

Tribeca Hummus Inc. v NJ Funding, Inc.

2025 NY Slip Op 34338(U)

November 7, 2025

Supreme Court, New York County

Docket Number: Index No. 153935/2024

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X

TRIBECA HUMMUS INC. D/B/A NISH NUSH

Plaintiff,

- v -

NJ FUNDING, INC.,

Defendant.

-----X

INDEX NO. 153935/2024

MOTION DATE 08/08/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 88, 89, 90, 91, 92

were read on this motion to/for DISMISS

Upon the foregoing documents, and after a final submission date of September 2, 2025, Defendant NJ Funding, Inc.'s ("Defendant") motion to dismiss Plaintiff Tribeca Hummus Inc. d/b/a Nish Nush's ("Plaintiff") Complaint pursuant to the doctrine of collateral estoppel and this Court's Decision and Order in a related action captioned NJ Funding, Inc. v Eyal Hen, Index No. 450963/2025, (the "Guarantor Action") and for summary judgment is granted in part and denied in part.

As a preliminary matter, the Court is cognizant of and frowns upon Plaintiff's very belated opposition. However, in the interest of justice and resolving cases on the merits, the Court considers the opposition to the motion.

Defendant's motion to dismiss pursuant to collateral estoppel is denied. Collateral estoppel applies when "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (Conason v Megan Holding, LLC, 25 NY3d [2015] [internal quotation

marks and citation omitted], *rearg denied* 25 NY3d 1193 [2015]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1985]). “The fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interests in consistent and accurate results.” (*Buechel v Bain*, 97 NY2d 295, 304 [2001]). The litigant seeking the benefit of collateral estoppel must show that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party, while the party to be precluded bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.*).

Collateral estoppel does not apply here because the issues in this proceeding are distinct from the issues in the Guarantor proceeding. The Guarantor proceeding dealt with the discrete issue of the amount of rent owed pursuant to a guaranty. In this action there are numerous distinct causes of action including breach of contract (which is the remedy afforded to Plaintiff under the parties’ lease, as opposed to the remedy of withholding rent), negligence, breach of the covenant of quiet enjoyment, constructive eviction, declaratory judgment, and a cause of action alleging the premises were unfit for its intended purpose. These issues are wholly separate from the issue of the amount of rent owed under a guaranty. Because the issues between this proceeding and the Guarantor proceeding are not identical, collateral estoppel does not apply.

Defendant’s motion for summary judgment is granted in part and is otherwise denied, without prejudice, with leave to renew upon the close of discovery. “Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v*

New York City Health and Hosps. Corp., 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The breach of the covenant of quiet enjoyment cause of action is dismissed because Plaintiff remained in possession without paying rent, which is a condition precedent to its right to insist upon the covenant (*558 Seventh Ave. Corp. v E&B Barbers Inc.*, 237 AD3d 635 [1st Dept 2025]). Likewise, Plaintiff's constructive eviction claim fails because it remained in possession of the premises (*see Clarke v Fifth Ave. Dev. Co., LLC*, 211 AD3d 460, 461 [1st Dept 2022]). The undisputed evidence that Plaintiff remained in possession and continued operations also requires dismissal of the fifth cause of action alleging the premises were unfit for the intended purpose. The negligence claim is duplicative of the breach of contract claim where Plaintiff fails to assert any duty distinct from those outlined in the parties' lease (*see 99 Wall Dev. Inc. v Consigli & Associates, LLC*, 238 AD3d 502, 503 [1st Dept 2025]).

However, issues of fact remain with respect to the breach of contract and declaratory judgment causes of action. Plaintiff's obligation to pay rent was not excused if Defendant breached the lease, which was the reason for this Court's Decision and Order in the Guarantor action (*see also Universal Communications Network, Inc. v 229 West 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011]). Pursuant to the lease, the sole remedy for Plaintiff if it believed Defendant breached the lease was to sue Defendant for breach of lease, as it has done here. The deposition testimony proffered in opposition from ongoing federal litigation between Plaintiff and its insurance company (NYSCEF Docs. 83-85) raise issues of fact regarding the source of the gas interruption, who was responsible for remedying it, and whether there was a contractual obligation

gas, either express or implied, which must be resolved through further discovery here. As it appears depositions have not taken place in this case and the instant motion was filed prior to the compliance conference taking place, the motion for summary judgment dismissing the breach of contract and declaratory judgment causes of action is denied, without prejudice, with leave to renew upon further discovery and a more fully developed record.

Accordingly, it is hereby,

ORDERED that Defendant’s motion is granted solely to the extent that Plaintiff’s causes of action for negligence, constructive eviction, breach of the covenant of quiet enjoyment, and claim that the premises were unfit for their intended purpose are dismissed, and the remainder of Defendant’s motion is denied; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed compliance conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov, but in no event shall it be submitted any later than November 25, 2025. If the parties have a serious discovery dispute requiring Court intervention, they shall notify the Court promptly to be scheduled for an in-person or virtual conference; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

11/7/2025
DATE

Mary V Rosado JDC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE