| **Townsend v 77 Bleecker St. Corp.** |
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| 2025 NY Slip Op 34240(U) |
| October 31, 2025 |
| Supreme Court, New York County |
| Docket Number: Index No. 153607/2021 |
| Judge: Lynn R. Kotler |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, *Justice* — PART 08

INDEX NO. 153607/2021
MOTION DATE 07/15/2025
MOTION SEQ. NO. 003

ROBERT EDWARD TOWNSEND, SUSANNE C NAGY,

Plaintiffs,

- v -

77 BLEECKER STREET CORP, JACOB SIROTKIN, CENTURY MANAGEMENT SERVICES, INC,

Defendants.

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 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

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

## INTRODUCTION

This action is brought by pro se plaintiffs R. Edward Townsend, Jr. and Suzanne C. Nagy, owners of apartments 1105 and 1005 (the "apartments") in the co-op located at 77 Bleeker Street in Manhattan (the "building"). Plaintiffs allege that, beginning in 2018, the apartments were damaged by substantial and repeated leaking whenever it would rain, and that the co-op board, defendant 77 Bleeker Street Corp. (the "co-op"), the building's management company, defendant Century Management Services, Inc., and the managing agent, defendant Jacob Sirotkin, failed to properly maintain the building and repair water damage to the apartments. Plaintiffs assert four causes of action for: (1) a permanent injunction requiring all defendants to repair the water damage to the apartments; (2) breach of the warranty of habitability against the co-op; (3) breach of contract against the co-op; and (4) a permanent injunction against all defendants to prevent them from commencing any legal action against plaintiffs, including a non-judicial foreclosure sale, based on plaintiffs' non-payment of maintenance and other charges due the co-op.

Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the complaint and to set this matter down for an inquest on contractual attorneys' fees due the

defendants for costs incurred in defending this action. Plaintiffs oppose the motion. The motion is granted.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to defeat a summary judgment motion (*Justinian Capital SPC v WestLB AG, N.Y. Branch*, 28 NY3d 160, 168 [2016]).

Defendants submit the expert affirmation of Seth P. Roye, the Principal of Seth P. Roye Architect PC ("SPRA"), together with copies of several SPRA reports (the "SPRA Reports") documenting the investigation and testing conducted by SPRA on behalf of the co-op with respect to water infiltration in plaintiffs' apartments. These submissions reflect that Roye conducted an inspection of the apartments in July 2021, during which he observed water damage in the stairway connecting the living area of the duplexed apartments to the atrium erected on plaintiffs' adjoining eleventh-floor terrace, as well as additional signs of damage on a vertical column adjacent to the stairs. A water test conducted in February 2022 employing a horizontal spray bar installed above the flashing at the top of the atrium demonstrated that the atrium's waterproof envelope was fatally deficient, as water infiltrated the atrium's frame and began pooling at the interior base of the atrium within one minute of the test's commencement. A subsequent flood test, conducted in December 2022, on the roof and base flashing of the terrace outside the atrium resulted in no water infiltration to the interior of the atrium, demonstrating that the terrace's roof membrane and base flashing were sound, and thus that the condition of these building elements were not also contributing to the leaking conditions in the subject apartments.

Based on these tests and his own observations, Roye opines that the atrium's waterproof envelope is fatally compromised and is the cause of the leaks within the apartments, and that the condition of the terrace outside the atrium is not contributing to the subject leaks. Roye further opines that structures such as plaintiffs' atrium require routine maintenance, at minimum every five years, to ensure proper functioning of gutters and drainage and to restore sealants as necessary, and that the atrium's deteriorated condition is due, in part, to a lack of such routine maintenance. Indeed, it is undisputed that plaintiffs have not conducted routine maintenance of the atrium, as defendants demonstrate via the submission of plaintiffs' deposition transcripts. Specifically, Townsend testified that, since purchasing the apartments in 2007/2008, plaintiffs have performed maintenance/repairs on the atrium only two or three times, while Nagy testified that plaintiffs have conducted no routine maintenance or repair of the atrium since 2010.

Defendants further submit the identical proprietary leases for each of the apartments (the "Lease"), which define each "Apartment" to include any abutting "terraces, balconies, roof, or portion thereof . . . which are allocated exclusively to the occupant of the Apartment." Pursuant to the Lease, plaintiffs are responsible for maintaining the interior of the apartments, including walls, floors, and ceilings, while the co-op is generally responsible for maintenance of the building's exterior and common elements. The Lease further provides that tenant-shareholders such as plaintiffs, who occupy apartments with private terraces, may not erect or install any structures on their terraces without the co-op's prior written approval "and compliance with the terms of Paragraph 21 hereof," and that any such structures "erected by the Tenant-Shareholder or his predecessor in interest may be removed and restored by the Apartment Corporation at the expense of the Tenant-Shareholder for the purpose of repairs, upkeep or maintenance of the Building." Paragraph 21 of the Lease provides that tenant-shareholders shall not, "without first obtaining the written consent" of the co-op, "make in the Apartment or Building, or on any roof, penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition[.]"

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Thus, "[w]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*112 W. 34th St. Assocs., LLC v*

*112-1400 Trade Props. LLC*, 95 AD3d 529, 531 [1st Dept. 2012] [internal quotation marks omitted]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield*, 98 NY2d at 569). An agreement is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*id.* at 569-70). "A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" (*112 W. 34th St. Assocs., LLC*, 95 AD3d at 531 [internal quotation marks omitted]).

Here, it is undisputed that the atrium, as a structure erected on the terrace appurtenant to the apartments, is an "alteration, enclosure or addition" under the Lease, which serves to extend the interior of the combined apartments to encompass a portion of the terrace. While there is no provision in the Lease expressly assigning responsibility as between plaintiffs and the co-op for the routine maintenance of such an alteration or addition, the reasonable expectations and intent of the parties with respect thereto is discernable from the contract's other relevant and unambiguous terms (*see Cobalt Blue Corp. v 184 W. 10th St. Corp.*, 227 AD2d 50, 53 [1st Dept. 1996] ["A lease is to be interpreted as a whole and construed to carry out the parties' intent, gathered, if possible, from the language of the lease."] [internal quotation marks omitted]).

Although the Lease requires the co-op's prior written approval before an alteration or addition may be erected on a private terrace, there is nothing in the Lease to suggest an implicit agreement by the co-op to assume responsibility for the routine maintenance thereof. To the contrary, the Lease expressly provides that, should the repair or maintenance of the building itself, for which the co-op is indisputably responsible, require the removal and restoration of a private terrace structure, such removal and restoration shall be done "at the expense of the Tenant-Shareholder[.]" Logic dictates that, if the co-op does not bear responsibility for the complete removal and restoration of such a structure, even when necessary to facilitate *its own* maintenance of common building elements, the parties could not reasonably have intended that the co-op bear responsibility for merely routine maintenance for the benefit of plaintiffs alone. Indeed, the atrium is in no way a common building element but instead, as already noted, serves to expand the private interior space of the apartments. Thus, read as a whole, the Lease makes clear the parties' reasonable expectation and intent that plaintiffs bear responsibility for the routine maintenance of the atrium.

In any event, even were the court to determine that the Lease is ambiguous with respect to who bears responsibility for maintenance of the atrium, the extrinsic evidence submitted by the parties, including plaintiffs' deposition testimony and the affirmation of defendant Sirotkin, the co-op's managing agent, all affirm the parties' shared understanding that tenant-shareholders are generally responsible for the routine maintenance and repair of apartment alterations or additions such as the atrium. Indeed, plaintiffs, in their opposition, do not dispute this point or offer any argument to the contrary.

Based on the above submissions, defendants have demonstrated their *prima facie* entitlement to summary judgment dismissing all four causes of action pleaded in the complaint. Plaintiffs' second and third causes of action are for breach of the implied warranty of habitability and breach of the Lease, respectively. The implied warranty of habitability, as codified in Real Property Law § 235-b, "sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 112–13 [1st Dept. 2010]). The statute expressly provides, however, that, "[w]hen any such condition has been caused by the misconduct of the tenant or lessee . . . it shall not constitute a breach of such covenants and warranties" (Real Property Law § 235-b[1]). The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages (*see Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445 [1st Dept. 2016]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept. 2010]). Defendants demonstrate their *prima facie* entitlement to summary judgment dismissing these two claims, as their submissions establish that the co-op performed its statutory and contractual obligations to maintain and repair the building; that the building is free of any leaking conditions and is neither the cause of, nor contributing to, the leaks in plaintiffs' apartments; and that any damage to the subject apartments caused by such leaks are instead the result of plaintiffs' own failure to maintain and repair their private atrium.

The first cause of action for a permanent injunction requiring defendants to repair the alleged leak damage to plaintiffs' apartments is likewise subject to dismissal. "Although it is permissible to plead a cause of action for a permanent injunction, . . . permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted"

(*Weinreb v 37 Apartments Corp.*, 97 AD3d 54, 59 [1st Dept. 2012]). As such, "injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action" (*id.* at 58). Therefore, dismissal of plaintiffs' second and third causes of action, which are the only substantive claims pleaded in the complaint, would necessarily require the dismissal of the first cause of action as well.

Additionally, a cause of action for a permanent injunction requires a plaintiff to demonstrate, *inter alia*, "a violation of a right presently occurring, or threatened and imminent[,]" and that the plaintiff "does not have an adequate remedy at law" (*Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept. 2012] [internal quotation marks omitted]). Here, as already discussed, defendants demonstrate, *prima facie*, that they did not cause or contribute to the leaks in the subject apartments, have no statutory or contractual duty to repair water damage to the apartments resulting therefrom, and thus that they have not violated plaintiffs' rights. Further, plaintiffs have an adequate remedy at law for the alleged leak damage to the apartments, namely monetary damages (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept. 2011]).

Plaintiffs' fourth cause of action, for a permanent injunction to prevent defendants from commencing a non-judicial foreclosure sale based on plaintiffs' non-payment of maintenance and other charges due the co-op, is subject to dismissal for the same reasons just discussed with respect to the first cause of action. Moreover, the fourth cause of action, as well as defendants' corresponding counterclaim against plaintiffs for nonpayment of said maintenance and co-op charges, is moot, as defendants represent in their motion papers that plaintiffs have fully satisfied their arrears and are current on their payments to the co-op.

Plaintiffs, in opposition, submit an affirmation by Townsend and an expert affirmation by Matthew J. Normandeau, a principal at the engineering firm of Simpson Gumpertz and Heger Associates, Inc., P.C. ("SGH"), together with an SGH report prepared under Normandeau's signature. These submissions, however, fail to raise a triable issue of fact.

With respect to plaintiffs' expert evidence, Normandeau expressly states in both his affirmation and report that he performed only a visual inspection of the subject apartments and a review of documents provided to him by plaintiffs, including the SPRA Reports relied upon by defendants. Neither he nor any of his colleagues at SGH performed any testing of their own on

plaintiffs' atrium to determine the cause(s) of the subject leaks and, as such, Normandeau offers no conflicting opinion as to causation to rebut the opinion of defendants' expert. Instead, Normandeau purports to identify methodological flaws in SPRA's testing and, on that basis alone, concludes that "SPRA's reports do not provide evidence to support their allegation that the atrium is the cause of the reported water leakage" and that "[t]he cause(s) of leakage are currently unknown[.]" Upon review, however, Normandeau's discussion of SPRA's testing does not support even these limited conclusions.

The crux of Normandeau's critique with respect to SPRA's March 2022 spray bar testing is that it was not adequately designed to "trace [specific] water leakage paths[.]" Even assuming the truth of this assertion, it is undisputed that SPRA's testing revealed immediate and significant water penetration into the interior frame of the atrium. SPRA's testing thus clearly demonstrated that the atrium's waterproof envelope is compromised regardless of whether, as Normandeau contends, it failed to affirmatively identify "specific water leakage path(s)." As to SPRA's December 2022 flood testing, Normandeau asserts, in conclusory fashion, that the testing should be considered inconclusive because it "[did] not extend to the full height of the base flashing and the tie-in to the atrium sill was not tested[.]" Normandeau does not, however, claim that the testing parameters employed by SPRA deviated from accepted industry standards and practices, nor does he provide any explanation as to why the expanded testing parameters for which he advocates are appropriate or necessary. Moreover, having failed to conduct any testing of his own, Normandeau is conspicuously unable to state that the use of such expanded testing parameters would reveal leaks in the base flashing maintained by the co-op, and any unstated implication that such testing *might* do so is impermissibly speculative (*see Beadell v Eros Mgmt. Reality, LLC*, 229 AD3d 43, 58 [1st Dept. 2024]). Normandeau's affirmation and report are thus insufficient to rebut defendants' expert evidence and do not, therefore, raise a triable issue of fact as to the source of the subject leaks.

Townsend's affirmation is likewise insufficient to raise a triable issue of fact. Townsend does not dispute that the atrium leaks but speculates that the leaks may result from various instances in which the atrium was allegedly damaged by defendants. In particular, these include: the co-op's allegedly faulty repair of the atrium after it was damaged by the co-op's workers during a 2010 fire; and the co-op's faulty temporary repair of one of the atrium's glass panels

after it was broken by a building contractor in June 2019, which allegedly caused "a flood" in October 2020 when the temporary glass panel repair failed. Neither of these alternative theories of causation are availing.

Townsend's assertion that the present condition of the atrium is attributable to its inadequate repair by the co-op over a decade ago, following the 2010 fire, is conclusory and entirely speculative (*see Justinian Capital SPC*, 28 NY3d at 168). Further, it is belied by documentary evidence demonstrating that any leak conditions that existed following the fire did not persist to the present. Specifically, defendants submit a letter from Townsend to the co-op, dated December 2015, concerning plaintiffs' claims of leaks and water damage following the fire, in which Townsend expressly states that "[t]here are no leaks or remaining issues with respect to the prior water damages" and that "[t]he above terms [regarding Townsend's payment of withheld maintenance charges and the co-op's issuance of credits and waiver of late fees] shall settle all claims with respect to the leaks/floods[.]" Moreover, given that Townsend also avers in his affirmation that plaintiffs discovered leaks almost immediately upon their return to the apartments in May 2011, and that plaintiffs did not commence the present action until April 2021, any claims regarding the co-op's allegedly faulty repair of the atrium following the fire is plainly time-barred (*see St. Hillaire v Torres*, 229 AD3d 476, 477 [2nd Dept. 2024] [six-year statute of limitations for breach of contract claim]; *Roman v Emigrant Sav. Bank-Brooklyn/Queens*, 111 AD3d 692, 694 [2nd Dept. 2013] [six-year statute of limitations for breach of implied warranty of habitability claim]).

As for the glass panel broken in June 2019, Townsend admits in his affirmation that, following the failure of the temporary repair and the purported "flood" that resulted therefrom in October 2020, the co-op promptly fixed the subject glass panel and "repaired all damage" in the apartments, such that "there were no significant problems during the first half of 2021." Given this admission, and absent any evidence, expert or otherwise, demonstrating a repeat failure of the glass panel repair or any causal connection between the atrium's continued leaks and the repaired glass panel, Townsend's suggestion that "the fix [of the glass panel] ha[s]n't worked," and that defendants are therefore liable for the alleged water damage in the apartments, is conclusory and speculative, and thus insufficient to create a triable issue of fact (*see Justinian Capital SPC*, 28 NY3d at 168).

The court has considered plaintiffs' remaining contentions, even if not specifically addressed herein, and finds them unavailing.

Pursuant to paragraph 28 of the Lease, the co-op is contractually entitled to recover from plaintiffs the reasonable attorneys' fees and costs incurred in defending this action. The co-op may file supplemental papers, within sixty (60) days of the date of this order, to establish the amount of its reasonable attorneys' fees and costs.

Accordingly, it is

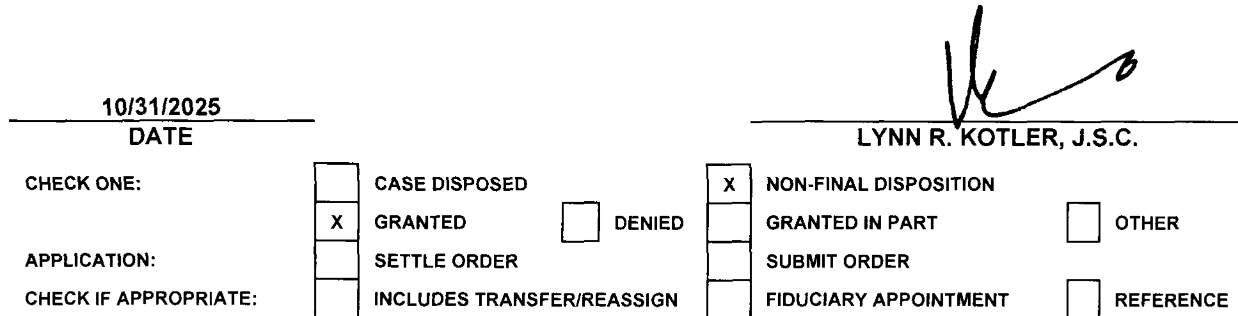
ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed in its entirety; and it is further

ORDERED that defendants shall file supplemental papers, within sixty (60) days of the date of this order, to establish the amount of their reasonable attorneys' fees and costs incurred in the defense of this action, and shall provide notice to the court of any such filing by emailing Aryeh Roskies, Esq. at aroskies@nycourts.gov; and it is further

ORDERED that plaintiffs shall file their opposition, if any, contesting the reasonableness of the attorneys' fees claimed by defendants, within thirty (30) days after the filing of defendants' supplemental papers; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



10/31/2025
DATE

LYNN R. KOTLER, J.S.C.

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| 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 |