

Brixmor SPE 6 LLC v H&N Holding Group, LLC

2022 NY Slip Op 30252(U)

January 6, 2022

Supreme Court, New York County

Docket Number: Index No. 655022/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

BRIXMOR SPE 6 LLC,

Plaintiff,

- v -

H&N HOLDING GROUP, LLC, HANY MOSTAFA
and NISREEN YOUINS

Defendants.

-----X

INDEX NO. 655022/2021
MOTION DATE 12/17/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover unpaid rent, additional rent and attorney's fees due under a commercial lease, the plaintiff landlord moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants, a corporate lessee and two personal guarantors, in the sum of \$91,320.57, plus additional sums accruing after the filing of the complaint. 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 [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 Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

The plaintiff submits, inter alia, the summons and complaint, an attorney's affirmation, the subject lease dated January 30, 2018, the first amendment of the lease dated May 9, 2019, a rent ledger, and the affidavit of David Mickelberg, Director of Collections for Brixmor Property Group, managing agent for the plaintiff's property in Carle Place, New York. In his affidavit,

Mickelberg states that the defendants defaulted in their obligations under the lease by failing to pay rent and additional rent when due, the first of each month, as shown in the ledger. The ledger demonstrates that, apart from one missed tax payment in April 2019, the defaults started on October 1, 2019 and continued through August 21, 2021, for a total outstanding balance of \$91,320.57, including late fees, as of August 1, 2021. The instant action was commenced on August 17, 2021.

The proof submitted establishes a *prima facie* 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). Having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70–71 (2003).

The plaintiff has also established its entitlement to relief under the second cause of action alleging breach of a guaranty. "[W]here 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, 446–47 (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 defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiffs in regard to the agreement. Again, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., supra at 70–71.

To the extent the plaintiff seeks additional damages for arrears and fees accrued after the filing of the complaint, that portion of the motion is denied. CPLR 3215(b) expressly provides

that a default “judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served.” CPLR 3215(b); see Mt. Hawley Ins. Co. v Am. States Ins. Co., 139 AD3d 497 (1st Dept. 2016); P & K Marble, Inc. v Pearce, 168 AD2d 439 (2nd Dept. 1990); Gluck v W. D. Allen Mfg. Co., 53 AD2d 584 (1st Dept. 1976); Lape v Lape, 23 AD2d 539 (1st Dept. 1965). The plaintiff provides no basis to depart from well-settled law that a default judgment may not exceed the amount demanded in the complaint or summons with notice.

Ordinarily, attorney’s fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, the lease and guaranty agreements each contains an attorney’s fees provision entitling the plaintiff to recover attorney’s fees. However, the plaintiff has submitted no proof in support of the amount of fees incurred in support of its application. It may do so by submitting supplemental papers within 30 days of the date of this order.

Generally, interest is computed “from the earliest ascertainable date the cause of action existed”. CPLR 5001(b). In a breach of contract action, interest “accrues from the time of an actionable breach.” Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). Thus, the plaintiff is entitled to statutory interest from October 1, 2019.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment is granted in part, without opposition; and is otherwise denied without prejudice, 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 \$91,320.57, plus costs and statutory interest from October 1, 2019, and it is further

ORDERED that the plaintiff's application for contractual attorney's fees is granted and it may submit supplemental papers in support within 30 days of this order, with notice to the Part 42 Clerk of any such filing, if so advised.

This constitutes the Decision and Order of the court.



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

1/6/2022
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
				<input checked="" type="checkbox"/>
				GRANTED IN PART
				<input type="checkbox"/>
				OTHER