

**Paz v 52-74th Hous. Corp.**

2023 NY Slip Op 34403(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160067/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

*Justice*

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HAROLD PAZ, SHARON PRESS

Plaintiffs,

- v -

52-74TH HOUSING CORP.,

Defendant.

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INDEX NO. 160067/2021

MOTION DATE 08/03/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 83, 84, 85, 86, 87, 88, 89, 90

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

In this landlord-tenant action, plaintiffs own shares allocated to unit #10 of the apartment building located at 52 West 74<sup>th</sup> Street, New York, NY 10023. Plaintiffs' complaint alleges that after numerous rainstorms, the interior of their top-floor unit was damaged by extensive water infiltration through the building's roof, façade, and exterior walls (NYSCEF Doc No 1). They assert that it was defendant's obligation, as the co-operative owner and manager, to repair and maintain the building's exterior and remedy this issue. Plaintiffs allege that even after they notified defendant of the serious water leaks in their unit, defendant failed to perform the necessary structural repairs to stop the damage, causing plaintiffs to undertake repairs at their own expense. Plaintiffs further state that as a result of the leak, toxic mold formed inside of their apartment, necessitating plaintiffs' vacatur. Plaintiffs now move for summary judgment on their claims that, through its inaction, defendant breached the lease and the warranty of habitability.

In opposition, defendant argues that plaintiffs' motion is premature because this is a fact-specific dispute and discovery is not yet complete (NYSCEF Doc No 62). Defendant argues that

plaintiffs cannot maintain a breach of contract claim because the leak was caused, or at least exacerbated, by plaintiffs' own malfeasance, i.e., their use of an irrigation system on the roof and/or their installation and relocation of HVAC units. Nor can they maintain a warranty of habitability claim, defendant argues, because the apartment at issue is not their primary residence and because the toxic mold condition has not been adequately established.

Defendant is correct that plaintiffs' motion for summary judgment must be denied, as discovery has not yet revealed whether plaintiffs are entitled to relief on either claim (*Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013] [“[p]laintiff’s cross motion for partial summary judgment was properly denied as premature in light of the incomplete state of discovery”]).

The condition causing the leak has not been established and is contested among the parties. Therefore, a question of fact remains as to who is responsible for maintaining or repairing that condition, and this fact is central to plaintiffs' claim that defendant breached the lease. Defendant offers a leak investigation report completed by Stone Engineering & Architecture, DPC, but the report is inconclusive as to the cause (NYSCEF Doc No 55 [advising that removing certain wooden slats on the roof “will assist in identifying the source of the water infiltration”]). The only remaining evidence left to evaluate on this discreet issue are the affidavits of plaintiff Harold Paz (NYSCEF Doc Nos 28, 83) and defendant's Board Treasurer Robyn Condie (NYSCEF Doc No 46), which provide conflicting explanations for the cause of the leak. Contradictory sworn statements such as these raise questions of fact which cannot be resolved on a motion for summary judgment (*Consol. Edison Co. of N.Y., Inc. v City of New York*, 2012 NY Slip Op 33655[U], \*2 [SC NY Co 2012] [“The cause of the [leak] cannot be determined as a matter of law on the basis of the conflicting evidence submitted”]; *Srica v American Bultrite Inc.*, 2019 NY Slip Op 31045[U], \*5 [SC NY Co 2019] [“Conflicting

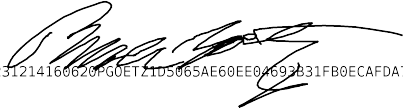
testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment”). Accordingly, plaintiffs’ motion must be denied as to their breach of contract claim to allow for additional discovery relating to the cause of the leak.

Regarding plaintiffs’ warranty of habitability claim, “[c]ontrary to the Coop defendant[’s] argument, the fact that plaintiff[s have] not lived in the apartment as [their] primary residence does not preclude [their] recovery for breach of the implied warranty of habitability” (*Fuisz v. 6 E. 72nd St. Corp.*, 2022 NY Slip Op 30973[U], \*18 [SC NY Co 2022]). Nonetheless, the allegation that plaintiffs used the apartment as a “pied-a-terre” is relevant to their claim for breach of the warranty of habitability, as it goes to the impact of the mold on plaintiffs’ health and safety (*Reinhard v Connaught Tower Corp.*, 150 A.D.3d 431, 432 [1st Dept 2017] [determining that “plaintiff’s evidence failed to show that the [condition] was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants,” taking into consideration that plaintiff “only intended to stay in the apartment occasionally”]). The regularity of plaintiffs’ use of the apartment is another fact that is presented inconsistently in the affidavits submitted, and therefore cannot be resolved on a motion for summary judgment (*Consol. Edison*, 2012 NY Slip Op 33655[U] at \*2; *Srica*, 2019 NY Slip Op 31045[U] at \*5). As to the toxic mold condition, plaintiffs have submitted a report by RTK Environmental Group deeming mold air samples taken from the living room and both bedrooms “unacceptable” (NYSCEF Doc No 88), but plaintiffs failed to show that the mold “rendered plaintiff[s’] apartment uninhabitable, breached the proprietary lease, or caused plaintiff[s] to be constructively evicted” (*Reinhard*, 150 A.D.3d at 432). Because additional discovery is required to establish the severity of the mold and whether plaintiffs were effectively forced out of their

home because of it, summary judgment must be denied on plaintiffs' warranty of habitability claim.

Accordingly, it is,

ORDERED that plaintiffs' motion for summary judgment is denied.

  
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12/14/2023  
DATE

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PAUL A. GOETZ, J.S.C.

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