

<b>ARC NYC400E67, LLC v Citizens Icon Holdings, LLC</b>
2020 NY Slip Op 33600(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 652267/2020
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

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ARC NYC400E67, LLC

Plaintiff,

- v -

CITIZENS ICON HOLDINGS, LLC,

Defendant.

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**INDEX NO. 652267/2020**  
**MOTION DATE 10/22/2020**  
**MOTION SEQ. NO. 001**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14 were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by filing its motion for Summary Judgment in lieu of complaint on June 4, 2020. Defendant opposed the instant motion on August 14, 2020 and plaintiff submitted its reply on August 27, 2020.

Pursuant to CPLR § 3213, when an action is based upon an instrument for the payment of money only or upon a judgment, the plaintiff may serve with the summons a notice of motion for summary judgment in lieu of complaint. An instrument qualifies under CPLR § 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms (*East New York Sav. Bank v. Baccaray*, 214 AD2d 601 [2nd Dept 1995]). Where the instrument requires something in addition to the party’s explicit promise to pay a sum of money, CPLR § 3213 is not available (See *Weissman v. Sinorm Deli, Inc.*, 88 NY2d 437 [1996]; *New Rochelle Dodge, Inc. v. Bank of New York*, 127 AD2d 638 [2nd Dept 1987]). An unconditional guarantee is an instrument for the payment of money under CPLR 3213, *European American Bank & Trust Co. v. Schirripa*, 108 A.D.2d 684, 485 N.Y.S.2d 763 (1st Dep’t 1985), even when it

requires a determination of costs, expenses, and attorneys' fees, matters that require substantial proof from outside the instrument itself. See *Chase Manhattan Bank, N.A. v. Marcovitz*, 56 A.D.2d 763, 392 N.Y.S.2d 435 (1st Dep't 1977).

In support of its motion, plaintiff submits the affidavit of Michael Anderson, the Senior Vice President and Chief Corporate Counsel of AR Global Investments, LLC, the parent company of ARC NYC400E67, LLC, together with the relevant commercial leases, personal guarantee, payment history and demand to cure, which establish: Pursuant to the March 29, 2018 Second Amendment of the lease, QUIK PARK EAST 67th STREET LLC, a New York limited liability company, having an address at 270 Madison Avenue, 2nd Floor, New York, New York 10016 leases the garage 400 East 67th Street, New York, New York from ARC NYC400E67, LLC, a Delaware limited partnership, with an address c/o American Realty Capital New York City REIT, Inc., 405 Park Avenue, New York, New York 10022 at a rate of \$77,083.33 per month. Payments due under said lease amendment were unconditionally guaranteed by defendant. Tenant has failed to pay rent for April, May and June, 2020, resulting in a balance due of at least \$231,249.99 as of June 4, 2020, together with costs, interest, disbursements and attorney's fees. In a letter dated, April 17, 2020, both Quik Park East 67th Street LLC and defendant were notified of the default under the lease. As such, plaintiff has established a *prima facie* entitlement to summary judgment.

In opposition, defendant does not dispute any of the facts alleged by plaintiff. Defendant argues that (1) the guarantee is not an instrument for the payment of money, only, (2) that plaintiff's affidavit fails to lay a proper foundation for the evidence presented and (3) that the default notice only creates a default for the month of April, 2020.

Defendant argues that Paragraph 2 of the Guaranty guarantees "not just payment, but also the performance of all obligations of Tenant under the Lease." Said interpretation is without merit


as the text of the paragraph specifically guarantees “the full and timely payment and performance of the obligations of Tenant under the Lease for the payment of Fixed Rent, Tenant’s Tax Payment, the Electric Bill pursuant to Section 8.A of the Lease and any Water Bill pursuant to Section 8.B of the Lease.” Defendant’s second argument is also unavailing as Michael Anderson has established personal knowledge of the amounts due and laid a foundation for the leases and guarantee (*Olympus Am., Inc. v. Beverly Hills Surgical Inst.* 110 A.D.3d 1048, 1048 [2d Dept 2013]; *Bank of Am., N.A. v. Solow*, 59 A.D.3d 304 [1<sup>st</sup> Dept 2009]). Defendant’s third argument is also insufficient to create an issue of fact as the unconditional guarantee specifically waives defendant’s entitlement to notice of any default. As such, defendant has failed to rebut plaintiff’s prima facie entitlement to summary judgment.

ORDERED that the plaintiff’s motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$\$231,249.99, together with interest at the rate of 9% per annum from the date of June 4, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

ORDERED that that portion of the plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees that plaintiff may recover against the defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that 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,<sup>1</sup> upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

<u>10/28/2020</u> DATE	 LAURENCE L. LOVE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE

<sup>1</sup> Available on the Court’s website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the “References” link on the navigation bar.