

**605 Fifth Prop. Owner, LLC v Rehab World Physical  
Therapy PLLC**

2023 NY Slip Op 32316(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 160694/2022

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR**

*Justice*

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605 FIFTH PROPERTY OWNER, LLC,

Plaintiff,

INDEX NO. 160694/2022

MOTION DATE 04/7/2023

MOTION SEQ. NO. 001

- v -

REHAB WORLD PHYSICAL THERAPY PLLC, ESTRELLA  
E. ERLANO AKA ESTRELLA ERLANO-LOPEZ

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

**BACKGROUND**

Plaintiff commenced this action seeking a judgment against Rehab World Physical Therapy PLLC, (Tenant) and Estrella Erlano (Guarantor) based on a lease agreement and personal guaranty executed by the parties for the third floor of 65 Fifth Avenue, New York, New York (Subject Premises).

Guarantor appeared by counsel on January 26, 2023 and filed an answer asserting seven affirmative defenses.

Tenant has failed to appear or file an answer.

**PENDING MOTION**

On March 8, 2023, Plaintiff moved for an order:

(a) Pursuant to CPLR § 3212, CPLR § 3211(b) and CPLR § 3013, dismissing the seven affirmative defenses of Guarantor;

(b) Pursuant to CPLR § 3025(c), granting Plaintiff leave to amend the complaint and

deeming the complaint amended to conform to the evidence set forth in the Esses Affidavit, so as to amend the amount sought in the first and second causes of action in the complaint to reflect the total of \$113,397.70, in fixed rent and additional rent that has accrued to date;

- (c) Pursuant to CPLR § 3215(a), granting Plaintiff a judgment on default against Tenant on the first amended cause of action in the Complaint and granting Plaintiff a money judgment in the sum certain amount of \$113,397.70, with statutory interest thereon against Tenant, by reason of Tenant's failure to timely answer, appear or otherwise move with respect to the Complaint;
- (d) Pursuant to CPLR § 3212 granting summary judgment in favor of Plaintiff and against Guarantor on the second amended cause of action, and awarding Plaintiff a final judgment against Guarantor, in the sum of \$113,397.70, with statutory interest thereon;
- (e) Scheduling a hearing to determine Plaintiff's attorneys' fees incurred in this action

### **ALLEGED FACTS**

Plaintiff is the owner and landlord of the Subject Premises. Pursuant to a lease dated July 23, 2020 (the "Lease"), between the plaintiff and Tenant, Tenant leased the Subject Premises, for a term commencing on July 23, 2020 and expiring on June 30, 2030.

Pursuant to a guaranty dated July 23, 2020 (the "Guaranty") Guarantor guaranteed Tenant's obligations under the Lease.

Tenant vacated and surrendered possession of the Subject Premises on or about July 2, 2021.

The terms for the termination of the guaranty were not met at the time of the surrender, as there was still rent outstanding.

Tenant has failed to comply with its obligations to pay base rent and additional rent charges due pursuant to the Lease.

To date, Tenant currently owes Rent to Plaintiff in the total sum of \$113,397.70, which is comprised of the following charges: (i) Base Rent for the months of April 2022 through February 2023 in the total amount of \$100,072.00 (ii) FDNY AC charge in the amount of \$210.00 (iii) water charges in the total amount of \$114.23, (iv) Administrative service charges in the total amount of \$5,019.81, plus (v) late interest charges in the total amount of \$7,981.66.

### **PRIOR ACTION**

In September 2021, Plaintiff commenced a prior action, under Index 158628/2021, against the Defendants named herein and additionally Ricardo Erlano, another Guarantor. The prior action sought rental arrears for the period of January 2021 through and including March 2022, along with other additional rent charges.

On March 29, 2022, Plaintiff moved for dismissal of Defendants' counterclaims and for summary judgment.

On April 20, 2022, the court granted Plaintiff's motion and awarded Plaintiff a judgment against Defendants in the amount of \$113,262.12, together with costs and interest. The Plaintiff was also awarded attorney's fees in the amount of \$30,577.14.

On October 5, 2022, Ricardo E. Erlano filed bankruptcy in the Eastern District of New York. On January 11, 2023, he received his bankruptcy discharge. The judgment in the prior action was satisfied in full by payment made from Guarantor.

### **DISCUSSION**

***Plaintiff's motion to dismiss the seven affirmative defenses of Guarantor is granted and***

***Plaintiff is awarded summary judgment as against Guarantor***

CPLR §3211 (b) provides: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit"

On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (*see e.g. Vita v. New York Waste Servs., LLC*, 34 A.D.3d 559, 559, 824 N.Y.S.2d 177 [2006]; *Santilli v. Allstate Ins. Co.*, 19 A.D.3d 1031, 1032, 797 N.Y.S.2d 226 [2005]). In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed (*Warwick v. Cruz*, 270 A.D.2d 255, 255, 704 N.Y.S.2d 849 [2000]). A defense should not be stricken where there are questions of fact requiring trial (*see e.g. Atlas Feather Corp. v. Pine Top Ins. Co.*, 128 A.D.2d 578, 578–579, 512 N.Y.S.2d 844 [1987]).

*534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 541, 935 N.Y.S.2d 23 (1st Dept. 2011).

In support of Plaintiff's motion to dismiss the affirmative defenses of the Guarantor, Plaintiff relies on Section 5 of the Guarantee, which provides in pertinent part:

Guarantor shall not be entitled to claim, and irrevocably covenants not to raise or assert, any defense, counterclaim, set-off or deduction against the Guaranteed Obligations that would or might be available to Tenant, other than actual payment and performance of all Guaranteed Obligations in full in accordance with their terms.

