

<b>29th St. Assoc. LLC v Khachatryan</b>
2022 NY Slip Op 34042(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 652248/2022
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

29TH STREET ASSOCIATES LLC

Plaintiff,

- v -

IRINA KHACHATRYAN,

Defendant.

-----X

INDEX NO. 652248/2022

MOTION DATE 09/12/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In this action to recover \$110,743.90 in damages for breach of a guaranty agreement, the plaintiff, 29<sup>th</sup> Street Associates LLC, owner of commercial property at 217 East 29<sup>th</sup> Street in Manhattan, moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against the defendant, Irina Khachatryan, personal guarantor and principal of the former tenant Elita Salonchic, Inc. The defendant filed untimely opposition. The motion is granted in part.

A plaintiff may seek relief under CPLR 3213 “[w]hen [the] action is based upon an instrument for the payment of money only.” See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1<sup>st</sup> Dept. 2013); Allied Irish Banks, P.L.C. v Young Men’s Christian Assn. of Greenwich, 105 AD3d 516 (1<sup>st</sup> Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1<sup>st</sup> Dept. 2013). In order to establish a prima facie entitlement to summary judgment in lieu of a complaint, a plaintiff must produce an instrument containing an “unequivocal and unconditional obligation to repay” (Zyskind v FaceCake Mktg. Tech., Inc., 101 AD3d 550, 551 [1<sup>st</sup> Dept. 2012]), one which by its terms is for the payment of money only over a stated period of time (see Bloom v Lugli, 81 AD3d 579,580 [2<sup>nd</sup> Dept. 2011]), and establish that the defendant failed to pay in accordance with those terms. See Zyskind v FaceCake Mktg. Tech., Inc., *supra*; Rhee v Meyers, 162 AD2d 397 (1<sup>st</sup> Dept. 1990). It has been held that an unconditional guaranty under a lease may fall within the parameters of CPLR 3213. See Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., 25 NY3d 485 (2015); Springprince, LLC

v Elie Tahari, Ltd., 173 AD3d 544 (1<sup>st</sup> Dept. 2019); Board of Mgrs. of the Saratoga Condominium v Shuminer, 148 AD3d 609 (1<sup>st</sup> Dept. 2017); cf. Times Square Assocs. v Grayson, 39 AD2d 845 (1<sup>st</sup> Dept. 1972). Further, it is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof in admissible form to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of the motion, the plaintiff submits, *inter alia*, a deed to the property, the subject underlying lease dated May 20, 2014, which term was to expire May 31, 2024, an assignment of the lease to Elita Salonchic, Inc., dated December 15, 2015, the subject guaranty agreement, dated December 31, 2015, a rent ledger referable to the defendant with entries through May 1, 2022, an affirmation of counsel and an affidavit of Jonathan Ruhl, a representative of the plaintiff. Ruhl alleges that the tenant, which operated the premises as a hair salon, became delinquent in rent and additional starting on April 1, 2020, and as of May 1, 2022, when the action was commenced, the tenant had accrued arrears of \$110,743.90. The ledger also shows that the rent and additional rent accrued from April 1, 2020, through September 30, 2020, was \$26,119.18. Ruhl alleges that the defendant guarantor failed to pay any of the amount due. In the guaranty agreement, the defendant agreed to guaranty the full payment of all obligations of the tenant, and that the defendant's obligations under the guaranty would terminate only after 180 days written notice of vacatur by the tenant was given to the landlord, the tenant surrendered the premises surrender of premises and payment of all rent and additional rents due as of that date were paid in full.

By this proof, the plaintiff has established a breach of contract, *i.e.* (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). 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 (1<sup>st</sup> Dept. 1995), aff'd 88 NY2d 716 (1996). 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 (1<sup>st</sup> Dept. 2012) (quoting National Westminster Bank USA v Sardi’s Inc., 174 AD2d 470, 471 [1<sup>st</sup> Dept. 1991]).

As noted, the defendant’s opposition, due August 2, 2022, was filed August 12, 2022, the return date of the motion. Even if the court were to consider the untimely submission, it clearly does not allege, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the execution of the guaranty agreement and does not raise any other issue of fact warranting denial of the motion. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. The opposition consists only of an affirmation of counsel with several attached exhibits, including a number e-mail communication between the parties. Since counsel claims no personal knowledge of the underlying facts, her affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1<sup>st</sup> Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1<sup>st</sup> Dept. 2010). In any event, counsel’s affirmation does not indicate any viable defense. She states only that the shop closed in March 2020 due the pandemic, briefly re-opened thereafter, and that the defendant vacated the premises in October 2020. Contrary to counsel’s suggestion, the e-mail communications do not show that the plaintiff agreed to waive any rent or accept a lesser amount than required by the lease. Rather, the communications show that when the defendant informed the plaintiff that the shop was closing due to the pandemic and was unable to pay any amount, the plaintiff, by Ruhl, informed her that late fees would be waived for several months, and any unpaid rent would not be forgiven but would be “carried forward.” The ledger indicates that that was done, leaving a balance of \$110,743.90 on May 1, 2022.

However, in its own submission, the plaintiff fails to address the applicability of 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. As stated, the tenant had accrued arrears of \$110,743.90, as of May 2022, but the ledger also shows that the rent and additional rent accrued from April 1, 2020, through September 30, 2020, was \$26,119.18. As such, the plaintiff has established entitlement only to \$84,624.71 in unpaid rent and additional rent as against the defendant guarantor.

The plaintiff also seeks \$32,500.00 contractual attorney's fees incurred in enforcing the guaranty pursuant to Paragraph 19 of the lease agreement and the corresponding terms of the guaranty agreement. Liability is established, but the amount sought is excessive. The factors used to determine the reasonableness of legal fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted).” Matter of Barich, 91 AD3d 769 (2<sup>nd</sup> Dept. 2012); see Matter of Freeman, 34 NY2d 1 (1974). An award of reasonable attorney's fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1<sup>st</sup> Dept. 2009). A court may reduce requested fees to eliminate unnecessary work (see Matter of SR, 169 AD3d 574 [1<sup>st</sup> Dept. 2019]), work that was duplicative or was unnecessarily performed by an attorney rather than a paralegal or secretary (JK Two LLC v Garber, 171 AD3d 496 [1<sup>st</sup> Dept. 2019]) or where the amount sought was unsubstantiated by the proof submitted. See Silverstein v Goodman, 113 AD3d 539 (1<sup>st</sup> Dept. 2014); Josefsson v Keller, 141 AD2d 700 (1<sup>st</sup> Dept. 1988). The plaintiff submits the C.V. of its attorney, Mark Altschul, and his affirmation in which he states he has been practicing law in the field of commercial litigation since 1985, that he spent 15 hours on this motion, and charges a an hourly rate of \$400, for a total of \$6,000.00, and that prior to that he devoted an unspecified number of hours in reviewing the file, conducting "various consultations", sending e-mail communications to the client and "research[ing] about the defendant", without submission of any further detail or proof. Anticipated additional fees to be incurred in the future are not recoverable. Considering the plaintiff's submissions and the circumstances presented, the court finds that an award of \$10,000.00 in counsel fees to be reasonable.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted in part, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of \$84,624.71, plus costs and statutory interest from October 1, 2020, and it is further

ORDERED that the plaintiff's application for contractual attorney's fees is granted in part, and it is further

ORDERED that the Clerk shall enter an additional judgment in favor of the plaintiff and against the defendant in the sum of \$10,000.00.

This constitutes the Decision and Order of the court.

11/22/2022  
DATE

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

CHECK ONE:

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