

<b>Davison v Eisenhower</b>
2019 NY Slip Op 30264(U)
February 4, 2019
Supreme Court, New York County
Docket Number: 161179/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X  
SUSAN DAVISON D/B/A ABBOTT MORTGAGE COMPANY A/K/A  
ABBOTT MORTGAGE, INDEX NO. 161179/2017  
MOTION DATE N/A, N/A  
Plaintiff, MOTION SEQ. NO. 001 002

- v -

LETTY LOU EISENHAUER, HILARY THOMPSON, RAY  
THOMPSON

DECISION AND ORDER

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36  
were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46  
were read on this motion to/for MISCELLANEOUS

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this ejection action, Defendants Hilary Thompson and Ray Thompson (the “Thompsons”) move in motion sequence 001 to dismiss the complaint of Plaintiff Susan Davison, d/b/a Abbott Mortgage Company, a/k/a Abbot Mortgage (collectively, “Abbott”), on the grounds that Abbott, as the assignee of two mortgages on the building located at 42 North Moore Street, New York, New York 10013 (the “Building”), lacks standing to commence the instant action seeking ejection of the Thompsons from the Fourth Floor Loft (the “Premises”) in the Building. Abbott opposes the motion and moves in motion sequence 002 for an order adding Moore Street Building Corp. (“Moore”), the Building’s owner, as a party plaintiff. For the following reasons, the Thompsons’ motion to dismiss is denied and Abbott’s motion to add Moore as a party plaintiff is granted.

## BACKGROUND

The Building is presently owned by Moore. Abbott and Moore are joint venturers in the Building. The Joint Venture Agreement, dated August 2, 2001, conveyed to Abbott the Units for the Third, Fourth, Fifth, and Sixth floors of the Building, subject to certain exceptions (*see* Joint Venture Agreement, NYSCEF Doc. No. 30, p.2, ¶ A).

Letty Lou Eisenhauer (“Eisenhauer”) is the leasee of the Premises. The Thompsons are purported illegal subleasees and the present occupants of the Premises. The Thompsons argue that Abbott cannot enter into and retake possession of the Premises without Moore’s consent. However, in so arguing, the Thompsons concede that Moore as the purported owner of the Building has authority to commence an ejectment action to regain possession of the Premises (*see* Cassady Reply Aff, NYSCEF Doc. No. 33, ¶ 37, [“Plaintiff is aware that she needs the Owner’s involvement to commence and maintain an eviction proceeding and/or ejectment action against Defendants.”]).

On October 20, 2017, Abbott served a notice of termination on Eisenhauer, which stated that Eisenhauer’s tenancy in the Premises was terminated effective November 30, 2017, on the grounds that Eisenhauer breached the applicable Loft Law by failing to maintain the Premises as her primary residence. Thereafter, on December 18, 2017, Abbott commenced this action to recover possession of the Premises.

On May 18, 2018, the Thompsons filed a pre-answer motion to dismiss Abbott’s complaint (motion sequence number 001) on the grounds that Abbott, as the assignee of two mortgages on the Building, lacked standing to evict the Thompsons from the Premises. The Thompsons argued that only Moore, as the owner of the building, had standing to commence and maintain an eviction and/or ejection action against the Thompsons.

While the Thompsons' motion to dismiss was pending, on August 28, 2018, Abbott filed a motion (motion sequence number 002), pursuant to CPLR 1001 and 1003, to add Moore as a party plaintiff and annexed thereto a letter from Moore wherein Moore consented to be added as a party plaintiff in this action.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2010] [citation omitted]). In considering such a motion, the court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 1181, quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). A "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts" (*2001 Real Estate Space Catalyst, Inc. v Stone Land Capital, Inc.*, 2019 WL 233143, \*1 [Sup Ct, New York County 2019], quoting *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

When a party moves for pre-answer dismissal of a complaint under CPLR 3211 (a) or (b), CPLR 3211 (f) operates to extend the moving party's time to serve a responsive pleading "until ten days after service of notice of entry of the order." "Further, service of a pre-answer motion to dismiss not only extends the defendant's time to answer but also the plaintiff's time to amend its complaint as of right" (*2001 Real Estate Space Catalyst, Inc.*, 2019 WL

233143 [Sup Ct, New York County 2019], citing *Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2d Dept 2013]; *STS Mgt. Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 [2d Dept 1998]; *Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374, 375 [1st Dept 1991]).

Importantly, CPLR 1003 provides, in relevant part, that “[p]arties may be added . . . once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.”

Here, the Thompsons’ time to respond to the complaint has not expired. Accordingly, Abbott was permitted as of right seek to add Moore as a party plaintiff in this action under CPLR 1003. The Court granting leave, which decision is committed to the court’s discretion, is also consistent with the principle that leave should be freely given absent a showing of prejudice.

As for the Thompsons’ argument that leave to add Moore as a party plaintiff should be denied because the Notice of Termination improperly identified Abbott as the landlord of the premises, the argument lacks merit as service of a 30-day notice to terminate is not required prior to an owner’s commencement of an ejection action against the occupiers of the premises as there is no allegation of a subsisting landlord-tenant relationship between the Thompsons and Abbott or Moore (*Hsiu v Trujillo*, 192 Misc 2d 147, 151 [Sup Ct Bronx Cnty 2002]).

Accordingly, it is hereby

ORDERED that Defendants’ motion to dismiss is denied; and it is further

ORDERED that Plaintiffs’ motion for leave to add Moore as a party plaintiff is granted; and it is further

ORDERED that an amended summons and a second amended complaint containing the new caption shall be served by movant, in accordance with the Civil Practice Law and Rules, upon all parties in this action, and upon any parties being added thereto, within 60 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action, amended summons, and second amended complaint shall bear the following caption:

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SUSAN DAVISON, d/b/a ABBOTT MORTGAGE COMPANY, a/k/a ABBOTT MORTGAGE, and MOORE STREET BUILDING CORP.,

Plaintiffs,

-against-

LETTY LOU EISENHAUER, HILARY THOMPSON and RAY THOMPSON,

Defendants.

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ORDERED that Defendants shall have thirty days from the date of service of the amended summons and second amended complaint to answer or otherwise respond to the second amended complaint; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh).

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

2/14/19  
DATE

WFP  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
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
				OTHER
				REFERENCE