

**ESRT 1350 Broadway, LLC v CNJ Holdings, LLC**

2023 NY Slip Op 30503(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 150306/2019

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART IV

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ESRT 1350 BROADWAY, LLC,

Plaintiff,

-against-

CNJ HOLDINGS, LLC,

Defendants.

**DECISION FOLLOWING  
INQUEST**

Index No. 150306/2019

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HON. FRANK P. NERVO, J.S.C.

By Decision and Order on motion sequence 001, the Hon. Debra A. James, J.S.C. found defendant in default and granted plaintiff a default judgment against same, with the determination of damages and attorneys' fees to be calculated at inquest (*see* NYSCEF Doc. No. 18). By administrative order, the inquest in this matter was assigned to Part IV, before the Hon. Frank P. Nervo, J.S.C. Thereafter, by Order dated December 02, 2022, this Court directed the inquest proceed on paper submissions on January 23, 2023, unless defendant appeared in this matter and sought cross-examination (*see* NYSCEF Doc. No. 22). The Court has received papers in support of plaintiff's damages (NYSCEF Doc. Nos. 23 - 34). Defendant has neither submitted papers in opposition nor sought to cross-examine plaintiff's witnesses. Defendant has not appeared on this inquest.

RENT AND ADDITIONAL RENT

Turning to the merits of the inquest and considering the procedural posture of this matter, namely defendant's default, it is beyond cavil that defendant has admitted all traversable allegations in the complaint, including liability (*Amusement Bus. Underwriters v. American Intl. Group*, 66 NY2d 878 [1985]; *Curiale v. Ardra Ins. Co., Ltd.*, 88 NY2d 268 [1996]). Whether a default is premised upon failure to answer or upon striking of an answer is of no moment (*Abbas v. Cole*, 44 AD3d 31, 33 [2d Dept 2007]). Accordingly, the only issue before the Court is "plaintiff's conclusion as to damages" (*Amusement Bus. Underwriters v. American Intl. Group, supra*; *Curiale v. Ardra Ins. Co., Ltd, supra*).

Plaintiff has established the following by a preponderance of the evidence (*see generally* NYSCEF Doc. Nos. 23 - 34). Defendant entered into a commercial lease agreement with 1350 Broadway Associates for Suite 1010 at 1350 Broadway New York, NY 10018. Thereafter, 1350 Broadway Associates was dissolved and transferred all assets to plaintiff. Following the dissolution, defendant continued to make payments under the lease agreement to plaintiff until July 1, 2016, when defendant failed to remit any further payments. Defendant vacated the premises the following month, on or about August 15, 2016. Pursuant to the parties' commercial lease agreement, defendant is

responsible for the remainder of the lease term should defendant default on its obligations under the agreement. Accordingly, plaintiff is entitled to recover \$179,004.88 from defendants.<sup>1</sup>

#### ATTORNEYS' FEES

Turning to the attorneys' fees sought by plaintiff, where attorneys' fees are authorized, either by statute or agreement, the fee sought must be reasonable; where the fee is unreasonable, inflated, or needlessly incurred, the Court may dismiss the claim for attorneys' fees (*American Motorists Ins. Co. v. Napco Sec. Systems Inc.*, 244 AD2d 197 [1st Dept 1997]). In determining the reasonableness of attorneys' fees, the Court considers the attorneys' affidavit and submissions to elicit the "difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved" (*Bankers Federal Sav. Bank FSB v. Off West Broadway Developers*, 224 AD2d 376 [1st Dept 1996]).

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<sup>1</sup> Amount of rent and additional rent owing plaintiff after crediting defendant \$18,000.00 for security deposit.

Here, plaintiff seeks \$59,662.36 for attorneys' fees; one-third of the principal amount awarded.<sup>2</sup> However, at the time plaintiff was awarded default judgment, following plaintiff's motion for same, plaintiff's counsel averred its attorneys' fees were \$1,440.00 (NYSCEF Doc. No. 14). Now, at the conclusion of this matter, plaintiff's attorneys aver a total of 7.8 hours have been expended to date, and at their customary rate of \$400.00/hr such work totals \$3,120.00 (NYSCEF Doc. No. 23). Notwithstanding, plaintiff's counsel seek nearly twenty-times that amount in attorneys' fees based upon anticipated future work enforcing the instant judgment (*id.* at ¶ 22).<sup>3</sup> Such a fee would require an hourly rate of approximately \$5,000.00 for the work performed to date. For any court to imprimatur such a fee would be shockingly outrageous.

Notwithstanding that plaintiff's counsel avers it customarily charges \$400/hr for its services, the Court notes that where counsel is assigned to represent indigent tenants in matters attendant to lease defaults such counsel

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<sup>2</sup> Plaintiff's counsel's papers are wholly silent as to the fee arrangement reached between it and plaintiff. Furthermore, no retainer or other fee agreement has been submitted as evidence on this inquest.

<sup>3</sup> Plaintiff's counsel has not provided any support, appellate or otherwise, for the proposition that the Court may properly award attorneys' fees for uncertain and yet to be completed post-judgment work on the assumption that same will occur. The Court is confident that no such authority exists.

necessarily face the same legal issues as plaintiff's counsel, yet assigned counsel receive markedly less compensation. Hourly compensation figures for counsel assigned to represent indigent tenants in Housing Court under the Universal Access to Legal Services Law are not readily available. However, the Office of Civil Justice at New York City Human Resources Administration estimates that upon full implementation of the Universal Access to Legal Services Law, a total of approximately 400,000 individuals will qualify for representation in 125,000 eviction cases with annual funding for counsel in these matters reaching \$166 million (*Universal Access to Legal Services, A report on Year Two of Implementation in New York City*, Office of Civil Justice New York City Human Resources Administration, Fall 2019 at p. 1 available at: [OCJ UA Annual Report 2019 \(nyc.gov\)](#)). Consequently, on average, appointed counsel receive less than approximately \$1,400.00 for each matter.<sup>4</sup>

Where counsel are assigned to represent indigent parties by Court order in other matters not covered by the Universal Access to Legal Services Law,

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<sup>4</sup> The Court is cognizant that this estimation assumes a single attorney is appointed to represent the interests of all indigent individuals in a qualifying matter, does not reflect administration costs, and assumes all funding reaches appointed counsel. Undoubtedly, there are matters with multiple qualifying individuals who will require separate counsel due to a litany of factors, including but not limited to diverging interests. These factors necessarily reduce the amount of compensation assigned attorneys receive. The Court is, therefore, confident that the actual average amount of compensation assigned attorneys receive in Housing Court is significantly less than \$1,400.00 per matter.

counsel likewise receive significantly less compensation by statute – \$75.00/hr (see e.g. County Law § 722-B; Family Court Act § 245; and Judiciary Law § 35). This Court, however, recognizes that this statutory compensation rate was set a number of years ago and was recently increased, on an interim basis, to \$158.00 per hour by Decision and Order of the Hon. Lisa Headley, J.S.C. (*New York County Lawyers Assn. v. State of New York*, 2022 NY Slip Op 32476[U] [New York Cnty. Sup. Ct., July 25, 2022] [Headley, J]).

In any event, it is beyond cavil that “the Court may form an independent judgment from the facts and evidence before it as to the nature and extent of the services, make an appraisal of such services, and determine the reasonable value thereof” (*Jordan v. Freeman*, 40 AD2d 656 [1st Dept 1972]; see also *McAvoy v. Harron*, 26 AD2d 452, 455 [4th Dept 1966]).

This matter presents routine issues, is not complex, and, given defendant’s default, required minimal effort by plaintiff’s counsel to secure a successful result. The instant matter is the antithesis of a fiercely-litigated commercial lease dispute (c.f. *APF 286 Mad LLC v. RIS Real Properties, Inc.*, 46 Misc.3d 151(A) [App. Term, 1st Dept 2015]). A defaulting commercial tenant’s failure to pay rent pursuant to a commercial lease is an unexceptional and banal

matter. To be sure, the vast majority of inquests following default judgment which are assigned to this Part are tenant defaults of commercial lease agreements, legally identical to this matter. Furthermore, in considering counsel's performance in this matter, counsel admittedly failed to adhere to the Court's prior order and submitted untimely papers on this motion due to law office failure (*see e.g.* NYSCEF Doc. 23 at ¶ 6 - 10). Likewise, plaintiff's counsel failed to timely move for a default judgment, again due to law office failure (NYSCEF Doc. No. 7 at ¶ 6 - 11). Failure to comply with court-imposed and statutory deadlines is indisputably deficient practice, irrespective of the proffered excuse of law office failure, and but for the Court excusing such deficiencies, counsel's failures would have sabotaged an otherwise guaranteed victory for its client. Consequently, counsel's performance does not favor the award sought.

The Court's own research reveals that where attorneys' fees sought are exorbitant, the Appellate Division, First Department has denied the request to recover fees outright and dismissed the claim entirely (*see e.g. American Motorists Ins. Co. v. Napco Sec. Systems Inc.*, 244 AD2d 197 [1st Dept 1997]). Federal appellate courts have reached the same conclusion (*Clemens v. New York Central Mutual Fire Ins. Co.*, 903 F3d 396 [3d Cir. 2018]; *Brown v. Stackler*, 612 F.2d

1057 [7th Cir. 1980]; *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554 [5th Cir. 1998]; *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92 [4th Cir. 1993]; *Lewis v. Kendrick*, 944 F.2d 949 [1st Cir. 1991]; *Envtl. Def. Fund, Inc. v. Reilly*, F.3d 1254 [D.C. Cir. 1993]). “Underling these decisions is the idea that if courts did not possess this kind of discretion, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such conduct would be reduction of their fee to what they should have asked for in the first place” (*Clemens v. New York Central Mutual Fire Ins. Co.*, 903 F.3d at 402 [internal citation omitted]).

The instant fee request is precisely the type of palpably unreasonable demand sought to be discouraged; plaintiff’s counsel “requests an award of attorneys’ fees in the sum of \$59,662.36 as set forth in the Complaint, or at least \$3,120.00, or such other sum that the Court deems reasonable given the procedural history of this action” (NYSCEF Doc. No. 23 at ¶ 23). “[A] fee request is not the opening salvo in a back and forth negotiation with the court. The request is not the sticker price on a used car that all parties understand is the starting point for spirited dickering” (*M.G. v. Eastern Regional High School Dist.*, 2009 WL 3489358 [DNJ 2009] *vacated and remanded on other grounds* 386 Fed. Appx. 186 [3d Cir. 2010]).

Given the foregoing, denial of plaintiff's counsel's fee request would be amply supported. Indeed, where this Court has previously been presented with a palpably incredible, exorbitant, and offensive fee request by counsel following default in a matter attendant to a residential lease dispute, this Court has denied the attorneys' fees claim in its entirety (*Clozel v. Jalisi*, Civil Court, County of New York, Part 84 - Index No. 11227/2012). However, in the Court's discretion in this matter, it will not dismiss the plaintiff's counsel's outrageous fee request outright and leave counsel uncompensated.

The Court finds that the instant matter is routine in nature involving little effort, as discussed *supra*, and further finds that plaintiff's counsel has performed the same type of work as counsel assigned to represent indigent tenants pursuant to the Universal Access to Legal Services Law who receive less than \$1,400.00 compensation for such matters. Likewise, plaintiff's counsel has not performed work exceeding that required of counsel assigned in other matters pursuant to the County Law, Judiciary Law, and Family Court Acts – whose compensation is fixed by statute at \$75.00/hr and was recently increased to \$158.00/hr by Court Order (*supra*).

Accordingly, the Court finds \$1,232.40, representing 7.8 hours of work at \$158.00/hr, a customary fee charged for similar services. This represents approximately 2% of the attorneys' fees sought by plaintiff's counsel.

Assuming without determining, *arguendo*, that plaintiff's counsel's rate of \$400.00/hr was reasonable, the Court notes that counsel's averred 7.8 hours expended would equate to a fee of \$3,120.00 – approximately 19% of the total requested fee award of \$59,662.36.

#### I N T E R E S T

Finally, turning to the interest sought on the award, plaintiff prays for interest on the award from August 15, 2016, the date defendant vacated the premises (NYSCEF Doc. Nos. 23 and 24.). The Court finds that interest on the breach of the lease agreement, as a contract, should be calculated by the date of said breach (*Brushston-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 261 [1998]; *Rodriguez v. Moore-McCormack Lines*, 32 NY2d 425, 429 [1973]). The breach here, however, occurred on July 1, 2016, when defendant ceased remitting payments to plaintiff pursuant to the lease agreement. Accordingly, the Court finds interest should be calculated from July 1, 2016.

Interest on the award of legal fees is properly calculated from the date plaintiff was determined to be the prevailing party (*see Solow Mgmt. Corp. v. Tanger*, 19 AD3d 225 [2d Dept 2005]). Here, the Court's decision and order on motion sequence 001, granting plaintiff a default judgment against defendant, is the date plaintiff was determined to be the prevailing party on the issue of liability. Accordingly, interest from the date that Decision and Order was deemed filed, November 12, 2021, is appropriate.

Accordingly, it is

**ORDERED and ADJUDGED** that plaintiff, ESRT 1350 BROADWAY, LLC, 125 Park Avenue New York, NY 10017, shall have judgment for breach of the lease agreement in the amount of \$179,004.88 as against defendant, CNJ HOLDINGS, LLC, 134 West 29<sup>th</sup> Street 4<sup>th</sup> Floor New York, NY 10001, with interest at the statutory rate from July 1, 2016, as calculated by the Clerk of the Court and together with costs and disbursements as taxed by the Clerk of the Court; and it is further

**ORDERED and ADJUDGED** that plaintiff's counsel, SMITH CARROAD WAN & PARIKH, P.C., 202 East Main Street Smithtown, NY 11787, shall have judgment for its attorneys' fees in this matter in the amount of

\$1,232.40 as against defendant, CNJ HOLDINGS, LLC, 134 West 29<sup>th</sup> Street 4<sup>th</sup> Floor New York, NY 10001, with interest at the statutory rate from November 12, 2021, as calculated by the Clerk of the Court and together with costs and disbursements as taxed by the Clerk of the Court; and it is further

**ORDERED** that judgment shall be submitted to the Clerk of the Court, unless directed otherwise by that office, and not to chambers.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT FOLLOWING INQUEST.

Dated: February 17, 2023

E N T E R:



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HON. FRANK P. NERVO  
J.S.C.