McQuillan v Carmine Ltd.

2026 NY Slip Op 31641(U)

April 13, 2026

Supreme Court, New York County

Docket Number: Index No. 659612/2025

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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SAM MCQUILLAN, TAYLOR ZAKARIN, BRENDAN MONAGHAN, MARK HERMAN, MARY LYNN PYLE, LONA VIGI

Plaintiff,

- v -

CARMINE LIMITED,

Defendant.

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INDEX NO. 659612/2025

MOTION DATE 01/08/2026

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISSAL.

This action arises out of allegations of, *inter alia*, breach of contract and breach of warranty of habitability. Defendant now moves, pursuant to CPLR §3211(a)(1), for an order dismissing the complaint with prejudice as against plaintiffs Taylor Zakarin and Mark Herman with respect to the first, second, third and fifth causes of action, and an order, pursuant to CPLR §3211(a)(7), dismissing plaintiffs' fourth cause of action to the extent that it seeks recovery on a theory of negligence per se[1], and the fifth cause of action, seeking declaratory judgment, in its entirety. Plaintiffs oppose the instant motion. For the reasons set forth below, the motion to dismiss is granted in part.

Background

Plaintiffs reside in various penthouse apartments within 1 Christopher Street, the building owned by defendant. Plaintiffs' causes of action relate to allegations that defendant failed to

[1] During oral argument defendant withdrew the portion of the motion seeking dismissal of the fourth cause of action.

promptly and properly make repairs associated with private terraces in conformity with Local Law 11 and other safety regulations. The complaint alleges that plaintiffs do not have access to their private terraces and have not had access for an unreasonable period, that plaintiffs' personal property on the terraces was damaged due to the ongoing construction. The complaint further alleges that plaintiffs have been deprived of light and air and have also been exposed to excessive noise and asbestos.

Standard of Review

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp*., 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.'" *Id*.

"In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law." *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

Discussion

First Cause of Action-Breach of Contract

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 58 [1st Dept 2013].

In support of dismissal of this claim and as documentary evidence defendant provides the lease agreements to the subject apartments to establish that defendants Zakarin and Herman are not signatories to the underlying leases or subsequent renewals. In opposition, plaintiffs argue that they are lawful occupants of the apartment and have been added treated as residents of the building for many years.

Here, the Court finds that the case law relied on by plaintiffs to support their arguments are distinguishable from the instant action and agrees that defendants Zakarin and Herman are not signatories to the lease agreement or any subsequent renewals, thus there is no privity of contract; accordingly, the cause of action for breach of contract asserted by defendants Zakarin and Herman is dismissed.

Second Cause of Action-Breach of Warranty of Habitability

New York Real Property Law § 235-b(1) provides in part that in any "written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or

safety." The First Department has held that "generally, a predicate for the applicability of Real Property Law § 235-b is the existence of a lease between the parties" (*Bykovtseva v DTH Capital, Inc.*, 239 AD3d 476, 477 [1st Dept 2025]).

Defendant seeks dismissal of this cause of action asserted by Zakarin and Herman based on the absence of a lease agreement between the parties. In opposition, plaintiffs contend that RPL § 235-b applies to parties that are nonparties to a lease. In support of that position plaintiffs cite to *Dep't of Hous. Pres. & Dev. of the City of N.Y. v Sarto*r, 109 AD2d 665, 667 [1st Dept 1985]. In *Sartor*, the issue was the application of the RPL § 235-b with respect to public administrators governed by Real Property Actions and Proceedings Law, an issue distinguishable from the instant matter.

Here, the Court finds that consistent with the caselaw in this Department and the RPL § 235-b, plaintiffs' Zakarin and Herman second cause of action requires dismissal.

Third Cause of Action-Private Nuisance

The elements for a private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act". *(Berenger v 261 W. LLC* 93 AD3d 175, 182 [1st Dept 2012] quoting *Copart Indus., Inc. v Consol. Edison Co.*, 41 NY2d 564, 570 [1977]).

Here, defendant has established through the documentary evidence that plaintiffs Zakarin and Herman do not have property rights to have standing to assert a private nuisance cause of action (*see Broxmeyer v United Capital Corp.*, 79 AD3d 780, 784 [2d Dept 2010]). Accordingly, the third cause of action asserted by plaintiffs Zakarin and Herman is dismissed.

Fifth Cause of Action-Declaratory Judgment

Plaintiffs' fifth cause of action seeks a declaration (a) granting plaintiffs an ongoing rent abatement of not less than 50% due to lack of access to the terraces and allegations that the apartments are uninhabitable, (b) defendant is obligated to restore full and unobstructed access to all terraces, remove scaffolding materials, unsealing windows and doors, remediating mold and water damage, and repairing the elevator mechanical defect, and (c) plaintiffs' obligation to pay full monthly rent shall not be reinstated until defendant has remediated the conditions for in each of the apartments as was bargained for through the leases entered into.

Defendant moves on the grounds that plaintiffs have an adequate remedy at law, namely is first and second causes of action, thus a declaration is not necessary. In opposition plaintiffs contend that a declaration is appropriate as it relates to the future obligations and performance of the parties.

Here, the Court finds that plaintiffs have not sufficiently established that a declaratory judgment is appropriate and not duplicative of the first two causes of actions. The cases relied upon by plaintiffs to support the position that a declaration is appropriate are distinguishable from the instant matter. Defendant cites to various cases, including landlord tenant actions that stand for the proposition that a plaintiff may not seek declaratory judgment when other remedies are available, *see* (*Bartley v Walentas*, 78 AD2d 310, 312 [1st Dept 1980]; *Colfin SNP-1 Funding, LLC v Sec. Natl. Props. Servicing Co., LLC*, 199 AD3d 406, 407 [1st Dept 2021]). "It is well settled that a declaratory judgment action should not be entertained where it parallels a breach of contract claim and merely seeks a declaration of the same rights and obligations." *Id.* internal citation and quotations omitted. Here, the Court finds that the cause of action seeking a declaration parallels the breach of contract and breach of warranty of habitability. Accordingly, it is hereby

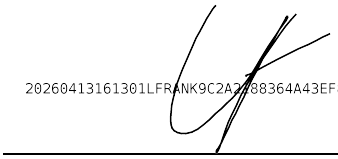
ORDERED that the fifth cause of action is dismissed in its entirety; and it is further

ORDERED that the first, second and third causes of action asserted by plaintiffs Taylor Zakarin and Mark Herman only are dismissed; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days of service of a copy of this Order with notice of entry.



4/13/2026
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE