

**Bilski v Kern**

2007 NY Slip Op 31474(U)

May 18, 2007

Supreme Court, New York County

Docket Number: 0104054/2007

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: CAROL EDMEAD  
J.S.C.  
*Justice*

PART 35

*Christopher Bilski*

- v -

*Frank Kern*

INDEX NO. 10405467  
MOTION DATE 5/18/07  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Motions sequence 001 and 003 are consolidated for joint disposition as follows:

Plaintiffs Christopher Bilski and Andrea Mendez ("plaintiffs") initially moved by order to show cause for an order enjoining defendants Frank Kern, Carnegie Management Company ("Carnegie"), and Shapiro Family Realty Associates ("Shapiro Realty") (collectively, "defendants") from performing construction work occurring at 40 East 89<sup>th</sup> Street, apartments 7C,D, and E, New York, New York, until plaintiffs' lease expires on May 31, 2007. By order dated April 9, 2007, the Court granted interim relief in favor of plaintiffs restricting construction work to Monday through Friday, 10:00 a.m. to 4:00 p.m. Plaintiffs live one floor above Frank Kern, who began construction work in apartment 7D in September 2006. Carnegie acts as agent for Shapiro Realty. The construction work included knocking down walls and converting apartment 7D with apartments 7E and 7C into one apartment.

According to plaintiffs, on September 8 and 13, 2006, Kern's employees began drilling and hammering in the apartments. Plaintiffs allege that the resulting noise was unbearable to the Bilski family, and his three-year old son began crying such that it took twenty minutes to calm him down. When Mr. Bilski notified security of the noise, the workers stopped construction after the Bilski family left the apartment. Mr Bilski sent a letter to Carnegie advising that the noise constituted a breach of the quiet use and enjoyment provision of the parties' lease. Mr. Bilski was then advised that the only minor work was left to be completed. Kern agreed to have his workers notify Mr. Bilski prior to beginning any work so that the work could continue when the

Dated: \_\_\_\_\_

*Page 1 of 5*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Bilski family was not at home. However, despite the agreement, the construction work continued from September 2006 through December 2006 without any notice. When even greater noise began in January 2007, Mr. Bilski demanded that Carnegie cease construction. However, Mr. Bilski received no response. The Bilski family is subjected to the sound of a bench buzz saw cutting wood, drilling and hammering at all hours of the day and on the weekends. The work has continued for the past 6 months and with work permits that will not expire until June 1, 2008, Kern has no incentive to complete the work in a timely fashion.

In response, defendants moved by order to show cause to dismiss the amended complaint as asserted against Carnegie and Shapiro Realty on the ground that the current deeds to the building demonstrate that *Ralph W. Kern* and Shapiro Family Realty Associates LP are owners of the building. Defendants further move to dismiss the first cause of action for breach of implied warranty of habitability, the second cause of action for nuisance, and the third cause of action for breach of the covenant of quiet use and enjoyment for failure to state a cause of action. Defendants also seek dismissal of the fourth cause of action for injunctive relief given that adequate legal remedy exists. Defendants argue that Kern has not been properly added as a party defendant, as he, a co-owner of the building, is a necessary party, and has not been served with a supplemental summons pursuant to CPLR 305(b).

Plaintiffs oppose dismissal of their complaint, contending that the parties stipulated to discontinue the Civil Court action, which alleged nuisance and breach of quiet use and enjoyment.

Further, plaintiffs filed an Amended Complaint which adds Ralph Kern and Shapiro Family Realty Associates, L.P. as defendants to this action. Thus, the motion to dismiss on the grounds that the plaintiffs have not correctly named the owners of the Building is moot. Moreover, defendants' allegation that Carnegie was incorrectly named as an owner lacks merit, in that plaintiffs allege that Carnegie is a party to the Lease, who sent monthly rental invoices to plaintiffs and deposited plaintiffs' rental check.

Plaintiffs also claim that they have a valid claim for nuisance, by claiming that defendants are liable for the noise emanating from defendants' construction work and that plaintiffs repeatedly notified Carnegie to complain about the noise, to no avail. Defendant Kern misrepresented to plaintiffs that only minor work was remaining. Further, plaintiffs allege that the noise was so excessive that plaintiffs were unable to use their phone, work at home, eat meals, watch television or even have conversations with each other.

Plaintiffs also maintain that their breach of quiet enjoyment claim survives because they have adequately alleged that they have been constructively evicted from their premises. And, a plaintiff need not vacate an apartment while a suit for quiet use and enjoyment and constructive eviction is pending. Paragraph 22 of the complaint also alleges that defendants failed to make necessary repairs and thus have constructively evicted plaintiffs.

Furthermore, Kern may be held liable for breach of warranty of habitability because he has admitted that he is the managing agent for the owners, and upon information and belief, is a signatory to the lease. Based on the documentary evidence, it is reasonable to conclude that Kern and Carnegie are one and the same, agents for the Owners. Thus, it is premature to dismiss Kern from this action until discovery has been conducted to ascertain Kern's role as agent for the Owners.

In support of injunctive relief, plaintiffs argue that the Courts have maintained the *status quo* in cases in which it was later determined that the injury was purely monetary.<sup>1</sup> And, restricting the defendants to the work schedule contained in this Court's order will not harm the defendants in any way.

In reply, defendants argue that Ralph Kern cannot be simply added to the complaint, in that inasmuch as he is a co-owner of the building, and thus a necessary party, who has not been served with a summons pursuant to CPLR 305(b).

Further, dismissal of the complaint against Kern and Carnegie is warranted, because as the renewal lease indicates, Carnegie was simply acting on behalf of the owner, a disclosed principal. As there is no evidence of Carnegie's intent to substitute its personal liability for that of his principal, Carnegie cannot be held liable for breach of the warranty of habitability, breach of quiet use and enjoyment, or private nuisance. And, actual and constructive eviction *via* vacatur of the premises is necessary to support a claim for breach of the warranty of habitability, breach of quiet use and enjoyment. Finally, the cases on which plaintiffs rely to support their nuisance claim are distinguishable.

#### Analysis

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the 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 into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001];

---

<sup>1</sup> The Court learned subsequent to the submission of the papers that plaintiffs have withheld rent and thus, have not maintained the *status quo*.

*WFB Telecom, Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1<sup>st</sup> Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Here, the first and third causes of action for breach of implied warranty of habitability and quiet use and enjoyment cannot be maintained against defendants Frank Kern, Carnegie Management Company, and Shapiro Family Realty Associates. Such claims arise out of a landlord-tenant relationship (RPL §235-b; *Green v. Fischbein Olivieri Rozenholc & Badillo*, 119 A.D.2d 345, 507 N.Y.S.2d 148 [1<sup>st</sup> Dept 1986]) and current deeds reflect that none of such parties are owners of the subject building. Further, Frank Kern is an agent for a disclosed principal. The Court also notes that the renewal lease was signed "Carnegie Management Co. as Agent for owner." Thus, contrary to plaintiffs' contention, such defendants cannot be held liable for breach of implied warranty of habitability and quiet use and enjoyment.

In any event, "[m]ere temporary inconveniences and annoyances to the tenant by an act of the landlord do not ordinarily constitute a breach of the covenant' of quiet enjoyment" (33 N.Y.Jur., Landlord & Tenant, s 162, p. 501). Moreover, plaintiffs' complaint fails to allege sufficient facts indicating that they have been actually or constructively evicted from the premises to support a breach of quiet use and enjoyment claim (*see Tomenek v Shumway*, 248 AD2d 927 [4<sup>th</sup> Dept 1998]; *Barash v Pennsylvania Terminal Real Estate*, 26 NY2d 77 [1970]). The alleged need for repairs, in and of itself, is insufficient to support a claim of actual or constructive eviction as such damage may not be ascertained by mere conjecture or guess work (*Broadway Photoplay Co. v. World Film Corp.*, 225 N.Y. 104, 109, 121 N.E. 756, 758; *Dunkel v. McDonald*, 272 App.Div. 267, 70 N.Y.S.2d 653, *aff'd* 298 N.Y. 586, 81 N.E.2d 323).

With respect to the second cause of action for private nuisance, plaintiff must allege that there has been (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act (*Copart Indus., Inc. v. Consolidated Edison Company of New York, Inc.*, 41 N.Y.2d 564, 394 N.Y.S.2d 169 [1977]). Here, the complaint fails to allege sufficient facts indicating that the noise levels here caused an interference substantial in nature or were unreasonable in nature. The construction work is being performed within the scope and duration of permits issued by the City of New York, and does not rise to the level of a private nuisance. Such factors, among others, render the cases on which plaintiffs rely distinguishable.

Finally, with regard to the fourth cause of action for preliminary injunctive relief, there must be a showing of "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v. Axelrod*, 73 N.Y.2d at 750, 532 N.E.2d at 1272, 536 N.Y.S.2d at 45; *Housing Works, Inc. v. City of New York*, 255 A.D.2d 209, 213, 680 N.Y.S.2d 487, 491 (1st Dep't 1998)). Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail (*Scotto v. Mei*, 219 A.D.2d 181, 182, 642 N.Y.S.2d 863, 864 (1st Dep't 1996); *Faberge International Inc. v. DiPino*, 109 A.D.2d 235, 240, 491 N.Y.S.2d 345, 349 (1st Dep't 1985)). Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts (*Koultukis v*

*Phillips*, 285 AD2d 433, 728 NYS2d 440 [1st Dept 2001]). Furthermore, “[b]ecause the purpose of a preliminary injunction is to prevent litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards” (*Uniformed Firefighters Ass’n of Greater New York v City of New York*, 79 NY2d 236, 241, 581 NYS2d 734, 737 (1992). See also *Kanan, Cobin, Schupak & Aronow, Inc. v FD Int’l, Ltd.*, 8 Misc.3d 412, 415, 797 NYS2d 883, 886 (Sup. Ct. N.Y. Co. 2005)).

With respect to plaintiffs’ attempt to add Ralph Kern as a party defendant, this Court notes that this action has not been properly commenced against Ralph Kern, the co-owner of the building, as it is undisputed that he was not served with a summons in accordance with the CPLR. Since the complaint fails to state a claim sufficient to sustain a claim for breach of warranty of habitability, use and quiet enjoyment, nuisance, the attempt add Shapiro Family Realty Associates LP is also unavailing.

Based on the foregoing, it is hereby

ORDERED that the order to show cause by plaintiffs is denied in its entirety; and it is further

ORDERED that the order to show cause by defendants to dismiss the complaint is granted; and it is further

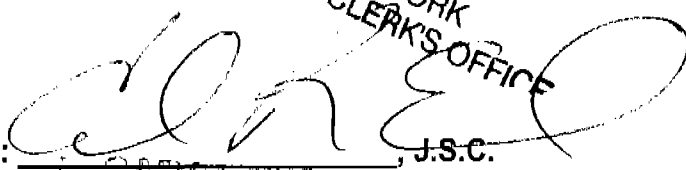
ORDERED that the defendants serve a copy of this order with notice of entry

ORDERED that the Clerk may enter judgment accordingly.

**FILED**

JUN 06 2007

NEW YORK  
COUNTY CLERK'S OFFICE



ENTER: \_\_\_\_\_ J.S.C.

Dated 5/15/07

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE