

**Brumberg v Board of Mgrs. of the Cast Iron House
Condominium**

2023 NY Slip Op 32733(U)

August 7, 2023

Supreme Court, New York County

Docket Number: Index No. 657019/2021

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04

Justice

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MATTHEW BRUMBERG, JUNYAO BRUMBERG, GABRIEL LOPEZ, SARAH STEIN-SAPIR, ANDREA FRAZZINI, NIGEL POWELL, GIORGIO DELUCA, JAMES CHUNG, JOSEPH DORAN, DANYA ALSAADY-NAZER, JODI SARFIELD, ADAM ARON

INDEX NO. 657019/2021

MOTION DATE 02/08/2022,
01/20/2023

MOTION SEQ. NO. 002 003

Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE CAST IRON HOUSE CONDOMINIUM, 361 BROADWAY ASSOCIATES HOLDINGS, LLC, THE ANDREWS ORGANIZATION, INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

This matter was recently transferred to Part IV.

MOTION SEQUENCE 002

Plaintiffs move to dismiss defendant 361 Broadway Associates Holding’s (hereinafter 361 Broadway’s) first counterclaim for tortious interference with prospective business relationships and second counterclaim for a permanent injunction. Defendant opposes, contending the counterclaims are sufficiently pleaded.

As with all motions to dismiss under CPLR § 3211, the counterclaim should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (see e.g. *Leon v. Martinez*, 84 NY2d 83 [1994]). “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” (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]).

To the extent that the motion seeks dismissal under § 3211(a)(7), the counterclaims are likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A counterclaim should not be dismissed so long as, “when the ... allegations are given the benefit of every possible inference, a cause of action exists,” and a party may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Here, although defendant 361 Broadway contends claims of rodents in the building are false, plaintiffs have submitted documentary evidence, in the form

of photographs annexed to their affidavits, showing rodents in the building. Accordingly, to the extent that defendant 361 Broadway's first and second counterclaims are predicated upon claims that plaintiffs falsely claimed the building was infested with rodents, 361 Broadway's claims are inherently incredible and contradicted by documentary evidence. Put simply, one cannot presume that to be true which is flatly contradicted by competent photographic evidence. Additionally, the building was found, via administrative hearing, in violation of NYCHC 151.02(a), for having active rat signs in the building (NYSCEF Doc. No. 73 at p. 11).

To the extent that plaintiffs otherwise seek to dismiss the counterclaims, that relief is denied. At this juncture, providing 361 Broadway's pleading every favorable inference, it has sufficiently pleaded claims for tortious interference with prospective business relationships and a concomitant permanent injunction, should it prove its claims at trial.

Consequently, defendant 361 Broadway's first and second counterclaims are dismissed solely to the extent that same are predicated upon claims that plaintiffs falsely stated to others that the building suffered a rodent infestation, and the motion is otherwise denied.

MOTION SEQUENCE 003

Plaintiffs seek an injunction compelling defendant building to eliminate a rat infestation in the building. Plaintiffs also seek an order compelling defendants to produce responses to outstanding discovery demands. Defendant building does not oppose that portion of the motion seeking to compel

discovery, contending only that upon information and belief such discovery has already been provided.

Generally, a preliminary injunction serves to maintain the status quo, and is appropriate only where the movant: will suffer irreparable harm if the injunction is withheld, has demonstrated a likelihood of success on the merits, and the balance of equities favors movant (CPLR § 6301; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]).

Here, it is beyond cavil that the presence of rodents in apartments and apartment buildings undoubtably raises health concerns and irreparable injury to those persons frequenting and residing in the building. Plaintiffs have demonstrated a likely success on the merits regarding their rodent related claims, having annexed affidavits with photographs showing rodents at defendant's building (NYSCEF Doc. No. 72, 73, and 74). There can be no question that the balance of equities favors movants here.

Accordingly, it is
ORDERED that motion sequence 003 is granted and a temporary injunction issues; defendant Board of Managers of the Cast Iron House Condominium shall immediately take all required measures to eliminate rodents from the building; and it is further

ORDERED that the failure to take necessary measures to eliminate rodents, shall be punishable by contempt, including but not limited to daily sanctions, upon further application by order to show cause; and it is further

ORDERED that motion sequence 002 is granted solely to dismissing 361 Broadway's first and second counterclaims to the extent that same are predicated upon claims that plaintiffs falsely stated to others that the building suffered a rodent infestation, and the motion is otherwise denied; and it is further

ORDERED that any stay of discovery is vacated; and it is further

ORDERED that all parties shall serve courtesy copies of any outstanding discovery demands within 14 days; all parties shall respond thereto within 20 days; and it is further

ORDERED that the failure to timely serve courtesy copies of outstanding demands shall constitute waiver of such discovery; the failure to timely respond, with such response complying with the Uniform Rules, may result in sanctions, including but not limited to the striking of pleadings, preclusion of evidence, or monetary sanctions against parties and/or counsel, in the Court's discretion upon further application; and it is further

ORDERED that counsel shall confer and, within 30 days of this decision and order, file, via NYSCEF with courtesy copy to chambers, a proposed discovery order addressing all outstanding discovery. Such proposed discovery order shall comply with the Part Rules, available on the Court's website, including the submission of a single joint letter contemporaneously with the proposed order addressing those matters which the parties cannot reach agreement. Failure to
[continued on following page]

timely file the above may constitute waiver of additional discovery or waiver of any objection to the issuance of a sua sponte discovery order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

8/7/2023
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

J.S.C.
 OTHER

REFERENCE



HON. FRANK P. NERVO