

**Rice v Abitbol**

2023 NY Slip Op 32067(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 155555/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

*Justice*

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INDEX NO. 155555/2022  
DANIEL RICE, MOTION DATE 10/24/2022,  
Plaintiff, 10/24/2022  
- v - MOTION SEQ. NO. 001 001

TAJA ABITBOL, DAVID CONE, 10 WEST END AVENUE  
#14B LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43  
were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral argument, which took place on April 4, 2023, where Jonathan E. Temchin, Esq. appeared for Plaintiff Daniel Rice (“Plaintiff”), Corey Morgenstern, Esq. and Gabriella Scarmato, Esq. appeared for Defendants David Cone (“Cone”) and Taja Abitbol a/k/a Taja Abitbol Cone (“Abitbol”) (collectively “Moving Defendants”), and William Candiloros, Esq. appeared for Defendant 10 West End Avenue #14B LLC (“West End”), the Moving Defendants’ motion for summary judgment is denied, without prejudice, as premature. Moving Defendants’ motion to dismiss pursuant to CPLR § 3211(a)(1) and (a)(7) is granted in part and denied in part.

**I. Background**

This is a property damage case arising out of water damage to an apartment, allegedly caused by fire sprinklers which were triggered by a fire in the Moving Defendants’ apartment. The allegedly damaged apartment is Unit 12G in a condominium building located at 10 West End

Avenue (*see* NYSCEF Doc. 1 at ¶ 1). Moving Defendants allegedly leased Unit 14B in the building, which is located directly above Unit 12G (*id.*). The unit is allegedly owned by Defendant West End (*id.* at ¶ 10).

Plaintiff initiated this action on July 1, 2022. Plaintiff alleges that on November 6, 2019, the Moving Defendants left a candle burning too close to certain combustibles located in Unit 14B, which started a fire (*id.* at ¶ 14). Plaintiff claims the fire continued for at least 30 minutes and caused significant damage when it activated fire sprinkler systems which left Unit 12G uninhabitable (*id.* at ¶¶ 15-16). Plaintiff alleges that Abitbol was to appear on a television show the day after the fire and attempted to use the fire to gain publicity (*id.* at ¶¶ 17-25). There are also allegations that Abitbol utilized the fire to promote her social media presence (*id.*). Plaintiff alleges that the Moving Defendants deliberately or recklessly caused the fire to create a storyline for Abitbol's candidacy for a role on the Real Housewives of New York (*id.* at ¶ 26).

Plaintiff asserted numerous causes of action, including: (1) negligence against Moving Defendants; (2) negligence against West End; (3) gross negligence against Moving Defendants; (4) intentional/willful/reckless misconduct against Moving Defendants; (5) private nuisance against Moving Defendants, and (6) trespass against Moving Defendants (*id.* at ¶¶ 28-60).

On October 14, 2022, the Moving Defendants filed the instant motion (NYSCEF Doc. 6). Moving Defendants seek, pre-answer, summary judgment dismissing all claims against them (*id.*). In the alternative, Moving Defendants move pursuant to CPLR § 3211(a)(1) for dismissal of the gross negligence and punitive damages claims, and pursuant to CPLR § 3211(a)(7) dismissing the gross negligence, nuisance, and trespass claims (*id.*).

Moving Defendants argue that it is appropriate, at this juncture, to treat their motion as a hybrid motion under both CPLR §§ 3211 and 3212 (NYSCEF Doc. 9). As to their CPLR § 3212

motion, Moving Defendants claim there are no issues of fact regarding the absence of Cone's role in causing the fire. They also claim that the fire was accidental. In support of this argument, they point to affidavits provided by the Moving Defendants and an FDNY report (*see* NYSCEF Docs. 13-14 and 17). As to their CPLR §3211(a)(1) motion, Moving Defendants argue in similar fashion that the gross negligence and punitive damages claims are utterly refuted by the affidavits and FDNY report. Finally, as to their CPLR § 3211(a)(7) argument, the Moving Defendants argue that the mere allegation that a candle was left lit next to combustibles does not rise to the level of wanton indifference giving rise to a gross negligence claim. The Moving Defendants further argue that the private nuisance claim is duplicative of the ordinary negligence claim. Finally, Moving Defendants argue the trespass claim should be dismissed because the intent element of the trespass claim is insufficiently pled.

On December 21, 2022, Plaintiff filed opposition (*see* NYSCEF Doc. 24). Plaintiff argues that the summary judgment motion is procedurally improper because issue has not yet been joined. They also argue the Court has not given notice that the motion will be treated as one for summary judgment as required under CPLR § 3211(c). Regarding the CPLR §3211(a)(1) motion, Plaintiff argues that the affidavits and FDNY report do not constitute documentary evidence as contemplated by CPLR § 3211(a)(1), and in any event, they do not definitively contradict the allegations. As to the CPLR §3211(a)(7) motion, Plaintiff asserts it sufficiently alleged gross negligence claim by alleging intent to cause the fire or reckless disregard for safety, and that Moving Defendants make factual arguments which cannot be resolved on a pre-answer motion to dismiss. Moving Defendants argue that the private nuisance claim is not duplicative of the negligence claim, and in any event, it would be premature to dismiss the nuisance claim at this juncture. Finally, Plaintiff argues it has adequately alleged intentional trespass.

Moving Defendants filed their reply on January 20, 2023 (NYSCEF Docs. 30-35). Moving Defendants' claim that the CPLR § 3212 motion is proper. Moving Defendants' argument is based on this Court's motion support room notifying the parties via NYSCEF that the instant motion was a motion for summary judgment. Moving Defendants' re-assert that the affidavits and FDNY report require dismissal of the gross negligence, punitive damages, private nuisance, and trespass claims. Moving Defendants argues that Plaintiff fails to state a claim for gross negligence since there are only conclusory assertions regarding the Moving Defendants acting deliberately, knowingly, intentionally, and/or recklessly. Moving Defendants argue that the private nuisance claim must be dismissed as it is premised on either the negligence or gross negligence claims. Finally, Moving Defendants' claim that there can be no inference that the Moving Defendants intended to cause water damage to Plaintiff's property by using a candle.

Defendant West End did not file opposition until February 17, 2023<sup>1</sup> (NYSCEF Doc. 38). West End, without filing a cross-motion, requests this Court to grant West End summary judgment on its cross-claims against the Moving Defendants, and to dismiss Plaintiff's Complaint against West End (*id.* at ¶ 2). West End argues the fire was caused solely by the negligence of the Moving Defendants, and that Defendant Cone was negligent in failing to conduct a thorough investigation when he smelled something strange in his apartment (*id.* at ¶¶ 7-8). West End further argues that pursuant to the terms of the lease it entered with the Moving Defendants, the Moving Defendants must indemnify West End for any claims arising out of damage to Plaintiff's apartment. Plaintiff, in an affirmation in opposition dated February 20, 2023, noted a series of procedural infirmities in

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<sup>1</sup> Moving Defendants and West End purportedly stipulated to adjourn the return date to February 21, 2023 (NYSCEF Doc. 27). The Court never so-ordered that stipulation. Nor did Plaintiff ever stipulate to the adjournment (*see* NYSCEF Doc. 28). Nonetheless, Defendant West End filed its opposition. This Court does not condone Defendant West End filing opposition despite the stipulation never being so ordered, and without the consent of Plaintiff. Nevertheless, as New York favors a public policy of resolving cases on the merits, the Court will consider West End's improper opposition.

West End's opposition, not least West End's failure to cross-move for relief (*see* NYSCEF Doc. 41). West End filed a reply on February 21, 2023, arguing that the Court may search the record on a motion for summary judgment and grant relief, even to a non-movant, if there are no issues of fact (NYSCEF Doc. 42).

