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### Ar-Rahman Found. Inc. v. Millat Food Inc.

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[\*1]

<b>Ar-Rahman Found. Inc. v Millat Food Inc.</b>
2020 NY Slip Op 50075(U)
Decided on January 16, 2020
Civil Court Of The City Of New York, New York County
Kraus, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 16, 2020

Civil Court of the City of New York, New York County

<p><b>Ar-Rahman Foundation Inc., Petitioner-Landlord,</b></p> <p><b>against</b></p> <p><b>Millat Food Inc. d/b/a Chandi Restaurant, Respondent-Tenant.</b></p>
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L & T 61324/19

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Sabrina B. Kraus, J.

### **BACKGROUND & PROCEDURAL HISTORY**

Petitioner commenced this summary holdover proceeding to recover possession of Store #1 at 13 West 29th Street, New York, New York 10001 (Subject Premises) based on the allegation that respondent was a month to month tenant whose right to occupancy had been terminated pursuant to a thirty day notice of termination

A bench trial was held on August 16 and August 22, 2019. On October 1, 2019, the court (Kim, J) issued a decision awarding petitioner a final judgment of possession and a money

judgment in the amount of \$79,961.36. The court also held that petitioner was the prevailing party entitled to attorneys' fees and set the matter down for an attorneys' fees hearing on October 17, 2019.

Respondent filed a notice of appeal on October 17, 2019.

Judge Kim held the attorneys' fees hearing on October 17, 2019, and after said hearing [\*2] awarded petitioner a further money judgment in the amount of \$28,252.16 for attorneys fees.

The warrant of eviction issued on October 23, 2019.

A Marshal's notice dated January 6, 2020 was served on respondent.

In November 2019, respondent moved for a stay pending appeal at the Appellate Term. The motion was denied without prejudice to respondent's right to move for a stay in Civil Court pursuant to CPLR § 5519(a)(6) [2019 NY Slip Op 87064(U)].

## **THE PENDING MOTION**

On January 24, 2020, respondent moved by order to show cause for an order by this court fixing an undertaking to effectuate a stay pending appeal pursuant to CPLR § 5519(a)(6). Petitioner submitted opposition and the court reserved decision.

## **DISCUSSION**

CPLR § 5519(a)(6) governs respondent's application for a stay pending appeal and provides in pertinent part:

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

. . .

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property. . .

Both parties devote a significant portion of their motion papers to addressing the merits of the pending appeal. This issue is not relevant to the court's determination on setting an undertaking, as the statute clearly provides for the stay without leave of court upon the fixing of an undertaking. A showing of merit is not required by CPLR § 5519 (a)(6) [ *see eg Matter of City of New York*, 62 Misc 3d 974].

Respondent asks that the only undertaking fixed by the court be the payment of ongoing uses and occupancy at the rate of \$8000 per month, which respondent alleges is the last monthly rate agreed to by the parties

Petitioner asks for an undertaking in the amount of \$236,417 50 , based on the prior money judgments awarded by Judge Kim, interest on said judgments, use and occupancy at the rate of \$8600 per month from September 2019 through January 2020, additional attorneys fees alleged incurred to date, and \$50,000 00 for additional attorneys' fees estimated to be incurred pending the appeal

Neither party requests a hearing on the issue of an undertaking.

Based on the foregoing, it is

**ORDERED** that respondent shall post with the clerk of the court an undertaking in the amount of \$2,638,009.70, cash or bond, within ten (10) days from the date of this order; and it is further

**ORDERED** that respondent shall serve a copy of the undertaking and notice of filing of [\*3]said undertaking on petitioner's attorney within five (5) days of said filing; and it is further

**ORDERED** that the stay pending appeal is conditioned on payment of ongoing use and occupancy from February 2020 forward in the amount of \$119,791 67 00; and it is further

**ORDERED** that the attorneys' fees hearing be stayed pending the appeal; and it is further

**ORDERED** that in the event respondent fails to comply with any of the foregoing provisions petitioner may move this court for an order vacating the stay.

This constitutes the decision and order of this Court

Dated January 16, 2020

New York, New York

Hon. Sabrina B. Kraus, JCC

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