

**Mays v Robertshaw**

2023 NY Slip Op 31060(U)

April 4, 2023

Supreme Court, New York County

Docket Number: Index No. 152230/2019

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Darrell Mays et al

INDEX NO. 152230-2019

- v -

MOT. DATE

John Robertshaw et al

MOT. SEQ. NO. 2 & 3

The following papers were read on this motion to/for sj  
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits  
Notice of Cross-Motion/Answering Affidavits — Exhibits  
Replying Affidavits

ECFS Doc. No(s). \_\_\_\_\_  
ECFS Doc. No(s). \_\_\_\_\_  
ECFS Doc. No(s). \_\_\_\_\_

This is an action for fraud, breach of the warranty of habitability and the covenant of quiet enjoyment arising from plaintiff's rental of defendants' 10,000 square foot townhouse in Manhattan which was allegedly infested with rodents. There are two motions pending before the court. In motion sequence 2, plaintiffs/counterclaim defendants Darrell Mays and Tara Mays' (collectively the "Mays") seek partial summary judgment: [1] on the second "Cause of Action" counterclaim seeking payment of legal fees, and (ii) on the "First Cause of Action" counterclaim for unpaid rent under RPL § 227-e. Defendants and Counterclaim Plaintiffs John Robertshaw, individually and as Trustee of the Robertshaw Charitable Remainder Trust, dated June 22, 2016 (the "Trust"), and Elizabeth Robertshaw (together with Robertshaw, individually, the "Robertshaws") oppose the Mays' motion. Meanwhile, in motion sequence 3, defendants move for summary judgment in their favor with respect to the Mays' claims and their counterclaims. The Mays oppose defendants' motion. Issue has been joined and the motions were timely brought after note of issue was filed as per the parties' stipulation dated June 28, 2022 and so ordered by the court on July 20, 2022. Therefore, summary judgment relief is available. The court's decision follows.

On June 28, 2018, the Mays entered into two, two-year lease agreements to lease from the defendants the premises located at 166 East 81st Street ("166") and 179 East 80th Street ("179") in Manhattan at an aggregate monthly rent of \$43,000. Section 10 of the Leases entitled "Liability" provides, in relevant part, that "[i]f an action is brought against Landlord arising from Tenant's act or neglect Tenant shall defend Landlord at tenant's expense with an attorney of Landlord's choice." Section 23 of the Leases, entitled "Tenant's Default," provides that "If this Lease is Cancelled, or Landlord takes back the Apartment, the following takes place:

Dated: 4/4/23

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts under this Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, broker fees, cleaning and repairing costs, decorating costs and advertising costs.

The Mays vacated the Premises on March 5, 2018 after they were allegedly constructively evicted due to a severe rodent infestation. Defendants maintain that there was no rodent infestation prior to the Mays' rental, with only periodic prophylactic extermination services and an occasional mouse sighting. However, there is no dispute that the Mays surrendered possession of the Premises to defendants without defendants having commenced an action in order to regain possession. Defendants maintain, however, that the Mays caused damage to the Premises and stole defendants' personal belongings such as wall sconces and a television.

Further, while the Mays claim that the defendants marketed the Premises for sale after the Mays' vacatur, defendants claim that they leased the Premises to Alexander and Patricia Farman-Farmaians on May 6, 2019 for an aggregate monthly rent of \$40,000. In April 2020, the Farman-Farmaians purchased 166 for \$8.33 million and continued to rent 179 for \$18,000 a month. In February 2021, 179 was sold to another purchaser for \$7 million.

### Parties' arguments

The Mays argue that the defendants are not entitled to collect attorneys fees and costs under the Leases according to the plain language of their operative provisions. Thus, they seek dismissal of defendants' "Second Cause of Action" counterclaim seeking attorney's fees. The Mays further assert that defendants cannot prove damages for unpaid rent under RPL § 227-e and "[d]efendants' \$731,000 rent claim and related ad damnum clause in the "First Cause of Action" counterclaims is knowingly baseless as a matter of law."

In support of their motion, defendants argue that the first and second causes of action for fraud and constructive fraud should be dismissed because the defendants did not make any false representations or omissions, the Mays took the Premises as is and the alleged rodent infestation was not a latent defect. Defendants assert that the Mays breach of the warranty of habitability claim must be dismissed because the Premises was habitable and the Mays themselves caused the rodent infestation. Defendants otherwise maintain that the Mays' remaining claim for breach of the covenant of quiet enjoyment must be dismissed as well. Finally, defendants seek summary judgment on their claims for breach of the lease and attorneys fees.

### **DISCUSSION**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The Mays are not entitled to dismissal of defendants' counterclaim for attorneys fees. "[A]n attorney's fee and other expenses incurred in prosecuting an action are considered an incident of litigation and, unless authorized by statute, court rule, or written agreement of the parties, are not recoverable"

(see *i.e. Panish v. Panish*, 24 AD3d 642 [2d Dept 2005]). Defendants answer alleges that “[t]he Leases provide that ‘Tenant must pay for damages suffered and reasonable expenses of Landlord relating to any claim arising from any act or neglect of Tenant. If an action is brought against Landlord arising from Tenant’s act or neglect Tenant shall defend Landlord at Tennant’s expenses with an attorney of Landlord’s choice.’” Here, there is a disputed issue as to whether there was a rodent infestation prior to the Mays’ rental of the Premises or, as defendants’ contend, the Mays caused the rodent infestation. Since it remains to be determined whether this action arose from the Mays’ acts or neglect, the Mays’ motion to dismiss the “Second Cause of Action” counterclaim must be denied. Relatedly, defendants’ motion for summary judgment on this claim is denied in light of triable issues of fact relating to the alleged rodent infestation.

The Mays’ next argument is based upon RPL § 227-e, which requires residential landlords to mitigate damages where a tenant vacates the premises before the end of the lease. This statute provides in pertinent part as follows.

landlord shall, in good faith and according to the landlord's resources and abilities, take reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower. If the landlord rents the premises at fair market value or at the rate agreed to during the term of the tenancy, the new tenant's lease shall, once in effect, terminate the previous tenant's lease and mitigate damages otherwise recoverable against the previous tenant because of such tenant's vacating the premises. The burden of proof shall be on the party seeking to recover damages. Any provision in a lease that exempts a landlord's duty to mitigate damages under this section shall be void as contrary to public policy.

Defendants bear the burden of establishing that they took reasonable and customary actions to “render the injury as light as possible” (*14 East 4th Street Unit 509 LLC v. Toporek*, 203 AD3d 17 [1st Dept 2022]). The mere fact that defendants alleged in their counterclaim that their damages are “believed to be \$731,000 does not mandate dismissal simply because defendants were able to mitigate their damages and relet the Premises at an aggregate monthly loss of \$3000 within months after the Mays’ early vacatur and failure to pay rent from February 2019 through the duration of the Leases. It does, however, appear that the figure of \$731,000 stems from the seventeen months that the Mays failed to pay rent due under the Leases, which is overstated on this record since defendants relet the premises. This figure allegedly includes damages the Mays caused to the “stoop and the pool”. While courts will strike a patently inappropriate ad damnun clause, the court is not going to parse or otherwise modify defendants’ alleged damages at this juncture. Accordingly, defendants’ motion to dismiss this counterclaim is also denied.

As for the balance of defendants’ motion, triable issues of fact preclude summary judgment on this record. As previously stated, defendants’ proffer that “they only saw a mouse occasionally in the Premises during the nearly twenty years they lived in the home” does not establish that there was no rodent infestation before the Mays rented the Premises. Even if the defendants have met their burden, the Mays have submitted sufficient evidence to defeat defendants’ motion, *i.e.* an invoice from Orkin Pest Control (“Orkin”) dated January 29, 2019 which provides in pertinent part:

Inspected and treated all areas to control infestation inside home. Detected and sealed all small cracks and crevices that with (sic) copper mesh and caulk gun. Saw a mouse run through exterior vent located outside of front office windows to basement.

Blizzard of rodents traps (sic) placed throughout where no pet or children cannot reach. Found and picked up 5 dead mouse from boiler room. New traps and pest equipment installed there. Basement base so many gaps and holes in walls, and Sheetrock, so I remember that these gaps must be closed or repaired. Crawl

space in laundry room is also treated and gaps there must also be repaired to prevent pest entry to basement from outside. Dumpster door need to be fully repaired with door sweep. I recommend that the grill that is used to cover fireplace in living room be also used to cover vent outside as well. Additional bait stations are needed in basement due to heavy rodent activity that was observed. Pest clean out should be ongoing and new additional resistant tempter bait stations must be added.

Whether there was an ongoing rodent infestation when defendants marketed the Premises for rental prior to the Mays entering into the Lease remains an open question. Defendants related argument that the Leases' as-is clause extinguishes the Mays' fraud claims is also unavailing at this juncture. The as-is clause excludes latent defects, which are not discoverable by reasonable inspection (see *i.e. Bean v. Ruppert Towers Hous. Co.*, 274 AD2d 305 [1st Dept 2000]). Defendants have not established that the rodent infestation the Mays' claim existed would have been discoverable by reasonable inspection of the Premises as a matter of law.

The Mays' breach of the warranty of habitability claim also survives summary judgment. A rodent infestation can constitute a breach of the warranty of habitability (see *i.e. Jobe v. Chelsea Hotel Owner LLC*, 198 AD3d 440 [1st Dept 2021]). Further, the May's claims about the magnitude of the alleged rodent infestation are not solely based upon their own personal observations but are corroborated by Orkin (see deposition of Orkin Regional Sales Manager, Steve Shaneman).

Finally, defendants have not shown that their conduct did not "deprive[] [the Mays] of [their] beneficial use and enjoyment of the premises" (*GFE Jerome Ave. LLC v. Steph-Leigh Assocs., LLC*, 200 A.D.3d 490 [1st Dept 2021]).

Accordingly, both motions are denied in their entirety.

## CONCLUSION

In accordance herewith, it is hereby:

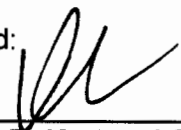
**ORDERED** that both motion sequence numbers 2 and 3 are denied in their entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

4/4/23  
New York, New York

So Ordered:

  
\_\_\_\_\_  
Hon. Lynn R. Kotler, J.S.C.