

**I. Buss & Allan Uniform Co., Inc. v Stone St. Props.  
LLC**

2018 NY Slip Op 32058(U)

August 22, 2018

Supreme Court, New York County

Docket Number: 651719/2018

Judge: Joel M. Cohen

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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. JOEL M. COHEN PART 45
Justice
INDEX NO. 651719/2018
MOTION DATE 07/27/2018
MOTION SEQ. NO. 001
I. BUSS & ALLAN UNIFORM COMPANY, INC.
Plaintiff,
- v -
STONE STREET PROPERTIES LLC,
Defendant.
DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents:

Plaintiff, I. Buss & Allan Uniform Company, Inc., ("I. Buss") seeks a default judgment against Defendant Stone Street Properties LLC ("Stone Street") for its failure to timely answer, appear or otherwise move in this action. For the reasons stated below Plaintiff's motion is granted and it shall be awarded a default judgment in the amount of \$30,975.00 plus pre-judgment interest at the contractually agreed upon rate of 1.5% per month as well as \$390.70 in court costs.

Factual and Procedural Background

I. Buss commenced this action with the filing of a Summons and Complaint on or about April 10, 2018. (NYSCEF 1). I. Buss alleges it entered into a three-year rental agreement with Stone Street on or about September 5, 2015. I. Buss alleges that Stone Street breached the agreement two years later (on or about September 8, 2017). See, Busch Affid., ¶¶4-20 (NYSCEF 9).

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On April 11, 2018, I. Buss served Stone Street with a copy of the Summons and Compliant via the New York Secretary of State in accordance with Limited Liability Corporation Law §303. (*See* Affidavit of Service [NYSCEF 2, 6]). Plaintiff also mailed a copy of the Summons and Complaint to Stone Street on May 17, 2018 as a courtesy. (*See*, Affidavit of Mailing [NYSCEF 8]). Stone Street's time to Answer lapsed on May 11, 2018. *See*, CPLR §320.

### ***Legal Standard***

Default judgments are governed by CPLR §3215. Under CPLR §3215(a), a plaintiff may seek a default judgment “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed.”

Limited Liability Corporation Law (“LLCL”) §303(a) governs service on limited liability companies and states in relevant part:

“Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served.”

### ***Legal Analysis***

In order to establish entitlement to a default judgment, Plaintiff must prove (1) Defendant was duly served, (2) Defendant has failed to appear or respond, and (3) the facts constituting its claims are supported by an affidavit of a person with knowledge or a verified complaint. *See* CPLR §3215(f); *Ostroy, et al. v. Six Square LLC, et al.*, 74 A.D.3d 693, 693 (1st Dep’t 2010).

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Plaintiff has satisfied each of these elements. First, it has provided sufficient evidence to confirm Defendant was served in compliance with LLCL. (See Affidavit of Service [NYSCEF 2, 6]). Second, Plaintiff offers an Affidavit from Plaintiff's CEO, Jennifer Busch, which confirms the facts contained within the Complaint and that Defendant failed to appear or respond. (See, Busch Affidavit, ¶¶4-21 [NYSCEF 9]).

A party is entitled to a sum certain on a default judgment if it submits requisite proof of the facts constituting the claim, the default and the amount due, in the form of either an Affidavit of a Verified Complaint. See, CPLR §3215(f); see also, *Chase Manhattan Bank (Nat. Ass'n) v. Evergreen Steel Corp.*, 91 A.D.2d 539, 539 (1<sup>st</sup> Dep't 1982). Ms. Busch's affidavit sets forth the amount of money Defendant owes as a result of the alleged breach. (See Busch Affidavit, ¶¶11-20 [NYSCEF 9]).

Here, Plaintiff alleges Defendant prematurely terminated the rental agreement, resulting in \$24,747.58 in unpaid service charges and \$6,228.00 in unpaid replacement fees relating to uniforms which were allegedly not returned to Plaintiff. Under the rental agreement, pre-judgment interest in the amount of 1.5% per month is to be added to any outstanding balance. See, Rental Agreement (NYSCEF 10), §5.3(b); See also, *Whittemore v Yeo*, 117 A.D.3d 544, 545 (1st Dep't 2014) (properly awarding pre-judgment interest).

Additionally, according to the subject Rental Agreement entered into between the two parties, Plaintiff is entitled to "any and all costs (including reasonable attorney's fees) incurred in enforcing its rights under the contract". (See, Rental Agreement, Exhibit A, ¶3 [NYSCEF 10]). Plaintiff's counsel, Yelena Rapoport, Esq. offers an Affirmation supporting the request for attorney's fees totaling \$5,157.50 (less a "\$700 courtesy discount"). Counsel also seeks reimbursement of court costs expended in connection with this action amounting to \$390.70.

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It is well settled that a default judgment may be determinative of liability but not the amount of damages to be awarded, unless there can be no dispute as to the amount due, the amount sought being a “sum certain”. *Arent Fox Kintner Plotkin & Kahn, PLLC v Lurzer GmbH*, 297 A.D.2d 590, 590 (1st Dep’t 2002); *Rokina Optical Co. v. Camera King*, 63 N.Y.2d 728, 730 (1984); *Reynolds Secs. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568 (1978); See also CPLR 3215[a]. “Accordingly, ... claims for attorneys’ fees, such as those made in this action, are not ordinarily amenable to characterization as claims for “sums certain”. *Arent Fox Kintner Plotkin & Kahn*, 297 A.D.2d at 590; *Reynolds Secs.*, 44 N.Y.2d at 572 (to be considered a “sum certain” there can be no dispute as to the amount due). Therefore, because attorneys’ fees are not treated by courts as a “sum certain”, Plaintiff shall be directed to an Inquest to determine the issue of attorneys’ fees.

Upon consideration, this Court finds Plaintiff has properly demonstrated satisfactory service on Defendant, Defendant’s failure to timely answer or otherwise appear, the sum certain due because of the alleged breach, and Plaintiff’s entitlement to costs in accordance with CPLR §3215 and the governing contract.

Therefore, it is:

**ORDERED** the branch of Plaintiff’s motion which seeks money damages for the alleged breach together with related court costs incurred is granted; it is further

**ORDERED** the County Clerk shall enter judgment against Defendant in the amount of \$30,978.58 plus pre-judgment interest of 1.5% per month from September 8, 2017 until the date of entry of judgment, as calculated by the Clerk. From the date of entry of judgment until satisfaction of the judgment, Plaintiff will be entitled to 9% interest, per annum, on the total

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Service and Replacement Fees. Judgment shall also be entered against Defendant in the amount of \$390.70 for court costs (not subject to 9% interest); it is further

**ORDERED** the branch of Plaintiff's motion for attorneys' fees is severed and referred to a Special Referee to hear and determine;

**ORDERED** that the entry of judgment with respect to the award of attorneys' fees is held in abeyance pending the determination of the Special Referee; and it is further

**ORDERED** Plaintiff is to serve Defendant with a copy of this Order with Notice of Entry within 5 days.

8/22/2018

DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE