

Clarke v Fifth Ave. Dev. Co., LLC

2025 NY Slip Op 33734(U)

September 30, 2025

Supreme Court, New York County

Docket Number: Index No. 158986/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12M

Justice

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IRENE CLARKE, LOUIS CLARKE,
Plaintiff,

INDEX NO. 158986/2020

MOTION DATE N/A

MOTION SEQ. NO. 006

- v -

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

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 151, 152, 153, 154,
155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175,
176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188

were read on this motion to/for

JUDGMENT - SUMMARY

FACTUAL BACKGROUND

Plaintiffs Irene and Louis Clarke entered into a lease with Defendant Fifth Avenue
Development Co., LLC ("FAD") for Apartment 610 at 1160 Fifth Avenue, New York, NY. The
one-year lease commenced June 1, 2020 and was set to expire May 31, 2021, at a monthly rent
of \$4,500. Plaintiffs paid the first month's rent and security deposit, but withheld further rent
beginning in July 2020.

The dispute centers on Defendants' elevator modernization project. Although Defendants
had contracted for the project in November 2019 and obtained permits in February 2020, they
did not disclose these facts to Plaintiffs prior to lease execution. On July 15, 2020, Plaintiffs
were advised that the elevator servicing their sixth-floor unit would be out of service for two
months. On July 30, 2020, Plaintiffs vacated, taking only essentials, and moved in with family
members during the COVID-19 pandemic. Their furniture and belongings remained in the

apartment. The elevator returned to service on October 1, 2020, and Plaintiffs resumed occupancy on October 4, 2020. They remained until March 31, 2021, when they vacated and surrendered possession before the lease's expiration.

The record reflects a number of facts not in dispute: that Plaintiffs signed the lease, tendered the first month's rent and security deposit, received notice of the elevator outage on July 15, 2020, temporarily vacated on July 30, 2020, returned on October 4, 2020, and remained until March 31, 2021. What remains disputed is whether Defendants fraudulently induced the lease, whether Plaintiffs' temporary absence amounted to constructive eviction, whether Defendants breached the warranty of habitability, whether Plaintiffs ratified the lease, and whether *res judicata* applies.

Defendants, in Motion Sequence 006, now seek partial summary judgment for \$40,500 in unpaid rent. Plaintiffs oppose, arguing that the lease was void due to fraud in the inducement, that they were constructively evicted during the elevator outage, that the warranty of habitability was breached, and that *res judicata* bars the counterclaim because a 2020 Housing Court proceeding for rent arrears was dismissed.

LEGAL STANDARD

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party

opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, [1st Dept 1990]).

In the context of lease disputes, summary judgment is appropriate where the landlord demonstrates “the existence of the lease and the guaranty, [...] the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease.” *Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016].

Additionally, “where there is a valid final judgment the doctrine of res judicata, or claim preclusion, bars future litigation between those parties on the same cause of action.” (*Matter of Hodes v Axelrod*, 70 NY2d 364, 372 [1987]). “To establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions.” (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018]).

DISCUSSION

Defendants have satisfied their prima facie burden by producing the written lease, demonstrating that Plaintiffs were given possession, and establishing that Plaintiffs ceased paying rent after July 2020. This evidence, if unrebutted, would support summary judgment under *Thor Gallery*.

The burden shifts to Plaintiffs, who have raised triable issues of fact. First, as to fraud, Plaintiffs contend that Defendants misrepresented the existence of elevator service despite having long planned a modernization project. The Appellate Division, in its Decision and Order dated December 8, 2022, affirmed the denial of Plaintiffs’ own motion for summary judgment in

this case, expressly holding that “the record presents an issue of fact whether defendants had the intent to defraud—a necessary element of a fraud claim”. (NYSCEF Doc No. 141). That unresolved issue prevents summary judgment on Defendants’ counterclaims as well, since the enforceability of the lease remains in question.

Second, constructive eviction is factually disputed. Plaintiffs argue that they were forced to vacate during the elevator outage, while Defendants maintain that Plaintiffs never surrendered possession because their belongings remained and they later returned. The First Department confirmed that triable issues exist as to whether Plaintiffs unreasonably rejected Defendants’ offer of alternative accommodations, and whether Plaintiffs’ conduct constituted an actual surrender. These unresolved issues preclude summary judgment.

Third, Plaintiffs assert breach of the warranty of habitability. Even if a breach occurred, the scope of any rent abatement remains unsettled. The Appellate Division, in its Decision and Order dated December 8, 2022, has already determined that such questions present issues of fact inappropriate for summary judgment. (NYSCEF Doc No. 141)

Fourth, Plaintiffs invoke res judicata based on the dismissal of Defendants’ prior Housing Court proceeding. However, the Civil Court’s July 7, 2021 order (NYSCEF Doc No. 184) dismissed the action solely for nonappearance of the parties, vacating any judgment or warrant. Such a dismissal is not a judgment on the merits and therefore does not satisfy the elements of claim preclusion pursuant to *Matter of Hodes* and *Paramount Pictures*. (70 NY2d 364, 372 [1987]; 31 NY3d 64, 73 [2018]). Plaintiffs’ res judicata defense fails as a matter of law.

Finally, the record reflects a dispute regarding Plaintiffs’ liability for rent after March 2021, when they vacated the apartment prior to lease expiration. Whether Plaintiffs are liable for April and May 2021 rent presents additional factual issues.

In sum, while Defendants have shown nonpayment under the lease, Plaintiffs have raised sufficient factual disputes regarding fraud, constructive eviction, warranty of habitability, and surrender to defeat summary judgment. The Appellate Division's prior decision confirms that these issues must be resolved at trial, and further discovery is warranted.

Accordingly, it is hereby

ORDERED that Defendant Fifth Avenue Development Co., LLC's motion for partial summary judgment is denied.

9/30/2025
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

[Handwritten Signature]
HON. IRENE A. STROTH
J.S.C.