

Board of Mgrs. of the King St. Condominium v Fiaux

2024 NY Slip Op 32731(U)

August 5, 2024

Supreme Court, New York County

Docket Number: Index No. 150857/2020

Judge: James d'Auguste

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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**

<p>PRESENT: <u>Hon. James E. d'Auguste</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>BOARD OF MANAGERS OF THE KING STREET CONDOMINIUM,</p> <p style="text-align: center;">Plaintiff,</p>	<p>PART 55</p> <p>INDEX NO. <u>150857/2020</u></p> <p>MOTION DATE <u>07/29/2020</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
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- v -

SEBASTIEN FIAUX, CAROLE FIAUX, CAROLE
RADZIWILL, ROBERT MARGOLIN, JANE KRAKOWSKI,
KEVIN ALBERT, REBECCA SHINE, NANCY BUSCH,
TRIPP SWANHAUS, GRACE SINGMAN, LINDA MASON,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 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, 94, 95, 96, 100

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the instant motion is granted in part and denied in part for the reasons set forth below.¹

As a threshold matter, and notwithstanding the parties' plethora of documentary exhibits, the Court construes this motion as seeking dismissal pursuant to CPLR 3211(a) and not summary judgment pursuant to CPLR 3211(c). Given that counterclaim defendants seek relief pursuant to, among other grounds, CPLR 3211(a)(1) based on documentary evidence, the Court can and does consider the parties' submissions without converting this motion to one seeking summary judgment. Turning to the merits, "[g]enerally, on a motion to dismiss brought pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true," and "accord plaintiffs the benefit of every possible

¹ Counterclaims against all counterclaim defendants except Margolin have been discontinued by stipulation. *See*, NYSCEF Doc. No. 100.

favorable inference,” and a complaint will survive if “the facts as alleged fit into any cognizable legal theory.” *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dept. 2006), *affd.*, 9 N.Y.3d 910 (2007). This is less exacting than the federal plausibility standard, and applies even as to federal claims brought in state court. *See, Rizvi v. North Shore Hematology-Oncology Assoc. PC*, NYLJ, Nov. 30, 2020 at p.17, col.3, 2020 NYLJ LEXIS 1761, *9 (Sup. Ct., Suffolk Co. 2020) (discussing differing pleading standards post-*Twombly*). While “the standard morphs from whether the plaintiff stated a cause of action to whether it has one,” when the parties offer documentary evidence, the *Bishop* standard of according every possible favorable inference in favor of letting counterclaims proceed remains. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (1st Dept. 2014). On the record before the Court, counterclaimants have mostly done so with regard to their claims and they are, for the purpose of the instant motion to dismiss, sufficiently pled to proceed except as noted.²

As to the counterclaims regarding alleged anti-French animus driving counterclaim defendant’s alleged conduct, counterclaimants sufficiently plead their first through sixth counterclaims as against counterclaim defendant Margolin factually. If true as offered, a reasonable factfinder could determine that Margolin violated federal, state and local anti-discrimination statutes as alleged. Commentary regarding the alleged hatred of children generally also supports counterclaimants’ claims based on familial status. That their alleged animus formed, if nothing else, a ‘but for’ reason for action is sufficient to proceed. The Court also notes that Margolin did not move to dismiss the seventh

² In considering the instant motion, the Court cast aside references to a long-ago – and sealed by operation of CPL § 160.55 – non-criminal disposition against one of the parties. *See, Brian Krist, Sealing the Bawdy House Door Open: An Examination of Unintended Consequences of Decriminalization and Sealing Statutes Upon Bawdy House Eviction Proceedings*, 48 NYRPLJ 27, *7-8 (2020) (collecting cases and discussing limitations upon records of violations, not crimes). The underlying facts and circumstances of that criminal prosecution do not appear to have any real connection to the claims at issue, and are simply not relevant to this action. *Cf., People v. Eason (In re New York City Mayor’s Office of Special Enforcement)*, Summons No. 429662435-0, 2018 N.Y. Misc. LEXIS 1603, *4 (Sup. Ct., New York Co. May 4, 2018) (unsealing records of criminal proceeding records for use in nuisance abatement investigation and litigation).

counterclaim, seeking injunctive relief based in part upon the same alleged animus, and instead focuses this motion upon those counterclaims which seek monetary relief for that conduct. However, the same alleged conduct in the seventh counterclaim also undergirds the previous six counterclaims, and Margolin's position is inherently incongruent. That said, Margolin correctly asserts that the first, second, and third counterclaims asserting violations of state and federal law are time-barred, and must be dismissed.³ As to the local and common law based claims in the fourth, fifth, and sixth counterclaims, they will proceed.

As to the eleventh counterclaim, asserting a nuisance claim based upon counterclaim defendant Margolin alone for smoking in a nuisance manner, that counterclaim is dismissed. The Court takes notice that tobacco usage generally, and tobacco smoking in particular, has been a source of controversy in Western culture for over four centuries, when King James of England and Scotland (better known for his authorized edition of the Bible) wrote to his subjects and the world of the (as in the original) "manifolde abuses of this vile custome of tobacco taking," in 1604. *See, e.g., James I, A Counterblaste to Tobacco* (G. Putnam & Sons 1905 ed.).⁴ However, over one in ten adult New Yorkers identified as smokers at the relevant times to this motion, making tobacco smoke a common (albeit unfavorable to many) occurrence of common life that was and remains legal in the circumstances presented. *See, New York City Dept. of Health & Mental Hygiene, Press Release 034-20: Adult Smoking Rate in NYC Declines: Reaches Take Care New York 2020 Target* (2020).⁵ At present, under the law, a neighbor smoking within their own residence is "incidental to normal occupancy in an apartment building," and expressly permitted in the applicable building by-laws, and thus not a nuisance. *Chapman v. 2278 BPE*

³ Margolin's objections that the state and federal claims would be duplicative are moot because those claims are time-barred.

⁴ Available at <https://www.laits.utexas.edu/poltheory/james/blaste/> (last accessed Aug. 2, 2024).

⁵ Available at <https://www.nyc.gov/site/doh/about/press/pr2020/adult-smoking-rate-in-nyc-decline.page> (last accessed Aug. 2, 2024).

LLC, 79 Misc. 3d 1213(A), *7 (Civ. Ct., Bronx Co. 2023) (collecting authorities in decision after trial for defendant).

Lastly, as to the thirteenth counterclaim, alleging defamation by referring to counterclaimants as ‘pariahs,’ New York law is clear that even hyperbolic and perhaps intemperate speech may nonetheless remain protected speech. See, Benlevi v. Rukaj, 2024 NY Slip Op 24156, *2 (Civ. Ct., New York Co. May 21, 2024), citing, Isaly v. Garde, NY Slip Op 34108(U) (Sup. Ct., New York Co. 2022). Even assuming counterclaim defendant Margolin uttered the alleged word, that expression “was not an actionable statement of objective fact because it...would clearly be understood by a reasonable listener to be a figurative expression of how [the speaker] felt.” Springer v. Almontaser, 75 A.D.3d 539, 541 (2d Dept.), lv. denied, 15 N.Y.3d 713 (2010).

Accordingly, it is

ORDERED that the instant motion is granted in part and denied in part; and it is further

ORDERED that the first, second, third, eleventh, and thirteenth counterclaims asserted in the answer filed as NYSCEF Doc. No. 007 are dismissed in their entirety; and is further

ORDERED that any relief sought and not specifically granted in this Order has been considered and denied.

This constitutes the Decision and Order of the Court.

James d'Auguste, J.S.C.

8/5/2024
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE