

**Board of Mgrs. of the Morgan Condominium v Gil**

2020 NY Slip Op 31176(U)

May 4, 2020

Supreme Court, New York County

Docket Number: 155933/2016

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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BOARD OF MANAGERS OF THE MORGAN
CONDOMINIUM, ON ITS OWN BEHALF AND ON BEHALF
OF ALL UNIT OWNERS OF THE MORGAN
CONDOMINIUM,

Plaintiffs,

- v -

ALEJANDRO GIL,

Defendant.

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INDEX NO. 155933/2016
MOTION DATE 10/11/2018
MOTION SEQ. NO. 002

AMENDED/ RESETTLED
DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34,
35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for VACATE - DECISION/ORDER

ORDER

Upon the foregoing documents, it is
ORDERED, pursuant to CPLR § 5019(a), as follows, the prior
Decision/Order dated May 1, 2020 is amended and resettled; and it
is further

ORDERED that defendant's motion to vacate his default in
appearing at a duly scheduled discovery conference is granted in
part; and it is further

ORDERED that the ex parte Order dated May 17, 2017 is hereby
vacated only to the extent that solely the Amended Answer and first
counterclaim for breach of fiduciary duty, second counterclaim for
trespass and third counterclaim for nuisance, interposed in

defendant's Amended Answer, are restored and reinstated, and the inquest is stricken; and it is further

ORDERED that the Order dated May 17, 2017 is otherwise unmodified, and the dismissal of the fourth, fifth and sixth counterclaims is sustained; and it is further

ORDERED that defendant or plaintiff's counsel shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

DECISION

"Pursuant to the Rules of the New York City Civil Court, 22 NYCRR § 208.14 [c], 'actions stricken from the calendar may be restored to the calendar only upon stipulation of all parties so ordered by the court or by motion on notice to all other parties, made within one year after the action is stricken.' Notwithstanding this time limitation, courts have discretion to grant a restoration motion brought more than one year after the case is stricken from the calendar provided the movant demonstrates (a) the merits of his/her claim; (b) a lack of prejudice to the opposing party or parties; (c) a lack of intent to abandon the action; and (d) a reasonable excuse for the delay (see Williams v. A & S Dept. Store, 5 Misc.3d 140 (A), 2004 WL 2964000 [App. Term 2004] [citing CPLR 3404]; Mester v. Cattani, 4 Misc.3d 132 (A), 2004 WL 1517405 [App. Term 2004]). All four requirements must be met before a dismissal pursuant to CPLR 3404 can be vacated."

(Kaufman v Bauer, 36 AD3d 481, 481-481 [1<sup>st</sup> Dept 2007]).

This court finds that defendant has met all four requirements.

As for the first counterclaim for breach of fiduciary duty, second counterclaim for trespass, and third counterclaim for nuisance, the supporting affidavit<sup>1</sup>, signed before a notary public by defendant on August 1, 2018, suffices to establish their merits. Contrary to plaintiff's argument, "the quantum of proof needed to prevail on a CPLR 5015(a)(1) motion is not as great as that required to successfully oppose a motion for summary judgment" (see Winney v County of Saratoga, 255 AD2d 882, 885 [3d Dept 1998]). Defendant's claim that plaintiff erected a fence in violation of New York City rules and regulations and in breach of the Offering Plan sets forth a meritorious claim for breach of fiduciary duty, as well as trespass. His sworn affidavit also asserts the essential elements of a claim of nuisance, to wit that the erection of the fence constituted substantial interference with his interest in his right to use and enjoy the unit, intentional in origin, unreasonable in character, and caused by plaintiff's actions or failure to act. See Copart Industries, Inc. v Con Edison Co. of New York, 41 NY2d

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<sup>1</sup>As pro se defendant failed to sign his Amended Answer before a notary public as required under CPLR § 2016, such Answer is unverified and cannot serve as an affidavit of merits. See Law Offices of Neal Frishberg v Toman, 105 AD3d 712 (2d Dept 2013).

564, 570 (1977).

However, the affidavit does not establish the merits of the fourth counterclaim for abuse of legal process, the fifth counterclaim for tortious interference with contract or the sixth counterclaim for intentional infliction of emotional distress.

In his "abuse of legal process" counterclaim, by supporting affidavit, defendant does not allege that any "process" was abused. Even were this court to consider his unverified Amended Answer, no meritorious counterclaim is stated. Such Amended Answer describes a "Lien", as filed by plaintiff with nefarious motive or purpose, but "without alleging any supporting facts" (Goldstein v Siegel, 19 AD2d 489, 491 [1<sup>st</sup> Dept 1963]).

In terms of "tortious interference with contract", in his unverified Answer defendant does not allege that his lease with the tenants was actually breached as a result of the plaintiff's intentional procurement of such breach, a required element of such cause of action. With respect to the alleged contract of sale with the third party, the affidavit of defendant likewise does not allege the requisite elements of such counterclaim. See American Preferred Prescription Co, Inc v Health Management, 252 AD2d 414 (1<sup>st</sup> Dept 1998).

Finally, defendant's assertions seeking liability against plaintiff for intentional infliction of emotional distress "fall far short of the strict standard" of "conduct . . . so outrageous

in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (Murphy v American Home Products Corp., 58 NY3d 293, 303 [1983]).

The record before the court establishes that plaintiff will suffer no prejudice with respect to the restoration of the counterclaims for breach of fiduciary duty, trespass, and nuisance, which implicate the same issues of fact raised in the declaratory judgment cause of action set forth in the complaint.

Pro se defendant has shown that he had no intention of abandoning his counterclaims, as his non-appearance was an isolated incident, and there is absolutely no pattern of neglect on his part. Pro se defendant's assertion that he did not have notice of the discovery conference date and his apparent lack of awareness of his need to enroll in the NYS Court Alert E-Tracking system (<https://www.courtalert.com/NYSCEF.asp>), is akin to law

office failure, especially since a review of the record shows that the stipulated discovery order of October 13, 2016 did not list any date for a future discovery status conference. See Polir Construction, Inc v Etingin, 297 AD2d 509, 513 (1<sup>st</sup> Dept 2002). See Polir Construction, Inc v Etingin, 297 AD2d 509, 513 (1<sup>st</sup> Dept 2002).

<u>05/04/2020</u> DATE	<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE