

Plaza Realty Assoc., LLC v Jinny Beauty Supply Co., Inc.
2018 NY Slip Op 32071(U)
August 22, 2018
Supreme Court, New York County
Docket Number: 154812/2017
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. JOEL M. COHEN</u>	PART	45
	<i>Justice</i>		
	-----X	INDEX NO.	<u>154812/2017</u>
	PLAZA REALTY ASSOCIATES, LLC	MOTION DATE	<u>07/30/2018</u>
	Plaintiff,	MOTION SEQ. NO.	<u>001</u>
	- v -		
	JINNY BEAUTY SUPPLY CO., INC.,		
	Defendant.		

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents:

Plaintiff, Plaza Realty Associates, LLC ("Plaza Realty") seeks a default judgment against Defendant Jinny Beauty Supply Co., Inc. ("Jinny Beauty") for its failure to timely answer, appear or otherwise move in this action. For the reasons stated below Plaintiff's motion is granted in part and it shall be awarded a judgment in the amount of \$141,320.25 plus pre-judgment interest at the statutory default rate of 9% per annum.

Factual and Procedural Background

Plaza Realty commenced this action with the filing of a Summons and Complaint on or about May 19, 2017. (NYSCEF 1). Plaza Realty alleges it entered into a lease agreement dated May 10, 2012 pursuant to which Defendant leased the 2nd floor of 1181 Broadway, New York, New York 10001 (the "Leased Premises") for the period of September 1, 2012 to August 31, 2019 (the "Lease"). (See Exhibit "1" to Moving Brief [NYSCEF 7]). Plaza Realty further

Plaza Realty Associates v. Jinny Beauty
154812/2017

2

alleges that Defendant failed to make timely rental payments and, as such, was evicted on March 3, 2017. (See Becher Affidavit ¶4 [NYSCEF 6]). Plaintiff now seeks payment for the remainder of the lease period, during which the Leased Premises remained vacant.

Plaza Realty represents that on June 7, 2017, it personally served Jinny Beauty with a copy of the Summons and Compliant through its agent, Bum Shin, who identified himself as authorized to accept service on behalf of Defendant. (See, Exhibit “B” to Moving Brief [NYSCEF 6]); *see also* CPLR §311(a)). Defendant’s time to Answer lapsed on June 27, 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.”

Under CPLR §311(a)(1), service on a corporation is complete when an agent of the entity is personally 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).

Here, satisfying the first element, Plaintiff has provided sufficient evidence to confirm Defendant was served in compliance with CPLR §311. (See Exhibit “A” [NYSCEF 5]). As to

Plaza Realty Associates v. Jinny Beauty
154812/2017

3

the second and third elements, Plaintiff offers an Affidavit from Plaintiff's Managing Agent, Shauli Becher, which confirms the existence of a valid lease, Defendant's alleged breach, and the amount of money Defendant allegedly owes because of the alleged breach. (See, Becher Affidavit, ¶¶3-7, [NYSCEF 6]). 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 (1st Dept 1982).

Here, Plaintiff alleges Defendant failed to make monthly rental payments in accordance with the Lease, thereby breaching the Lease. Due to Defendant's failures, Plaintiff evicted it from the Leased Premises, two years and five months before the Lease was to terminate. Due to the early termination of the Lease, Plaintiff claims damage in the amount of \$141,320.25. See Becher Affidavit, ¶¶5-7 (NYSCEF 6).

Additionally, according to the subject Lease, Plaintiff is entitled to reasonable attorneys' fees and costs associated with any action or proceeding brought against the Tenant for non-payment of rent. (See Lease Agreement, ¶41 [NYSCEF 7]). Plaintiff's counsel, Kirk Karabelas, Esq. offers an Affirmation supporting the request for attorney's fees, costs and expenses totaling \$5,775.00.

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

Plaza Realty Associates v. Jinny Beauty
154812/2017

4

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, and the sum certain due because of the alleged breach 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 is granted; it is further

ORDERED the County Clerk shall enter judgment against Defendant in the amount of \$141,320.25 plus pre-judgment interest of 9% per annum from March 3, 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 outstanding rent; it is further

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

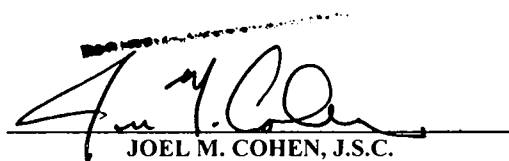
Plaza Realty Associates v. Jinny Beauty
154812/2017

5

ORDERED that the entry of judgment with respect to the award of attorneys' fees and expenses 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.

HON. JOEL M. COHEN
J.S.C.


JOEL M. COHEN, J.S.C.

8/22/2018
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input checked="" type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: