Collado v Dalan Real Estate
2026 NY Slip Op 30598(U)
January 30, 2026
Supreme Court, Kings County
Docket Number: Index No. 514379/2024
Judge: Richard J. Montelione
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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 30th day of January 2026.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

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BEN-HEMIR COLLADO, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

DALAN REAL ESTATE and DALAN MANAGEMENT & ASSOCIATES, INC.,

Defendants.

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DECISION and ORDER

Index No.: 514379/2024
Mot. Seq. No.: 1

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Notice of Motion/Affidavits/Affirmations/Exhibits...	6-17
Answering Affirmation//Exhibit..	18-25
Reply Affirmation...	26
Other..	

MONTELIONE, RICHARD J., J.

Ben-Hemir Collado (Plaintiff) individually and on behalf of others similarly situated, commenced this action by filing a summons and class action complaint on May 22, 2024, against Dalan Real Estate and Dalan Management & Associates, Inc. (Defendants) alleging, inter alia, that defendants engaged in deceptive business practices requiring renters to pay fees when the renter informs the defendants that they will be vacating their apartment prior to the lease expiration in violation of RPL § 227-e. Plaintiff's complaint alleges the following cause of action against the defendants: (1) Unjust Enrichment; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Declaratory Judgment; (4) Deceptive Acts or Practices, New York Gen.

Bus. Law pursuant to § 349; Deceptive Acts or Practices pursuant to New York Gen. Bus. Law § 350; and a demand for class certification pursuant to CPLR 901, naming Plaintiff as the representative of the Class and Subclass, and naming Plaintiff's attorneys as Class Counsel to represent the Class and Subclass members.

Defendants filed the instant pre-answer motion to dismiss seeking an order dismissing the Class Action Complaint against Defendants in its entirety pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7).

Legal Standard

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), "the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*See Old Republic Nat'l Title Ins. Co. v 1152 53 Management, LLC* 227 AD3d 824, 826 [2d Dept 2024] [internal quotations omitted]). A paper only constitutes documentary evidence, if it is ". . . unambiguous and of undisputed authenticity, that is, it must be essentially unassailable". *Id* at 827. "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case." (*See Anderson v Armentano,* 139 AD3d 769, 771 [2d Dept 2016] [internal quotations omitted]). "[L]etters, emails, and affidavits are not documentary evidence" (*Xu v. Van Zwienen,* 212 AD3d 872, 874 [2d Dept 2023]).

To prevail on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*MJK Bldg. Corp. v Fayland Realty, Inc.,* 181 AD3d 860, 861 [2d Dept 2020][internal quotation marks omitted]). Where, as here, evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal shall not eventuate (*Gruber v Donaldsons, Inc.,* 201 AD3d 887, 888 [2d Dept 2022] [internal quotation marks omitted]; *see also Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]).

Legal Analysis

Defendant moves to dismiss the complaint based on CPLR 3211(a)(1), documentary evidence and CPLR 3211(a)(7), on the basis that the pleadings fails to state a cause of action. Plaintiff alleges that defendants violated their duty to mitigate damages under RPL §227-e by requiring the plaintiff to pay a "leasebreak" fee equivalent to two months' rent (i.e., $5,264.54) in exchange for plaintiff's early termination of his residential lease.

It is undisputed that plaintiff and defendants entered into a residential lease agreement commencing on October 6, 2023, and under its terms terminating on October 5, 2024. (Ex. B,

NYSCEF Doc. No. 9). Pursuant to the lease the monthly rent was $2,632.27. The lease also contained certain provisions related to events of default, tenants' liabilities in the event of such defaults, and landlord's remedies as a result of tenants' default(s) and/or breach of the Lease's terms. Notably, paragraph 32 subsection B. of the lease agreement states that, "…if Tenant vacates the Unit in violation of the terms of this Lease, only then shall Landlord use reasonable efforts to re-rent the Unit at the lesser of the fair market value of the Unit or the Monthly rent paid under this Lease pursuant to Real Property Law §227-e." *Id.*

Defendants argue, that they entered into an early termination agreement with the plaintiff to settle the potential liability when, on December 29, 2023, the plaintiff notified them that of the early termination. Defendants further contend that this agreement does not violate RPL 227-e, nor does it circumvent their duty to mitigate damages because that duty arises *only* after a tenant has abandoned the premises. In this instance, the plaintiff paid the fee simultaneously with his vacating the premises. See NYSCEF #10, email from plaintiff to defendants, "Subject: Re: [External]75 Ralph Ave, Apt #5C - Officially Breaking the Lease - 12/31/23 Effective Date Good afternoon & Happy New Year Ron, In addition to paying the two monthly penalty fee, as of this afternoon, Olivia and I have completely moved out of #5C. We left our keys in the top right drawer, next to the oven."

