

**Nazor v Sydney Sol Group, Ltd.**

2023 NY Slip Op 33823(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156920/2019

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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MARIA NAZOR, PETER MICKLE

Plaintiff,

- v -

SYDNEY SOL GROUP, LTD., SHIMON MILUL,

Defendant.

INDEX NO. 156920/2019

MOTION DATE 07/13/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
 MOTION**

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HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

This action is the latest in a years-long dispute between plaintiffs Maria Nazor (Nazor) and Peter Mickle (Mickle) (together, plaintiffs), the tenants in a building located at 544 West 27th Street, New York, New York (the Building), and the building owner, defendant Sydney Sol Group, Ltd. f/k/a Mushlam, Inc. (Sol or the Owner). Sol and its principal, defendant Shimon Milul (Milul) (together, defendants), now move, pursuant to CPLR 3212, for summary judgment dismissing the third through twelfth causes of action in the complaint.

For the reasons set forth below, the motion is granted, and the complaint is dismissed.

**BACKGROUND**

Plaintiffs are the tenants of the 4th Floor (the Subject Premises) of the Building pursuant to a written lease agreement (the Lease) with the Owner's predecessor-in-interest for a term

commencing on June 1, 1983 and expiring on May 30, 1993. The Lease (NYSCEF Doc No. 202) was subsequently extended for ten years, expiring on May 31, 2003. Plaintiffs continued in possession of the Subject Premises as month-to-month tenants after the expiration of the Lease.

In January 2008, defendants commenced an action in the New York County Supreme Court, entitled *Mushlam Inc. v Nazor et al.* (Index No. 100207/08), seeking, inter alia, to recover possession of the Subject Premises upon termination of plaintiffs' month-to-month tenancy (the Ejectment Action) (*see* NYSCEF Doc Nos. 203-204).

Changes to Article 7-C of the Multiple Dwelling Law (the Loft Law) in 2010 extended coverage to buildings located north of West 24th Street, south of West 27th Street, west of Tenth Avenue and east of Eleventh Avenue in New York County, where two or more families lived independently from each other for 12 consecutive months between January 1, 2008 and December 31, 2009 (*see* Loft Law [Multiple Dwelling Law art 7-C] § 281 [5], added by L 2010, ch 135 § 1 and amended by L 2010, ch 147 § 1). Plaintiffs, who allege they have resided continuously in separate units on the fourth floor since 1995 (*see* Maxwell Breed [Breed] affirmation, exhibit 1, ¶ 21 [NYSCEF Doc No. 45]), have been unsuccessful in their pursuit of coverage for the Building as an "interim multiple dwelling," as that term is defined in the Loft Law (*see Matter of Nazor v New York City Loft Bd.*, 179 AD3d 609, 609 [1<sup>st</sup> Dept 2020]).

In March 2014, plaintiffs filed an application seeking coverage and protection for themselves and the Subject Premises pursuant to the Loft Law (the Prior Coverage Application). In April 2017, the Loft Board issued Loft Board Order (LBO) No. 4668, denying the Prior Coverage Application because plaintiffs failed to establish that they occupied the Subject Premises during the relevant time period as the residence of two families living independently from one another (*see* LBO No. 4668 [NYSCEF Doc No. 205]). Specifically, the Loft Board adopted

findings by the Administrative Law Judge that Nazor alone occupied the Subject Premises as one unit:

“The preponderance of the credible evidence demonstrates that Mr. Mickle resided at 55 West 14th Street from 2004 until 2010, and that Ms. Nazor was the only person who residentially occupied the fourth floor during this period”

(Report and Recommendation at 23 [NYSCEF Doc No. 206]).

In October 2018, upon the Loft Board’s final denial of the Prior Coverage Application, the Supreme Court (Jaffe, J.) granted the Owner’s cause of action for ejectment in the Ejectment Action (*see* Ejectment Order [NYSCEF Doc No. 207]). The Ejectment Order was subsequently vacated pursuant to a decision and order of the Supreme Court, the appeal of which is pending (*see Mushlam Inc. v Nazor et al.*, Docket No. 2021-04189 [1st Dept 2021]).

In 2019, the Loft Law was amended once more to expand the definition of an “interim multiple dwelling.” Multiple Dwelling Law § 281 (6) (a), added by L 2019, ch 41 § 2, reads, in part, that:

“[an] ‘interim multiple dwelling’ shall include buildings, structures or portions thereof ... which were occupied for residential purposes as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January first, two thousand fifteen, and ending December thirty-first, two thousand sixteen, provided that the unit seeking coverage: is not located in a cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, and is at least four hundred square feet in area.”

Plaintiffs commenced this action by filing a summons with notice on July 15, 2019, three weeks after the effective date of the amendments (*see* L 2019, ch 41 § 11), seeking, inter alia, a declaration that plaintiffs and the Subject Premises were covered and protected under the Loft Law as amended (MDL §281[6]); and that the Loft Board is precluded from determining plaintiffs’ Loft Law claims.

Plaintiffs originally alleged 12 causes of action in the complaint (NYSCEF Doc No. 25): (1) a judgment declaring that plaintiffs' units are covered under the Loft Law and that plaintiffs are protected occupants; (2) a judgment declaring that plaintiffs may pursue their Loft Law coverage claim in Supreme Court and that the Loft Board is precluded from determining plaintiffs' coverage claims under the Loft Law; (3) rent overcharge; (4) unjust enrichment; (5) harassment in violation of Real Property Law § 235-d and New York City Loft Board Regulations (29 RCNY) § 2-02; (6) breach of the warranty of habitability; (7) an accounting; (8) breach of lease; (9) retaliatory eviction; (10) constructive eviction; (11) property damage; and (12) recovery of attorneys' fees under Real Property Law § 235-d, New York City Loft Board Regulations (29 RCNY) § 2-02 and Multiple Dwelling Law § 302 (1) (b).

On May 17, 2021, this court dismissed plaintiffs' first and second causes of action for declaratory judgments relating to their new Loft Law claims without prejudice, deferring to the Loft Board's primary jurisdiction (*see* May 17, 2021 decision and order [NYSCEF Doc No. 78]). The parties' remaining causes of action and counterclaims were severed (*see id.*).

In August 2021, plaintiffs filed a new application with the Loft Board seeking coverage and protection pursuant to the 2019 Loft Law (the New Coverage Application [NYSCEF Doc No. 209]). On March 15, 2022, plaintiffs filed a Note of Issue (NYSCEF Doc No. 210), certifying completion of discovery and the parties' readiness for trial and/or a post-note of issue motion on the remaining causes of action.

## DISCUSSION

“‘[T]he proponent of a summary judgment motion 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’” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation

omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; see also *Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; see also *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1<sup>st</sup> Dept 2002], *aff'd* 99 NY2d 647 [2003]).

### **Rent Overcharge (Third Cause of Action)**

While plaintiffs' third cause of action alleges a claim for rent overcharge, plaintiffs are actually claiming a refund of rent that was voluntarily paid:

"From the commencement of Plaintiffs' respective tenancies, the Building has not had a certificate of occupancy and only commercial use is permitted ... By reason of the foregoing, Landlord has violated MDL § 302 (1) (b), and Plaintiffs are entitled to recover all amounts unlawfully collected by Landlord as rent or use and occupancy from no less than six years before the commencement of the Ejectment Action"

(complaint, ¶¶ 88, 90).

However, MDL § 302 does not provide for an independent cause of action for recovery of rent a tenant has already paid:

“[Tenants] may not recover their past rent payments made when the C of O was invalid or incorrect, as ‘Section 302 of the Multiple Dwelling Law, which is penal in nature and is to be strictly construed, does not by its terms provide for the recovery of rent previously paid for use and occupancy’”

(*Townsend v B-U Realty Corp.*, 67 Misc 3d 1228[A], 2020 NY Slip Op 50662[U], \* 13 [Sup Ct, NY County 2020], quoting *Goho Equities v Weiss*, 149 Misc 2d 628, 631 [App Term, 1<sup>st</sup> Dept 1991]; see also *Sheffield v Pucci*, 63 Misc 3d 1216[A], 2019 NY Slip Op 50554[U], \* 5 [Sup Ct, NY County 2019] [“the Multiple Dwelling Law does not provide for recovery of back rent voluntarily paid”]; *Ovalles v Mayer Garage Corp.*, 8 Misc 3d 137[A], 2005 NY Slip Op 51261[U], \* 1 [App Term, 1<sup>st</sup> Dept 2005] [“To the extent that Multiple Dwelling Law § 302 is applicable, it may not be used as a sword to recoup rents already paid”]).

Accordingly, the third cause of action must be dismissed.

#### **Unjust Enrichment (Fourth Cause of Action)**

In their fourth cause of action, plaintiffs allege that:

“By reason of their collection of rent from Plaintiffs for Plaintiffs’ residential use of units in the Building, that lacks a certificate of occupancy, Defendants have enriched themselves at Plaintiffs’ expense, and it would be inequitable to permit Defendants to retain the benefits that they have received at the expense of Plaintiffs. By reason of the foregoing, Plaintiffs are entitled to recover from Defendants, jointly and severally, all amounts paid to Landlord as rent from no less than six years before the commencement of the Ejectment Action, in an amount to be determined at trial”

(complaint, ¶¶ 92-93).

However, an unjust enrichment claim against defendants is not viable because the Lease governs the subject matter of the claim. “[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter” (*Cox v*

*NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter”]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1<sup>st</sup> Dept 2004] [“A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter”]). Thus, unjust enrichment is available only ““*in the absence of an actual agreement*”” (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012] [emphasis in original; citation omitted]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005] [unjust enrichment “is an obligation the law creates in the absence of any agreement”]).

As plaintiffs acknowledge, they entered into possession of the Subject Premises pursuant to the Lease and made rent payments for their use and occupancy of the Subject Premises pursuant to the Lease. In addition, plaintiffs assert a separate cause of action for breach of the Lease, in which they allege that “Landlord has breached its obligations under the lease by, among other things, unlawfully collecting rent and use and occupancy” (complaint, ¶ 114), and thus they seek the exact same damages in the unjust enrichment claim.

Accordingly, plaintiff’s unjust enrichment claim against defendants is duplicative of its breach of lease claim, as both claims cover the same subject matter and seek the same damages (*see e.g. 850 Third Ave. Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498, 499 [1<sup>st</sup> Dept 2022] [the claim for unjust enrichment “should have also been dismissed, as (it) cover(s) the same subject matter as the express contract (a lease) between the parties”] [citation, quotation marks and alteration omitted]; *International Dev. Inst., Inc. v Westchester Plaza, LLC*, 194 AD3d 411, 413 [1<sup>st</sup> Dept 2021] [finding that “the unjust enrichment claims must be dismissed as

duplicative of the contract claims (for breach of lease)”, as plaintiff does not “seek any specific damages in connection with the unjust enrichment claim, distinct from the contract claim”]; *see also Nezry v Haven Ave. Owner LLC*, 28 Misc 3d 1226 [A], 2010 NY Slip Op 51506[U], \* 10 [Sup Ct, NY County 2010] [“Where a written contract, such as plaintiffs’ leases, governs the dispute, quasi contract claims such as unjust enrichment are barred.”]).

### **Harassment (Fifth Cause of Action)**

In their fifth cause of action, plaintiffs allege that:

“Defendants have engaged in a course of conduct including intentional interruption or discontinuance or willful failure to restore services customarily provided and/or required by the written lease(s) between the parties as extended by operation of law. This course of conduct includes:

- a. Defendants’ refusal to repair essential Building systems and common areas, including elevator service, heating/cooling systems, security systems, and Plaintiffs’ units’ windows;
- b. Defendants’ intentional causation of leaks through the removal of bathroom fixtures in his “pied-a-terre”, located directly above Plaintiffs’ units, causing significant flooding and water damage to Nator’s unit;
- c. Defendants’ failure to take any steps, or install any materials, to protect Plaintiffs’ units when undertaking renovations to the Building and to Milul’s unit, resulting in excessive noise, dust, noxious odors and chemicals, and water penetration into Plaintiffs’ units;
- d. Defendants’ actual or constructive eviction of Nator and Mickle by changing the locks to several of the Building’s doors and the freight elevator and withholding the keys from Plaintiffs;
- e. Defendants’ use of threats and intimidation against Plaintiffs, including illegal trespasses, and his axing down a security door, installed to enclose a nonpublic corridor shared by Units 4N and 4S;
- f. Defendants’ destruction of, or failure to preserve, critical Window Period surveillance footage from security cameras at the Building that would have been dispositive of both Milul’s and Mickle’s uses of their respective units;

- g. Defendants' intentional failure to provide Plaintiffs, despite their long term residency in their respective units, with functioning buzzer/intercom systems, properly labeled mailboxes, or to list Nazor or Mickle in a directory of the Building's occupants; and
- h. Defendants' tampering with and/or destruction of, the electrical meter serving Plaintiffs' units, and that is located in the commercial space on the Building's ground floor, and to which Plaintiffs do not have access, and Defendants' failure to repair or replace the same, resulting in inaccurate and inflated electricity charges for Plaintiffs' respective units.

The course of conduct of Landlord and Milul has interfered with and disturbed the comfort, repose, peace, and quiet of Plaintiffs in Plaintiffs' use and occupancy of the Premises. In engaging in the aforementioned course of conduct, Landlord and Milul intended to cause Plaintiffs to vacate their respective units in the Building and to surrender their rights under the written lease, as extended by operation of law"

(complaint, ¶¶ 96-99).

A claim for harassment (RPL § 235-d) is subject to a one-year statute of limitation applicable to intentional torts (CPLR 215 [3]; *Bruce v College Props.*, 10 AD3d 538, 538 [1<sup>st</sup> Dept 2004]; *Havell v Islam*, 292 AD2d 210, 210 [1<sup>st</sup> Dept 2002]; *317 W. 89th St. LLC v Engstrom*, 36 Misc 3d 1242[A], 2012 NY Slip Op 51803[U], \* 4 [Sup Ct, NY County 2012]).

As plaintiffs admit, the alleged conduct occurred well before July 2018 – one year before the commencement of this action. For instance, Nazor admitted at deposition that the last time she was without elevator service was in 2008 (Nazor dep [NYSCEF Doc No. 211] at 203-204). Nazor further admitted that the last time she was without hot water service was “a long time” ago (Nazor dep [NYSCEF Doc No. 212] at 223), and that the last leak the Owner had notice of occurred in January 2015, and that she did not notify the Owner of any subsequent leaks (*id.* at 223-228). Nazor further admitted that the alleged “threats and intimidation against Plaintiffs, including illegal trespasses, and his axing down a security door” occurred almost 20 years ago (Nazor dep [NYSCEF Doc No. 214] at 119). Finally, Nazor admitted that provision and restoration of services

have always been plaintiffs' responsibility (Nazor dep [NYSCEF Doc No. 213] at 244 ["(the landlord)'s never been responsible for hot water or heat or anything."]).

In addition, pursuant to the Lease, plaintiffs, not defendants, are responsible for installation and maintenance of service fixtures:

"The Tenant agrees to take the demised premises 'as is' and agrees to install and maintain all plumbing, heating and electrical fixtures"

(see Lease Rider, ¶ 43)

The Lease also requires plaintiffs to make all necessary repairs in the subject premises regardless of fault:

"Tenant shall, throughout the term of this lease, take good care of the demised premises ... and at Tenant's sole cost and expense promptly make all repairs thereto and to the building, whether structural or non-structural in nature, caused by or resulting from the carelessness, omission, neglect or improper conduct of Tenant ... and whether or not arising from such Tenant conduct or omission"

(Lease, ¶ 4).

Plaintiffs also admit in the complaint that their claims of harassment were previously raised at trial before the Office of Administrative Trials & Hearings ("OATH") in 2015, well before the expiration of the statute of limitations:

"During the hearing, Plaintiffs presented unrefuted evidence of Defendants' serious *prior misconduct*, including:

- a. Defendants' destruction of, or failure to preserve, critical window period surveillance footage from security cameras at the Building that would have been dispositive of both Milul's and Mickle's uses of their respective units;
- b. Defendants' attempt to axe down a security door, installed to enclose a nonpublic corridor shared by Units 4N and 4S; and
- c. Defendants' constructive or actual eviction of Plaintiffs by changing the locks to several of the Building's doors and the freight elevator.

Plaintiffs further established that, while before OATH, Defendants had continued to destroy evidence and suppress relevant testimony, including:

- a. Defendants' attempted removal of Unit 5N's residential kitchen and bathroom fixtures on the night before the January 15, 2015 inspection directed by OATH, which removal caused a flood into Nazor's loft"

(complaint, ¶¶ 32-33 [emphasis added]).

Accordingly, plaintiffs' cause of action for harassment is barred by the one-year statute of limitations.

In opposition to the motion, plaintiffs contend that their harassment claim falls with the "continuing wrong" exception to the statute of limitations. This court disagrees. While continuing wrongs may toll the statute of limitations, the alleged acts must be, by definition, "continuous." The Merriam-Webster online dictionary defines "continuous" as "marked by uninterrupted extension in space, time, or sequence" (*see also Leonhard v U.S.*, 633 F2d 599, 613 [2d Cir 1980] [the continuing wrong exception applies "if the [tort] consisted of an unbroken chain of wrongful acts"]; *Wright v New York City Bd. of Educ.*, 2013 NY Slip Op 32032[U], \* 5 [Sup Ct, NY County 2013] ["when the act is not continuous it does not constitute a continuing wrong."]).

Plaintiffs' reliance on an alleged water leak occurring in March 2022 (*see Nazor dep at 224* ["The last one actually was just [the day before] Mr. Milul's testimony."]), seven years after the last leak in 2015, is insufficient to demonstrate an uninterrupted chain of events, even if this conduct were to constitute harassment. Moreover, Nazor admits that the Owner had no notice of this leak (*Nazor dep, at 228* ["Just like the other day there was a leak, I said forget about it."]), and that the leak really didn't impact her (*id. at 224- 225* ["It was a small leak, so it wasn't a big deal."]).

Accordingly, the fifth cause of action for harassment is dismissed.

### **Breach of the Warranty of Habitability (Sixth Cause of Action)**

In their sixth cause of action for breach of the warranty of habitability, plaintiffs allege that:

“Plaintiffs have been subjected to conditions in the Premises that are dangerous, hazardous and detrimental to their life, health and safety, including:

- a. Defective windows;
- b. Defective heating/cooling systems;
- c. Pervasive and systematic leaks and flooding caused by Landlord’s failure to repair and maintain the Building’s drainage and sewer systems;
- d. Failure to provide hot water;
- e. Disruption of basic services such as mail facilities and buzzers/intercoms;
- f. Defendants’ intentional destruction of a security door, installed to enclose a nonpublic corridor shared by Units 4N and 4S;
- g. Defendants’ failure to achieve compliance with the applicable standards of safety and fire protection required for multiple dwellings, including failure to install and maintain proper fire and carbon monoxide detection equipment;
- h. Defendants’ failure, upon information and belief, to remove hazardous levels of asbestos and lead paint from the Building; and
- i. Defendants’ failure to take any steps, or install any materials, to protect Plaintiffs’ units when undertaking renovations to the Building and to Milul’s unit, resulting in excessive noise, dust, noxious odors and chemicals, and water permeating Plaintiffs’ units.

By reason of the foregoing, Defendants (who are both ‘owners’ under the RPL and other applicable law) have breached the warranty of habitability of Plaintiffs’ respective units in violation of RPL §235(b)”

(complaint, ¶¶ 102-103).

However, this cause of action must be dismissed because the statutory warranty of habitability is inapplicable to the Building as it is a commercial premises, and thus far, plaintiffs

have been unsuccessful in their attempts to reclassify the Building as residential (*see* RPL § 235-b (1) [“In every written or oral lease or rental agreement for residential premises”]; *iPayment, Inc. v Silverman*, 192 AD3d 586, 587 [1<sup>st</sup> Dept 2021] [“a commercial tenant cannot avail itself of the statutory warranty of habitability.”]; *Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361, 364 [1<sup>st</sup> Dept 2006] [“plaintiff’s cause of action for breach of warranty of habitability must be dismissed since such a claim applies only to residential lease spaces.”]; *432 Park S. Realty Co. LLC v Gotham Real Estate Dev. LLC*, NYLJ, Mar. 24, 2021 at p 17, col 2 [Sup Ct, NY County 2021] [“there is no warranty of habitability in commercial leases.”]).

#### **Accounting (Seventh Cause of Action)**

In their seventh cause of action for an accounting, plaintiffs allege that:

“Under the written lease for their respective units, Plaintiffs deposited with Landlord money as security for the faithful performance and observance by Plaintiffs of the terms, provisions and conditions of their lease.

By Court Order in the Ejectment Action, Plaintiffs have paid to Landlord for the use and occupancy of their respective units, without prejudice.

Landlord and Milul owe Plaintiffs a fiduciary duty with respect to the funds entrusted to it by Plaintiffs which require Defendants to act in good faith and with that degree of care and skill which an ordinary prudent person in a like position would use under similar circumstances.

Defendants have not acted in accordance with their fiduciary duties and have wrongfully, intentionally, negligently, unlawfully and fraudulently failed to properly account for the funds entrusted to them by Plaintiffs. ...

By reason of the foregoing, Plaintiffs demand Defendants be required to provide an accounting for all funds entrusted to them, whether as security or as Court-Ordered use and occupancy payments, and, to the extent that any security deposit has been commingled, Defendants be directed to immediately return those trust fund”

(complaint, ¶¶ 105-108, 110).

Generally, “[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1<sup>st</sup> Dept 1997], quoting *Palazzo v Palazzo*, 121 AD2d 261, 265 [2d Dept 1986]; see e.g. *Royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 [1<sup>st</sup> Dept 2013] [“Plaintiff’s claim for an accounting cannot be maintained in the absence of a fiduciary relationship between plaintiff and defendants.”]).

Plaintiffs first seek an accounting with respect to the court-ordered use and occupancy payments that the court directed them to pay, pursuant to RPL § 220, in the Ejectment Action. Here, the court granted use and occupancy pendente lite as reasonable compensation for plaintiffs’ continued use and occupation of the Subject Premises, to which their tenancy was terminated (*see 862 Second Ave. v 2 Dag Hammar skjold Plaza Condominium & Ali Baba’s Terrace, Inc.*, 2018 NY Slip Op 31339[U], \* 2 [Sup Ct, NY County 2018], citing *MMB Assocs. v Dayan*, 169 AD2d 422, 422 [1<sup>st</sup> Dept 1991]) [“An award of use and occupancy pendente lite accommodates the parties’ competing interests by preserving the status quo until final resolution”]).

However, plaintiffs’ fail to demonstrate any basis pursuant to which there exists a fiduciary duty with respect to these payments, whether by court order or otherwise. Tellingly, the court did not direct defendants to hold these payments in trust for the benefit of plaintiff. Accordingly, there is no basis pursuant to which plaintiffs are entitled to an accounting of the court-ordered use and occupancy payments.

To the extent that plaintiffs are seeking an accounting with respect to their security deposit, General Obligations Law § 7-103 requires a landlord to hold a tenant’s security deposit in trust, and prohibits the landlord from commingling those security funds with the landlord’s other assets,

or otherwise treating those funds as its own (*see Glass v Janbach Props., Inc.*, 73 AD2d 106, 108 [2d Dept 1980] [“It is beyond cavil that a landlord holding a security deposit under a lease covering the rental of real property does so as a trustee. Such deposit remains the property of the tenant, and may not be mingled with the landlord's funds.”] [internal citation omitted]); *accord Audthan LLC v Nick & Duke LLC*, 60 Misc 3d 1229[A], 2018 NY Slip Op 51262[U], \* 9 [Sup Ct, NY County 2018]). Thus, a landlord has a “fiduciary duty not to commingle the money” (*Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 [1<sup>st</sup> Dept 2009]).

However, plaintiffs have failed to present any evidence that defendants have co-mingled their personal funds with plaintiffs’ security deposit or treated the security deposit as their own. Accordingly, plaintiffs are not entitled to an accounting on this basis either, and the seventh cause of action must be dismissed.

#### **Breach of the Lease (Eighth Cause of Action)**

In their eighth cause of action for breach of the Lease, plaintiffs allege that:

“Landlord has breached its obligations under the lease by, among other things, unlawfully collecting rent and use and occupancy, interfering with Plaintiffs’ quiet enjoyment of their units, failing to provide freight elevator service, or to furnish heat, hot water and other services, failing to comply with applicable safety and fire standards applicable to multiple dwellings, and failing to repair the pervasive and systemic leaks causing damage to Plaintiffs’ units”

(complaint, ¶ 114).

“ “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms”” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, “Robobank Intl.,” NY Branch*, 25 NY3d 485, 493 [2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see also Ellington v EMI Music*,

*Inc.*, 24 NY3d 239, 244 [2014]; *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Here, the plain language of the Lease bars plaintiffs' claims. First, pursuant to the express terms of the Lease, it is clear that plaintiffs agreed to pay rent in exchange for their use and occupancy of the Subject Premises: "Tenant shall pay the rent as above and as hereinafter provided" (Lease, ¶ 1).

Second, the Lease expressly states that plaintiffs are responsible for installation and maintenance of all service fixtures (*see* Lease Rider, ¶ 43 ["The Tenant agrees to take the demised premises 'as is' and agrees to install and maintain all plumbing, heating, and electrical fixtures."]).

Further, the Lease expressly requires that plaintiffs are responsible for all repairs in the demised premises, regardless of fault (Lease, ¶ 4 ["Tenant shall, throughout the term of this lease, take good care of the demised premises including the bathrooms and lavatory facilities ... and the windows and window frames and, the fixtures and appurtenances therein and at Tenant's sole cost and expense promptly make all repairs thereto and to the building ... caused by or resulting from the carelessness, omission, neglect or improper conduct of Tenant ... and whether or not arising from such Tenant conduct or omission."]).

Finally, contrary to plaintiffs' allegations, the Lease does not require that the Owner or the Building "comply with applicable safety and fire standards applicable to multiple dwellings" (complaint, ¶ 114) because the Building has not been found to be a multiple dwelling (*see* LBO No. 4668).

Plaintiffs cannot sustain a claim for breach of contract based on the Owner's failure to make repairs that are plaintiffs' responsibility, or otherwise not required by the Lease. To the extent that plaintiffs claim a breach of lease for failure to provide freight elevator service, Nazor

admitted that the last time she was without elevator service was in 2008, over 11 years prior to the commencement of this action (*see* Nazor dep at 203-204 [“Q: Do you recall the last time you did not have elevator service in the building? A: I do. Q: When was that? A: That was until – let me just – I think that was until 2008.”]). Accordingly, plaintiffs claim for breach of lease is barred by the applicable six-year statute of limitation for breach of contract (*see* CPLR 213 [2]; *Chelsea Piers L.P. v Hudson River Park Trust*, 106 AD3d 410, 412 [1<sup>st</sup> Dept 2013]; *Gross v 420 E. 72nd St. Tenants Corp.*, 21 Misc 3d 629, 634 [Sup Ct, NY County 2008]).

### **Retaliatory Eviction (Ninth Cause of Action)**

In their ninth cause of action for retaliatory eviction, plaintiffs allege that:

“Landlord’s attempted termination of Plaintiffs’ interest in their respective units, and commencement and maintenance of the Ejectment Action, have been in retaliation for Plaintiffs’ protected activities in violation of Real Property Law §223-b”

(complaint, ¶ 118).

A claim for retaliatory eviction is subject to a one-year statute of limitation (CPLR 215 [7] [“The following actions shall be commenced within one year: ... 7. An action by a tenant pursuant to [RPL 223-b (3)].”]). Plaintiffs’ claim for retaliatory eviction here is time-barred. As plaintiffs admit, defendants commenced the Ejectment Action to recover possession of the subject premises in January 2008, eleven years prior to commencement of this action.

In opposition to the motion, plaintiffs contend that this cause of action is not time-barred because it “relates back” to their affirmative defenses in the 2008 Ejectment Action, a completely separate action. The court rejects this argument.

“As codified New York’s Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate

back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are ‘united in interest’ (CPLR 203 [b]; *see also* CPLR 203 [e] [relation back of new claims against same party])” (*Buran v Coupal*, 87 NY2d 173, 177 [1995]). In other words, “the doctrine enables a plaintiff to correct a pleading error--by adding either a new claim or a new party--after the statutory limitations period has expired” (*id.*).

Contrary to plaintiffs’ argument, the doctrine cannot be used to have a complaint relate back to a prior, completely separate, proceeding (*see Davis v Sanseverino*, 145 AD3d 519, 520 [1<sup>st</sup> Dept 2016] [rejecting plaintiff’s attempt to relate back separate action to prior, settled litigation involving same automobile accident: “Plaintiff’s attempt to rely on the relation back doctrine to render this independent action timely is improper, since he is not seeking to amend a pleading in a timely-commenced action.”]; *see also Cataldo v Herrmann*, 154 AD3d 641, 642 [2d Dept 2017] [rejecting plaintiff’s attempt to relate back new action to prior, dismissed action against same defendant]; *Moran v JRM Contr., Inc.*, 145 AD3d 1584, 1585 [4<sup>th</sup> Dept 2016] [because the plaintiff sought to relate back a new claim against a new defendant to a previously dismissed complaint in a separate action, there was no “amended pleading” for the purposes of relating back]).

Accordingly, plaintiffs’ claim for retaliatory eviction is dismissed.

### **Constructive Eviction (Tenth Cause of Action)**

In their tenth cause of action for constructive eviction, plaintiffs allege that:

“Defendants’ intentional, malicious, reckless, and negligent actions and omissions have constituted a partial constructive eviction of Plaintiffs from their respective lofts”

(complaint, ¶ 121).

This cause of action is dismissed as duplicative. It is well settled that a cause of action for constructive eviction is duplicative of, and must be dismissed where, as here, plaintiffs also claim

a breach of warranty of habitability (*Dundy v Hanover River House Inc.*, 2008 NY Slip Op 33227[U], \* 26 [Sup Ct, NY County 2008] [“as to plaintiffs’ constructive eviction claim, the Appellate Division First Department holds that such a claim should be dismissed as duplicative of a claim for breach of the implied warranty of habitability.”], citing *Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1<sup>st</sup> Dept 1996]; see also *Musk v 13-21 E. 22nd St. Residence Corp.*, 2012 NY Slip Op 33021[U] [Sup Ct, NY County 2012]; *Baker v 40 E. 80 Apt. Corp.*, 2012 NY Slip Op 32634 [U] [Sup Ct, NY County 2012]). Moreover, “constructive eviction ‘may only be asserted defensively’” (*Musk*, 2012 NY Slip Op 33021[U], quoting *Elkman*, 233 AD3d at 105; see also *Fuisz v 6 E. 72nd St. Corp.*, 2022 NY Slip Op 30973[U], \* 9 [Sup Ct, NY County 2022]).

Accordingly, the tenth cause of action for constructive eviction is dismissed.

#### **Property Damage (Eleventh Cause of Action)**

In their eleventh cause of action, plaintiffs allege that:

“Defendants’ acts and omissions referred to above have caused damage to Plaintiffs, including, but not limited to, damage to real and personal property”

(complaint, ¶ 124).

Defendants allege that because “the same claims have already been interposed in the Ejectment Action,” plaintiffs’ property damage claim should be litigated in the context of the Ejectment Action (Jason M. Frosch, Esq. aff. [NYSCEF Doc No. 197], ¶ 140). In opposition to the motion, plaintiffs contend that they “accept Defendants’ proposition and agree to withdraw the property damage claim asserted herein without prejudice to an adjudication of such claim on the merits in the Ejectment Action” (opposition memorandum [NYSCEF Doc No. 233], at 40).

Accordingly, the eleventh cause of action is dismissed as moot.

#### **Twelfth Cause of Action (Attorneys’ Fees)**

In their twelfth cause of action for the recovery of attorneys' fees, plaintiffs allege that:

“Plaintiffs took occupancy of their respective units under a written lease that contains an attorneys’ fees provision. By operation of Real Property Law § 234, Plaintiffs are entitled to recover attorneys’ fees incurred in this litigation given Defendants’ many breaches of, and defaults under, the lease”

(complaint, ¶¶ 129-130).

Pursuant to Real Property Law § 234, “attorney’s fees may be awarded, in appropriate circumstances, to a tenant who is a prevailing party in a controversy” (*2118 Grp., LLC v Lior Grp. LLC*, 78 Misc 3d 1212[A], 2023 NY Slip Op 50213[U], \* 4 [Civ Ct, NY County 2023]; *see also 150 W. End Owners Corp. v Chestnut Holdings of NY Inc.*, 49 Misc 3d 1147, 1150 [Civ Ct, Kings County 2015]).

Given that plaintiffs’ cause of action for breach of lease is being dismissed, along with the rest of this action, plaintiffs cannot be said to be the prevailing parties, and thus, this cause of action is dismissed as well.

Accordingly, it is

ORDERED that defendants’ motion for summary judgment is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

  
10/26/2023

DATE



MELISSA A. CRANE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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