

**666 Fifth Assoc., LLC v Domeninanni**

2018 NY Slip Op 31985(U)

August 16, 2018

Supreme Court, New York County

Docket Number: 150350/2018

Judge: William Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

*Justice*

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666 FIFTH ASSOCIATES, LLC

Plaintiff,

- v -

DIEGO DOMENINANNI,

Defendant.

INDEX NO. 150350/2018

MOTION DATE 06/12/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

JUDGMENT - DEFAULT

This is an action by plaintiff, 666 Fifth Associates, LLC ("Plaintiff"), against defendant Diego Domeninanni ("Defendant"), as a guarantor of a lease between Plaintiff and assignee Bellair NY Corp, d/b/a Beticelli Shoes NY ("Tenant"), for the premises located at 666 Fifth Avenue, New York, New York. Plaintiff seeks payment for rent due and related expenses incurred in connection with this and other related proceedings.

Plaintiff is the landlord of the building located at 666 Fifth Avenue. Bellair NY Corp, d/b/a Boticelli Shoes NY ("Tenant"), is the tenant of record of the ground floor and basement of the building (the "Premises"). Defendant is a guarantor of the lease between Plaintiff and Tenant for the Premises.

In September 2017, Plaintiff served Tenant with a Rent Demand, Notice of Petition and Petition, commencing the underlying proceeding against Tenant in New York County Civil Court. On January 9, 2018, the Civil Court issued a possessory and money judgment against Tenant. A warrant was issued and, on February 26, 2018, Tenant was evicted from the Premises.

Shortly thereafter, on January 20, 2018, Plaintiff served Defendant with a Summons and Complaint for unpaid pre-vacatur and post-vacatur rent due from Tenant through the end of the lease term. On January 31, 2018, Plaintiff's counsel served a CPLR 3215 notice upon Defendant, who has not answered or otherwise appeared in this action.

Now, Plaintiff moves for an order, pursuant to CPLR 3125, granting default judgment against Defendant on the: (1) first cause of action for pre-vacatur base and addition rent due from Defendant through January 31, 2018, in the amount of \$340,687.73; (2) portion of the second cause of action for pre-vacatur base and additional rent due for February, 2018, in the amount \$23,656.37; (3) portion of the second cause of action for post-vacatur base and addition rent due from Defendant for March 1, 2018 through December 31, 2019, in the amount of \$558,662.47; (4) third cause of action for (a) attorneys' fees and expenses incurred in this action through April 30, 2018, (b) plus fees and expenses incurred in the underlying nonpayment proceeding against Defendant, plus fees and expenses arising from all of Defendant's prior rent defaults, and (c) for costs and disbursements. The motion has been submitted unopposed.

A motion for default judgment against a non-appearing party is governed by CPLR 3215 (*IMG Int'l Mktg Grp. v. SDS William ST., LLC*, 32 Misc.2d 1233(A) [Sup Ct NY 2011]). A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the court to enter a default judgment (*Popescu v. The Brand Suite, LLC*, 2014 WL 3671434 [Sup Ct NY Cnty 2014], citing *PDQ Aluminum Products Corp. v Smith*, 20 Misc3d 94, 96 [App Term, 2d Dept 2008]). The plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing (*SMROF II 2012-I Tr. V Tella*, 139 AD3d 599 [1st Dept 2016]).

In support of Plaintiff's motion, Plaintiff provides proof that Defendant was properly served on January 20, 2018, when the process server delivered a copy of the summons and verified complaint (the "Complaint") to the doorman at Defendant's residence, located at 1214 Fifth Ave, Apt 35B, New York, New York 10029. Plaintiff's affidavit states the doorman confirmed that Defendant was a resident of the building and called Defendant who instructed the doorman not to allow the process server into the building (*see Bank of America, N.A. v Grufferman*, 117 AD3d 508 [1st Dept 2014] [service on doorman to defendant's apartment build was proper under CPLR 308(2) where process server was denied access to defendant's apartment]). Service on Defendant was completed on January 24, 2018, when a true copy of the Complaint was mailed, in a post-paid wrapper, properly address to Defendant's residence. An affidavit of service was filed with the Court on January 31, 2018 (NYSCEF 4).

Plaintiff also submits proof that it complied with the addition notice requirements of CPLR 3215(g)(3) by mailing an additional notice and a copy of the Complaint to Defendant on January 31, 2018 (NYSCEF 6).

The Complaint contains causes of action for, *inter alia*, breach of contract based on Defendant's purported breaches of the subject guarantee.

To state a claim for breach of contract in New York, one "must allege (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages" (*Oppman v IRMC Holdings, Inc.*, 14 Misc. 3d 1219[A] [Sup Ct NY Cnty 2007], citing *Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004] [citation omitted]). "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and

certain, or capable of certain ascertainment, and not remote, speculative or contingent” (*Fruition, Inc. v. Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] [citation omitted]).

A guaranty is a contract that must be construed “in the strictest manner and a guarantor should be bound to the express terms of the written guaranty.” (*Wider Cansol, Inc. v. Tony Melillo, LLC*, 107 A.D.3d 883, 884 [2nd Dept 2013]; citing *Louis Dreyfus Energy Corp. v. MG Rejining and Marketing, Inc.*, 2 NY3d 495 [2004]; *Arlana Ltd. Partnership v. The 8th of January Corp.*, 50 AD3d 933 [2nd Dept 2008]; *665-75 Eleventh Ave. Realty Corp. v. Schlanger*, 265 AD2d 270 [1st Dept 1999]).

Plaintiff has met its prima facie burden with respect to pre-vacatur rent as Plaintiff, through supporting affidavits, established that Defendant entered into a guaranty with Plaintiff (NYSCEF 3 [the “Guaranty”]), whereby he agreed to be personally liable for all Tenant’s obligations under the subject lease, including, but not limited to, pre-vacatur base and additional rent, in the amount of \$364,344.10 for rent due from Tenant through February, 2018. Plaintiff has also established its entitlement to post-vacatur rent in the amount of \$558,662.47 for rent due from Tenant for March 1, 2018 through December 31, 2019.

In addition, under the terms of the lease and Guaranty, Plaintiff is entitled to reimbursement for its reasonable attorneys’ fees and expenses incurred in the nonpayment proceeding in Civil Court and fees and expenses arising from Tenant’s prior rent defaults, in the sum of \$30,809.49, plus the attorneys’ fees and expenses incurred by Plaintiff in this action through April 30, 2018 in the amount of \$12,591.08 (NYSCEF 9, ¶ 34).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for a default judgment on the Complaint herein is granted on Plaintiff's first, second and third causes of action and the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$966,407.14, which sum includes: (1) \$364,344.1 for pre-vacatur rent and additional rent through February 2018; (2) \$558,662.47 for post-vacatur rent from March 2018 through December 2019; and (3) \$43,400.57 for attorneys' fees and expenses incurred by Plaintiff in this action and in the related nonpayment proceeding, together with interest at the rate of 9% per annum from the date of the decision and order on this motion, as calculated by the Clerk, with costs and disbursements as taxed by the Clerk upon submission by Plaintiff of an appropriate bill of costs.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

8/16/2018  
DATE

  
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W. FRANC PERRY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER

APPLICATION:

- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- SUBMIT ORDER
- FIDUCIARY APPOINTMENT  REFERENCE

CHECK IF APPROPRIATE: