

**Abrams v Board of Mgrs. of 25 Beekman Place
Condominium**

2019 NY Slip Op 30587(U)

March 8, 2019

Supreme Court, New York County

Docket Number: 154144/2018

Judge: Robert D. Kalish

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agent, attend to the day-to-day operations of the Building, and keep its common elements (Common Elements)¹ in good repair (*id.* ¶ 6).

Plaintiffs allege that, shortly after they bought the Unit in December 2016, they experienced excessive and unreasonable noises, vibrations, and offensive cooking odors in the Unit about which they immediately notified the Building' superintendent (*id.* ¶¶ 18-20).

Plaintiffs also assert that, after they moved in, they learned that water from the roof of the Building was leaking into their Unit because of a roof membrane that had exceeded its useful life (*see id.* ¶ 39).

Plaintiffs maintain that they also notified Defendants about these problems shortly after they arose and repeatedly requested that Defendants have them fixed. Plaintiffs allege that Defendants made “half-hearted efforts” to reduce the excessive noises and vibrations in their Unit (*id.* ¶ 35) and attempted a temporary repair of the roof (*id.* ¶ 40) but were unsuccessful with respect to each of these issues (*id.* ¶¶ 36-38, 41-46). Plaintiffs also assert that they repeatedly complained to the superintendent and Defendants about offensive odors but that they took no action to fix that problem (*id.* ¶ 44).

Plaintiffs assert four causes of action sounding in: (1) nuisance; (2) breach of contract; (3) breach of fiduciary duty; and (4) negligence.

In their first cause of action, Plaintiffs allege that the failure of the Board and MKI to maintain and repair the Building, including its pumps, fans, pipes, roof and other facilities, has caused excessive noises and vibrations in the Unit (*id.* ¶ 48). Plaintiffs further allege that, by

¹ The “Common Elements” are defined to “include, but are not limited to, those rooms, areas, corridors, spaces and other parts of the Building and all facilities therein for the common use of the Units and the Unit Owners or which are necessary or convenient for the existence, maintenance or safety of the Building” (*id.* ¶ 7).

failing to repair the Building, including its fans, airducts and other facilities, the Board has permitted offensive, obnoxious odors to enter the Unit (*id.* ¶ 49). Plaintiffs further allege that, by failing to replace the worn-out roof membrane, the Board and MKI have allowed continuing, damaging leaks to enter Plaintiffs' Unit (*id.* ¶ 50). Plaintiffs seek an injunction directing Defendants to take all necessary steps to abate these nuisances (*id.* ¶ 51).

In their second cause of action, Plaintiffs allege that the Condominium By-Laws are a contract between the Board and unit owners, like them, which the Board breached by, among other things, failing to maintain and repair the Common Elements of the Building and permitting several nuisances to continue unabated (*id.* ¶ 53-54).

In their third cause of action, Plaintiffs allege that, as owners of the Unit, the Board owes them a fiduciary duty to safeguard their use and enjoyment of the Building and Unit and to preserve their values (*id.* ¶ 57). Plaintiffs allege the Board has breached this duty by failing to maintain and repair the Building and by failing to protect the Unit from the continuing nuisances described, which have lessened the values of the Unit and the Building.

In their fourth cause of action, Plaintiffs allege that the Board and MKI owe them a duty of care to maintain and repair the Building and its Common Elements in accordance with "standards of quality, service and appearance appropriate to a luxury condominium" (*id.* ¶ 61). Plaintiffs assert that Defendants acted negligently by failing to maintain and repair the Building and its Common Elements in such a manner as to maintain its luxury standard and by failing to abate the nuisances (*id.* ¶ 62). Plaintiffs seek compensatory damages on the second, third, and fourth causes of action (*id.* ¶¶ 55, 58-59, 64).

Defendants now move to dismiss portions of Plaintiffs' first cause of action, for nuisance. Specifically, Defendants move for dismissal of Plaintiffs' claim for nuisance caused by offensive

cooking odors, which is asserted against the Board, only. Defendants further move to dismiss the part of Plaintiffs' claim for nuisance premised on roof leaks, which is asserted against both the Board and MKI. Defendants do not seek dismissal of the branches of Plaintiffs' first cause of action regarding excessive noise and vibration.

Defendants also move to dismiss the second and third causes of action, for breach of contract and breach of fiduciary duty, respectively, which are asserted against the Board, only, and the fourth cause of action for negligence, which is asserted against both Defendants.

Plaintiffs oppose Defendants' motion and cross-move for a preliminary injunction directing Defendants to eliminate the alleged excessive noises and vibrations produced by pumps located in the cellar of the Building and by fan units located on its roof.

DISCUSSION

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.*).

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citation omitted]).

Under CPLR 3211 (a) (7), the court addresses the face of the pleading, to decide whether the pleader's allegations fit any cognizable legal theory (*id.*, 84 NY2d at 87-88). "Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts" (*Khalil v State*, 17 Misc3d 777, 781 [Sup Ct, NY County 2007] [citation omitted]).

On a motion pursuant to CPLR 3211 (a) (7), the Court “may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one” (*Chanko v American Broadcasting Co.*, 27 NY3d 46, 52 [2016] [citation omitted]). Nevertheless, “allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [citations omitted]).

I. Plaintiffs’ First Cause of Action—Nuisance Based on Odors and Leaks

A. Odors

Defendants argue that Plaintiffs have failed to state a cause of action for nuisance caused by excessive odors because the Complaint does not allege that the nuisance is intentional or that Defendants caused it. Defendants further argue that the Complaint does not allege that the odors were substantial, unreasonable, or interfering with Plaintiffs’ right to use and enjoy the Unit. Defendants further argue that, as a matter of law, the Board cannot be held liable in nuisance for cooking odors caused by a third party.

“The elements of a common-law claim for a private nuisance are:

“(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, caused by another’s conduct in acting or failure to act.

“Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct”

(*Berenger v 261 West LLC*, 93 AD3d 175, 182 [1st Dept 2012] [citations and internal quotation marks omitted]). Defendants’ argument, citing *Berenger*, that any nuisance must be intentional to be actionable, is misplaced. The Court of Appeals has held that a party may be subject to liability for private nuisance arising out of its negligent or reckless misconduct (*see Copart Indus., Inc. v*

Consolidated Edison Co., 41 NY2d 564, 569 [1977]). Here, Plaintiffs allege that they have complained to Defendants about offensive cooking odors in their Unit multiple times to little avail (Complaint ¶ 44).

The Court finds that this allegation satisfies the elements of nuisance and is sufficient to withstand Defendants' CPLR 3211 (a) (7) motion to dismiss. While Defendants fault Plaintiffs for not strictly adhering to *Berenger's* definition of nuisance, insofar as they do not allege the odors at issue are "substantial," "unreasonable," or interfered with Plaintiffs' rights, Plaintiffs do complain of an "ongoing, recurring presence of an unacceptable level of odor" (*Zipper v Haroldon Ct. Condominium*, 39 AD3d 325, 326 [1st Dept 2007], citing *Domen Holding Co. v Aranovich*, 1 NY3d 117, 123-24 [2003]). Defendants' argument regarding the elements under *Berenger* goes to whether Plaintiffs' cause of action is artfully stated, not whether they have one.

Defendants argue in the alternative that the Board cannot be held liable for nuisance caused by offensive cooking odors because it did not cause or create them. Plaintiffs argue that Defendants' definition of causation is too narrow, and the Court agrees. Plaintiffs allege that the offensive odors in their Unit, specifically, are caused not only by third parties cooking in the Building's other units but also by ventilation problems caused and created by improper kitchen renovations that the Board permitted in other units, including the unit owned by the president of the Board. Plaintiffs allege that the faulty renovations both intensify the odors and discharge them into the Unit (affidavit of Samuel J. Abrams, sworn to July 30, 2018 [Abrams aff] ¶¶ 6-14; see also Complaint ¶¶ 43-44). As such, the Court rejects this alternative argument and accepts as true for the purposes of the instant motion that the Board's failure and refusal to maintain and repair the Building's ventilation system has caused substantial, unreasonable and continuing offensive and obnoxious odors to enter the Unit (see *Copart Indus., Inc.*, 41 NY2d at 566

[nuisance claim based not on defendant's creation of pollutants at its steam and electricity plant, but on its improper discharge of "noxious emissions" from smokestacks, which damaged exteriors of automobiles plaintiff stored on adjoining property]).

Finally, Defendants argue that the first cause of action should be dismissed because the cooking odors Plaintiffs complain about are merely common annoyances incidental to urban life, which are unavoidable in multiple-dwelling buildings. In effect, Defendants argue that cooking odors cannot constitute a nuisance as a matter of law.

A cause of action for nuisance rests on two factors: first, how offensive the nuisance is (*see Berenger*, 93 AD3d at 182 [whether the interference with plaintiffs' rights is "substantial in nature. . . [and] unreasonable in character"]); and, second, whether such interference involves "a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co.*, 1 NY3d at 139 [citation and internal quotation marks omitted]).

"The law relating to private nuisances is a law of degree and usually turns on the question of fact whether the use is reasonable or not under all the circumstances. No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another"

(*McCarty v National Carbonic Gas Co.*, 189 NY 40, 46 [1907]).

Plaintiffs describe the cooking odors entering the Unit as "direct, frequent and potent" (*Abrams* aff ¶ 7). These allegations satisfy the pleading requirement that an alleged nuisance be substantial, unreasonable and recurring (*see Berenger*, 93 AD3d at 182 and *Domen Holding Co.*, 1 NY3d at 139).

Rather than addressing these factors, Defendants conclude that "the 'annoying' smell of cooking odors," generally, is "merely an annoyance" of city life "that one must endure," and cannot constitute actionable nuisance (Defendants' memorandum in support, at 8, citing *Ewen v Maccherone*, 32 Misc3d 12 [1st Dept 2011]).

The *Ewen* decision does not support the conclusion that, as a matter of law, cooking odors can never constitute an actionable nuisance. *Ewen* merely states that “not every intrusion will constitute a nuisance” and that city residents “must suffer *some* damage, annoyance and inconvenience from each other” (32 Misc3d at 14 [emphases added]). It may well be that the odors in the Unit will prove to be insubstantial or reasonable, or will be shown to recur infrequently, under the *Berenger* and *Domen Holding Co.* standards. Nevertheless, in this motion to dismiss, the Court finds that Plaintiffs have a cause of action sounding in nuisance with respect to these odors. As such, Defendants’ motion on that facet of Plaintiffs’ nuisance cause of action on the aforementioned grounds is denied.

B. Nuisance Caused by Leaks

In *Berenger*, the plaintiff alleged, among other things, that the defendant condominium sponsor committed a trespass by allowing glycol leaking from a cooling tower to enter plaintiff’s penthouse condominium (93 AD3d at 181).

“Trespass is the invasion of a person’s right to exclusive possession of his land, and includes the entry of a substance onto land. . . . Unlike trespass, which arises from the exclusiveness of possession and requires a physical entry onto the property, a claim of private nuisance arises from an interest in the use and enjoyment of property. . . [and is] characterized by a pattern of continuity or recurrence of objectionable conduct”

(*id.* at 181-182 [citations omitted]).

Berenger demonstrates that trespass is a proper action to assert where a party is aggrieved by the invasion of its real property by a liquid (*id.* at 181, *citing Crown Assoc. v Zot, LLC*, 83 AD3d 765 [2d Dept 2009] [water] and *Duane Reade v Reva Holding Corp.*, 30 AD3d 229 [1st Dept 2006] [debris and water]).

In *Duane Reade*, the Appellate Division, First Department held that the plaintiff commercial tenant had sufficiently alleged claims for nuisance and trespass (30 AD3d at 236–

237). Duane Reade had leased a store in Brooklyn from defendant landlord Reva. Reva then hired defendant contractor F&S to add a second story to the building. Plaintiff alleged that F&S did not perform in a workmanlike manner, causing injury to property (*id.*, 30 AD3d at 230). Specifically, plaintiff alleged that F&S opened exploratory holes in the building's roof that it failed to cover and seal properly, resulting in water leaking from the roof into plaintiff's store and, on at least two occasions, causing water pipes to freeze and burst (*id.*).

The Appellate Division, First Department determined that the motion court erred in dismissing Duane Reade's nuisance claim and that Duane Reade had sufficiently alleged a "recurrence of objectionable conduct" on the part of Reva and F&S, respectively (*id.*, 30 AD3d at 236–237 [citations and internal quotation marks omitted]). The court also found that Duane Reade had sufficiently alleged that Reva and F&S had "committed a trespass upon the demised premises by causing water and debris to be deposited therein, without any right to do so" (*id.*, 30 AD3d at 237 [citations omitted]).

Here, under the *Duane Reade* standard, Plaintiffs have sufficiently alleged a recurrence of objectionable conduct. As such, Defendants' motion to dismiss that part of Plaintiffs' nuisance cause of action relating to water leaks in the roof on the aforementioned grounds is denied.

II. Plaintiffs' Second Cause of Action—Breach of Contract based on Leaks

In their second cause of action, Plaintiffs allege that the Board breached the Condominium By-Laws by permitting leaks from the roof to exist and to interfere with Plaintiffs' use and enjoyment of the Unit. Defendants move to dismiss this cause of action pursuant to CPLR 3211 (a) (1) and (7) as to the alleged leaks. Defendants allege that, under section 2.13.2 of the Condominium By-Laws, the Board cannot be held liable for water leaks that emanate from Common Elements. Section 2.13.2 states, in pertinent part:

“Neither the Board nor any member thereof shall be liable for. . . (ii) any injury, loss or damage to any individual or property, occurring in or upon either a Unit or any Common Element and is either: (a) caused by the elements, by any Unit Owner or by any other individual, (b) resulting from electricity, water snow or ice that may leak or flow from a Unit or any portion of any Common Element, or (c) arising out of theft or otherwise; except when caused by the acts of bad faith or willful misconduct of the Board or any member thereof.”

Plaintiffs argue that Defendants’ interpretation of the By-Laws is incorrect and that it contains limitation of liability solely as to personal injuries and injuries to personal property and contend that this provision has no application to any damage caused by the Board to the Unit.

Plaintiffs further argue that Section 6.6.3 of the By-Laws holds the Board responsible for water leaks caused by the disrepair of Common Elements. Plaintiffs maintain that, under Section 6.6.3, the Board is obligated to keep “Common Elements” of the Building in “first class condition” and that this requires the Board to “promptly make or perform, or cause to be made or perform, all maintenance work, repairs, and replacements necessary in connection herewith.”

The Court finds that these provisions of the Condominium By-Laws are ambiguous enough to bar dismissal of Plaintiffs’ breach of contract claim pursuant to CPLR 3211 (a) (1) (*see Wright v Evanston Ins. Co.*, 14 AD3d 505, 505 [2d Dept 2005] [affirming denial of 3211 [a] [1] dismissal where insurance contract on which movant relied, that contained “ambiguous and conflicting” provisions, “failed to resolve all factual issues and conclusively dispose of plaintiff’s claims as a matter of law”]). Further, the Court finds that Plaintiffs have a cause of action for breach of contract as to the leaks based upon these sections. As such, the branch of the Defendants’ motion that is to dismiss the second cause of action is denied.

III. Plaintiffs’ Third Cause of Action—Breach of Fiduciary Duty

In their third cause of action, Plaintiffs allege that the Board breached its fiduciary duty by not repairing the Building and not abating the nuisances. Defendants argue that this cause of

action must be dismissed because a condominium board does not owe a fiduciary duty to unit owners as a matter of law. The Appellate Division, First Department has held otherwise (*see Tsui v Chou*, 135 AD3d 597, 597-598 [1st Dept 2016] [condominium board's decision not to investigate claims that board members improperly extended their terms on board, beyond period by-laws permitted, in breach of their fiduciary duties, held arbitrary and therefore not protected by business judgment rule]; *Odell v 740 Broadway Condominium*, 284 AD2d 52, 59 [1st Dept 2001] [condominium's board owes fiduciary duties to owner upon unit's purchase]). The Court declines to adopt Defendants' broad proposed restriction on a unit owner's private right of action as to a condominium board under any circumstances. Whether the acts of the Board were arbitrary or should be protected by the business judgment rule is not an appropriate inquiry for a court on a motion to dismiss. As such, Defendants' motion to dismiss Plaintiffs' third cause of action for breach of fiduciary duty is denied.

IV. Plaintiffs' Fourth Cause of Action—Negligence

Defendants assert, correctly, that Plaintiffs' negligence claims are based on the same allegations as the breach of contract claims. From this, Defendants argue that Plaintiffs cannot maintain their negligence cause of action because they fail to identify a "legal duty independent of the contract itself [which] has been violated" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]). In *Clark-Fitzgerald*, the Court of Appeals found that the plaintiff failed to allege a violation of a legal duty independent of the contract, because each of its allegations were "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract" (70 NY2d at 390).

Plaintiffs allege that the Board and MKI breached their duty of care, which required them to maintain and repair the Common Elements of the Building "in such a manner that standards of

quality, service and appearance appropriate to a luxury condominium are maintained”

(Complaint ¶¶ 61-62). These allegations repeat, verbatim, Plaintiffs’ description of the Board’s duties under the Condominium By-Laws (*id.* ¶ 5), which form the basis of their cause of action for breach of contract (*see id.* ¶¶ 52-55).

Plaintiffs nevertheless argue that Defendants owe them a duty of care separate and apart from their contractual obligations based on the Multiple Dwelling Law (MDL) and New York City’s Housing Maintenance Code. For the purposes of withstanding this motion to dismiss, the Court agrees as to the MDL, and that is sufficient for the fourth cause of action to withstand this motion to dismiss on these grounds. Liability under the MDL may arise from injury caused by a defective or dangerous condition where a property owner’s common-law duty under Multiple Dwelling Law § 78 to maintain premises in a reasonably safe condition has been breached, and where such breach was a proximate cause of the injury (*see Juarez by Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 643 [1996]; *Rivera v Nelson Realty, LLC*, 20 AD3d 316 [1st Dept 2005]). Plaintiffs have a cognizable negligence cause of action independent of and severable from their breach of contract cause of action. As such, Defendants’ motion to dismiss Plaintiffs’ fourth cause of action for negligence on these grounds is denied.

V. Dismissal of All Causes of Action as Against MKI

Aside from the grounds discussed above, Defendants argue in the alternative that all causes of action asserted against MKI must be dismissed because, as an agent acting solely on behalf of its disclosed principal, it may not be held liable to third parties. The court agrees.

As an agent for the Board, which is its disclosed principal, MKI cannot be held liable to third parties, such as Plaintiffs, ““for nonfeasance but only for affirmative acts of negligence or other wrong”” (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [1st Dept 2006], *overruled*

on other grounds by *Fletcher v Dakota, Inc.*, 99 AD3d 43 [1st Dept 2012], quoting *Greco v Levy*, 257 App Div 209, 211 [1st Dept], *affd* 282 NY 575 [1939].

“The reason is clear. ‘Unless the agent has assumed authority and responsibility, as if he were acting on his own account, then the duty which the agent fails to perform is a duty owing only to his principal and not to the third party to whom he has assumed no obligation’”

(*Pelton*, 38 AD3d at 11, quoting *Jones v Archibald*, 45 AD2d 532, 535 [1974]).

Plaintiffs have failed to show for the purposes of the instant motion that MKI, as the Board’s managing agent, owed them an independent duty or that MKI was affirmatively negligent in its conduct toward them. All the duties MKI is alleged to have breached were breached by nonfeasance. As such, the first and fourth causes of action asserted against MKI, sounding in nuisance and negligence, respectively, are dismissed.

VI. Plaintiffs’ Cross-Motion for Preliminary Injunctive Relief

Plaintiffs cross-move for a preliminary injunction enjoining and directing the Board “immediately to take all necessary steps to eliminate the noise produced from the pumps located in the cellar of the [Building]” and “from the fan units and cooling tower located on the Building roof” (affirmation of Michelle P. Quinn, Esq., executed July 30, 2018 [Quinn aff], ¶ 2.a). Defendants oppose.

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005], citing CPLR 6301). “A preliminary injunction is a drastic remedy, which should not be granted unless the movant demonstrates “a clear right” to such relief” (*22 Irving Place Corp. v 30 Irving LLC*, 57 Misc3d 253, 255 [Sup Ct, NY County 2017], quoting *City of New York v 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]).

“It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits” (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 616 [1st Dept 2018], citing *Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 531 [1st Dept 2017]).

CPLR 6301 provides that:

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.”

The CPLR allows for a preliminary injunction in two situations: (1) to restrain a defendant who is threatening to do, or is doing, an act in violation of plaintiff’s rights with respect to the subject of the action that would tend to render judgment ineffectual; or (2) in an action where plaintiff is demanding, and would be entitled to, a judgment which permanently restrains defendant from committing or continuing an act, which if committed or continued while the action is pending, would injure plaintiff (*see* Siegel, NY Prac § 327 [6th ed.]).

Rather than seeking to restrain Defendants, Plaintiffs seek an injunction to compel Defendants to engage in specific conduct. Although CPLR 6301

“speaks only in terms of ‘restraining’ the commission or continuance of acts, a preliminary mandatory injunction may be granted where the plaintiff presents a case showing or tending to show that affirmative action of a temporary character on the part of the defendant is necessary to preserve or restore the status quo of the parties”

(67A NY Jur 2d Injunctions § 42 [2d ed.], citing *Bachman v Harrington*, 184 NY 458 [1906] and *Pizer v Trade Union Serv.*, 276 App Div 1071 [1st Dept 1950]).

Plaintiffs' cross-motion must be denied because, even if they make out their prima facie showing for preliminary injunctive relief (*see Nobu Next Door, LLC*), the Court finds that they fail to show that the affirmative actions that they want Defendants ordered to perform are in any way necessary to preserve the status quo between them and Defendants (*see Pizer*, 276 App Div at 1071 [grant of "mandatory injunction *pendente lite* [is an] extraordinary action [] justified only where the situation is unusual and where the granting of the relief is essential to maintain the *status quo* pending trial of the action"] [citations omitted]).

The Court finds further that Plaintiffs have not sufficiently shown extraordinary circumstances for the purposes of the instant cross-motion. To the contrary, the injunction sought would not only disturb the status quo but would also grant Plaintiffs the ultimate relief sought, which they now seek at the outset of the litigation, with respect to their allegations of noise and vibration nuisances under their first cause of action (*St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [1st Dept 2003] [citations omitted]).

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted to the extent that Plaintiffs' first and fourth causes of action against MKI for nuisance and negligence are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Plaintiffs' cross-motion for preliminary injunctive relief is denied; and it is further

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ORDERED that the action shall bear the following caption:

-----X
SAMUEL J. ABRAMS and RACHAEL A. WAGNER,

Plaintiffs,

Index No.: 154144/2018

- against -

BOARD OF MANAGERS OF 25 BEEKMAN PLACE CONDOMINIUM,

Defendant.
-----X

And it is further

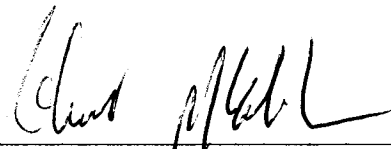
ORDERED that movants and cross-movant shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry upon all parties and upon the county clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption herein; and it is further

ORDERED that the remaining parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, March 19, 2019, for a preliminary conference.

The foregoing constitutes the decision and order of the court.

Dated: March 8, 2019

Enter:



HON. ROBERT D. KALISH
J.S.C.