

Bay Ridge Lodge 758 v Grand Lodge of Free & Accepted Masons of the State of N.Y.

2018 NY Slip Op 31689(U)

March 21, 2018

Supreme Court, Kings County

Docket Number: 502414/17

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of March, 2018

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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BAY RIDGE LODGE 758, FREE & ACCEPTED MASONS, BAY RIDGE LODGE 758 BUILDING CORP., JERRY FISHMAN, ERIK D. RUKHMAN, JOSEPH STAIANO, ABNER ABIEL RIVERA, ANDREW F. BRUSKIN,¹ ANTHONY J. REGINA, PETER GRAZIOLI, AND ANTHONY BARRIS,

Plaintiffs,

- against -

Index No. 502414/17

THE GRAND LODGE OF FREE & ACCEPTED MASONS OF THE STATE OF NEW YORK, JEFFREY M. WILLIAMSON, INDIVIDUALLY AND IN HIS CAPACITY AS GRAND MASTER OF MASONS IN THE STATE OF NEW YORK, JOSEPH J. BURKE, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DEPUTY GRAND MASTER, THIRD KINGS MASONIC DISTRICT, RALPH K. ARCHANGEL, INDIVIDUALLY AND IN HIS CAPACITY AS NORTH STAR PROGRAM CHAIRMAN FOR THE THIRD KINGS MASONIC DISTRICT, AND GILL R. CALDERON, INDIVIDUALLY AND IN HIS CAPACITY AS ASSISTANT GRAND LECTURER FOR THE THIRD KINGS MASONIC DISTRICT,

Defendants.

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¹By a stipulation dated July 24, 2017, plaintiff Andrew F. Bruskin (Bruskin) has discontinued his claims as against defendants (Doc #17).

The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>4, 6-12 19, 21-33, 35-36</u>
Opposing Affidavits (Affirmations)_____	_____
Reply Affidavits (Affirmations)_____	_____
_____ Affidavit (Affirmation)_____	_____
Memoranda of Law_____	<u>5, 37 20, 41</u>

Upon the foregoing papers, in this action by plaintiffs Bay Ridge Lodge 758 Free & Accepted Masons (Bay Ridge Lodge), Bay Ridge Lodge 758 Building Corp. (Building Corp.), Jerry Fishman (Fishman), Erik D. Rukhman (Rukhman), Joseph Staiano (Staiano), Abner Abiel Rivera (Rivera), Anthony J. Regina (Regina), Peter Grazioli (Grazioli), and Anthony Barris (Barris) (collectively, plaintiffs) against defendants the Grand Lodge of Free & Accepted Masons of the State of New York (the Grand Lodge), Jeffrey M. Williamson (Williamson), Joseph J. Burke (Burke), Ralph K. Archangel (Archangel), and Gill R. Calderon (Calderon) (collectively, defendants) for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, civil conspiracy, and defamation, defendants move, under motion sequence number one, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' amended complaint in its entirety, with prejudice. Plaintiffs cross-move, under motion sequence number two, for an order: (1) denying defendants' motion to dismiss this action; (2) granting them leave to plead again, pursuant to CPLR 3211 (e), in the event that defendants' motion to dismiss is granted; (3) granting them judgment, pursuant to

CPLR 3211 (b), dismissing all of the defenses raised in defendants' motion to dismiss; (4) as a logical corollary to CPLR 3211 (b), granting them partial summary judgment, pursuant to CPLR 3212 (e), on the issue of liability; (5) as a logical corollary to CPLR 3212 (e), setting this action down for an immediate trial on the issue of their damages, pursuant to CPLR 3212 (c); or, alternatively, (6) granting them partial summary judgment, pursuant to CPLR 3211 (c), on the issue of liability; (7) as a logical corollary to CPLR 3211 (c), setting this action down for an immediate trial on the issue of their damages, pursuant to CPLR 3211 (c); or, alternatively, (8) pursuant to CPLR 3212, determining what facts are not in dispute or are incontrovertible and specifying such facts and deeming them established for all purposes in this action; and (9) granting them such other, further, and different relief as the court may deem just and proper.

FACTS AND PROCEDURAL BACKGROUND

Bay Ridge Lodge was a not-for-profit corporation organized as a subordinate lodge of the Grand Lodge, and formed pursuant to the Benevolent Orders Law. Bay Ridge Lodge was issued a warrant or Charter from the Grand Lodge. Fishman was a member of Bay Ridge Lodge, and, beginning in May 2013, he held the office of Master of Bay Ridge Lodge. Fishman was a fifth generation Mason, with his family's Mason membership tracking back to 1857, and Fishman's late father was a Mason for 70 years. Through a recruiting effort by Fishman, Bay Ridge Lodge's membership rose to over 100 active members. Bay Ridge Lodge collected dues from its members, which were used to support charitable causes.

Rukhman was a member and the Treasurer of Bay Ridge Lodge. Staiano was a member, the Junior Warden, and the Acting Secretary of Bay Ridge Lodge. Rivera was a member, Trustee, and the Acting Junior Warden of Bay Ridge Lodge. Grazioli, Barris, and Regina were members and Trustees of Bay Ridge Lodge. Building Corp. is a for-profit C corporation with a principal place of business in Brooklyn, New York.

Williamson is the Grand Master of Masons of the Grand Lodge. Burke was the Assistant Grand Lecturer, and he was elevated to the position of District Deputy Grand Master for the Third Kings Masonic District in May 2016. Archangel is the North Star Program Chairperson for the Third Kings Masonic District. Calderon is the Assistant Grand Lecturer for the Third Kings Masonic District.

Bay Ridge Lodge was the fee owner of a building, which is located at 9104 4th Avenue, Brooklyn, New York (the building). The rent collected by Bay Ridge Lodge from the building was in the amount of \$70,000 annually. In addition to the building, Bay Ridge Lodge held other assets (collectively, the property), including a bank account. Plaintiffs claim that from January to April 2016, there were eight meetings held by Bay Ridge Lodge, and it was determined by Bay Ridge Lodge that it would form a separate corporation, namely, Building Corp., to operate the building.

Fishman, Grazioli, and Barris caused Building Corp. to be formed on or around March 7, 2016, at which time Building Corp.'s certificate of incorporation was filed with the New York State Department of State. Building Corp. does not hold a warrant or Charter from the

Grand Lodge, and it is not a corporation formed pursuant to the Benevolent Orders Law. Building Corp.'s certificate of incorporation reflects that Building Corp. was formed under Business Corporation Law § 402 as a for-profit New York corporation. Building Corp.'s certificate of incorporation was signed by Fishman, and Fishman is Building Corp.'s authorized representative.

On July 11, 2016, Fishman, Grazioli, and Barris caused Bay Ridge Lodge, as the seller, to transfer the building to Building Corp., as the buyer, for allegedly no or inadequate consideration. Fishman, Grazioli, and Barris are identified as authorized signatories for Bay Ridge Lodge, and Fishman is identified as Building Corp.'s authorized representative on the transfer documents. As reflected by bank statements, in September 2016, there were transfers in excess of \$100,000 from Bay Ridge Lodge's bank account to Building Corp.'s bank account, which were allegedly made by Fishman, Grazioli, and Barris, and \$10,000 of Bay Ridge Lodge's funds were used to pay attorney's fees in connection with these transfers.

Plaintiffs claim that Burke favored spending Lodge money on parties and other outings for Lodge members. Plaintiffs allege that at the May 21, 2016 fraternal night dinner where the winner of each Lodge's Brother of the Year award was announced, at which time Fishman presented the award to Staiano, Burke stated that his choice for Bay Ridge Lodge's Brother of the Year award would have been Milton Henry (Henry). Plaintiffs further allege that at the May 26, 2016 annual election of officers, Burke stated that he would have preferred Henry as the Master of Bay Ridge Lodge over Fishman, who was reelected as the

Master of Bay Ridge Lodge. Plaintiffs assert that this was because Henry and Burke preferred funding parties and outings, rather than spending Bay Ridge Lodge's money on charitable purposes.

A September 28, 2016 meeting, which Fishman could not attend because he had recently undergone heart surgery, was audiotaped by Staiano. Thomas P. Wilkinson (Wilkinson) filled in for Fishman as the Master of Bay Ridge Lodge at this meeting. Burke, Archangel, and Calderon attended this meeting. At this meeting, Staiano read emails from Henry, and stated that Henry had engaged in un-Masonic conduct, and that Henry was invited to a meeting and refused to attend. Henry was restricted from Bay Ridge Lodge until further notice. Burke expressed his dissatisfaction with this, and there was a heated verbal dispute. Following this meeting, Burke issued a report to Williamson and the Grand Lodge. Based on this report, Williamson summoned Fishman, David J. McDowell (McDowell), who was the Senior Warden of Bay Ridge Lodge, Rukhman, Wilkinson, Staiano, and Rivera to a hearing at the Grand Lodge headquarters on October 31, 2016. Williamson revoked Bay Ridge Lodge's Charter and the dues cards before the hearing.

On the same day of the October 31, 2016 hearing, the Grand Lodge wrote to Burke and stated that "Williamson . . . in response to the meeting held this morning with the principal officers of [Bay Ridge Lodge], orders and directs you as the personal representative of the Grand Master to immediately collect and take possession of all of the Financial Records, Instruments and Bank Books belonging to [Bay Ridge Lodge]." A November 10,

2016 “Official Directive and Lawful Masonic Order” directed Fishman and others to “cause all of the financial records, bank books, ledgers, financial reports, financial statements, and documentation pertaining to the funds, foundations and property held in any and all financial and/or brokered accounts belonging to or held in trust for [Bay Ridge Lodge to] be entrusted and delivered to . . . Burke on or before November 18, 2016.” Fishman responded by his counsel, Dennis Houdek, Esq., to the “Official Directive and Lawful Masonic Order” on November 18, 2016, and advised Williamson that any and all books and records requested in his “Official Directive and Lawful Masonic Order” had been previously transferred to counsel by him, and were, therefore, only discoverable by litigation.

Williamson, in response, issued a “Grand Master’s Directive,” dated December 2, 2016, addressed to, among others, Fishman, which, among other things: (1) ordered the immediate suspension from office of Fishman, as the Master of Bay Ridge Lodge; (2) directed that Fishman shall stand suspended from office until a Masonic Trial was convened to hear and try him; (3) appointed the Senior Warden of Bay Ridge, McDowell, as the Master of Bay Ridge Lodge; and (4) ordered McDowell to deliver or cause to be delivered to the District Deputy Grand Master all of the permanent records belonging to Bay Ridge Lodge from the past five years on or before Wednesday, December 7, 2016. The “Grand Master’s Directive” warned that if all of the permanent records belonging to Bay Ridge Lodge from the past five years were not turned over to the District Deputy Grand Master by McDowell on or before Wednesday, December 7, 2016, then “[i]n addition to contumacy to an order of

the Grand Master,” the “failure to comply with this . . . order [would] subject the Senior Warden acting as Master and other elected officers of the [Bay Ridge] Lodge to being singularly and severally liable for violating their fiduciary duties under the Benevolent Orders Law of the State of New York,” and “subject him or them to civil charges and penalties.” The Grand Master’s Directive further warned that “[t]he Grand Lodge also reserves the right to present the matter of the violation of fiduciary obligations under the Benevolent Orders Law of the State of New York by the Lodge Officers to the New York Attorney General’s office for [its] review and possible action.”

By a letter dated December 7, 2016, Mr. Houdek, Esq., on behalf of Fishman, McDowell, Rukhman, Staiano, and Rivera, responded that each and every one of these directives was blatantly wrongful and rejected by them, and that each and every one of the threats based on those directives was completely without basis. Mr. Houdek, Esq., reiterated the statements in his prior November 18, 2016 letter that any and all books and records requested in the “Official Directive and Lawful Masonic Order” had been previously transferred to him by Fishman and were thus only discoverable in the litigation that he was authorized by his clients to commence.

On December 12, 2016, the Grand Lodge, in a letter signed by Paul M. Rosen, General Secretary, addressed to Burke, stated that Williamson, as the Grand Master, in response to the deliberate failure of the officers of Bay Ridge Lodge to deliver or cause to be delivered the permanent records and financial records of Bay Ridge Lodge to the District

Deputy Grand Master, as ordered, declares the Charter of Bay Ridge Lodge “suspended until further notice.” This letter further stated that the suspension of Bay Ridge Lodge’s Charter had the same effect upon all of the members of Bay Ridge Lodge, and, as such, each member could not affiliate with another Lodge unless they were expressly exempted from the order of suspension. The Grand Lodge also brought charges against Fishman, Rukhman, Staiano, McDowell, Rivera, Bruskin, Regina, and Michael Bistreich. The charges against Fishman accused him of “contumacy” in failing to turn over the books and records of Bay Ridge Lodge and Building Corp. to the Grand Lodge. In May 2017, following a Masonic trial, a Masonic judgment was issued, finding Fishman guilty of all charges. A Masonic Trial was held with respect to the charges against Bay Ridge Lodge and the individual plaintiffs on August 9, 2017. According to plaintiffs, the individual plaintiffs were suspended from being Masons for one year. By a Masonic decision dated August 9, 2017, the Trial Commission imposed on Bay Ridge Lodge the following discipline: “Recommend Forfeiture of Lodge Charter.”

On January 6, 2017, the Trustees of Masonic Hall & Asylum Fund (the Trustees), which is the Masonic arm above the Grand Lodge in the hierarchy of New York Masonry, filed an action against Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, as the defendants therein, alleging a first cause of action for conversion, a second cause of action for replevin, a third cause of action for breach of fiduciary duty, and a fourth cause of action for unjust enrichment (the Trustee action). The Trustees’ first cause of action for

conversion, in the Trustee action, seeks an order directing the defendants therein to provide a full and complete accounting of all transactions involving the building from January 1, 2016 to the date of the accounting, and awarding them damages in an amount exceeding \$1 million. The Trustees' second cause of action for replevin, in the Trustee action, requests an order directing that title to the property be transferred to the Trustees, or, in the alternative, an order appointing a receiver pursuant to CPLR 6401 to hold, maintain, and protect the property during the pendency of the Trustee action. The Trustees' third cause of action for breach of fiduciary duty, in the Trustee action, demands an award of damages in an amount exceeding \$1 million. The Trustees' fourth cause of action for unjust enrichment, in the Trustee action, demands an order directing that title to the building be transferred to the Trustees and that Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris pay over to them the total sum of all rental income received on account of the building. On February 26, 2017, Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris filed an amended answer and 30 counterclaims. On March 20, 2017, the Trustees filed a reply to the counterclaims, denying all of the allegations contained therein.

On February 6, 2017, plaintiffs filed the instant action against defendants. On April 27, 2017, plaintiffs filed an amended complaint. The allegations in plaintiffs' amended complaint are virtually identical to those asserted in the counterclaims in the Trustee action. In plaintiffs' 150-page amended complaint, the first, seventh, thirteenth, nineteenth, twenty-fifth, thirty-first, forty-third, forty-ninth causes of action allege claims of breach of contract

by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants. The second, eighth, fourteenth, twentieth, twenty-sixth, thirty-second, forty-fourth, fiftieth causes of action allege claims of breach of fiduciary duty by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants. The third, ninth, fifteenth, twenty-first, twenty-seventh, thirty-third, forty-fifth, fifty-first causes of action allege claims of fraud by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants. The fourth, tenth, sixteenth, twenty-second, twenty-eighth, thirty-fourth, forty-sixth, fifty-second causes of action allege claims of unjust enrichment by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants. The fifth, eleventh, seventeenth, twenty-third, twenty-ninth, thirty-fifth, forty-seventh, fifty-third causes of action allege claims of civil conspiracy by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants. The sixth, twelfth, eighteenth, twenty-fourth, thirtieth, thirty-sixth, forty-eighth, fifty-fourth causes of action allege claims of defamation by Bay Ridge Lodge, Building Corp., Fishman, Rukhman, Staiano, Rivera, Regina, Grazioli, respectively, against defendants.²

²The thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, and forty-second causes of action alleged by Bruskin against defendants have been discontinued by the July 24, 2017 stipulation.

On August 23, 2017, an order to show cause by the Trustees, seeking the appointment of a temporary receiver for the property was signed, and a temporary restraining order was granted. On October 3, 2017, Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, as the defendants in the Trustee action, filed a cross motion to dismiss the Trustees' complaint. The order to show cause and the cross motion have been decided by the court in a separate decision and order.

On June 9, 2017, defendants filed their instant motion. On September 2, 2017, plaintiffs filed their instant cross motion.

DISCUSSION

Defendants argue that plaintiffs have not turned over the requested financial records, instruments, and bank books, and that they, therefore, cannot state a damages claim based upon items that are still in their possession. Defendants contend that by withholding Bay Ridge Lodge's financial records, instruments, and bank books, plaintiffs are in violation of their contractual duties. Defendants cite to the Constitutions of the Grand Lodge of Free and Accepted Masons of the State of New York (September 1991), which, in § 121 (2), provides that each District Deputy Grand Master "shall have power and it shall be his duty . . . to examine the books and records [of each Lodge] and see if they are properly kept." Defendants further cite to Supplement to Handbook of Masonic Law of New York (1977) § 322, which provides that "[t]he treasurer of a Lodge is required to exhibit all records of the Lodge with regard to disbursements in his custody, upon request, to the District Deputy

Grand Master.” Defendants also cite to Supplement to Handbook of Masonic Law of New York (1977) § 599, which states that the “[f]ailure of a Treasurer to produce Lodge records on request of the District Deputy constitutes disobedience of lawful Masonic authority and is a Masonic offense.”

Defendants argue that based upon plaintiffs’ refusal to turn over the books and records relating to Bay Ridge Lodge, they remain in ongoing defiance and violation of Masonic and New York State Law, and that so long as plaintiffs continue to breach their contractual obligations, good cause exists to suspend Bay Ridge Lodge’s Charter and the individual plaintiffs’ memberships at the conclusion of the Masonic trials. Defendants contend that plaintiffs cannot state a viable claim for damages because defendants are exercising the discretion and powers properly granted to them by Masonic Law, to which plaintiffs voluntarily bound themselves upon their initiation, and that plaintiffs cannot state a claim based upon property that they have no enforceable interest under either Masonic Law or New York State Law. Defendants maintain that plaintiffs’ amended complaint must be dismissed with prejudice for failure to allege any viable damages theory.

Plaintiffs assert that they, in fact, by their Masonic counsel, Michael Brockbank, Esq., turned over said records to Proctor Storck, who was defendants’ attorney and the Masonic equivalent of a prosecutor at the Masonic hearing, on or about January 19, 2017, approximately two and a half months after defendants’ initial request for them. They point out that these voluminous books and records had been gathered up by Fishman while he was

recovering from his third heart surgery, which had occurred on September 14, 2016. In fact, the charge at the Masonic trial was that the books and records were not turned over in a timely manner, and that Bay Ridge Lodge initially refused to turn them over. The issue of whether this constituted a proper basis for the disciplinary action taken is disputed. Thus, defendants have not shown that plaintiffs' failure to turn over books and records necessitates dismissal of this action.

Defendants further contend that plaintiffs cannot premise their claims for damages upon the suspension of their Charter or memberships. Defendants argue that the statuses of Bay Ridge Lodge's Charter and of the individual plaintiffs' memberships have always been at the discretion and judgment of the Grand Master and Grand Lodge. In support of this argument, defendants rely upon the Constitutions of the Grand Lodge of Free and Accepted Masons of the State of New York (1991) § 113 (6), which states that the Grand Master shall have power "[t]o suspend any elected officer of a Lodge from the functions of his office for just cause," and the Constitutions of the Grand Lodge of Free and Accepted Masons of the State of New York (1991) § 113 (7), which states that the Grand Master shall have power "[t]o suspend the charter of any Lodge until the next Annual Communication of the Grand Lodge." Defendants further rely upon Handbook of Masonic Law of New York (1952) § 102, which states that the "Grand Lodge, at an Annual Communication and after trial of a Particular Lodge upon charges duly presented to the Grand Master, at which trial the Particular Lodge shall have been afforded an opportunity of being heard in its defense, and

after the findings of the Trial Commission have been submitted to Grand Lodge, may declare the charter of a Particular Lodge forfeited.”

Defendants also point to Handbook of Masonic Law of New York (1952) § 104, which states that the “Grand Lodge at any time may, upon proper cause shown, suspend the Charter of a Particular Lodge,” and Handbook of Masonic Law of New York (1952) § 234, which states that “[t]he Grand Master may at any time, upon proper cause shown, suspend the charter of a Particular Lodge, which suspension shall not extend beyond the next Annual Communication of Grand Lodge.” Defendants additionally rely upon Handbook of Masonic Law of New York (1952) § 236, which provides that “[t]he Grand Master is specifically authorized, for just cause, to suspend any elected officer of a Lodge from the functions of his office, as where charges have been, or are directed by the Grand Master to be, preferred against the Master, or where the Secretary has refused to deliver the books and papers of the Lodge to the Master or to allow him to have access to them, but this marks the limits of the Grand Master's power and the Master can be removed permanently only after trial as prescribed by the Constitutions.”

