SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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677 EUROMAD LLC,

Plaintiff,

- v -

LEVY GORVY LLC, DOMINIQUE LEVY, and EMMANUEL PERROTIN,

Defendants.

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INDEX NO. 653744/2023

MOTION DATE 5/7/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26

were read on this motion for DISMISSAL.

Rosenberg & Estis, P.C., New York, NY (Cori Rosen of counsel), for plaintiff.
Bergstein Flynn Knowlton & Pollina PLLC, New York, NY (Bradley P. Pollina and Lee Bergstein of counsel), for defendants.

Gerald Lebovits, J.:

In this commercial-landlord-tenant action, plaintiff-landlord, 677 Euromad LLC, is seeking $2,280,311.23 in holdover rent from defendant-tenant Lévy Gorvy LLC (tenant) and from defendant-guarantor Dominique Lévy (guarantor).[1] Plaintiff alleges that it is entitled to this amount because tenant failed properly to surrender possession of the leased premises when tenant's lease expired.

Tenant and guarantor now move to dismiss under CPLR 3211 (a) (1) and (a) (7). The motion is granted.

DISCUSSION

Paragraph 59(k) of the parties' lease provides that a holdover tenancy, at double rent, will arise if "possession of the Demised Premises is not surrendered to Landlord within one day after the date of the expiration of the term or earlier termination of this Lease." (NYSCEF No. 9 at 31-32.) Paragraph 21 of the lease provides that upon expiration of the lease, "Tenant shall quit and surrender to Owner the demised premises, broom clean, in good order and condition, ordinary wear and tear excepted and Tenant shall remove all its property." (*Id.* at 4.)

[1] Plaintiff also initially sued co-guarantor Emmanuel Perrotin. That claim has been discontinued. (*See* NYSCEF No. 20.)

Plaintiff alleges that on the last day of the lease term, tenant "purported to surrender the Premises to Plaintiff"; and that plaintiff refused to "accept the purported surrender" because "open applications in connection with Tenant's alterations, as well as certain DOB [Department of Buildings] violations related to the same and/or use of the Demised Premises" remained. (NYSCEF No. 1 at ¶¶ 22-23.) The complaint also alleges that tenant retained a set of keys to the premises. (*See id.* at ¶ 25.) Plaintiff contends that in these circumstances, tenant did not fully surrender possession of the premises (or leave it in good order and condition) as required by the lease. And given this asserted failure to surrender, plaintiff says, tenant and guarantor are liable for at least six months of holdover rent accruing at double the monthly rent during the lease term, totaling $2.28 million. (*See id.* at ¶¶ 27-29, 34, 44.)

Defendants do not contest the existence of open DOB applications and violations. They argue instead that these applications and violations did not amount to a constructive refusal to surrender possession giving rise to a holdover tenancy. This court agrees.

Appellate Division precedent establishes that a need, after a lease expires, to conduct repairs to leased premises, and a resulting delay in reletting the premises, does not give rise to a claim for holdover rent—including when the tenant retains a set of keys to carry out the repairs. Thus, in *Arnot Realty Corp. v New York Telephone Co.*, the Appellate Division, Third Department, held that "a tenant who has vacated premises but breached covenants to repair cannot be held liable for holdover rent while the repairs are made and the premises unleased." (245 AD2d 780, 782 [3d Dept 1997].) And in *Charlebois v Carisbrook Industries, Inc.*, the Third Department held insufficient a "claim of a holdover tenancy premised upon defendants' retention of a set of keys and their periodic use of the premises to complete repairs." (23 AD3d 821, 822 [3d Dept 2005].)

Similarly, the Appellate Division, First Department, has held that when a tenant vacates the premises, but in doing so "fail[s] to remove structural alterations and major installations, that failure did not constitute a constructive holdover." (*Chemical Bank v Stahl*, 255 AD2d 126, 127 [1st Dept 1998].) And in *Building Service Local 32B-J Pension Fund v 101 Ltd. Partnership*, the First Department held that the motion court properly dismissed landlord's claim for lost rent due to tenant's "breach of a lease covenant requiring a tenant to keep the premises in good repair"—specifically rejecting "landlord's argument that it is entitled to recover lost rent under a holdover theory." (115 AD3d 469, 470, 472 [1st Dept 2014].)

Nor does plaintiff identify any authority for the proposition that the post-expiration presence of outstanding alteration applications and open DOB violations constitutes a constructive holdover.[2] Plaintiff relies on the First Department's decision in *Akron Meats, Inc. v 1418 Kitchens, Inc.* (160 AD2d 242 [1st Dept 1990]). In that case, though, the Court held only

[2] At oral argument, plaintiff contended that it was unable to close out tenant's open alteration-permit applications, and that only the tenant could do so. But that contention does not appear in plaintiff's papers on the motion. In any event, this court is unpersuaded that any continued need by tenant to access the premises to close out its alteration applications would give rise to a constructive holdover. (*See Charlebois*, 23 AD3d at 822.)

that the tenant's breach of a lease provision requiring the tenant to repair any damage left from the removal of tenant's fixtures meant that the tenant was not entitled under the lease to an early-termination payment from the landlord—not that the need to do repairs gave rise to a holdover tenancy. (*See id.* at 244-245.) And in *Ebrahime v Stine* (132 AD3d 801, 801-802 [2d Dept 2015]), also cited by landlord, the Court affirmed a jury verdict awarding approximately $12,000 in damages for tenant's breach of the lease by not leaving the premises in good repair. But the appellate briefs there reflected that the jury's award reflected the cost to restore the premises to good condition, not holdover rent. (*See* Br. of Plaintiff-Respondent, 2014 WL 11191818, at *12 [2d Dept July 11, 2014] [describing plaintiff's damages evidence at trial].)

Here, on the other hand, the lease does not include language (whether in the surrender or the holdover terms) requiring tenant to have closed out any alteration permits or open DOB violations. Nor has plaintiff asserted a claim for *damages* resulting from its putative inability to relet the premises, or related to any repair/alteration costs it had to incur to address the open permits and violations—only a claim for holdover rent.

Finally, plaintiff's manager's affidavit in opposition to the motion to dismiss argues that tenant's retention of the keys supports plaintiff's claim that tenant retained control and dominion over the premises after the purported surrender (and thereby held over). (*See* NYSCEF No. 22 at ¶ 11.) But as discussed above, retention of a set of keys to conduct necessary repairs is not sufficient to create a holdover tenancy. Although plaintiff asserts that plaintiff lacked access to the property for reletting purposes due to tenant's retention of the keys, that assertion is found only in plaintiff's *attorney affirmation* (*see* NYSCEF No. 23 at ¶ 46)—not in the manager's affidavit or the party-verified complaint.

This court concludes, therefore, that plaintiff has not made out a cause of action for holdover rent against tenant. Absent a showing that tenant's obligations under the lease include payment of holdover rent, plaintiff necessarily lacks a cause of action against guarantor for that money. Given this court's conclusion on that point, the court does not reach whether guarantor's obligations under the guarantee encompass payment of accrued holdover rent.

Accordingly, it is

ORDERED that the motion to dismiss brought by tenant and by guarantor Dominique Lévy is granted, and plaintiff's complaint is dismissed as against these defendants, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendants shall serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk (by the means set forth in the court's e-filing protocol, available on the e-filing page of the court's website, https://ww2.nycourts.gov/courts/1jd/supctmanh/E-Filing.shtml), which shall enter judgment accordingly.

5/7/2024
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE