

230 Fifth Ave. Assoc., LLC v Am Home Textiles, LLC
2021 NY Slip Op 32120(U)
November 3, 2021
Supreme Court, New York County
Docket Number: Index No. 150963/2021
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

230 FIFTH AVENUE ASSOCIATES, LLC,
Plaintiff,

- v -

AM HOME TEXTILES, LLC and AMIT MITTAL
Defendants.

-----X

INDEX NO. 150963/2021

MOTION DATE 08/02/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DEFAULT JUDGMENT.

In this action seeking to recover damages for breach of a commercial lease and a guaranty agreement, plus attorney’s fees, the plaintiff landlord moves pursuant to CPLR 3215 for leave to enter a default judgment against defendant Am Home Textiles, LLC, the tenant, and defendant Admit Mittal, the guarantor, in the sum of \$120,667.29, purportedly representing unpaid rent and additional rent from April 2020 through May 2021. No opposition is submitted. The motion is granted in part.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008]).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). “The proof submitted must establish a *prima facie* case.” See Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006).

In support of its motion, the plaintiff submits, *inter alia*, an attorney’s affirmation, the affidavit of Lily Cheng, a property manager employed by the plaintiff, the subject lease and three subsequent amendments of the lease, the subject guaranty, the deed for the subject premises, and a rent ledger, dated April 30, 2021. In her affidavit, Cheng indicates, and the third amendment of the lease supports, that effective April 1, 2018, the monthly rent was \$11,589.38. The third amendment further indicates that the term of the lease was to expire on March 31,

2022. Cheng also states, and the lease and third amendment thereto confirms, that the tenant was also obligated to pay additional rent for electricity, real estate taxes, and fuel.

Cheng asserts that during the period of April 2020 through January 2021, the tenant failed to pay rent and additional rent in the amount of \$93,419.64. Cheng also avers, and the lease supports, that if the tenant failed to pay any installment of fixed annual rent, additional rent, or any other sum payable to the landlord under the terms of the lease within five days of such installment becoming due, interest and a late charge in the amount of five cents for each dollar overdue would accrue from and after the date on which any such sum was due and payable.

Cheng additionally states that the rent ledger submitted in support of the plaintiff's motion is a copy of a ledger that is prepared in the ordinary course of the plaintiff's business, and that it is the plaintiff's business practice to prepare such a ledger and make the entries that appear on the ledger contemporaneously with the charges that appear on it. The ledger demonstrates that the tenant made no payments for the period of April 2020 through January 2021 and that as of January 2021, there was an unpaid balance of \$128,187.78. However, the court notes that the complaint only seeks to recover \$93,419.64 for unpaid rent and additional rent during this period. The plaintiff proffers no explanation for the discrepancy.

Cheng states that pursuant to the guaranty, the guarantor agreed to pay all base and additional rent due under the lease. The guaranty, titled "Limited Guaranty (Good Guy)," dated March 9, 2010, is signed by Amit Mittal. A notary acknowledgment, also dated March 9, 2010, is annexed to the one-page guaranty. The guaranty provides, in pertinent part, that Mittal "guarantees to [the] [l]andlord, its successors and assigns, that [] he shall pay to [the] [l]andlord all [m]inimum [r]ent, [a]dditional [r]ent and all other charges that has accrued or may accrue under the terms of the [l]ease." The guaranty additionally states that it is "absolute and unconditional and is a guarantee of payment and not of collection." It also specifies that it "shall remain and continue in full force and effect, as to any renewal, modification or extension of this [l]ease and during any period when [the] [t]enant is occupying the premises."

With respect to its first cause of action, the plaintiff has established a claim for breach of contract by showing (1) the existence of a contract, (2) the plaintiff's performance under that

contract; (3) the tenant's breach of that contract and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996).

The complaint seeks damages through January 2021 only, when the complaint was filed, and for the lesser sum of \$93,419.64, even though the ledger appears to indicate that there was an unpaid balance of \$128,187.78 as of January 2021. Although the plaintiff has provided evidence that the tenant has not paid rent and additional rent through April 2021, CPLR 3215(b) expressly provides that a default "judgment shall not exceed in amount or differ in type from that demanded in the complaint." CPLR 3215(b); see P & K Marble, Inc. v Pearce, 168 AD2d 439 (2nd Dept. 1990); Sanford v Powers, 93 AD2d 985 (4th Dept. 1983); Gluck v W. D. Allen Mfg. Co., 53 AD2d 584 (1st Dept. 1976); Lape v Lape, 23 AD2d 539 (1st Dept. 1965). The plaintiff did not move to amend the complaint and provides no basis to depart from the above-cited rule. Therefore, the plaintiff has established that it is entitled to judgment on its first cause of action, in the sum of \$93,419.64 only, for unpaid rent and additional rent from April 2020 through January 2021.

As for the second cause of action for breach of the guaranty, where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), (quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The terms of the subject guaranty agreement are clear, unambiguous, absolute, and unconditional and, having defaulted in this action, the defendant has not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiffs in regard to the agreement.

The plaintiff's papers do not address NYC Administrative Code 22-1005 (L.L. 2020/55, 5/26/2020) (the Guaranty Law), which bars enforcement of personal guaranties on commercial

leases under certain conditions and if the alleged liability arose between March 7, 2020 and September 30, 2020, the period of onset of the COVID-19 public health emergency. Having failed to answer, the defendants have not raised the issue.

The Guaranty Law provides, in relevant part,

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

c. The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive.

N.Y.C. Admin. Code § 22-1005. The subject lease states that the “[t]enant shall use and occupy the demised premises for [o]ffice and [s]howroom for [w]holesale and [d]isplay of home textile products and for no other purpose.” The tenant defaulted on its rent in April 2020, during the peak of the COVID-19 public health emergency in New York City. The rent ledger demonstrates that for years prior to that, since at least September 2014, the tenant made its rent and additional rent payments. Nonetheless, neither of the defendants has appeared in this action and the record contains no assertion that the tenant actually ceased operations or closed to the public as a result of COVID-19-related executive orders, as is required under paragraph 1, subparagraph (c) of the Guaranty Law. See iPayment, Inc. v Silverman, 192 AD3d 586, 587 (1st Dept. 2021) (application of Guaranty Law was not appropriate in the absence of such an assertion by defendant tenant). Thus, the plaintiff is entitled to judgment on the second cause of action in the sum of \$93,419.64.

Turning to the third and fourth causes of action seeking a judgment declaring that the tenant and guarantor, respectively, are obligated to pay rent and additional rent through the expiration of the lease, the plaintiff has not established its entitlement to such relief. “[N]o declaratory judgment is appropriate when an adequate remedy is already provided by another well-known form of action, such as [an] action[] for . . . breach of contract, [which is] alleged in this complaint.” Arthur Young & Co. v Fleischman, 85 AD2d 571 (1st Dept. 1981) (citing James v Alderton Dock Yards, 256 NY 298 [1931]). As such, the plaintiff’s motion for leave to enter a default judgment on the third and fourth causes of action is denied.

Finally, in regard to the fifth and sixth causes of actions seeking attorney’s fees incurred in connection with this action pursuant to paragraph 19 of lease and the guaranty, the court finds that the plaintiff is entitled to contractual attorney’s fees from the tenant only. The guaranty is limited to minimum rent, additional rent, and all other charges that accrue under the terms of the lease. In contrast to the lease, the guaranty is silent on attorney’s fees. Therefore, the general rule that attorney’s fees are “incidental to litigation,” and that each party bears its own costs applies with respect to the guarantor. See Fleming v Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375, 379, (2010) (citing Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]). The court refers the issue of the amount due to the plaintiff for attorney’s fees as against the tenant only under the subject lease agreement to a Judicial Hearing Officer (JHO) or Special Referee to hear and report.

Accordingly, it is

ORDERED that the plaintiff’s motion for leave to enter a default judgment pursuant to CPLR 3215 is granted on the first, second, and fifth causes of action, without opposition, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of \$93,419.64 as and for rent and additional rent through January 2021, plus costs and statutory interest from the date of judgment; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of the amount of reasonable attorney's fees the plaintiff may recover from the defendant Am Home Textiles, LLC, only, under the subject lease agreement; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part,

subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the plaintiff shall serve a copy of this order on the defendants within 10 days.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/03/2021
DATE

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