

Teresharan Realty v B'way & 5th, Inc.

2015 NY Slip Op 31798(U)

September 18, 2015

Supreme Court, New York County

Docket Number: 156437/2014

Judge: Cynthia S. Kern

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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: Part 55

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TERESHARAN REALTY,

Plaintiff,

-against-

Index No. 156437/2014

DECISION/ORDER

B'WAY & 5TH, INC. and KYUNG RIM CHOI,

Defendants.

-----X

KYUNG RIM CHOI,

Third-Party Plaintiff,

-against-

HAN IK CHO and STEVE KIM a/k/a SIN Y. KIM,

Third-Party Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Affidavits in Opposition..... | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Plaintiff commenced the present action to recover unpaid rents stemming from a commercial lease and accompanying guaranty. Plaintiff now moves for an order: (1) granting it default against defendant B'way and 5th, Inc. ("B'way" or the "corporation"); (2) granting it summary judgment against defendant Kyung Rim Choi ("Choi"), as guarantor, and striking Choi's affirmative defenses and counterclaims; and (3) setting this matter down for a hearing on

attorney fees. Plaintiff's motion is granted to the extent described below.

The relevant facts are as follows. On or about April 17, 2008, defendant B'way entered into a lease agreement (the "Lease") with plaintiff Teresharan Realty ("Teresharan") to lease the premises at 39 West 32nd Street, New York, NY (the "premises") whereat the corporation ran a restaurant known as "Korea Spoon." The Lease term was to commence on May 1, 2008 and end April 30, 2018. In connection with the Lease, defendant Choi signed and executed a personal guaranty (the "Guaranty") wherein he personally guaranteed all obligations due and owing under the Lease.

Sometime after entering into the Lease, the corporation defaulted under the Lease by failing to pay rent when it was due. Thus, on or about October 21, 2013, plaintiff commenced a summary nonpayment proceeding against the corporation in Civil Court. On or about February 26, 2014, plaintiff was awarded a final judgment of possession and a money judgment against the corporation in the amount of \$202,946.70. The corporation was eventually evicted from the premises on March 19, 2014 and plaintiff re-let the premises to a new tenant for a term beginning on August 7, 2014.

On or about July 1, 2014, plaintiff commenced the instant action against the corporation and Choi seeking to recover all unpaid rents and damages stemming from the corporation's default. The corporation has failed to answer or otherwise appear in this action and it is in default. On or about August 24, 2014, Choi answered plaintiff's complaint and asserted two counterclaims. In the first counterclaim, Choi alleges that plaintiff has taken possession of collateral used by the corporation to secure a business loan in the amount of \$750,000 and defendants are entitled to immediate possession of the collateral. In the second counterclaim,

Choi alleges that plaintiff has been enriched at Choi's expense by retaining the benefit of the collateral and, as such, Choi has been damaged in the amount of \$750,000.

On the instant motion, plaintiff seeks default judgment against the corporation and summary judgment against Choi. Additionally, plaintiff seeks to dismiss Choi's counterclaims. In response, Choi has presented no opposition to the portion of plaintiff's motion seeking to dismiss his counterclaims and affirmative defenses. Further, Choi does not dispute that he is liable under the Guaranty for unpaid rent. However, Choi contests the amount of plaintiff's claim. Specifically, Choi contends that plaintiff must apply the corporation's security deposit to the amount outstanding thereby reducing its claim against Choi by \$300,000.

As liability has been conceded by Choi, the only issue for this court is whether plaintiff is entitled to a money judgment at this time or whether an inquest is necessary to determine the amount of damages plaintiff may recover. The court finds that an inquest is necessary to determine the amount of damages plaintiff may recover against defendants as the court cannot determine from the papers submitted what the current outstanding rent is. Further, during the inquest, the referee shall determine how the security deposit will be applied.

Accordingly, based on the foregoing, plaintiff's motion for an Order (1) granting it default judgment against the corporation; and (2) granting it summary judgment against Choi and dismissing Choi's affirmative defenses and counterclaims is granted. An inquest is hereby directed on the issue of damages on a date to be set by the calendar clerk upon entry and service of a copy of this order together with payment of the appropriate fee. Judgment shall thereafter be entered in favor of the plaintiff and against defendants for the amount found upon the inquest. This constitutes the decision and order of the court.

Dated: 9/18/15

Enter: Cg
J.S.C.

CYNTHIA S. KERN
J.S.C.