Plaintiff maintains courts have consistently upheld defense waiver provisions in guaranties and require the dismissal of affirmative defenses alleged in violation of such waivers, citing *Red Tulip, LLC v. Neiva*, 44 A.D.3d 204 (1st Dept. 2007), in which the court granted summary judgment against guarantor stating that “[u]nfortunately for [Guarantor], her affirmative defenses and counterclaims faced an insurmountable obstacle: the guaranty she signed...waived all defenses and counterclaims... except ‘actual payment,’ which she has never alleged”.

Defendant's opposition, which only includes an attorney's affirmation, and lacks an affidavit from an individual with personal knowledge, argues that absolute and unconditional guarantees should not always be upheld and affirmative defenses, as part of the validity of the guarantee, should be allowed to be challenged. Defendant relies on *Manufacturers Hanover*

*Trust Co. v. Yanakas* 7 F.3d 310 (2d. Cir 1993), in which the court did not enforce the guarantee finding that the Guarantor was “fraudulently induced to sign the guarantee”

However, the *Yanakas* action is distinguishable, as Plaintiff points out, because Defendant does not raise fraud as an affirmative defense in the instant action. As the opposition fails to include an affidavit of a person with knowledge, there is no allegation anywhere that the Guarantor was fraudulently induced into signing the guarantee.

The court finds the guarantee to be enforceable and that the same waives all defenses except that of actual payment, which Guarantor does not claim in the instant action.

Further, Plaintiff’s motion for summary judgment is granted, as there are no genuine issues of material issues of fact requiring a trial. Plaintiff has established, through admissible evidence, that the arrears are due and owing pursuant to the terms of the Lease from Tenant and that Guarantor unconditionally guaranteed payment of the arrears pursuant to the Guaranty. Guarantor failed to submit an affidavit from any person with firsthand knowledge in opposition to the motion, nor did Guarantor submit a response to Plaintiff’s Statement of Material Facts.

The court will note however, that Plaintiff’s reliance on the doctrine of *res judicata*, arguing that the Guarantor is barred from any asserting affirmative defenses in the instant action since the affirmative defenses could have been, and should have been raised by Guarantor in the Prior Action, is misplaced. “*Res judicata* or claim preclusion, precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties, involving the same subject matter (*Martinez v JRL Food Corp.*, 194 AD3d 488 [1<sup>st</sup> Dept. 2021]).” The judgment in the prior action was for a different period of time and for a different amount of arrears. The amounts claimed herein were not due at the time of the prior action, therefor could not have been litigated.

***Plaintiff's Motion for a default judgment as against Tenant is granted***

CPLR § 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial... the plaintiff may seek a default judgment against [it].” “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.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

In support, Plaintiff submits the affirmation of Brian Bendy, Esq; an affidavit of service of the summons and complaint on tenant, by service of the Secretary of State of the State of New York; additional notice pursuant to CPLR 3215(g)(4); the affidavit of Abraham Esses, property manager of Plaintiff.

Plaintiff has established *prima facie* entitlement to a default judgment as against Rehab World Physical Therapy PLLC.

***Plaintiff's Motion for Leave to Amend Pursuant to CPLR §3025(c) is Granted***

CPLR §3025(c) allows for the amendment of pleadings to conform to evidence. While generally this provision is invoked at trial, it is also properly raised on a motion for summary judgment.

An application to amend under CPLR 3025 (c) is addressed to the sound discretion of the trial court and should be determined in the same manner and by weighing the same considerations as upon a motion under CPLR 3025 (b) (see, *Murray v City of New York*, 43 NY2d 400, 405). Pursuant to that subdivision, leave to amend pleadings is freely given in the absence of operative prejudice (see, *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Moreover, since a summary judgment motion is the procedural equivalent of a trial (see, *Jehle v Hertz Corp.*, 174 AD2d 812, 813), Supreme Court was free to invoke the provisions of CPLR 3025 (c) (see, *Thailer v LaRocca*, 174 AD2d 731, 732).

*Werner v. Katal Country Club*, 234 A.D.2d 659, 661 (1996).

Here Guarantor has shown no prejudice in allowing the amendment of the complaint. Guarantor's claim that allowing amendment would delay the action is without merit. Based on the foregoing, the court deems the complaint amended to reflect that the amount sought in the first and second causes of action in the complaint is \$113,397.70 in fixed rent and additional rent, owed by the Guarantor.

Additionally, the court finds that Plaintiff is entitled to attorneys' fees pursuant to the Lease. Guarantor simply argues in opposition that Plaintiff has failed to offer an itemized statement of fees. As Plaintiff submits no specific amount of fees requested or and statements detailing the amount of fees sought, Plaintiff may move for a specific amount of fees by notice of motion. The court will then be able to determine whether a hearing is necessary to determine the amount of fees sought.

### **CONCLUSION**

WHEREFORE it is hereby:

ORDERED that Plaintiff's motion to dismiss the Guarantor's affirmative defenses is granted; and it is further

ORDERED that Plaintiff's motion to amend the complaint to conform to the proof is granted and the complaint is deemed amended to seek a total of \$113,397.70 in arrears; and it is further

ORDERED that Plaintiff's motion for a default judgment as against Rehab World Physical Therapy PLLC, is granted; and it is further

ORDERED that the Plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$113,397.70, together with interest at the rate of 9 % per annum

from the date of December 14, 2022 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

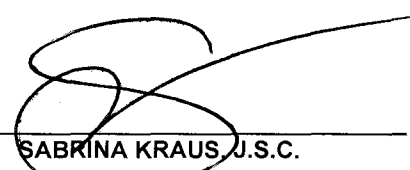
ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on Defendants and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

7/10/2023  
DATE

  
SABRINA KRAUS, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE