

**Golden Ox Realty LLC v Board of Mgrs. of the  
Colden Garden Condominium**

2021 NY Slip Op 32582(U)

July 7, 2021

Supreme Court, Queens County

Docket Number: Index No. 701368/2020

Judge: Pam Jackman Brown

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This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNTY OF QUEENS**  
**IAS PART 19**

**Short Form Order**

**Present: Hon. Pam Jackman Brown, JSC**

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**Index No. 701368/2020**

**GOLDEN OX REALTY LLC, GOLDEN OX  
REALTY ER, LLC, 42-31 COLDEN ST. CORP.,**

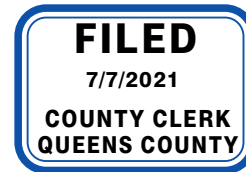
**Motion Date: 2/22/2021**

Plaintiffs,

**Mot. Seq. No.: 2**

-against-

**THE BOARD OF MANAGERS OF THE  
COLDEN GARDEN CONDOMINIUM a/k/a  
COLDEN CONDOMINIUM, and CLS  
PROPERTIES MANAGEMENT, INC.,**



Defendants.

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Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 41 to 78 and 95 to 98 read on this Notice of Motion by Defendants' for an Order pursuant to CPLR §§ 3211 (a)(1), (4), (5) and (7) granting Defendants' motion to dismiss the first through fifth causes of action in the complaint filed by Plaintiffs Golden Ox Realty LLC (hereinafter "Golden Ox"), Golden Ox Realty ER, LLC (hereinafter "Golden Ox ER"), and 42-31 Colden St. Corporation (hereinafter "42-31 Colden," and collectively with Golden Ox and Golden Ox ER, "Plaintiffs"); and (b) for such other and further relief that the Court may deem just, fair and equitable.

	<u>PAPERS E-FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion - Exhibits, Affirmation(s) and Affidavit(s) Annexed	41-42	43-52
Affirmation in Opposition, Affidavit and Exhibits Annexed	54-58	59-63
Notice of Cross Motion-Affirmation, Affidavits, and Exhibits Annexed	64-69	70-76
Affirmation in Reply	95-98	

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

Upon the foregoing papers, it is Ordered that Defendants' motion seeking to dismiss the first through fifth causes of actions is denied. Plaintiff's cross motion seeking an Order directing Defendants' to produce cooling tower maintenance records and granting partial relief as to the declaratory judgment, mandamus, and other appropriate relief as to the seventh and eighth causes of action in the complaint, granting a preliminary injunction, and granting plaintiff leave to amend the complaint is denied in part and granting in part in accordance with this Decision and Order.

This is an action whereby Plaintiffs are commercial unit owners that own various units in a condominium managed and operated by Defendant Board of Managers of Colden Garden Condominium located at 42-31 Colden Street, Flushing, New York (hereinafter "subject premises"). Plaintiffs allege that air conditioning equipment in the subject premises emits hazardous vapor or gas causing them to have limited use of certain areas of their units and playgrounds. Plaintiffs allege to have made several attempts to notify Defendants of the potential health hazard and nuisance coming from the cooling tower system. Plaintiffs further allege that Defendants have failed to fix the cooling tower system, thus violating New York City Building Code § 27-776 (c) with respect to the cooling systems location and operation. In addition, Plaintiffs allege that Defendants have failed to allow Plaintiffs access to various condominium books and maintenance records pertaining to the cooling tower system.

Plaintiffs commenced this action with the filing of a summons and complaint on January 13, 2020. On September 18, 2020 Defendants filed a verified answer to the cause of action seeking relief under Article 78.

Now, upon Notice of Motion, Defendants seek to dismiss the first through fifth causes of action in Plaintiffs' complaint contending that Plaintiffs' causes of action for nuisance and breach of contract must be dismissed because documentary evidence establishes that Defendants have maintained the equipment. Defendants also contend that Plaintiffs' claim for trespass must be dismissed because there is no trespass under New York law premised on the incursion of vapor or other intangible substances onto the subject premises. Moreover, because these claims fail, the related claims for injunctive and declaratory relief should also fail.

Plaintiffs oppose Defendants' motion contending that trespass is the invasion of a person's right to exclusive possession of his land and includes the entry of a substance onto the land. Plaintiffs claim that Defendants' conduct in maintaining the cooling tower violates the prohibition against nuisances or objectionable conduct upon the

property as provided in the condominium documents. Additionally, Plaintiffs maintain that the cooling tower in the present location and condition violates the prohibition in the condominium documents against improper, offensive, or unlawful use of the property and/or violating the laws and regulations of government bodies.

The Court turns to the branch of Defendants' the motion seeking to dismiss this action pursuant to CPLR § 3211(a)(1). "To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Teitler v. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]). Here, Defendants produce the offering plan, the condominium deeds, and the condominium by-laws. However, the issues of fact pertaining to the cooling tower potentially being hazardous are not resolved based on the evidence provided by the movant.

In opposition, Plaintiff's submits the Affidavit of Engineer Kwong Seung which provides that Defendants should discontinue its use of the cooling system due the hazardous bacteria it creates. Plaintiff submits the Affidavit of James Blum, PE which states that the cooling system is in violation of New York City Health Code 8-03 (c). Accordingly, this branch of Defendants' motion to dismiss pursuant to CPLR § 3211(a)(1) is denied.

The Court now turns to the branch of Defendants' the motion seeking to dismiss this action pursuant to CPLR § 3211(a)(4). A court has "broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action so long as the relief ... is the same or substantially the same" (*Dec v. BFM Realty, LLC*, 153 A.D.3d 497 [2d Dept 2017], quoting *Swartz v. Swartz*, 145 A.D.3d 818 [2d Dept 2016]). In the instant matter, Plaintiffs' claim for nuisance, trespass and breach of contract are not duplicative. Additionally, there are no other pending actions whereby the parties in this action or the relief being sought are substantially the same. Accordingly, this branch of Defendants' application seeking to dismiss this action pursuant to CPLR § 3211(a)(4) is denied.

The Court turns to the branch of Defendants' the motion seeking to dismiss this action pursuant to CPLR § 3211(a)(5). "The general rule applicable to contract actions is that a six year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation" (*Squeri v. Moriches Assoc.*, 307 A.D.2d 260 [2d Dept 2003]). However, "where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew

such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to the filing of the suit” (*Beller v William Penn Life Ins. Co. of New York*, 8 AD3d 310 [2d Dept 2004]). Here, the subject contract imposed a continuing duty upon the Defendants’ to provide a sound cooling tower for the building. Accordingly, Plaintiff’s claim for damages accrued each time the Defendants allegedly breached these obligations by failing to fix the cooling tower. Therefore, Plaintiff’s claim is not time barred at the time Plaintiff commenced this action. Defendants continued to maintain the cooling tower system that is allegedly emitting hazardous vapors. Accordingly, this branch of Defendants’ application seeking to dismiss this action pursuant to CPLR § 3211(a)(5) is denied.

The Court now turns to the branch of Defendants’ the motion seeking to dismiss the first through fifth causes of action pursuant to CPLR § 3211(a)(7). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), and the motion has not been converted to one for summary judgment, “the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] 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” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977]). Here, Plaintiff’s complaint alleges that Defendants have failed to repair the cooling tower system, thus violating laws with respect to the equipments location and operation. Defendants have not submitted any evidentiary material to support that Plaintiff’s do not have causes of action for nuisance, trespass, breach of contract, declaratory relief, or a permanent injunction. Accordingly, this branch of Defendants’ application seeking to dismiss the first through fifth causes of action pursuant to CPLR § 3211(a)(7) is denied.

The Court now turns to Plaintiff’s cross motion seeking an Order directing Defendants to produce cooling tower maintenance records and granting partial relief as to the declaratory judgment, mandamus, and other appropriate relief as to the seventh and eighth causes of action, granting a preliminary injunction, and granting plaintiff leave to amend the complaint. Upon review of the parties’ submissions, the Court finds that Plaintiff’s request for a preliminary injunction, declaratory judgment, and mandamus are denied. Plaintiff’s request for leave to amend the complaint is granted, and it is further

**ORDERED** that Defendants shall provide all cooling tower maintenance records to Plaintiff’s within sixty days of entry of this Order, and it is further

**ORDERED** that Defendants shall register the cooling system with New York City Department of Health within sixty days of entry of this Order, and it is further

**ORDERED** that Defendants complete an inspection of the cooling system with New York City Department of Buildings within sixty days of entry of this Order.

Accordingly, Defendants application seeking to dismiss the first through fifth causes of action in Plaintiffs' complaint is denied. Plaintiffs' cross-motion seeking an Order directing Defendants to produce cooling tower maintenance records and granting partial relief as to the declaratory judgment, mandamus, and other appropriate relief as to the seventh and either causes of action in the complaint, granting a preliminary injunction, and granting plaintiff leave to amend the complaint is granted in part and denied in part.

All other contentions are without merit.

The foregoing constituted the Decision and Order of this Court.



Dated: July 7, 2021  
Jamaica, NY

**HON. PAM JACKMAN BROWN, JSC**

