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12 E. 88th LLC v. Fox

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2021 NY Slip Op 50815(U)
Decided on August 30, 2021
Supreme Court, New York County
Lebovits, J.
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Decided on August 30, 2021

Supreme Court, New York County

12 East 88th LLC, Plaintiff,

against

Barry Fox, MBE LTD, and EILEEN ECK, Defendants.

Index No. 161809/2018

Rose & Rose, New York, NY (Paul Coppe of counsel), for plaintiff.

Emery Celli Brinckerhoff Abady Ward & Maazel LLP, New York, NY (Richard D. Emery and Zoe Salzman of counsel), and Vernon & Ginsburg LLP, New York, NY (Darryl M. Vernon and Yoram Silagy of counsel), for defendants.

Gerald Lebovits, J.

This is a holdover action brought by plaintiff-landlord 12 East 88th LLC against defendants

Barry Fox, Eileen Eck, and MBE Ltd. Fox, and sometimes Eck, currently occupy an apartment located at 12 East 88th Street in Manhattan. MBE, a corporation wholly owned by Fox, leased the apartment from plaintiff. Plaintiff seeks possession of the apartment; and seven years of accrued use and occupancy at double the monthly rent under the lease, plus default interest, as against MBE and against Fox and Eck personally. Defendants now move to dismiss under CPLR 3211 (a) (1) and (a) (7). The motion to dismiss is granted in part and denied in part.

BACKGROUND

Fox has lived in an apartment at 12 East 88th Street since 1975. Eck, Fox's wife, is a Connecticut resident but lives in the apartment at times. MBE executed the most recent lease of the apartment, which Fox personally guaranteed, in 2012. When plaintiff purchased the building in early 2014, it took over the lease from the building's prior owner.

The 2012 apartment lease expired on May 31, 2014. The parties did not renew the lease. Nor did Fox leave the premises upon the expiration of the lease. Under the terms of the lease's attached building-rules rider, Fox's remaining in possession gave rise point to a holdover occupancy. (*See* NYSCEF No. 39 at 14.) The rider provides that a holdover tenant is liable for use and occupancy at double the monthly rent set in the lease. (*See id.*) Defendants allege that they paid rent for four months following the expiration of the lease, thereby creating a month-to-[*2]month tenancy, instead. In May 2018, plaintiff sent a notice of termination to MBE; the notice characterized the tenancy as month-to-month. (NYSCEF No. 42.) Defendants allege that conditions in the building have degraded considerably since the lease's expiration.

In December 2015, plaintiff filed a non-eviction plan to convert the building to a condominium. (NYSCEF No. 27.) In 2017, plaintiff filed a notice of petition in Housing Court to recover the property. (NYSCEF No. 28.) In its notice, plaintiff requested payment of $27,500 a month for the period of November 2014 to July 2017. (*Id.* at ¶ 5.) $27,500 was monthly rent for the apartment under the 2012 lease. (NYSCEF No. 39 at ¶ 3.) In 2019, the Housing Court proceeding was discontinued by stipulation of the parties without any award of costs or fees to either party. (NYSCEF No. 53 at ¶ 1.)

Plaintiff brought this action in December 2018. Plaintiff's complaint, as amended in 2020, asserts five causes of action: (i) accrued double-rent use and occupancy against MBE under the lease rider; (ii) accrued double-rent use and occupancy against MBE under Real Property Law (RPL) § 220; (iii) accrued double-rent use and occupancy against Fox and Eck personally; (iv) default interest

under the lease; and (v) immediate possession of the apartment. Plaintiff is seeking a total of approximately $4.2 million in accrued use and occupancy (as of the date of this decision), more than $800,000 in in default interest, and prejudgment interest.

Defendants move to dismiss the complaint in its entirety. The motion is granted in part and denied in part as to plaintiff's first cause of action; granted as to plaintiff's second cause of action; granted as to plaintiff's third cause of action; denied as to plaintiff's fourth cause of action; and denied as to plaintiff's fifth cause of action.

DISCUSSION

To prevail on a CPLR 3211 (a) (1) motion to dismiss, defendants must provide documentary evidence that "utterly refutes plaintiff's factual allegations." (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].) Defendants' evidence must also "conclusively establish[] a defense to the asserted claims as a matter of law." (*Leon v Martinez*, 84 NY2d 83, 88 [1994].) Under CPLR 3211 (a) (7), the question is whether "the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) The court must construe the pleading liberally, accepting its factual allegations as true and affording the benefit of every possible inference to the plaintiff. (CPLR 3026; *Leon*, 84 NY2d at 87.)

I. The Branch of Defendants' Motion Seeking Dismissal of Plaintiff's Claim for Eviction and Repossession

Plaintiff's fifth cause of action seeks eviction and repossession. Defendants contend that this claim fails to state a cause of action because defendants are shielded from eviction by the Martin Act's protections for non-purchasing tenants in a converted condominium. (*See* General Business Law [GBL] § 352-eeee [2] [c].) Defendants do not establish that they come within these protections. This branch of the motion to dismiss is denied.

The Martin Act provides that when a residential building is converted to condominium ownership under a non-eviction plan, the condominium may not then evict non-purchasing [*3]tenants for their failure to purchase their unit in the building. (*See id.* § 352-eeee [2] [c] [ii].) The Act defines a non-purchasing tenant as a "person who has not purchased under the plan and who is *a*

tenant entitled to possession at the time the plan is declared effective. (*Id.* § 352-eeee [1] [e] [emphasis added].) Month-to-month tenants qualify as non-purchasing tenants under the Martin Act. (*See 300 E. 64th St. Partners, LLC v Boissevain*, 51 Misc 3d 957, 960-961 [Civ Ct, NY County 2016].) But holdover tenants do not. (*See MH Residential 1, LLC v Barrett*, 78 AD3d 99, 104 [1st Dept 2010].)

In moving to dismiss plaintiff's fifth cause of action, defendants assert that plaintiff accepted four monthly rent payments from them following the 2012 lease's expiration in 2014. Therefore, defendants contend, they, like the tenant in *Boissevain*, were month-to-month tenants when the condominium-conversion plan became effective in December 2015, and thereby shielded by the Martin Act from eviction. This court concludes that defendants' showing is not sufficient to establish this defense at the pleading stage.

If a landlord accepts rent from a tenant holding over after a multi-year lease has expired, a month-to-month tenancy will be created "unless an agreement express or implied is made providing otherwise." (Real Property Law [RPL] § 232-c.) Defendants contend that documentary evidence conclusively establishes that plaintiff accepted their post-expiration rent payments. This court disagrees.

Although defendants present copies of post-expiration rent checks that they made out to plaintiff, they do not submit evidence that plaintiff ever *cashed* those checks, such as by providing the applicable entries in defendants' bank statements. (*See* NYSCEF No. 59.) Similarly, defendants present billing statements sent by plaintiff to defendant MBE for rent from the lease's expiration through October 2014; but do not show that MBE then made payments for the billed periods that plaintiff accepted. (*See* NYSCEF No. 60.) Defendants also present a notice of termination that plaintiff sent to defendants on May 31, 2018, that refers to defendants' tenancy as month-to-month. (*See* NYSCEF No. 42.) This notice, however, does not of its own force render defendants' tenancy month-to-month; nor does it supply the missing acceptance-of-rent evidence.

Moreover, the parties expressly agreed pre-expiration that any post-expiration acceptance of rent by plaintiff would not give rise to a tenancy implicating the Martin Act's protections. Paragraph 11 of the building rules, attached as a rider to the 2012 lease, provides that "[u]nder no circumstances shall Tenant's occupancy of the Apartment after the expiration or termination of this lease be deemed or construed to create any tenancy right for the Tenant in the apartment beyond the expiration or termination of this Lease." (NYSCEF No. 39 at 14.) Further, "acceptance by Owner of any payments from Tenant after the expiration or termination of this lease" shall "be deemed to represent payment

of use and occupancy by Tenant," and "shall not be deemed or construed to create any tenancy rights for Tenant in the Apartment, unless otherwise agreed to in writing by owner."[FN1] (*Id.*) Thus, under RPL § 232-c, plaintiff has at least [*4]stated an ejectment cause of action that would not be barred by the Martin Act provisions on which defendants rely.

This court is not persuaded by defendants' argument that RPL § 232-c is inapplicable here. Defendants rely on the Court of Appeals's decision in *Jaroslow v Lehigh Valley Railroad Company* (23 NY2d 991 [1969]). But in *Jaroslow*, the Court merely disallowed a landlord's unilateral attempt to bind a holdover tenant to a new tenancy at a rent fixed by the landlord. (*See id.* at 993.) *Jaroslow* did not deny effect to a landlord and tenant's bilateral contracting-out from what might otherwise be a potential month-to-month tenancy. To the contrary, the First Department has squarely held that such an agreement between landlord and tenant must be given effect under RPL § 232-c. (*See N. Shore Community Servs., Inc. v Community Dr. LLC* (120 AD3d 1142, 1143 [1st Dept 2014].) And although defendants also contend that plaintiff waived the benefit of any such agreement by its post-expiration conduct (*see* NYSCEF No. 64 at 9), that argument is not susceptible to resolution—one way or the other—at the pleading stage.[FN2] It therefore does not support defendants' motion to dismiss plaintiff's ejectment claim.

Defendants also contend that the no-tenancy-creation language in ¶ 11 of the building rules cannot support plaintiff's eviction cause of action because "lease provisions which purport to waive tenants' rights under the Martin Act are "void as contrary to public policy." (NYSCEF No. 64 at 10, quoting GBL § 352-eeee [6].) But ¶ 11 does not purport to oust tenants' Martin-Act rights. Instead, it merely defines the scope of tenancy rights upon the expiration of the lease. And the parties executed the lease incorporating the building-rules rider in 2012—two years before the terms of that rider might have had Martin Act-related implications upon the building's condominium conversion. (*Cf.* NYSCEF No. 64 at 12 [defendants' noting that "[a]t the time the lease . . . was executed in 2012, there was no plan to convert the building to a condominium"].)

Defendants have thus not shown for pleading purposes that the Martin Act's protections for non-purchasing tenants necessarily defeat plaintiff's eviction cause of action. The motion to dismiss this claim is denied.

II. The Branch of Defendants' Motion Seeking Dismissal of Plaintiff's Claims for Use and Occupancy

Plaintiff's first two causes of action seek use and occupancy based on a liquidated-damages provision of the lease and RPL § 220, respectively. In addition to challenging the particular merits of those two causes of action, defendants seek their dismissal on the threshold ground that *any* collection of use and occupancy by plaintiff is barred under Multiple Dwelling Law (MDL) § 302 due to the building's lack of a certificate of occupancy. Defendants' request to dismiss the first cause of action is granted with respect to those periods for which the building lacked a certificate of occupancy, and otherwise denied. Defendants' request to dismiss the second cause of action is granted.

A. Defendants' Argument that Collection of Use and Occupancy on Any Theory is Barred Absent a Certificate of Occupancy

Multiple Dwelling Law (MDL) § 301 (1) provides that "[n]o multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law." If a dwelling or structure is "occupied in whole or in part for human habitation in violation of [MDL § 301] . . . [n]o rent shall be recovered by the owner of such premises . . . and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent." (MDL § 302 [1] [a] [b].)

