

**1325 Ave. of the Ams., L.P. v Frittella**

2020 NY Slip Op 33275(U)

October 5, 2020

Supreme Court, New York County

Docket Number: 655678/2019

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

1325 AVENUE OF THE AMERICAS, L.P.,
Plaintiff,

- v -

STEFANO FRITTELLA, ROBERTO DELLEDONNE
Defendant.

-----X

INDEX NO. 655678/2019
MOTION DATE 9/24/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment (motion seq. 001) against defendant Stefano Frittella on each of plaintiff's causes of action asserted against him in the complaint -- breach of Frittella's personal guaranty and attorneys' fees -- is granted solely on the issue of liability; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Roberto Delledonne is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the issues of the amount of damages owed by defendants under the two Guaranties, and the attorneys' fees, costs, expenses and disbursements due to plaintiff, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

**ORDERED** that both the motion and the cross motion are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

**ORDERED** that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this decision and order with notice of entry upon all parties within 20 days.

## MEMORANDUM DECISION

In this action, plaintiff/landlord 1325 Avenue of the Americas, L.P. seeks to hold defendants Stefano Frittella (Frittella) and Roberto Delledonne (Delledonne) jointly and severally liable for all amounts due under their respective personal guaranties of a commercial lease between plaintiff and nonparty tenant, 53rd Street Partners LLC (the Tenant), dated April 11, 2015 (the Lease).

Plaintiff now moves for an order: (1) pursuant to CPLR 3212, awarding summary judgment in favor of plaintiff and against Frittella on the issue of liability with respect to each of plaintiff's causes of action asserted against him in the complaint -- breach of Frittella's personal guaranty and attorneys' fees; (2) pursuant to CPLR 3215, entering a default judgment against defendant Delledonne; and (3) setting the matter down for an inquest on all of plaintiff's monetary claims for breach of the two personal guaranties, and attorneys' fees, costs, expenses and disbursements (motion seq. 001).

For the reasons set forth below, plaintiff's motion is granted.

## FACTS

### The Lease and Each Guaranty

Pursuant to the Lease, the Tenant leased a portion of the lobby level and basement level in the building located at 1325 Avenue of the Americas, New York, New York (the Premises) (affidavit of Ben Goodsir, vice president of 1325 Rental GP, LLC, the general partner of plaintiff [NYSCEF Doc No. 10], ¶ 7). The Tenant operates a restaurant at the Premises by the name of Remi (*id.*, ¶ 8).

In connection with, and as additional security, for the Lease, each defendant executed an identical personal guaranty (the Guaranty [NYSCEF Doc No. 11]). In their respective Guaranty, each defendant, as the “Guarantor” agreed, in pertinent part, that:

“Guarantor hereby guarantees, unconditionally and absolutely, to Landlord, its successors and assigns (without requiring any notice of nonpayment, nonkeeping, nonperformance or nonobservance or proof of notice or demand whereby to charge Guarantor, all of which Guarantor hereby expressly waives), the full and faithful keeping, performance and observance of all the covenants, agreements, terms, provisions and conditions of the Lease provided to be kept, performed and observed by Tenant (expressly including, without being limited to, the payment as and when due of fixed rent, additional rent, charges, interest and damages payable by Tenant under the Lease) and the payment of any and all other damages for which Tenant shall be liable by reason of any act or omission contrary to any of said covenants, agreements, terms, provisions, or conditions.

\* \* \*

The liability of Guarantor is coextensive with that of Tenant and also joint and several, and action or suit may be brought against Guarantor and carried to final judgment and/or completion and recovery had, either with or without making Tenant a party thereto”

(Guaranty at 1).

In their respective Guaranty, each defendant also agreed that it “will pay to Landlord all Landlord’s expenses, including, but not limited to, reasonable attorneys’ fees and expenses, in enforcing this Guaranty” (*id.*, ¶ 11), and that it survives termination of the Lease (*id.*, ¶ 12).

### **Tenant’s Breach of the Lease and the Ejectment Action**

Because the Tenant breached the Lease by failing to pay the amount of \$1,151,360.78 (the Arrears), by Notice of Default dated July 26, 2019, plaintiff demanded that the Tenant cure such default by paying the Arrears on or before August 9, 2019 (Goodsir aff, ¶ 12). The Tenant failed to do so, and on August 13, 2019, plaintiff served the Tenant with a “Notice of Intention to End and Terminate Lease,” which advised the Tenant that plaintiff elected to cancel and terminate the

Lease effective as of August 19, 2019 (the Termination Date) (*id.*, ¶ 13). The Tenant failed to vacate and/or surrender possession of the Premises on or before the Termination Date (*id.*, ¶ 14).

On August 30, 2019, plaintiff commenced a separate action in this court under Index No. 158509/19, seeking, *inter alia*, possession of the Premises (*id.*, ¶ 16). In that action, plaintiff and the Tenant entered into a so-ordered stipulation of settlement, dated September 26, 2019 (the Stipulation [NYSCEF Doc No. 12]), pursuant to which the Tenant agreed that: (1) it was in default under the Lease, (2) it owed the Arrears to plaintiff, (3) it agreed to pay at least \$75,000 per month for use and occupancy in order to remain in possession until April 11, 2020, and (4) if the Tenant breached the terms of the Stipulation, plaintiff could evict Tenant (*id.*, ¶ 16).

However, the Tenant defaulted under the terms of the Stipulation by failing to pay use and occupancy, and other amounts as required, and the eviction was scheduled for December 11, 2019 (*id.*, ¶ 17).

### **This Action**

On September 30, 2019, plaintiff commenced this action by filing the complaint (NYSCEF Doc No. 1). The complaint asserts two causes of action against each defendant/guarantor: breach of guaranty and attorneys' fees.

On October 14, 2019, the summons and complaint were served on Delledonne by leaving a copy thereof with a person of suitable age and discretion and thereafter mailing said papers to him on October 15, 2019 (*see* affidavit of service [NYSCEF Doc No. 14]). The affidavit of service of the summons and complaint upon Delledonne was filed with the court on October 16, 2019 (*see id.*). As a result, service was complete 10 days thereafter, or on October 28, 2019 (the first business day after the 10-day period expired), and Delledonne had 30 days from October 28, 2019, or until November 29, 2019, to appear in this action.

Although Delledonne's time to respond to the complaint expired on November 29, 2019, he failed to appear prior to that date (Goodsir aff, ¶ 29).

On December 6, 2019, pursuant to CPLR 3215 (g), plaintiff served Delledonne with an additional copy of the summons and complaint (*see* NYSCEF Doc No. 16).

On November 26, 2019, Frittella filed his answer (NYSCEF Doc No. 5). In the answer, Frittella admits that he executed his Guaranty (*see* complaint, ¶ 9; answer, ¶ 9).

## DISCUSSION

### Motion for Summary Judgement on the Guaranty Against Frittella

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]). Summary judgment is a drastic remedy that may be granted only when it is clear that no triable issues of fact exist (*Matter of New York City Asbestos Litig.*,

33 NY3d 20, 25 [2019]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and “should not be granted where there is any doubt as to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1<sup>st</sup> Dept 1994]; accord *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]).

It is well-settled that “[o]n a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty” (*Davimos v Halle*, 35 AD3d 270, 272 [1<sup>st</sup> Dept 2006]; see also *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 [2d Dept 2008]; see e.g. *1407 Broadway Real Estate LLC v Tsui*, 36 Misc 3d 1219[A], 2012 NY Slip Op 51400[U], \*4 [Sup Ct, NY County 2012] [involving action on guaranty of lease]). Such guaranties “have been consistently upheld by New York courts” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 493 [2015]).

In *Plaza 52, LLC v Cohen* (2009 NY Slip Op 31849[U] [Sup Ct, NY County 2009]), in finding that the landlord had established its prima facie entitlement to summary judgment against the guarantors of the tenant’s obligations under the lease, the court held that:

““On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty.’ Here, [landlord] has presented a copy of the guaranty and the affidavit of its managing agent . . . that sets forth a calculation of the amount of unpaid rent and other charges that [tenant] is liable for, and states that neither [tenant] nor defendants has ever made any payments towards these amounts. Defendants do not contest that neither [tenant] nor themselves has ever reimbursed [landlord] for [tenant’s] debts. Thus, it is clear that [landlord] has established all of the elements of its breach of guaranty claims against defendants”

(*id.* [citations omitted]; see also *Broadway 36th Realty, LLC v London*, 29 Misc 3d 1238[A], 2010 NY Slip Op 52192[U], \*5-6 [Sup Ct, NY County 2010] [granting the landlord summary judgment

on claim under unconditional guaranty of tenant's obligations under the lease to pay all rent, additional rent and other charges]).

Likewise, here, plaintiff has established the *prima facie* elements necessary to enforce Frittella's written Guaranty. Frittella admits that he signed his personal Guaranty of the Tenant's obligations under the Lease, and plaintiff has established the Tenant's breach under the Lease. Indeed, the Tenant has admitted that it owes more than \$1.1 million to plaintiff under the Lease (*see* Stipulation). Plaintiff has also established that Frittella has breached his personal Guaranty by failing to pay any amounts due thereunder.

In opposition, Frittella fails to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. "Rabobank Intl.," N.Y. Branch*, 25 NY3d at 492; *Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008]). Pursuant to the clear terms of the Guaranty, Frittella "irrevocably waived" any defenses to his liability under the Guaranty:

"Guarantor absolutely, unconditionally and irrevocably waives any and all right to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this Guaranty or the obligations of Guarantor under this Guaranty"

(Guaranty, ¶ 2).

This court finds that this language is "sufficiently specific to constitute valid waivers of defenses" (*JFURTI, LLC v Singal*, 171 AD3d 611, 611 [1<sup>st</sup> Dept 2019]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1<sup>st</sup> Dept 2007]; *see also Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 [1<sup>st</sup> Dept 2010] [a provision of a guaranty that the guarantor waives all defenses and counterclaims is valid]).

Accordingly, plaintiff is entitled to summary judgment as to liability on its first cause of action for breach of Frittella's Guaranty. Pursuant to paragraph 11 of the Guaranty, plaintiff is

also entitled to summary judgment as to liability on its second cause of action for attorneys' fees (*see W6 Facility X, LLC v West 6 Care Ctr., Inc.*, 169 AD3d 968, 969-970 [2d Dept 2019]) [(t)he plaintiff also established its prima facie entitlement to judgment as a matter of law on the issue of liability on its cause of action to recover attorney's fees insofar as asserted against the guarantor" as "the guaranty provided for the recovery of attorney's fees in connection with an action to enforce the lease or guarantee"]. The issues of calculation of damages due under the Guaranty, and the amount of attorneys' fees to which plaintiff is entitled, are referred to a Special Referee to hear and report.

### **Motion for a Default Judgment Against Delledonne**

Pursuant to CPLR 3215 (f), "[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*HSBC Bank USA, N.A. v Clayton*, 146 AD3d 942, 944 [2d Dept 2017] [citation omitted]; *accord 154 E. 62 LLC v 156 E. 62<sup>nd</sup> St. LLC*, 159 AD3d 498, 498 [1<sup>st</sup> Dept 2018]; *Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 [2d Dept 2017]). The plaintiff can satisfy this requirement through an affidavit of a party with personal knowledge of the facts (*Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]; *Goodman v New York City Health & Hosps. Corp.*, 2 AD3d 581, 581 [2d Dept 2003]).

Plaintiff has clearly satisfied the first and third of these requirements by submitting the affidavits of service, and the Goodsir affidavit, in which Goodsir asserts that Delledonne has not answered or appeared. Plaintiff has also submitted proof of the facts constituting its claims. Accordingly, plaintiff has established that Delledonne is in default for failing to appear, and its motion for a default judgment is granted.

The court has considered the remaining arguments, and finds them to be without merit.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion seq. 001) against defendant Stefano Frittella on each of plaintiff's causes of action asserted against him in the complaint -- breach of Frittella's personal guaranty and attorneys' fees -- is granted solely on the issue of liability; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Roberto Delledonne is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the issues of the amount of damages owed by defendants under the two Guaranties, and the attorneys' fees, costs, expenses and disbursements due to plaintiff, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that both the motion and the cross motion are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry upon all parties within 20 days.

*[Handwritten Signature]*  
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10/5/2020  
DATE

CAROL R. EDMEAD, J.S.C.

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