

**Decana, Inc. v Faiman**

2024 NY Slip Op 33277(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 654628/2023

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

DECANA, INC.,

Plaintiff,

- v -

JONATHAN FAIMAN and KIRA FAIMAN,

Defendants.

-----X

**INDEX NO.** 654628/2023

**MOTION DATE** 11/17/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28

were read on this motion to DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, the motion by defendant Kira Faiman to dismiss the complaint is denied, for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 17, 20-21) and the exhibits attached thereto, in which the court concurs, as summarized herein. In this landlord-tenant action, plaintiff/landlord seeks to recover rent arrears and use and occupancy from defendants, who were tenants of the apartment in question. The lease was originally between plaintiff and defendant Jonathan Faiman alone (NYSCEF Doc. No. 2). The lease renewal dated November 22, 2019, for a two-year term from April 1, 2020, through March 31, 2022, bears two tenant signatures (NYSCEF Doc. No. 3 at 1). The signatures cannot be identified from the face of the document; but it is clear that, as opposed to earlier lease renewals, there are two tenant signatures rather than only one, which belongs to defendant Jonathan Faiman.

Defendant Kira Faiman moves to dismiss the complaint on the grounds that she is not a tenant and, therefore, not liable under the lease. She argues that, as a technical matter, plaintiff

cannot establish that her signature is on the lease renewal. She also argues that, because plaintiff has sued Mr. Faiman numerous times without also naming her as a defendant, plaintiff should be judicially estopped from claiming that she is a tenant. Neither argument requires dismissal of the case.

“The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed” (*Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]). Here, plaintiff is accused of treating Mr. Faiman as the only tenant by not naming Ms. Faiman as such in prior actions involving the apartment. For judicial estoppel to apply here, plaintiff would have had to formally take the position that Ms. Faiman was not a tenant, which plaintiff has never actually done. Further, when interpreting a contract “[t]he provisions of the contract establishing the rights of the parties prevail” over allegations made in a complaint (*Manchester Equip. Co., Inc. v Panasonic Indus. Co.*, 141 AD2d 616, 618 [2d Dept 1988]). Thus, that plaintiff may not have named Ms. Faiman in prior actions does not control over the terms of the lease renewal, assuming that Ms. Faiman is in fact the other tenant who signed.

The court also notes that the lease contains a “No Waiver” clause, providing that plaintiff’s “failure to enforce any term of this Lease is not a waiver of any of Landlord’s rights” (lease, NYSCEF Doc. No. 2, ¶ 25). Plaintiff’s failure to previously pursue Ms. Faiman under the lease and its renewals cannot operate to bar the present action. At minimum, issues of fact regarding whether Ms. Faiman should be considered a tenant preclude dismissal of the claim for breach of the lease (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

Plaintiff's other causes of action are also not subject to dismissal due to the issues surrounding Ms. Faiman's liability under the lease. Because she questions the enforceability of the lease, plaintiff may alternatively plead quasi-contractual claims such as unjust enrichment and quantum meruit (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008] ["where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies"]). In addition, as the Appellate Division, First Department, has recently reaffirmed, "an account stated is an independent cause of action that can be asserted simultaneously with a breach of contract claim and that an account stated claim should not be dismissed as duplicative of a breach of contract claim" (*Aronson Mayefsky & Sloan, LLP v Praeger*, 228 AD3d 182, 187 [1st Dept 2024]).

Accordingly, it is hereby

ORDERED that defendant Kira Faiman's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on October 23, 2024, at 10:00 AM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at [https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary\\_conf\\_forms.shtml](https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml), to the Principal Court Attorney of this Part (Part 38) at [ssyaggy@nycourts.gov](mailto:ssyaggy@nycourts.gov).

This constitutes the decision and order of the court.

ENTER:



<u>9/12/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART <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