

BRL Hampton Rd. LLC v Heather
2020 NY Slip Op 32248(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 651511/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART IAS MOTION 48EFM

Justice

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INDEX NO. 651511/2019

BRL HAMPTON ROAD LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

ASHLEY HEATHER, SPUR INNOVATION, INC., 630
HAMPTON ROAD LLC,

DECISION + ORDER ON
MOTION

Defendant.

-----X

ASHLEY HEATHER, SPUR INNOVATION, INC., 630
HAMPTON ROAD LLC

Third-Party
Index No. 595831/2019

Plaintiff,

-against-

BRUCE LEWIN

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73,
74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

JUDGMENT - DEFAULT

Masley, J.:

In motion sequence number 004, plaintiff BRL Hampton Road LLC moves to strike the answer, defenses, and counterclaim of defendants Spur Innovation, Inc. and 630 Hampton Road LLC (630 Hampton) (collectively, the Corporate Defendants) and for entry of a judgment in favor of plaintiff against 630 Hampton on plaintiff's first cause of action in the amount of \$1,000,000, plus interest at 9% per annum from May 18, 2018 to

present and costs and disbursements. Plaintiff also moves, pursuant to CPLR 2111(d)¹, to reargue this court's order dated January 23, 2020, modifying the order to release the funds held in escrow by plaintiff's attorney. This motion is not opposed by the Corporate Defendants. Defendant Ashley Heather opposes the release of the escrow funds only.

On January 23, 2020, this court issued an order granting defense counsel's motion to withdraw as counsel (NYSCEF Doc. No. [NYSCEF] 58, January 23, 2020 Decision and Order). In that order, the Corporate Defendants were directed to retain counsel, in accordance with CPLR 321 and New York Limited Liability Company Law, within 10 days (*id.* at 2). If the Corporate Defendants did not comply, their answer could be stricken (*id.*). To date, counsel has not been retained. Thus, the portion of plaintiff's motion seeking to strike the Corporate Defendants' answer, including defenses and counterclaim, is granted.

CPLR 3215 (a) provides that "[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, the plaintiff may seek a default judgment against him." "[S]triking an answer is the equivalent of a default in answering, and a plaintiff's right to recover upon a defendant's default in answering is governed by CPLR 3215" (*Jones v Corley*, 35 AD3d 381, 381 [2d Dept 2006] [citations omitted]).

"On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against

¹ Plaintiff's counsel cites this section of the CPLR in the Notice of Motion; however, CPLR 2221 (d) governs motions to reargue.

a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing" (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup Ct, NY County 2018] [citations omitted]). "CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the [moving] party of the facts constituting the claim" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]). The movant may, however, file a "verified complaint instead of the affidavit when the complaint has been properly served" and, because "the [movant] 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" (*id.* at 70-71).

Plaintiff has not met its burden of proof. Plaintiff fails to submit an affidavit from a person of knowledge and the amended complaint is not verified. Thus, the portion of this motion seeking a default judgment is denied without prejudice.

Plaintiff also moves to reargue this court's January 23, 2020 order, wherein the court ordered that the \$73,322.00 held by defendants' former counsel be transferred and held in escrow by plaintiff's counsel. Plaintiff seeks to modify that order to permit the release of the escrow funds based on a decision by Southampton Village Justice Michael Solomon, Suffolk County (Suffolk Action). In the Suffolk Action, Justice Solomon, after trial, granted plaintiff a judgment of possession and warrant of eviction and a money judgment in the amount \$267,254.97, comprised of the base rent for the months of April 2019, May 2019, June 2019, July 2019, August 2019, September 2019, and October 2019, plus adjustments and allowances (NYSCEF 73, Suffolk Action Trial Decision at 6). In support of its motion, plaintiff submits an affirmation of defendants'

former counsel submitted in this action in support of defendants' motion to dismiss the amended complaint (NYSCEF 75, Hazin aff). In this affirmation, Hazin affirms that defendant 630 Hampton deposited the April 2019 and May 2019 rent monies into his firm's escrow account; the monthly rent payment amount was \$36,666 (*id.* at ¶ 11 n. 5).

Defendant Heather submits opposition to this portion of plaintiff's motion; however, Heather cannot represent Hampton 360, and thus, the opposition will not be considered. Nevertheless, even if the court did consider it, Heather's argument that the funds should not be released because they were borrowed by Hampton 360 from other third parties is without merit. As these funds in escrow satisfy a portion of plaintiff's judgment in the Suffolk Action, the funds shall immediately be released. This portion of the motion is granted.

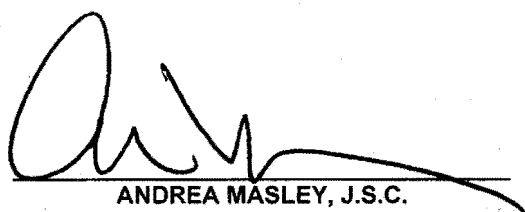
Accordingly, it is

ORDERED that plaintiff's motion is granted, in part; and it is further

ORDERED that defendants Spur Innovation, Inc. and 630 Hampton Road LLC's answer is stricken; and it is further

ORDERED that plaintiff's counsel is directed to release the \$73,332.00 it holds in escrow immediately to plaintiff.

7/10/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: