

**Adams & Miller No. 247 LLC v Gross**

2009 NY Slip Op 33268(U)

July 27, 2009

Sup Ct, NY County

Docket Number: 101724/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 101724/2009  
**ADAMS & MILLER NO. 247 LLC**  
 VS.  
**GROSS, BRADLEY S.**  
 SEQUENCE NUMBER : # 001  
 SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 101724-09  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. #001  
 MOTION CAL. NO. \_\_\_\_\_

ere read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*Submitted. G waves oral argument due to Mr Gross' inability to appear. J 5/21/09*

HON. JUDITH J. GISCHE

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

**FILED**  
 JUL 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 7/27/09

*JJ*  
**JUDITH J. GISCHE, J.S.C.**  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

ADAMS & MILER NO. 247 LLC,

Plaintiff,

-against-

BRADLEY S. GROSS,

Defendant.

**Decision/Order**

Index No.: 101724/09

Seq. No. : 001

Present:

Judith J. Gische  
J.S.C.

**FILED**  
JUL 29 2009

COUNTY CLERK'S OFFICE  
NEW YORK

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

<b>Papers</b>	<b>Numbered</b>
Plt's summons, n/m [sjlc] w/ RFS affid, exhs .....	1

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

Plaintiff has commenced this action to enforce a Guaranty to a commercial lease.

This is plaintiff's motion for summary judgment in lieu of a complaint. CPLR § 3213. Defendant, *pro se*, has submitted an affirmation in opposition. This motion was scheduled for oral argument on May 21, 2009. At that time, the defendant notified the court via an *ex parte* letter that he was unable to appear for oral argument. The court, therefore, waived oral argument and marked the motion submitted. The court's decision follows.

On or about January 18, 2008, plaintiff and Metro LH Corp (the "tenant") entered into a commercial loft lease agreement for the premises located at 247 West 35<sup>th</sup> Street, Suites 301, 302 and 303 (the "premises"). The defendant, a shareholder of the tenant, entered into a Guaranty with plaintiff in which he agreed to "absolutely, unconditionally and

irrevocably guaranty to [plaintiff] all rent and additional rent and other charges payable by tenant under the Lease... up to the 'Surrender date.' "

Plaintiff claims that the tenant failed to pay base rent, late fees, water/sewer charges and real estate taxes associated with the premises. On September 22, 2008, plaintiff served the tenant with a Petition Non-Payment of Rent because the tenant had allegedly defaulted under the Lease. The tenant was evicted as a result of those proceedings. Plaintiff has provided to the court a statement of the amounts due from the tenant under the lease. Article 7 of the Guaranty also provides that the "[p]revailing party will pay the other's reasonable Attorney's fees, court costs and other expenses incurred by [plaintiff] in enforcing or attempting to enforce this Guarantee." Plaintiff now seeks a judgment in its favor and against the defendant in the amount of \$44,834.25, and an inquest on the issue of plaintiff's damages for attorneys fees reimbursement.

Defendant has submitted an affirmation in opposition to the motion, wherein he contends that CPLR § 3213 relief is not available in this case. Specifically, defendant argues that the Guaranty is not an instrument for the payment of money only because it is a "guarantee for the 'payment and performance' obligations which were to be performed by the tenant under the Lease." The defendant also disputes plaintiff's claimed damages as a result of the tenant's default, as well as the merits of the underlying landlord/tenant action.

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M.Electron Power, Inc., 37 NY2d 151 (1975). A motion for summary judgment in lieu of complaint is available when the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR § 3213. Summary judgment in lieu of a

complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a prima facie cause of action. Seaman-Andwall Corp. v. Wright Machine Corp., 31 AD2d 136 (1<sup>st</sup> Dept. 1968), *aff'd* 29 NY2d 617 (1971).

First, defendant's affirmation is improper because defendant, an attorney, is the party in this case. Even a person who may by statute use an affirmation cannot do so when he is a party to the action (Slavenburg Corp. v. Opus Apparel, 53 NY2d 799 [1981]). Nonetheless, the arguments raised by the defendant, even if these arguments were properly interposed, are insufficient to defeat plaintiff's motion.

The court rejects defendant's argument that the Guaranty is not an instrument for the payment of money only within the meaning of CPLR § 3213 (see European American Bank & Trust Co. v. Schirripa, 1085 AD2d 684 [1st Dept 1985]; see also First Interstate Credit Alliance, Inc. v. Sokol, 179 AD2d 583 [1st 1992]; Israel Discount Bank of New York v. 500 Fifth Avenue Assoc., 167 AD2d 203 [1st 1990]). Here, plaintiff has demonstrated right to judgment herein by submitted a copy of the Guaranty along with an affidavit of nonpayment.

The underlying landlord tenant action is a red herring, and defendant's arguments with respect thereto are disregarded. Equally unavailing are defendant's conclusory statements concerning the amount due under the lease. The defendant has not come forward with any proof that would otherwise refute plaintiff's statement of the tenant's account and thereby raise any issue of fact sufficient to defeat plaintiff's motion.

For all of these reasons, plaintiff's motion is granted to the extent that plaintiff is entitled to a money judgment for the amount sued herein, to wit: \$44,834.25.

Since plaintiff has prevailed in this action, plaintiff is also entitled to reimbursement

for its attorneys fees incurred herein (see i.e. Chase Manhattan Bank, N.A. v. Marcovitz, 56 AD2d 763 [1st Dept 1977]). The court hereby refers the issue of what reasonable attorneys fees plaintiff may recover from the defendant to a Special Referee to hear and determine. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference may be assigned.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is granted in its entirety; and it is further

**ORDERED** that the Clerk is hereby directed to enter a money judgment in favor of plaintiff Adams & Miller No. 247 LLC and against defendant Bradley S. Gross in the total amount of Forty Four Thousand Eight Hundred Thirty Four and 25/100 Dollars (\$44,834.25); and it is further

**ORDERED** that the court hereby refers the issue of what reasonable attorneys fees plaintiff may recover from the defendant to a Special Referee to hear and determine. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference may be assigned.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 27, 2009

So Ordered

HON. JUDITH J. GISSON

**FILED**  
JUL 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK