

235 N. Henry St. LLC v Diaz

2021 NY Slip Op 31384(U)

April 21, 2021

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.

-----X

INDEX NO. 650945/2016
MOTION DATE 6/05/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion for REARGUMENT.

ORDER

Upon the foregoing documents, including proof of service by overnight mail and by posting of NYSCEF of such documents, upon defendants, it is

ORDERED that the motion of plaintiff for leave to reargue its motion for summary judgment is granted on default of defendants in responding to the motion to reargue, as well as on the grounds that this court clearly overlooked multiple facts in the record, as well as law; and it is further

ORDERED that, upon reargument, the Court modifies its prior order, dated February 11, 2020, to grant plaintiff's motion for summary judgment to the following extent:

(1) on the first, third, fourth, and fifth affirmative defenses of the amended complaint, summary judgment in favor of

plaintiff is granted, and such defenses are dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied, and searching the record, the court grants defendants partial summary judgment of liability on their first counterclaim for breach of warranty of habitability; and it is further

ORDERED that upon the rendering of the determination of assessment of damages (decision) of the Special Referee, plaintiff may move to restore its second and fourth causes of action for attorneys' fees (or the defendants may move to restore their second counterclaim for attorneys' fees for breach of warranty of habitability) to the calendar for an assessment of attorneys' incurred by whichever party prevails, as evidenced by the decision of the Special Referee; and it is further

ORDERED that

WHEREFOR, this matter having come on before this court on June 5, 2020, on motion of the plaintiff to reargue the motion for summary judgment and the Order dated February 11, 2020, and that on such original motion, the plaintiff having been represented in connection therewith by William Ferrall, Esq., and the defendants appearing pro se, and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine, and it appearing to the court that a

reference to determine is appropriate pursuant CPLR 4317 (b) in that an issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

To assess damages on the first and third causes of action, i.e. the amount of holdover rent for the periods June 1, 2011 through July 31, 2015 and August 1, 2016 through February 23, 2017, accounting for any credits for which evidence is proffered as to the second affirmative defense of the amended answer, and the amount of any offset for damages on the defendants' first counterclaim for breach of the warranty of habitability (any diminution in the value of the use of the premises) during such periods;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated;

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the

Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel for plaintiff and defendants pro se shall immediately consult one another in conference with the judge, and counsel for plaintiff shall, within 15 days from the date of service of this Order with notice of entry, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the plaintiff and pro defendants of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing via Microsoft Teams, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses, accordingly; and it is further

ORDERED that the decision of the assigned JHO/Special Referee shall issue in accordance with CPLR § 4319.

DECISION

The court grants the motion of plaintiff for reargument of its motion for summary judgment, and upon reargument, modifies its Order dated February 11, 2020, only to the extent of dismissing the first, third, fourth and fifth affirmative defenses of defendants' amended answer. As there are issues of facts with respect to damages on the remaining causes of action, as well as to defendants' payment defense, the court otherwise denies plaintiff's motion.

As plaintiff argues, defendants did admit the "original debt", and that they made "every effort" to satisfy such amount. However, with respect to defendant's allegations of payment, plaintiff comes forward with no ledger that shows credits that account for a series of receipts issued on March 1, 2013, and from August 5, 2015 through October 8, 2015, by plaintiff to defendants. Nor does plaintiff submit any ledgers for the periods that defendants state, under oath, that they made rental

payments, as shown in their bank account statements for September 2011 through December 2015.

With its amended reply to the amended first counterclaim for breach of warranty of habitability, plaintiff has joined issue on such counterclaim, which this court overlooked when it determined plaintiff's original motion for summary judgment. Defendant's opposing affidavit attaches a summary of air testing results in their apartment. While admittedly hearsay¹, such results, coupled with the statements under oath 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). The reply affidavit of plaintiff's principal does not proffer any evidence that tends to show that the premises were leased in accord with the warranty of habitability implied in every residential lease. See Solow v Wellner, 86 NY2d 582 (1995). Further, contrary to the plaintiff's statement, there is no requirement that defendants' provide written notice to the plaintiff of the conditions of the apartment. It suffices that defendants assert in their verified amended answer that

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

plaintiff had actual notice of the conditions. See Vanderhoff v Casler, 91 AD2d 49 (3d Dept 1983).

The question of which party has prevailed in this action must await the assessment of holdover rent damages trial, and therefore the question of attorneys' fees shall be held in abeyance until such determination.

Debra A. James
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<u>4/21/2021</u> DATE		<u>DEBRA A. JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input 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 checked="" type="checkbox"/> REFERENCE