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| Dovom LLC v Slavutsky |
| 2022 NY Slip Op 33397(U) |
| October 6, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 650068/2022 |
| Judge: Nancy M. Bannon |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

DOVOM LLC,

Plaintiff,

- v -

YANNA SLAVUTSKY, FOODIE PHILOSOPHY, LLC

Defendant.

-----X

INDEX NO. 650068/2022

MOTION DATE 06/07/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19

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

In this breach of contract action seeking to recover \$759,129.48 in unpaid base rent and additional rent, the plaintiff landlord, Dovom LLC, owner of commercial property at 1716 Second Avenue in Manhattan, moves pursuant to CPLR 3215 for default judgement against the defendants, tenant Foodie Philosophy, LLC and guarantor Yanna Slavutsky. The plaintiff also seeks contractual attorney’s fees. No opposition is submitted. The motion is granted.

“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).” 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).

In support of the motion, the plaintiffs submitted, *inter alia*, the summons and complaint, proof of service, a rent ledger that shows the breakdown of all charges for base rent, real estate taxes, utilities, sewer charges and late fees, the deed to the property, the subject lease agreement signed by Slavutsky on behalf of Foodie Philosophy dated January 29, 2018, and

the guaranty agreement signed by Slavutsky in her personal capacity dated August 29, 2018.

The guaranty agreement provides that Slavutsky agreed to guaranty:

“absolutely and unconditionally, to Landlord for the period commencing on the Commencement Date of the Lease until the expiration of such Lease the full and prompt payment of (a) all Base Rent, additional rent and other charges, costs and expenses which shall at any time be payable by Tenant under the Lease (and any amendments, modifications and other instruments relating thereto) through and including the Surrender Date (as hereinafter defined), and any and all use and occupancy charges during any period of time Tenant is occupying the Demised Premises as a holdover Tenant after the expiration or earlier termination of the Term of the Lease, (b) all damages caused by and costs and expenses incurred by reason of such holding over after the expiration or earlier termination of the Lease; and (c) all damages caused by and costs and expenses incurred by reason of Tenant's to remove any mechanic's liens filed against the Building ”

The plaintiff also submitted an affirmation of its counsel and an affidavit of Annette Fobbs, the its authorized agent, dated April 25, 2022, in which she states that the tenant defaulted under the lease and the defendant guarantor failed to make any payments to the plaintiff as required by the guaranty agreement.

The plaintiff's proof establishes, *prima facie*, its entitlement to relief on the first cause of action alleging breach of contract. The plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' 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 defendant is “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). Furthermore, “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, 446–47 (1st Dept. 2012) (quoting Nat'l 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 by failing

to appear in this action or oppose this motion, the guaranty agreement is enforceable against Slavutsky.

In regard to the third cause of action, the plaintiff's submissions are insufficient to impose individual liability on Slavutsky upon a theory of piercing the corporate veil. A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation's business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal. Worthy v New York City Housing Auth., 21 AD3d 284 (1st Dept. 2005). Such proof is absent here. That Slavutsky signed the lease is of no moment since "[i]t is axiomatic that 'a corporation can only act through an individual.'" *Id.* at 286, quoting Nevin v Citibank, 107 F Supp 2d 333, 350 (SDNY 2000).

The plaintiffs also seek rent and additional rent that accrued after the filing of the complaint from January 2022 to March 2022, bringing the total sum demanded by plaintiffs to \$838,309.48. However, 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). Moreover, the plaintiffs provide no basis to depart from this well-settled rule that a default judgment may not exceed the amount demanded in the complaint.

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). Therefore, the plaintiff is entitled to statutory interest from June 1, 2019, the date of the first default.

The plaintiff has established entitlement to contractual attorney's fees. Article 19 of the lease provides that "If Owner...makes any expenditures or incurs any obligations for the payment of money, including...reasonable attorney's fees in instituting, prosecuting, or defending any actions or proceeding..." (see generally Flemming v Barnwell Nursing Home and

Health Facilities, Inc., 15 NY3d 375 [2010]; Coopers & Lybrand v Levitt, 52 AD2d 493 [1st Dept. 1976]). However, the plaintiff has not provided any documentation to establish the proper amount to be awarded, such as billing records or invoices. Therefore, the motion is granted on this cause of action on the issue of liability and the plaintiff may submit supplemental papers to establish damages within 30 days.

Any relief not expressly granted herein is denied.

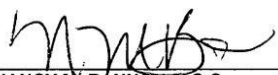
Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for default judgment pursuant to CPLR 3215 is granted as to the first and second causes of action, without opposition, and denied as to the third cause of action, 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 \$759,129.48, plus costs and statutory interest from June 1, 2019, and it is further

ORDERED that the fourth and fifth causes of action seeking attorney's fees is granted as to liability and the plaintiff may submit supplemental papers to establish the proper amount of fees, if so advised, within 30 days of the date of this order and shall notify the Part 42 Clerk of such filing.

This constitutes the Decision and Order of the court.



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

10/6/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE