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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK Part 52/63

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SPECTRA PHOTO ART INC.,

Plaintiff,

against

Index No. LT-304433/24

DECISION/ORDER

LAGUARDIA SMOKE & CONVENIENCE INC.
510 LaGuardia Place, Unit #1A
New York, New York 10012

Submitted: 6/12/24

Respondent(s) -Tenant(s)

"XYZ Corporation"

Respondent(s) -Undertenant(s)

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Recitation, as required by CPLR§ 2219(a), of the papers considered in the review of this Motion:

Respondent's Motion to Vacate Default and Restore Case to Calendar..1
Petitioner's Opposition and Cross-Motion for Summary Judgment..2

In this non-payment summary proceeding, petitioner seeks money judgment in the amount of $103,408.00, together with final judgment of possession and issuance of warrant. A review of the papers reveals respondent entered into a commercial lease agreement ("Lease") with petitioner, with a commencement date of 11/1/22, and a two-year term with fixed monthly rent of $15,450.00, plus additional rent as provided by the Lease. Respondent failed to pay rent for the months of December 2023 and January 2024, and on 1/18/24, petitioner served respondent with a 14-Day Notice to Cure. Respondent failed to cure its default and on 3/15/24 petitioner served respondent with a non-payment petition and notice of petition. Pursuant to RPAPL §732[3], respondent had 10-days to file an answer to the 3/15/24 petition. Respondent failed to respond to the petition and defaulted on 3/25/24. Two weeks later, on 4/8/24, petitioner submitted a warrant requisition.

Respondent now moves to vacate its default, restore the matter to the calendar and file a late answer, arguing that it has a reasonable excuse for its default and a meritorious defense to petitioner's claims. Petitioner opposes vacatur and alternatively cross-moves for summary

judgment, should respondent be granted leave to file late answer.

In order to vacate a default judgment, a defendant must demonstrate an excusable default and a meritorious defense (CPLR 5015[a]; Yang v. Knights Genesis Group, 223 AD3d 639 [1st Dept 2024]; U.S. Bank Trust N.A. v. Rivera, 187 AD3d 624 [1st Dept 2020]). In the instant case, respondent argues its default was excusable because: (a) personal service of the petition was not made on respondent's "owner and/or corporate officer"; (b) respondent was lured into default through "ongoing negotiations" with petitioner; and (c) the "lateness was *de minimus*" (NOM ¶¶ 23-31).

Respondent's claim that "personal service" of the petition and notice of petition was required is incorrect. RPAPL §735(1) expressly permits conspicuous service of the petition and notice of petition in instances where prior attempts at personal service or substitute service were unsuccessful. In the case at bar, petitioner has furnished a notarized affidavit of service dated 3/15/25, which states that, following two prior attempts at service, respondent was served by conspicuous service, by "affixing a true copy" of the petition and notice of petition "to the entrance door" of the subject premises at 510 LaGuardia Place, Unit #1A, New York, NY 10012 (Opp. Exh. 3). The affidavit further states on 3/15/25, following conspicuous service, copies of the petition and notice of petition were mailed to respondent, at the premises address, by certified mail and by regular first-class mail. This is precisely the manner of service set forth by RPAPL §735.

A process server's sworn affidavit of service attesting to the proper delivery of the summons and complaint constitutes *prima facie* evidence of service in the manner described, and therefore, gives rise to a presumption of proper service" (Franpo Realty, LLC v. Power Furniture Inc., 213 AD3d 604 [1st Dept 2023]; Deutsche Bank Natl. Trust Co. v Patisso, 193 AD3d 814, 816 [2d Dept 2021]). Mere conclusory denials of receipt of service are insufficient to rebut the presumption of proper service created by the properly executed affidavit of service herein (see, Ocwen Loan Servicing, LLC v. Ali, 180 AD3d 591 [1st Dept 2020], lv dism 36 NY3d 1046 [2021]; see also, Perlbinger Holdings LLC v. Patel, 202 AD3d 578 [1st Dept 2022], lv den 39 NY3d 905 [2022]). Accordingly, respondent's self-serving, conclusory denials of service are insufficient to constitute reasonable excuse for its default.

Respondent's argument that it was induced into default through ongoing negotiations is similarly unavailing. A review of the record reveals the sole documentary evidence of negotiations between the parties is a brief email exchange beginning on 4/11/24 and concluding on 4/15/24 (Opp, Exh. 5). Although the parties discuss potential settlement in this email exchange, all of the correspondence therein occurred more than two weeks after respondent's 3/25/24 default. As such, the 4/11/24 through 4/15/24 email exchange cannot be relied upon as an excuse for defaulting.

Respondent's claim that its failure to file an answer within the 10-day time limit set forth by RPAPL §732[3] was merely *de minimis*, is also unpersuasive. A summary proceeding is a special proceeding created by statute, and it is well established that there must be strict compliance with the statutory requirements (MSG Pomp Corp. v. Doe, 185 AD2d 798 [1st Dept 1992]). Moreover, this is not a case where respondent was merely one day late in complying with RPAPL §732(3). In the instant action, petitioner served respondent on 3/15/25, and 24-days later respondent still had not filed an answer, prompting petitioner to submit its 4/8/24 warrant requisition. Under these circumstances, respondent's persistent failure to file an answer was neither *de minimis* nor reasonable.

Absent a reasonable excuse, vacatur is not appropriate regardless of whether respondent may have a potentially meritorious defense (Yang, *supra*, at 639; Rivera, *supra*, at 625). The Court notes that respondent's attempt to frame a meritorious defense through allegations that (a) it was "constructively evicted" due to ongoing street/sidewalk construction; and (b) predicate notice was defective, are wholly unsupported by the record. Other than a self-serving, conclusory statement, respondent has furnished no evidence, photographic, documentary or otherwise, that there was any construction related interference with its day-to-day business during any prescribed period of time during the leasehold period. To demonstrate a meritorious defense, a party must do more than merely make conclusory allegations or vague assertions (Castillo v. 2460 Tiebout Ave. Assoc., LLC, 209 AD3d 518 [1st Dept 2022]; Peacock v. Kalikow, 239 AD2d 188 [1st Dept 1997]).

Respondent's assertion that predicate notice was defective is equally meritless. A review of the file indicates the 14-Day Notice properly identified respondent, landlord and the subject premises, and clearly identified the nature of respondent's default (failure to pay December 2023

and January 2024 rent) and the exact dollar amount required to cure said default (Opp, Exh. 2). The record also contains a sworn affidavit of service showing the notice was properly served on 1/18/24 by affixing it to the subject premises and sending copies that same day, by certified mail and regular mail, to respondent at the subject premises, and by email to respondent's owner, Abrahim Kassim, as provided for in Section 20.1 of the Lease (Opp, Exh. 2).

Respondent alternatively alleges predicate notice was insufficient because the signature on the default notice was that of petitioner's attorney. Again, respondent is mistaken. RPAPL §711(2) does not require petitioner's signature on the 14-Day Notice to Cure, and respondent cites to no provision of the lease requiring the default notice be signed by the landlord. Where the notice provision of a lease does not specifically require a default notice to be signed by the landlord, signature on said notice by petitioner's attorney is legally sufficient (Matter of QPII-143-45 Sanford Ave., LLC v. Spinner, 108 AD3d 558 [2nd Dept 2013]; *see also* Beau Arts Prop. Co. v. Whelan, 1990 NY Misc. Lexis 809 [AT 1st Dept][default notice signed by attorney legally sufficient where landlord's signature not required by lease or statute]; *cf.* Siegel v. Kentucky Fried Chicken of Long Is., 108 AD2d 218 [2nd Dept 1985], *affd* 67 NY2d 792 [1986]).

Unlike the case at bar, in Siegel the default provision of the lease specifically required "the landlord" to serve the required notice. In the instant case however, the default provision of the lease (Section 20.1) does not specify who must sign the default notice. Rather, Section 20.1 of the lease simply requires notice to be delivered in writing "to Tenant at Tenant's address" with copies by email to tenant's owner and guarantor, Abrahim Kassim, which was properly effectuated as evidenced by the affidavit of service (Opp, Exh. 2). In addition, the default notice served upon respondent was clear, complete and unambiguous, and the signature line at the bottom of the notice plainly indicated it was issued by "Spectra Photo Art Inc. (Landlord)," and signed on behalf of petitioner "By: Nicholas G. Yokos, Esq., Attorney for Landlord." Accordingly, predicate notice in the instant case was legally sufficient (Spinner, *supra*).

The Court has considered respondent's remaining contentions and finds them without merit.

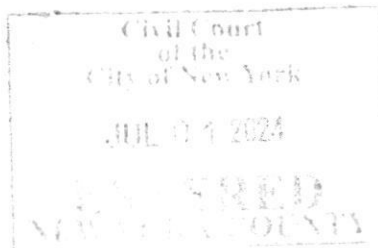
In sum, respondent's motion to vacate its default, restore the case to the calendar and file

late answer is denied. Petitioner's cross-motion for summary judgment and to strike respondent's affirmative defenses is denied as academic. The Clerk of the Court is directed to enter a possessory judgment, issuance of a warrant forthwith, and a money judgment in the amount of $103,408.00 in favor of petitioner and against respondent. Earliest execution date (EDD) of said warrant shall be 7/19/24.

Petitioner is also entitled to reasonable attorney fees pursuant to Section 21.7 of the lease. The parties are directed to appear for an attorney fees hearing on 7/31/24 at 11:45 a.m. in room 421 at 111 Centre Street, New York, NY 10013. The Clerk of the Court is directed to issue notice of said hearing to all parties.

Petitioner is directed to serve respondent with a copy of this order, with notice of entry, by overnight mail on or before 7/12/24.

This constitutes the Court's order and decision.



7/1/24

Jose´ A. Padilla, Jr.
Judge of the Civil Court