RPL § 227-e provides, in pertinent part, that:

> "In any lease or rental agreement […], if a tenant vacates a premises in violation of the terms of the lease, the landlord shall, in good faith and according to the landlord's resources and abilities, take reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower. If the landlord rents the premises at fair market value or at the rate agreed to during the term of the tenancy, the new tenant's lease shall, once in effect, terminate the previous tenant's lease and mitigate damages otherwise recoverable against the previous tenant because of such tenants vacating the premises. The burden of proof shall be on the party seeking to recover damages. Any provision in a lease that exempts a landlord's duty to mitigate damages under this section shall be void as contrary to public policy." [emphasis added].

Plaintiff's first cause of action, alleging unjust enrichment, must be dismissed because under CPLR 3211(a)(1) both parties concede the lease between the parties exists and this lease constitutes documentary evidence. Under CPLR 3211(a)(7), plaintiff has failed to state a cause of action because there is in fact a lease and where there is an enforceable contract there is no unjust enrichment. "Recovery for unjust enrichment is barred by a valid and enforceable contract" (*see Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 593 [2d Dept 2007] citing, *Samiento v World Yacht Inc.*, 38 AD3d 328, 329 [2007]; *Singer Asset Fin. Co., LLC v Melvin,* 33 AD3d 355 [2006]; *Stark v City of New York,* 31 AD3d 530, 531 [2006]).[1]

The court accepts the defendant's position that the requirements of RPL §227-e do not apply until the tenant vacates the premises. Assuming the facts alleged in the complaint,

[1] The *Samiento* case relied upon by the Second Department was reversed on other grounds.

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plaintiff's second cause of action, breach of the Covenant of Good Faith and Fair Dealing, depends on whether or not the defendant landlord has shown, as a matter of law, that the settlement termination fee of two-months' rent was not obtained by misleading provisions found in the lease and the settlement agreement regarding the landlord's obligations under RPL § 227-e. Plaintiff concedes that he voluntarily paid the "leasebreak fee" equivalent to two-month's rent in exchange for the early termination and vacated the unit on December 31, 2023, and gave notice of vacancy on January 1, 2024, with approximately ten months remaining on the lease. According to the plaintiff, defendants re-rented the unit vacated by the plaintiff two weeks thereafter, but there is no question of fact that a separate agreement was reached regarding the two-month rental fee in lieu of the landlord seeking damages against the tenant.

A binding contract, as a general matter, will form when there is an "...offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound." *See Kay v Heavenly Events & Catering Corp.*, 241 AD3d 1305, 1307 [2d Dept 2025]. Although plaintiff argues that the landlord received a windfall as a result of re-renting the plaintiff's apartment within two weeks at a greater rental, the plaintiff likewise ostensibly received the benefit of substantially limiting his damages in the event the apartment could not be rented for ten months or rented for a lower amount. If this was purely an issue of contract law, the court would be compelled to dismiss the complaint. However, the court must consider this agreement in the context of RPL § 227-e, the remedial purpose of the statute, and after an examination of the lease.

The court starts with a review of the lease itself (NYSCEF #9):

The following is found in ¶32 of the lease:

> C. Whether the Unit is re-rented or not, Tenant must pay to Landlord as damages: 1. the difference between the Monthly Rent in this Lease and the amount, if any, of the rents collected in any later lease or leases of the Unit for what would have been the remaining period of this Lease except to the extent limited by Real Property Law §227-e if applicable;

The court finds this provision is somewhat misleading. "Whether the unit is re-rented or not, Tenant *must pay to the Landlord as damages*...difference between the Monthly Rent in the Lease (and the new lease)...except to the extent limited by Real Property Law §227-e if applicable." First, there is no question of fact or law that Real Property Law §227-e applies and the use of "if applicable" objectively leaves the tenant with an ambiguity regarding the law's application. Second, because Real Property Law §227-e applies, the tenant *is not automatically responsible* "whether the unit is re-rented or not" but is responsible *only if the landlord has made reasonable efforts to mitigate damages with the burden on the landlord to prove damages*. Real Property Law §227-e.

The following paragraph ¶32 continues:

> 2. …Landlord's failure to re-rent to another tenant will not release or change your liability for damages, unless the failure is due to Landlord's deliberate inaction.

This is misleading because "deliberate inaction" is not the legal standard imposed upon the landlord. The actions of a landlord who merely perfunctorily mitigates damages is not entitled to any damages. Under Real Property Law §227-e, "(i)n any lease or rental agreement […], if a tenant vacates a premises in violation of the terms of the lease, the landlord *shall, in good faith* and according to the landlord's resources and abilities, take reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower." In fact, the burden is on the landlord to show that it has acted in good faith to mitigate its damages and *only* then will the tenant be liable for damages.

It is unclear whether the Early Termination Policy (NYSCEF #11) was provided to the tenant along with the residential lease which may bear on the ultimate issues on the merits. Turning to the "Early Lease Termination Settlement Agreement," (NYSCEF #12), first paragraph, "Tenant(s) understand that under applicable law they are liable for the full rent until a new tenant has taken legal possession under a new lease ("Lease Obligations")." This is an incomplete statement of the law and misleading. Tenant is *not liable* for the "full rent until a new tenant has taken legal possession under a new lease unless the landlord has made "reasonable and customary actions to rent the premise" in good faith. Real Property Law §227-e. The burden is on the landlord. Real Property Law §227-e.

The settlement agreement also provides:

> As a result, the actual amount owed as a result of the Lease Obligations cannot be determined as of the date of this agreement. Subject to Tenants' full compliance with this agreement, to eliminate the uncertainty of the Lease Obligations, and in order to create finality of the amounts owed under the Lease the Owner has agreed to accept, and the Tenant(s) have agreed to pay, in full satisfaction and as a settlement of such Lease Obligations, the sum of ($5,264.54) ("Satisfaction Amount"). The Satisfaction Amount is due upon the execution of this Agreement.

This provision constitutes a liquidated damages agreement. Liquidated damage clauses that constitute a penalty are not enforceable. "A liquidated damages clause is enforceable if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*see Schmuelian v Bichoupan*, 225 AD3d 910, 912-13 [2d Dept 2024], citing *Colacino v Colacino,* 152 AD3d 486, 487 [2d Dept 2017] [internal quotations omitted]). Here, precise damages can be calculated upon a new tenancy but not at the time of the agreement. The court does not determine at this juncture whether the liquidated damages clause is a penalty and an unenforceable provision, whether there is a "reasonable proportion to the probable loss;" only that the defendant has not met his burden, as a matter of law, of showing it is not. There is no evidence that the vacancy rate in New York City would present a problem in re-renting the unit or the need to reduce the rent, the cost associated with

past early terminations and any losses suffered, the methodology employed to determine that the two months rent is reasonably related to the potential loss, whether early terminations constitute a windfall to the landlord, or whether the landlord already had a tenant lined up for occupancy when the tenant notified the landlord of his vacatur from the premises.

The plaintiff has stated a cause of action for declaratory relief (third cause of action) as rights can be adjudicated at the conclusion of this litigation. CPLR 3001.

The defendants' motion to dismiss the Fourth Cause of Action under General Business Law § 349 based on deceptive Acts or Practices must be granted because the allegations within the complaint do not relate to a consumer transaction and there is an individual lease between the parties. *See Hello Beautiful Salons, Inc. v Dimoplon*, 2026 NY Slip Op 00242, 2026 WL 157425, at *3 [2d Dept Jan. 21, 2026]

> To successfully plead a cause of action alleging a violation of General Business Law § 349, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*North State Autobahn, Inc. v. Progressive Ins. Group Co.,* 102 AD3d 5, 11 [internal quotation marks omitted]; *see City of New York v. Smokes–Spirits.Com, Inc.,* 12 NY3d 616, 621). "[P]arties claiming the benefit of [General Business Law § 349(h)] must, at the threshold, charge conduct that is consumer oriented" (*North State Autobahn, Inc. v. Progressive Ins. Group Co.,* 102 AD3d at 11–12 [internal quotation marks omitted]; *see New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 320). "Private contract disputes, unique to the parties ... [do] not fall within the ambit of the statute" (*North State Autobahn, Inc. v. Progressive Ins. Group Co.,* 102 AD3d at 12 [internal quotation marks omitted]; *see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 N.Y.2d 20, 25). "[T]he defendant's acts or practices must have a broad impact on consumers at large" (*North State Autobahn, Inc. v. Progressive Ins. Group Co.,* 102 AD3d at 12 [alteration and internal quotation marks omitted]; *see New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d at 320).

The defendants have met their burden of showing there is no cause of action based on deceptive acts or practices under General Business Law § 350 inasmuch as there is no specific allegation regarding false advertisement or reliance on any false advertisement. "While there is no requirement that the plaintiff allege reliance on defendants' deceptive practices in a GBL § 349 claim (*see Stutman*, 95 NY2d at 29; *Small v Lorillard Tobacco Co.*, 252 AD2d 1, 7 [1998], *affd* 94 NY2d 43 [1999]), to state a claim under GBL § 350, plaintiff must allege reliance on the false advertisement (*see Andre Strishak & Assoc., P.C.*, 300 AD2d at 610)." (*Lazaroff*, 2011 NY Slip Op 52541[U], *7)," *see Raphael v Schwan's Consumer Brands, Inc.*, 87 Misc 3d 1260 [Sup Ct 2025].

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The last issue is whether the class action waiver within the residential lease is enforceable. As argued by defendants' counsel, §39 of the lease provides:

> To the extent that allowed by law, the parties irrevocably waive any right to assert any claims against the other party or the parties' representatives as a member or representative in any class or representative action. The parties' waiver survives the expiration or termination of this Lease.

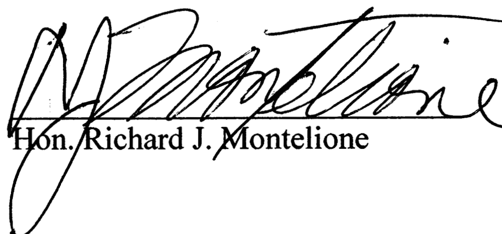
Neither party provided the court with any cases that have considered this issue, and this court could not find any. "(We must) (i)nterpret(e) the requirements of the class action statute liberally… (*see City of New York v Maul,* 14 NY3d 499 [2010])," *see Gudz v Jemrock Realty Co., LLC*, 105 AD3d 625, 626, 964 NYS2d 118, 119-20, 2013 NY Slip Op 02814, 2013 WL 1760601 [1st Dept 2013], *affd sub nom. Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 23 NE3d 997, 998 NYS2d 729, 2014 NY Slip Op 08211, 2014 WL 6607407 [2014]). Given the highly regulated rent controlled and rent stabilized apartments in the City of New York because of the well-known low vacancy rate, the lack of any authority enforcing a waiver of class action provision within the lease, and the remedial nature of Real Property Law §227-e, the court finds that the defendants did not meet their burden of showing that the provision of the lease is enforceable, as a matter of law, or that the plaintiffs otherwise cannot meet their burden of showing "numerosity, commonality" etc. "CPLR 901 sets forth five prerequisites to class certification. 'These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority' (*see Burgos v B&H Healthcare Services, Inc.*, 239 AD3d 585, 587 [2d Dept 2025], quoting *City of New York v Maul,* 14 NY3d 499, 508; *Moreno v Future Health Care Servs., Inc.,* 186 AD3d at 595–596).

Based on the foregoing, it is

ORDERED that, the portion of defendants DALAN REAL ESTATE and DALAN MANAGEMENT & ASSOCIATES, INC.'s pre-answer motion to dismiss is GRANTED to the extent that plaintiff's first cause of action for unjust enrichment (first COA), deceptive Acts under General Business Law §349 and §350 (fourth and fifth COA) are DISMISSED; and it is further

ORDERED that any further request for relief herein is DENIED.

This constitutes the decision and order of the Court.



Hon. Richard J. Montelione

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