SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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IRENE CLARKE, LOUIS CLARKE,

Plaintifs,

- v -

FIFTH AVE. DEVELOPMENT CO., LLC, PELICAN MANAGEMENT, INC., GOLDFARB PROPERTIES, CHRISTOPHER MILLER,

Defendants.

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INDEX NO. 158986/2020

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54-73, 76-100, 102-111

were read on this motion for summary judgment.

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment on liability on their causes of action against defendants for fraud, partial constructive eviction, breach of warranty of habitability, and denial of quiet enjoyment, and dismissing defendants' counterclaims for overdue rent and counsel fees. Defendants oppose and, by notice of cross motion, move pursuant to CPLR 3126 and 3124 for an order striking plaintiffs' complaint and reply to counterclaims and ordering then to pay defense counsel's fees, and/or an order compelling plaintiffs to appear for their depositions, and an order granting leave to amend their counterclaims to increase the *ad damnum* to reflect the correct amount of overdue rent. Plaintiffs oppose the cross motion.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 2)

In plaintiffs' complaint, they allege, as pertinent here:

Plaintiffs are parties to a one-year lease for apartment 610, on the sixth floor of 1160 Fifth Avenue in Manhattan, commencing on June 1, 2020 at a monthly rent of $4,500. Plaintiff Louis Clarke is 54 years old and suffers from medical conditions that limit his physical activity. Defendant Fifth Ave. Development Co., LLC owns the building and defendant Pelican Management, Inc. is its managing agent. Defendant Goldfarb Properties is owner's beneficial owner, and defendant Miller is Goldfarb's employee.

The building consists of six stories comprising 61 residential apartments, configured into three wings, with each wing serviced by one elevator; there are no freight or service elevators. Defendants advertised the building to the public as a first-class residence, featuring, among others, elevator service. As there is no garbage chute in the building, residents must take their trash to the basement and they use the elevators to do so. They must also use the elevators to access washers and dryers in the basement. Absent elevator service, residents are obliged to use the stairs to carry up groceries or dry cleaning, walk dogs, retrieve mail or deliveries, and admit cleaning services.

When plaintiffs viewed the apartment before signing the lease, the elevator on their wing was in service and they were not told that it may be taken out of service in the future. At the time they signed the lease, the COVID-19 pandemic was in its initial stage. Plaintiffs allege, on information and belief, that defendants had planned to replace the elevator in early 2020 but delayed due to the pandemic.

On July 15, 2020, within two months of the commencement of their lease, defendants informed plaintiffs that the elevator would be replaced and that the project was to commence within three weeks, with elevator service being suspended indefinitely. Fearing the loss of the elevator, plaintiffs were forced to vacate the apartment and had to move into the one-bedroom

Brooklyn apartment of plaintiff Irene's 85-year old mother, who suffers from dementia. Irene shared her mother's bed while Louis slept on the couch. Plaintiffs' teenage daughter had to stay in the home of Louie's mother. Eventually, plaintiffs left New York City until they were told in October 2020 that the elevator had been replaced. They then moved back into their apartment.

Plaintiffs thus contend that defendants' failure to provide a working elevator for two months created a health and safety risk, constituted a partial constructive eviction from their apartment, violated the warranty of habitability and denied them their right to quiet enjoyment. They complain that defendants refused to abate their rent for the two months at issue and reported their rent default to credit reporting agencies.

Plaintiffs advance causes of action for fraud, partial constructive eviction, breach of the warranty of habitability, and denial of quite enjoyment. They seek compensatory and punitive damages, as well as a judgment directing defendants to remove any adverse information from plaintiffs' credit report and enjoining them from further damaging plaintiffs' credit rating, abating their rent, and awarding them costs.

B. Answer and counterclaims (NYSCEF 4)

Defendants deny plaintiff's allegations and assert as counterclaims that plaintiffs owe five months of rent as of November 2020 and that the lease requires them to pay defendants' legal fees.

C. Discovery

After filing their answer to the counterclaims in July 2021 (NYSCEF 48), plaintiffs served discovery demands and deposition notices in November and December 2020. Defendants served their demands and deposition notices in December 2020.

In March 2021, plaintiffs filed a motion to compel defendants to respond to their

discovery demands. Defendants cross-moved for the same relief and also sought to compel plaintiffs to appear for depositions.

In May 2021, the parties entered into a preliminary conference stipulation; plaintiffs' depositions were scheduled therein to be held on or before October 1, 2021, and defendants on or before November 1, 2021. The parties also stipulated that plaintiffs would hold their motion in abeyance, except for their request for an order requiring defendants to produce an employee of Goldfarb for deposition, and defendants withdrew their cross motion. (NYSCEF 45).

In August 2021, plaintiffs filed a motion for a court-ordered subpoena addressed to the Department of Buildings, seeking records related to the building and the elevator at issue.

In September 2021, plaintiffs filed the instant motion.

In November 2021, the two prior motions were decided, plaintiffs' motion for a deposition was granted, and their motion for the DOB subpoena was denied. (NYSCEF 74).

II. MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION TO STRIKE OR COMPEL

Even if plaintiffs had established their *prima facie* entitlement to summary judgment, defendants identify the existence of numerous issues of fact, including whether plaintiffs refused defendants' offer to occupy an identical apartment on the building's second floor at no additional cost while the elevator was out of service, thereby mooting their claims that defendants had breached the warranties of habitability and quiet enjoyment of the apartment. They also deny having a duty to inform plaintiffs about the elevator project before they signed the lease (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491 [landlord had no duty to disclose to tenant information about planned future repairs to elevator in building as parties had non-fiduciary relationship]; *see also Sehera Food Svces. Inc. v Empire State Bldg. Co. LLC*, 74 AD3d 542 [1st Dept 2010] [no duty to disclose in non-fiduciary, arms-length transaction between landlord and

tenant]), and observe that plaintiffs were not constructively evicted, having moved back into the apartment. For the same reason, defendants maintain that plaintiffs cannot seek rescission of the lease. (*See* Rasch, 1 NY Landlord & Tenant Inc. Summary Proc § 2:11 [4th ed] ["But a tenant cannot rescind the lease upon the ground of fraud, where he fails to promptly surrender possession of the property upon the discovery of the fraud. If he continues the use and occupancy of the premises received under the lease, he will be deemed to have elected to affirm the lease"]).

Defendants also establish that their counterclaims may not be dismissed as plaintiffs admittedly did not pay rent and the lease provides for the payment of attorney fees to the prevailing party.

Moreover, as plaintiffs have not yet appeared for their depositions, defendants have not yet been able to examine them under oath. Thus, plaintiffs' motion is also premature, and defendants' motion to compel the depositions is meritorious. (CPLR 3212[f]; s*ee Guzman v City of New York*, 171 AD3d 653 [1st Dept 2019] [summary judgment motion properly denied as premature as no discovery had been conducted, and thus plaintiff deprived of opportunity to depose witnesses with pertinent knowledge]; *Sodhi v 112 Park Enter., LLC*, 147 AD3d 1000 [2d Dept 2017] [denial of summary judgment motion on liability warranted as little discovery had been exchanged and party depositions had not been held]). If plaintiffs fail to appear, defendants may seek sanctions against them.

III. CROSS MOTION TO AMEND

Absent any dispute that plaintiffs did not pay all of the required rent during their tenancy with defendants, defendants demonstrate that the amendment of their counterclaim and *ad damnum* to reflect the correct amount of rent owed by plaintiffs as of today is meritorious.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment is denied; it is further

ORDERED, that defendants' cross motion to strike or compel is granted to the extent of directing plaintiffs to appear for their depositions within 30 days of the date of this order; it is further

ORDERED, that defendants' cross motion to amend is granted, and the proposed amended complaint (NYSCEF 98) is deemed filed and served upon service of a copy of this order with notice of entry; and it is further

ORDERED, that the parties submit a compliance conference stipulation, setting forth deadlines for any remaining discovery, on or before June 1, 2022, in Word format and by email to cpaszko@nycourts.gov.

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4/21/2022
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE