

**Questell v 17 Convent LLC**

2024 NY Slip Op 30106(U)

January 3, 2024

Supreme Court, New York County

Docket Number: Index No. 651135/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

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CARLOS QUESTELL, STUART ARCHIBALD, JASON FORD, JESSICA FORSE, EMILY S. CHOW, JENNIFER FRAUTSCHI, THEODORE HOERR, KENNETH C. NWOSU, NGAR NAY ANNIE YUNG, VICTOR RAMOS, NATHAN MORRIS, STEPHANE NYOMBAYIRE, JONATHAN BUCKINGHAM, KINGSON MOMAH, LINDA LAZO, JAMES DONEGAN, JULIETTE M. HAN, MARK CALVIN CHAMBERS, NATALIE CHAUDHARY, and 17 CONVENT AVENUE CONDOMINIUM,

Plaintiffs,

- v -

17 CONVENT LLC, JEREMY BAK, HOWARD TRACHTMAN, ESTHER BAK, ANDREW SILVERMAN, DARINA SILVERMAN, JAMES DIPALMA, AUDREY TRACHTMAN, KEVIN PARONYAN, MARC PALEY, and MARIELA GOMEZ,

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, and 48

were read on this motion for INJUNCTION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 49

were read on this motion to COMPEL ACCEPTANCE OF THE COMPLAINT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion to compel acceptance of plaintiffs’ late served complaint (Mot. Seq. No. 002) is granted, and defendants’ cross-motion to dismiss for failure to timely serve is denied. CPLR 3012(d) provides that “the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” The court should consider “the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility

of prejudice to adverse parties, and the potential merits of any defense (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-73 [1st Dept 2017])

Plaintiffs provide a reasonable excuse for their delay based upon ongoing negotiations and discussions with counsel, as set forth in the moving and reply affirmations of Joseph Colbert, Esq. (NYSCEF Doc. No. 36, 49) and the exhibits attached thereto. The record also contains affidavits from plaintiff Carlos Questell, and two expert witnesses, as well as the verified complaint, which together sufficiently set forth the merits of plaintiffs' claims (*cf. Fawn Second Ave. LLC v First Am. Tit. Ins. Co.*, 192 AD3d 478 [1st Dept 2021] ["Plaintiffs' motion was supported solely by an attorney affirmation and an unverified complaint"]). The papers in support of the cross-motion to dismiss do not disclose any prejudice to defendants. Moreover, the delay was short, as plaintiffs filed their verified complaint on August 7, 2023, approximately two and a half months after the deadline of May 16, 2023 (CPLR 3012[b]). *Hyundai Corp. v Republic of Iraq* (20 AD3d 56, 63 [1st Dept 2005]), cited by defendants, is not to the contrary, as there, defendant sought to file a late answer three years after its time to do so expired.

The motion for an order of attachment and preliminary injunction enjoining distribution of, and attachment of sale proceeds of the sale of apartment PHB in the building located at 17 Convent Avenue, New York, New York 10027, and enjoining any other distributions or corporate reorganizations by defendant 17 Convent LLC, is denied. An order of attachment may be granted where a plaintiff shows "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (*Ford Motor Credit Co. v Hickey Ford Sales, Inc.*, 62 NY2d 291, 301 [1984]). As relevant herein, a pre-judgment attachment may be granted where "the defendant, with intent

to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201[3]). "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" (CPLR 6301). Preliminary injunctions "should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Ass'n of Greater New York v City of New York*, 79 NY2d 236, 241 [1992]). "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]).

Plaintiffs have not sustained their burden on the motion. Questell's affidavit is speculative and conclusory, and provides no proof of defendants' intent to frustrate a judgment or defraud plaintiffs (*Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366, 366-67 [1st Dept 2006] ["Indeed, fraud is never presumed by a mere showing of the liquidation or disposal by a debtor of its business assets"] [internal quotations marks and citation omitted]). Moreover, plaintiffs fail to show irreparable harm in the absence of a preliminary injunction. "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-37 [2d Dept 2009]). Plaintiffs' claims are effectively compensable for monetary damages. Defendant 17 Convent LLC, the sponsor of the condominium conversion at the heart of this case, is also theoretically not the only party potentially liable to plaintiffs for the cost of the repairs to be building, and nothing prevents plaintiffs from amending their complaint to include such parties.

Accordingly, it is hereby

ORDERED that the motion for an order of attachment and preliminary injunction is denied; and it is further

ORDERED that the temporary restraint put in place by the court’s order of August 4, 2023 (NYSCEF Doc. No. 32) is vacated; and it is further

ORDERED that the motion to compel acceptance of plaintiff’s late filed complaint is granted, and the cross-motion to dismiss the complaint for failure to timely file is denied; and it is further

ORDERED that defendants are directed to answer the verified complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on February 7, 2024, at 10:00 AM.

This constitutes the decision and order of the court.



1/3/2024			LOUIS L. NOCK, J.S.C.
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE