

Chip Fifth Ave. LLC v Quality King Distribs., Inc.

2021 NY Slip Op 30540(U)

February 26, 2021

Supreme Court, New York County

Docket Number: 161128/2015

Judge: Paul A. Goetz

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

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

CHIP FIFTH AVENUE LLC,

Plaintiff,

- v -

QUALITY KING DISTRIBUTORS, INC., PRO'S CHOICE
BEAUTY CARE, THOMAS BUTKIEWICZ, JOHN LIBRO,

Defendants.

-----X

QUALITY KING DISTRIBUTORS, INC., PRO'S CHOICE
BEAUTY CARE, THOMAS BUTKIEWICZ

Plaintiffs,

-against-

S3 DIGITAL CORPORATION, CIRCLE MEDIA, INC.

Defendants.

-----X

INDEX NO. 161128/2015

MOTION DATE 10/08/2020,
10/08/2020

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595907/2015

The following e-filed documents, listed by NYSCEF document number (Motion 009) 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 495, 496, 498, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 552, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574

were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 497, 499, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 553, 575, 576, 577, 578, 579

were read on this motion to/for ATTORNEY - FEES.

Plaintiff-landlord CHIP Fifth Avenue LLC (CHIP) brought this action to recover on guaranties, following the breach of a commercial lease (Guaranty Action). CHIP now moves (in

motion sequence number 009) for an order against defendant Quality King Distributors, Inc. (Quality King) awarding it: (1) the attorneys' fees and costs incurred in litigating this action; (2) the attorneys' fees and costs that CHIP continues to incur in connection with the instant motion (i.e. fees on fees); and (3) prejudgment interest on the foregoing amounts, pursuant to CPLR 5001. CHIP also moves (in motion sequence number 010) for the same relief in connection with *Quality King Distributors, Inc. v CHIP Fifth Avenue LLC*, index No. 654924/2016, a related action brought by CHIP's commercial tenant alleging wrongful eviction (Wrongful Eviction Action). By decision and order dated April 11, 2017, the two actions were joined for purposes of discovery and trial (GA NYSCEF Doc No. 188).¹

The underlying facts of these cases are set out in detail in a decision and order dated April 7, 2020 in the Wrongful Eviction Action (Wrongful Eviction Decision) (Sherwin affirmation, exhibit 73).² Therefore, familiarity with the facts is assumed and only a brief overview of the two actions is provided. Unless indicated otherwise, defined terms in the Wrongful Eviction Decision have the same meaning when used herein.

BACKGROUND

On October 29, 2015, after S3 stopped paying rent, CHIP commenced the instant action against Quality King and three other guarantors (GA NYSCEF Doc No. 1). By decision and order dated July 25, 2016, the court granted CHIP's motion for partial summary judgment against Quality King "on the basic issue of liability" under the guaranty and found that CHIP

¹ Citations to NYSCEF document numbers that begin with "GA," refer to documents filed in the Guaranty Action, under index No. 161128/2015. Citations to NYSCEF document numbers that begin with "WEA" refer to documents filed in the Wrongful Eviction Action, under index No. 654924/2016.

² Citations to "Sherwin affirmation" refer to the affirmation filed in support of motion sequence number 009.

was “also entitled to legal fees to date,” but denied the motion with respect to two months of rent and re-letting costs (GA NYSCEF Doc No. 71 at 3). By decision and order dated October 5, 2016, the court granted CHIP’s motion to reargue and reversed its prior determination, finding that CHIP was entitled to reasonable re-letting costs, but that the extent and reasonableness of those expenses and any legal fees had to be litigated (GA NYSCEF Doc No. 160). The court also granted Quality’s King motion to reargue but, upon reargument, adhered to its prior determination (GA NYSCEF Doc No. 159). On October 17, 2016, judgment was entered in CHIP’s favor in the amount of \$308,743.89 (GA NYSCEF Doc No. 168).

Quality King appealed and, on February 1, 2018, the Appellate Division, First Department, affirmed, finding that “the guarantor’s liability can be greater than that of the obligor tenant, inasmuch as the lease and guarantees were separate undertakings, and the latter is enforceable without qualification or reservation” (*CHIP Fifth Ave. LLC v Quality King Distributors, Inc.*, 158 AD3d 418, 419 [1st Dept 2018]; Sherwin affirmation, exhibit 11). After failed attempts to reargue and appeal to the Court of Appeals (Sherwin affirmation, exhibits 12, 13), in October 2018, Quality King satisfied the October 17, 2016 judgment (GA NYSCEF Doc No. 277) and the parties settled the remaining claims, with the exception of CHIP’s claim for attorneys’ fees and costs (GA NYSCEF Doc Nos. 286, 287).

While litigation continued in the Guaranty Action, on September 16, 2016, S3 commenced the Wrongful Eviction Action against CHIP. By decision and order dated April 11, 2017, the two actions were joined for purposes of discovery and trial only (GA NYSCEF Doc No. 188).

In October 2017, S3 filed for bankruptcy. Quality King obtained an assignment of S3’s Wrongful Eviction Action (WEA NYSCEF Doc Nos. 76-79) and CHIP filed a claim in the

bankruptcy proceeding. On May 31, 2018 the bankruptcy court approved the bankruptcy plan. In connection with the plan, CHIP executed a broad third-party release of its claims against S3 and its assignees (WEA NYSCEF Doc Nos. 217, 220).

On June 14, 2018, Quality King substituted as plaintiff in the Wrongful Eviction Action (WEA NYSCEF Doc Nos. 75-79).

On March 15, 2019, Quality King moved in the Guaranty Action for summary judgment dismissing CHIP's sole remaining claim for attorneys' fees and cost (GA NYSCEF Doc No. 288). By a decision and order dated June 28, 2019, this court denied the motion (GA NYSCEF Doc No. 334). In so doing, the court rejected Quality King's contention that the claim was released pursuant to the bankruptcy plan, finding that, because "[CHIP] [was] asserting its claim for attorneys' fees directly against defendant Quality King, in its capacity as S3' guarantor," rather than against S3 or its assignees, "the third-party release [did] not bar plaintiff's claim" (*id.* at 2). The court further held that "the guaranty provides that guarantor's liability shall not exceed the indebtedness of the tenants except that the landlord may recover the cost of collection (including attorneys' fees) in connection with its enforcement of the guaranty," that "the First Department ha[d] already held that the guaranty entitled landlord to collect attorney's fees in connection with this collection proceeding and [that] the release of S3's obligations to the landlord [did] not change this result, as the guaranty explicitly provides" (*id.*).

Also, on March 15, 2019, both Quality King and CHIP moved for summary judgment in the Wrongful Eviction Action (WEA NYSCEF Doc Nos. 118, 153). By decision and order dated April 7, 2020, this court granted summary judgment in CHIP's favor to the extent of dismissing Quality King's complaint (WEA NYSCEF Doc No. 287, 2020; Sherwin affirmation, exhibit 73, Wrongful Eviction Decision). The court also granted summary judgment in Quality King's favor

to the extent of dismissing CHIP's counterclaim for attorneys' fees and costs. The court explained that this was because, "[CHIP's] counter-claim for attorneys' fees in [the] Wrongful Eviction Action [was] asserted against Quality King in its capacity as S3's assignee" and, as S3's assignee, "Quality King [was] a 'Released Party' under the bankruptcy plan" (Wrongful Eviction Decision at 11). The court did not address the parties' contentions pertaining to CHIP's claim for attorneys' fees under the guaranty, finding that such relief had to be sought under the index number for the Guaranty Action (*id.* at 13).

DISCUSSION

On the instant motions, the parties dispute whether CHIP is: (1) collaterally estopped from seeking attorneys' fees and costs incurred in the Wrong Eviction Action; (2) entitled to fees on fees; and (3) entitled to prejudgment interest on its ultimate award of attorneys' fees. The parties also dispute whether CHIP's claimed attorneys' fees and costs are reasonable.

Collateral Estoppel

Quality King argues that this court has already determined that CHIP released S3 and Quality King, as S3's assignee, in the bankruptcy proceeding from any obligation under the lease, including the attorneys' fees and costs incurred in the Wrongful Eviction Action. It argues that CHIP may not relitigate the issue. In addition, Quality King contends that, because of this determination, there is no "Indebtedness . . . of S3 to CHIP under the Lease" (GA NYSCEF Doc No. 504, guaranty at 1) and CHIP is limited to the recovery of the "costs of collection" incurred in the Guaranty Action (*id.*). Quality King also argues that, for the same reasons, CHIP cannot recover the fees and costs incurred in the bankruptcy proceeding. CHIP counters that the Wrongful Eviction Decision addressed Quality King's liability in its capacity as S3's assignee

only and that, pursuant to the broad terms of the guaranty, Quality King remains liable in its capacity as guarantor.

The doctrine of collateral estoppel is inapplicable here. Collateral estoppel prevents parties from relitigating previously decided issue where, among other things, “the issues in both proceedings are identical” (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011]). The issue before the court in the Wrongful Eviction Action was whether Quality King, in its capacity as S3’s assignee, was liable for CHIP’s attorneys’ fees and costs (Wrongful Eviction Decision at 11-13). The court expressly declined to decide whether Quality King could be held liable in its capacity as S3’s guarantor, finding that the issue had to be raised in the Guaranty Action (*id.* at 13), which CHIP now does.

In its capacity as guarantor, Quality King is liable for the reasonable attorneys’ fees and costs that CHIP incurred in connection with the Wrongful Eviction Action and in the bankruptcy proceeding.

First, the guaranty covers these expenditures. It provides that Quality King “unconditionally and absolutely guarantees and promises to pay CHIP and its successors and assigns, any and all Indebtedness . . . of S3 to CHIP under the Lease” (guaranty at 1). The guaranty defines “‘Indebtedness’ . . . in its most comprehensive sense and includes all rental obligations of S3 to CHIP, arising under and pursuant to the Lease” (*id.*). The lease defines “additional rent” to include:

“reasonable attorneys’ fees and disbursements . . . which Landlord may incur or pay out by reason of, or in connection with: . . . iii. any default by Tenant in the observance or performance of any obligation under the lease . . . v. any action or proceeding brought by Tenant against Landlord . . . in which Tenant fails to secure a final judgment against Landlord” (GA NYSCEF Doc No. 502, lease, ¶ 52 [a] [iii], [v]).

Quality King failed to secure a final judgment against CHIP in the Wrong Eviction Action. Its complaint was dismissed. Therefore, CHIP's reasonable attorneys' fees and disbursements in that action are included in the guaranteed "Indebtedness." The fees that CHIP incurred in the bankruptcy proceeding (*see* Sherwin affirmation, exhibits 45-48) are also recoverable as "Indebtedness" under the guaranty, because they were a result of S3's default under the lease.

Second, CHIP's release of S3 and its assignees in the bankruptcy proceeding merely released *those* parties from *their* obligations under the lease. It did not eliminate the obligation itself or alter Quality King's liability under the guaranty (*see CIT Group/Equip. Fin., Inc. v Riddle*, 31 AD3d 477, 478 [2d Dept 2006] [finding that the guarantor remained liable for debts, interest, late charges and reasonable attorneys' fees, because it had not been discharged from the debt and because "(a) guarantor's liability for a corporate debt is not affected by the corporation's bankruptcy filing"]). Moreover, the guaranty expressly contemplates this exact scenario and provides that: "any change in the status of S3, shall not release Guarantor from liability under this Guaranty"; "Guarantor . . . specifically assume[s] any and all risks of a bankruptcy or reorganization proceeding with respect to the S3"; and "in the event a settlement is made with S3 for less than the amount due CHIP, Guarantor shall not be released from liability for the balance still due CHIP even though S3 shall have been released from said Indebtedness" (guaranty at 1). Accordingly, in its capacity as guarantor, Quality King remains liable for the reasonable attorneys' fees and costs that CHIP incurred in connection with the Wrongful Eviction Action and the bankruptcy proceeding (*see Taubes v Stuart*, 181 AD2d 669, 671 [2d Dept 1992] [finding that the corporate debtor's bankruptcy did not affect the guarantor's liability and that the guaranty's language, stating that "(g)uarantor waive(d) any defense arising . . . by reason of the cessation or modification from any cause whatsoever of the liability of

Debtor(,)’ prevent(ed) the guarantor from being discharged from liability based upon the (debtor’s) discharge . . . from liability in bankruptcy”]; *see also First Natl. Bank of Highland v Burley*, 162 AD2d 910, 911 [3d Dept 1990] [finding that the lender’s “compromise of its claim against the bankruptcy estate and (the debtor’s) discharge in bankruptcy did not impair (the lender’s) rights against (the guarantor) under the guarantee,” which provided for “settlements and compromises as (lender) may deem proper with respect to any of the indebtedness, liabilities and obligations covered by this guaranty”]).

Accordingly, CHIP is entitled to recover reasonable attorneys’ fees and costs incurred in the Wrongful Eviction Action and the bankruptcy proceeding.

Fees on Fees

CHIP argues that it is entitled to the attorneys’ fees incurred in bringing the instant motions as “the costs of collection (including attorneys’ fees)” incurred in “pursu[ing] collection proceedings” against Quality King (guaranty at 1). Quality King counters that the guaranty lacks the specific language required for the recovery of fees on fees.

“[A]n award of fees on fees must be based on a statute or on an agreement” (*Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [1st Dept 2001]). An attorneys’ fee provision must be strictly construed, as it “is contrary to the well-understood rule that parties are responsible for their own attorney’s fees” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]). Where “it is not ‘unmistakably clear’ from the parties’ agreement that fees on fees were contemplated, such an award is not allowed” (*Batsidis v Wallack Mgt. Co.*, 126 AD3d 551, 553 [1st Dept 2015]; *see also Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015]).

Here, the guaranty provides for payment of “all Indebtedness,” defined as “all rental obligations of S3 to CHIP, arising under and pursuant to the Lease” (guaranty at 1), which

includes “reasonable attorneys’ fees and disbursements” that the landlord incurs in successfully defending or prosecuting any action in connection with the lease (*see* lease, ¶¶ 19, 52). The guaranty also provides for the payment of “the costs of collection (including attorneys’ fees) in the event that CHIP is required to pursue collection proceedings against Guarantor hereunder” (guaranty at 1). Thus, the plain language of the guaranty provides for the payment of attorneys’ fees incurred in the Wrongful Eviction Action as “Indebtedness” and the payment of attorneys’ fees incurred in bringing the Guaranty Action as “the costs of . . . pursu[ing] collection proceedings” under the guaranty (*id.*). Neither clause provides for fees on fees.

The guaranty also contains broad language for the payment of “all costs, attorneys fees and reasonable expenses of collection proceedings against Guarantor brought to recover any indebtedness guaranteed hereunder” (*id.* at 2). Again, there is no explicit language entitling CHIP to the collection of fees on fees. “If the parties had intended for the [guaranty] to cover [CHIP’s] attorney’s fees for time spent preparing for the fee [motions], they were free to put that in the agreement” (*Batsidis*, 126 AD3d at 553 [denying fees on fees]; *see Jones*, 125 AD3d at 534 [affirming denial “of ‘fees on fees’ [as] proper since the parties’ agreement [did] not explicitly provide for such fees”]; *see also 214 Wall St. Assoc., LLC v Medical Arts-Huntington Realty*, 99 AD3d 988, 990 [2d Dept 2012] [internal quotation marks and citations omitted] [finding that an agreement did not provide for fees on fees and that, even if it “arguably support[ed] an implied right to those costs and fees, the public policy of the American Rule militate[ed] against adoption of that interpretation”]).

Accordingly, CHIP is not entitled to fees on fees.

Prejudgment Interest

CHIP contends that, because the lease and the guaranty provide for attorneys' fees as a matter of contract, it is entitled to CPLR 5001 prejudgment interest on these fees. In the Guaranty Action, it argues, prejudgment interest should be calculated from 30 days after each invoice for legal services was sent to CHIP, as Quality King was liable under the guaranty upon S3's breach of the lease. In the alternative, it suggests that interest should be calculated from July 25, 2016, when the court first ruled that CHIP was entitled to attorneys' fee. In the Wrongful Eviction Action, CHIP argues that interest should be calculated from April 21, 2020,³ the date the court dismissed the complaint in that action and CHIP became entitled to attorneys' fees. Quality King counters that CPLR 5001 is not applicable, because CHIP's attorneys' fees are not damages for breach of contract. It argues that, because CHIP has never demanded payment of its attorneys' fees, there has been no breach and, without a breach, no cause of action for breach of contract and no attendant right to prejudgment interest under CPLR 5001.

