40 Broad Assoc. No. 2 LLC v Cafe Gallery V Inc.
2021 NY Slip Op 30032(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 656257/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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40 BROAD ASSOCIATES NO. 2 LLC,

Plaintiff,

- v -

CAFE GALLERY V INC., and YONG LEE

Defendant.

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INDEX NO. 656257/2019

MOTION DATE 11/24/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover $6,861,934.95 for unpaid rent, additional rent, and accelerated rent, the plaintiff, 40 Broad Associates No. 2 LLC, owner of a commercial condominium unit, moves pursuant to CPLR 3215 for the second time for leave to enter a default judgment against the defendant Café Gallery V, Inc., the former commercial tenant, and defendant Yong Lee, personal guarantor on the lease. No opposition is submitted. The motion is granted to the extent described herein.

As a preliminary matter, by an order dated October 26, 2020, the court granted the plaintiff permission to file the instant motion and directed the plaintiff to establish "sufficient cause" for the delay in so moving pursuant to CPLR 3215(c). Since the motion has been filed within one year of the defendants' default, however, the motion is timely and sufficient cause need not be shown in order for the court to grant the relief sought.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006). While the "quantum of proof necessary to support an application for a default judgment is not

exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a prima facie case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default." Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

By order dated January 1, 2020, the court denied the plaintiff's first application for relief pursuant to CPLR 3215 because the plaintiff failed to submit sufficient proof of its claims. The plaintiff had submitted the summons and verified complaint, the underlying lease dated June 29, 2016, a lease amendment dated June 6, 2018, and an affirmation of counsel. The plaintiff alleged in the complaint that as of May 2019, the defendants were in arrears, that it commenced a summary proceeding in the Civil Court, New York County, and that it was granted possession of the premises on June 11, 2019. The plaintiff purported to provide a copy of a Civil Court order and a Marshal's inventory, but neither were legible. The plaintiff further alleged that as of the filing of the complaint, October 23, 2019, the defendants were in arrears for past due rent and additional rent totaling $385,333.63 and summarily listed the various components of those charges, without any supporting documentation. Specifically, no ledger, invoices or utility or tax bills were included in the motion papers. The plaintiff also alleged that the defendants failed to pay the security deposit of $81,000.00, but it did not allege when the defendants took possession of the premises. Finally, via the complaint and counsel's affirmation, the plaintiff alleged that, in addition to past due amounts, pursuant to Section 17 of the lease, it was entitled to payment of all rent due for the period of October 1, 2019, through July 31, 2033, discounted to present value of $6,918,534.71, and that it made such demand upon the defendants, who failed to pay. The plaintiff did not demonstrate how it calculated the sums sought or offer any detail as to why the premises were not re-let. The court found that the plaintiff's submissions failed to establish that under the lease terms and the circumstances presented it was entitled to accelerated rent through 2033, or to any of the other sums demanded.

On the instant application, the plaintiff has made numerous additional submissions including, *inter alia*, (1) legible copies of the Civil Court order of possession and Marshal's inventory, (2) the plaintiff's written demand for accelerated rent dated September 27, 2019, (3) a worksheet showing the present value calculations for accelerated rent, (4) the affidavit of Stephanie Knight, leasing manager for the plaintiff's former managing agent with regard to the subject lease, (5) resident ledgers applicable to the defendants' leasehold, (6) the affirmation of Chaim Simkowitz, CEO of the plaintiff's current managing agent with regard to the subject lease, and (7) the affidavit of Richard Kave, managing director of the company hired by the plaintiff to attempt to re-let the subject commercial space beginning in July 2019.

These submissions are sufficient to cure the deficiencies identified in the court's January 1, 2020, order. They establish a *prima facie* breach of contract claim against the defendant Café Gallery V, Inc., insofar as they show (1) the existence of a contract, (2) the plaintiff's

performance under the contract, (3) the corporate defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Though the rent acceleration provision of the lease imposes a penalty on the defendants that may be disproportionate to the actual amount of damages the plaintiff has suffered, it is the defendants' burden to show that the bargained-for liquidated damages are, in fact, an unlawful penalty. See 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., 24 NY3d 528 (2014). Since the defendants failed to oppose the plaintiff's motion, they have not met that burden.

The proof also establishes the plaintiff's cause of action for breach of guaranty. "Where 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), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and, having failed to oppose the motion, the defendants have not shown any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreement. Moreover, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

The plaintiff's submissions also establish proof of proper service of the summons and complaint upon the defendants and proof of the defendants' default. Accordingly, the plaintiff is entitled to leave to enter default judgment against the defendants in the sum of $6,861,934.95 under the subject agreements.

As to the plaintiff's request for attorney's fees, such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). In light of the terms and conditions of the parties' lease agreement, which provides that corporate defendant shall indemnify the plaintiff against any cost, including attorney's fees, incurred by the plaintiff as a result of the defendant's default under the agreement, the plaintiff is entitled to an award of attorney's fees. However, the plaintiff's submissions are insufficient to establish the precise amount of attorney's fees to which the plaintiff is entitled. Therefore, the court denies the branch of the plaintiff's motion seeking attorney's fees without prejudice to renewal upon the submission of proper papers within 30 days of this order.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is granted to the extent provided below, and the branch of the plaintiff's motion seeking attorneys' fees is denied without prejudice to renewal upon proper papers within 30 days; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the amount of $6,861,934.95, with statutory interest from the date of judgment.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/4/2021
DATE

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	X	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE