

**Seaton v Babad**

2025 NY Slip Op 32348(U)

July 2, 2025

Supreme Court, New York County

Docket Number: Index No. 153566/2024

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58**

*Justice*

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DEBRA SEATON, SIMON SEATON,  
Plaintiffs,

- v -

CHAIM BABAD, JACOB EISENSTEIN, EK REALTY, LLC  
Defendants.

INDEX NO. 153566/2024

MOTION DATE 06/21/2024,  
10/25/2024

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40 were read on this motion to/for JUDGMENT - DEFAULT.

Defendants Eisenstein and EK Realty, LLC (collectively, movants) move pursuant to CPLR 602 and 3211(a)(4) for an order consolidating the instant proceeding with a prior pending action, and upon consolidation, dismissing the instant action against movants pursuant to CPLR 3211(a)(1), (3), (7), and (8) or, alternatively, granting them time to file an answer (seq. 002). Plaintiffs oppose.

Plaintiffs move, submitted on default, pursuant to CPLR 3215 for a default judgment against Babad (seq. 003).

**I. PERTINENT BACKGROUND**

At issue in this action is commercial property located at 1751 Park Avenue in Manhattan and owned by non-party Park 121 Realty LLC (Park LLC). Plaintiffs and defendant Babad are members of Park LLC.

In 2021, plaintiffs sued Babad in this court, and Babad countersued, for alleged financial improprieties involving Park LLC, under index number 654196/21 (prior action). That action is pending, and a receiver was appointed to maintain the financial status quo until it is resolved. Movants here were appointed as the receiver's property manager.

In this action, plaintiffs claim that they maintained an office at the premises, where they stored extensive and valuable business and personal items, that defendants here knew about the office, and that sometime in 2023, defendants convinced new tenants in the building to clear out and destroy the items in the office. Plaintiffs thus sue defendants for conversion, intentional and negligent infliction of emotional distress, and negligence (NYSCEF 1).

## II. MOTION TO DISMISS (SEQ. 001)

### A. Consolidation or prior action pending

Pursuant to CPLR 602, actions may be consolidated when they involve common questions of law or fact. Here, movants do not establish that this action involving the destruction of plaintiffs' personal property has common questions of law or fact with the pending action involving financial proprieties of the LLC and its members. Consolidation is thus denied.

For the same reason, there is no basis to dismiss this action based on the pendency of the prior action, as there is no similarity between the issues in both actions, nor a unity of all parties (*see Aerogen LLC v Tapjets Holdings Inc.*, 238 AD3d 532 [1st Dept 2025] [dismissal denied on prior action pending, as prior action did not involve same cause of action or same parties]; *Finch Prop. Holdings I, LLC v Blumenfeld*, 234 AD3d 521 [1st Dept 2025] [action should be dismissed where identity of parties and causes of action in two pending actions raise danger of conflicting rulings related to same matter; there, relief sought and parties in each action were different]).

Thus, movants' motion to consolidate or dismiss based on a prior pending action is denied.

B. Dismissal against Eisenstein

As plaintiffs consent to dismissal of the action against Eisenstein, without prejudice (NYSCEF 30), the motion is granted to that extent.

C. Dismissal based on lack of standing

According to movants, as they are agents of a duly-court-appointed receiver, leave of the court is required before they may be sued. Plaintiffs argue that there is an "ultra vires" exception which permits the maintenance of an action without leave of the court if the property manager undertakes acts or transactions in carrying on or conducting business connected with the property.

Based on the allegations in the complaint, movants fail to show that the "ultra vires" exception does not apply here, and therefore, their motion to dismiss on that ground is denied (*see e.g., Melvin v Klein*, 49 Misc 2d 24 [Sup Ct, Onondaga County 1965] [finding that exception involved conducting business in ordinary sense of words, such that if trustee continued to operate railroad, he could be sued for damages for use of another's tracks]).

D. Dismissal based on documentary evidence or failure to state a claim

Pursuant to CPLR 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that . . . a defense is founded upon documentary evidence[.]" Dismissal is "warranted only if documentary evidence submitted utterly refutes plaintiff's factual allegations, and conclusively establishes a defense to the asserted claims as a matter of law" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015], *affd.*, 31 NY3d 100 [2018] [internal quotations omitted]).

Affidavits, emails, and text messages, in and of themselves, do not qualify as documentary evidence pursuant to CPLR 321(a)(1) (*see Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014] [emails may constitute documentary evidence]), and here, the alleged documentary evidence does not demonstrate that plaintiffs do not have a claim against defendants, nor that they fail to state a claim against them.

### III. MOTION FOR A DEFAULT JUDGMENT AGAINST BABAD

Plaintiffs submit proof that they served Babad with the pleadings on May 1, 2024, and that he failed to appear or answer timely.

However, the allegations in the complaint do not set forth a claim for intentional infliction of emotional distress (IIED), as this is not the type of outrageous conduct sufficient to constitute the claim (*see Gregg v Chen*, 220 AD3d 697 [2d Dept 2023] [landlord's acts in damaging or removing tenant's personal property did not support IIED claim]; *see also Seltzer v Bayer*, 272 AD2d 263, 264-265 [1st Dept 2000] [observing that conduct required to support IIED claim is normally comprised of "longstanding campaign of deliberate, systematic, and malicious harassment"]).

As plaintiffs do not allege that Babad owed them a legally-cognizable duty or that his conduct unreasonably endangered their safety or caused them to fear for their safety, their claim of negligent infliction of emotional distress fails (*Whitfield v Law Enforcement Employees Benevolent Assn.*, 237 AD3 1139 [2d Dept 2025]; *Murphy v Certain*, 217 AD3d 455 [1st Dept 2023] [no duty alleged]).

Nor do they allege a claim for negligence, given that plaintiffs allege that Babad intentionally disposed of their property, and absent a duty owed to them by Babad.

Plaintiffs' motion for a default judgment is thus granted solely to the extent of granting a default judgment against Babad on their conversion claim. As the action will continue as to defendant EK Realty, the damages to be assessed against Babad, if any, on this claim will be determined at an inquest to be held at the same time as the trial in this action.

IV. CONCLUSION

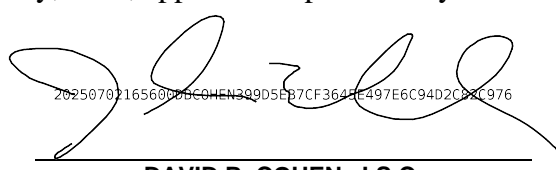
Accordingly, it is hereby

ORDERED that defendants Eisenstein and EK Realty, LLC's motion is granted solely to the extent of severing and dismissing, without prejudice plaintiffs' claims against defendant Jacob Eistenstein, and is otherwise denied, and the clerk is directed to enter judgment accordingly; it is further

ORDERED that plaintiffs' motion for a default judgment against defendant Babad is granted solely as to their conversion claim and is otherwise denied, with an inquest on damages to be held at the time of trial; it is further

ORDERED that defendant EK Realty, LLC, file its answer within 30 days of the date of this order; and it is further

ORDERED that plaintiffs and defendant EK Realty, LLC, appear for a preliminary conference on September 30, 2025, at 9:30 am.

  
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7/2/2025  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE