

**Lapine v Brennan**

2024 NY Slip Op 34882(U)

July 29, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 626793/2023

Judge: Vincent J. Martorana

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

INDEX NO: 626793/2023

**Supreme Court of the State of New York**  
**IAS Part 23 - County of Suffolk**

PRESENT: Hon. Vincent J. Martorana

\_\_\_\_\_  
RICHARD LAPINE and MARTHA CHASE  
LAPINE,

Plaintiffs,

- against-

JOHN BRENNAN and CHRISTINE BRENNAN,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: 02/16/24  
ADJOURNED DATE: 02/29/24  
MOTION SEQ. NO.: 001 - MD

PLTF'S/PET'S ATTY:  
Scoolidge Peters Russotti & Fox LLP  
2 Park Avenue, 20th Floor  
New York, New York 10016

PLTF'S CO-COUNSEL:  
Margolin & Pierce, LLP  
16 Hampton Road, Suite 3  
Southampton, New York 11968

DEFT'S/RESP'S. ATTY:  
Greenberg Traurig, LLP  
2317 Montauk Highway  
Bridgehampton, New York 11932

Upon efiled documents numbered 20-26, 30-36; it is

**ORDERED** that Defendants' motion seeking dismissal of Plaintiffs' complaint, pursuant to CPLR §3211(a)(1) and (7), and further seeking a declaratory judgment and an award of attorneys' fees, is denied; and it is further

**ORDERED** that counsel for the parties are directed to appear for a status conference before the court, in person, on August 27, 2024 at 2:30 p.m. Counsel shall be prepared to discuss all aspects of the case and the parties' positions with respect to settlement.

The within action arises from a contract for the sale of real property, which was entered into on May 1, 2023 ("Agreement"). Plaintiffs seek a declaration that their performance under the agreement is excused and that they are entitled to return of their \$260,000.00 down payment, along with damages and costs. Defendants now move, pre-answer, seeking dismissal of Plaintiffs' amended complaint, pursuant to CPLR §3211(a)(1) and (7). Defendants also request a declaration that Plaintiffs are in default under the Residential Contract of Sale and that Defendants are entitled to keep Plaintiffs' down payment, along with an award of attorneys' fees and costs.

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 2

Plaintiffs allege that they entered into an agreement to purchase real property from Defendants and that they obtained a “conditional lending commitment” that required them to obtain homeowners insurance. They further allege that after the contract for sale was executed, the property suffered water damage from a flood, which Defendants failed to disclose. When Plaintiffs attempted to procure homeowners insurance, it is claimed that Plaintiffs were unable to obtain a proper policy due to the undisclosed insurance claim. Plaintiffs state that this is the reason they were unable to obtain financing and that Plaintiffs deprived them of the chance to cancel the contract, by failing to timely disclose the flood.

Defendants assert that Plaintiffs agreed to purchase Defendants’ property at 1490 Deerfield Road, Water Mill, New York 11976 for the sum of \$2,600,000.00. They claim that the Agreement contained a Mortgage Contingency clause, pursuant to which Plaintiffs were obligated to diligently pursue and obtain a commitment from a lender by August 10, 2023. If Plaintiffs failed to obtain a commitment from a lender by August 10, 2023, they had five business days to cancel the contract. The deadline was August 17, 2023 (“Cancellation Date”). Defendants claim that Plaintiffs failed to timely obtain a commitment from a lender and failed to timely cancel; therefore, they waived their right to cancel and waived their right to a return of their down payment. Defendants aver that a time is of the essence closing was scheduled for October 30, 2023 and that Plaintiffs manufactured an excuse to get out of purchasing the home, they allege: “Plaintiffs argued that their Downpayment should be returned because, in June 2023, Defendants filed an insignificant insurance claim arising from a water heater leak in the Property’s basement and associated repairs.” Defendants argue that the property was sold “as is” and that the contract allowed that if any appliance was determined to be in non-working order as of the date of closing, that the Seller had the option of arranging for repair or providing the Purchaser with a \$750.00 credit. Defendants chose to replace the leaking water heater, along with the basement carpet and wallboard which were damaged by water. Defendants claim that multiple contract provisions preclude Plaintiffs from obtaining the relief they seek. They further assert that Plaintiff did not actually have a mortgage commitment (with actual terms and conditions) but rather a conditional approval. As such, Defendants assert that Plaintiffs could have cancelled the Agreement but that they failed to timely do so.

Plaintiffs claim that the property suffered a “major internal flood,” that carpet and wallboard was replaced, that an insurance claim for approximately \$20,000.00 was made by Defendants to pay for the work and that, “Defendants knew or should have known, that such a claim would make it impossible to Plaintiffs to obtain a mortgage to finance the sale.” They further state if they had known about the flood and basement repair prior to the cancellation date, they would have cancelled. Plaintiffs claim that the property was rendered “unfinanceable” as a result of the insurance claim, and that Plaintiffs should have been notified so they could cancel the contract. Plaintiffs’ real estate counsel affirms that the mortgage lender approved the appraisal on or about August 7, 2023 and that upon receipt of such approval, she informed Defendants’ counsel that the Plaintiffs had received a mortgage commitment. Plaintiff’s memorandum in opposition states that “such appraisal approval constituted a mortgage commitment.” However, Plaintiffs also state that the loan approval was conditioned upon procurement of insurance. Annexed to the amended complaint is a text message that appears to be from an insurance agent or broker asking if any disclosure had been made about a June 8, 2023 water damage claim that paid out \$20,048.00. A homeowner’s insurance quote is also annexed to the amended complaint. Additionally submitted is an email from the prospective lender dated September 29, 2023, which states that the bank requires full homeowners insurance with no

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 3

carve outs. The nature of the “carve out” is not clear from the exhibits. The insurance quote shows “Limited” coverage for water damage. It is unclear if this is the problem, why it is limited, or what “Limited” means in this context.

Plaintiffs state that, based upon “specific cancellation rights and the contract’s overall structure,” it was Defendants’ duty to disclose the flood and the subsequent repairs, and to permit them to cancel the sale. Defendants’ failure to disclose, it is argued, constituted a breach of the covenant of good faith and fair dealing.

The Mortgage Commitment Contingency provision of the Residential Contract of Sale, paragraph 8(a), provides:

Mortgage Commitment Contingency. (*Delete paragraph if inapplicable. For explanation, see Notes on Mortgage Commitment Contingency Clause.*) (a) The obligation of Purchaser to purchase under this contract is conditioned upon issuance, on or before 60 days after a fully executed copy of this contract is given to Purchaser or Purchaser’s attorney via e-mail with receipt confirmed or in the manner set forth in paragraph 25 or subparagraph 8(j) (the “Commitment Date”), of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser’s sole cost and expense, of \$2,080,000.00 for a term of at least 30 years (or such lesser sum or shorter term as Purchaser shall be willing to accept) at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the “Commitment”). To the extent a Commitment is conditioned on the sale of Purchaser’s current home, payment of any outstanding debt, no material adverse change in Purchaser’s financial condition or any other customary conditions, Purchaser accepts the risk that such conditions may not be met; however, a commitment conditioned on the Institutional Lender’s approval of an appraisal shall not be deemed a “Commitment” hereunder until an appraisal is approved (and if that does not occur before the Commitment Date Purchaser may cancel under subparagraph 8(e) unless the Commitment Date is extended). Purchaser’s obligations hereunder are conditioned only on issuance of a Commitment.

*(Subsections omitted)*

Section 8, subsections (d) and (e) and (g) of the agreement provide:

(d) If all Institutional Lenders to whom applications were made deny such applications in writing prior to the Commitment Date, Purchaser may cancel this contract by giving Notice thereof to Seller, with a copy of such denials, provided that Purchaser has complied with all its obligations under this paragraph 8.

(e) If no Commitment is issued by an Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 4

whom application was made and that Purchaser has complied with all its obligations under this paragraph 8.

(g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), then Purchaser shall be deemed to have waived Purchaser's right to cancel this contract and to receive a refund of the Downpayment by reason of the contingency contained in this paragraph 8.

The "Notes on Mortgage Contingency Clause" referenced in paragraph 8, appear after the signatures on the Contract of Sale. Relevant excerpts are as follows:

From paragraph 2: (*language omitted*) The Commitment contingency is satisfied by issuance of a Commitment in the amount specified on or before the Commitment Date, unless the Commitment is conditioned on approval of an appraisal. If the Commitment is conditioned on approval of an appraisal and such approval does not occur prior to the Commitment Date, Purchaser should either cancel the contract or obtain an extension of the Commitment Date. If the Commitment is later withdrawn or not honored. Purchaser runs the risk of being in default under the contract of sale with Seller.

Paragraph 5: If, as has been common, the Commitment letter itself is conditioned on sale of Purchaser's home or payment of any outstanding debt or no material adverse change in Purchaser's financial condition, such a Commitment will satisfy the contract contingency nonetheless, and Purchaser will take the risk of fulfilling those Commitment conditions, including forfeiture of the Downpayment if Purchaser defaults on its obligation to close. Under New York case law, a defaulting Purchaser may not recover any part of the Downpayment, and Seller does not have to prove any damages. If Purchaser is not willing to take that risk, the clause must be modified accordingly.

The Second Rider to the Contract of Sale dated May 1, 2023, paragraph 3, which supplements paragraph 23 of the Contract of Sale, provides that in the event of litigation to enforce the contract or to recover the downpayment, the prevailing party, is entitled to recover from "the party against whom any final judgment is entered"... "all reasonable costs, charges, and expenses, including reasonable attorneys' fees, expended or incurred in connection therewith," plus interest.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 29 NYS3d 879 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Affidavits submitted by a plaintiff to remedy any defects in the complaint may be considered

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 5

(*Chanko v. Am. Broad. Companies Inc.*, *supra*; *Leon v Martinez*, *supra*). However, if evidentiary material submitted by the defendant movant is considered, “the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]; *see also Williams v. Silverstone*, 215 AD3d 787, 788, 185 NYS3d 699 [2d Dept. 2023]). In considering evidentiary material in support of a motion to dismiss for failure to state a cause of action, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; *Sokol v. Leader*, *supra*). Although it is rare, dismissal under CPLR 3211 (a) (7) may be granted based upon an affidavit if such affidavit conclusively establishes that the claimant has no cause of action (*Sokol v. Leader*, *supra*; *Porat v. Rybina*, *supra*). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe v. Ascend Charter Sch.*, *supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 401 NYS2d 182[1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

For dismissal to be granted pursuant to CPLR §3211 (a) (1), a defendant must submit documentary evidence of undisputed and unambiguous authenticity “that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim” (*Hohwald v Farm Family Casualty Insurance Company*, 155 AD3d 1009, 66 NYS3d 316 [2d Dept 2017], *quoting Botach Mgt. Group v Gurash*, 138 AD3d 771, 772, 31 NYS3d 80 [2d Dept 2016]; *see also Palero Food Corp. v Zucker*, 186 AD3d 493, 129 NYS3d 104 [2d Dept 2020]; *Grant v DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept 2018]). The documentary evidence offered must be unambiguous and authentic, must entirely refute the plaintiffs’ factual allegations, and must conclusively establish a defense as a matter of law (*S & J Serv. Ctr., Inc. v Commerce Commercial Grp., Inc.*, 178 AD3d 977, 112 NYS3d 584 [2d Dept 2019]; *Porat v Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept 2019]). The evidence submitted upon such motion must be documentary; affidavits, letters and deposition testimony do not qualify (*S&J Serv. Ctr.*, *supra*; *Porat v Rybina*, *supra*; *Granada Condo. III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’ in the proper case” (*Fontanetta v Doe*, 73 AD3d 78, 84–85, 898 NYS2d 569, 574 [2d Dept 2010]; *see also S&J Serv. Ctr.*, *supra*).

Plaintiffs’ first cause of action asserts a breach of the implied covenant of good faith and fair dealing and their second cause of action seeks a declaratory judgment that the contract of sale contained a mortgage condition precedent that was not fulfilled, excusing Plaintiffs’ performance under the agreement and entitling them to the return of their downpayment. Plaintiffs also seek contractual attorneys’ fees.

A covenant of good faith and fair dealing is implied in every contract and is breached when a party acts in such manner that the other contracting party is denied the benefits of the agreement (*P.T. & L. Contracting Corp. v. Trataros Const., Inc.*, 29 AD3d 763, 816 NYS2d 508 [2d Dept.

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 6

2006]; *1357 Tarrytown Rd. Auto, LLC v. Granite Properties, LLC*, 142 AD3d 976, 37 NYS3d 341 [2d Dept. 2016]; *Celauro v. 4C Foods Corp.*, 187 AD3d 836, 132 NYS3d 159 [2d Dept. 2020]). Included in this covenant is the obligation of each promisor to act in good faith and it includes promises that a reasonable promisee would expect to be included, which do not contradict the terms of the agreement (*Singh v. City of New York*, 189 AD3d 1697, 139 NYS3d 307 [2d Dept. 2020], *leave to appeal granted*, 37 NY3d 912 [2021]). “The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct” (*25 Bay Terrace Assocs., L.P. v. Pub. Serv. Mut. Ins. Co.*, 194 AD3d 668, 672, 148 NYS3d 484, 489–90 [2d Dept. 2021])(*quoting Gutierrez v. Government Empls. Ins. Co.*, 136 AD3d at 976); *see also E. Ramapo Central Sch. Dist. v. New York Sch. Ins. Reciprocal*, 199 AD3d 881, 158 NYS3d 173, 177 [2d Dept. 2021]). The conduct which is alleged to be implicitly prohibited by a contract must be “implicit in the agreement viewed as a whole” and must not be inconsistent with other terms of the contract (*Singh v. City of New York*, 40 NY3d 138, 146, 195 NYS3d 429, *reargument denied*, 40 NY3d 975, [2023])(*internal quotation omitted*); *Cordero v. Transamerica Annuity Serv. Corp.*, 39 NY3d 399, 409, 190 NYS3d 274 [2023]). “Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion” (*Dalton v. Educ. Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1995]; *Cordero v. Transamerica Annuity Serv. Corp.*, *supra*).

Here, Plaintiffs assert that the failure to disclose the water heater failure, water damage and insurance claim, resulted in denying Plaintiffs the benefits of the agreement. Plaintiffs state that this failure to disclose made it impossible to insure the property and impossible to obtain a mortgage loan to finance the sale, and deprived Plaintiffs of their right to timely cancel the contract.

Defendants argue that there was an “as is” provision in the Contract of Sale. Paragraph 12 relates to condition of the property and sets forth, in part:

**12. Condition of Property.** Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser’s own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical conditions, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same “as is” in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of Closing (except as otherwise set forth in paragraph 16(e)) or elsewhere herein, without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representatives shall have the right, at reasonable times and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing.

It is noted that paragraph 16 of the agreement, titled “Conditions to Closing,” subsection (e)

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 7

states:

(e) All plumbing (including water supply and septic systems, if any), heating and air conditioning, if any, electrical and mechanical systems, equipment, and machinery in the building(s) located on the property and all appliances which are included in this sale being in working order as of the date of Closing. The roof shall be free of leaks and the basement shall be free of standing water at closing.

It is undisputed that Plaintiffs' inspection of the premises was prior to the water heater failure and the water damage caused by the flood, that Defendants knew the condition of the property had changed since Plaintiffs had viewed the property, and that Defendants neither disclosed the changed condition nor offered Plaintiffs the opportunity to re-inspect the premises after the flood occurred. Defendants argue that it was their prerogative to either repair any non-working appliances or provide a \$750 credit for each such non-working appliance, pursuant to paragraph 31 of the May 1, 2023 Rider to Contract of Sale. This is the basis for the assertion that they were not required to disclose that carpet and wallboard were replaced, along with the water heater.

