

235 N. Henry St. LLC v Diaz

2020 NY Slip Op 30429(U)

February 11, 2020

Supreme Court, New York County

Docket Number: 650945/2016

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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235 NORTH HENRY STREET LLC,

Plaintiff,

- v -

FELIX DIAZ and IVIS MAS,

Defendants.

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INDEX NO. 650945/2016

MOTION DATE 02/11/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

It appearing to the court, upon further deliberation after oral argument, which court rescinds its ruling made on the bench on this day, and now holds that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, as well as the amount of damages in the form of an abatement on the first counterclaim interposed in the answer, as defendants have established prima facie evidence of breach of such warranty, and moreover, plaintiff submits no reply to the counterclaim or motion to dismiss same, it is

ORDERED that the motion is granted with regard to liability on the first cause of action of the complaint; and it is further

ORDERED that an immediate trial of the issues regarding damages, including any abatement of rent on the counterclaim for breach of warranty, shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon all parties appearing and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before Trial Part 40; and it is further

ORDERED that such service upon 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 www.nycourts.gov/supctmanh).

DECISION

Upon further deliberation following oral argument, the court rescinds its ruling from the bench, and grants the motion of plaintiff for partial summary judgment of liability on the first cause of action of the complaint. As plaintiff argues, defendants

did admit the "original debt", and that they made "every effort" to satisfy such amount.

However, plaintiff does not establish the amount of damages, as plaintiff comes forward with no ledger that shows credits that account for a series of receipts issued from August - October 2015 by plaintiff to defendants, as well as the rental payments made during the time in question as shown in defendant's bank account statements. In addition, the air testing, which admittedly constitutes hearsay¹, coupled with the affidavit of defendants, which are admissible, establish prima facie that plaintiff breached the warranty of habitability by failing to ameliorate leaks, mold and flooding of the basement. See Park West Management Corp. v Mitchell, 62 AD2d 291 (1st Dept. 1978).

Moreover, as to the first counterclaim for breach of warranty of habitability, the court notes, that upon a thorough review of the papers at bar, the court finds no answer or reply to such counterclaim. Nor does plaintiff seek to dismiss same, so plaintiff is in default thereto.

¹Each party may subpoena witnesses to authenticate photographs and business records at the trial.

The question of which party prevails must await the assessment of damages trial, and therefore the question of attorneys fees shall be held in abeyance until such determination.

2/11/2020
DATE

[Signature]
DEBRA A. JAMES, 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