

Kaysen v Ultimate Group Mgt. Inc.

2023 NY Slip Op 33225(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 158744/2022

Judge: Gerald Lebovits

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

PRESENT: HON. GERALD LEBOVITS **PART** **07**

Justice

-----X

INDEX NO. 158744/2022

CHARLOTTE KAYSEN,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

ULTIMATE GROUP MANAGEMENT INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to

DISMISS

Weingrad & Weingrad, PC, New York, NY (Stephen A. Weingrad of counsel), for plaintiff.
Lavian LLP, New York, NY (Daniel Lavian of counsel), for defendant.

Gerald Lebovits, J.:

This is an action for return of a \$3,200 residential-lease security deposit, brought by plaintiff, Charlotte Kaysen, against her former landlord's management company, defendant Ultimate Group Management Inc. Ultimate Group moves to dismiss the complaint under CPLR 3211 (a) (1) and (a) (7). The motion is granted.

BACKGROUND

On or about October 10, 2020, plaintiff Charlotte Kaysen entered into a lease with 144 Sullivan Street Equities Inc. for an apartment in a building located at 144 Sullivan Street in Manhattan.

The lease describes "144 Sullivan Street Equities c/o Ultimate Group Management" as the owner and landlord of the building. 144 Sullivan Street Equities is also listed as the owner of the building on several other documents annexed to movant's papers. For example, nonparty Kevin Austin Weeks (Kaysen's father) executed a guaranty of Kaysen's obligations under the Lease. The guaranty describes 144 Sullivan Street Equities as the landlord. Ultimate Group also submits a 1987 deed for the property that describes 144 Sullivan Street Equities as the owner of the building. Although Kaysen was directed to send rent and security deposit checks to Ultimate Group, those checks were made payable to 144 Sullivan Street.

In October 2022, Kaysen brought this action against Ultimate Group. Kaysen alleges that Ultimate Group was her landlord under the lease. She further alleges that Ultimate Group failed

to return her deposit, as required by General Obligations Law (GOL) § 7-108; that Ultimate Group improperly commingled her deposit with other funds, rather than maintain the deposit in a separate interest-bearing account as required by GOL § 7-103; and that this conduct resulted in unjust enrichment. Kaysen also claims that when she raised these issues with Ultimate Group, it retaliated by harassing her and her father, in violation of common-law negligence principles and Real Property Law (RPL) § 223-b. And she asserts that Ultimate Group's conduct violated the civil provisions of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1962 (c).

The complaint seeks money damages consisting of (i) the \$3,200 deposit; (ii) statutory punitive damages under GOL § 7-108 of up to \$6,400; and (iii) common-law punitive damages of \$25,000.¹

In November 2022, Ultimate Group moved under CPLR 3211 to dismiss all claims against it. (NYSCEF No. 2.) While the motion was pending, plaintiff appears to have amended its complaint as of right under CPLR 3025 (a) to add 144 Sullivan Street Equities as a defendant.² (NYSCEF No. 12.) The amended complaint did not alter any allegation or cause of action against Ultimate Group.

DISCUSSION

Before considering the merits of Ultimate Group's motion, the court must consider Kaysen's argument that the motion has necessarily been rendered moot by the filing of an amended complaint. (See NYSCEF No. 19.) It has not. (See *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998] [rejecting the principle that "the filing of an amended pleading automatically abates a motion to dismiss . . . addressed to the original pleading".]) It is undisputed that the amended complaint is the operative pleading in this action, at least as to Ultimate Group. The court therefore considers the current motion to be "seeking dismissal of the amended complaint" as against movant. (*Mid-Hudson Valley Fed. Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218, 1219 n 1 [3d Dept 2017].) That course is particularly appropriate here, where the amendment served to implead a second defendant, not add or amend the allegations against the moving defendant.³

¹ This action therefore comes within the monetary jurisdiction of the New York City Civil Court. Indeed, Kaysen's claims for the return of her security deposit and for statutory damages based on the failure to return the deposit come within the monetary jurisdiction of the Small Claims Part of Civil Court. Although it is unclear to this court why this action was not brought as a small claim to begin with, the court concludes that it is most economical and efficient for the court to decide the pending motion itself, rather than transfer the action to Civil Court under CPLR 325 (d).

² The amended complaint was e-filed on NYSCEF as an "Exhibit" filed in connection with motion sequence 001. (See NYSCEF No. 12.) For this reason, the General Clerk's Office appears not to have treated this document as an amended complaint requiring alteration of the action's caption.

³ Because the amended complaint did not alter Kaysen's allegations or causes of action against Ultimate Group, this court is not persuaded that Ultimate Group was required on pain of default

This court notes that the amended complaint adds claims against 144 Sullivan Street Equities. (*See* NYSCEF No. 12.) But the amended complaint and supplemental summons appear to have been served only on the principal of *Ultimate Group*. (*See* NYSCEF No. 20.) Absent a showing that Ultimate Group’s principal is also a principal of 144 Sullivan Street Equities, or otherwise authorized to accept service on that party’s behalf, no basis in the record exists to treat the amended complaint as operative as against 144 Sullivan Street Equities. Kaysen is therefore directed, within 30 days of entry of this order, to submit a letter to the court showing either that the December 19, 2022, service on 144 Sullivan Street Equities was proper, or that Kaysen should be permitted to serve that party now under CPLR 306-b. The letter may attach any appropriate supporting documentation, and should be both e-filed on NYSCEF and emailed to SFC-Part7-Clerk@nycourts.gov.

I. The Branch of Ultimate Group’s Motion Seeking Dismissal of Kaysen’s Claims under CPLR 3211 (a) (1)

Ultimate Group contends that all of Kaysen’s claims against it should be dismissed under CPLR 3211 (a) (1) because documentary evidence establishes that Ultimate Group was not the landlord, but merely the managing agent for landlord 144 Sullivan Street Equities. This court agrees that Ultimate Group’s proffered documentary evidence demonstrates that it was only the managing agent. As a result, some, but not all, of Kaysen’s claims are subject to dismissal under CPLR 3211 (a) (1).

A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The court agrees with Ultimate Group that the documents it has provided on this motion—the lease executed by Kaysen, the guaranty executed by her father, her rent/deposit checks, and the deed to the building—consistently show that Kaysen’s landlord is 144 Sullivan Street Equities, not Ultimate Group. (*See* NYSCEF Nos. 6-9.) At most, the lease describes “144 Sullivan Street Equities Inc. c/o Ultimate Group Management Inc.” as the owner of the premises (NYSCEF No. 7 at 1)—a description indicating that Ultimate Group is acting on behalf of owner 144 Sullivan Street Equities, not that Ultimate Group is itself the owner.

GOL § 7-108 (d) and (e) impose obligations on the landlord with respect to the tenant’s security deposit. This statute does not impose any obligations on a managing agent of the landlord. Similarly, RPL § 223-b’s bar on retaliation expressly applies to the landlord, and only the landlord.

Ultimate Group cannot be held liable for 144 Sullivan Street Equities’s actions, either. The lease discloses that Ultimate Group is acting for 144 Sullivan Street Equities. And as an

to file a new motion to dismiss or to file an answer, as Kaysen would have it. (*See* NYSCEF No. 21.)

agent of a disclosed principal, Ultimate Group “will not be personally bound” absent “clear and explicit evidence” of its “intention to substitute or superadd [its] personal liability for, or to, that of [its] principal.” (*Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1st Dept 1998] [internal quotation marks omitted]). Kaysen does not allege that Ultimate Group intended to make itself liable instead of, or in addition to, 144 Sullivan Street Equities.

II. The Branch of Ultimate Group’s Motion Seeking Dismissal of Kaysen’s Claims under CPLR 3211 (a) (7)

That Ultimate Group cannot be held liable to Kaysen as her landlord does not itself defeat all of her causes of action. In particular, her common-law claims for harassment, negligence, and unjust enrichment, and her civil RICO claim, are not subject to dismissal under CPLR 3211 (a) (1). This court concludes that these claims must instead be dismissed under CPLR 3211 (a) (7) for failure to state a cause of action.

The unjust-enrichment claim against Ultimate Group fails because the subject matter of the claim, the return of the security deposit, is covered by the signed ease with 144 Sullivan Street Equities, Inc. (*See Randall’s Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012] [“There can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim.”].) Kaysen’s allegations in support of her negligence claim do not identify a tort duty that Ultimate Group owed to her, the breach of which injured her. And New York does not recognize a common-law cause of action for harassment. (*See Edelstein v Farber*, 27 AD3d 202, 202 [1st Dept 2006].).

Kaysen’s RICO claim is subject to dismissal on at least two independent grounds. *First*, 18 USC § 1962 (c) makes it unlawful “for any person employed by or associated with any enterprise . . . the activities of which affect interstate or foreign commerce” to “conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity.” Thus, liability under this provision requires “the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.” (*Cedric Kushner Promotions, Ltd. v King*, 533 US 158, 161 [2001]; *accord Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 368 [1st Dept 2007] [noting this “distinct enterprise” requirement].) Kaysen does not identify what the enterprise is in this case, much less allege that Ultimate Group is a corporate person distinct from that enterprise.

Second, § 1962 (c) liability requires a pattern of racketeering activity—*i.e.*, at least two predicate acts of racketeering activity within a 10-year period. (*Simpson Electric Corp. v Leucadia, Inc.*, 72 NY2d 450, 462 [1988].) The only two predicate acts that the complaint alleges are (i) failing to maintain security deposits in an escrow account; and (ii) “refusing to return [deposits] on a bogus pretext.” (NYSCEF No. 12 at ¶ 88.) At a minimum, the complaint does not sufficiently allege that failing to comply with GOL § 7-103’s escrow-account requirements for security deposits comes within RICO’s definition of racketeering activity. (*See* 18 USC § 1961).

Ultimate Group’s request to dismiss all of Kaysen’s claims against it is therefore granted. Ultimate Group also requests in passing that this court award it attorney fees. (*See* NYSCEF No.

3 at 1, 5.) But it does not identify a basis for that award in statute, regulation, or contract. The court therefore declines to award fees.

Accordingly, it is

ORDERED that defendant Ultimate Group’s motion to dismiss is granted, and the complaint is dismissed as against Ultimate Group, with costs and disbursements to be taxed in favor of Ultimate Group upon the submission of an appropriate bill of costs; and it is further

ORDERED that any claims by Kaysen against 144 Sullivan Street Equities are severed and shall continue; and it is further

ORDERED that Kaysen shall, within 30 days of entry of this order, submit a letter showing that service on 144 Sullivan Street Equities was proper or that Kaysen should be permitted to serve 144 Sullivan Street Equities now, as discussed above; and it is further

ORDERED that Ultimate Group shall serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

9/18/2023

DATE


HON. GERALD LEBOVITZ
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE