

[Levy v. 103-25 68th Ave. Owners, Inc.](#)

Supreme Court of New York, Appellate Division, Second Department

January 17, 2024, Decided

2022-02519, 2022-02520 (Index No. 709388/18)

Reporter

2024 N.Y. App. Div. LEXIS 190 *; 2024 NY Slip Op 00185 **; 223 A.D.3d 728

[1]** Salomon Levy, et al., respondents, v 103-25 68th Avenue Owners, Inc., et al., appellants, et al., defendants.

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THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Prior History: In an action, inter alia, to recover damages for housing discrimination, the defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, Ltd., Dagmara K. Krasa, Michael L. Marks, and Pat Jennings appeal from (1) an order of the Supreme Court, Queens County (Timothy J. Dufficy, J.), entered February 7, 2022, and (2) an order of the same court entered February 14, 2022. The order entered February 7, 2022, insofar as appealed from, denied those branches of those defendants' motion which were pursuant to [CPLR 3211\(a\)](#) **[*1]** to dismiss the second cause of action and the ninth cause of action insofar as asserted against them. The order entered February 14, 2022, denied those defendants' motion to impose sanctions upon the plaintiffs.

[LeVy v. 103-25 68th Ave. Owners, Inc., 2022 N.Y. Misc. LEXIS 18364 \(N.Y. Sup. Ct., Feb. 7, 2022\)](#)

Case Summary

Overview

HOLDINGS: [1]-The supreme court should have granted that branch of the co-op defendants' motion which was to dismiss the second cause of action under [CPLR](#)

[3211\(a\)\(1\)](#) because the amended complaint, as amplified by the plaintiffs' evidentiary submissions, failed to set forth acts outside the scope of authority of the board of directors, or any violations of the cooperative's governing documents by the co-op defendants, sufficient to support the second cause of action; [2]-The Supreme Court should have granted that branch of the co-op defendants' motion which was to dismiss the ninth cause of action pursuant to [CPLR 3211\(a\)\(7\)](#) because to the extent that the ninth cause of action identified any cognizable claims, it was duplicative of the causes of action sounding in discrimination and malicious prosecution, which the supreme court properly determined were subject to dismissal.

Outcome

Order reversed.

Counsel: Gartner + Bloom, P.C., New York, NY (Arthur P. Xanthos of counsel), for appellants.

Charles A. Termini, Oceanside, NY, for respondents.

Judges: VALERIE BRATHWAITE NELSON, J.P., LARA J. GENOVESI, LILLIAN WAN, JANICE A. TAYLOR, JJ. BRATHWAITE NELSON, J.P., GENOVESI, WAN and TAYLOR, JJ., concur.

Opinion

DECISION & ORDER

ORDERED that the order entered February 7, 2022, is reversed insofar as appealed from, on the law, and those branches of the motion of the defendants 103-25 68th Avenue Owners, **[*2]** Inc., John P. Lovett & Associates, Ltd., Dagmara K. Krasa, Michael L. Marks, and Pat Jennings which were pursuant to [CPLR 3211\(a\)](#) to dismiss the second cause of action and the ninth cause of action insofar as asserted against them are granted; and it is further,

ORDERED that the appeal from the order entered February 14, 2022, is dismissed as abandoned; and it is further,

ORDERED that one bill of costs is awarded to the defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, Ltd., Dagmara K. Krasa, Michael L. Marks, and Pat Jennings.

The plaintiffs are the former proprietary lessees of a cooperative apartment located in Forest Hills. The plaintiffs were involved in a prolonged noise dispute with the occupants of a neighboring apartment, during which many complaints were made to the defendants 103-25 68th Avenue Owners, Inc., the cooperative corporation, John P. Lovett & Associates, Ltd., the cooperative's management company, and Dagmara K. Krasa, Michael L. Marks, and Pat Jennings, individual members of the **cooperative's board** of directors (hereinafter collectively the co-op defendants). After attempts were made to resolve the dispute, including a formal mediation, and to enforce [*3] the cooperative's rules concerning noise, the board of directors voted to terminate the [**2] plaintiffs' lease, and an eviction proceeding was commenced against the plaintiffs. The plaintiffs subsequently moved out of the apartment and ultimately sold their shares in the cooperative corporation.

In June 2018, the plaintiffs commenced this action against the co-op defendants and the occupants of the neighboring apartment, alleging, inter alia, that the co-op defendants exceeded the scope of their authority, discriminated against them for having children, and acted in bad faith. The co-op defendants moved pursuant to [CPLR 3211\(a\)\(1\)](#) and [\(7\)](#) to dismiss the amended complaint insofar as asserted against them. They subsequently moved to impose sanctions upon the plaintiffs. In an order entered February 7, 2022, the Supreme Court denied those branches of the co-op defendants' motion which were to dismiss the second cause of action and the ninth cause of action insofar as asserted against them and granted those branches of the motion which were to dismiss the remaining causes of actions insofar as asserted against them. In an order entered February 14, 2022, the court denied the co-op defendants' motion to impose [*4] sanctions upon the plaintiffs. The co-op defendants appeal.

The co-op defendants' appeal from the order entered February 14, 2022, must be dismissed as abandoned, as their brief does not request modification or reversal of any portion of that order (see [Canberg v County of Nassau](#), 214 AD3d 943, 944, 187 N.Y.S.3d 237; [Ashfaq](#)

[v Ice Cream Depot Corp.](#), 209 AD3d 704, 706, 176 N.Y.S.3d 108).

"To succeed on a motion to dismiss based upon documentary evidence pursuant to [CPLR 3211\(a\)\(1\)](#), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" ([Patel v Gardens at Forest Hills Owners Corp.](#), 181 AD3d 611, 612, 120 N.Y.S.3d 354 [internal quotation marks omitted]; see [Goshen v Mutual Life Ins. Co. of N.Y.](#), 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858; [Leon v Martinez](#), 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972). In considering a motion to dismiss for failure to state a cause of action pursuant to [CPLR 3211\(a\)\(7\)](#), the court must "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" ([Nonnon v City of New York](#), 9 NY3d 825, 827, 874 N.E.2d 720, 842 N.Y.S.2d 756, quoting [Leon v Martinez](#), 84 NY2d at 87-88). Nonetheless, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" ([Godfrey v Spano](#), 13 NY3d 358, 373, 920 N.E.2d 328, 892 N.Y.S.2d 272; see [Young v 101 Old Mamaroneck Rd. Owners Corp.](#), 211 AD3d 771, 774, 180 N.Y.S.3d 224). Where, as here, evidentiary material is submitted and considered on a motion pursuant to [CPLR 3211\(a\)\(7\)](#), and the motion is not converted into one for summary judgment, the question becomes whether [*5] the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it (see [Leon v Martinez](#), 84 NY2d at 88; [Guggenheimer v Ginzburg](#), 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182; [Sokol v Leader](#), 74 AD3d 1180, 1181-1182, 904 N.Y.S.2d 153).

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a **cooperative board's** determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" ([40 W. 67th St. v Pullman](#), 100 NY2d 147, 153, 790 N.E.2d 1174, 760 N.Y.S.2d 745 [alterations and internal quotation marks omitted]; see [Matter of Levandusky v One Fifth Ave. Apt. Corp.](#), 75 NY2d 530, 538, 553 N.E.2d 1317, 554 N.Y.S.2d 807; [Young v 101 Old Mamaroneck Rd. Owners Corp.](#), 211 AD3d at 775). "The business

judgment rule does not apply when a **cooperative board** acts outside the scope of its authority or violates its own governing documents" ([Matter of Dicker v Glen Oaks Vil. Owners, Inc., 153 AD3d 1399, 1402, 61 N.Y.S.3d 338](#) [internal quotation marks omitted]; see [Katz v Board of Mgrs. of Stirling Cove Condominium Assn., 201 AD3d 634, 636, 161 N.Y.S.3d 226](#)).

Contrary to the plaintiffs' contentions, the amended complaint, as amplified by the their evidentiary submissions, failed to set forth acts outside the scope of authority of the board of directors, or any violations of the cooperative's governing documents by the co-op defendants, sufficient to support the second cause of action. Moreover, the plaintiffs made only conclusory allegations, [*6] without any factual basis, that the co-op defendants acted in bad faith or with a discriminatory motive (see [40 W. 67th St. v Pullman, 100 NY2d at 157](#); [Young v 101 Old Mamaroneck Rd. Owners Corp., 211 AD3d at 775](#); [**3] [Patel v Gardens at Forest Hills Owners Corp., 181 AD3d at 612](#); [Cohen v Kings Point Tenant Corp., 126 AD3d 843, 845, 6 N.Y.S.3d 93](#)). Accordingly, the Supreme Court should have granted that branch of the co-op defendants' motion which was to dismiss the second cause of action.

The Supreme Court should have granted that branch of the co-op defendants' motion which was to dismiss the ninth cause of action insofar as asserted against them pursuant to [CPLR 3211\(a\)\(7\)](#). To the extent that the ninth cause of action identifies any cognizable claims, it is duplicative of the causes of action sounding in discrimination and malicious prosecution, which the court properly determined were subject to dismissal pursuant to [CPLR 3211\(a\)\(7\)](#) (see [Cohen v Kings Point Tenant Corp., 126 AD3d at 845](#); [Hudson Val. Mar., Inc. v Town of Cortlandt, 79 AD3d 700, 703, 912 N.Y.S.2d 623](#)).

BRATHWAITE NELSON, J.P., GENOVESI, WAN and TAYLOR, JJ., concur.