SLG Graybar Mesne Lease LLC v Air Promotion Group USA, Inc.
2022 NY Slip Op 33571(U)
October 13, 2022
Supreme Court, New York County
Docket Number: Index No. 159342/2021
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** 18

Justice

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SLG GRAYBAR MESNE LEASE LLC

Plaintiff,

- v -

AIR PROMOTION GROUP USA, INC. D/B/A AIRLINEPROS INC.,

Defendant.

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INDEX NO. 159342/2021

MOTION DATE 03/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

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

Upon the foregoing documents, plaintiff moves for leave to enter default judgment on the complaint pursuant to CPLR 3215 and defendant cross-moves to vacate its default and leave to serve a late answer pursuant to CPLR 3012 (d).

CPLR 3012 (d) provides that "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Factors to consider include "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense" (Emigrant Bank v Rosabianca, 156 AD3d 468, 472-73 [1st Dept 2017]).

The Court finds that defendant "failed to establish a reasonable excuse for its delay in appearing in the action, as the mere denial by its [chairman] of receipt of a copy of the summons and complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service" (Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC, 140 AD3d 1054, 1054–55 [2d Dept 2016]). Plaintiff served defendant via the Secretary of State (BCL 306) on October 20, 2021 and the accompanying receipt demonstrates that process was forwarded to the defendant at 420 Lexington Avenue, Suite 2523, in New York, New York (NYSCEF Doc Nos 2, 6). The affidavit

submitted by defendant's chairman states that plaintiff knows that defendant has occupied "Room 358-60" at the building located at 420 Lexington Avenue, and not Suite 2523, since October of 2017 (NYSCEF Doc No 22 at ¶¶ 50-52). However, if defendant did not receive process from the Secretary of State because of this change in address, it is defendant's own fault for not keeping the Secretary of State apprised of its current address (see Ultimate One Distrib. Corp., 140 AD3d at 1055, quoting Sussman v Jo-Sta Realty Corp., 99 AD3d 787, 788 [2d Dept 2012]). Defendant also claims that service was improper because plaintiff served only one entity "Air Promotion Group USA Inc d/b/a AirlinePros Inc," even though "Airline Pros Inc. is a separate and distinct corporation, formed and existing pursuant to the laws of the State of Florida, and not authorized to conduct business (nor actually conducting business) in the State of New York (NYSCEF Doc No 22 at ¶ 15). Even though defendant fails to submit evidence supporting that that claim as to the difference in the corporate entity/entities, the Court finds that service was proper and defendant is the proper defendant since it is not disputed that Air Promotion Group USA Inc. is a real corporation that was the named tenant on the lease, and the "doing business as" designation is reasonable and proper given that's the name on their business door (see NYSCEF Doc No 31 at ¶ 5, citing NYSCEF Doc No 32).

As for potential meritorious defense(s), defendant does not dispute that it is in breach of the lease in failing to pay rent. Rather, defendant contends that the notice to cure and notice of lease termination were improper. More specifically, defendant claims that the notice to cure was defective because it improperly quoted 3.01 of the lease, which, defendant contends, requires a written demand before a notice to cure and, therefore, the notice of lease termination was improper because it followed a notice to cure without some other preceding written demand. Consequently, defendant claims that plaintiff is not entitled to the liquidated damages as a penalty for holding over, as sought in the third cause of action, because of the improper notice of lease termination. However, the sentence that defendant cites only applies to additional rent and goes on further to state "unless other payment dates are hereinafter

provided." In any event, that paragraph generally states when fixed rent and additional rent is due under the lease, and the Court cannot see where, within the lease, another written demand would be required prior to a notice to cure (see generally NYSCEF Doc No 9). Further, it is undisputed that the plaintiff followed Section 5.01 of the lease regarding lease termination and other relevant provisions regarding the manner of notice. Accordingly, the Court finds that defendant failed to advance a meritorious defense to the claims in the complaint.

While the length of the delay in seeking this relief was relatively short, the parties failed to address the remaining factors in Emigrant Bank (156 AD3d 468) (i.e., prejudice to the parties and whether the delay was willful). Ultimately, the Court finds that defendant failed to sufficiently meet its burden on their cross-motion.

"On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defendant's default" (Katz v Blau, 173 AD3d 987, 988 [2d Dept 2019]). Here, plaintiff submitted adequate proof of service, proof of defendants' default in appearing, and proof of facts constituting the claim for breach of lease. Specifically, plaintiff submitted the lease and subsequent lease modifications, and a party affidavit setting forth plaintiff's compliance with the lease and defendant's default in performing, which resulted in damages. Plaintiff's proof of damages is adequate as to the first cause of action for arrears through January 2022 in the amount of $109,783.97 (see NYSCEF Doc No 8 at ¶¶ 12-13, citing NYSCEF Doc No 16 [ledger]), and the third cause of action for liquidated damages, as the damages are easily computable in accordance with Article 12.01 of the lease in the amount of $91,726.38.

However, the Court cannot direct entry of judgment as to the amount due under the fourth cause of action for reasonable attorneys' fees and the second cause of action for rent from the date of breach

through the expiration date of the lease (September 30, 2022) (see NYSCEF Doc No 8 at ¶¶ 14-18). The second cause of action is based on paragraph 26.01 of the lease which states:

> "If this Lease is terminated because of Tenant's default hereunder, then, in addition to Landlord's rights of re-entry, restoration, preparation for and rerental, and anything elsewhere in this Lease to the contrary notwithstanding, at Landlord's election, all Rent and Additional Rent reserved in this Lease from the date of such breach to the expiration date of this Lease shall become immediately due and payable to Landlord and Landlord shall retain its right to judgment on and collection of Tenant's aforesaid obligation to make a single payment to Landlord of a sum equal to (i) the amount by which (x) the Fixed Annual Rent and Additional Rent payable hereunder for the period to the Expiration Date from the date of such breach, exceeds (y) the then fair and reasonable rental value of the Premises for the same period, both discounted at the prime rate of interest charged by JP Morgan Chase, New York, (or the successor thereto) on the date of such breach to present worth, and (ii) all reasonable out-of-pocket expenses of Landlord in obtaining possession of, and in effecting the reletting of the Premises including, without limitation, alteration costs, commissions, concessions and legal fees" (NYSCEF Doc No 9, lease).

In support of the motion on this claim, the party affidavit cites only a portion of the foregoing lease provision, stating "If this Lease is terminated because of Defendant's default hereunder, then … all Rent and Additional Rent reserved in this Lease from the date of such breach to the expiration date of this Lease shall become immediately due and payable to Landlord" (NYSCEF Doc No 8 at ¶ 14, quoting lease paragraph 26.01). The party affidavit goes on to state that the defendant is liable under this paragraph in the sum of $177,262.32 but with no supporting proof as to how plaintiff came to that conclusion. Therefore, while the Court finds that plaintiff is entitled to recovery on this cause of action, as well as the cause of action for reasonable attorneys' fees, the exact amount due will be determined at an inquest.

Accordingly, it is hereby ORDERED that defendant's cross motion is denied; and it is further

ORDERED that plaintiff's motion for leave to enter default judgment on the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant AIR PROMOTION GROUP USA, INC. d/b/a AIRLINE PROS, INC. on the first cause of

action in the sum of $109,783.97, with interest at the statutory rate from June 1, 2021 until entry of judgment, and on the third cause of action in the sum of $91,726.38, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the second and fourth causes of action are severed and shall proceed; and it is further

ORDERED that an assessment of damages against the defendant is directed as to those remaining second and fourth causes of action; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who 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 service of this order upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J).[1]

This constitutes the decision and order of the Court.

10/13/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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

[1] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.