

One Step up Ltd. v Manhattan Beachwear, Inc.

2023 NY Slip Op 33082(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 653594/2020

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART **37**

Justice

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ONE STEP UP LTD.,	INDEX NO. <u>653594/2020</u>
Plaintiff,	MOTION DATE <u>03/10/2022</u>
- v -	MOTION SEQ. NO. <u>003</u>

MANHATTAN BEACHWEAR, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27

were read on this motion for a

DEFAULT JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion for a default judgment is granted as follows.

Background

On September 12, 2019, plaintiff, One Step Up LTD., as subtenant, entered into a sublease (the "Sublease") with defendant, Manhattan Beachwear, Inc., as sublandlord, for certain office space located on the 32nd floor of 1411 Broadway, New York, New York (the "Premises"). NYSCEF Doc. No. 26 at 27. The sublease incorporated a lease (the "Overlease") between defendant, as tenant, and non-party 1411 IC-SIC Property LLC, as landlord. NYSCEF Doc. No. 26 at 62. Pursuant to the Sublease plaintiff was to take possession of the Premises on December 2, 2019 ("Commencement Date"), and would begin paying rent five months later, on April 2, 2019. Id. The plaintiff's monthly rent for the Premises the first year was \$59,584.00. Id.

Pursuant to § 2.1 of the Sublease:

all of the terms, covenants, conditions and provisions in the Overlease, including specifically the provisions regarding Tenant's default and Landlord's remedies with respect thereto, are hereby incorporated in, and made a part of this Sublease, except ... (iii) [where they] are inconsistent with or modified by any of the terms, covenants or conditions of this Sublease.

NYSCEF Doc. No. 26 at 30.

Pursuant to § 2.1 (d) of the Sublease, plaintiff's "covenant to pay Fixed Rent and Additional Rent ... shall be independent of every other covenant in this Sublease." NYSCEF Doc. No. 26 at 30.

Pursuant to § 2.2 of the Overlease, so long as the tenant is not in default, they “shall have quiet and peaceable possession of the Premises ... and Landlord shall not disturb such possession except as expressly provided in this Lease.” NYSCEF Doc. No. 26 at 70.

Pursuant to § 27.17 of the Overlease, “the time for performance of any obligation of Landlord or Tenant under this Lease shall be excused during and extended by any period during which such party shall be prevented from performing such obligation by reason of Force Majeure.” NYSCEF Doc. No. 26 at 125. The Overlease defines Force Majeure, pursuant to § 1.1(g), as “any acts of God, governmental restriction, requirements of Law ... or any other cause or event beyond Landlord’s or Tenant’s reasonable control by which such party shall be hindered, delayed or prevented from performance of any act under this Lease.” NYSCEF Doc. No. 26 at 68.

Pursuant to § 8.2 of the Sublease, defendant agreed to reimburse plaintiff for “hard and soft” construction costs incurred in plaintiff’s initial buildout (“Construction Contribution”). NYSCEF Doc. No. 26 at 14. Pursuant to § 8.4 of the Sublease, defendant would pay the Construction Contribution upon substantial compliance with the Sublease and upon defendant’s receipt of a request, as long as it was made within 270 days of the Commencement Date. Id.

Pursuant to § 9.1 of the Sublease, plaintiff agreed to provide defendant a \$197,308.77 letter of credit (the “Letter of Credit”) as security for the Sublease. NYSCEF Doc. No. 26 at 16. The same subsection states that, in the event of default “in respect of any of the terms, provisions and conditions of [the Sublease], [defendant] may make a demand for payment under said Letter of Credit and use, apply, or retain the whole or any part of the proceeds thereof ... to the extent required for the payment of any Sublease Rents, or any other sum as to which Subtenant is in default.” Id. (emphasis added).

On November 5, 2019, plaintiff alleges it caused the Letter of Credit to be issued to defendant. NYSCEF Doc. No. 26 at 16 ¶ 16.

On March 7, 2020, then-New York Governor Andrew M. Cuomo declared a state of emergency due to the global COVID-19 pandemic. On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8 requiring, inter alia, that all non-essential businesses “reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m.” Plaintiff, “an apparel manufacturer and distributor, is not considered an essential business.” NYSCEF Doc. No. 26 at 3 ¶ 18.

On May 18, 2020, plaintiff’s counsel emailed defendant that “the building has been closed. Subtenant has not been able to commence construction. Subtenant needs the 6 month rent abatement.” NYSCEF Doc. No. 26 at 161.

Plaintiff, believing the force majeure clause in the Overlease applied, did not pay rent on the Premises in May, June, or July 2020.

On July 24, 2020, plaintiff alleges that defendant drew down on the Letter of Credit for its full amount of \$197,308.77. NYSCEF Doc. No. 26 at 4 ¶ 32.

On August 4, 2020, plaintiff sued defendant asserting three causes of action for: (1) breach of the Overlease in the amount of \$197,308.77 (amount of the Letter of Credit); (2) breach of covenant of quiet enjoyment in the amount of \$350,000; and (3) declaratory judgment that, inter alia, due to the COVID-19 pandemic, the Overlease's "Force Majeure" and "Quiet Enjoyment" clauses were triggered such that plaintiff, despite not paying rent, was in compliance with the Sublease and, further, was entitled to an extension of time to obtain a Construction Contribution from defendant. NYSCEF Doc. No. 1.

On October 14, 2020, defendant answered with a general denial, four defenses, and eight affirmative defenses. NYSCEF Doc. No. 4.

In a Decision and Order dated October 18, 2021, Justice Debra James granted a motion by defendant's counsel to be relieved, gave defendant 30 days to obtain new counsel if it so chose, and directed both parties to file "a proposed preliminary conference order or competing proposed preliminary conference orders on November 30, 2021." NYSCEF Doc. No. 21.

On November 30, 2021, plaintiff filed a proposed preliminary conference order. NYSCEF Doc. No. 24. Defendant has failed to file a proposed preliminary conference order or otherwise appear in this action since the October 18, 2021, Decision and Order.

On February 25, 2022, plaintiff moved, pursuant to CPLR 3215, for a default judgment, based on defendant's failure to file a proposed order as directed, granting its first cause of action, in the amount of \$197,308.77 plus interest from July 24, 2020, and directing an inquest on damages sustained pursuant to its second cause of action. NYSCEF Doc. Nos. 25 and 26.

Discussion

To obtain a default judgment, a plaintiff must submit proof of service of the summons and complaint, the facts constituting the claim, the default, and the amount due. CPLR 3215. "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." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

Plaintiff's argument that it did not owe rent to defendant because of Governor Cuomo's Executive Orders is unavailing. While the Overlease's force majeure clause would arguably obviate the rent obligations of *defendant*, as tenant, during the early months of the pandemic, that same clause does not apply to plaintiff, as subtenant, because when the Overlease's clauses that "are inconsistent with or modified by any of the terms, covenants or conditions" of the Sublease, the Sublease prevails, and § 2.1(d) of the Sublease is clear that plaintiff's "covenant to pay [rent] shall be independent of every other covenant in this Sublease." See 558 Seventh Ave. Corp. v Times Sq. Photo Inc., 194 AD3d 561, 562 (1st Dept 2021), appeal dismissed, 37 NY3d 1040 (2021) ("Although the force majeure clause in the lease would excuse the parties from their obligations under the lease for the duration of certain circumstances beyond their control, the clause expressly excepts the tenant's obligation to pay rent and additional rent."); Bremen House, Inc. v LoBosco, 214 AD3d 557, 558 (1st Dept 2023).

However, plaintiff is correct that, pursuant to § 9.1 of the Sublease, defendant was only entitled to draw down from the Letter of Credit "to the extent required for the payment of any Sublease Rents, or any other sum as to which Subtenant is in default," and, therefore, plaintiff is entitled to \$18,556.77 (\$197,308.77 [Letter of Credit] minus \$178,752, [\$59,584.00 rent for May, June, and July]), plus interest from July 24, 2020.

Plaintiff's second cause of action, for breach of the Overlease's covenant of quiet enjoyment fails, as that covenant only applies if the subtenant is not in default and, as established above, here plaintiff defaulted on the sublease when it failed to pay rent for May through July 2020.

Conclusion

Therefore, the motion of plaintiff, One Step Up LTD., for a default judgment against defendant, Manhattan Beachwear, Inc., is hereby granted in part on its first cause of action, denied as to its second cause of action, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$18,556.77 plus statutory interest from July 24, 2020.



9/5/2023

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			