

<b>Eisdorfer 60 LLC v David</b>
2022 NY Slip Op 33331(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 160382/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

-----X  
EISDORFER 60 LLC,

Plaintiff,

- v -

KURT DAVID, JEAN ELBAUM-DAVID

Defendant.

INDEX NO. 160382/2021

MOTION DATE 01/26/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

-----X  
HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 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, 63

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and oral argument which took place on July 27, 2022 where Melissa S. Levin, Esq. appeared for Plaintiff Eisdorfer 60 LLC (“Plaintiff”) and Scot Mackoff, Esq. appeared for Jean Elbaum-David (“Jean”), Jean’s motion to dismiss is denied.

**I. Factual and Procedural Background**

This action arises out of a lease (the “Lease”) and guaranty (the “Guaranty”) entered between Plaintiff and Defendants Jean Elbaum-David and Kurt David (“Kurt”) (collectively “Defendants”). Plaintiff seeks rent arrears, holdover rent, alleged damages related to New York City Department of Sanitation violations, late fees, repair fees, and attorneys’ fees (NYSCEF Doc. 2). Kurt has not filed any responsive pleading to date. Jean filed this pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (7) (NYSCEF Doc. 24).

Plaintiff owns a residential building located at 81 Hudson Street, New York, NY 10013 (the “Building”) (NYSCEF Doc. 1 at ¶ 1). Both Jean and Kurt signed a lease with Plaintiff to rent

the second and third floors of the building (the “premises”) (NYSCEF Doc. 1 at ¶ 4; *see also* NYSCEF Doc. 3). The lease term commenced January 9, 2020 and expired on January 31, 2021 (NYSCEF Doc. 1 at ¶ 6).

In the Summer of 2020, allegedly, multiple tenants in the Building began to complain about parties being held in the premises with over 200 guests on a weekly to bi-weekly basis (*id.* at ¶ 11). The New York City Police Department (“NYPD”) also notified Plaintiff about the parties (*id.*). These parties led to fines from the City of New York Department of Buildings and Department of Sanitation for violating COVID-19 Pandemic Regulations (*id.* at ¶¶ 16-17). The lease agreement was not renewed, and a sixty-day notice of termination was issued on January 11, 2021 (*id.* at ¶ 10). It is alleged that premises were subject to three Sheriffs’ raids (*id.* at ¶¶ 24, 26-27). Indeed, these illegal “covid parties” became the subject of New York Post articles (*id.* at ¶ 28).

Despite numerous written warnings to both Jean and David from Plaintiff, the illegal covid parties continued (*id.* at ¶¶ 30-32). This caused Plaintiff to sue Defendants seeking injunctive relief prohibiting them from hosting covid parties and illegally selling alcohol (the “injunctive relief action”) (*Eisdorfer 60 LLC v Kurt David and Jean Elbaum-David*, Index No. 152891/2021 [Sup Ct, New York County, 2021]; *id.* at ¶ 32). In the injunctive relief action, the Court, on April 13, 2021, granted Plaintiff a preliminary injunction enjoining Kurt and his guests from engaging in the illegal covid parties and compelling Kurt to allow Plaintiff to enter the premises to conduct repairs (*id.* at ¶ 34; *see also* NYSCEF Doc. 7)

As Kurt continued to violate the Court’s order, Plaintiff moved to hold Kurt in contempt. However, before the Court signed that order, on June 4, 2021, the parties agreed to discontinue the

action with prejudice so long as possession of the premises was surrendered (*id.* at ¶ 39; *see also* NYSCEF Doc. 12).

Allegedly, once Plaintiff regained possession of the premises, it realized the damage that Defendants' possession had been done. Plaintiff alleges extensive repair work was required to restore the premises (*id.* at ¶ 40). Despite letters to Jean from Plaintiff seeking money for unpaid rent, holdover rent, violation fees, legal fees, late fees, and repair work, Jean never responded (*id.* at ¶ 41). This led Plaintiff to file the instant action.

According to Jean, her name was only added to the lease so that she could be a guarantor (NYSCEF Doc. 26). Jean claims there were multiple emails and phone calls with brokers which indicate only Kurt was moving into the premises and that Jean would be the guarantor (*id.*). Jean signed a guaranty (NYSCEF Doc. 29). Jean further claims she paid the rent on Kurt's behalf from February 2020 through December 2020, and the two months of security deposit should be deemed to have paid rent for January 2021 (NYSCEF Doc. 26). Jean claims she surrendered all possessory rights she may have to the apartment on January 28, 2021 via letter to Plaintiff (NYSCEF Doc. 33). Jean claims that based on the language of the Lease, and since there was no extension of the Guaranty, she has no obligations to Plaintiff beyond January 31, 2021 (NYSCEF Doc. 26).

In response, Seth Cohen, the principal of Plaintiff, provided a sworn affidavit that Jean signed the lease as a co-tenant and even if she were still the guarantor, she is liable for unpaid rent, damages, and fees incurred during the tenancy that she guaranteed (NYSCEF Doc. 39).

## II. Discussion

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]).

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 determine 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]).

The first and second causes of action are dismissed. The first cause of action which seeks rent for the months of January, February, and March 2021, should be dismissed as to Jean based on the documentary evidence. The second cause of action, which seeks holdover rent for April and May 2021 should also be dismissed as to Jean based on the documentary evidence. First, Jean unequivocally gave up any possessory rights she had to the apartment in January of 2021 (NYSCEF Doc. 33). The rent was paid through December 2021 (NYSCEF Doc. 15). Plaintiff took two months rent pursuant to the security deposit in contravention of General Obligation Law § 7-

108(1) (NYSCEF Doc. 3). Therefore, the extra month of security deposit should have been applied to the January of 2021 rent, thereby satisfying any obligation Jean owed to Plaintiff.

Moreover, since a guaranty must be interpreted in the strictest manner, and cannot be altered without the guarantor's consent, the Guaranty did not extend to the new tenancy which was created at the expiration of the lease term in January of 2021 (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]). The guaranty explicitly states that it only guarantees the obligations to be performed by Lessee "pursuant to this Lease" (NYSCEF Doc. 29). As the Lease to which the Guaranty applied expired in January of 2021, and the guaranty only extended to the original Lease, Jean cannot be liable for any unpaid rent after January of 2021. Indeed, Plaintiff's own termination letter impliedly admits that a new tenancy arose upon the original lease's termination, as Plaintiff stated in its termination notice that the terminated tenancy was a "monthly hiring" tenancy (NYSCEF Doc. 14). While Kurt was a holdover tenant, he did not become a holdover tenant until the expiration of the "monthly hiring" specified in the Plaintiff's termination notice (NYSCEF Doc. 14)., As such, Jean cannot be held to have guaranteed that new tenancy without a written instrument. Because Kurt became a holdover tenant during a tenancy not guaranteed by Jean, it follows that Jean cannot be responsible for the rent Plaintiff seeks. Therefore, the first and second causes of action are dismissed.

The fourth cause of action seeking late fees for January, February, March, April, and May 2021 rent should also be dismissed. The January rent was already in the possession of Plaintiff by virtue of illegally retaining two months' worth of rent for the security deposit, and Jean neither guaranteed Kurt's rental obligations nor retained any possessory interest in the premises for the months of February through May.

However, the remainder of the causes of action survive Jean's motion to dismiss. Even if Jean was just a mere guarantor and not a tenant during the time Kurt occupied the premises, accepting the allegations as true and giving Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings, Jean may still be liable for damages which occurred during the original tenancy<sup>1</sup>. The damages sought in the third cause of action for NYC Department of Sanitation violations occurred at least in part during the lease which Jean guaranteed. Similarly, the fifth cause of action seeks to recover damages incurred from restoring the premises to their original state. Since it is possible that the damage to the apartment happened during the lease term guaranteed by Jean, she may still be liable for the damages sought under this cause of action.

Finally, since Jean is still a party to this action, she may still be liable to Plaintiff for attorneys' fees should Plaintiff prevail on its third and fifth causes of action. However, Plaintiff also seeks attorneys' fees incurred in the injunctive relief action. Plaintiff already sued for attorneys' fees in that action, yet later stipulated to discontinue that action, with prejudice (NYSCEF Doc. 12). Plaintiff is barred from seeking those attorneys' fees twice by the doctrines of res judicata and collateral estoppel. Therefore, Plaintiff's seventh cause of action is dismissed to the extent it seeks legal fees incurred in the prior action.

Accordingly, it is hereby

ORDERED that Plaintiff's first, second, and fourth causes of action are dismissed as to Defendant Jean; and it is further

ORDERED that Plaintiff's seventh cause of action is dismissed to the extent it seeks attorneys' fees from Plaintiff's prior and discontinued action against Defendants; and it is further

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<sup>1</sup> The massive parties hosted at the premises began in the Summer of 2020, while the lease term did not expire until January of 2021.

ORDERED that Defendants serve a responsive pleading to Plaintiff's Complaint within 20 days from entry of this decision and order.

This constitutes the decision and order of the Court.

<u>10/3/2022</u> DATE	<u>Mary V Rosado</u> HON. MARY V. ROSADO, J.S.C.					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE