

**Rubini v Hypatia III**

2022 NY Slip Op 32950(U)

September 1, 2022

Supreme Court, New York County

Docket Number: Index No. 158890/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

ROCCO RUBINI,

Plaintiff,

- v -

HYPATIA III, CHRISTOPHER LLOYD, LISA LLOYD

Defendant.

INDEX NO. 158890/2021

MOTION DATE 01/13/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for

DISMISS

Oral argument took place on June 2, 2022 with Yoram Silagy appearing on behalf of Plaintiff Rocco Rubini (“Plaintiff” or “Rubini”) and Jason R. Mischel appearing on behalf of Defendants Hypatia III (“Hypatia”), Christopher Lloyd (“Christopher”) and Lisa Lloyd (“Lisa”) (collectively “Defendants”). Upon the foregoing documents and oral argument, it is decided and ordered as follows.

**I. Factual and Procedural Background**

Plaintiff owns Unit 1792 at 2109 Broadway, New York, New York 10023 (the “Apartment”) (NYSCEF Doc. 1 at ¶ 1). Plaintiff lives full time in Chicago and is a Professor of Romance Languages and Literatures at the University of Chicago (NYSCEF Doc. 13 at ¶¶ 6-8). From August 1, 2016 through July 31, 2017, Defendant Hypatia III entered into a lease (the “First Lease”) with Plaintiff to rent the Apartment (*id.* at ¶ 10). Although this was a residential lease, Hypatia III is a corporation. A rider to the First Lease indicated that Christopher Lloyd and Lisa Lloyd would be living in the Apartment (*id.*) Christopher and Lisa Lloyd are husband and wife.

Another lease was entered into from August 1, 2017 to July 13, 2018 (the “Second Lease”) which Christopher Lloyd and Lisa Lloyd both signed as tenants, but Hypatia did not sign (*id.* at ¶ 11). From August 1, 2018 to July 31, 2019 Christopher and Lisa Lloyd signed a subsequent lease with Plaintiff (the “Third Lease”) (*id.* at ¶ 12). A final lease (the “Fourth Lease”) was signed from August 1, 2019 to July 31, 2021 at a monthly rent of \$5,900; however, only Lisa Lloyd signed this lease (*id.* at ¶ 14). The rent on the Fourth Lease was always paid by Hypatia (*id.* at ¶ 22). All four leases contained a rider stating that Lisa and Christopher were to be tenants residing in the Apartment.

Allegedly, Defendants did not pay rent pursuant to the Fourth Lease for the months of August through December of 2020 and January through July of 2021 (NYSCEF Doc. 1 at ¶ 6). Emails from August and September of 2020 from Lisa to Plaintiff indicate that the Defendants decided to break their lease (NYSCEF Doc. 13 at ¶ 20). Plaintiff, via email, rejected this request (*id.* at ¶ 21). After Defendants unilaterally broke their lease with Plaintiff, the Plaintiff entered into a new lease with a new tenant in June 2021 at a monthly rent of \$4500 (*id.* at ¶ 23).

Plaintiff alleges to have made efforts to re-rent the Apartment since Defendants vacated in August 2020 (*id.* at ¶ 24). The apartment was listed on September 18th, 2020 in multiple advertisements, including a Corcoran Advertisement which asked for monthly rent of \$4,800 (*id.*)

Plaintiff filed a Complaint seeking rent arrears on September 28, 2021 (NYSCEF Doc. 1). Rather than file an Answer, Defendants filed a motion to dismiss pursuant to CPLR §§3211(a)(1) and (7) (NYSCEF Doc. 4). Defendants argue that because the lease was not fully executed, and because the lease had a clause which states it is not effective unless fully executed, then the lease had no force or effect (NYSCEF Doc. 5). Defendants claim because Hypatia and Christopher never executed the lease, it is without effect (*id.*)

In turn, Plaintiff cross-moved for summary judgment and opposed Defendants' motion to dismiss (NYSCEF Doc. 12). Plaintiff urges the Court to consider the emails between the parties, the course of performance under the multiple leases, and the reality of the fact that although only Lisa signed the Fourth Lease, Christopher and Lisa were both occupying the apartment from 2016 to 2020. Plaintiff also argues that Lisa had apparent authority to sign the lease on behalf of all three defendants, as indicated by multiple emails where she referred collectively to "our lease" when signing the Fourth Lease and stating "we made a decision that is best for us" when it came to breaking that lease (*id.*). Defendants in opposition argue that the emails do not bind defendants for rent owed and that Lisa did not have apparent authority to sign the lease on behalf of all Defendants (NYSCEF Doc. 29).

