

Semen v Derzie

2026 NY Slip Op 31120(U)

March 23, 2026

Supreme Court, Kings County

Docket Number: Index No. 509669/2025

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 23rd day of March 2026

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

PATRICA SEMEN, a/k/a PATRICA CONCETTA SEMEN, as Trustee of the Catherine Lazzara Trust, and CATHERINE LAZZARA, as a Life Estate Tenant,

Plaintiff(s),

-against-

ERIC DERZIE, STACY DERZIE, JOSEPH SAFDIE, MELANIE KISHK, JACK KISHK, and MK REALTY MELANIE KISHK BROKER LLC d/b/a CENTURY 21 MELANIE KISHK REALTY,

Defendant(s).

DECISION & ORDER

Index No.: 509669/2025

Calendar No.: 36 & 37

Motion Seq.: 1 & 2

Return Date: 9/11/2025

Recitation of the following papers as required by CPLR 2219(a):

**NYSCEF
Papers Numbered**

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Upon the foregoing papers, the decision and order of the Court is as follows:

Plaintiffs commenced this action against the next-door neighbors, Eric Derzie (“Mr. Derzie”) and Stacy Derzie (“Ms. Derzie”), a notary Joseph Safdie (Mr. Safdie),¹ and Melanie Kishk, Jack Kishk, and MK Realty Melanie Kishk Broker LLC d/b/a Century 21 Melanie Kishk Realty (“Kishk defendants”) for damages relating to a residential real estate sale.

¹ It is believed by the parties that Mr. Safdie has passed away.

The Kishk defendants and defendant Stacy Derzie have each moved pre-answer to dismiss the complaint per CPLR § 3211.

Plaintiffs alleged that the Kishk defendants, the broker and real estate agent for the listing of plaintiffs' property known as 2143 West Street, Brooklyn, New York 11223 ("Property") breached their fiduciary duty to them by failing to inform them of a telephone call made by the Derzie defendants regarding the reciprocal driveway easement between their properties. It is also alleged that the Kishk defendants defamed plaintiffs by disclosing this information to the prospective buyers. Plaintiffs claim that this telephone call caused a \$2,075,000.00 sale to disintegrate.

The basis of this action is assignments/easements by Filippo Lazarra (deceased) and plaintiff/life tenant Catherine Lazarra to the Derzie defendants granting the latter parking rights in a shared driveway between their properties. In the most recent easement dated 3/14/2011, the Derzie defendants were granted exclusive parking rights and, in return, they agreed to relieve Filippo and Catherine of all responsibility for the maintenance, repair, etc. of the shared driveway. This agreement was memorialized in a written document entitled "Reciprocal Driveway Easement" and recorded on 3/24/2011 in the New York City Department of Finance Office of the City Register, Document ID #2011031500506001 (*see* Exhibit F annexed to the complaint, NYSCEF #2 at p.57).²

The complaint alleges 12 causes of action seeking, *inter alia*, the nullification of the recorded driveway easements, permanently restraining the Derzie defendants from recording the easements, monetary damages of \$2,075,000.00 from the Derzie defendants and the Kishk

² There ere other recorded easements that preceded the 3/14/2011 easement which plaintiffs also seek to nullify.

defendants, together with punitive damages and reasonable attorney fees, and restraining the Derzie defendants from obstructing plaintiffs' right to use the driveway.

Motion Sequence #1

The Kishk defendants move for an order per CPLR § 3211 [a] [7], dismissing plaintiffs' 10th [breach of fiduciary duty] and 11th [defamation] causes of action, the only ones asserted against them. Defendants argue that plaintiffs' complaint fails to state a cause of action for breach of fiduciary duty because assuming the alleged phone call is true and that the Derzie defendants did not have exclusive use of the shared driveway, there can be no breach of fiduciary duty for disclosing publicly available information to a prospective buyer. (*Barrett v Freifeld*, 77 AD3d 600, 602 [2d Dept 2010] [No duty to disclose information that can be discovered by anyone through the exercise of ordinary diligence]). As to the defamation claim, truth is a complete defense, *i.e.*, an easement was publicly recorded with the New York City Office of the Register (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014]).

Motion Sequence #2

Stacy Derzie moves for an order per CPLR § 3211 [a] [1] [complete defense based on documentary evidence], CPLR § 3211 [a] [5] [statute of limitations], and CPLR § 3211 [a] [7] [failure to state a cause of action], and CPLR § 3016 [a] [failure to plead with specificity]. (MS#2).³

Derzie argues that the 2011 easement supersedes the previously recorded easements. Therefore, the causes of action seeking to nullify the prior easements and award damages based on same are moot. (*Matter of Hepco Plumbing & Heating v NYC Dept of Buildings*, 227 AD3d 903, 905 [2nd Dept 2024] [A controversy must involve a present, live dispute.]). Next, the causes

³ Eric Derzie has not appeared in this action.

of action seeking to nullify the 2011 easement based on 1) forgery is not pled with specificity (*Ferdico v Zweig*, 82 AD3d 1151, 1153-54 [2nd Dept. 2011]; *Scope v Equity NY Corp.*, 222 AD3d 687, 689 [2nd Dept. 2023]), and 2) improper notarization is time-barred (*Camp Bearberry, LLC v Khanna*, 212 AD3d 897, 898 [3rd Dept 2023] [RPL § 306 provides for a 10-year statute of limitations for challenging recorded conveyances, which includes easements.]). Also time-barred are the claims based on fraudulent inducement which are subject to a six-year statute of limitations. As to the slander claims, Derzie asserts truth as a defense. The 2011 properly recorded easement is documentary evidence that defeats plaintiffs' quiet title claims.

Law & Analysis

On a motion to dismiss a complaint for failure to state a cause of action under CPLR § 3211 [a] [7], a court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Goldberg v KOSL Bldg. Group., LLC*, 236 AD3d 995, 996 [2^d Dept 2025]; *Boyle v North Salem Cent. Sch. Dist.*, 208 AD3d 744, 745 [2^d Dept 2022]).

“At the same time, however, ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’ ” (*Simkin v Blank*, 19 NY3d 46, 52 [2012], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). “[W]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR § 3211 [a] [7], and the motion is not converted into one for summary judgment, the question becomes whether

the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*4 Colonial Dr., LLC v Suburban Consultants, Ltd.*, 242 AD3d 1155, 1157-1158 [2d Dept 2025] [internal quotation marks omitted]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

“A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law” (*Hamer v FPG Am., LLC*, 235 AD3d 624, 625 [2025] [internal quotation marks omitted]).

Motion Sequence #1

The Kishk defendants’ motion is granted (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28). A review of plaintiffs’ complaint is devoid of any allegation that the Kishk defendants had knowledge that the 2011 easement (or its predecessors) were allegedly not signed Filippo Lazzara, who predeceased his wife, Catherine Lazzara, the life tenant. It follows that a failure to advise of this alleged phone call cannot be the basis of a breach of defendants’ fiduciary duty because assuming the allegations in the complaint are true, the 2011 easement is a matter of public record that would be discoverable by any potential buyer of the property and these defendants, through ordinary diligence in the form of a search of the Office of the City Register (*Barrett v Freifeld*, 77 AD3d 602; and *see* CPLR § 3211 [a] [7]). Therefore, the 10th cause of action for breach of fiduciary duty is dismissed because the recorded easement is a complete

documentary defense as a matter of law (*Hamer v FPG Am., LLC*, 235 AD3d 625; CPLR § 3211 [a] [1]).

Plaintiffs' complaint, and Semen's affidavit in opposition, fail to plead that defendants' knew that the recorded easement was a potential forgery. Also missing from the complaint and the affidavit are facts as to when Semen first learned of the recorded easements that are claimed to be forgeries, or the foundation for her allegations in the complaint that Catherine Lazarra and Filippo Lazarra never appeared before the notary. This is notable since the Irrevocable Inter Vivos Trust granting Ms. Lazarra a life estate and appointing Ms. Semen as the trustee, was not created until 2016 – five years after the alleged forgery on 3/14/2011.

Therefore, the 11th cause of action for defamation must also be dismissed because the allegations, taken together with Semen's affidavit, do not state a valid cause of action for defamation, *i.e.*, that the Kishk defendants acted “with reckless disregard for the statements' truth or falsity, or with a high degree or belief that their statements were false.” (*Foster v Churchill*, 87 NY2d 744, 751-752 [1996]).

Motion Sequence #2

Defendant Stacy Derzie's motion to dismiss is denied. Unlike the Kishk defendants, Stacy Derzie, as alleged in the complaint, is formerly known as Stacy Safdie – the same last name as the notary Joseph Safdie. Additionally, it is alleged in the complaint that Filippo and Catherine Lazarra were of advanced age and fraudulently induced by Stacy and Eric Derzie to execute all the recorded easements that were notarized by Joseph Safdie. Notwithstanding the fact that only Eric Derzie signed the easements, these allegations coupled with this apparent relationship between Stacy Derzie and Joseph Safdie warrant a denial of the motion. Again, unlike the Kishk defendants, there is an inference that Stacy Derzie may have acted with

reckless disregard for the legitimacy of the recorded easements (*Foster v Churchill*, 87 NY2d 744, 751-752 [1996]).

As argued by Stacy Derzie in support of her motion, forgery is not subject to a statute of limitations. Accepting plaintiffs' allegations as true, they have stated viable causes of action based on a forgery and fraudulent notary that goes beyond allegations of an improper notarization that would be time-barred under RPL § 306.

Therefore, construing the pleadings in the light most favorable to plaintiffs, and affording them the benefit of every possible favorable inference, Derzie's motion is denied (*Leon v Martinez*, 84 NY2d 87-88), with leave to renew after the completion of discovery.

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that the motion by defendants Melanie Kishk, Jack Kishk, and MK Realty Melanie Kishk Broker LLC d/b/a Century 21 Melanie Kishk Realty for an order per CPLR § 3211 [a][7], dismissing plaintiffs' 10th [breach of fiduciary duty] and 11th [defamation] causes of action is GRANTED (MS#1), and the Clerk shall enter judgment accordingly, and it is further

ORDERED that the motion by defendant Stacy Derzie is DENIED (MS#2).

This constitutes the decision and order of the Court.

E N T E R:



Hon. Anne J. Swern, J.S.C.

Dated: 3/23/2026