

**2228-2236 Broadway LLC v Hart**

2023 NY Slip Op 32200(U)

July 3, 2023

Supreme Court, New York County

Docket Number: Index No. 652062/2021

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 59

*Justice*

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2228-2236 BROADWAY LLC,

Plaintiff,

- v -

STEVEN B. HART and BETSY J. HART,

Defendants.

-----X

INDEX NO. 652062/2021MOTION DATE 06/28/2023MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks summary judgment dismissing the fourth (fraudulent inducement), fifth (waiver, estoppel, ratification) and seventh (negligent misrepresentation) affirmative defenses alleged in defendants' answer, the motion of plaintiff for summary judgment in its favor pursuant to CPLR 3211(a) is GRANTED and such affirmative defenses are stricken; and it is further

ORDERED that the motion of plaintiff seeking summary judgment in its favor on the complaint is DENIED; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or competing

preliminary discovery conference order(s) at least two days before August 24, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

As their second, third and sixth affirmative defenses, defendants assert breach of lease and warranty of habitability. As stated in Park West Management Corp v Mitchell, 47 NY2d 316, 329 (1979):

Inasmuch as the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition, the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition.

Plaintiff does not come forward with prima facie evidence negating defendants' breach of the warranty of implied habitability defense, as plaintiff's manager does not state that he observed first-hand the conditions of the premises during the period in question. Moreover, by the statement of one of the defendants, under oath, concerning the breach warranty of habitability affirmative defenses, defendants raise genuine issues of fact that must be determined by a fact finder at trial. See Edstrom v St

Nicks Alliance Corp, 194 AD3d 518, 519 (1<sup>st</sup> Dept 2021). Finally, such affidavit of defendant raises issues of fact whether plaintiff had notice of the alleged dangerous conditions at the premises. See Chapman v Silber, 97 NY2d 9, 19-20 (2001).

The fourth affirmative defense wherein defendants allege that plaintiff fraudulently induced defendants to enter into the lease fails as defendants do not assert that they sustained any damages that would not be recoverable under their second, third and sixth, affirmative defenses sounding in breach of lease and warranty of habitability. As such affirmative defense is therefore duplicative of such breach of contract affirmative defenses, it must be dismissed. See Manas v VMS Associates, LLC, 53 AD3d 451, 453 (1<sup>st</sup> Dept 2008).

This court concurs with plaintiff that defendants' fifth affirmative defense (waiver, estoppel, and ratification) is meritless. As argued by plaintiff, paragraph 24 irrefutably defeats the waiver affirmative defense (see Wilmington Trust v MC-Five Mile Commercial Mortgage Finance LLC, 171 AD3d 491 [1<sup>st</sup> Dept 2019]). With respect to estoppel, plaintiff is likewise correct that the written lease whose terms govern the promises refutes such defense. See Grossman v New York Life Ins Co, 90 AD3d 990, 991-992 (2d Dept 2011). Finally, defendants assert none of the factual elements of the doctrine of ratification, i.e. plaintiff's express or implied adoption of the actions by

one whom the other assumes to be acting, but without authority, relating back and supplying original authority to execute an agreement, here presumably the lease. See Rocky Point Properties, Inc. v Sear-Brown Group, Inc., 295 AD2d 911 (4<sup>th</sup> Dept 2002).

Defendants' seventh affirmative defense that alleges negligent misrepresentation likewise lacks merit, as defendants assert neither any more than an "arms-length business transaction", nor that "there was [a] special, privity-like relationship between the parties that imposed a duty on plaintiff to impart correct information to defendant" (New WTC Retail Owner LLC v Pachanga, Inc, 160 AD3d 584, 585 [1<sup>st</sup> Dept 2018]). On that basis, such affirmative defense is not cognizable.

With respect to when plaintiff re-rented the subject apartment to third persons and whether such exercise of its duty to mitigate its damages when defendants allegedly abandoned the premises was reasonable pursuant to Real Property Law § 227-e (see 14 East 4<sup>th</sup> Street Unit 509 LLC v Toporek, 203 AD3d 17, 22 [1<sup>st</sup> Dept 2022]), defendants are correct that knowledge of the salient facts remains exclusively within possession of plaintiff, rendering defendants unable to address the statement in the affidavit of plaintiff's manager that "[p]laintiff was successful in renting the Premises to a new tenant as of July 7,

2021". On such basis, summary disposition of the complaint must be denied. See Gaughan v Chase Manhattan Bank, 204 AD2d 67 (1st Dept 1994).

*Debra A. James*

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7/3/2023

DATE

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