PS 90 Bd. of Mgrs. v L&M Dev. Partners
2026 NY Slip Op 30504(U)
February 10, 2026
Supreme Court, New York County
Docket Number: Index No. 654603/2017
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** 03M

Justice

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PS 90 BOARD OF MANAGERS, SUSAN DONEGAN, JAMES DONEGAN,

Plaintiffs,

- v -

L&M DEVELOPMENT PARTNERS, WEST 147TH ASSOCIATES, LLC, WEST 147TH MANAGERS, LLC, L&M BUILDERS GROUP, LLC, L&M WEST 147TH DEVELOPERS, LLC, JOHN AND JANE DOES 1-10, ABC CORPORATIONS 1-10,

Defendants.

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INDEX NO. 654603/2017

DECISION AFTER NON-JURY TRIAL

This action arises out of a breach of contractual obligations relating to the construction and condition of a residential condominium unit purchased by Plaintiffs Susan and James Donegan ("Plaintiffs" or "Donegans"). By Decision and Order dated March 20, 2025, the Court granted summary judgment in Plaintiffs' favor on the issue of liability and directed that the matter proceed to trial solely on the issue of damages (NYSCEF 422).

Shortly before trial, co-plaintiff PS 90 Board of Managers discontinued its claims against all defendants with prejudice, and all remaining claims, cross-claims, and third-party actions were discontinued with prejudice (NYSCEF 482, 503). What remained for trial was the issue of damages on the Donegans' breach-of-contract claims against West 147th Associates LLC ("Defendant" or "Sponsor"), the condominium sponsor that developed the building and offered the residential units for sale pursuant to an Offering Plan.

A bench trial on damages was conducted on September 29 and October 1, 2025. At trial, Plaintiffs argued that their damages included lost rent, rent abatements that Plaintiffs provided to

DECISION AFTER NON-JURY TRIAL

their tenants, condominium assessments they paid to fund building repairs, homeowners association fees, and diminution in the value of the Unit. Plaintiffs' proof consisted primarily of the testimony of Plaintiff Susan Donegan and real estate broker Lucie Holt, together with documentary evidence including rental leases. Defendant elected not to present competing testimony.

Based on the evidence presented at trial, including the testimony of Plaintiff Susan Donegan and real estate broker Lucie Holt, the documentary evidence admitted at trial, and the parties' post-trial submissions, the Court finds that Plaintiffs have established entitlement to $96,200.00 in damages for lost rental income and rent abatements arising from Defendant's breach of contract. Plaintiffs' remaining claims for damages are unavailing.

The Court's findings of fact and conclusions of law are set forth below.

FINDINGS OF FACT

1. Plaintiffs purchased Penthouse Unit H at 220 West 148th Street, New York, New York ("Unit") for $565,000 on November 2, 2011 and closed on January 26, 2012 (NYSCEF 491-92, tr 23:21-24:4; 24:20-25; 56:3-6; 82:15-83:1).
2. The purchase of the Unit was governed by an Offering Plan (DX-3 [Offering Plan]).
3. The Offering Plan expressly contemplated that some purchasers would buy their units for investment purposes, providing: "Sponsor [Defendant] reserves the further right to sell Market Units to Purchasers who intend to be owner-occupants as well as to Purchasers for investment or resale. Purchasers who acquire Market Units for investment or resale may, in turn, rent out their Units, and accordingly, some Market Units may not be used for personal occupancy of the owner" (Offering Plan, Special Risk [9][b]).

4. The Offering Plan also contained the Bylaws for the building's Board of Managers. The Bylaws set forth the approval process for owners seeking to lease their units. Specifically, Section 9.2(b) provides:

> Each Residential Unit Owner shall have the right to lease or license use of said Owner's Residential Unit … only in accordance with the following provisions:
>
> > (i) Any Residential Unit Owner who receives a bona fide offer for a lease or license of said Owner's Residential Unit … which said Owner intends to accept, shall give notice to the Board of Managers of such offer and such intention, together with the name and address of the proposed lessee, licensee and other occupant(s), the terms of the proposed lease, references, and such other information as the Board may reasonably require, including without limitation, identification, a credit report and other financial information respecting the proposed tenant, licensee and other occupant(s)…
> >
> > (ii) Leases or licenses of Residential Units must contain terms of at least twelve (12) consecutive months but may not exceed any maximum term the Board may impose.

5. Plaintiffs did not occupy the Unit themselves during the period in which they owned it. Plaintiffs instead rented the Unit to third-party tenants, consistent with the Bylaws requirements (tr 25:21-23; 55:25-56:2).

6. Plaintiffs' real estate broker Lucie Holt followed the approval process set forth in Article 9 of the Bylaws when she rented the Unit on Plaintiffs' behalf (tr 131:20-132:14).

7. Section 4 of Article O of the Offering Plan, addressing repair of defects, includes the following provision disclaiming liability for consequential damages:

> Nothing contained in this Section 4 or elsewhere in the Plan shall be construed to render Sponsor liable for consequential damages, whether based on negligence, breach of contract, warranty or otherwise (except as Sponsor may be liable for by law) (Offering Plan, §4(i)).[1]

[1] Section 4(i) also lists a number of maintenance items that need not be replaced, such as chipped stone, formica, and the like. It later provides (without explanation) that: THE ITEMS AND CONDITIONS DESCRIBED ABOVE ARE NOT DEFECTS AND MAY BE FOUND IN ANY

Early Tenancy and Initial Water Intrusion

8. Starting on April 1, 2012 through March 31, 2013, the Unit was occupied by tenants Zennah Jones and June Barry at a monthly rent of $2,300 (tr 26:2-9; 62:3-8).

9. In September 2012, water intrusion forced Jones and Barry to move their belongings from the bedroom to the living room but did not result in rent abatements (tr 30:22-31:3).

10. The lease was renewed for two years, through March 2015, at a monthly rent of $2,400 (tr 26:8-15).

11. At some point, Jones and Barry separated, and Plaintiffs entered into a written lease with Jones for the period of May 1, 2014 through April 30, 2015, at a monthly rent of $2,400 (PX-5 [Lease of a Condominium Unit]; tr 26:10-14; 108:2-8; 28:20-29:2).

12. In May 2014, the Unit experienced water intrusion that materially impaired the habitability of the Unit (tr 32:9-23).

13. As a result of the water leak and related damage, Plaintiffs permitted Jones to break the lease and waived her rent for six weeks, from August 1, 2014 until she vacated the Unit in mid-September 2014 (*id.*; 71:16-72:9).

14. The Unit was effectively uninhabitable and remained vacant from mid-September 2014 through October 31, 2015 (tr 32:24-33:8). During this period, Plaintiffs were unable to

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NEWLY CONSTRUCTED OR NEWLY RENOVATED BUILDING …. NOTHING CONTAINED IN THIS SECTION MAY BE CONSTRUED SO AS TO RENDER SPONSOR LIABLE FOR CONSEQUENTIAL DAMAGES WHETHER BASED ON NEGLIGENCE, BREACH OF CONTRACT, BREACH OF WARRANTY OR OTHERWISE, IT BEING INTENDED THAT SPONSOR'S SOLE ROLE UNDER THIS SECTION WILL BE TO REPAIR OR REPLACE THE ITEM, SUBJECT TO THE TERMS AND CONDITIONS ABOVE" (*id.*). The scope of this capitalized language is unclear, given that the entirety of Section 4 addresses "Repair of Defects." The most reasonable reading is that "the items described above" refers back to the list of minor items set forth earlier in Section 4(i) as to which replacement and repair is not obligatory, rather than modifying the entirety of Section 4.

rent the Unit due to its condition, which included unfinished flooring in the bedroom and holes cut into the ceiling for examination of the walls, the roof, and the skylight (tr 33:9-14).

Carol Julien Tenancy and Abatements

15. Plaintiffs entered into a one-year lease with tenant Carol Julien for the period from November 1, 2015 through October 31, 2016 at a monthly rent of $2,700 (tr 35:2-17; 75:16-23; PX-6 [Standard Form of Condominium Apartment Lease]). Julien's tenancy was also marked by multiple water-intrusion events.

16. In February 2016, the Unit experienced water intrusion that interfered with habitability and forced Julien to move her bed out of the bedroom (tr 35:18-25). Although there is some suggestion that this intrusion may have been related to the bursting of a frozen pipe (tr 76:2-15), the Court concludes based on the preponderance of the evidence that it was proximately caused by the construction defects.

17. Plaintiffs reduced Julien's monthly rent from $2,700 to $1,000 starting in November 2016 (tr 46:1-6).

18. In May 2017, a water leak initially forced Julien to move her belongings from the bedroom to the living room (tr 36:22-37:2). Julien, along with several neighbors, was eventually forced to move into a hotel for one month as a result of the water leak (tr 37:3-8).

19. Plaintiffs provided Julien a rent abatement for the entire month of May 2017 (tr 37:14-38:8). Plaintiffs also entered into another lease with Ms. Julien starting on May 1, 2017 and ending on October 31, 2017 (PX-7 [Standard Form of Condominium Apartment

Lease]). The lease included a rider providing the tenant a "rent reduction of $1,700 per month upon work start and if noise levels require that Tenant works elsewhere" (*id*. at 8).

20. Julien vacated the Unit in September 2017, before the expiration of her lease (tr 77:10-14).

Extended Vacancy (October 2017 - December 2018)

21. From October 2017 through December 2018, the Unit remained vacant and unrentable because of the water intrusion and resulting damage (tr 45:20-25; 115:11-21; 118:14-119:5).

22. The Court credits Susan Donegan's testimony, corroborated by the testimony of real estate broker Lucie Holt, that the Unit was not marketable for rental during this time.

Homeowners Association Fees and Condominium Assessments

23. Plaintiffs paid Homeowners Association fees ranging between $770 and $834 per month (tr 46:10-20).

24. In November 2015, Plaintiffs paid a special condominium assessment of $11,280 relating to roof and building repairs (tr 36:8-14).

25. In October 2018, Plaintiffs paid an additional special assessment of $14,046 (tr 46:21-47:4).

Sale of the Unit and Price Reduction

26. In October 2017, Plaintiffs listed the Unit for sale at approximately $975,000 (tr 47:5-16). The listing price was determined by Holt, Plaintiffs' broker, who testified that the price was based on comparable units in the building and surrounding area (tr 116:13-21).

27. Plaintiffs were unable to secure a buyer at that price due to concerns regarding the Unit's condition and the building's history of water intrusion and stopped marketing the Unit around May or June 2018 (tr 48:12-17; 117:23-119:5).

28. Based on Holt's advice, Plaintiffs relisted the Unit at a lower listing price and ultimately sold it in January 2019 for $880,000 (tr. 57:9-14; 119:10-120:12). This purchase price was $315,000 higher than Plaintiffs' acquisition price in 2011.

29. Holt testified that the price reduction was based on the market value of comparable units in the building and the area (tr 120:3-9). Holt also testified that part of the reduction was to facilitate faster sale of the unit (*id.*).

CONCLUSIONS OF LAW

As noted above, this action proceeded to trial solely on the issue of damages. By Decision and Order dated March 20, 2025, the Court granted summary judgment in Plaintiffs' favor on the issue of liability. That determination constitutes the law of the case and is binding for purposes of trial (*Delgado v City of New York*, 144 AD3d 46, 47 [1st Dept 2016] ["[W]hen an issue is specifically decided on a motion for summary judgment, that determination is the law of the case. As such, the trial court, as well as the parties, are bound by it "absent a showing of subsequent evidence or change of law."] [internal quotation marks and citations omitted]). Accordingly, Defendant's attempts to revisit whether a breach occurred, or whether the construction defects identified by the Court were actionable, are foreclosed.

With respect to damages, "[i]t is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; *Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805 [2014]). "Special, or consequential

damages, which do not so directly flow from the breach, are also recoverable in limited circumstances" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187, 192 [2008] [internal quotation marks and citation omitted]). Such damages are "recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made" (*Am. List Corp. v U.S. News and World Report, Inc.*, 75 NY2d 38, 43 [1989]).

"Lost profits may be either general or consequential damages, depending on whether the non-breaching party bargained for such profits and they are the direct and immediate fruits of the contract" (*Biotronik A.G.*, 22 NY3d at 806] [internal quotation marks omitted]). "Lost profits must also be established with reasonable certainty" (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 405 [1993]). "As in all contract actions, the burden of proving the damages is on plaintiff" (*Manshul Const. Corp. v Dormitory Auth. of New York*, 79 AD2d 383, 387 [1st Dept 1981]).

I. Lost Rent and Rent Abatements

The Court concludes that Plaintiffs met their burden of proof with respect to certain damages attributable to lost rental income and rent abatements. The trial record established by a preponderance of the evidence that recurring water intrusion and related construction defects materially interfered with the habitability of the Unit. Ms. Donegan credibly testified that, as a result of those conditions, Plaintiffs were forced to provide rent abatements to tenants and/or were unable to rent the Unit for extended periods. That testimony was corroborated by contemporaneous leases and the testimony of Plaintiffs' real estate broker.

Defendant's argument that these damages are barred by the Offering Plan's limitation of remedies under Section (4)(i) is unavailing. As noted above, Section (4)(i) disclaims liability for "consequential damages, whether based on negligence, breach of contract, warranty or otherwise

(except as Sponsor may be liable for by law)" (Offering Plan at 91). However, because the Offering Plan "does not specifically preclude recovery for lost profits, nor does it explicitly define lost profits as consequential damages," the Court must "turn to . . . precedent for guiding principles to assist in determining whether, under this agreement, . . . lost profits are general damages" or consequential damages (*Biotronik A.G.*, 22 NY3d at 805).

The Court concludes that the lost rental damages here are general—not consequential—because they flowed directly from the breach of the agreement (*id*. at 808). The Offering Plan expressly contemplated that some purchasers—like Plaintiffs—would rent their units. Because the Offering Plan specifically contemplated rental use, loss of rental income due to construction defects was the natural and probable consequence of the breach (*Id*.) and thus constituted recoverable general damages rather than excluded consequential damages.

Defendant's reliance on *Masiach v 420 W. Invs., LLC*, 103 AD3d 466 [1st Dept 2013] is misplaced. In that case, the First Department enforced a limitation-of-remedies provision that "limit[ed] defendant's obligation under the purchase agreement to making repairs, or alternatively, recompensing for repairs made" (*id*. at 466). The court did not specify the nature or severity of defects that were at issue in that case or whether the offering plan expressly contemplated rental use by owners.[2] Equally unavailing is Defendant's reliance on *BML Properties Ltd. v China Constr. Am., Inc.*, 226 AD3d 582 [1st Dept 2024]. In that case, the plaintiff sought damages based on the predicted success of "collateral business arrangements" (operating a hotel) with all the attending uncertainties attaching to such a commercial venture.

[2] To the extent Defendant relies on other language in Section 4(i) indicating that "Sponsor's sole role under this Section will be to repair or replace the item, subject to the terms and conditions above," as noted earlier the Court construes that portion of Section 4(i) as referring to a list of minor items that would not qualify as "defects," such as chipped formica, which would not apply to the substantial water intrusion defects at issue in this case.

By contrast, the damages here simply measure the value of the promised performance—a usable apartment for personal or rental use—and are direct consequences of the breach rather than consequential damages from a collateral business arrangement.

Accordingly, Plaintiffs proved entitlement to $96,200.00 in damages for lost rent and rent abatements. Specifically, Plaintiffs are entitled to (i) $36,000 in damages relating to Jones's tenancy, consisting of rent abatement for six-weeks and lost rent for the thirteen months and two weeks the Unit remained vacant following Jones's departure, calculated at the contractual monthly rent of $2,400 for the period from mid-September 2014 through October 31, 2015; (ii) $19,700 in damages relating to Julien's tenancy, consisting of one month's rent concession for May 2017 at the contractual rent of $2,700 and $17,000 representing ten months of $1,700 abatements from November 2016 through April 2017 and again from June through September 2017; and (iii) $40,500 in lost rent, calculated at $2,700 per month for each month the Unit remained vacant between October 2017 and December 2018.

II. Diminution in Value

Plaintiffs did not, however, prove by a preponderance of the evidence that the breach of contract proximately cause a diminution in the market value of the Unit. Although Plaintiffs' broker testified that prospective purchasers raised concerns regarding the Unit's condition and the building's history, the Unit sold for a profit over Plaintiffs' purchase price. Moreover, the broker testified that price adjustments were strategically made to price the Unit below recent sales in the building and surrounding neighborhood in order to facilitate a faster sale.

Given the absence of credible evidence for a reasoned, non-speculative impact on the market value of the Unit attributable to Defendant's conduct, Plaintiffs' claim for diminution-of-value damages is denied.

III. Condominium Assessments

Plaintiffs also are not entitled to recover condominium assessments they paid during the period of building repairs. Plaintiffs did not offer proof that those assessments were for the repair of defects specific to their Unit, as opposed to building-wide repairs. Moreover, those assessments were paid to fund building repairs for which PS 90 Board of Managers asserted claims on behalf of all unit owners, including the Donegans, and those claims were subsequently settled covering the period in which the assessments were paid. Absent proof allocating the assessments to Unit-specific defects, recovery of those amounts from Defendant would constitute a duplicative payment for building-wide repair costs. Plaintiffs' claim for recovery of their payment of condominium assessments is therefore denied.

IV. Homeowners Association Fees

Similarly, Plaintiffs failed to prove they are entitled to recover their homeowners association fees. Those fees were payable regardless of whether the Unit was occupied, rented, or vacant. As such, they do not represent a loss caused by Defendant's breach. Recovering those fees in addition to damages for lost rent and rent abatements would be duplicative. Accordingly, Plaintiffs' claim for these damages is denied.

Conclusion

Plaintiffs have established by a preponderance of the evidence their entitlement to recover damages for lost rent and rent abatements in the amount of $96,200 together with prejudgment interest pursuant to CPLR 5001.

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is

ORDERED that judgment will be **GRANTED** in favor of Plaintiffs against Defendant West 147th Associates LLC in the amount of $36,000 representing the aggregate amount of lost-

rent and rent-abatement damages in connection with the tenancy of Zennah Jones and subsequent vacancy from mid-September 2014 through October 31, 2015 plus prejudgment interest running from August 1, 2014; and it is further

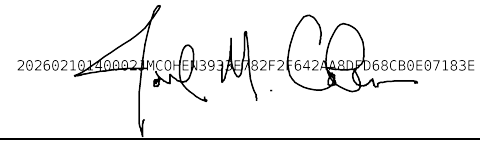
ORDERED that judgment will be **GRANTED** in favor of Plaintiffs against Defendant West 147th Associates LLC in the amount of $19,700 representing the aggregate amount of lost-rent and rent-abatement damages found by the Court in connection with the tenancy of Carol Julien plus prejudgment interest running from November 1, 2016; and it is further

ORDERED that judgment will be **GRANTED** in favor of Plaintiffs against Defendant in the amount of $40,500 representing the aggregate amount of lost-rent damages found by the Court in connection with the extended vacancy between October 2017 and December 2018 following the tenancy of Carol Julien plus prejudgment interest running from October 1, 2017; and it is further

ORDERED that the parties settle a final judgment pursuant to 22 NYCRR 202.48, returnable to the Court within 30 days of this Decision and Order; and it is further

ORDERED that any relief not expressly granted herein is denied.

This constitutes the Decision and Order of the Court.



DATE: 2/10/2026 **JOEL M. COHEN, JSC**

Check One: [x] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**