In this case, the apartment building is indisputably occupied in whole or in part for human habitation. It also appears undisputed that for a significant portion of the period at issue, the building in question lacked a certificate of occupancy due to open violations issued by the New York City Department of Buildings (DOB). (*Compare* NYSCEF No. 44 at 16-17 [contending that the building "has been occupied . . . in violation of the certificate of occupancy from 2000 to the present day," *with* NYSCEF No. 47 at ¶ 24 [plaintiff's affirmation in opposition to the motion to dismiss, contending that "since June 2018, the subject building has . . . had a series of temporary certificates of occupancy in place, covering all but a few months"].) Defendants contend that plaintiff cannot recover use and occupancy from them for periods in which no certificate of occupancy was in place for the building. This court agrees. (*See Barrett Japaning, Inc. v Bialobroda*, 190 AD3d 544, 545 [1st Dept 2021] [holding that the lack of a certificate of occupancy for the subject building precluded the landlord's effort to recover use and occupancy from a tenant in the building].)

In opposing this branch of the motion to dismiss, plaintiff contends that (i) MDL § 302 bars the

collection of rent or use and occupancy only when a "part of the subject building is occupied for human habitation in violation of the certificate of occupancy"; and (ii) the DOB violations here were unrelated to any impermissible habitation-related use of part of the building. (NYSCEF No. 47 at 15-16.) This contention fails because it would impose an extra-textual limitation on the terms of MDL §§ 301 and 302.

MDL §§ 301 (1) and 302 (1) operate together to bar the collection of rent from residential tenants occupying a multiple dwelling in the absence of a certificate of occupancy—whatever the reason for the lack of a certificate.[FN3] In other words, it is residential occupancy of a dwelling in violation of § 301's prohibition on occupancy without a certificate that forecloses the collection of rent, not merely occupancy of a dwelling in a manner that violates the certificate. (*See W. 48th Holdings LLC v Eliyahu*, 2019 NY Slip Op 51066[U], at *1-2 [App Term, 1st Dept June 26, 2019] [holding that landlord could not collect rent from tenant due to the absence of a certificate of occupancy stemming from the landlord's subdivision of apartments in the building, "even if tenant's apartment was not one of the newly created apartments"].)

Nothing in the text of §§ 301 and 302 supports plaintiff's suggestion that the residential occupancy at issue must itself violate an extant certificate of occupancy or another provision of the MDL. The First Department's decision in *Phillips & Huyler Associates v Flynn*, on which [*5]plaintiff relies, addressed a scenario in which the premises at issue were being occupied for *commercial*, not residential, purposes in violation of the certificate of occupancy. (*See* 225 AD2d 475, 475 [1st Dept 1996].) Plaintiff suggests that "reliev[ing] an entire building of its obligation [to] pay rent" in the circumstances of this case would border on "absurdity." (NYSCEF No. 47 at ¶ 23.) But the Court of Appeals has emphasized that the text of MDL § 302 must be given its full meaning, even if it would "make sense from a practical point of view" to impose extra-textual limitations of the sort that plaintiff argues for here. If doing so leads to "an undesirable result, the problem is one to be addressed by the Legislature."[FN4] (*Chazon, LLC v Maugenest (*19 NY3d 410, 416 [2012].)

The branch of defendant's motion seeking dismissal of plaintiff's claims for use and occupancy is therefore granted only for those periods between June 1, 2014, and the present in which the building lacked any certificate of occupancy, temporary or permanent, and otherwise denied. This court does not, at this stage of the litigation, reach the apparent dispute between the parties about whether and when, within that period, a certificate of occupancy was in place.

B. Defendants' Argument that Plaintiff is Not Entitled to Collect Use and Occupancy under the Lease's Liquidated-Damages Clause

Plaintiff's first cause of action seeks recovery from MBE of several years of use and occupancy at the rate of $55,000 a month—twice the monthly rent owed under the lease—under the lease's liquidated-damages provision. Defendants move to dismiss this claim on three distinct grounds, arguing that collection of double-rent use and occupancy under the lease is (i) prohibited by the Martin Act as an unconscionable rent increase; (ii) barred as an unenforceable penalty; and (iii) precluded under principles of equitable estoppel. This branch of defendants' motion is denied.

1. Defendants' Argument that Plaintiff's Claimed Liquidated Damages are an Unconscionable Rent Increase under the Martin Act

The Martin Act protects "non-purchasing tenants" from "unconscionable rent increases beyond ordinary rentals for comparable apartments during the period of their occupancy." (GBL § 352-eeee [2] [c] [viii].) Defendants assert that plaintiff has failed to allege that any comparable apartments in the building are being rented at $55,000 per month. Therefore, defendants argue, increasing to this rate from the lease-period-rent is unconscionable and barred by the Martin Act. This court disagrees.

As discussed above, defendants have not shown at this stage of the litigation that they qualify in the first place as non-purchasing tenants under the Martin Act. Additionally, this statutory protection, by its terms, applies to unconscionable increases in (i) rent that is (ii) charged by the landlord post-conversion to (iii) to tenants during their tenancy—not, as here, (i) use and occupancy that (ii) has accrued after the end of the defendants' tenancy at (iii) an amount [*6]set in a pre-conversion lease. Defendants do not provide any authority to support their assertion that the unconscionable-rent-increase protections provided by § 352-eeee (2) (c) (viii), or the parallel language in (2) (c) (iv), apply in these circumstances. Nor would applying these protections here serve the statutory purpose of "prevent[ing] sponsors from charging [non-purchasing] tenants above-market rents as a means of forcing them out." (*Paikoff v Harris*, 185 Misc 2d 372, 378 [App Term, 2d Dept 1999].)

Moreover, even if Martin Act-based protections might in theory extend to unconscionable amounts in use and occupancy, the applicability of those protections in a given case remains a defense that defendants must establish, not an element of the claim that plaintiff must allege in the complaint. And defendants here do not attempt to establish whether other comparable apartments exist in the building (or in other apartment buildings in the neighborhood), or what the ordinary rent

of those comparable apartments might be. The Martin Act bar on unconscionable rent increases thus does not provide a basis to dismiss plaintiff's first cause of action.

2. Defendants' Argument that Plaintiff's Claimed Liquidated Damages are an Unenforceable Penalty

Defendants next contend that the lease provision assessing use and occupancy at $55,000 per month constitutes an unenforceable penalty, rather than a permissible liquidated-damages clause, because it is disproportionate to the actual losses that plaintiff might sustain from defendants holding over. This court disagrees.

A liquidated-damages provision in a contract is, in effect, "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." (*Leroy v Sayers*, 217 AD2d 63, 69 [1st Dept 1995], quoting *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 423-424 [1977].) A court may not enforce a liquidated-damages provision if it is contrary to public policy—for example where the provision is a penalty clause, because "the damages flowing from a breach of a contract can be easily established or . . . the damages fixed are plainly disproportionate" to the injury suffered. (*See id.* at 69-70, quoting *Seidlitz v Auerbach*, 230 NY 167, 173-174 [1920].)

The burden of establishing "that the stated liquidated damages are, in fact, a penalty" rests on defendants here, as the party seeking to avoid those damages. (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005].) This court concludes that defendants have not definitively demonstrated that the $55,000/month in use and occupancy is an impermissible penalty, as required to warrant dismissal of plaintiff's first cause of action at the pleading stage.

Defendants argue that awarding double rent would be so disproportionate a remedy as to constitute a penalty because the landlord's actual damages from a holdover by defendants would be limited to the monthly rent under the lease. But defendant does not, at this stage of the litigation, provide a basis to exclude the possibility that a holdover would inflict injury over and above the existing monthly rent—for example, by preventing the landlord from reletting the apartment at a much higher rent, selling the apartment rather than continuing to rent it out, or for that matter reducing the value of the building as a whole in a subsequent sale. Nor do defendants' motion papers demonstrate that it was so clear that the premises would simply have been relet at the existing rent, rather than sold or relet at a much higher rent, that damages from a holdover [*7]were readily

ascertainable when the lease was executed.[FN5]

3. Defendants' Argument that Plaintiff's Claimed Liquidated Damages are Barred by Estoppel Principles

Defendants next contend that plaintiff has taken the position that rent would be only $27,500 per month. According to defendants, plaintiff took this position by billing and accepting $27,500, by filing a Housing Court proceeding asserting that defendants owed that amount, and by waiting three years before bringing this action. Defendants allege that they relied on plaintiff's position to their detriment, assuming for the last six years that any rent owed for the apartment would not exceed $27,500 per month. Therefore, defendants argue, plaintiff is estopped from seeking double rent.

As discussed above, defendants have not established, at least at this stage of the action, that plaintiff accepted rent payments from them after the lease's expiration. In any event, the building-rules rider expressly provides that the "[o]wner may accept partial payments after the expiration or termination of this Lease without waiving Owner's right to seek and obtain payment of the balance." (NYSCEF No. 39 at 14.) Waiver "may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." *(Jefpaul Garage Corp. v Presbyterian Hosp. in City of NY,* 61 NY2d 442, 446 [1984]; *see also Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 AD3d 338, 340 [1st Dept 2006] [reversing trial-court holding that "the landlord waived its right to collect the higher holdover rent by billing defendant at the lower rate" for 10 months].)

Finally, the doctrine of judicial estoppel is not applicable here. Whatever position plaintiff may have taken in Housing Court, the proceeding was discontinued by stipulation, and plaintiff did not secure a ruling in its favor. (*See Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005] [explaining that judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action"] [emphasis added; internal quotation marks omitted].)

Defendants' motion to dismiss plaintiff's first cause of action, in particular, is thus granted only with respect to those periods in which the building lacked any certificate of occupancy, and otherwise denied.

C. The Branch of Defendants' Motion Seeking Dismissal of Plaintiff's Claim for Use and Occupancy under RPL § 220

Plaintiff's second cause of action also seeks recovery of double rent from MBE, this time under RPL § 220. That statute permits courts to award landlords "reasonable compensation for the use and occupation of real property"—*i.e.*, the fair market value of the premises after the expiration of the lease. (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011].) The landlord bears the burden of establishing the premises' fair-market value. (*See id.*) In assessing whether that burden has been met at a given stage of the litigation, courts may take into account "a parol lease or other agreement . . . as evidence of the amount to which" the landlord is entitled. (RPL § 220.)

In asserting this cause of action, though, plaintiff's complaint does not allege the premises' fair-market value. Rather, plaintiff has alleged only that under "Paragraph 11 of the Building Rules Rider to the Lease and RPL § 220," plaintiff is entitled to $55,000 a month in use and occupancy running from the termination of the lease. (NYSCEF No. 22 at ¶ 28.) This claim merely duplicates plaintiff's first cause of action, which seeks the same damages (seven years of double rent) for the same conduct (defendants' holding-over) based upon the same lease provision (paragraph 11 of the lease rider). (*See* NYSCEF 22 at ¶¶ 14-20, 24-27.) This court concludes that the second cause of action should be dismissed as duplicative. (*See PSC Ave. A LLC v Table 20 LLC*, 2021 WL 222064, at *1 [Sup Ct, NY County Jan. 19, 2021] [dismissing claim for "holdover use and occupancy" as duplicative of plaintiff's breach-of-lease claim because the holdover claim also was "based on defendant's alleged breach of the lease" and "rel[ied] on the same facts"].) And even if this claim were not duplicative, it would be independently subject to dismissal, at least in part, for failure to allege that double-rent use and occupancy would be consistent with the premises' fair market value for purposes of RPL § 220.

Defendants' motion to dismiss plaintiff's second cause of action is granted.

III. The Branch of Defendants' Motion Seeking Dismissal of Plaintiff's Claim to Hold Fox and Eck Personally Liable for Damages or Use and Occupancy

Plaintiff's third cause of action seeks to hold Fox and Eck personally liable, jointly and severally along with MBE, for damages or use and occupancy. Defendants' motion to dismiss this claim is granted.

With respect to Eck, defendants argue that she cannot be held liable on the lease or on Fox's personal guarantee of the lease, because she was a party to neither. (*See* NYSCEF No. 44 at 13-14.) In opposing the motion to dismiss, plaintiff concedes that Eck "was not a party to the guaranty," and does not advance any other basis for holding her personally liable.[FN6] (NYSCEF No. 47 at ¶ 18.) The motion to dismiss is therefore granted as to Eck.

With respect to Fox, plaintiff seeks to hold him liable for MBE's obligation to pay double-rent use and occupancy based on his personal guarantee, incorporated into the lease. This guarantee made Fox responsible for "the strict performance of and observance by [MBE] of all the agreements, provisions and rules in the attached lease." (NYSCEF No. 51 at 11.) And it provided that the guarantee would "remain in full effect even if the Lease is renewed, changed or [*8]extended in any way." (*Id.*) The lease, however, expired on May 31, 2014, and was neither renewed nor extended.[FN7] Nor does the guarantee provide that it will remain in force after expiration of the lease should the tenant hold over. This court concludes, therefore, that the guarantee did not make Fox liable for use and occupancy accruing after the lease expired.

Plaintiff contends that Fox nonetheless remained subject under the guarantee to cover MBE's obligation to pay double rent in the event of a holdover, because that obligation was itself contained in the lease. (*See* NYSCEF No. 47 at 13-14.) But the First Department has held otherwise in very similar circumstances. (*See Elite Gold*, 31 AD3d at 340.)

In *Elite Gold*, the lease provided that should tenant hold over after the expiration of the lease, the tenant would be deemed to be a month-to-month tenant at a rent of 150% the lease's rent and additional rent (*see id.* at 339); and the tenant executed a guarantee of "the full performance and observance of all of the agreements to be performed and observed by Tenant in the attached lease," which would "remain and continue in full force and effect as to any renewal, change or extension of the lease" (Br. for Plaintiff-Appellant, *Elite Gold*, 2005 WL 5704862, at * 25 [Dec. 1, 2005]). After the tenant held over without a renewal or extension of the lease, the landlord sought to hold the guarantor liable for holdover rent. The trial court granted summary judgment for the guarantor, holding that the guarantee bound her only during the period of the lease—not during the post-expiration holdover. (*See id.* at *4-*5.)

On appeal, the landlord argued that the guarantee was "not limited to a renewal, change or extension of the lease," but instead "cover[ed] any obligation that is based on an agreement in the lease," including the lease provision imposing the "150% month to month holdover payment

obligation." (*Id.* at *26.) The First Department disagreed. It held that because the guarantee "created an obligation on the part of the . . . guarantor only as to 'any renewal, change or extension of the lease,' upon the expiration of the lease it lapsed and cannot be a vehicle to bind" the guarantor. (*Elite Gold*, 31 AD3d at 340, citing *665—75 Eleventh Ave. Realty Corp. v Schlanger*, 265 AD2d 270, 271 [1st Dept 1999]; *see also Lo-Ho LLC v Batista*, 62 AD3d 558, 560 [1st Dept 2009] [concluding, in the alternative, that "a mere holdover tenancy could not operate in and of itself, to extend a personal guarantee in the absence of a such a provision" in the guarantee].)

Here, as in *Elite Gold*, the language of Fox's guarantee provided for its continued effect only during a "renewal, change or extension of the lease." (*See* NYSCEF No. 51 at 11.) The guarantee could have provided that it would remain in effect during a post-expiration holdover. But it did not. (*Cf. Stephen LLC v Zazula*, 171 AD3d 488, 488 [1st Dept 2019] [holding a guarantor liable for rent owed by the tenant during a post-expiration month-to-month tenancy, where the guarantee expressly provided that it would remain in effect "if the [tenant] hold[s] over after expiration or termination of the term"] [alterations in original].) Given the First Department's holding in *Elite Gold*, and this court's obligation to interpret a guarantee strictly and bind a guarantor only to "the express terms of his guarantee," *Lo-Ho LLC* 62 AD3d at 559-560 [internal quotation marks omitted]), the court concludes that Fox cannot be held liable on his guarantee for MBE's post-expiration monetary obligations (whether construed as damages or use [*9]and occupancy). Nor does plaintiff argue that Fox should be held personally liable as an occupant of the apartment.

Plaintiff's third cause of action is therefore dismissed against Fox, as well as against Eck.

IV. The Branch of Defendants' Motion Seeking Dismissal of Plaintiff's Claim for Prejudgment Interest

Finally, defendants seek dismissal of plaintiff's fourth cause of action, seeking prejudgment interest. Defendants argue principally that plaintiff's interest calculations are incorrect because they do not account for rent payments that defendants assertedly made. But such calculation errors would go merely to the amount of interest to which plaintiff might be entitled; they do not form a basis for dismissing the prejudgment interest claim itself. And it is premature at the pleading stage to assess the amount of interest to which plaintiff might (or might not) ultimately be entitled. Defendants' motion to dismiss plaintiff's prejudgment-interest claim is denied.

Accordingly, it is

ORDERED that the branch of defendants' motion under CPLR 3211 seeking dismissal of plaintiff's first cause of action is granted in part and denied in part; and it is further

ORDERED that the branch of defendants' motion under CPLR 3211 seeking dismissal of plaintiff's second and third causes of action is granted; and it is further

ORDERED that the branch of defendants' motion under CPLR 3211 seeking dismissal of plaintiff's fourth and fifth causes of action is denied; and it is further

ORDERED that the parties appear before this court for a telephonic preliminary conference on September 30, 2021.

DATE 8/30/2021

Footnotes

Footnote 1: Defendants claim this clause is "not relevant" to the (non)existence of a month-to-month tenancy, "because it applies only to new, independent rights purportedly created by the acceptance of rent," such as "rent stabiliz[ation] or other rights," as opposed to "the nature of the tenancy established by this conduct." (NYSCEF No. 64 at 8.) But they provide no support for the claim beyond this bare—and unpersuasive—assertion.

Footnote 2: This court expresses no view at this time on the ultimate merits of defendants' waiver-by-conduct argument with respect to their tenancy rights.

Footnote 3: Section 302 (1) (b) also bars an action or special proceeding "for possession of said premises for nonpayment of such rent." That bar does not preclude the present eviction action based on a holdover.

Footnote 4: Plaintiff also does not explain why it needed nearly four years after purchasing the building to obtain even a temporary certificate of occupancy, if the building-code violation precluding issuance of the certificate was as minor as plaintiff suggests.

Footnote 5: Defendants also argue that liquidated damages at double rent is rendered even more disproportionate by the assertedly deteriorating living conditions in their apartment. But as defendants themselves point out, courts must assess liquidated-damages provisions as of the time of their execution, not later. (*See* NYSCEF No. 64 at 12, quoting *Vernitron Corp. v CF 48 Assocs.*, 104

AD2d 409, 409 [2d Dept 1984].) Defendants' allegations about deterioration in the condition (and habitability) of the apartment appear on their face to be limited to events occurring after the building's condominium conversion—not to conditions existing when the lease was prepared and executed.

Footnote 6: Plaintiff does not, for example, argue on this motion that even if Eck were not a tenant or guarantor, she could still be held personally liable merely as an occupant of the apartment.

Footnote 7: Indeed, as discussed above in Point I, *supra*, the expiration of the lease on that date—thus ending defendants' tenancy in the apartment prior to the condominium conversion—is the crux of plaintiff's argument defending its claim for defendants' eviction.

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