## II. Discussion

### A. Pre-Answer Summary Judgment

The Court denies Moving Defendants' pre-answer motion for summary judgment. As recently reiterated by the First Department, "a motion for summary judgment brought before a defendant has answered the complaint is premature and must be denied" (*see SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 AD3d 610, 611 [1st Dept 2022] citing *Valentine Tr. v Kernizan*, 191 AD2d 159, 161 [1st Dept 1993]). Indeed, "[t]he Court of Appeals has noted that the rule barring a pre-joinder motion for summary judgment is strictly applied" (*id.* citing *City of Rochester v Chiarella*, 65 NYS2d 174, 179 [1985]). Moving Defendants' reliance on a NYSCEF notification from this Court's motion support room to show CPLR § 3211(c) applies is misplaced.<sup>2</sup> While CPLR § 3211(c) allows the Court to notify the parties that it intends to treat a motion to dismiss as a motion for summary judgment prior to issue being joined, here, the Moving Defendants, on their own accord, filed a motion for summary judgment – this was not a case where the Court converted a pending motion to dismiss into one for summary judgment (*see also SHG, supra* at 611).

Because Moving Defendants have unilaterally filed a motion for summary judgment before serving their Answer, the motion is denied without prejudice, with leave to renew after issue is joined. As the underlying motion for summary judgment is denied on procedural grounds, the

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<sup>2</sup> The better practice, rather than relying on the NYSCEF notification, would have been to draft a letter to the Court requesting it to treat the instant motion as a pre-joinder motion for summary judgment pursuant to CPLR § 3211(c).

Court, at this juncture, declines West End's request that the Court search the record and grant it summary judgment. In any event, the record before the Court thus far is sparse, as there has been no discovery. Indeed, West End is requesting relief as drastic as summary judgment without even submitting an affidavit from anyone with personal knowledge of its crossclaims or defenses.

**B. Motion to Dismiss Pursuant to CPLR § 3211 (a)(1)**

Moving Defendants' motion to dismiss pursuant to CPLR § 3211(a)(1) is denied. A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

As a preliminary matter, factual affidavits, which simply assert the factual inaccuracy of a Complaint, do not constitute documentary evidence providing a basis for dismissal under CPLR § 3211(a)(1) (*see Bou v Llamozza*, 173 AD3d 575, 575 [1st Dept 2019]; *see also Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 438 [1st Dept 2014] citing *Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]). Therefore, the affidavits of Moving Defendants fail to provide a basis for dismissal.

Likewise, the FDNY report does not utterly refute Plaintiff's allegations as required by CPLR 3211(a)(1). While FDNY concluded that the fire was "accidental" this is merely FDNY's opinion, albeit a potentially probative opinion (*see Metropolitan Property and Cas. Ins. Co. v 116*

*2nd Ave. LLC*, 2023 NY Slip Op. 31282[U] [Sup. Ct. NY Co. 2023] citing *New York Telephone Co. v Mobil Oil Corp.*, 99 AD2d 185, 192 [1st Dept 1984] [holding that reports of inspection by the Fire Department “are merely opinion evidence”]; *see also Wesco Ins. Co. v United Hood Cleaning Corp.*, 2022 WL 72520 at \*1 [Sup. Ct., NY Co. 2022]). Thus, the FDNY report is insufficient to grant Moving Defendants’ CPLR § 3211(a)(1) motion to dismiss.

### **C. Motion to Dismiss Pursuant to CPLR § 3211 (a)(7)**

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

#### **1. Gross Negligence**

Given this is a pre-answer motion to dismiss, the Court finds it premature to dismiss the gross negligence claim against either of the Moving Defendants (*see G.T. v Roman Catholic Diocese of Brooklyn, N.Y.*, 211 AD3d 413, 413 [1st Dept 2022] citing CPLR § 3211[d]). As there has not been a modicum of discovery exchanged, Plaintiff would not be able to plead sufficient particularized facts regarding either of the Moving Defendants’ intent, nor would it have the

requisite knowledge regarding whether the candle was burning around combustible material. Rather, this information is in the sole possession and control of the movants.

Although Moving Defendants' point out that it is not alleged that Cone did not light the candle, Plaintiff also alleged that Cone and Abitbol were grossly negligent in "monitoring the subject candle(s)." (*see* NYSCEF Doc. 1 at ¶ 45). Cone also admits in his affidavit that he smelled something strange in the apartment but could not identify the source of the odor (NYSCEF Doc. 14 at ¶ 3). It was not until he saw black smoke coming through the vents of the air conditioner that he discovered there was a fire (*id.* at ¶ 4). At a minimum, there must be further discovery into Cone's reaction to the strange smell prior to dismissing the gross negligence claim against him. Therefore, accepting all the allegations as true, and granting Plaintiff all favorable inferences which may flow from the Complaint, as this Court must on a pre-answer motion to dismiss, the gross negligence claim survives.<sup>3</sup>

## 2. Private Nuisance

Moving Defendants' motion to dismiss the private nuisance cause of action as duplicative of the negligence or gross negligence causes of action is granted. "Where nuisance and negligence elements are 'so intertwined as to be practically inseparable,' a plaintiff may recover only once for the harm suffered" (*70 Pinehurst Ave. LLC v RPN Management Co., Inc.*, 123 AD3d 621, 622 [1st Dept 2014] quoting *Murphy v Both*, 84 AD3d 761, 762 [2d Dept 2011]). Although Plaintiff asserts duplicative claims should be disposed on summary judgment, this is incorrect: there is no prohibition for dismissing duplicative claims on a CPLR § 3211(a)(7) motion to dismiss (*see e.g. FM Cost Containment, LLC v +42 W. 35th Property LLC*, 203 AD3d 426 [1st Dept 2022]; *see*

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<sup>3</sup> The Court makes no judgment at this time as to the merits of a potential summary judgment motion on a more developed record on this issue.

also *Ingram Yuzek Gainen Carroll & Bertolotti, LLP v McCullar*, 75 Misc.3d 1211[A] [Sup. Ct. NY Co. 2022]).

Here, the nuisance claim explicitly and repetitively alleges that it arises out of Moving Defendants' "negligent, grossly negligent and/or intentional conduct." (see NYSCEF Doc. 1 at ¶¶ 52-56). The damage arising from the private nuisance is alleged to be "no less than \$320,000.00" which is identical to the damages arising from the negligence, gross negligence, and intentional/willful/reckless misconduct causes of action (*id.* at ¶¶ 42; 46, and 50). Because the nuisance claim arises solely from the surviving negligence/gross negligence/intentional misconduct claims, and the damages are identical, this cause of action is dismissed as duplicative.

### 3. Trespass

Moving Defendants' motion to dismiss the trespass claim is denied. To adequately state a claim for trespass, it must be alleged that there was an intentional entry onto the land of another without justification or permission (*22 Irving Place Corp. v 30 Irving LLC*, 57 Misc.3d 253 [Sup. Ct. NY Co. 2017]). As previously stated, it is alleged that Moving Defendants intentionally caused the fire to create a storyline for Abitbol's candidacy for a role on *Real Housewives of New York* (NYSCEF Doc. 1 at ¶ 26). While Moving Defendants argue that they did not intend to cause water damage arising to Plaintiff's apartment from lighting a candle, this argument, at this stage, is unavailing. As held by the Court of Appeals, the alleged trespasser: "need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produced the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness." (*Phillips v Sun Oil Co.*, 307 NY 238, 331 [1954]; see also Restatement 2d, Torts § 168).

As it is alleged Moving Defendants intentionally caused the fire, and there is a reasonable inference that causing a fire will trigger a building's fire sprinklers, it follows that water intrusion stemming from a fire sprinkler may constitute a trespass. At the present juncture, whether the Moving Defendants acted with the intent to sustain a trespass claim cannot be resolved on the instant motion to dismiss. Accepting the allegations as true, Plaintiff stated a claim for trespass.

Accordingly, it is hereby,

ORDERED that Moving Defendants' motion is granted solely to the extent the private nuisance claim is dismissed as duplicative and that the Moving Defendants' motion is otherwise denied; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Moving Defendants' shall file a responsive pleading to Plaintiff's Complaint; and it is further

ORDERED that the parties are directed to appear for an in-person preliminary conference with the Court on July 26, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York. If the parties agree to a proposed preliminary conference order prior to the date of the conference, the parties are directed to submit the proposed order via e-mail to SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear for a conference; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order on all parties with notice of entry.

This constitutes the Decision and Order of the Court.

6/21/2023

DATE

*Mary V Rosado JSC*

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE