

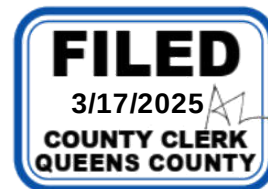
Xiao Liu v 136-51 37th Ave. LLC
2025 NY Slip Op 35455(U)
March 14, 2025
Supreme Court, Queens County
Docket Number: Index No. 727027/2022
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR

Justice



XIAO LIU,

Plaintiff,

-against-

136-51 37TH AVENUE LLC, FEI LIN,

Defendants.

IAS PART 42

Index No.: 727027/2022

Motion Date: 4/4/24

Motion Cal. No. 26

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by 136-51 37th Avenue LLC and Fei Lin (collectively, the “defendants”) for an order: a) pursuant to CPLR §3211(a)(5) and RPAPL § 853), dismissing the action based upon the statute of limitations; and/or b) pursuant to CPLR § 3211(a)(7), RPAPL § 853 and/or RPAPL § 768(2), dismissing the action based upon plaintiff’s failure to state a cause of action; and/or c) pursuant to CPLR § 3211(a)(1), dismissing the action based upon documentary evidence; and/or d) pursuant to CPLR § 3211(f), granting defendants leave to file an answer; and/or e) granting such other and further relief in favor of defendants as the Court deems just and proper. Moreover, Xiao Lio (“Ms. Liu” or “plaintiff”) cross moves for an order: a) granting plaintiff leave to file an amended complaint pursuant to CPLR § 3025(b); and b) granting such other and further relief as the Court deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 04 – 08
Notice of Cross Motion-Affirmation-Exhibits.....	EF 09 – 18
Affirmation in Opposition to Cross Motion-Memorandum of Law.....	EF 19 – 20

Upon the foregoing papers, it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action commenced by plaintiff Xiao Liu (“Liu”) stemming from an alleged

unlawful eviction of the commercial premises, Liu's salon business, located at 136-51 37 Avenue, first floor, Flushing, New York ("subject premises"). Liu filed an order to show cause in the Civil Court under index number LT 300388/2021 alleging defendant 136-51 37th Avenue LLC ("136-51 LLC") unlawfully evicted Liu on November 4, 2020. Liu alleges ZT9 Realty LLC was the prior owner of the subject premises who entered a lease with Rainbowinstar, Inc. ("Rainbowinstar") for a ten-year term commencing March 1, 2017, and ending February 28, 2027. Rainbowinstar then subleased the subject premises to Zhenyu Cui ("Cui") who was allowed to further sublease the units. Cui entered into a sublease agreement with Liu commencing March 17, 2017. In May of 2019, the subject property was sold to defendant 136-51 LLC subject to all leases. Liu references a letter dated November 4, 2020, whereby the prime tenant Rainbowinstar had voluntarily surrendered the subject premises, and any lease had been terminated.

After a hearing was conducted, the Honorable David Hawkins, by decision and order dated April 29, 2021, found that Liu was unlawfully evicted of the subject premises, that 136-51 LLC changed the locks denying Liu of the legal right to possess the subject premises and ordered 136-51 LLC to restore Liu to possession forthwith (*see Liu v 136-51 37 Avenue LLC*, Civil Ct, Queens County, April 29, 2021, Hawkins, J., Index No. 300388/2021). 136-51 LLC then filed a motion to reargue that decision, and Judge Hawkins denied that motion by decision and order dated December 3, 2021 (*see Liu v. 136-51 37 Avenue LLC*, Civil Ct, Queens County, December 3, 2021, Hawkins, J., Index No. 300388/2021). On December 23, 2022, Liu filed this action. 136-51 LLC and defendant Fei Lin ("Lin"), the principal officer of 136-51 LLC (collectively "defendants"), then filed the instant motion seeking an order dismissing the complaint pursuant to CPLR § 3211 (a)(1), (5) and (7). Liu then filed her cross-motion seeking to amend the complaint pursuant to CPLR § 3025(b). Defendants allege this action is barred by the one-year statute of limitations governing wrongful evictions, pursuant to CPLR § 215(7). Liu does not deny that the one-year statute of limitations applies. However, the court will consider plaintiff's cross-motion to amend the complaint insofar as the amended complaint includes causes of action for tortious interference and breach of contract, each of which are governed by a longer statute of limitations.

Pursuant to CPLR § 3025 (b), it provides that leave to amend pleadings "shall be freely given upon such terms as may be just" (CPLR § 3025(b); *Rhoda v. Avery*, 155 AD3d 737 [2d Dept 2017]; *In re Eshaghian*, 144 AD3d 1155 [2d Dept 2014]; *see also Notaro v. Performance*

Team, 161 AD3d 1093 [2d Dept 2018]; *Flagstar Bank, FSB v. Davis*, 178 AD3d 670 [2d Dept 2019]). Further, “[n]o evidentiary showing of merit is required under CPLR § 3025(b)” (*Chaudhari v. Chaudari*, 220 AD3d 835, 838 [2d Dept 2023]; quoting *First National Bank of Long Island v. Four Keys Realty, LLC*, 213 AD3d 639, 641 [2d Dept 2023]; citing *Lucido v. Mancuso*, 49 AD3d 220 [2d Dept 2008]). “In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Betz v. Blatt*, 160 AD3d 689, 693 [2d Dept 2018]; see *Garafolo v. Wing Inc. Specialty Trades*, 139 AD3d 793 [2d Dept 2016]; see also *LaSalle Bank, N.A. v. Abedin*, 2025 NY Slip Op 013161 [2d Dept 2025]).

Here, Liu proposes to amend the first cause of action by deleting the portion of it referencing RPAPL § 768 (1) and seeks a finding of wrongful eviction. “Wrongful evictions are governed by a one-year Statute of Limitations applicable to intentional torts” (*Gold v. Schuster*, 264 AD2d 547, 549 [1st Dept 1999]; *Kolomensky v. Wiener*, 135 AD2d 505 [2d Dept 1987]). CPLR § 205(a) allows a plaintiff, in a timely commenced action that is terminated, to “commence a new action upon the same transactions or occurrences or series of transactions or occurrences within six-months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action and that service upon defendant is effected within such six-month period” (CPLR § 205 [a]). Here, the Civil Court decided the unlawful eviction matter on April 29, 2021: Thus, the one-year statute of limitations ran from April 29, 2021 to April 28, 2022. Even assuming arguendo that Liu was entitled to the six-month additional period provided by CPLR § 205 (a), Liu would have had until October 28, 2022, to file this claim for wrongful eviction; yet the plaintiff filed it on December 23, 2022. As such, the court finds the proposed amended first cause of action for wrongful eviction is time-barred and without merit (see *Stewart v. GDC Tower at Greystone*, 138 AD3d 729 [2d Dept 2016]; *Gkanios v D’Ambrosio*, 271 AD2d 488 [2d Dept 2000]; *Urrea v Friedman*, 231 AD2d 710 [2d Dept 1996]). To the extent the first cause of action in the original complaint remains, it is dismissed as time-barred.

Furthermore, Liu proposes to amend the second cause of action seeking civil penalties against 136-51 LLC; and she seeks to amend the second cause of action to tortious interference against both defendants. “Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual

breach of contract, and damages resulting therefrom” (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]; *Tsatskin v. Kordonsky*, 189 AD3d 1296, 1298 [2d Dept 2020]; *Moulton Paving, LLC v. Town of Poughkeepsie*, 98 AD3d 1009, 1013 [2d Dept 2012]; *Delanerolle v. St. Catherine of Sienna Medical Center*, 213 AD3d 1013 [2d Dept 2024]). “Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant” (*Carvel Corp. v. Noonan*, 3 NY3d 182, 190 [2004]; *106 N. Broadway, LLC v Lawrence*, 189 AD3d 733,740 [2d Dept 2020]). In her proposed amended complaint, Liu fails to allege any existing contract or prospective contract with a third-party or culpable conduct by defendants that constituted wrongful means. As such, the proposed second cause of action is devoid of merit and palpably insufficient (see *New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351 [2d Dept 2017]; *Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC*, 82 AD3d at 1036; *Delanerolle v. St. Catherine of Sienna Medical Center*, 213 AD3d at 1013). Therefore, defendant’s motion to add a cause of action for tortious interference is denied.

Additionally, the third cause of action in the original complaint sought civil and criminal penalties as against Lin only pursuant to RPAPL § 768. Liu has abandoned that claim and now seeks leave to amend the third cause of action to plead a violation of Real Property Law § 228 as against both defendants in that they allegedly failed to provide Liu with a 30-day notice before removing Liu from the subject premises. However, section 228 of the Real Property Law provides a defense to a summary holdover proceeding if not received prior to commencement of such summary proceeding, and does not create a private cause of action. As such, the proposed amendment to the third cause of action is devoid of merit and fails to state a cause of action (*Bd. Of Mgrs. of 150 E. 72nd St. Condominium v. Vituvius Estates, LLC*, 2018 WL 3005053, 2018 NY Misc. LEXIS 2364 [Sup Ct, New York Co. 2018]; *aff’d on other grounds*, 173 AD3d 589 [1st Dept 2019]; *Paul v. 370 Lex., LLC*, 7 Misc.3d 747 [Sup. Ct, New York Co. 2005]).

Moreover, as for the fourth cause of action, which Liu does not seek to amend, Liu seeks treble damages pursuant to RPAPL § 853. However, under RPAPL § 853 “[w]rongful evictions are governed by the one-year statute of limitations applicable to intentional torts (*Gold v. Schuster*, 264 AD2d at 549; *Kolomensky v. Wiener*, 135 AD2d at 507). As discussed above, the Civil Court decided the illegal lockout matter on April 29, 2021. Thus, the one-year statute of limitations ran one year from April 29, 2021, to April 28, 2022. As Liu commenced this action more than a year later, the fourth cause of action is dismissed as time-barred (see *PK Rest., LLC*

v. *Lifshutz*, 138 AD3d 434 [1st Dept 2016]).

Finally, Liu seeks to add a fifth cause of action asserting breach of contract. Here, Liu's proposed amended complaint fails to allege any contract defendants may have had with her, implied, oral or written. Therefore, Liu has failed to establish the existence of a contract with defendants, an essential element for the breach of contract cause of action (*see SI Hylan Care, LLC v. 2454-2464 Hylan Blvd., LLC*, 138 AD3d 821 [2d Dept 2016]; *Johns v AMC Beauty Salon*, 29 Misc 3d at 346). As such, the proposed amendment seeking to add a breach of contract claim is palpably insufficient and patently devoid of merit (*Merlino v. Knudson*, 214 Ad3d 642 [2d Dept 2023]; *Zelevnik v MSI Const., Inc.*, 50 AD3d 1024 [2d Dept 2008]).

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss is granted, in its entirety; and it is further,

ORDERED that the complaint is dismissed, in its entirety, with prejudice; and it is further,

ORDERED that plaintiff's cross motion to amend the complaint, pursuant to CPLR § 3025, is denied, in its entirety; and it is further,

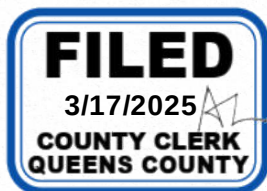
ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

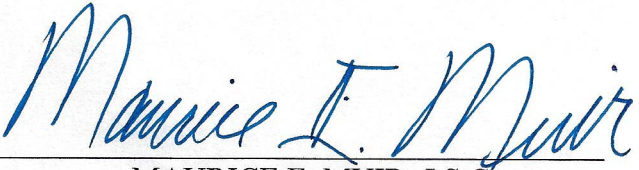
ORDERED, that defendants shall serve a copy of this decision and order with notice of entry upon the plaintiff on or before March 31, 2025.

The foregoing constitutes the decision and order of the court.

Dated: March 14, 2025

Long Island City, New York




MAURICE E. MUIR, J.S.C.