## II. Discussion

### A. Defendants' Motion to Dismiss

#### i. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

**ii. The Complaint Survives Defendants' Motion to Dismiss**

Under the liberal pleading standard of CPLR § 3211(a)(7), Plaintiff clearly states a claim for rent arrears. Therefore, that branch of Defendants' motion to dismiss is without merit. Moreover, the documentary evidence put forth by Defendants does not meet the standard of being unambiguous, and do not definitively contradict the allegations in Plaintiff's Complaint. For instance, the payment of rent, the Fourth Lease, and the emails that surrounded the Fourth Lease's execution do not definitively contradict the allegations that Hypatia and Christopher agreed to be bound by the Fourth Lease's terms. The signature line upon which Lisa signed the lease stated that she was signing on behalf of Christopher and Lisa (a married couple), and despite living in the apartment for months after signing, Christopher never objected to the payment of rent or terms of the lease Lisa signed (NYSCEF Doc. 8; *see also Finkelstein v Finkelstein*, 206 AD3d 527, 528 [1st Dept 2022] [wife and children's silence after husband/father acted with apparent authority on their behalf ratified husband/father's apparent authority to act on wife and children's behalf]). Similarly, Hypatia's continued payment of rent on the Fourth Lease could be construed as ratification of Lisa signing on its behalf to be bound by the terms of the Lease.

Although Plaintiff relies on *Family Health Management, LLC v Rohan Developments, LLC* (2021 N.Y. Slip Op. 30079(U) [Sup Ct, New York County 2021]) to argue that the lease never went into effect because it was not executed by all parties, the Court finds the facts of that case to be distinguishable from the case at bar. In *Family Health Management*, there was no payment of rent by the parties, the “tenants” were never in possession of the premises, and the executed lease was never delivered. In the case before the Court, Lisa and Christopher had possession of the premises for years; they had been parties to various leases throughout those years; they continued to pay rent, and most importantly, Lisa executed and delivered a copy of the Fourth Lease purportedly on her own behalf and purportedly on behalf of her Husband. Moreover, Lisa, without any objection from Christopher, appears to indicate that there are multiple parties on the lease when she makes references in the email communications as “our lease.” Thus, the documentary evidence does not clearly and unambiguously controvert the allegations as required for a motion to dismiss based on CPLR § 3211(a)(1). Defendants’ motion to dismiss is denied.

Moreover, although Defendants make out a statute of frauds argument pursuant to New York General Obligations Law §5-701(1) and (10), that argument is also lacking considering the Lease is in writing and Lisa purportedly signed on behalf of both herself and her husband Christopher (*Jill Real Estate, Inc. v Smyles*, 150 AD2d 640 [2d Dept 1989] [If it is shown that spouse who did not sign agreement for sale of real estate had complete knowledge of and participated in the transaction, she cannot deny her husband’s authority to execute the contract on her behalf]).

### **B. Summary Judgment**

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v*

*Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1<sup>st</sup> Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Plaintiff is seeking summary judgment on rent arrears as a result of a breach of contract. To make prima facie showing for breach of contract, Plaintiff must show a valid contract, Plaintiff's performance under the contract, Defendants' breach, and damages (*Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]).

Although the documentary evidence does not warrant dismissal of the Complaint, given that no Answer has been served, no discovery has taken place yet, and whether certain parties were signatories or bound to the Fourth Lease is hotly in dispute, the Court finds that summary judgment is premature at this time. Specifically, viewing the facts in the light most favorable to the non-moving party, it has not been proved conclusively in the record that Christopher or Hypatia intended to be bound by the terms of the Fourth Lease. Moreover, there are certain procedural deficiencies with Plaintiff's motion for summary judgment; for instance, Plaintiff has violated New York Court Rules § 202.8-g(a). Plaintiff's counsel failed to annex to its motion for summary judgment a statement of material facts for which it contends there is no genuine issue to be tried. Viewing the facts in the light most favorable to the non-moving party, and given this early, pre-

answer, pre-discovery summary judgment motion, the Court finds summary judgment to be premature. Therefore, Plaintiff's cross-motion for summary judgment is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is denied without prejudice; and it is further

ORDERED that Defendants shall file an Answer to Plaintiff's Complaint within 30 days of entry of this Decision and Order.

This constitutes the Decision and Order of the Court.

9/1/2022  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

*Mary V Rosado*  
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HON. MARY V. ROSADO, J.S.C.