# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

201 East 61 LLC, et. al.

INDEX NO. 160567-2021

MOT. DATE

- v -

MOT. SEQ. NO. 001

In Soo Park, et. al.

The following papers were read on this motion to/for default judgment

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| Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits | NYSCEF DOC No(s)._____ |
| Notice of Cross-Motion/Answering Affidavits — Exhibits | NYSCEF DOC No(s)._____ |
| Replying Affidavits | NYSCEF DOC No(s)._____ |

This is an action for a breach of a commercial lease. Plaintiffs now move for an order pursuant to CPLR § 3215 granting them a default judgement against the commercial tenant, defendant, Soo Family Corp. d/b/a Captain Cleaners a/k/a Captain Dry Cleaners ("Soo Family") and against the guarantor, defendant In Soo Park ("Soo Park"). Plaintiffs seeks a money judgement of $811,459.51 against the defendants for rent plus interest as well as recoupment of their reasonable legal fees, costs and expenses. The motion has been submitted without opposition despite proof of service of notice of the motion on the defendants via first class mail. Therefore, the motion is considered on default.

Plaintiffs have failed to provide proof of service of the summons and complaint on defendant Soo Park in his/her individual capacity. Therefore, the motion must be denied as to this defendant. Plaintiffs have provided proof of service of the summons and complaint upon defendant Soo Family via personal service to Ms. Nancy Dougherty, an authorized agent of the Office of the Secretary of State of the State of New York, in accordance with BCL § 306. Despite such service, Soo Family has not answered the complaint and it's time to do so has not been extended by the court. Therefore, plaintiff has established that the defendant, Soo Family, has defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiffs are entitled to default judgment in their favor, provided they otherwise demonstrates that they has a *prima facie* cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Dated: 7/27/22

**HON. LYNN R. KOTLER, J.S.C.**

**1. Check one:** ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

**2. Check as appropriate: Motion is** ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

**3. Check if appropriate:** ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Plaintiffs are among the current legal owners of the premises located at 201 East 61st Street, Store E, New York, New York 10065 (the "premises"). In September 1988, the prior owner of the premises, non-party the Rakoff-Marolda Corporation ("Rakoff"), leased the premises to non-party Captain Dry Cleaners, Inc. ("Captain") pursuant to a written lease with a term of ten years expiring on September 1998. The lease was assigned by Captain to non-party Ha Family, Inc. by Assignment and Assumption of Lease dated March 1990. In June 2005, Rakoff and Ha Family, Inc. signed an amendment to the lease in which some terms of the lease were changed. The lease was then assigned by Ha Family Inc. to non-party Water Mill Cleaners Corp. by Assignment and Assumption of Lease dated September 2005. Water Mill Cleaners Corp. assigned the lease to the defendant, Soo Family, by Assignment and Assumption of the Lease dated May 2013. Concurrent with Soo Family's execution of the assignment, Soo Park executed a personal guaranty agreement wherein s/he unconditionally guaranteed Soo Family's obligations under the lease. Finally, Soo Family extended the lease agreement by Amendment and Extension of the Lease Agreement dated May 2013 (the "extension"). The extension is signed by Soo Park, in his/her capacity as the president of Soo Family. Pursuant to the extension, Soo Family became the commercial tenant of the premises and the lease term was extended through June 30, 2023. Plaintiff has provided copies of the original September 1988 lease, the March 1990 assignment, the June 2005 amendment, the May 2013 extension and the May 2013 guaranty. Plaintiff has not provided a copy of the May 2013 assignment. However, the defendant signed the extension which acknowledged the May 2013 assignment therein.

In its complaint, the plaintiffs assert two causes of action. The first cause of action is for breach of contract against the tenant, Soo Family. The second cause of action seeks to enforce the guaranty against Soo Park, and a declaration that Soo Park is personally liable for Soo Family's obligations under the lease.

The motion is further supported by the sworn affidavit of Ms. Isabel Negron, the property manager of the premises, who states based upon personal knowledge that the plaintiff 201 East 61 LLC owns the premises and that plaintiff I.R. 201 E 61st LLC has an ownership interest in the premises. She states that 201 East 61 LLC obtained title to the premises in 2013. She further asserts that on or about May 2013, Water Mill Cleaners Corp. assigned its lease to Soo Family, and that Soo Family occupied the premises following the May 2013 assignment. She states that in the same month, Soo Family executed an Amendment and Extension of the Lease which extended the Lease to June 30, 2023 and required the tenant to pay rent and additional rent under the terms of the original 1988 lease. Negron claims that Soo Family breached the lease by failing to pay rent due in November 2016. Negron asserts that Soo Family did not make any further rent payments thereafter. She claims that on or about April 14, 2017, the plaintiffs commenced a non-payment action against Soo Family in the Civil Court of the City of New York, County of New York (index no. 060328/2017) which ended in the issuance of a warrant of eviction and a money judgment of $64,259.61 in favor of the plaintiffs. Negron asserts that Soo Family was evicted from the premises on July 25, 2017. Negron states that at the time of eviction, the tenant owed back rent and additional rent totaling $140,504.73. Of that sum, $64,259.61 was included in the Civil Court judgement, for a remainder of $76,245.12 lost rent from the day of default through to the day of eviction. Negron then states that the plaintiffs lost $423,345.29 in rent from the date of the eviction through the end of the Lease term as a result of the default.

Negron also asserts that Soo Family owes $245,491.02 in additional rent for property taxes. The June 2005 amendment to the lease, which was incorporated into the subsequent assignments, included a clause that states that:

> Tenant agrees to pay Landlord as additional rent for each tax year an amount equal to Tenant's proportionate share of the amount by which the taxes due for such tax year are greater than the Base tax... "Base Tax" shall mean the fiscal tax year 2004/2005... "Tenants Proportionate Share" shall be 20%.

Negron states that the base tax for the 2004/2005 fiscal tax year was $208,824.85. Negron also provides the property tax amounts for the six years between Soo Family's default and the expiration of

the lease. 20% of the differences between those property taxes and the Base tax gives a total of $245,491.02 in additional rent. Therefore, the plaintiffs are entitled to $245,491.02 in additional rent

Next, in her affidavit Negron states that, in accordance with the lease, Soo Family owes $53,932.74 in re-letting expenses for repairs and broker fees. The original 1988 lease whose terms were adopted in every subsequent assignment provides, in part, that:

> in case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent and additional rent shall become due thereupon...(c) tenant... shall also pay Owner liquidated damages for the failure... to observe and perform said Tenant's covenants... In computing such liquidated damages there shall be added to the said deficiency such expenses as owner may incur in connection with re-letting, such as legal expenses, attorneys' fees, brokerage, advertising, and for keeping the demised premises in good order or for preparing the same for re-letting."

The plaintiffs' application is supported by an invoice from the broker demonstrating costs of $50,432.74. Negron states that the plaintiffs incurred $3,500 in expenses to repair the premises. Therefore, plaintiffs are entitled to $53,932.74 in re-letting fees.

Finally, Negron states that the Soo Family owes $12,445.34 in legal fees and expenses. The original 1988 lease states that:

> in the event Tenant herein fails to make any of the installments of rent or additional rents as herein stated, or otherwise defaults under the terms of the lease... and Landlord is required to employ counsel for the collection, enforcement, review or preparation of any documents thereof, then, Tenant shall be liable for reasonable attorney's fees.

Plaintiffs have provided the court with their legal fee invoices and the affirmation of Ryan P. Kaupelis, Esq., attesting to the legal services performed by plaintiff's counsel. The invoices demonstrate that the law firm has billed plaintiff $12,445.34 for legal services provided in connection with the non-payment proceeding and the instant action. Attorney Kaupelis details the services he provided in connection with this matter, as well as his background and experience. Therefore, plaintiff has demonstrated that the hours worked were reasonable and that the charges were commensurate with the work performed (*see i.e. Gamache v. Steinhaus*, 776 NYS2d 310 [2d Dept 2004]). Accordingly, plaintiffs are entitled to the reimbursement for legal fees in the sum of $12,445.34.

Based upon the foregoing, plaintiffs have demonstrated a *prima facie* cause of action for breach of the lease against Soo Family and plaintiffs are entitled to a money judgment for $811,459.51 for unpaid rent, additional rent, and reasonable attorneys' fees together with interest from the date of default, November 1, 2016 (CPLR § 5001; *see Solow v. Bradley*, 273 A.D.2d 75 [1st Dept 2000]).

Finally, plaintiff seeks to enforce the guaranties against Soo Park. As discussed *supra*, plaintiffs have not submitted any evidence of service of the summons and complaint upon Soo Park in his/her individual capacity. Soo Park may have been served in his/her representative capacity as President of Soo Family, but there is no evidence that s/he was served in his/her individual capacity as guarantor. S/he must be served in his/her individual capacity. Therefore, this branch of the motion is denied without prejudice to renewal within 90 days upon proof of proper service of the summons and complaint and motion papers upon In Soo Park. Plaintiff's failure to renew within the time provided will be deemed an unreasonable failure to prosecute and the court will *sua sponte* dismiss this action pursuant to CPLR § 3216.

**CONCLUSION**

In accordance herewith, it is hereby

**ORDERED** that plaintiffs' motion for a default judgment is granted to as to the defendant Soo Family Corp. d/b/a Captain Cleaners a/k/a Captain Dry Cleaners; and it is further

**ORDERED** that plaintiffs' motion for a default judgment is denied as to defendant In Soo Park without prejudice to renewal within 90 days upon proof of proper service of the summons and complaint and motion papers upon In Soo Park. Plaintiff's failure to renew within the time provided will be deemed an unreasonable failure to prosecute and the court will *sua sponte* dismiss this action pursuant to CPLR § 3216; and it is further

**ORDERED** that the Clerk is directed to enter a money judgment in favor of plaintiffs 201 East 61 LLC and I.R. 201 E 61st LLC and against defendant Soo Family Corp. d/b/a Captain Cleaners a/k/a Captain Dry Cleaners for $811,459.51 together with interest from November 1, 2016.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 7/27/22
New York, New York

So Ordered:

**Hon. Lynn R. Kotler, J.S.C.**