

**Lucio v Marvel**

2025 NY Slip Op 32991(U)

June 11, 2025

Supreme Court, Kings County

Docket Number: Index No. 535479/2024

Judge: Derefim B. Neckles

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At an IAS Term, Part FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of June, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,  
Justice.

-----X  
✓ JESSICA LUCIO,

Plaintiff,

-against-

*OSC SER #1*

Index No.: 535479/2024 ✓

✓ MARK MARVEL, 70 WASHINGTON STREET CONDOMINIUM, 70 WASHINGTON STREET CONDOMINIUM BOARD OF MANAGERS, JAMEL TALBI, ZIMMET LAW GROUP P.C., BRYAN ZIMMET, ESQ., MICHELLE GENG, ESQ., HOLLY S. BROWN, ESQ., SOLSTICE RESIDENTIAL GROUP, LLC, YAKOV ISAKOV, CPA., COMPASS, INC., COMPASS, INC. DBA COMPASS IN THE U.S. AND/OR OTHER COUNTRIES, AARON GRAF, SONIA HONDRAKI, DOUGLAS ELLIMAN REALTY, LLC, LIL NEJAD; and JOHN AND JANE DOES #1-100,

Defendants.

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_

10, 16  
42, 46, 51-53

Upon the foregoing papers in this rescission action, plaintiff Jessica Lucio moves (in motion sequence 1), by order to show cause (1) pursuant to CPLR 6301, for a preliminary injunction staying a related foreclosure action (bearing Kings County index No. 505731/24), and (2) for an order, pursuant to CPLR 602 (a), joining for trial both the instant matter and the foreclosure action.

### **Background**

In May 2022, plaintiff purchased a condominium apartment, Unit 4J, in the premises located at 70 Washington Street in Brooklyn. On or about December 29, 2024, she brought this action contending, inter alia, that various lawyers, real estate agents, and the Condominium Board misled her to believe that the building permitted smoking in an owner's individual apartment unit when, in fact, the building did not allow smoking anywhere at all. As a result, plaintiff's complaint asserts various claims, including negligent misrepresentation, legal malpractice, and breach of fiduciary duty, and seeks rescission of the purchase agreement of the apartment and money damages.

On February 27, 2024, approximately ten months before plaintiff brought this action, the Condominium Board commenced a foreclosure action against plaintiff and her daughter, Isabella Lucio, a resident of the unit and a fellow smoker. The foreclosure action alleged that the Condominium, by its Board, possessed a lien on the unit resulting from unpaid and delinquent common charges, capital assessments, and electricity charges. In the foreclosure action, on November 4, 2024, the Condominium moved for summary judgment in the foreclosure action (NYSCEF Index No. 505731/2024, Doc No. 13). On May 4, 2025, Lucio, by her attorney, cross-moved for an order seeking, inter

alia, a preliminary injunction staying that case (NYSCEF Index No. 505731/2024, Doc No. 28). The court has yet to issue an order on either of those motions in the foreclosure action.

The instant order to show cause was signed by the court on December 31, 2024, oral argument was heard on April 1, 2025, and the court reserved decision on that return date.

### Discussion

With respect to that portion of plaintiff's motion seeking a preliminary injunction staying the foreclosure action, this court lacks the authority to grant such relief. The general rule is that one action cannot be stayed by a motion in another action (*Safier v Cohl*, 95 AD2d 933 [3d Dept 1983]). The proper procedure is for plaintiff to seek such relief in the foreclosure action (*see e.g. Fourth Fed. Sav. & Loan Assn. v Garber*, 172 AD2d 399, 400 [1st Dept 1991]). Indeed, the court notes that plaintiff apparently concedes as much as she cross-moved for a stay of the foreclosure action before the court in that action on May 4, 2025 ( a date more than 3 months after plaintiff filed the instant motion)

In any event, even if this court had the authority to grant plaintiff such relief, a preliminary injunction "is considered a drastic [remedy], which should be used sparingly" (*Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 1123 [2d Dept 2017]). A party seeking a preliminary injunction must show that he/she will likely succeed on the merits, the balance of the equities lies in the movant's favor and irreparable harm would result in the absence of the injunction (*County of Orange v*

*Lockey*, 111 AD2d 896, 897 [2d Dept 1985]). Here, plaintiff's declaration that "[p]laintiff is most likely to succeed on the merits of their claims" (NYSCEF Doc No. 10 at ¶ 43) is made in conclusory fashion, without any showing of the merit of her defenses in the foreclosure action (*see e.g. Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]). Additionally, one who does not live in the subject premises cannot show that foreclosing on said premises would cause irreparable injury (*see e.g. Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 722 [2d Dept 2012]). Here, plaintiff concedes she does not live at the property as her complaint specifically alleges that she resides in the Washington State and the apartment is apparently inhabited by her daughter (NYSCEF Doc No. 1 at ¶ 2).

The court also denies that branch of plaintiff's motion seeking a joint trial of the foreclosure action with the instant action. "CPLR 602 (a) provides that [w]hen actions involving a common question of law or fact are pending before a court, the court . . . may order a joint trial of any or all the matters in issue [and] may order the actions consolidated . . . to avoid unnecessary costs or delay" (*HSBC Bank USA, N.A. v Francis*, 214 AD3d 58, 62 [2d Dept 2023] [internal quotation marks omitted]). Even where common questions of fact or law do exist, a motion for joint trial or consolidation should be denied where there is a showing of prejudice to a substantial right by the party opposing the motion (*id.*). Whether to grant a joint trial lies within the sound discretion of the court (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622 [2d Dept 2012]).

Here, there are no common questions of fact or law between the two cases. The commonality starts and ends with the unit itself. The two cases concern different causes of actions arising from fundamentally different facts. The instant case concerns plaintiff trying to rescind the purchase of her condominium unit because she was allegedly misled by the defendants, while the foreclosure action concerns plaintiff's alleged failure to pay various charges owed to the Condominium. Stated differently, the instant case exclusively concerns facts which transpired before the purchase, while the foreclosure action exclusively concerns facts which transpired after the purchase (*see e.g. County of Westchester v White Plains Ave., LLC*, 105 AD3d 690, 691 [2d Dept 2013]; *American Holdings Inv. Corp. v Josey*, 71 AD3d 927, 931 [2d Dept 2010]). Moreover, the instant matter involves more than 10 defendants who are not parties in the foreclosure action, and, thus, the issues in the foreclosure action do not impact them (*see e.g. McGinty v Structure-Tone*, 140 AD3d 465, 466 [1st Dept 2016]; *G&L Indus./Old Action Labs, Inc. v Bell Bates Co.*, 293 AD2d 511, 512 [2d Dept 2002]).

In any event, the Condominium has shown that it would suffer prejudice by facing significant delay in adjudicating the foreclosure matter. "Where joint trial by reason of tardy institution of a second action will result in undue delay and expense in the determination of the first action, the court may deny joint trial" (*Pierce v International Harvester Co.*, 65 AD2d 254, 258 [4th Dept 1978]; *see e.g. Cipollina v Kent*, 52 AD2d 632 [2d Dept 1976]). Plaintiff filed her complaint approximately ten months after the commencement of the foreclosure action (*compare* NYSCEF Doc No. 1 *with* NYSCEF Index No. 505731/2024, Doc No. 10). Plaintiff has not explained why she waited so long

to initiate the present action. The lapse in time becomes all the more stark when considering that she filed two counterclaims against the Condominium Board in the foreclosure action (NYSCEF Index No. 505731/2024, Doc No. 12 at ¶¶ 28-34). This signals that she was aware of potential claims she had stemming from the alleged misrepresentation, but chose to litigate them piecemeal between the foreclosure action and the instant matter. Additionally, a court may not grant consolidation or a joint trial when there is a pending dispositive motion in one of the actions (*see HSBC Bank USA, N.A.*, 214 AD3d at 63). In the foreclosure action, the Condominium filed a dispositive motion which seeks summary judgment and is still pending (NYSCEF Index No. 505731/2024, Doc No. 13). In contrast, discovery here is at its infancy, thus, it would cause unnecessary delay in adjudicating that issue (*see e.g. Skelly v Sachem Cent. Sch. Dist.*, 309 AD2d 917, 917-918 [2d Dept 2003]; *cf. Viafax Corp. v Citicorp Leasing, Inc.*, 54 AD3d 846, 850 [2d Dept 2008]).


Accordingly, it is

**ORDERED** that plaintiff's order to show cause is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: *June 11, 2025*

ENTER

  
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Hon. Derefim B. Neckles  
**HON. DEREFIM B. NECKLES**  
**A.J.S.C.**