

499 Fashion Tower LLC v Ahmed
2017 NY Slip Op 31861(U)
August 31, 2017
Supreme Court, New York County
Docket Number: 155501/2017
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X

499 FASHION TOWER LLC
Plaintiff,

INDEX NO. 155501/2017

MOTION DATE 6/16/2017

- v -

MOTION SEQ. NO. 001

EJAZ AHMED,
Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 6, 7
were read on this application to/for SUMMARY JUDGMENT (BEFORE JOINDER)

Upon the foregoing documents, it is

**Ordered that the motion is denied and the proceeding is dismissed without prejudice with
leave to refile upon proper papers.**

Plaintiff moves for an order pursuant to CPLR 3213 granting it summary judgment in lieu
of complaint in plaintiff's favor in the sum of \$61,326.35, together with interest, costs
disbursements, and reasonable attorneys' fees in an action for the payment of money only, based
upon a guaranty. Plaintiff's motion is unopposed.

In an affirmation by its attorney, Jeffrey H. Roth, plaintiff avers that it is the owner of a
building at 499 Seventh Avenue, New York, New York and that it entered into a lease with JK

Gift, Inc., ("Tenant"), for the store and basement of the subject building on or about September 23, 2010. A copy of said lease is annexed as Exhibit B. As an inducement for plaintiff to enter into said lease, a Guaranty was executed by defendant Ejaz Ahmed and is annexed as Exhibit A.

Plaintiff alleges that the Guaranty absolutely and unconditionally obligates defendant to pay all of the tenant's monetary obligations under the lease, including monthly rent, and any and all additional charges as they come due under the lease. Plaintiff alleges that the tenant failed and refused to pay the monthly rent for May and June of 2017, the water and sprinkler charges for June of 2017, and electrical charges for the period of April 18 through May 16, 2017. Plaintiff further alleges that it has notified the defendant that these charges are now due and owing, notwithstanding the fact that it is not required to do so under the Guaranty. However, this Court notes that plaintiff has failed to append a copy of said notice to its papers.

Plaintiff also annexes to its papers an Affidavit in Support by Thomas R. Block, who avers he is a member of plaintiff and, as such, he is fully familiar with the facts and circumstances herein. The Court notes that Mr. Block does not explain what his position is with plaintiff or how, or in what manner, he is personally familiar with the facts of this matter. He does state that defendant has failed to pay the charges that are now due under the lease, including: rent in the amount of \$59,702.62 for the months of May and June, 2017, water and sprinkler charges of \$200 for June 2017, and electrical charges for the period from April 18 through May 16, 2017 in the amount of \$1,326.35, with total sum of \$61,326.35 now due and owing.

Plaintiff, by its attorney, alleges that he knows of no facts in dispute or of any defense to this action and accordingly requests a money judgment be entered in plaintiff's favor against defendant in the sum of \$61,326.35 plus interest, costs and disbursements

CONCLUSIONS OF LAW:

Motion for Summary Judgment In Lieu of Complaint

“When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” CPLR 3213. A plaintiff may establish “entitlement to summary judgment in lieu of complaint by submitting a promissory note executed by [the] defendants and proof of [the] defendants' failure to make payments according to its terms.” *Blumenstein v Waspit Group, Inc.*, 140 AD3d 620, 620 (1st Dept 2016); *see Goldberger v Magid*, 133 AD3d 546, 546 (1st Dept 2015). “Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense.” *Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 (1st Dept 2012) (citation omitted); *see Emerald Invs. Ltd. v Toms*, 133 AD3d 558, 558-559 (1st Dept 2015); *Gliklad v Cherney*, 132 AD3d 601, 601 (1st Dept 2015).

Procedural Issues:

A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). A movant's service of a summons and motion pursuant to CPLR 3213 requires a defendant to serve answering papers

by the time set forth in the notice of motion, and “the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of service” which is calculated pursuant to CPLR 320. *Goldman v Saltzman*, 13 Misc3d 1023, 1025 (Sup Ct Nassau County 2006). Plaintiff has the burden of establishing, inter alia, that defendant was properly served with the motion. *See Cadle Co. v Ayala*, 47 AD3d 919 (2d Dept 2008).

Although this Court checked both the paper file with working copies submitted to it and the efiled documents on this case, as it is permitted to do (*see, Matter of Moynihan*, 120 AD3d 1029, 1041 n 1 [1st Dept 2014]), it has been unable to find an affidavit of service indicating that the defendant was served. The affidavit of service was not efiled with this Court, as required by 22 NYCRR 202.5-bb(a)(1) and (c)(1). Nor is there any indication that an affidavit of service was received by the Clerk’s office. Thus, there is no proof on record with this Court that defendant was served with plaintiff’s motion.

Given that no affidavit of service was filed with this Court, and thus the minimum amount of time defendant needed to be given to respond to the motion cannot be ascertained, this Court lacks the jurisdiction to hear the motion, it must be denied without prejudice and the action must be dismissed. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1027, citing *National Bank of Canada v Skydell*, 181 AD2d 645 (1st Dept 1992).

Even assuming, arguendo, that the affidavit of service had been properly filed, this Court would still be constrained to deny plaintiff’s motion on the ground that the Affidavit in Support by Thomas R. Block, is deficient. As stated above, Mr. Block does not explain what his position is with plaintiff nor how or in what manner he is personally familiar with the facts of this matter. Additionally, no papers were submitted as proof of the failure of the tenant to pay the charges plaintiff alleges are now due and owing under the Guaranty. Plaintiff fails to annex any copies of

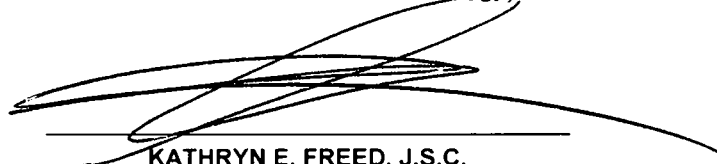
non-payment notices or proof of any such demand sent to tenant. Plaintiff additionally fails to submit copies of any rent ledgers with an affidavit of someone with personal knowledge attesting to the non-payment of such charges. As such, the supporting papers annexed to plaintiff's motion do not "contain proof of the essentials of the plaintiff's cause of action." *Mercantile Bank of Chicago v Wismer*, 48 Misc2d 275 (1st Dept 1965).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff, 499 Fashion Tower, LLC., for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied, without prejudice, and the action is dismissed with leave to refile upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT



8/31/2017

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: