SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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BENJAMIN FREEMAN,

Plaintiff,

- v -

HARMONIA HOLDINGS LLC, TODD SCHUSTER,

Defendants.

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INDEX NO. 161866/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted in part and denied in part and defendants' cross-motion is denied.

Background

Plaintiff owns an apartment in Manhattan. He entered into a one-year lease with the corporate defendant (Harmonia Holdings, LLC ["Harmonia"]) starting on August 1, 2019 and ending on July 31, 2020; defendant Todd Schuster entered into a guaranty in connection with the lease. The monthly rent was $25,500.

Less than two months after defendants took possession, plaintiff's attorney received a letter from defendants' attorney in which he insisted that defendants were constructively evicted from the apartment (NYSCEF Doc. No. 97).[1] Among the issues were that were included in that September 20 letter were that the residents (Mr. and Mrs. Schuster) expected the apartment to be

[1] Although the attorney's letter was dated September 20, defendants admit that they only stayed in the apartment from August 6 until about August 12th (NYSCEF Doc. No. 101 at 78) and building log entries show that they allowed other people access to the apartment thereafter (NYSCEF Doc. No. 100). Mr. Schuster also admitted that they let other people stay there after he moved out (NYSCEF Doc. No. 101 at 141).

furnished but that "nearly all of the aesthetically pleasing decorative items" were removed, defective air conditioning, leaks and that the apartment directly above was undergoing significant construction (*id*.). The letter insists that defendants were forced to relocate because the apartment was not habitable and defendants had no obligation to pay any more rent (*id*.). The key issue in these motions is the noise from the construction project above.

Plaintiff's attorney responded to the letter and insisted that these alleged issues were merely a pretext to let the defendants out of their contractual obligations (NYSCEF Doc. No. 98). Defendants moved out anyway, stopped paying rent, and then plaintiff commenced this case seeking various relief, including the unpaid rent.

Plaintiff now moves for summary judgment on his claim for unpaid rent, to strike defendants' affirmative defenses and counterclaims and for legal fees. He insists that the lease clearly required Harmonia to pay rent and that defendant Schuster guaranteed payment of the rent. Plaintiff maintains that defendants failed to show that the apartment was not fit for human habitation (defendants' counterclaim under the warranty of habitability) and it should therefore be dismissed. He observes that there were no violations issued to the plaintiff with respect to any code violations or any noise violations relating to the construction in the upstairs apartment. Plaintiff points out that the visitor log demonstrates that defendants let others use the apartment, which casts doubt on the alleged inhabitability of the unit.

Defendants cross-move for summary judgment and argue that plaintiff breached the express terms of the agreement. They stress that the occupants (Mr. and Mrs. Schuster) worked from home and that is why they insisted that there be a provision about construction; defendants point to a rider to the lease which specifically states that plaintiff was not aware of any construction projects to the building. They point out that plaintiff was well aware of the ongoing

construction project in the unit directly above and contend that plaintiff had lived in the unit immediately before leasing it to defendants.

Defendants insist that plaintiff's assertion at his deposition that the provision in the rider only applied to *exterior* renovations to the building is not a credible contention. They argue that plaintiff cannot recover any rent, and defendants were entitled to vacate, where plaintiff intentionally hid the fact that there was a construction project going on directly above. Defendants claim that they are entitled to summary judgment, at a minimum, on their affirmative defenses of breach of quiet enjoyment, constructive eviction, and breach of contract as well as their counterclaims.

In reply, plaintiff insists that defendants presented no evidence that noise was a material issue for the prospective occupants or that they communicated this issue to plaintiff. Plaintiff blames defendants for not doing ordinary due diligence to ascertain whether there were any construction projects going on in the building. He maintains that defendants should have insisted on a provision that protected them from an individual apartment renovation. Plaintiff argues that he did not have any particular knowledge about the construction project and so any claim of fraud or negligent misrepresentation must fail.

In reply to their cross-motion, defendants contend that plaintiff intentionally ensured that defendants only viewed the apartment on the weekends (when construction was not taking place). They also claim that they had no duty to do their own investigation into ongoing construction projects because they bargained for a provision in the lease about this issue.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Lease Itself (Plaintiff's Motion and Defendants' Fraud Counterclaims)

The central issue on both plaintiff's motion and defendants' cross-motion is the terms of the lease. There are two critical and relevant terms. The first, in the pre-printed form, is "Construction or demolition may be performed in or near the Building. Even if it interferes with Tenant's ventilation, view or enjoyment of the Apartment it shall not affect Tenant's obligations in this Lease" (NYSCEF Doc. No. 96, § 15). The second is in the rider: "Landlord represents that Landlord is unaware of any major construction projects to the Building" (*id*. § R-22).

Both sides offer their own interpretations of these two provisions. Defendants contend that section 15 applies only to "future" construction while plaintiff argues that the phrase "to the Building" in R-22 only means projects that affect the exterior and does not apply to a construction project right above the apartment in question. The Court declines to embrace either of these views on a motion for summary judgment. The Court is unable to find as a matter of law that there is some temporal limitation to section 15 or that interior construction projects are clearly excluded from R-22.

Of note here is that the rider also contains a paragraph which requires that "any inconsistency between the provisions of this Rider and the provisions of the printed form of Lease which this Rider is annexed to, the provisions of this Rider shall govern and be binding" (*id*. § R-1). Therefore, any argument that paragraph 15 of the lease means that defendants cannot complain about construction projects at all is without merit to the extent it conflicts with R-22. In other words, the Court cannot rely upon paragraph 15 to ignore the representation made in R-22.

The next question is the purported facts submitted surrounding the rider provision. Defendants presented an email thread which shows that in March 2019, just a few months before the parties entered into the lease, plaintiff received an email in which he was told that there was a "major renovation" going on in the apartments above him (NYSCEF Doc. No. 115 at 6 of 6). The purpose of the email was to obtain access to plaintiff's apartment in order to do some piping work; they apparently needed to break open one of plaintiff's bathroom ceilings and do some work for a few hours each day over the course of about four days. Plaintiff responded to that email, which shows that he knew that there was a gut renovation upstairs. That raises an issue of fact for plaintiff's request for summary judgment on his breach of contract claim because it

shows, at least as of March or April 2019, that the landlord had knowledge of plans for major construction directly above.

Mr. Schuster, the guarantor, admitted at his deposition that there was scaffolding up at the building when he and his wife toured the apartment (NYSCEF Doc. No. 101 at 35). So, it is possible that a factfinder could find that, when negotiating the rider provision about "major construction projects to the building," Mr. Schuster was thinking about construction projects on the exterior of the building or the building as a whole. In any event, the case must go to a fact finder.

The point is that a fact finder could conclude that plaintiff clearly knew about the major renovation occurring right above him (where two apartments were being combined) in the months right before he leased the apartment and yet he still entered into a lease in which he represented that there were no major construction projects to the building. This raises issues of fact as a fact finder might conclude that that defendants were duped into paying more than $25,000 a month for an apartment where they insisted that there be no ongoing construction (as evidenced by R-22). Of course, plaintiff will be entitled to argue to the fact finder that he thought this provision concerned construction to the exterior of the building or the building as a whole; but the Court cannot reach such a conclusion on a motion for summary judgment as it would require the Court to embrace plaintiff's subjective interpretation of this provision.

And defendants are not entitled to summary judgment either. Plaintiff was asked at his deposition "When you were in Apartment 4C before you moved out in July, did you hear any noise coming from the apartments above?" and he responded, "No" (NYSCEF Doc. No. 103 at 84). It is unclear whether or not this question was meant to address whether plaintiff heard

anything during the month of July 2019 or if he heard noise at any time in the months prior to moving out in July 2019.

To the extent that this means that plaintiff did not hear any noise at all in 2019, it raises an issue of fact with respect to the fraud claims as a fact finder might conclude that plaintiff never heard any excessive noise and therefore did not make any misrepresentations in the lease. Of course, if the question was limited to just July 2019, then it is irrelevant as the contract was entered into in June 2019 (meaning that it encompassed representations and knowledge prior to the date of the contract). And there were no other questions posed to plaintiff at his deposition about whether plaintiff heard excessive or loud noises in 2019 *before* the lease was signed.

And plaintiff also insisted that aside from the March emails, there were no follow up emails about the upstairs project from the architect and they never worked on pipes by going through plaintiff's apartment (at least with his explicit permission) (*id*. at 68). If a fact finder believes plaintiff, then even if he knew about the project, the fact finder might think that plaintiff did not make any misrepresentations about noise he never heard or about work that no longer involved access to his apartment.

And the provision at issue contains a representation that plaintiff did not know about any *major* construction projects; if the fact finder believes plaintiff's account that he didn't hear any loud noises from the project, then it might think under these circumstances that plaintiff had no reason to believe it was a *major* project to disclose, or even that plaintiff might have thought the project was over. The fact finder must consider the credibility of each witnesses' account because, unfortunately, the provision at issue R-22 does not provide absolute clarity about its precise scope.

That a broker allegedly sent an email in which she claimed that there were no "major construction projects coming up" (NYSCEF Doc. No. 104) is not dispositive as it does not absolve plaintiff of his own particular knowledge about the construction project and the circumstances surrounding the inclusion of the key rider provision or the meaning of the language therein.

Another issue discussed at Mr. Schuster's deposition was that he was only shown the apartment on a weekend. Defendants insist that this was part of some scheme to hide the construction, which was happening during the week. That is not dispositive. Of course, defendants can raise it at trial but simply showing an apartment on the weekend is not proof, as a matter of law, that plaintiff committed fraud.

Defendants' First, Second and Fifth Counterclaims

These counterclaims seek relief under the theories of breach of the warranty of habitability, the breach of the covenant of quiet enjoyment, and constructive eviction.

"The implied warranty of habitability sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable. Tenants alleging breach of warranty of habitability must provide evidence sufficient to support their claims" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 112-13, 912 NYS2d 2 [1st Dept 2010] [citations omitted]).

"To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82, 308 NYS2d 649 [1970]). "To establish a breach of the covenant of quiet enjoyment, a tenant must show actual or

constructive eviction" (*34-35th Corp. v 1-10 Indus. Assoc., LLC*, 16 AD3d 579, 580, 792 NYS2d 173 [2d Dept 2005]).

Here, the essential issue is whether defendants met their burden to show that the noise was "so excessive that [the tenant] was deprived of the essential functions that a residence is supposed to provide" (*Armstrong v Archives L.L.C.*, 46 AD3d 465, 465 [1st Dept 2007] [internal quotations and citations omitted]).

The problem for this Court is that defendants did not submit any objective evidence to show that the noise was excessive. Often, cases involving excessive noise (usually they arise in the nuisance context) include decibel readings (*see Stiglianese v Vallone*, 255 AD2d 167, 680 NYS2d 224 [1st Dept 1998] or violations issued by government agencies (*Berenger v 261 W. LLC*, 93 AD3d 175, 183, 940 NYS2d 4 [1st Dept 2012]). This type of documentation provides objective evidence that the noise exceeded applicable codes and is not merely a subjective complaint. Here, defendants didn't submit decibel level readings, audio or video recordings, proof of a violation, or anything else to show that the noise level was so excessive that it meets the standard for these three counterclaims.

Moreover, there was no evidence that the noise occurred late at night, during weekends or during some inappropriate time. Mr. Schuster testified that he "heard a lot of noise" every *weekday* he and his wife were in the apartment (NYSCEF Doc. No. 101 at 78). And he admits that they only stayed in the apartment from August 6 until about August 12 (*id*.). The Court must also balance the fact that construction will inevitably occur in apartment buildings in Manhattan and, unfortunately, neighbors will have to tolerate it. That construction occurs is not, by itself, grounds for a breach of the warranty of habitability, the breach of the covenant of quiet enjoyment or enough to justify a constructive eviction claim. On this record, the Court is unable

to find that defendants are entitled to summary judgment on these counterclaims; the Court also cannot find that defendants raised a material issue of fact in response to plaintiff's request to dismiss these causes of action.

Another basis to dismiss these counterclaims is that the alleged noise was not caused by plaintiff; rather it was caused by third parties (construction workers for the owners of the unit above). In other words, there is no evidence that plaintiff (the landlord) was responsible for creating the allegedly unlivable conditions or that he possessed the requisite control to abate the loud noises.

Remaining Contentions

Plaintiff moved to dismiss all of defendants' affirmative defenses and plaintiff devoted substantial time in its moving brief to addressing each of these affirmative defenses (NYSCEF Doc. No. 15-22). However, defendants did not specifically address any of their affirmative defenses in their memorandum of law in opposition, although some are mentioned in passing as they are identical to certain of the counterclaims. For instance, defendants bring both affirmative defenses and counterclaims based upon the claims for warranty of habitability, constructive eviction, breach of the covenant of quiet enjoyment.

Accordingly, this Court must sever and dismiss all of the affirmative defenses except for the fifteenth affirmative defense (that plaintiff breached the contract). It is not this Court's role, nor would it be appropriate, for this Court to do its own analysis for each of the 16 affirmative defenses. Plaintiff met his burden with specific reasons for why each affirmative defense should be dismissed and defendants failed to sufficiently oppose the vast majority of these arguments.

The only affirmative defense that remains is the one based on the theory that plaintiff breached the contract (the fifteenth); an issue clearly discussed at length above.

The Court also finds that even though defendant Harmonia was not authorized to do business at the start of the case (as it is a foreign corporation), it has now remedied that issue (NYSCEF Doc. No. 116). In any event, the proper remedy would have been a brief stay to permit this defendant to gain the proper authorization (*see Matter of Mobilevision Med. Imaging Services, LLC v Sinai Diagnostic & Interventional Radiology, P.C.,* 66 AD3d 685, 686, 885 NYS2d 631 [2d Dept 2009]). This is not an independent basis to dismiss the counterclaims.

Summary

In this dispute, the real question is the meaning of the rider provision R-22 and its application to the instant circumstances. Among the issues a fact finder must consider include: the meaning of the "to the Building" phrase, plaintiff's knowledge about the noise (and potential noise) from the construction project above his apartment, and an assessment of Mr. Schuster's decision to vacate so quickly.

Broadly, there are two sides to this story. Harmonia argues that it was hoodwinked into signing a lease (and the co-defendant hoodwinked into signing the guaranty) when the plaintiff knew that there was an intolerable noise situation caused by the construction above. The plaintiff's version is that he heard no noise before he moved out and that the whole noise issue is just a pretext because defendant changed its mind after moving in. It may have been that the Schusters were disappointed that certain furnishings, decorations, and coffee table books were allegedly not left in the apartment (as highlighted in the September 20, 2019 letter) or they found someplace else more to their liking. The record shows that they were only there a week before they left and then, a month after that, and after allowing other people access to the apartment, had their attorney claim there was a noise problem.

And the fact finder will have to also determine, among other things, what the parties really intended when they included a provision about "no major construction to the building"? Did plaintiff really think it meant only exterior work or work to common areas – and if so, why doesn't the clause say that? Did the defendants really think it meant any construction that would cause excessive noise because they worked from home – and if so, why doesn't the clause say that?

Determining what was really going on requires credibility determinations. Of course, the Court cannot make such credibility findings on a motion for summary judgment nor can it render a definitive determination with respect to the parties' intended meaning behind the key provision in the rider.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that all of the affirmative defenses (except for the fifteenth affirmative defense) and the first, second, and fifth counterclaims are severed and dismissed and denied with respect to the remaining requests for relief; and it is further

ORDERED that defendants' cross-motion is denied.

9/19/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**