

**Fifty E. Forty-Second Co. LLC v Ildiko Pekar Inc.**

2019 NY Slip Op 30164(U)

January 16, 2019

Supreme Court, New York County

Docket Number: 154422/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

FIFTY EAST FORTY-SECOND COMPANY LLC, Plaintiff, INDEX NO. 154422/2017 MOTION SEQ. NO. 001

- v -

ILDIKO PEKAR INC., ILDIKO PEKAR, and ILDI PEKAR SKIN CARE LTD.,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion and cross-motion are decided as follows.

In this dispute between a landlord and tenant, plaintiff Fifty East Forty-Second Company LLC ("50 East LLC") moves, pursuant to CPLR 3212, for partial summary judgment on its third, fourth, sixth, eleventh, twelfth, and fourteenth<sup>1</sup> causes of action against defendants Ildiko Pekar, Inc., Ildiko Pekar, and Ildi Pekar Skin Care, Ltd., for, inter alia, outstanding base and additional rent. Plaintiff further moves, under CPLR 3211(a)(1) and (7) and Real Property Law § 227, to dismiss defendants' counterclaims. Defendants oppose the motion and cross-move, pursuant to CPLR 3025(b), for leave to amend their answer. After oral argument, and after a review of the

<sup>1</sup> The Court will not consider the motion with respect to plaintiff's fourteenth cause of action, which seeks to pierce the corporate veil (Doc. 15 at 20-22), as neither party has addressed that cause of action in its papers.

parties' papers and the relevant statutes and caselaw, it is ordered that the motion and cross-motion are **decided as follows.**

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

50 East LLC owns a building located at 50 East 42d Street ("the premises") in Manhattan. (Doc. 14 at 2–3.) On April 29, 2010, 50 East LLC entered into a written lease with defendant Ildiko Pekar, Inc. ("Ildiko, Inc.") (*id.* at 3), for the 26th floor of the building (Doc. 79 at 15). Defendant Ildiko Pekar ("Pekar") signed the lease on Ildiko, Inc.'s behalf with the intention of operating a skin care salon on the premises. (Docs. 14 at 3; 36.) Ildiko, Inc., however, is a non-existent entity. (Docs. 14 at 3; 18.) The actual name of Pekar's business is defendant Ildi Pekar Skin Care, Ltd. ("Skin Care"), of which Pekar is the president and chief executive officer. (Docs. 14 at 3; 36.) The next day, on April 30, 2010, Pekar signed a guaranty on the lease. (Doc. 21 at 20.)

After moving into the premises, Pekar and her business—Skin Care—began experiencing repeated leaks, water shutoffs, and elevator service disruptions, which adversely affected the parties' relationship as well as Skin Care's business operations. Pekar alleges that leaks occurred from August to November of 2011 and in July and October of 2014. (Docs. 36 at 2–3; 39–41; 44.) In addition, she asserts that the building's water supply was shut off for periods of time in January of 2013, February and March of 2015, and July of 2016 (Docs. 36 at 3; 45–49), and that there were elevator disruptions in 2014 (Doc. 36 at 4). These problems led to Pekar's clients cancelling their appointments with Skin Care. (*Id.*) Although Skin Care's management informed 50 East LLC about these issues (Docs. 39; 41–42; 48–49), Pekar maintains that the problems were not addressed in a timely fashion (Doc. 36 at 4). Nevertheless, despite these recurrent issues, 50 East LLC and

Pekar executed two lease extensions, which extended the lease's term through April 30, 2015, and April 30, 2018, respectively. (Docs. 23–24.)

Around February of 2015, Pekar began searching for a new place to relocate Skin Care. (Doc. 69.) In March of 2016, Pekar indicated that she wanted to move her business to a different suite in the building. (Docs. 70; 79 at 9.) On November 3, 2016, after she had found a new space for the business, Pekar sent plaintiff an e-mail giving 30 days' notice that the business was going to vacate the premises. (Docs. 36 at 4; 38.) On November 29, 2016, 50 East LLC informed her that it would agree to terminate the lease if she found a new tenant to take over the premises and that otherwise the “lease [would] remain in effect until a new deal is completed” with the prospective tenant. (Doc. 71 at 2.)

E-mails from December of 2016 reflect that Pekar was unable to find a new tenant. (Doc. 73.) In a December 9, 2016, e-mail sent to plaintiff, Pekar explained that the prospective tenant had decided not to move into the premises due to “the same concerns we [had] with the noise and overall environment,” (*id.*), but that Skin Care was still “going to proceed with the cancellation,” (*id.*). To this, 50 East LLC responded: “The cancellation was only valid if we had another tenant coming in. We do not have that tenant anymore.” (*Id.*) According to 50 East LLC, during these discussions, Pekar withheld rent for the period from July of 2016—after Pekar had expressed her desire to relocate Skin Care to a different suite in the building (Docs. 70; 79 at 9)—to February of 2017 (Doc. 14 at 9).

50 East LLC subsequently commenced a nonpayment summary proceeding against Ildiko, Inc., to collect the unpaid rent through the end of 2016. (*Id.* at 7–8; Doc. 25 at 1.) The proceeding ultimately resulted in 50 East LLC and Ildiko, Inc., reaching a “Surrender Agreement.” (Doc. 25.) Dated February 23, 2017, the agreement provided that Ildiko, Inc., was to immediately abandon

and restore 50 East LLC to possession of the premises. (*Id.* at 2.) The agreement also provided that “such actions shall not be deemed to constitute a termination of [the] lease . . . nor vitiate [Ildiko, Inc.’s] obligations thereunder.” (*Id.*) On the same page, the agreement further provided that the “[nonpayment summary] proceeding [was] discontinued without prejudice to [50 East LLC’s] right to pursue enforcement in a plenary action of its rights and remedies under the Lease with regard to the rent arrears sought in this proceeding and rent for the balance of the term of the Lease.” (*Id.*)

On May 10, 2017, 50 East LLC commenced the instant action against defendants by filing a summons and complaint seeking, *inter alia*, outstanding base and additional rent. (Doc. 15.) The complaint alleged fourteen causes of action. (*Id.*)

50 East LLC now moves, pursuant to CPLR 3212, for partial summary judgment on its third, fourth, sixth, eleventh, and twelfth causes of action. Its third cause of action seeks judgment against Pekar, as guarantor of the lease, for Ildiko, Inc.’s unsatisfied obligations on the lease. (*Id.* at 10–12.) The fourth cause of action seeks liability against Pekar for liquidated damages for the unexpired term of the lease. (*Id.* at 13.) The sixth cause of action is for a declaration that Pekar is personally liable for damages and for Ildiko, Inc.’s debts.<sup>2</sup> (*Id.* at 15–16.) The eleventh cause of action seeks a judgment against Pekar for attorneys’ fees. (*Id.* at 18–19.) The twelfth cause of action seeks a judgment against Pekar pursuant to Debtor Credit Law § 274. (*Id.* at 19.)

50 East LLC further moves, under CPLR 3211(a)(1) and (7) and Real Property Law § 227, to dismiss defendants’ counterclaims (*see, e.g.*, Doc. 12 at 2) for breach of the covenant of quiet enjoyment and partial constructive eviction (Doc. 16 at 7–8).

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<sup>2</sup> In the complaint, 50 East LLC asserts damages in the amounts of \$25,001.95, \$24,406.14, and \$49,908.09 for its third, fourth, and sixth causes of action. (Doc. 15 at 22–23.) However, in its motion, 50 East LLC seeks only a total of \$48,704.19 (*see, e.g.*, Doc. 14 at 1) for pre-vacatur and post-vacatur rent as liquidated damages on those causes of action (*id.*).

Defendants oppose the motion and cross-move, pursuant to CPLR 3025(b), for leave to amend their answer. Defendants' proposed amended complaint seeks to include facts underlying their existing counterclaims (Doc. 52 at 8–10), and seeks to add a third counterclaim for constructive eviction (*id.* at 11).

#### LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

**a. Whether 50 East LLC is Entitled to Summary Judgment on its Third, Fourth, Sixth, Eleventh, and Twelfth Causes of Action.**

The third, fourth, sixth, and twelfth causes of action asserted by 50 East LLC seek to hold Pekar personally liable on the lease that it executed with a nonexistent entity—i.e., Ildiko, Inc.—on the basis that Pekar exposed herself to such liability by signing the guaranty.

“As a general rule, a person entering into a contract on behalf of a nonexistent corporate entity may be held personally liable on the contract.” (*Commrs. of State Ins. Fund v Staulcup*, 95

AD3d 1259, 1261 [2d Dept 2012] (internal quotations omitted); *see also Sunquest Enters., Inc. v Zar*, 115 AD3d 486, 486 [1st Dept 2014] (“Plaintiff is correct that, had defendants entered into a contract on behalf of a nonexistent entity . . . they would be personally liable under the contract.”). Additionally, where, as here, summary judgment is being sought to enforce a written guaranty, “all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998].)

Here, the lease was executed between 50 East LLC and Ildiko, Inc., in April of 2010. (Doc. 21 at 1.) Importantly, Pekar executed the guaranty in writing (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989] (“To be enforceable, a special promise to answer for the debt or default of another must be in writing and subscribed to by the party against whom enforcement is sought.”)), and the guaranty references the lease (Doc. 21 at 20). Furthermore, the guaranty clearly obligates Pekar to ensure satisfaction of Ildiko, Inc.’s responsibilities under the lease, and no condition limiting her liability appears in the guaranty. In pertinent part, the guaranty states that “[Pekar] guarantees to [50 East LLC] . . . the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by [Ildiko, Inc.] . . .” (*Id.*) “[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 [1st Dept 2012].)

The guaranty, in conjunction with the lease, establishes that Pekar is liable for unpaid rent, notwithstanding that Ildiko, Inc., is a nonexistent entity which never occupied the premises. (*See generally Commrs. of State Ins. Fund*, 95 AD3d at 1261; *Sunquest Enters., Inc.*, 115 AD3d at 486.)

With respect to pre-vacatur<sup>3</sup> rent, 50 East LLC has established that defendants began withholding rent in July of 2016. (Doc. 14 at 9.) Pekar, as signatory to the guaranty, agreed to be personally liable for the nonexistent entity's obligation to pay rent under the lease. (Doc. 21.) In regard to the dispute over her liability for post-vacatur rent, this Court finds that Pekar is liable pursuant to the "Surrender Agreement," which provides, in unequivocal terms, that Ildiko, Inc.'s abandonment of the premises and restoration to 50 East LLC thereof "shall not be deemed to constitute a termination of [Ildiko, Inc.'s] lease or estate nor vitiate [Ildiko, Inc.'s] obligations thereunder." (Doc. 25 at 2.) Thus, plaintiff has satisfied its prima facie case for summary judgment on its third, fourth, sixth, and twelfth causes of action for Pekar's personal liability on pre-vacatur and post-vacatur rent.

Furthermore, this Court determines that plaintiff has established its prima facie case for summary judgment in regard to its eleventh cause of action. Paragraph 19 of the lease provides that Ildiko, Inc., is responsible for 50 East LLC's reasonable attorneys' fees in any nonpayment proceeding or action in which 50 East LLC prevails. (Doc. 21 at 3.)

Defendants do not raise an issue of fact in opposition.<sup>4</sup> Instead, they argue that summary judgment should be denied because they have purportedly viable counterclaims against 50 East LLC, including counterclaims for breach of the covenant of quiet enjoyment and partial constructive eviction. (*See generally* Doc. 35.) This Court considers those counterclaims below.

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<sup>3</sup> This Court acknowledges that there is a dispute between the parties as to when vacatur of the premises occurred. Defendants argue that they vacated the premises at the end of November in 2016 (Doc. 35 at 9), less than a month after Pekar had sent the November 3d, 2016, e-mail giving 50 East LLC 30 days' notice that her business was going to relocate to a different suite in the building (Docs. 36 at 4; 38). However, that argument is belied by the "Surrender Agreement," pursuant to which defendants vacated the premises on February 23, 2017. (*See* Doc. 25.)

<sup>4</sup> The preliminary statement in defendants' memorandum of law (Doc. 35) opposing 50 East LLC's motion claims that "there are numerous questions of fact that require that Plaintiff's [50 East LLC's] motion for partial summary judgment be denied in its entirety (*id.* at 6). However, the memorandum fails to identify such an issue of fact warranting denial of plaintiff's partial summary judgment motion. Indeed, defendants have failed to address plaintiff's eleventh cause of action for reasonable attorneys' fees.

**b. Whether 50 East LLC is Entitled to Summary Judgment Dismissing Defendants' Counterclaims.**

50 East LLC further moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss defendants' existing counterclaims. (Doc. 26 at 9.) CPLR 3211 (a)(1) provides for dismissal should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) Therefore, if the "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . ." (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Unlike CPLR 3211(a)(1), which allows parties to challenge the other's pleadings using the documentary evidence, CPLR 3211(a)(7) "test[s] the *facial* sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014] (emphasis added).) First, "the motion may be used to dispose of an action in which the [party] has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss a claim where the party has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

Regarding defendants' counterclaim for partial constructive eviction, courts have held that, "[t]o be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises." (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970].) And, with respect to her counterclaim for breach of the covenant of quiet enjoyment, "a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises." (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006] (internal quotations and brackets omitted).) Because the

documentary evidence establishes that defendants vacated the premises due to the “Surrender Agreement,” and not because they were constructively evicted, their counterclaims must be dismissed pursuant to CPLR 3211(a)(1).

In light of the above discussion, this Court determines that defendants’ cross-motion for leave to amend their answer to include a counterclaim for constructive eviction (Doc. 35 at 20) must be denied. As previously mentioned, defendants vacated the premises pursuant to the “Surrender Agreement” and therefore were not constructively evicted. (*See Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003] (“Where, as here, the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied.”) (internal citation omitted).)

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that the Clerk shall enter judgment in favor of plaintiff Fifty East Forty-Second Company LLC against defendant Ildiko Pekar in the amount of \$48,704.19, plus statutory interest from November 1, 2016 and costs to be calculated by the Clerk; and it is further

**ORDERED** that the branch of plaintiff’s motion for summary judgment on its third, fourth, sixth, and twelfth causes of action for unpaid pre-vacatur and post-vacatur rent is granted to the

extent that plaintiff is awarded \$48,704.19, plus statutory interest from November 1, 2016, against defendant Ildiko Pekar personally; and it is further

**ORDERED** that the branch of plaintiff's motion for summary judgment on its eleventh cause of action for reasonable attorneys' fees is granted; and it is further

**ORDERED** that the branch of plaintiff's motion for summary judgment dismissing the counterclaims by defendants Ildiko Pekar, Inc., Ildiko Pekar, and Ildi Pekar Skin Care, Ltd. for partial constructive eviction and breach of the covenant of quiet enjoyment is granted; and it is further

**ORDERED** that plaintiff's remaining causes of action are dismissed as against defendants Ildiko Pekar, Inc., and Ildi Pekar Skin Care, Ltd. as moot pursuant to this decision and order; and it is further

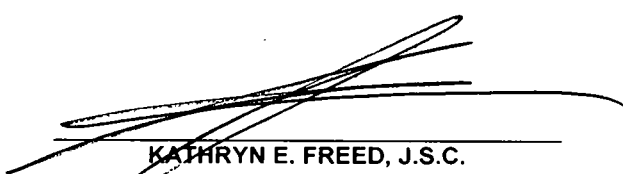
**ORDERED** that defendants' cross-motion seeking leave to amend their answer to include a counterclaim for constructive eviction is denied; and it is further

ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

ORDERED that within 30 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date for a hearing to calculate the amount of reasonable attorneys' fees to be awarded and the Clerk shall notify all parties of the hearing date; and it is further

ORDERED that this constitutes the decision and order of this Court.

1/16/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER

APPLICATION:

- SETTLE ORDER

- SUBMIT ORDER

CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN

- FIDUCIARY APPOINTMENT  REFERENCE