Defendants point to the Mortgage Contingency clause which allows for cancellation of the agreement prior to August 17, 2023, in the event that Plaintiffs were unable to procure a mortgage commitment by August 10, 2023. Defendants allege that Plaintiffs failed to procure the Commitment by August 10 and failed to cancel the contract by August 17, 2023, therefore they waived any right to cancel the contract. Plaintiffs assert that they did have a mortgage commitment but that it was effectively caused to be cancelled by Defendants' undisclosed insurance claim, which prevented them from getting full insurance on the property.

The documentary evidence submitted in support of dismissal of Plaintiffs' first cause of action for breach of the covenant of good faith and fair dealing is insufficient to be conclusively dispositive of such claim. Furthermore, the claim as stated in the amended complaint, combined with the evidence presented on this record, is sufficient to establish the existence of a cause of action. The portion of Defendant's motion seeking dismissal of Plaintiffs' first cause of action pursuant to CPLR§3211(a)(1) and (7) is therefore, denied.

A cause of action for declaratory relief manifests when there is an actual, justiciable controversy between the parties involving substantial interests for which a declaratory judgment will have some real effect (*Cong. Machon Chana v. Machon Chana Women's Inst., Inc.*, 162 AD3d 635, 80 NYS3d 61 [2d Dept. 2018]; *Zwarycz v. Marnia Const., Inc.*, 102 AD3d 774, 958 NYS2d 440 [2d Dept. 2013]; *see also* CPLR§3001; *Bettan v. Geico Gen. Ins. Co.*, 296 AD2d 469, 745 NYS2d 545 [2d Dept. 2002]). Such interests may not be hypothetical or predicated upon a speculative future event (*Tomasulo v. Vill. of Freeport*, 151 AD3d 1100, 58 NYS3d 440 [2d Dept. 2017]; *Waterways Dev. Corp. v. Lavalley*, 28 AD3d 539, 813 NYS2d 485 [2d Dept. 2006]; *Am. Ins. Ass'n v. Chu*, 64 NY2d 379, 476 NE2d 637 [1985]). A declaratory judgment may appropriately delineate the rights of the parties in the context of a given set of facts, based upon a justiciable controversy presented; however, its purpose is not to declare findings of fact (*Cong. Machon Chana v. Machon Chana Women's Inst., Inc.*, 162 AD3d 635, 80 NYS3d 61 [2d Dept. 2018]).

Plaintiffs' second cause of action in the amended complaint alleges that the mortgage

Richard Lapine et al v John Brennan et al  
Hon. Vincent J. Martorana

Index No.: 626793/2023  
Page 8

condition precedent of the contract was not met, and that this was due to the acts and omissions of Defendants which resulted in the withdrawal of the mortgage commitment. Plaintiffs seek a declaratory judgment that they are excused from performance and are entitled to return of their downpayment. Defendants assert that Plaintiffs failed to attend the time is of the essence closing on October 30, 2023, and that they have no lawful excuse for default. Defendants further argue that Plaintiffs did not actually have a mortgage commitment by August 10, 2023, as was required by the agreement. These issues are far from clear, based upon the record that is presently before the court. Here again, the documentary evidence submitted has not conclusively disposed of Plaintiffs' claim. Moreover, the second cause of action as stated in the amended complaint, combined with the evidence presented on this record, is sufficient to establish the existence of a declaratory judgment cause of action. The portion of Defendant's motion seeking dismissal of Plaintiffs' second cause of action pursuant to CPLR§3211(a)(1) and (7) is therefore, denied.

Furthermore, as CPLR§3211(a)(1) and (7) dismissal is denied with respect to both causes of action, the portion of Defendants' motion which seeks a declaration that Plaintiffs are in default under the contract of sale and that Defendants are entitled to payment of the \$260,000.00 in escrowed funds, is denied. This request arises from the presumed dismissal of Plaintiffs' claims. As Defendants' motion to dismiss is denied, Defendants are not entitled to such a declaration, nor are they entitled to an award of attorneys' fees at this juncture.

Based upon the foregoing, Defendants' motion is denied in its entirety.

Dated: July 29, 2024  
Riverhead, New York



\_\_\_\_\_  
VINCENT J. MARTORANA, J.S.C.

CHECK ONE:     FINAL DISPOSITION     NON-FINAL DISPOSITION