

**Rodano v Pollack**

2012 NY Slip Op 32070(U)

July 19, 2012

Sup Ct, NY County

Docket Number: 100738/11

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN  
J.S.C.

PART 23

Index Number : 100738/2011  
RODANO, JOSEPH, et al.  
vs.  
POLLACK, MICHAEL A., et al.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE: 4/19/12  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to ~~for~~ dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1, 2</u>
<u>3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is denied.

*This constitutes the decision and order of this Court. See separate Opinion.*

**FILED**

AUG 07 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: New York, New York July 18, 2012 RNTBA \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X  
JOSEPH RODANO and PETER PILOTTI,

Index No. 100738/11

Plaintiff,

**OPINION**

-against-

MICHAEL A. POLLACK and  
THE BOARD OF MANAGERS OF THE  
46 WEST 67<sup>TH</sup> STREET CONDOMINIUM,

**FILED**

**AUG 07 2012**

Defendant.  
----- X

NEW YORK  
COUNTY CLERK'S OFFICE

**RICHARD F. BRAUN, J.:**

This is an action for private nuisance against defendant Michael A. Pollack (Pollack) for noxious odors, and breach of fiduciary duty against defendant The Board of Managers of the 46 West 67<sup>th</sup> Street Condominium (Board). Defendant Pollack moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1) and (a) (7). Defendant Board moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (7) and the statute of limitations. Pursuant to a January 12, 2012 stipulation, the parties agreed that any reference to defendant Board's motion to dismiss as a cross motion shall be considered a reference to defendant Board's motion as a motion, not a cross motion.

On a motion pursuant to CPLR 3211, a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 99-100 [1<sup>st</sup> Dept 2004]). To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the

cause(s) of action of the opposing party (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 [1<sup>st</sup> Dept 2003]; *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1<sup>st</sup> Dept 2001]; see *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

Plaintiffs and defendant Pollack reside in the same building, which is managed by defendant Board. Plaintiffs and defendant Pollack share a common wall. In 2005 or 2006, defendant Pollack renovated his apartment including the kitchen and dining area. In the kitchen, defendant Pollack installed a drop ceiling containing a ventilation unit with an exhaust system. Plaintiffs have experienced noxious odors from defendant Pollack's apartment, and complained to defendants Pollack and Board.

Defendant Pollack has not shown that plaintiffs' private nuisance claim lacks sufficient allegations as to the claim. The Court in *Copart Inds. v Consolidated Edison Co.* (41 NY2d 564, 569 [1977]) explains that "one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (citations omitted)." (emphasis added.) Plaintiffs have alleged sufficient facts to assert a claim under the second element in that plaintiffs allege that there is a defective exhaust system that has caused the odors to enter plaintiffs' apartment.

Although plaintiffs' factual allegations speak of a breach of quiet enjoyment and defendant Board discusses constructive eviction, plaintiffs do not assert either cause of action, and in any event the allegations of the complaint are insufficient for either claim. Plaintiffs have not alleged that they have abandoned their property in order to constitute a breach of the covenant of quiet enjoyment

(*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1<sup>st</sup> Dept 2005]), or a constructive eviction (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]) for such cause of action or a breach of the covenant of quiet enjoyment (*Gettinger Assoc., L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 415 [1<sup>st</sup> Dept 2011]). Nor have they alleged wrongful actions by defendants that have substantially and materially deprived plaintiffs of the beneficial use and enjoyment of their property (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d at 83; *Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [1<sup>st</sup> Dept 2010]). Furthermore, the concept of a constructive eviction does not apply to the relationship between a unit owner and a condominium board, as there is no landlord tenant relationship between them (*see Katz v Board of Mgrs., One Union Sq. E. Condominium, N.Y., N.Y.*, 83 AD3d 501, 502 [1<sup>st</sup> Dept 2011]).

As the party seeking review of defendant Board's actions, plaintiffs must allege the elements of a breach of fiduciary duty claim. To state such a claim, a plaintiff must allege that the defendant owed the plaintiff a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by the defendant's misconduct (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1<sup>st</sup> Dept 2011]). Plaintiffs do not set forth facts alleging these elements. Nor do plaintiffs allege that defendant Board engaged in unlawful discrimination, self-dealing, or other misconduct by defendant Board's members (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536 [1990]; *Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1<sup>st</sup> Dept 1999]). Pursuant to the business judgment rule, as articulated in *Matter of Levandusky v One Fifth Ave. Apt. Corp.* (75 NY2d at 537-538), plaintiffs have not alleged sufficient facts to permit judicial inquiry into defendant Board's decision making in order to show a breach of fiduciary duty.

Therefore, by this court's separate July 18, 2012 decisions and orders, defendant Pollack's

motion was denied, and defendant Board's motion was granted to the extent of dismissing plaintiffs' complaint against defendant Board. The court need not discuss the other issues raised.

Dated: New York, New York  
July 19, 2012



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RICHARD F. BRAUN, J.S.C.

**FILED**

**AUG 07 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**