

**SASOF TR-43 Aviation Ireland Ltd. v Eastok Avia
FZC, Yanair Ltd.**

2017 NY Slip Op 31514(U)

July 14, 2017

Supreme Court, New York County

Docket Number: 650666/2017

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SASOF TR-43 AVIATION IRELAND LIMITED,
SASOF II (A) AVIATION IRELAND LIMITED

Index No.: 650666/2017

DECISION & ORDER

Plaintiffs,

-against-

EASTOK AVIA FZC, YANAIR LTD.,

Defendants,
-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs SASOF TR-43 Aviation Ireland Limited (SASOF TR-43) and SASOF II (A) Aviation Ireland Limited (SASOF II (A)) move for a default judgment against defendant Eastok Avia FZC (Eastok) pursuant to CPLR § 3215 and (1) directing Eastok to turn over SASOF TR-43’s engines, (2) awarding \$679,600 to SASOF TR-43 for breach of contract; (3) awarding \$454,000 to SASOF II (A) for breach of contract; (4) awarding plaintiffs reasonable legal fees; (5) awarding plaintiffs pre-judgment interest of 2% per month; and (6) awarding plaintiffs post-judgment interest. Seq. 001. The motion is unopposed. Plaintiffs’ motion is granted for the reasons that follow.

This case has its genesis in two agreements to lease certain aircraft engines. One is between SASOF TR-43 and Eastok, and the second is between SASOF II (A) and Eastok. SASOF TR-43 and SASOF II (A) are foreign companies engaged in the business of commercial aviation investing and are incorporated and based in Ireland. Dkt. 1 (Compl.) ¶¶ 13-14.¹ Eastok is a limited liability corporation formed under the laws of and based in the United Arab Emirates.

¹ References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the PDF file.

Id. ¶ 15. By executed agreement on March 30, 2015, as amended on May 8, 2015, SASOF TR-43 leased to Eastok two aircraft engines and associated equipment with an agreed-upon value of over \$2.5 million. Dkt. 11 (SASOF TR-43 Agreement); Dkt. 12 (Equipment Schedule No. 1 to SASOF TR-43 Agreement) at 1; Dkt. 13 (Equipment Schedule No. 2 to SASOF TR-43 Agreement) at 1. Under a separate but similar agreement dated March 30, 2015, as amended on May 6, 2015, SASOF II (A) leased to Eastok a single aircraft engine and associated equipment with an agreed-upon value of over \$4.5 million. Dkt. 14 (SASOF II (A) Agreement) (with SASOF TR-43 Agreement, Agreements); Dkt. 15 at 2 (Equipment Schedule No. 1 to SASOF II (A) Agreement). Under the Agreements, Eastok was to make lease payments of \$80,000 per month (termed “Basic Rent” in the Agreements) plus pay “Supplemental Rent” based on the number of “flight cycles” flown on each engine per month (Dkt. 12 at 2, 7; Dkt. 13 at 2-3) to SASOF TR-43. \$60,000 per month Basic Rent was to be paid to SASOF II (A) (Dkt. 15 at 2). The Agreements, under their terms, are governed by New York law. Dkt. 11 at 28 & 14 at 28.

Plaintiffs allege that Eastok ceased making the required payments to SASOF II (A) in May 2016 and to SASOF TR-43 in July 2016. Dkt. 10 (Miller Aff.) ¶¶ 28, 33. Under the Agreements, overdue payments bear 2% interest per month from the due date until the date of payment. Dkt. 11 at 10 & 14 at 10. Failure to provide timely lease payments constitutes an “Event of Default” under Section 15 of the Agreements. Dkt. 11 at 23 & 14 at 23. An Event of Default permits plaintiffs, upon declaring that the lease is in default, to, inter alia, demand immediate return of the engines, terminate the leases, and pursue legal action to enforce their rights under the Agreements. Dkt. 11 at 23-25 & 14 at 23-25.² On September 2, 2016, plaintiffs

² Termination of the leases also obliges Eastok to return the engines to plaintiffs. Dkt. 11 at 16, 24-25 & 14 at 16, 24-25.

emailed³ notices of default to Eastok's designated recipient under Section 19(a) of the Agreements, demanding return of the engines. Dkt. 16. On November 7, 2016, plaintiffs emailed notices of termination to Eastok, reiterating their demand for return of the engines. Dkt. 17. The record is silent on whether Eastok received the notices or responded to the emails.⁴

The instant action was commenced on February 6, 2017.⁵ The complaint asserted the following causes of action, numbered here as in the complaint: (1) replevin; (2) conversion; (3) breach of contract; and 4) unjust enrichment. Compl. ¶¶ 44-66. Service of the summons and complaint on Eastok in the United Arab Emirates was completed via USPS registered mail on February 21, 2017, in accordance with Section 19(g) of the Agreements. Dkt. 9 (Aff. Of Service

³ Plaintiffs' affidavits submitted with their motion are silent on the mode of delivery of NYSCEF docket entries 16 (notices of default) and 17 (notices of lease termination), but the face of the documents state that they were sent "via email."

⁴ Under Section 19(a) of the Agreements, "notices required or permitted to be given hereunder shall be in writing and shall be deemed to have been given when *hand-delivered or sent by next business day delivery service* to the party to which they are directed at the address shown below, or to such other address as either party shall hereafter notify the other." See Dkt. 11 at 27 & 14 at 27 (emphasis added). The section specifies a P.O. Box address and an email address for Eastok in the United Arab Emirates. See Dkt. 11 at 27 & 14 at 27. A demand for return of the engines and termination of the lease require either formal delivery or actual notice under the contract, which plaintiffs have not shown by mere submission of the emails. See Dkt. 11 at 24 & 14 at 24 (stating that lessor may "declare any or all Leases to be in default" upon an "Event of Default" and may demand the return of the engines to lessor upon such declaration); Dkt. 11 at 24-25 & 14 at 24-25 (stating that lessor may, upon declaration of default, "terminate any Lease ..., by written notice to Lessee and/or repossess the Engine(s)"). Nevertheless, plaintiffs unquestionably provided constructive notice of default and termination under the Agreements by effectuating service of the complaint and motion papers on Eastok by mail, as discussed below, in accordance with Section 19(g) of the Agreements. See Dkt. 11 at 28 & 14 at 28 ("Notices hereunder shall be conclusively presumed received as evidenced by a delivery receipt furnished by the United States Postal Service or any reputable commercial delivery service.").

⁵ Co-defendant YanAir, Ltd. (YanAir) is incorporated in Ukraine. Compl. ¶ 16. Plaintiffs allege that YanAir is in possession of SASOF TR-43's engines. Compl. ¶¶ 39-43. Plaintiffs assert claims against YanAir for replevin, conversion, and unjust enrichment and are attempting service on YanAir pursuant to the Hague Convention. Dkt. 6 (Archer Aff.) at 3 n.1.

of Summons and Complaint).⁶ On April 27, 2017, plaintiffs filed the instant motion for a default judgment for breach of contract against Eastok along with an affirmation from a director of SASOF TR-43 and SASOF II (A), Marcus Miller, of the facts supporting their motion. Dkt. 10 (Miller Aff.). The Miller Affidavit attests that Eastok owes SASOF TR-43 \$679,600 for eight months of Basic and Supplemental Rent from September 2016 through April 2017, and that Eastok owes SASOF II (A) \$454,000 for “seven plus months” of Basic Rent from June 2016 through January 19, 2017, when SASOF II (A) recovered its engine. Dkt. 10 ¶¶ 29, 34.⁷

On April 30, 2017, Plaintiffs served the motion papers by mail in accordance with Section 19(g) of the Agreements. Dkt. 20 ¶ 6 (Aff. of Service of Mot. Papers). Neither the complaint nor the motion were answered.

To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(f). A defaulting defendant “admits all traversable allegations in the complaint, including the basic allegation of liability.” *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) (“[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.”). Nonetheless, a defendant’s default does not “give rise to a ‘mandatory ministerial duty’ to enter a default judgment against it. Rather, the [plaintiff is]

⁶ In Sections 19(a) and 19(g) of the Agreements, Eastok agreed to service of process at an address in United Arab Emirates via USPS or commercial delivery service, and to personal jurisdiction and venue in the City of New York, for any action arising out of the Agreements. Dkt. 11 at 27-28 & 14 at 27-28.

⁷ In an apparent error, Miller Affidavit paragraph 34, which is part of a section describing SASOF II (A)’s damages, identifies SASOF TR-43 instead of SASOF II (A). The court assumes that paragraph 34 of the Miller Affidavit was intended to refer to SASOF II (A). Compare Dkt 10 (Miller Aff.) ¶ 34 with Compl. ¶ 10 (noting that SASOF II (A), but not SASOF TR-43, had recovered its engine).

required to demonstrate that [it] at least [has] a viable cause of action.” *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); see *Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006) (McGuire, J., concurring). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citations omitted); see *Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014).

The elements of a breach of contract are the existence of a valid contract, plaintiff’s performance, defendant’s breach, and resulting damages. See *Morris v. 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). Plaintiffs attached the Agreements to their motion papers and aver facts sufficient to show prima facie validity of the Agreements, plaintiffs’ own performance under the Agreements, Eastok’s breach of the Agreements, and resultant damages.

Based on plaintiffs’ affirmations, and Eastok’s effective admissions on default, the court finds that Eastok breached the Agreements by non-payment of the lease payments when due. SASOF TR-43 is entitled to a default judgment on the unpaid Basic and Supplemental Rent, from September 2016 through the earlier of (a) the date of the inquest⁸ and (b) SASOF TR-43’s recovery of its engines, with 2% per month pre-judgment interest. SASOF II (A) is likewise entitled to a default judgment on the unpaid Basic Rent from June 2016 through January 19, 2017, when SASOF II (A) recovered its engine, also with 2% per month pre-judgment interest. Additionally, SASOF TR-43 is entitled to an order directing Eastok to turn over SASOF TR-43’s engines, as the SASOF TR-43 Agreement entitles SASOF TR-43, upon an “Event of Default”

⁸ Since plaintiffs provide only conclusory allegations of past due Basic Rent and Supplemental Rent in their motion papers and fail to detail their calculations, the court will order an inquest as to damages. See *Rokina*, 63 NY2d at 730 (noting that a defaulting defendant, while admitting liability, “does not admit the plaintiff’s conclusion as to damages”).

(such as nonpayment of lease payments when due), to declare a default, demand that Eastok return the engines, and repossess the engines. Dkt. 11 at 24-25.

Plaintiffs request an award of reasonable attorneys' fees under the Agreements. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491 (1989). A party does not waive the benefit of the standard rule against fee-shifting absent "unmistakably clear" language in the contract. *Id.* Sections 16, the Remedies sections, of the Agreements⁹ set forth plaintiffs' remedies in the "Event of Default" and provide the requisite clarity:

Lessee shall be liable ..., upon duly justified and documented invoices, ***for reasonable legal fees and other costs and out-of-pocket expenses actually and directly incurred by Lessor by reason of the occurrence of any Event of Default or the exercise of Lessor's remedies with respect thereto, including all costs and expenses incurred in connection with the return of the Engine*** in accordance with the terms of Section 9 hereof and the applicable Equipment Schedule, or in placing the Engine in the condition required thereby (collectively, the "Default Rate").

⁹ To support plaintiffs' request for attorneys' fees, the Miller Affidavit relies instead on Section 6 of the Agreements, which states as follows:

Lessee shall reimburse Lessor for reasonable attorneys' fees and other legal expenses incurred by Lessor for the purpose of attempting to collect any past due sums payable by Lessee hereunder or for the purpose of repossessing the Engine following the expiration of the Lease Term.

Dkt. 11 at 10 & 14 at 10; Dkt. 10 (Miller Aff.) at 6-7. The Agreements define "Lease Term" as "the term of each Lease of an Engine beginning on the Delivery Date and ending on the Redelivery Date." Dkt. 11 at 4 & 14 at 4. The Agreements define "Redelivery Date" as "the date on which Lessee returns the Engine to the Redelivery location in a condition which complies with all such requirements of this Lease." Dkt. 11 at 4 & 14 at 4. Thus, while Section 6 supports plaintiffs' claim for attorneys' fees incurred in recoupment of past due lease payments, it supports awarding attorneys' fees for repossession of the engines only after they have already been returned. The court does not reach the issue of whether Section 6 reflects a scrivener's error that may be reformed, as Section 16 provides the remedy sought.

Dkt. 11 at 25 & 14 at 25. One remedy provided by Section 16 permits plaintiffs to “proceed by appropriate court action ... to enforce performance by Lessee of the applicable covenants of any Lease and to recover damages for the breach thereof” Dkt. 11 at 25 & 14 at 25. These provisions unmistakably evince Eastok’s intent to reimburse plaintiffs’ reasonable legal fees in prosecuting the instant action to enforce Eastok’s performance and recover damages for its breach—namely, to recover past due lease payments and the engines. Accordingly, it is

ORDERED that plaintiffs’ motion for a default judgment is granted against Eastok Avia FZC and in favor of SASOF TR-43 Aviation Ireland Ltd. for unpaid Basic Rent of \$80,000 per month and Supplemental Rent from September 2016¹⁰ until the date of the inquest or recovery of the engines, whichever is earlier, plus 2% per month pre-judgment interest from February 1, 2017 until the entry of judgment, and thereafter at the statutory rate; and it is further

ORDERED that plaintiffs’ motion for a default judgment is granted against Eastok Avia FZC and in favor of SASOF II (A) Aviation Ireland Ltd. for unpaid Basic Rent from June 2016¹¹ until January 19, 2017, plus 2% per month pre-judgment interest from September 15, 2016 until entry of judgment, and thereafter at the statutory rate; and it is further

ORDERED that plaintiffs shall submit a proposed order by e-file and with hard-copy to the courtroom within one week of the entry of this order on NYSCEF, directing Eastok to turn over SASOF TR-43’s engines; and it is further

¹⁰ The SASOF TR-43 Lease specifies the “Basic Rent Payment Date” by reference to activities performed on the engines, to which the record is otherwise silent. *See* Dkt. 12 at 2-3; Dkt. 13 at 2-3. For one of SASOF TR-43’s engines (but not the other), the Supplemental Rent pay date is specified as the 10th day of each calendar month. *Compare* Dkt. 12 at 2 with Dkt. 13 at 3.

¹¹ The SASOF II (A) Lease specifies the exact “Basic Rent Payment Date” of each month by reference to the delivery date of the engine, which is not specified in the record. *See* Dkt. 15 at 2.

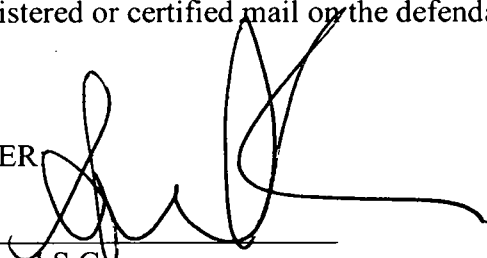
ORDERED that the issues of the amounts owed under the leases and reasonable attorneys' fees that each plaintiff is entitled to recover from Eastok are referred to a Special Referee to hear and determine, and judgment following the Special Referee's inquest shall also direct Eastok to turn over SASOF TR-43's engines, and within twenty days of the date of this decision and order, plaintiffs shall file a note of issue and serve a copy of this order with notice of entry, as well as a completed information sheet,¹² on the Special Referee Clerk at spreffnyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date, and notify the parties of the time and date of the hearing; and it is further

ORDERED that the claims against YanAir are hereby severed and shall continue; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry within one week of the entry of this order on NYSCEF, by registered or certified mail on the defendants.

Dated: July 14, 2017

ENTER



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

¹² Copies of the Information Sheet are available at:
<http://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/SRP-InfoSheet.pdf>