

**ESRT 1400 Broadway, L.P. v Jemma Apparel Holdings, LLC**

2023 NY Slip Op 33741(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 653105/2021

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

ESRT 1400 BROADWAY, L.P.,

Plaintiff,

- v -

JEMMA APPAREL HOLDINGS, LLC and EFREM  
GERSZBERG

Defendants.

-----X

**INDEX NO.** 653105/2021

**MOTION DATE** 04/03/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 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, 42, 43

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

The plaintiff landlord in this breach of contract action seeks to recover unpaid rent, additional rent, late fees and attorney’s fees pursuant to a commercial lease and guaranty agreement with defendant Jemma Apparel Holdings, LLC (Jemma), a former tenant, and Efrem Gerszberg, personal guarantor on the lease. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint and dismissal of the defendants’ affirmative defenses pursuant to CPLR 3211(b). The defendant opposes the motion. For the following reasons, the motion is granted on the issue of liability and the matter is referred to a Special Referee for computation of all damages and attorney’s fees.

It is well-settled that the movant on a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499,

503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings; the original commercial lease agreement between 1400 Broadway Associates, LLC, the plaintiff's predecessor in interest, and Jemma dated February 16, 2012 (the lease); a lease modification between the plaintiff and Jemma dated July 7, 2015, which extended the lease from July 1, 2015 to July 31, 2024, and a Guarantee dated February 7, 2012, whereby Efrem Gerszberg agreed, *inter alia*, to unconditionally guarantee all of the tenant's obligations under the lease accruing prior to the tenant's vacatur of the premises (which was January 17, 2022); a Notice of Default dated February 10, 2021, showing arrears accrued to date of \$105,328.84; a rent ledger showing arrears of \$666,380.72 through August 1, 2022, which includes the \$86,000.00 security deposit credit to the account upon the defendants' default; and property tax and utilities statements and invoices. The plaintiff also submits an affidavit of Maxx Mendez, an accounts receivable associate employed by an entity that is a partner in the plaintiff entity. Mendez states that the tenant first defaulted in November 2020 and the default continued through the filing of the motion in September 2022, accruing \$614,945.05 arrears and security due through July 2022. In a reply affidavit filed November 10, 2022, Mendez avers that Gerszberg was liable for the arrears through the date of vacatur, January 17, 2022, a total of \$426,966.73.

The plaintiff's proof establishes, *prima facie*, its entitlement to judgment on the first cause of action for breach of contract. Specifically, the plaintiff's proof demonstrates (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). Inasmuch as the plaintiff's papers include various calculations of amount of

rent, additional rent and fees due from Jemma, the issue of damages shall be determined by a Referee. The second cause of action seeks replenishment of the security deposit as required by the lease. This is essentially a breach of contract claim which may be factored into a determination of damages by the Referee.

The third cause of action, for breach of a guaranty, is also established. “[W]here 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]). The terms of the subject guaranty, executed by the defendant, are clear, unambiguous, absolute, and unconditional. The defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the guaranty. Notably, in Section 8 of the lease modification, defendant Gerszberg reaffirms his obligations under the guaranty and agreed that it remained in full force and effect through the extended lease term.

The fourth cause of action is for “continuing damages” through the date of judgment. Though not a cognizable cause of action on its own, it is essentially a breach of contract claim and the relief is granted on liability, the proper amount due to be determined by a Referee.

It is well settled that attorney’s fees are merely incidents of litigation, for which each party is responsible for his own, and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1<sup>st</sup> Dept. 1976). Here, the plaintiff establishes its entitlement to contractual attorney’s’ fees pursuant to Section 6(C) and (D) of the lease. However, the plaintiff does not provide any proof to support any amount of fees incurred. Thus, that amount shall also be determined by a Referee.

In opposition to the plaintiff’s motion, the defendants fail to raise a triable issue of fact on any cause of action. They submit only a skeletal affirmation of counsel and memorandum of

law. Since counsel claims no personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); 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). Furthermore, counsel's legal argument that the motion is premature due to outstanding discovery is unpersuasive. The defendants "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11<sup>th</sup> Street, 80 AD3d 106, 114 (1<sup>st</sup> Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1<sup>st</sup> Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1<sup>st</sup> Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1<sup>st</sup> Dept. 2012); Kent v 534 East 11<sup>th</sup> Street, supra; Flores v City of New York, 66 AD3d 599 (1<sup>st</sup> Dept. 2009). Nothing more than mere hope or speculation is offered here.

Finally, the branch of the plaintiff's motion seeking to strike the defendant's 17 affirmative defenses is granted. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1<sup>st</sup> Dept. 2015); 534 East 11<sup>th</sup> Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1<sup>st</sup> Dept. 2011). For the reasons discussed in the plaintiff's moving papers, the plaintiff meets this burden. Most of the affirmative defenses are improperly asserted in a conclusory manner in the answer without any detail. See CPLR 3013; 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). Moreover, the defense of laches was expressly waived in the guaranty agreement and the several affirmative defenses that can be discerned, such as waiver and force majeure, are without merit.

For these reasons, the plaintiff's motion is granted on all causes of action on the issue of liability, and the issue of damages is to be determined by a Referee. Both defendants are to be jointly and severally liable on any damages or attorney's fees accrued through the date of the

defendant tenant's vacatur of the premises, January 17, 2022, and the defendant tenant shall be solely liable for any damages accrued thereafter and up to the date of this order.

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). Thus, upon the Referees' determination of damages, statutory interest shall be awarded from November 1, 2020.

Accordingly, upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion which is for summary judgment pursuant to CPLR 3212 is granted on all causes of action of the complaint on the issue of liability, damages to be determined by a Judicial Hearing Officer (JHO) or Special Referee, and it is further

ORDERED that the branch of the plaintiff's motion which is for dismissal of the defendants' affirmative defense pursuant to CPLR 3211(b) is granted and all affirmative defenses are dismissed, and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of the amount of rent, additional rent, late fees, attorney's fees and disbursements the plaintiff may recover (1) from defendant Jemma Apparel Holdings, LLC under the subject lease agreement for the period of November 1, 2020, through the date of this order, October 17, 2023, and (2) from defendant Efreem Gerszberg under the Guarantee for the period of November 1, 2020, through January 17, 2022, jointly and severally with Jemma, (3) with statutory interest from November 1, 2020, and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further


ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the plaintiff shall serve a copy of this order on the defendants within ten (10) days of the date of the order.

This constitutes the Decision and Order of the court.

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

10/17/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> <u>REFERENCE</u>