

90 Lex LLC v HFZ 90 Lexington Ave. Owner, LLC

2022 NY Slip Op 34257(U)

December 15, 2022

Supreme Court, New York County

Docket Number: Index No. 653425/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

90 LEX LLC,

Plaintiff,

- v -

HFZ 90 LEXINGTON AVENUE OWNER, LLC, ZIEL
FELDMAN

Defendant.

-----X

INDEX NO. 653425/2020

MOTION DATE 12/12/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for

SUMMARY JUDGMENT

Defendant HFZ 90 Lexington Avenue Owner, LLC's ("HFZ 90") motion for summary judgment is denied.

Background

Plaintiff contends that it is the owner of an apartment it purchased from HFZ 90, the sponsor. It purchased the apartment in a newly constructed building for \$2.2 million. Plaintiff maintains that there were issues from the beginning and that the shoddy construction resulted in a settlement agreement (in June 2019) that required HFZ 90 to do repair work to fix various construction defects in the apartment. Plaintiff alleges that this work included repairing the apartment's walls and ceiling which suffered water damage, the inability to maintain an adequate temperature in the apartment, replacing defective balcony windows and other issues on a 40-item list. Plaintiff maintains that although HFZ 90 purportedly attempted to fix these issues, it argues that many items were not properly corrected and that new defects were created.

HFZ 90 moves for summary judgment to dismiss the complaint on the ground that plaintiff, during discovery, did not point to any damages. It also points out that plaintiff admitted it had not yet retained an expert with respect to damages. HFZ 90 contends that at plaintiff's deposition (movant took the deposition of the individual residing in the unit), plaintiff was unable to point to any damages. It points out that plaintiff was asked if he had contracted with anyone to repair the alleged defects about which plaintiff complains. HFZ 90 emphasizes that plaintiff admitted that it had not incurred any costs to fix the alleged defects and had not kept any receipts for the cleaning service.

In opposition, plaintiff contends that the repair work that HFZ 90 was supposed to complete included an entire wall in unit's kitchen, the balcony door frame, chipped areas in the master bathroom, the water damaged ceiling and the vanity in the bathroom. It contends that it provided a punch list of 13 items in October 2019 (a date right before the repairs were supposed to be completed) to the sponsor. Plaintiff insists that it conducted another inspection of the unit (the resident of the unit was relocated from August 2019 until October 2019) on October 10, 2019 and found several remaining issues despite the fact that the deadline to remedy the problems had passed. Another punch list was submitted.

Plaintiff contends that the resident moved back into the apartment in November 2019 and found that six items were still not properly addressed, including the fact that the temperature could not be adequately controlled. Allegedly, it is difficult to properly heat the apartment as the heating system does not accurately reflect the temperature in the unit. Plaintiff complains about sunken floorboards as well as scratches and holes in the entryway. It also details other issues and points to a letter from February 2020 in which it detailed the issues (NYSCEF Doc. No. 73).

Plaintiff insists that HFZ 90 clearly breached the terms of the settlement agreement by not completing the repairs and points out that the settlement agreement itself has a liquidated damages provision. It argues that there is a question of fact about the amount of plaintiff's damages.

In reply, HFZ 90 contends that plaintiff is not entitled to liquidated damages because such damages were available only where the repair work was not done in a timely manner. It argues that because plaintiff returned to the unit (after being relocated while work was done) it cannot be awarded liquidated damages. HFZ 90 also argues that plaintiff showed no proof of damages.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942

NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies the motion as plaintiff raised a material issue of fact that it suffered damages. HFZ 90's motion focuses exclusively on the argument that plaintiff cannot show any damages. But plaintiff did—it points to the letter its counsel sent in February 2020 (after the deadline to finish repairs had passed) that details the remaining issues. And the affidavit plaintiff submitted in opposition also details issues with the apartment that remain, including the fact that maintaining a comfortable temperature is allegedly impossible.


That plaintiff's witness was apparently unable to point to costs he has incurred to fix issues not properly addressed by movant is beside the point. There is no requirement that plaintiff had to fix the issues in the apartment on its own and then demand that HFZ 90 reimburse it in order to raise an issue of fact about damages. Moreover, plaintiff need not demand a specific amount of damages in connection with this motion—it need only point out that there are damages.

The fact is that plaintiff raised an issue of fact that HFZ 90 breached the agreement to fix the issues in the apartment and it resulted in substandard apartment. As plaintiff alleges, it purchased the subject unit for \$2.2 million in a *newly constructed building* and a pre-closing inspection revealed numerous issues that necessitated an agreement to fix the apartment. Plaintiff alleges that the repairs were not fully completed and the apartment remains in substandard condition while HFZ 90 contends they successfully fixed the unit. That is a material issue of fact - whether defendant honored its obligations to fix the apartment.

The Court need not opine about the liquidated damages provision as it is not dispositive in the instant motion.

Accordingly, it is hereby

ORDERED that defendant HFZ 90 Lexington Avenue Owner, LLC’s motion for summary judgment is denied.

<u>12/15/2022</u> 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 checked="" type="checkbox"/> DENIED	<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 type="checkbox"/> REFERENCE