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2021-01-22

### Eisner v. Zaim

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**Eisner v Zaim**

2021 NY Slip Op 30221(U)

January 22, 2021

Supreme Court, New York County

Docket Number: 656238/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

*Justice*

-----X

MARGARET EISNER, OREN EISNER

Plaintiff,

- v -

BEYHAN ZAIM,

Defendant.

-----X

INDEX NO. 656238/2020

MOTION DATE 01/12/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS.

The motion by defendant to *inter alia* dismiss is granted in part and denied in part and the cross-motion by plaintiffs for *inter alia* a continuance pursuant to CPLR 3211(d) is denied.

**Background**

This case deals with a security deposit. Plaintiffs were tenants at a property owned by defendant in Manhattan. Plaintiffs claim that they moved in 2014 and signed various renewals that extended the lease until June 15, 2020. Plaintiffs allege that the lease converted into a month-to-month tenancy after that and they vacated the premises on July 15, 2020 after paying the additional month's rent (June-July 2020).

They complain that they left the apartment in broom clean condition and even hired a professional cleaner when they moved out. Plaintiffs claim that defendant waited until October 2020 to deliver an itemized statement about the security deposit and defendant initially wanted to

withhold \$12,375 of the \$18,600 deposit. They point out that defendant violated various laws imposed on landlords relating to security deposits and they are entitled to double damages.

Defendant now moves to dismiss and to strike plaintiff's jury demand. She claims that plaintiffs vacated the apartment in July 2020 without notice and she was not able to verify that plaintiffs had vacated the apartment until August 13, 2020. On this same day, defendant claims that she discovered significant damage to the apartment. She asserts that due to the ongoing pandemic, she was unable to get an estimate for the damage until late September 2020.

After engaging in settlement discussions, defendant claims that she decided to send back the entire security deposit and address plaintiffs' potential liability at a later time. Defendant questions why plaintiffs brought this case when she sent back the full amount and she attaches a copy of the wire transfer (NYSCEF Doc. No. 17). She claims this case was filed 30 minutes after the security deposit was returned.

Defendant moves to strike the jury trial demand and points to the lease which has a waiver provision. She insists that the case should be dismissed because the security deposit was returned. Defendant argues that plaintiffs did not inform her that they were vacating so she did not violate any laws relating to inspections prior to plaintiff's vacatur. Defendant also seeks sanctions based on plaintiffs' commencement of this action.

In opposition and in support of their cross-motion, plaintiffs claim that defendant and her counsel have suborned perjury and engaged in document forgery in relation to the wire transfer receipt. Plaintiffs say that they have not received the security deposit. They attach their account statement for the period of October 24, 2020 through November 23, 2020 and claim it shows that there was no wire transfer on November 12, 2020 from defendant to the plaintiffs' account. They

assert that they sent a subpoena on non-party JP Morgan Chase Bank about the purported wire transfer and are awaiting a response.

Plaintiffs next attach an email in which counsel for defendant blames plaintiffs for not providing all the information required to complete the wire transfer. The email suggests that the security deposit amount was withdrawn from defendant's account but has been sitting in limbo. Plaintiffs argue that the motion to dismiss should be denied or, at a minimum, there should be continuance to explore what happened to the wire transfer.

In reply, defendant claims that she spoke with someone at Chase Bank on at least three occasions after November 12, 2020 (the date of the purported transfer) and she was told the money had been transferred. Defendant blames plaintiffs for not providing the additional information required to complete the wire transfer and questions why plaintiffs made a cross-motion instead of working to complete the wire transfer.

In reply to the cross-motion, plaintiffs insist that defendant has admitted violations of the various laws relating to security deposits and she failed to produce documentary evidence sufficient to dismiss this case.

### **Discussion**

As an initial matter, the Court denies the branch of defendant's motion to dismiss plaintiff's complaint. There is no evidence submitted by defendant that conclusively establishes that she sent the wire transfer. Clearly, there is a dispute about what happened with the wire transfer on November 12, 2020. Plaintiffs have apparently subpoenaed JP Morgan Chase about what exactly happened. Moreover, there are disputed facts about the notice to terminate the lease. Plaintiffs claim they satisfied the notice requirement and defendant claims that plaintiffs "held over" in the apartment without providing any notice.

This case comes down to spite – the landlord did not immediately return the security deposit – she did not know they had vacated and then Covid slowed inspections and getting estimates down - but claims that she tried to send a wire for the full amount. Defendant is obviously willing to give back the entire security deposit, but now plaintiff wants more. Even if the parties are too emotional to work this out, there is no reason why the attorneys cannot.

However, this Court cannot force the parties to resolve this case. If they intend to litigate instead of resolving a case that appears to have been nearly settled, that is their right. Plaintiffs successfully opposed the motion by attaching a copy of their bank statement showing that they did not receive the wire transfer and an email from counsel for defendant which confirms the wire transfer was not successful. But that does not mean that the defendant acted in bad faith or forged documents.

### **Sanctions**

The Court declines to issue any sanctions at this time. More discovery is necessary relating to what happened with the wire transfer, including defendant's bank statements for the relevant period. It may be that defendant believed she transferred the money but the bank stopped it for some reason and did not return it to her account. Under that scenario, it is understandable that she would move to dismiss based on a wire transfer. Of course, plaintiffs attach their account statement and claim they never got the wire transfer so clearly something went wrong.

On these papers, the Court is unable to find that anyone committed a fraud upon the Court or any of the allegedly horrible acts of which each party accuses the other. On this record, there is no dispute that the wire transfer did not go through but there is a genuine disagreement about what happened. The Court cannot leap to a finding that sanctions are justified here.

**Jury Demand**

Plaintiffs did not oppose the branch of defendant’s motion to strike the jury demand so that portion is granted.

**Summary**

The Court sees no reason to grant a continuance as requested by plaintiffs in their cross-motion. Plaintiffs successfully raised issues of fact to deny defendant’s cross-motion. The parties can proceed to discovery, including discovery from non-parties such as the bank. The parties are directed to appear for a preliminary conference on April 26, 2021.

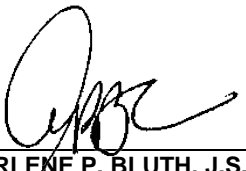
Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss is granted only to the extent that plaintiff’s jury demand is stricken and denied as to the remaining relief requested, and defendant is directed to answer pursuant to the CPLR; and it is further

ORDERED that the cross-motion by plaintiff for *inter alia* a continuance and for sanctions is denied.

Remote Preliminary Conference: April 26, 2021.

1/22/2021  
DATE

  
ARLENE P. BLUTH, 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
	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
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
		<input type="checkbox"/> REFERENCE