CPLR 5001 provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract" and that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed." Ordinarily, "interest is computed on damages for breach of contract . . . and flows from the date of the breach" (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005], quoting *119 Fifth Ave. Corp. v Berkhout*, 135 Misc 2d 773, 774 [Civ Ct, NY County 1987]). However, "[a]ttorney fees are not damages for breach of any substantive provision of a contract Rather, they represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been

³ April 21, 2020 is the date the Wrongful Eviction Decision was filed on NYSCEF. The Wrongful Eviction Decision is dated April 7, 2020.

determined” (*id.* at 226-227, quoting *119 Fifth Ave. Corp.*, 135 Misc 2d at 774).⁴ Therefore, “[t]he calculation of prejudgment interest on [a] fee award . . . should be . . . the date the court determined that plaintiff had prevailed on its claim and was therefore entitled to an award of attorneys’ fees” (*id.* at 227; *see also 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 503 [1st Dept 2010] [finding that “prejudgment interest on the attorneys’ fee claim was properly awarded from the date of the underlying judgment on plaintiff’s breach of contract claim” and not the date of the judgment on appeal]). Where fees are incurred at various points, the court may choose a “‘reasonable intermediate date’ . . . from which all interest should run” (*Solow Mgt. Corp. v Tanger*, 43 AD3d 691, 691 [1st Dept 2007], quoting CPLR 5001[b]; *see Miller Realty Assoc. v Amendola*, 51 AD3d 987, 990 [2d Dept 2008] [modify award of interest on attorneys’ fees to run from “the midpoint date between . . . (the date the court determined that the plaintiff had prevailed on its claim), and . . . (the date that the court awarded the attorney’s fees)”]; *see also Fifth & 106th St. Assoc. v Harris*, 37 Misc 3d 128[A], 2012 NY Slip Op 51910[U] [App Term, 1st Dept 2012] [same]; *Negron v Goldman*, 11 Misc 3d 144[A], 2006 NY Slip Op 50809[U] [App Term, 1st Dept 2006] [same]).

The cases that Quality King relies on, denying prejudgment interest on awards of legal fees, are inapposite. In *Ficus Invs., Inc. v Private Capital Mgt., LLC*, the court granted the defendant’s motion, pursuant to the terms of the operating agreement, for an order awarding him

⁴ Notably, the court in *Solow Mgt. Corp.* was addressing “a request for prejudgment interest on an award of attorneys’ fees pursuant to a residential lease and Real Property Law § 234” (19 AD3d at 226). Nonetheless, its reasoning is applicable here, as it was premised on the holding of *119 Fifth Ave. Corp.*, which began its analysis by recognizing a landlord’s right to prejudgment interest on attorneys’ fee, when a lease provides for such fees, reasoning that: “CPLR 5001 (a) commands prejudgment interest in a contract or property action”; “[a] lease is a contract”; and “[section 234] simply confers upon tenant a reciprocal right to fees whenever landlord is so entitled under the lease” (135 Misc 2d at 774).

an advancement of expenses in defending himself against claims of breach of fiduciary duty, conversion and unjust enrichment (71 AD3d 591, 591-592 [1st Dept 2010]). However, the court declined to grant CPLR 5001 prejudgment interest on the award, because it had determined that the defendant “was entitled to an advancement of expenses *prior to disposition of the action*,” based on the terms of the operating agreement “and not in the context of a breach of contract action” (*id.* at 592 [emphasis added]). Quality King also relies on *546-552 W. 146th St. LLC v Arfa*, in which the court denied prejudgment interest in circumstances nearly identical to those in *Ficus* and cited that case in support of its determination (99 AD3d 117, 123 [1st Dept 2012]). Here, unlike in those cases, the attorneys’ fees are being awarded “because of a breach of performance of a contract” and after disposition of that claim (CPLR 5001 [a]).

Fees have been incurred at various points in both actions. In the Guaranty Action, the court granted partial summary judgment in CHIP’s favor “on the basic issue of liability” and determined that CHIP was “entitled to legal fees to date” on July 25, 2016 (GA NYSCEF Doc No. 71 at 3). However, as discussed above, litigation did not end there and CHIP continued to incur fees. In the Wrongful Eviction Action, this court granted summary judgment in CHIP’s favor, dismissing Quality King’s complaint on April 7, 2020. However, the court also dismissed CHIP’s claim for attorneys’ fees in that action and CHIP did not vindicate its right to those fees until the instant decision. Because fees were incurred throughout the course of these closely related actions and because all recovery stems from Quality King’s liability as guarantor, the date from which interest shall be calculated will be the midpoint date between July 25, 2016, the date Quality King was found liable under the guaranty, and the date of the ultimate attorneys’ fees order, yet to be determined (*see Solow Mgt. Corp.*, 43 AD3d at 691; *Miller Realty Assoc.*, 51 AD3d at 990).

Reasonableness of Costs and Fees

Quality King challenges the reasonableness of CHIP's attorneys' fees and costs on various grounds. In addition, it argues that CHIP is not entitled to recover fees that it has not paid and, due to a lack of an engagement letter, is not obligated to pay.

First, a written engagement letter is not required for the recovery of attorneys' fees (*see Board of Mgrs. of the 25th Charles St. Condominium v Seligson*, 126 AD3d 547, 548 [1st Dept 2015] [stating that a written retainer "is not necessary for the (plaintiff) to recover legal fees for the services provided by the firm"]).

Second, Quality King fails to cite any authority requiring denial of attorneys' fees that have been incurred, but not yet paid, and the court could not locate any. Quality King's reliance on *379 Madison Ave., Inc. v Stuyvesant Co.* is misplaced, as that case dealt with a contract promising to "reimburse" attorneys' fees (242 App Div 567, 569 [1st Dept 1934], *affd* 268 NY 576 [1935]). The court held that "until the plaintiff . . . paid its attorneys after the rent litigation was concluded, it could not . . . maintain[] an action for reimbursement" (*id.*). Quality King also relies on *Moses Prod. Inc. v Sweetland Films B.V.*, where the court held that the "[p]laintiff [was] entitled only to recover only [sic] the reasonable attorneys' fees that it has actually paid" (2006 NY Misc LEXIS 2394, at *6-7 [Sup Ct, NY County July 13, 2006, No. 602330-01]). However, the court in that case makes no mention of the contractual or statutory provision entitling plaintiff to attorneys' fees and relies on cases addressing "reimbursement" of attorneys' fees (*id.*, citing *F.H. Krear & Co. v Nineteen Named Trustees*, 810 F2d 1250, 1269 [2d Cir 1987] [stating that "under a contract calling for 'reimbursement' for attorney's fees, . . . a party is not entitled to an award exceeding the amount he has actually paid his attorney"]; *379 Madison Ave., Inc.*, 242 App Div at 569). Here, the guaranty contains no reference to reimbursement.

Likewise, the lease provides for repayment of “reasonable attorneys’ fees and disbursements . . . which Landlord may *incur* or *pay out*” (lease, ¶ 52 [a] [emphasis added]). Therefore, here, payment of fees is not a prerequisite to maintaining a claim for attorneys’ fees (*see 930 Fifth Corp. v King*, 54 AD2d 636, 637 [1st Dept 1976], *affd* 42 NY2d 886 [1977] [stating that “the Court of Appeals interprets clauses providing for attorneys’ fees as giving rise to a cause of action upon incurrence, unless the clause specifically requires payment prior to a request for reimbursement”).

Quality King also relies on *Zelouf Intl. Corp. v Zelouf*, where the court denied recovery of attorneys’ fees that were “billed but not paid” (2015 NY Slip Op 32694[U], *3 [Sup Ct, NY County 2015]). However, in denying the unpaid portion of the fees, the court, in the exercise of its discretion, adopted the recommendation of the judicial hearing officer, who heard and reported on the issue of the amount of reasonable attorneys’ fees. Here, the court also refers the issue of the amount of reasonable attorneys’ fees and costs to a Special Referee to hear and report.

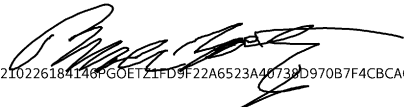
Accordingly, it is hereby

ORDERED that motion sequence numbers 009 and 010 are granted to the extent that plaintiff shall recover reasonable attorneys’ fees and costs incurred in connection with the underlying litigations, with prejudgment interest pursuant to CPLR 5001 at the midpoint date between July 25, 2016 and the date of the ultimate attorneys’ fees order; and it is further

ORDERED that to the extent plaintiff seeks attorneys’ fees and costs incurred in moving for fees and costs (i.e. fees on fees), the motions are denied; and it is further

ORDERED that that the issue of the amount of reasonable attorneys' fees and costs plaintiff may recover against the defendant Quality King Distributors, Inc. 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,⁵ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.



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2/26/2021

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

⁵ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).