Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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91-10 146, LLC,

Plaintiff(s),

-against-

SUNSHINE DEVELOPMENTAL SCHOOL, INC. , and MICHAEL KOFFLER,

Defendant(s).

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Index No.: 723825/2020

Motion Dated: August 31, 2021

Motion Cal. No.:

Motion Seq. No.: 2

The following papers numbered EF26-EF40, EF43 and EF46 read on this motion by plaintiff 91-10 146 LLC for an order: (1) pursuant to CPLR §3212, granting summary judgment against the defendants; (2) directing entry of a money judgment in favor of plaintiff and against defendants in the amount of $153,050; and (3) awarding plaintiff a judgment for its reasonable attorneys' fees, costs and disbursements.

	PAPERS NUMBERED
Notice of Motion Affid.-Exhibits.....	EF26 - EF37
Answering Affid.-Exhibits.....	EF39
Reply Affid.-Exhibits.....	EF43
Memoranda of Law.....	EF38, EF40, EF46

Upon the foregoing papers it is ordered that those branches of this motion which are for summary judgment against the defendants in the amount of $153,050 for principal and contractual interest are granted, and the Clerk of the Court is directed to enter judgment in the amount of $153,050 plus interest at the statutory rate. The branch of this motion which concerns attorney's fees is denied without prejudice to renewal.

I. The Facts

91-10 146, LLC (plaintiff or "the lender") owns property located at 91-10 146th Street, Jamaica, New York 11435 (the premises), which is rented to defendant Sunshine Developmental School, Inc. (Sunshine School or "borrower"). To pay off $153,050 in rental arrears, the plaintiff and Sunshine School entered into a Loan Agreement dated December 17, 2019, as evidenced by a Note, whereby the plaintiff loaned Sunshine School $153,050 (the loan). The plaintiff secured the Note with a Guaranty from defendant Michael Koffler. The Guaranty states that it was "an absolute and unconditional guarantee of payment and performance," and it obligated the guarantor to pay the sums due under the Note in case of default by the borrower.

The Loan Agreement states: "as of the date of this Agreement ADRC is the Tenant and Sunshine is the Subtenant of the Premises in accordance with the Lease and Sublease." While the Loan Agreement further states: "ADRC and Sunshine (jointly and severally 'Borrower') are in default in the payment of Basic Rent and Additional Rent," only defendant Sunshine School signed the Loan Agreement and the Note as borrower.

The Loan Agreement and the Note required defendant Sunshine School to make monthly payments of interest only in the amount of $765.00 on the 15th day of each month from December 15, 2019 through August 15, 2021 and then between September 15, 2021 and October 15, 2022, Sunshine School was to make monthly payments of interest and principal in the amount of $11,347. The defendant borrower defaulted on payments due under the Note and Loan Agreement. The Loan Agreement contained an acceleration clause, and by letter sent on November 30, 2020, the plaintiff declared the outstanding principal balance of the loan and other sums due under the Loan Agreement to be immediately due and payable in full.

II. Discussion

"To make a prima facie showing of entitlement to judgment as a matter of law in an action to recover on a Note, and on a Guaranty thereof, a plaintiff must establish the existence of a Note and Guaranty and the defendants' failure to make payments according to their terms" (*JPMorgan Chase Bank, N.A. v. Galt Grp., Inc.*, 84 AD3d 1028, 1029 [2011]; *JP Morgan Chase Bank, N.A. v. Rads Grp., Inc.*, 88 AD3d 766 [2011]). In the case at bar, the plaintiff successfully carried this burden through, *inter alia*, the submission of an affidavit from Daniel Englander, a member of the plaintiff lender.

Thus, the burden on this motion now shifts to the defendants, requiring them to show that there is an issue of fact which must be tried (*see, Alvarez v. Prospect Hospital, supra),* or to demonstrate the existence of a defense warranting the denial of summary judgment (*see,*

Plantamura v. Penske Truck Leasing, Inc., 246 AD2d 347 [1998] or the need for disclosure (*See*, CPLR §3212[f]; *Denkensohn v. Davenport,* 130 AD2d 860 [1987]). The defendants failed to carry this burden. First, there is no merit in the defendants' contention that ADRC is a necessary party to this lawsuit. Only defendant Sunshine School signed the Loan Agreement and the Note as borrower, and, even if ADRC had co-signed the Note, the defendant borrower, as a co-maker of the Note sued upon, would have joint and several liability and, therefore, could be sued separately (*See, Kirshtein v. Balio*, 199 AD2d 777 [1993]). Second, there is also no merit in the defendants' argument that the plaintiff lender failed to give a required "predicate notice" and to allow time to cure before accelerating the outstanding principal balance and beginning this lawsuit. While section 7(c) Miscellaneous of the Loan Agreement provides that "Any notice, demand, or request hereunder shall be in writing," the loan documents do not specifically impose upon the plaintiff lender obligations to send a predicate notice of default or to allow a cure period. Moreover, the Note specifically states the defendant borrower "waive[s] presentment, demand for payment, protest and notice of dishonor." Third, the defendants did not adequately demonstrate a need for disclosure regarding the sum that they owe the plaintiff. Supported by a business record attached as Exhibit 2, the Affidavit of David Englander specifically alleges the payments missed by the defendant borrower, and the defendants failed to submit documentary or other evidence sufficient to show that there is a genuine issue of fact with regard to missed or uncredited payments requiring disclosure.

The plaintiff has demonstrated that it is entitled to summary judgment in regard to the amount owed for principal and interest. The Court notes that CPLR §5001(a) permits a creditor to recover prejudgment interest on unpaid interest and principal payments awarded from the date each payment became due under the terms of the Promissory Note to the date liability is established (*See, Spodek v. Park Prop. Dev. Assocs.*, 96 NY2d 577, 581 [2001]). In the case at bar, the Loan Agreement between the parties provides a default interest rate of 12% per annum from the date of an event of default.

In regard to attorney's fees, attorney's fees may be recovered where authorized by statute, court rule or written agreement of the parties (*See, Owens v. Tompkins Bank of Castile*, 170 AD3d 1683 [2019]). In the case at bar, the Loan Agreement, Note, and Guaranty each give the lender the right to recover attorneys' fees incurred in connection with the enforcement of their terms. In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained" (*In re Szkambara*, 53 AD3d 502, 502–03 [2008]; *In re Sucheron*, 95 AD3d 892 [2012]). Here, while the plaintiff's attorney requests a hearing on the amount of recoverable attorney's fees, he did not demand a specific amount for attorney's fees, discuss the factors relevant to attorney's fees, or set forth his hourly rate charged for his legal services. This Court

cannot determine if a hearing is even necessary. This branch of the motion is denied without prejudice to renewal.

Dated: 11/29/21

FILED
11/29/2021
COUNTY CLERK
QUEENS COUNTY

MARGUERITE A. GRAYS
J.S.C.