

Nudelman v Muller

2026 NY Slip Op 31188(U)

March 23, 2026

Supreme Court, Kings County

Docket Number: Index No. 530938-2024

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 23rd day of March 2026.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

ALINA NUDELMAN,

Plaintiff(s),

-against-

TAMAS MULLER,

Defendant(s).

DECISION & ORDER

Index No.: 530938-2024

Return Date: 1/8/2026

Motion Seq.: 003

Recitation of the following papers as required by CPLR 2219(a):

**NYSCEF
Papers
Numbered**

Plaintiff’s Notice of Motion, Affirmation and Supporting Documents.....	21-26
Defendant’s Affirmation in Opposition and Supporting Documents.....	27-29
Plaintiff’s Affirmation in Reply and Supporting Documents.....	30-32

Upon the foregoing papers and after oral argument, plaintiff’s Motion to Dismiss is decided as follows:

Procedural History

Plaintiff commenced this action by filing a Summons and Notice of Motion for Summary Judgment in Lieu of a Complaint seeking a sum certain of \$50,000.00. In support of the motion, Nudelman submitted an affidavit stating that she and defendant entered into a Buyout Agreement on 4/22/2024 for her 42.5% ownership interest in Golden Minds Prep LLC, a daycare center. Defendant purchased her share for \$100,000.00, payable in two installments. Defendant paid the first installment but defaulted on the second payment that was due on 10/31/2024. In opposition,

defendant served a cross-motion to dismiss this action based on plaintiff's failure to first submit this dispute to mediation pursuant to Article 13 of the Operating Agreement signed by the parties on 9/30/2022. Additionally, defendant's affidavit stated that plaintiff breached the terms of the Buyout Agreement by failing to fulfill her specific obligations under the contract. By an Order dated 5/19/2025, both motions were denied. In accordance with the terms of the order, defendant filed an answer with six (6) counterclaims on 8/25/2025: breach of contract, anticipatory breach of contract, fraud, breach of covenant of good faith and fair dealing, misappropriation of trade secrets and confidential information, and unjust enrichment.

Plaintiff now moves to dismiss the counterclaims per CPLR § 3211 [a] [1] [documentary evidence], [a] [3] [lack of legal capacity to sue] and [a] [7] [failure to state a cause of action and as to the counterclaim for fraud, CPLR § 3016 [b] [failure to plead with particularity].

Discussion

A party may submit affidavits in opposition to a motion to dismiss pursuant to CPLR § 3211 [a] [7] but it does not obligate them to do so to avoid a dismissal. Therefore, a party may stand on the pleadings alone, "confident that its allegations are sufficient to state all of the necessary elements of a cognizable cause of action" to survive a motion to dismiss under CPLR § 3211 [a] [7]. (*See Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). When determining a motion to dismiss pursuant to CPLR § 3211 [a] [7], the Court must accept the factual allegations in the [pleading] as true and "accord the [nonmoving party] the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

However, if the Court considers evidentiary material outside the pleadings and the motion is not converted to one for summary judgment, "the question becomes whether the pleader has a

cause of action, not whether the pleader has stated one and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, [a] dismissal should not [be granted]” (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 480 [2d Dept. 2017]). As each party has submitted documentary evidence beyond the pleadings, the Court must now determine whether defendant has stated material facts that demonstrate a significant dispute exists constituting a viable counterclaim.

Plaintiff’s motion is denied. Defendant’s answer is replete with numerous factual allegations that when liberally construed, demonstrate that defendant has sufficiently pled viable counterclaims (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 480.).

Further, defendant’s allegations are more than a complaint that plaintiff was not sincere when she promised to perform under the contract (*Compare, Manas v VMS Assoc., LLC*, 58 AD3d 451, 453 [1st Dept 2008]). At a minimum, defendant’s allegations are that plaintiff promised to perform but at the time the promise was made, had “a preconceived and undisclosed intention of not performing.” If true, “such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud” and is “not a mere promissory statement as to what will be done in the future.” (*Id.*; *Deerfield Communications Corp v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Regarding plaintiff’s motion per CPLR § 3211 [a] [1], plaintiff’s affidavit does not qualify as documentary evidence since defendant has offered his own affidavit to rebut plaintiff’s allegations (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; *Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]). At this juncture, plaintiff’s motion per

CPLR § 3211 [a] [3] that defendant lacks capacity to sue [standing] has been rebutted by defendant. Defendant avers that the Buyout Agreement created obligations by plaintiff to defendant individually.

Therefore, based on the competing affidavits and allegations, discovery is necessary before this Court can determine that a significant dispute does not exist as a matter of law concerning defendant's counterclaims (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 480). It is noted that a preliminary conference [discovery] order was issued by the Court on 8/25/2025 and this motion was filed one month later. The parties shall proceed to discovery.

Defendant's request in the opposition to amend the answer is denied. Unlike summary judgment under CPLR § 3212 [b], the Court cannot "search the record" and grant such a request absent a motion on notice seeking affirmative relief.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the Court.

E N T E R:



Hon. Anne J. Swern, J.S.C.

Dated: 3/23/2026