

**Kozak v Kushner Vil. 329 E. 9th, LLC**

2025 NY Slip Op 32780(U)

August 6, 2025

Supreme Court, New York County

Docket Number: Index No. 157448/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58**

*Justice*

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ANDREW KOZAK, DANIEL PORVIN, DARLA STACHECKI,  
MONIQUE SAFFORD, MICHAEL MAHER, ANA  
SUSSMANN,

Plaintiffs,

- v -

KUSHNER VILLAGE 329 EAST 9TH, LLC, WESTMINSTER  
MANAGEMENT,

Defendants.

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INDEX NO. 157448/2020

MOTION DATE 01/30/2025

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 178, 179, 180, 181, 214

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiffs move for an order, pursuant to CPLR 1001 and 1002, joining as necessary parties in this action, the new owners of the building at issue, EVP Owner LLC, EVP TIC II Owner LLC, EVP TIC III Owner LLC, and EVP TIC IV OWNER LLC (collectively, EVP). Defendants cross-move pursuant to CPLR 3211(a)(1), (4), and (7) for an order dismissing them from the action. Plaintiffs and EVP oppose the cross-motion.

By interim order dated August 5, 2025, the motion to amend was granted, and the cross-motion was submitted for decision.

**I. PERTINENT PROCEDURAL BACKGROUND**

In this action, plaintiffs sue defendants for various alleged habitability issues related to the buildings at issue; defendants were the buildings' owners until September 30, 2024, when they sold the buildings to EVP.

Plaintiffs commenced this action in September 2020. In November 2021, plaintiffs moved for certification of a class, and defendants cross-moved for summary dismissal of the complaint. By decision and order dated November 10, 2022, defendants' motion for summary judgment was granted, the complaint was dismissed, and the motion for class certification was denied as academic (NYSCEF 135).

In November 2024, the Appellate Division, First Department, modified the decision by denying dismissal of the first, second, fourth, and fifth causes of action, and granting the motion for class certification. However, the Court held that dismissal of the breach of warranty claims of plaintiffs Kozak, Porvin, Stachecki, and Safford had been appropriate as they had already litigated those claims in civil court non-payment proceedings (NYSCEF 159).

## II. CONTENTIONS

### A. Defendants

Defendants argue that plaintiffs' first cause of action, which seeks a judgment declaring that defendants may not collect rent from plaintiffs, and the second cause of action, seeking a mandatory injunction compelling defendants to make the buildings safe for occupancy, among others, may no longer be maintained against them as they are no longer the owners.

They assert that the third cause of action, for violations of the warranty of habitability, are barred as to the other two plaintiffs, Maher and Sussman, as Maher raised the claim as a defense in his non-payment proceeding, as did Sussman before she vacated her unit and abandoned her claims.

Defendants argue that the fourth cause of action, for a violation of General Business Law (GBL) 349, fails to state a claim as the alleged conduct at issue involves only parties to the building dispute and not the public at large, and that the fifth cause of action, for attorney fees

pursuant to Real Property Law 234, fails as plaintiffs have not been the prevailing party, nor can fees be recovered in a declaratory judgment action.

### B. Plaintiffs

Plaintiffs assert that the class members have valid claims for breach of the warranty of habitability against defendants, and otherwise argue that defendants should remain as parties here in order to completely adjudicate their claims.

### C. EVP

EVP contends that the first claim remains valid as there may be an issue of reimbursement of rent already paid by plaintiffs in the certified class, which would require payment by defendants, not EVP. The second claim should not be dismissed because the issue of building violations is based on defendants' conduct at the building. The third claim is valid as defendants haven't shown that all of the plaintiffs in the certified class settled their warranty of habitability claims. EVP takes no position on plaintiffs' fourth and fifth causes of action.

## III. ANALYSIS

Pursuant to CPLR 3211(7), a party may move for dismissal "on the ground that the pleading fails to state a cause of action." Dismissal of a complaint pursuant to CPLR 3211(a)(7) requires that the pleading be afforded a liberal construction and that the court accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556 [1st Dept 2021]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and

inferences to be drawn from them do not allow for an enforceable right of recovery”  
(*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citations omitted]).

In the first cause of action, plaintiffs seek a judgment: (1) barring defendants from collecting rent in the buildings under the current temporary certificates of occupancy (TCOs); (2) declaring that the partial TCOs are unlawful; and (3) declaring that no rents are due from plaintiffs until final COs are obtained.

As defendants sold the buildings, they no longer can or are trying to collect rent from plaintiffs, and whether or not the TCOs are unlawful or plaintiffs will not have to pay future rent until final COs are obtained are unrelated to defendants’ statuses as former owners (*see e.g., Vill. of Hempstead v Taliercio*, 8 AD3d 476 [2d Dept 20024] [action for permanent injunction barring defendants from operating house illegally was rendered academic when defendants sold house]). Similarly, that defendants may ultimately have to refund rent to some of the class members is irrelevant to the declaratory relief sought in this cause of action. Defendants are thus entitled to dismissal of this claim against them.

In the second cause of action, plaintiffs seek an injunction: (1) directing defendants to make the buildings safe, to comply forthwith with all DOB requirements, and to obtain a final CO for the buildings; and (2) enjoining any action by defendants to collect rent until they obtain a final CO. For the same reasons as above, this claim may not be maintained against defendants.

For the third cause of action, absent proof that all class members are precluded from raising breach of warranty of habitability claims, defendants are not entitled to dismissal of this claim.

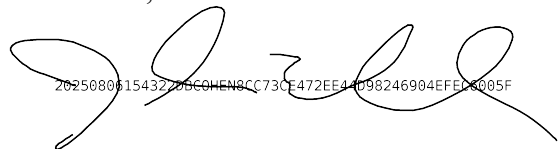
A violation of GBL 349 requires a showing that the claimed improper or illegal conduct is or was aimed at the public at large, ie, is consumer-oriented (*APR Energy Holdings Ltd. v*

*Deloitte Tax LLP*, 209 AD3d 402 [1st Dept 2022]). Here, the allegations at issue involve a dispute between owners and tenants of particular buildings and do not involve consumer-oriented conduct, and thus plaintiffs do not state a claim under GBL 349 (*see Haygood v Prince Holdings 2012 LLC*, 186 AD3d 1157 [1st Dept 2020] [private dispute between landlord and tenant did not concern consumer-oriented conduct aimed at public at large]; *Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646 [1st Dept 2013] [action was limited to parties in subject building and did not involve public at large]). The same holds true for defendants' claimed violation of NYC Code 20-700 (*id.*).

As plaintiffs' third cause of action is not dismissed, defendants are also not entitled to dismissal of the fifth cause of action for attorney fees, as whether plaintiffs will ultimately be the prevailing party here remains to be determined. Moreover, there is no merit to defendants' argument that attorney fees may not be awarded in a declaratory judgment action (*see Sandlow v 304 Riverside Corp.*, 201 AD3d 418 [1st Dept 2022] [plaintiff entitled to attorney fees as he prevailed on claim for declaratory judgment and related injunctive relief]).

Accordingly, it is hereby

ORDERED, that defendants' cross-motion to dismiss is granted to the extent of severing and dismissing plaintiffs' first, second, and fourth causes of action, and is otherwise denied.



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DAVID B. COHEN, J.S.C.

8/6/2025  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE