

**800 Third Ave. Assoc., LLC v ATA Enters. Mgt. Inc.**

2023 NY Slip Op 30533(U)

February 15, 2023

Supreme Court, New York County

Docket Number: Index No. 656314/2022

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 M. BANNON PART 42**

*Justice*

-----X

800 THIRD AVENUE ASSOCIATES, LLC

Plaintiff,

- v -

ATA ENTERPRISES MANAGEMENT INC.,

Defendant.

-----X

**INDEX NO.** 656314/2022

**MOTION DATE** 01/09/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

In this breach of contract action to recover, *inter alia*, unpaid rent and additional rent due under a commercial lease, the plaintiff landlord, owner of property at 800 Third Avenue in Manhattan, moves pursuant to CPLR 3212 for summary judgment on the complaint against defendant ATA Enterprises Management, Inc., a former tenant, and pursuant to CPLR 3211(b) for dismissal of its affirmative defenses and counterclaims. No opposition is submitted.

The complaint includes three causes of action, the first seeks \$173,993.57 representing amounts due for base rent and additional rent as of May 2022, when the action was commenced, the second seeks amounts due through expiration of the lease term, and the third seeks contractual attorney’s fees. The defendant answered the complaint and asserted eleven affirmative defenses and four counterclaims. The counterclaims accused the plaintiff of violating New York City Administrative Code § 22-1005, the Guaranty Law, and of tenant harassment in violation of New York City Administrative Code § 22-902 and 22-903, and sought civil penalties and compensatory damages.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v

Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*.

Recovery under breach of contract requires a plaintiff to demonstrate (1) the existence of a contract, (2) the plaintiff's 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); Flomenbaum v New York Univ., 71 AD3d 80 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 1995), *aff'd* 88 NY2d 716 (1996).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, the subject lease, a rent ledger, utility bills and an affidavit of Richard Teichman, an employee of the managing agent for the building, Joseph P. Day Realty Corp. Teichman states that the ten-year lease term ran from July 2018 through August 2028, with monthly base rent of approximately \$40,000.00. The defendant, which operated a real estate company on the premises, vacated the premises on November 5, 2021, leaving unpaid the electric charges for December 2021, and all rent and additional rent through the end of the through September 30, 2022, when the motion was filed. The plaintiff seeks a total of \$348,012.55, after application of the defendant's security deposit, an amount supported by the affidavit, ledger and utility bills submitted with the motion. In his affidavit, Teichman states that the plaintiff is not seeking base rent due prior to January 1, 2022, because the plaintiff sued the personal guarantor on the lease, Lili Kalimian, in a separate action which was resolved when Kalimian paid all base rent through December 31, 2021. By this proof, the plaintiff has met its burden on the motion and demonstrated entitlement to summary judgment on the first and second causes of action of the complaint in the sum of \$348,012.55. By failing to oppose the motion, the defendant has failed to raise any triable issue.

Further, as to the third cause of action, the plaintiff is expressly entitled to recover reasonable attorney's fees under Paragraph 18 of the parties' lease. However, the plaintiff has not submitted any supporting proof to establish the amount of fees incurred. Thus, the motion is

granted as to the third cause of action of the complaint on the issue of liability and the plaintiff shall submit any supporting proof within 30 days.

In addition to summary judgment on its complaint, the plaintiff seeks, and is granted, dismissal of the defendants' affirmative defenses and counterclaims. All of the affirmative defenses are improperly asserted in a conclusory manner in the answer without any detail. See Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1<sup>st</sup> Dept. 2009); Mfrs.Hanover Trust Co. v Restivo, 169 AD2d 413 (1<sup>st</sup> Dept. 1991). CPLR 3013 expressly requires that all "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." As correctly argued by the plaintiff, all four counterclaims are without factual or legal support. Indeed, Administrative Code § 22-1005 was a temporary protection available for a period in 2020 only to personal guarantors on some commercial leases, and not to commercial tenants, and there is simply no indication of any incident of harassment by the plaintiff in the answer. Furthermore, Paragraph 26 of the lease bars any counterclaim by the defendant in any action commenced by the plaintiff upon any default by the defendant under the lease terms.

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 (1<sup>st</sup> 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 January 1, 2022.

Accordingly, upon the foregoing papers, it is hereby

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the first and second causes of action of the complaint (CPLR 3212) is granted, without opposition, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of \$348,012.55, plus costs and statutory interest from January 1, 2022, and it is further

ORDERED that the branch of the plaintiff's motion which is to dismiss the defendant's affirmative defenses and counterclaims (CPLR 3211[b]) is granted, without opposition, and the affirmative defenses and counterclaims are dismissed, and it is further

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the third cause of action of the complaint (CPLR 3212), seeking contractual attorney's fees, is granted, without opposition, on the issues of liability and the plaintiff is granted leave to submit supplemental proof to establish the amount of fees incurred, if so advised, within 30 days of the date of this order and shall notify the Part 42 Clerk of any such filing.

This constitutes the Decision and Order of the court.

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

2/15/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: