

<b>Adrianna Papell, L.L.C. v Silverstein</b>
2020 NY Slip Op 33877(U)
November 20, 2020
Supreme Court, New York County
Docket Number: 656126/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

<p>-----X</p> <p>ADRIANNA PAPELL, L.L.C.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>SCOTT SILVERSTEIN,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<table border="0"> <tr> <td style="width: 100px;"><b>INDEX NO.</b></td> <td><u>656126/2019</u></td> </tr> <tr> <td><b>MOTION DATE</b></td> <td><u>N/A</u></td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td><u>001</u></td> </tr> </table> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>	<b>INDEX NO.</b>	<u>656126/2019</u>	<b>MOTION DATE</b>	<u>N/A</u>	<b>MOTION SEQ. NO.</b>	<u>001</u>
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<b>MOTION SEQ. NO.</b>	<u>001</u>						

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 17, 18, 19, 20, 24, 25, 26

were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

This is a CPLR 3213 motion/action for payment of guaranteed minimum royalties pursuant to an unconditional guaranty executed by defendant Scott Silverstein in favor of plaintiff Adrianna Papell, L.L.C. Plaintiff and Silverstein Company Ltd. entered into a Trademark License Agreement on or about July 10, 2012. (Aff. of Adam Berkman [Pl.'s CEO] in Supp., ¶ 6 [NYSCEF Doc. No. 4].) The parties subsequently executed two amendments to the Trademark License Agreement. Only the Second Amendment to the Trademark License Agreement altered provisions of the Trademark License Agreement relevant to this decision. The Second Amendment modified the Trademark License Agreement by, among other things, substituting Scott Silverstein, LLC for Silverstein Company Ltd., as Licensee under the Trademark License Agreement. (Berkman Aff., Ex. C [Second Amendment], Recitals [NYSCEF Doc. No. 7].)

The Trademark License Agreement, as amended by the First and Second Amendments, requires Scott Silverstein, LLC to pay Guaranteed Minimum Royalties to plaintiff according to a

schedule to the Trademark License Agreement. (Berkman Aff., Ex. A [Trademark License Agreement], § 13.6 [NYSCEF Doc. No. 5]; Second Amendment, § 1.)<sup>1</sup>

Pursuant to the Trademark License Agreement, defendant executed an Unconditional Guaranty. (Trademark License Agreement, § 13.6.) The Unconditional Guaranty, as set forth in the Second Amendment, provides:

“This Guaranty shall be irrevocable, absolute and unconditional, and if for any reason[], . . . any Minimum Commissions due under the License Agreement or any part thereof, shall not be paid promptly when due, Guarantor [defendant] will immediately pay the same to Licensor [plaintiff] pursuant to and in accordance with the provisions of the License Agreement. . . .”

(Unconditional Guaranty, § 2.) The Unconditional Guaranty further provides:

“[Defendant] guarantees that the sum of up to \$630,000 to be payable by Licensee will be promptly paid in full when due, whether at maturity, by acceleration or otherwise, in accordance with the provisions thereof.”<sup>2</sup>

(Berkman Aff., Ex. D [Unconditional Guaranty], § 1 [NYSCEF Doc. No. 8].)

### Discussion

CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” It is well settled that “[a]n unconditional guaranty is an instrument for the payment of ‘money only’ within the meaning of CPLR 3213.” (Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v

<sup>1</sup> The Second Amendment replaced the original schedule for the payment of Guaranteed Minimum Royalties.

<sup>2</sup> The terms Minimum Commissions and Guaranteed Minimum Royalties are used interchangeably in the Unconditional Guaranty. The fifth Whereas clause in the Unconditional Guaranty provides: “WHEREAS, as an inducement for Adrianna Papell to enter into the Second Amendment and the transactions contemplated thereby, the Guarantor has agreed to guarantee the due and punctual payment of up to \$630,000 of the total Guaranteed Minimum Royalties for the Term of the Second Amendment January 1, 2017 to December 31, 2020, due for sales of Licensed Products in the Agreement (the ‘Minimum Commissions Obligation’).”

Navarro, 25 NY3d 485, 492 [2015]; Punch Fashion, LLC v Merchant Factors Corp., 180 AD3d 520, 521 [1st Dept 2020]; Bank of America, N.A. v Solow, 59 AD3d 304, 305 [1st Dept 2009], lv dismissed 12 NY3d 877.) “To meet its prima facie burden on its [CPLR 3213] summary judgment motion, [the plaintiff] must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty. Thereafter, the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense.” (Cooperatieve Centrale, 25 NY3d at 492 [internal quotation marks and citations omitted].)

In support of its motion for summary judgment, plaintiff submits the affidavit of Adam Berkman, its CEO, annexing the Trademark License Agreement, the First and Second Amendments to the Trademark License Agreement, and the Unconditional Guaranty. Plaintiff's CEO attests that plaintiff terminated the Trademark License Agreement based on the April 29, 2019 bankruptcy filing of Scott Silverstein, LLC (Berkman Aff., ¶ 30), and that, upon the termination, Scott Silverstein, LLC's obligation to pay the Guaranteed Minimum Royalties was accelerated under the Trademark License Agreement. (Id.) The accelerated amount of the Royalties provided for in the Schedule to the Second Amendment was \$4,324,000. (Id.; Second Amendment, Schedule A.) As further attested by plaintiff's CEO, defendant did not pay the lesser sum that he guaranteed – that is, the \$630,000 of the Guaranteed Minimum Royalties owed to plaintiff under the Trademark License Agreement and Unconditional Guaranty after Scott Silverstein, LLC's payment obligation was accelerated. (Berkman Aff., ¶ 32.) Plaintiff accordingly seeks judgment for the \$630,000 royalty payment guaranteed by defendant.

As plaintiff correctly contends, the Trademark License Agreement unambiguously provides that “[plaintiff] may terminate this Agreement immediately without any right to cure if

any of the following events occur: . . . [Scott Silverstein, LLC] is declared bankrupt or is dissolved either compulsorily or voluntarily, or a petition is presented or an order is made or an effective resolution is passed or analogous proceedings are taken for bankruptcy. . . .”

(Trademark License Agreement, § 16.2 [d] [emphasis in original].) The Trademark License Agreement further unambiguously provides that “termination of this Agreement by [plaintiff] for material breach by [Scott Silverstein, LLC] as provided for in this Agreement shall accelerate all of the remaining obligations of [Scott Silverstein, LLC], including the Guaranteed Minimum Royalty and the Marketing Fee, which shall become immediately due and payable.” (Id., § 18.3.)

Based on the terms of the Trademark License Agreement and plaintiff’s affidavit, plaintiff satisfies its prima facie burden of proving the existence of the guaranty, the underlying debt, and the guarantor’s failure to perform.

In opposition, defendant fails to establish the existence of a triable issue of fact. Defendant does not dispute that Scott Silverstein, LLC filed for bankruptcy. Nor does defendant dispute that no payment was made of the Guaranteed Minimum Royalties thereafter due under the Trademark License Agreement or of the \$630,000 guarantee amount under the Unconditional Guaranty. Rather, defendant contends that plaintiff’s claim is not properly raised by a motion pursuant to CPLR 3213.

More particularly, defendant argues that the Unconditional Guaranty is not an instrument for the payment of money only because the Unconditional Guaranty includes a guarantee of performance. (Def.’s Memo. In Opp., at 3 [NYSCEF Doc. No. 25].) The Unconditional Guaranty unambiguously requires defendant to guarantee the payment of the Guaranteed Minimum Royalties (subject to the \$630,000 limit) and no other obligation. Defendant’s

argument is thus wholly unsupported by the language of the Unconditional Guaranty and is flatly contradicted by settled law that an unconditional guarantee is an instrument for the payment of money only.

Defendant further contends that because defendant's obligation under the Unconditional Guaranty is to make payment "up to" \$630,000, the obligation is "conditioned upon future uncertain events and payment schedules," and that payment of the obligation therefore may not be sought pursuant to CPLR 3213. (Def.'s Memo. In Opp., at 4.) The language of the Trademark License Agreement and the Unconditional Guaranty do not support this contention. The Trademark License Agreement provides unconditionally for acceleration of the Guaranteed Minimum Royalties upon stated occurrences – here, Scott Silverstein, LLC's bankruptcy filing. The Unconditional Guaranty provides unconditionally for payment of up to \$630,000 of any outstanding Guaranteed Minimum Royalties. Here, it is not disputed that over \$630,000 of the Guaranteed Minimum Royalties are outstanding. Plaintiff's claim is therefore plainly amenable to resolution on a CPLR 3213 motion.

The court rejects defendant's further argument that CPLR 3213 is inapplicable to the Unconditional Guaranty because an "impermissible degree of reference to outside sources is necessary." (Id., at 5.) The outside sources to which defendant refers are the Trademark License Agreement and the amendments to that Agreement. (Id.) "The fact that one must look at the [underlying] agreement between [the plaintiff and the obligor] to determine the amount of the guarantee[] does not preclude the use of CPLR 3213." (Punch Fashion, LLC, 180 AD3d at 522; Boland v Indah Kiat Fin. [IV] Mauritius, 291 AD2d 342, 342-343 [1st Dept 2002]; Manufacturers Hanover Trust Co. v Green, 95 AD2d 737, 737 [1st Dept 1983], appeal dismissed 61 NY2d 760 [1984].) PDL Biopharma, Inc. v Wohlstadter, (147 AD3d 494, 495-496 [1st Dept

2017]) on which defendant relies, is not to the contrary. There, the court was required to construe complex agreements and to resolve preliminary legal issues, including whether the guaranties sued upon were still in effect and whether they had come due. No such issues are present on this motion, which involves one Unconditional Guaranty and one underlying obligation set forth in the Trademark License Agreement, the enforceability of which are not in question.

Plaintiff also seeks “legal fees and costs incurred by Adrianna Papell to enforce the Unconditional Guaranty.” (Pl.’s Memo. In Supp., at 8.) The Unconditional Guaranty provides that “[g]uarantor shall also pay to [plaintiff] such further amount as shall be sufficient to cover the cost and expense of collecting such sums, or part thereof, or of otherwise enforcing the License Agreement or this Guaranty, including without limitation, in any case, reasonable counsel fees, court costs and other litigation expenses.” (Unconditional Guaranty, § 2.) The court holds that defendant is liable to plaintiff for attorney’s fees incurred in connection with the enforcement of the Unconditional Guaranty. Plaintiff does not, however, make a showing on the motion of the amount of its reasonable attorney’s fees but, rather, requests a hearing on the issue. In view of the coronavirus emergency, it is not possible at this time to schedule a referee hearing on attorney’s fees. This branch of the motion will accordingly be denied without prejudice to plaintiff’s right to move for attorney’s fees.


It is accordingly hereby ORDERED that the motion of plaintiff Adrianna Papell, L.L.C. for summary judgment in lieu of complaint is granted to the following extent:

It is ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Adrianna Papell, L.L.C. and against defendant Scott Silverstein in the sum of \$630,000, with interest at the statutory rate from April 29, 2019 until the date of entry of judgment, as calculated by the Clerk,

and thereafter with interest on the judgment at the statutory rate, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the branch of plaintiff's motion for attorney's fees is denied without prejudice to plaintiff's right to move for attorney's fees on a proper record, which shall include: attorney's affirmation(s) or affidavits(s), as appropriate, setting forth the legal services performed and the rates charged; demonstrating that the rates were usual and customary for the services performed, and that the services were reasonably necessary; attaching contemporaneous time records; and attaching invoices and setting forth the amount paid, if the amount paid was less than the amount charged. Provided that: The branch of the motion for attorney's fees will be deemed denied if the motion is not brought within sixty (60) days of the date hereof.

This constitutes the decision and order of the court.

<u>11/20/2020</u>			
DATE		MARCY S. FRIEDMAN, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<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 type="checkbox"/> REFERENCE