement is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference

to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 23, 2014

  
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EILEEN A. RAKOWER, J.S.C.