Defendants additionally contend that plaintiffs’ causes of action are not justiciable because plaintiffs have not exhausted their contractual remedies since Fishman and Bay Ridge Lodge have not filed notices of appeal from the decisions of the Trial Commission, which they could have done within 60 days of being served with notice of the decision,

pursuant to Code of Procedure of the Grand Lodge of Free and Accepted Masons of the State of New York (effective May 6, 1942, amended May 6, 1986) § 407.

It has been long established, however, that “[t]he rule of exhaustion of remedies within the society . . . does not apply where a member seeks relief from an illegal suspension or expulsion from the society or where an appeal to the tribunal of the order would be useless” (10 NY Jur 2d, Benevolent Orders § 39; *see also Bray v Grand Lodge, Knights of Pythias*, 121 Misc 764, 768 [Sup Ct, Westchester County 1923]; *Sweeney v Independent Order of Foresters*, 179 NYS 94, 98 [Sup Ct, Washington County 1919], *affd* 190 App Div 787 [3d Dept 1920]). Here, plaintiffs are seeking relief from an allegedly illegal suspension and expulsion, and an appeal would be useless and an idle ceremony under these circumstances.

Defendants argue that this action involves a non-justiciable, private voluntary organization’s determination concerning the conduct of its members. “It is well settled that no judicial tribunal will interfere with the internal government of the affairs of either voluntary associations or membership corporations, where the action complained of has been fairly taken in conformity with the reasonable by-laws and regulations adopted for the orderly administration of their affairs” (*Stein v Marks*, 44 Misc 140, 143 [Sup Ct, NY County 1904]; *see also Matter of Haebler v New York Produce Exch.*, 149 N.Y 414, 427 [1896]). However, “such bodies must conform to their own rules and regulations, and no disciplinary action will be valid unless it be taken as prescribed by their by-laws and the statutes governing their

procedure” (*Stein*, 44 Misc at 143). Furthermore, courts will “ordinarily entertain jurisdiction and afford relief when a member of a benevolent order or fraternal benefit society seeks to enforce or preserve a right of property or contract” (10 NY Jur 2d, Benevolent Orders § 38). Here, plaintiffs allege that defendants have violated and have not conformed to their own rules and regulations, and plaintiffs seek to enforce their rights to the property of Bay Ridge Lodge and their contractual rights as members and as a fraternal society. Thus, resort to this court for relief is permissible and appropriate.

Defendants further argue that plaintiffs have failed to allege the existence of any compensable damages, which are required elements of each and every cause of action alleged in plaintiffs’ amended complaint, and that each of plaintiffs’ causes of action, therefore, fail to state a claim for which relief may be granted. This argument is rejected. Plaintiffs have alleged that they stand to lose their interests in the assets and property of Bay Ridge Lodge, Bay Ridge Lodge’s Charter, and their individual memberships in Bay Ridge Lodge.

Defendants additionally argue that plaintiffs have failed to allege the requisite elements of each of their causes of action. As to plaintiffs’ breach of contract claim, it is well established that “[t]he constitution and by-laws constitute the contract between the society and a member” (*Foley v New York Mut. Benevolent Socy.*, 141 App Div 180, 184 [1st Dept 1910], *affd* 208 NY 538 [1913]). A cause of action may be premised on a violation of the Grand Lodge’s constitution and bylaws (*see Gifford v Guilderland Lodge, No. 2480, B.P.O.E.*, 272 AD2d 721, 723 [3d Dept 2000]). Defendants concede that there is a contract

between the Grand Lodge and plaintiffs, but dispute that the individual defendants have any contract with plaintiffs.

Plaintiffs assert that all of them (except Building Corp.) and all of the individual defendants entered into a Membership Agreement by signing a Petition For Initiation and Advancement upon their entrances into the Masons. The Membership Agreement signed by each of them include bilateral obligations and responsibilities to which they each must adhere. These obligations are memorialized in contractual terms, which are comprised of the Constitutions, Opinions, Statutes, Interpretations, Decisions, Rulings and Edicts, the Rules of Order, and the Code of Procedure (the Contractual Terms) that govern the relationship between plaintiffs and defendants.

Code of Procedure of the Grand Lodge of Free and Accepted Masons of the State of New York (effective May 6, 1942, amended May 6, 1986), in Chapter 1, Section 2, entitled "Foundation of Masonic jurisprudence," sets forth that "[t]he foundation of Masonic jurisprudence is the common law of Freemasonry, which is to be learned from the ancient usages of the Craft as developed and interpreted from and since the year 1721." Code of Procedure of the Grand Lodge of Free and Accepted Masons of the State of New York (effective May 6, 1942, amended May 6, 1986), in Chapter 1, Section 4, entitled "Regulation of Masonic disciplinary proceedings," provides that "[t]he method by which Masonic discipline may be invoked and Masonic offenses prosecuted, tried and punished is regulated by this Code of Procedure." Plaintiffs allege that defendants failed to perform their

obligations to them under the Contractual Terms, causing them damages. They demand monetary damages, the costs and disbursements of this action, and the reinstatement of Bay Ridge Lodge's Charter.

Plaintiffs (except Building Corp.) and defendants have reciprocal contractual rights and obligations under the Contractual Terms, and plaintiffs are intended third-party beneficiaries of the individual defendants' contractual obligations to the Grand Lodge, which are directly for plaintiffs' benefit. Consequently, dismissal of plaintiffs' breach of contract claims must be denied except as to Building Corp., which does not have any contract with any of the defendants.

Defendants seek dismissal of plaintiffs' breach of fiduciary claims. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *see also Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). Defendants concede that there was a fiduciary relationship between plaintiffs and the Grand Lodge. "[A] fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another" (*Penato v George*, 52 AD2d 939, 942 [2d Dept 1976], *appeal dismissed* 42 NY2d 908 [1977]). There was also a fiduciary relationship between plaintiffs (except for Building Corp.) and the individual defendants, as Brothers of a fraternal organization. Defendants did not have a fiduciary relationship with Building Corp. Plaintiffs

claim that defendants breached their fiduciary duties to them by suspending Bay Ridge Lodge's Charter and taking away the memberships of the individual plaintiffs (except Building Corp.) in Bay Ridge Lodge. Thus, dismissal of plaintiffs' claims for breach of fiduciary duty must be denied except with respect to Building Corp., to whom defendants owed no fiduciary duty.

With respect to plaintiffs' claims of fraud, "[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; see also *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP*, 12 NY3d at 559).

Here, plaintiffs have failed to allege in what way they justifiably relied upon any alleged misrepresentation by defendants to their detriment, and they have failed to plead fraud with any particularity as required under CPLR 3016 (b). Thus, plaintiffs' claims for fraud must be dismissed (see CPLR 3211 [a] [7]).

With respect to plaintiffs' claims for unjust enrichment, "[t]he elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*GFRE, Inc. v U.S. Bank, N.A.*, 130

AD3d 569, 570 [2d Dept 2015], quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). “The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered” (*GFRE, Inc.*, 130 AD3d at 570, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]; see also *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]).

Plaintiffs’ amended complaint fails to sufficiently allege that defendants were enriched at their expense (see *GFRE, Inc.*, 130 AD3d at 570). To the extent that plaintiffs claim that the Trustees in the Trustee action may obtain title to Bay Ridge Lodge’s property, the Trustees will only do so if it is ultimately determined, on the merits, that the Trustees are legally entitled to such property, and, as such, this would not give rise to a claim of unjust enrichment. Consequently, dismissal of plaintiffs’ unjust enrichment claims is warranted (see CPLR 3211 [a] [7]).

Defendants seek dismissal of plaintiffs’ claims for civil conspiracy. It is well established that “New York does not recognize civil conspiracy to commit a tort as an independent cause of action” (*McSpedon v Levine*, __ AD3d __, 2018 NY Slip Op 00826, *2 [2d Dept 2018]; see also *Alexander & Alexander of N.Y. v Fritzen*, 68 N.Y.2d 968, 969 [1986]; *Blanco v Polanco*, 116 AD3d 892, 895-896 [2d Dept 2014]; *Hebrew Inst. for Deaf & Exceptional Children v Kahana*, 57 AD3d 734, 735 [2d Dept 2008]). “[S]uch a claim stands or falls with the underlying tort” (*Hebrew Inst. for Deaf & Exceptional Children*, 57

AD3d at 735). A plaintiff may only “plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme” (*McSpedon*, 2018 NY Slip Op 00826, *2; *see also Alexander & Alexander of N.Y.*, 68 NY2d at 969; *Blanco*, 116 AD3d at 896). Thus, “[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement” (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2013]; *see also 1766-68 Assoc., LP v City of New York*, 91 AD3d 519, 520 [1st Dept 2012]).

Here, the underlying tort which plaintiffs attempt to allege is fraud. Therefore, inasmuch as the court finds that the underlying tort of fraud must be dismissed, the cause of action alleging civil conspiracy to commit fraud must also be dismissed (*see McSpedon*, 2018 NY Slip Op 00826, * 2; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1009 [2d Dept 2017]; *Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]).

As to plaintiffs’ defamation claims, plaintiffs, in their amended complaint, allege that Burke stated, at the October 31, 2016 hearing, referring to the individual plaintiffs, that “they’re all morons. They’re all called morons.” This, however, constitutes a nonactionable opinion since this statement was “indefinite, ambiguous and incapable of being objectively characterized as true or false” (*Leone v Rosenwach*, 245 AD2d 343, 343 [2d Dept 1997],

quoting *Hollander v Cayton*, 145 AD2d 605, 606 [2d Dept 1988]). Thus, this statement cannot be the basis for a defamation claim.

Plaintiffs do not allege that any other allegedly defamatory statements were made concerning Rukhman, Rivera, Regina, Grazioli, or Barris (*see* CPLR 3016 [a]). As to Fishman, plaintiffs allege that on January 27, 2017, Fishman learned that a past Grand Master of the State of New York, Vinny Libone (Libone), told Wayne Northrop (who is the Master of another Lodge) at the Christmas party that Fishman stole \$110,000 from Bay Ridge Lodge, and Libone then spread this statement to every Mason he encountered. Plaintiffs allege, upon information and belief, that “Burke fed this vicious lie to Libone, who then rebroadcast it.” Plaintiffs additionally allege that at least two separate other Masons, previously unknown to Fishman or any of the individual plaintiffs herein, posted on Facebook, on January 23, 2017, that Fishman has “st[olen] everything not nailed down” and is “a disgrace to our fraternity and our values,” and that, upon information and belief, “Burke is the source of this demonstrable falsehood, which was then rebroadcast via Facebook.” One who makes a defamatory statement is not responsible for its recommunication without his [or her] authority or request by another over whom he [or she] has no control” (*Hoffman v Landers*, 146 AD2d 744, 747 [2d Dept 1989]; *see also Geraci v Probst*, 15 NY3d 336, 342 [2010]). Thus, since no specific statement is directly attributed to Burke, these allegations are insufficient to allege a claim of defamation against him. Plaintiffs fail to allege any

specific defamatory statements by any of the other defendants. Consequently, plaintiffs' defamation claims must be dismissed (*see* CPLR 3211 [a] [7]).

Since the court has dismissed plaintiffs' causes of action for fraud, unjust enrichment, civil conspiracy, and defamation, plaintiffs' cross motion, insofar as it seeks summary judgment in their favor on these claims, is rendered moot. With respect to plaintiffs' (except Building Corp.'s) causes of action for breach of contract and breach of fiduciary duty, partial summary judgment in their favor must be denied since defendants have not yet interposed an answer, and, in any event, material and triable issues of fact exist as to these claims.

CONCLUSION

Accordingly, defendants' motion is: (1) granted to the extent that it seeks dismissal of all of Building Corp.'s causes of action; (2) denied to the extent that it seeks dismissal of plaintiffs' causes of action for breach of contract and breach of fiduciary duty with respect to all of the plaintiffs other than Building Corp.; and (3) granted to the extent that it seeks dismissal of plaintiffs' causes of action for fraud, unjust enrichment, civil conspiracy, and defamation. Plaintiffs' cross motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



HON. LAWRENCE KNIPEL