

Altin Realty Corp. v S.H. Zell & Sons, LLC

2019 NY Slip Op 33611(U)

December 9, 2019

Supreme Court, New York County

Docket Number: 650951/2019

Judge: W. 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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INDEX NO. 650951/2019

ALTIN REALTY CORP.,

MOTION DATE 08/05/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

S.H. ZELL & SONS, LLC, STANLEY ZELL

DECISION + ORDER ON MOTION

Defendant.

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

were read on this motion to/for JUDGMENT - DEFAULT

In this action for breach of a lease agreement, plaintiff, Altin Realty Corp., seeks a default judgment in its favor and against defendants, S.H. Zell & Sons, LLC (Zell LLC) and Stanley S. Zell (Zell) (collectively, defendants, and entry of a money judgment, jointly and severally in the amount of \$75,900.17, which includes \$5,050.17 in attorneys' fees and expenses incurred through June 21, 2109.

According to plaintiff, on or about May 1, 2000, plaintiff and Zell LLC entered into a written lease for "Booths 17 and 18", which were located in the lower level of a building located at 23 West 47th Street, New York, NY 10036 (the building) (plaintiff exhibit C). In addition, Zell entered into a guaranty dated May 1, 2000, individually guaranteeing payment of rents and other obligations under the lease (id.). The lease was orally modified to include half of Booth 15 and Booth 16. After the expiration of the lease on April 20, 2002, Zell LLC became a month-to-month tenant. Under the terms of the lease, Zell LLC was required to pay a monthly rent of \$4,600 per month. Zell LLC defaulted under the lease by failing to pay rent to plaintiff from

October 2017 through to October 2018, for a total due and owing of \$59,800. Plaintiff submits the rent ledger of the lease as proof of monies due (plaintiff exhibit D).

On or about May 1, 2007, plaintiff and Zell LLC entered into a second lease for rent of Room 20 located on the second floor of the building (plaintiff exhibit E). Zell, likewise, entered into a personal guarantee for the payments of rent and other obligations of the second lease that same day (*id.*). After the expiration of the lease on April 30, 2009, Zell LLC continued in possession as a month-to-month tenant, and was required to pay plaintiff monthly rent in the amount of \$850. Beginning in October 2017 through October 2018, Zell LLC failed to pay rent. The outstanding monies due to plaintiff during that period total \$11,050.00. Plaintiff submits the rent ledger for the second lease as proof of monies due (plaintiff exhibit F).

This action was commenced with the filing of a summons and verified complaint on February 13, 2019 and service of the summons and complaint upon Zell LLC on February 22, 2019 by personally delivering the same to the authorized agent with the Office of the Secretary of State of the State of New York, as well as by personally serving Zell LLC on March 7, 2019, at its business address (plaintiff exhibit B). On March 7, 2019, Zell was also served at both the business address and last known residence (*id.*). Zell's wife, Helene Zell, accepted service (*id.*). Defendants have not answered the summons and complaint or otherwise appeared in this action, and are currently in default. Plaintiff's motion is supported by a copy of the relevant lease, guaranty, statement of summons due and owing and proof of the legal fees incurred by plaintiff in this action, as well as proof of service. Plaintiff moves for a default judgment against defendants on plaintiffs' claims to recover unpaid rent due and owing under the lease.

On a motion to enter a default judgment, a 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 (*see SMROF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]). "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]).

Plaintiff has provided proof that the notice of motion, as well as the summons and verified complaint were properly served on defendants. Despite such notice, the defaulting defendants failed to answer the complaint, nor did they obtain an order from the court requesting an extension of time in which to do so. Additionally, defendants failed to submit opposition to the instant motion.

In its verified complaint, plaintiff asserts causes of action for breach of a lease agreement and guaranty, by failing to make payments and for an account stated. The elements of a breach of contract cause of action are: formation of a contract between the parties; performance by plaintiff; defendants' failure to perform and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). An account stated exists when bills, invoices or statements evidence a party's indebtedness and the purportedly indebted party fails to object within a reasonable amount of time (*Russo v Heller*, 80 AD3d 531 [1st Dept 2011]).

Plaintiff established a prima facie claim for breach of contract, as it submits the lease agreements between the parties (plaintiff exhibits C & E), that plaintiff performed under the contract, that defendant breach the lease agreement by failing to pay plaintiff in accordance with the terms of the agreement, and that plaintiff was damaged in the total amount of \$75,900.17. Additionally, the rent ledgers reflect the dates and rents due and owing to plaintiff.

Plaintiff also submits the signed guaranty agreements and underlying leases, and the affidavit of Joseph Y. Ipek, president of plaintiff, setting forth the sums for rent due and owing as noted in the rent ledgers, establishes a prima facie case of breach of the guaranty.

“[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement” (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 [1st Dept 2012] [internal quotation marks and citation omitted]). The terms of the subject guaranty are clear, unambiguous, absolute and unconditional and, having defaulted in this action, Zell has not shown, or even alleged, any fraud, duress or any other wrongful conduct by plaintiff regarding the agreement.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment on the verified complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff, Altin Realty Corp., and against defendants S.H. Zell & Sons, LLC and Stanley S. Zell, jointly and severally, in the amount of \$75,900.17, together with interest at a rate of 9% per annum from the date of July 15, 2019 through to the date of entry of judgment by the Clerk of the Court, as calculated by the Clerk of the Court, which includes legal fees in the amount of \$5,050.17, plus costs and disbursements as taxed by the clerk upon submission by plaintiff of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiff's motion seeking additional attorneys' fees is severed and referred to a special referee to hear and determine the reasonable attorneys' fees owed to plaintiff; and it is further

ORDERED that a copy of this order with a notice of entry be served by the movant upon the defaulting defendants by first class mail and the Clerk of the Court (60 Centre Street, Room 119) is directed upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures of Electronically Filed Cases.

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.

12/9/2019
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

WD
HON. W. FRANK PERRY, III
J.S.C.

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE