

**CPT 360 Lexington, LLC v Premium Capital Funding
LLC**

2010 NY Slip Op 33507(U)

December 20, 2010

Sup Ct, NY County

Docket Number: 106258/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 106258/2010

CPT 360 LEXINGTON, LLC

vs

PREMIUM CAPITAL FUNDING LLC

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

DEC 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 12/21/10

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

CPT 360 LEXINGTON, LLC,

Plaintiff,

-against-

PREMIUM CAPITAL FUNDING LLC
(d/b/a TOPDOT MORTGAGE),

Defendant.

-----X

Decision/Order

Index No.: 106258/10

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's n/m [§ 3215] w/GB affid, MDC affirm., exhs 1

Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a lease agreement for the building located at 360 Lexington Avenue, New York, New York, Floor 16 (the "Premises"). Presently before the court is plaintiff's motion for entry of a default judgment against defendant, pursuant to CPLR § 3215. This motion was previously denied by the court on September 29, 2010, without prejudice to renew within 60 days, for failure to comply with CPLR § 3215[g][4][i] and failure to provide a sworn statement by someone with personal knowledge (Order, Gische J., 9/29/10).

On the instant motion, plaintiff has filed proof that an additional copy was mailed to defendant on October 8, 2010, more than twenty (20) days before seeking entry of a judgment on default. BCL § 306 and CPLR § 3215[g][4][i].

This motion is brought within one year of defendant's default and despite such

notice and additional notice, defendant has not appeared and its time to do so has expired. This motion has been submitted to the court without opposition and it will be decided on default.

FILED

DEC 23 2010

Discussion

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). 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 N.Y.2d 728 [1st Dept. 1984]).

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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. Blderman Industries U.S.A., Inc., 242 A.D.2d 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 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

Plaintiff claims that defendant owes \$94,530.93 for rent, additional rent, and liquidated damages for February 1, 2010 through October 1, 2010, plus interest, costs, and attorney's fees.

Plaintiff provides the affidavit of Grace Bellino ("Bellino"), manager of collections and property administration for plaintiff. Plaintiff asserts two causes of action against defendant for breach of contract and attorney's fees. Plaintiff claims that on November 26, 2008, defendant entered into a written lease agreement (the "Lease"), for a term commencing December 1, 2008 and ending November 30, 2011. Plaintiff states that

defendant vacated the Premises on May 5, 2010 and has failed to make payments pursuant to the Lease, from February 1, 2010, the date of default.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990). The above claims establish the elements of a *prima facie* cause of action for breach of contract and plaintiff has therefore met its burden.

Plaintiff has established that defendant was obligated to pay rent of \$9,576.00 per month for the entire lease term. Therefore, plaintiff is entitled to a money judgment in the principal amount of \$94,530.93 for rent, additional rent, and liquidated damages for February 1, 2010 through October 1, 2010, plus interest at the statutory rate, from June 1, 2010 (as a reasonable intermediate date [CPLR § 5001(b)]).

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (2d Dept. 1986). Here, the Lease expressly provides in Article 21 that defendant is liable for plaintiff's attorneys' fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiff may recover from defendant for its reasonable attorneys' fees to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the clerk is hereby directed to enter a money judgment in favor of plaintiff, CPT 360 LEXINGTON, LLC, and against defendant, PREMIUM CAPITAL FUNDING LLC (d/b/a TOPDOT MORTGAGE), in the amount of ninety-four thousand five hundred thirty dollars and ninety-three cents (\$94,530.93); and it is further

ORDERED that interest shall run from June 1, 2010 (as a reasonable intermediate date [CPLR § 5001(b)]), at the statutory rate; and it is further

ORDERED that the issue of what plaintiff may recover from defendant for its reasonable attorneys fees is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
December 20, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

DEC 23 2010

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