

**Curtis v Bouley**

2011 NY Slip Op 32928(U)

November 1, 2011

Sup Ct, NY County

Docket Number: 194558/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_  
Justice

PART 15

Index Number : 104558/2011  
**CURTIS, W. ROBERT**  
vs.  
**BOULEY, DAVID**  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. 104558/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002

\_\_\_\_\_ motion to/for \_\_\_\_\_  
\_\_\_\_\_ | No(s). 1  
\_\_\_\_\_ | No(s). 3  
\_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

**FILED**

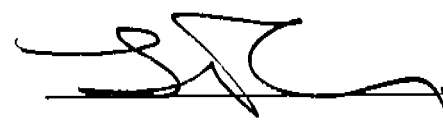
NOV 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 11/1/11

 J.S.C.

**HON. EILEEN A. RAKOWER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
W. ROBERT CURTIS,

Plaintiff,

Index No. 194558/11

- against -

Mot. Seq.: 002

**DECISION/ORDER**

DAVID BOULEY, BOULEY RESTAURANT, BOULEY  
AT HOME/BOULEY COMPLEX, BOULEY BAKERY  
& MARKET, BOULEY STUDIO, BRUSHSTROKE,  
BOULEY/CARE BOULEY TEST KITCHEN, BOJI BOULEY  
X CORPORATION, BOULEY Y PARTNERSHIP AND BOULEY  
Z ENTERPRISE,

Defendants.

**FILED**

NOV 07 2011

-----X

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff W. Robert Curtis brings this action for, among other things, private nuisance, premises liability, breach of contract, misrepresentation and specific performance, as the result of an ongoing dispute between him and his neighbor defendant David Bouley.

Plaintiff owns the property located at 155 Duane Street, a five-story townhouse consisting of a two story office which sits below a residential unit. The office space shares a common wall with the building located at 130 West Broadway, which is owned by Bouley. According to the complaint, Bouley, a chef and restaurateur, has recently closed down a number of his restaurants and is using the 130 West Broadway location mainly for food preparation and garbage disposal. As a result, starting in or around, October 2010, plaintiff alleges that the office unit became infested with vermin and flies, preventing him from renting the space for an amount of \$30,000-\$35,000 a month.

The parties previously appeared before this Court for oral argument on May 31, 2011, wherein the Court granted Bouley's motion to dismiss to the extent of

dismissing plaintiff's first, fourth, and fifth causes of action, for public nuisance, breach of contract, and misrepresentation, respectively. The Court also struck paragraphs 9-29 of the complaint as being scandalous and prejudicial, and denied plaintiff's cross-motion for an injunction. Plaintiff subsequently amended his complaint, re-alleging the breach of contract and misrepresentation claims, and adding a claim for specific performance.

Bouley again moves to dismiss plaintiff's breach of contract and misrepresentation claims, and to dismiss the cause of action for specific performance, pursuant to CPLR 3211(a)(7). Bouley also moves to strike paragraphs 5, 7 and 30 of plaintiff's amended complaint pursuant to 3024(b). Plaintiff opposes and cross-moves for expedited court-supervised discovery,<sup>1</sup> and for specific performance.

Bouley argues that plaintiff still fails to plead facts sufficient to sustain the cause of action for breach of contract, in that there was no mutual exchange, and no consideration. As to the misrepresentation claim, Bouley asserts that plaintiff merely alleges future intent on the part of Bouley, which cannot constitute fraud. Further, Bouley claims that, by plaintiff's own admissions, he could not have reasonably relied on Bouley's assurances.

Plaintiff, in opposition, submits a letter from Bouley dated November 4, 2010, which plaintiff claims was omitted from the initial complaint and evidences a written agreement, wherein Bouley addresses changes to be made to remediate the "fruit fly problem." Plaintiff contends that the "consideration" supporting the agreement was his delay in commencing a lawsuit. Plaintiff also reformulates his misrepresentation claim to add an allegation that Bouley falsely stated that he remediated the problems in the basement.

It is well settled that on a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

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<sup>1</sup>The discovery portion of the cross-motion is rendered moot by a so-ordered stipulation entered into at a compliance conference held on September 13, 2011.

\* 4]

To create a binding contract, there must be “a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all the material terms.” (*Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 NY2d 584[1999]). Plaintiff, in his amended complaint, still fails to allege that there was a meeting of the minds as to the “material terms” agreed upon with respect to the remediation of the sanitary problems.

Nor does plaintiff sufficiently allege the existence of consideration. In order for a forbearance of litigation to constitute consideration, there must be a definite promise to forego future litigation in exchange for the performance requested. (see; *Wood Realty Trust v. Storonske Cooperage Co.*, 229 AD2d 821[3rd Dept. 1996] and see generally; *Elghanian v. Elghanian*, 277 AD2d 162[1st Dept. 2000])). Here, there was no bargained for consideration. Rather, plaintiff merely conjectures that Bouley promised to remediate the problems at his premises in order to “prevent litigation and complaints to public authorities.”

As the Court previously found, information about Bouley’s disputes with other neighbors, and with New York City agencies, is merely prejudicial and unnecessarily inserted into the pleadings. (see; CPLR 3024[b]).

In a claim for fraudulent misrepresentation, a plaintiff must allege “a misrepresentation or a material omission of [present] fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173[2011]).

When taking plaintiff’s allegations as true, as the Court must, plaintiff now pleads a cause of action sounding in misrepresentation. In his amended complaint, plaintiff alleges that Bouley repeatedly assured him that the problems in the basement had been remedied, when, in fact, he knew that they had not. Whether plaintiff’s reliance on Brouley’s statements was reasonable is a question generally left to the finder of fact. (*Talansky v. Schulman*, 2 AD3d 355[1st Dept. 2003])

Wherefore it is hereby

[\* 5] .  
ORDERED that the motion is granted to the extent that the causes of action for breach of contract and specific performance are hereby severed and dismissed; and it is further

ORDERED that paragraph #'s 5,7 and 30 are hereby stricken from the complaint; and it is further

ORDERED that the discovery portion of the cross-motion is denied as moot; and it is further

ORDERED that the remainder of the cross-motion is denied.

DATED: November 1, 2011



EILEEN A. RAKOWER, J.S.C.

**FILED**

NOV 07 2011

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