

S&E Bridge & Scaffold LLC v Mollen

2026 NY Slip Op 31114(U)

March 17, 2026

Supreme Court, New York County

Docket Number: Index No. 158854/2025

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 158854/2025

S&E BRIDGE & SCAFFOLD LLC,

MOTION DATE

Petitioner,

MOTION SEQ. NO. 001 002

- v -

SCOTT E. MOLLEN, MSD RCOF PARTNERS XLIX, LLC,
PARK PLACE DEVELOPMENT PRIMARY LLC, THE CITY
OF NEW YORK

DECISION + ORDER ON
MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 7, 9, 16, 19, 20,
21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 52, 54

were read on this motion to/for SEIZURE/REPLEVIN

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 14,
15, 17, 29, 32, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53

were read on this motion to/for DISMISSAL

Upon the foregoing documents and the petition, Respondent MSD RCOF Partners XLIX, LLC's
("MSD") cross-motion to dismiss (Mot Seq. 1) and Respondent Scott E. Mollen's ("Mollen") motion to
dismiss (Mot Seq. 2) are determined as follows:

Petitioner, S&E Bridge & Scaffold LLC, ("S&E"), commenced this petition to recover its 42-
story hoist, located at 43 Park Place, New York New York, an unfinished construction project which is
currently the subject of a foreclosure proceeding pending before this Court ("subject property"). S&E
seeks to recover possession of its hoist and other unspecified equipment at the subject property, or
alternatively, to recover the fair market replacement value of the hoist (\$1,873,000), with interest from
December 2019. Respondent Park Place Development Primary LLC, ("Park Place") is the owner of the
subject property. Respondent MSD is the administrative agent for non-parties Malayan Banking Berhad,
London Branch, Intesa Sanpaolo S.P.A., New York Branch, Warba Bank K.S.C.P., and 45 Park Place
Investments, LLC, which provided the funding to Park Place. Mollen was appointed as the Receiver in
the foreclosure action.

The petition was filed on July 10, 2025, and multiple stipulations were then entered into by the
parties extending the time to respond. MSD and Mollen oppose the petition and move to dismiss per
CPLR §3211 on similar grounds. S&E opposes dismissal. Park Place has appeared but has not
responded to the motions. Respondent, the City of New York has not appeared, but no affidavits of
service have been filed.

Petitioner seeks to recover possession of its 42-story hoist and unspecified construction equipment and materials from the subject property. It is alleged that the hoist was initially provided to the subject property per a July 6, 2016, agreement between Petitioner and non-party Gilbane Residential Construction LLC, (“Gilbane”) the construction manager for the construction project at the subject property (“Gilbane agreement”). According to the Gilbane agreement, the hoist was to be provided by S&E for use at the subject property for a period of 27 months for the agreed sum of \$2,199,000. After that time, a monthly rate of \$30,000 would be charged. Petitioner alleges that \$409,118.41 of the original 27-month rental period remains unpaid. Petitioner alleges that the \$30,000 monthly rental has not been paid since December 2019, totaling \$2,331,533.41. Petitioner asserts that despite multiple requests, Respondents have not agreed to let S&E remove its hoist and that the New York City Department of Buildings (“DOB”) has refused to grant authorization to remove the hoist.

MSD commenced a foreclosure action concerning the subject property, which is pending before the Supreme Court, New York County, Index No. 850083/2020, on March 11, 2020. S&E and Respondent Park Place are defendants in the foreclosure action. Gilbane, which is not a party to this petition, is a party to the foreclosure action. In the foreclosure action, S&E asserted crossclaims against Gilbane sounding in breach of contract and unjust enrichment, due to an alleged outstanding balance of \$409,118.41 owed under the contract. Mollen was appointed as the Temporary Receiver in the foreclosure action by Order of this Court, dated March 12, 2020.

While the foreclosure action was pending, on October 23, 2023, S&E, MSD, Mollen and non-party Reidy Contracting Group entered into an agreement, whereby S&E would lease the subject hoist and provide a hoist operator for certain corrective construction work at the Property (“Reidy agreement”). The Reidy agreement provides for a \$40,000 per month rental of the hoist and costs for the hoist operators. Section “Credit, Payment and Release of the Receiver” of the Reidy agreement contains the following language:

Notwithstanding anything to the contrary, Receiver shall have no obligation for the Rental Period contemplated herein for any payment owing or alleged to be owing pursuant to this Agreement, the Services, the Equipment and/or relating to the Project Address. By entering into this Agreement, [S&E] acknowledges and agrees that Administrative Agent shall be solely responsible to compensate the [S&E] for the Services, the Equipment, and any work, labor or materials performed or provided under this Agreement.... [S&E] shall look only to Administrative Agent for the payment of compensation or other amounts owed or alleged to be owed in connection with the Services, the Equipment, and any work, labor or materials performed or provided under this Agreement and any work or Services relating to or arising out of this Agreement, and [S&E] hereby agrees to release and forever discharge Receiver... from any and all actions... and demands whatsoever, in law... or equity which [S&E] has, had or will ever have, whether known or unknown, against Receiver Parties in connection with Administrative Agent’s obligation to compensate [S&E] under this Agreement.

MSD seeks dismissal under CPLR §3211(a)(1)(7), arguing that S&E does not have a superior possessory interest in the hoist and other equipment per the Reidy agreement. MSD also seeks dismissal arguing that as it was not a party to the Gilbane agreement, any claim for a money judgment cannot be maintained. Additionally, MSD seeks dismissal under CPLR §3211 (a)(4) due to the pending foreclosure action, under CPLR §3211 (a)(10) because Gilbane is not a party to this petition and under CPLR §3211 (a)(5) arguing that the petition is barred by the three-year statute of limitations.

A motion to dismiss pursuant to CPLR §3211 (a)(1) may only be granted where “documentary evidence” submitted decisively refutes Plaintiff’s allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or “conclusively establishes a defense to the asserted claims as a matter of law” (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily “documentary” is exceedingly narrow and “[m]ost evidence” does not qualify (*see Higgitt, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 [2011]). To be accepted, the submitted “documentary evidence” “must be explicit and unambiguous” (*see Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017] *citing Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]).

On a motion pursuant to CPLR §3211(a)(7), the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant (*see Guggenheimer, supra; Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court “must determine whether the proponent of the pleading has a cause of action, not whether she has stated one” (*Kantrowitz & Goldhamer, P.C. v Geller, supra; see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Further, “whatever may be implied from [the] statements [in the pleading] by reasonable intention” is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]).

“To state a cause of action for replevin, a plaintiff must establish a superior possessory right to property in a defendant’s possession” (*Reif v. Nagy*, 175 A.D.3d 107, 120 [1st Dept 2019]; *Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004]). In its petition, S&E asserts that it is the owner of the subject hoist, that the hoist was permitted to be used at the subject property per the Gilbane agreement, that there is an outstanding balance owed to S&E by Gilbane and that S&E has demanded the return of the hoist, which was refused by Respondents.

MSD argues that dismissal is warranted because the petition does not allege that S&E has a superior possessory interest and that per the Reidy agreement, it is Respondents who actually have the superior interest in the hoist. Respondents also argue that even if the hoist was no longer in use by MSD at the subject property, its removal is subject to approval by the DOB. In opposition, S&E acknowledges that Respondents acquired possession of the hoist per the Reidy agreement. However, S&E asserts that such agreement was terminated by a December 6, 2023, email. S&E does not allege that it was not paid pursuant to the Reidy agreement, or that the agreement was breached by any Respondent. S&E also asserts that in 2024 it was negotiating another agreement with MSD regarding use of the hoist, which had not been finalized at the time the petition was filed. Additionally, S&E acknowledges that the DOB, not MSD or Mollen, has refused permission for the removal of the hoist.

Although the petition is not articulate on this point, accepting the allegations as set forth as true, S&E has sufficiently stated a cause of action for replevin. The Reidy agreement does not conclusively

establish which party has the superior possessory right in the subject hoist as of December 2023, or anytime thereafter. Whether S&E may ultimately prevail upon its claim against any of the Respondents, or whether it may withstand a dispositive motion on other grounds, is not for consideration by the Court at this time. (*see EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). Rather, the evaluation is "... only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). At this time, the Reidy agreement, without additional evidence, does not show that a claim for replevin action cannot be maintained.

Pursuant to CPLR §3211(a)(4), a party may move for judgment dismissing one or more causes of action asserted against them based upon the pendency of a prior commenced action pending between the same parties for the same relief (*see Brach v Schwartz*, 215 AD3d 913, 914 [2d Dept 2023]). "[A] court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*DAIJ, Inc. v Roth*, 85 AD3d 959, 959 [2d Dept 2011]). "While complete identity of the parties is not a necessity for dismissal under [the statute,] there must at least be a substantial identity of the parties which generally is present when at least one plaintiff and one defendant is common in each action" (*Matter of Witkowski v. HS 570, Inc.*, 218 AD3d 1230, 1232 [4th Dept 2023]). Further, "[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action[,] rather, it is sufficient if the two actions are 'sufficiently similar' and that the relief sought is 'the same or substantially the same'" (*Cherico, Cherico & Associates v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [internal citations omitted]).

Although the parties are substantially similar, the prior action concerns whether MSD can foreclose on the subject property due to Park Place's alleged default as well as the various cross claims and counterclaims between the defendants for breach of contract and/or to enforce mechanics' liens. Here, the petition seeks the return of a hoist which has allegedly been refused. It has not been shown that these matters are so substantially the same that there is a risk of conflicting decisions.

MSD also moves to dismiss pursuant to CPLR §3211(a)(10) asserting that Gilbane is a necessary party. CPLR §1001(a) defines a necessary party as "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants." "In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party" (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]).

As MSD, and Mollen, have asserted, the applicable agreement is the Reidy agreement, of which Gilbane was not a party. Moreover, no party has alleged that Gilbane currently possesses or otherwise controls the hoist. Thus, it has not been shown that Gilbane is a necessary party to this action and complete relief can be obtained by the current parties (*see General Elec. Capital Corp. v Pacheco & Lugo, P.L.L.C.*, 300 AD2d 185 [1st Dept 2002]).

On a motion to dismiss a cause of action claiming it is barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see* CPLR §3211[a]5; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). In evaluating such a motion, "the Court must take the allegations in the complaint as true and resolve all

inferences in favor of the Plaintiff” (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]). As well, a Plaintiff’s opposition to a CPLR §3211 motion “must be given [its] most favorable intendment” (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the Plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

“The statute of limitations for replevin claims is three years, and a claim ‘against a good faith purchaser accrues once the true owner makes a demand and is refused. A refusal of a demand ‘need not use the specific word ‘refuse’ so long as it clearly conveys an intent to interfere with the demander’s possession or use of his property’” (*Middendorf v Am. Numismatic Soc’y*, 209 AD3d 534, 534 [1st Dept 2022], *quoting Swain v. Brown*, 135 AD3d 629, 631 [1st Dept. 2016]).

Although the petition generally refers to the Gilbane agreement, MSD asserts that the Reidy agreement controls between the parties herein and S&E acknowledges in its opposition that hoist remains at the subject property per the Reidy agreement. As the controlling agreement is the Reidy agreement, even if a demand for the return of the hoist had been made immediately after the agreement was executed, the three-year statute of limitations would not have expired yet. Thus, at this time, the documents submitted do not clearly establish that the statute of limitations had run at the time this petition was commenced.

Accordingly, MSD’s motion to dismiss the petition is denied.

Mollen seeks dismissal of the petition pursuant to CPLR §§3211(a)(1) and (7) because S&E does not have a superior interest in the hoist and because there can be no personal liability against Mollen as the Receiver and under CPLR §3211(a)(3) because S&E does not have capacity to sue Mollen. Mollen also seeks dismissal under CPLR §3211(a)(4) due to the pending foreclosure action, under CPLR §3211(a)(5) arguing that the petition is barred by the three-year statute of limitations and because of the release language in the Reidy agreement.

Mollen seeks dismissal of the petition under CPLR §3211(a)(3), whereby a cause of action must be dismissed on the basis that “the party asserting the cause of action has not legal capacity to sue” (CPLR §3211[a][3]). “Capacity is a threshold question involving the authority of a litigant to present a grievance for judicial review” (*Caprer v. Nussbaum*, 36 AD3d 176, 181-182 [2d Dept 2006]). Mollen argues that dismissal is appropriate because S&E did not seek, or obtain this Court’s permission to commence an action against him. In opposition, S&E acknowledges that it did not obtain permission from this Court and argues that dismissal is not required based upon the failure to obtain permission.

Contrary to S&E’s position, dismissal is appropriate against a receiver where leave of court was not obtained (*Guberman v. Rudder*, 85 A.D.3d 683, 684 [1st Dept 2011]; *see also see Chang v. Zapson*, 67 A.D.3d 435 [1st Dept 2009]). A court can “... permit[] the action to be filed *nunc pro tunc*” (*citing Copeland v. Salomon*, 56 N.Y.2d 222, 230 [1982]). However, permission still must be obtained (*Collins v. Vickers*, 296 A.D.2d 320, 321 [1st Dept 2002]). Here, S&E failed to seek permission prior to commencing this petition, has not provided any viable excuse for neglecting to do so and, to date, has not sought leave to sue the Receiver *nunc pro tunc*.

With respect to any claim of liability against Mollen personally, as a general rule a “receiver ha[s] no personal liability for the actions performed within his official capacity and within the scope of

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his authority pursuant to the receivership order” (*Bankers Fed. Sav. FSB v Off W. Broadway Devs.*, 227 AD2d 306, 306 [1st Dept 1996]). Here, the petition does not claim that Mollen acted outside the scope of his duties or that he acted in bad faith or otherwise demonstrated a lack of due care (*see Ocean Side Institutional Indus., Inc. v United Presbyterian Residence*, 254 AD2d 337, 338 [2d Dept 1998]). S&E failed to address Mollen’s argument on this point in opposition.

In any event, the release language in the Reidy agreement absolves any claim against Mollen in the performance of his acts as the Receiver. The above agreement contains broad release language, whereby S&E agreed to release Mollen from any and all claims, known and unknown. “It is well established that a valid release constitutes a complete bar to an action on a claim which is the subject of the release” (*Glob. Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]; *see also Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). “Where... the language of a release is clear and unambiguous, the signing of a release is a “jural act” binding on the parties (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934, 935 [1998]). S&E does not address this argument in opposition and neglected to show how the release is not binding (*see id.; Glob. Mins. & Metals Corp., supra* at 98).

Accordingly, Mollen’s motion is granted and the petition is dismissed as against Mollen only.

Incidentally, this matter was improperly commenced by S&E as a special proceeding instead of as an action (*see CPLR §103[a]*). However, per CPLR §103(c), “[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.” Moreover, New York State has a strong policy of litigating matters on the merits. (*see Peg Bandwidth, LLC v. Optical Commc'ns*, 150 AD3d 625, 626 [1st Dept 2017]). Therefore, the subject proceeding is converted into an action and the petition is deemed to constitute a complaint. (*see David H. Berg & Assocs. v. Weksler*, 193 AD3d 612 [1st Dept 2021]; *see also Berger v A.S.P.C.A.*, 84 Misc. 3d 1236(A) [Sup Ct, Kings Cty 2024]).

Accordingly, it is

ORDERED that Respondent MSD’s motion to dismiss the petition pursuant to CPLR §§3211(a)(1)(4)(5)(7) and (10) is denied; and it is further

ORDERED that Respondent Mollen’s motion to dismiss the petition as against him pursuant CPLR §§3211(a)(1)(3)(5) and (7) is granted.

3/17/2026

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER J.S.C.
REFERENCE

FRANCIS A. KAHN, III, J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.