

**Trump Village Section 4, Inc. v Vilensky**

2019 NY Slip Op 30553(U)

February 19, 2019

Supreme Court, Kings County

Docket Number: 522355/16

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 19<sup>th</sup> day of February, 2019.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
TRUMP VILLAGE SECTION 4, INC.,

Plaintiff,

- against -

GENE VILENSKY a/k/a GENE VILENSKIY,  
Defendant.

-----X

DECISION AND ORDER

Index No. 522355/16

Motion Seq.: #5 & #6

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_

1-2    4-6  
3      7  
8

Upon the foregoing papers, defendant Gene Vilensky a/k/a Gene Vilenskiy (Vilensky) moves (Motion Seq. #5) for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint. Plaintiff Trump Village Section 4, Inc. (Trump Village) separately moves (Motion Seq. #6) for an order, pursuant to CPLR 3211 (a) (1), (a) (5)<sup>1</sup> and (a) (7), dismissing Vilensky's counterclaims.

<sup>1</sup> On reply, Trump Village withdrew that branch of its motion seeking, pursuant to CPLR 3211 (a) (5), to dismiss Vilensky's counterclaims, as barred by the applicable statute of limitations.

## ***Background***

### ***The Instant Action***

On December 16, 2016, Trump Village, apparently a cooperative development comprised of two sets of residential apartment complexes in Brooklyn, commenced this action against Vilensky, the purported owner of the stock and party to the occupancy agreement appurtenant to apartment 2E at Trump Village (the Apartment), by filing a summons and a verified complaint. The complaint alleges that, on or about March 3, 2014, Vilensky submitted an application in connection with his Cooperative Purchase Agreement (the Application) to the Trump Village Board of Directors in which he fraudulently represented “that he would be the sole occupant of the Apartment and [that] it would be used as his personal residence” “in order to induce Trump [Village] to approve the transfer Application and to waive its right of first refusal” (complaint at ¶¶ 39 and 34). Vilensky, upon information and belief, allegedly “entered into the Contract of Sale never intending to reside in the Apartment” and “with the intention to use the Apartment for commercial purposes” (*id.* at ¶¶ 35-36). The complaint further alleges that Vilensky, upon information and belief, “commenced subleasing the Apartment without permission and contrary to the rules of Trump [Village]” and “engaged in the business of renting the Apartment on [a] short term basis, essentially using the Apartment as a hotel room or such other transient occupancy” (*id.* at ¶¶ 45-46). The complaint further alleges, upon information and belief, that “Vilensky had listed the Apartment on Airbnb, a website that provides a marketplace for short term apartment . . . rentals” (*id.* at ¶ 51).

The complaint asserts five causes of action against Vilensky for: (1) fraud in the inducement based on his deliberate failure “to disclose that he was purchasing the Apartment for . . . commercial endeavor[s]” in the Application (*id.* at ¶ 66); (2) breach of the Occupancy

Agreement; (3) “rescission of the Stock Certificates and Occupancy Agreement” because “Vilensky’s false representations and concealment of facts . . . were calculated to induce the Board of Trump to approve the transfer application and waive its right of first refusal . . .” (*id.* at ¶¶ 89 and 91); (4) “a permanent . . . injunction enjoining Vilensky from breaching the Bylaws, rules, and Occupancy Agreement” (*id.* at ¶ 96); and (5) an award of attorneys’ fees, costs and disbursements based on the Bylaws and Occupancy Agreement.

On October 26, 2018, Vilensky filed a verified amended answer in which he denied the material allegations in the complaint and asserted five counterclaims against Trump Village for: (1) unlawful eviction – violation of RPAPL 853 based on the allegation that “on numerous occasions, Plaintiff physically prevented Defendant from entering the Apartment by erecting a physical barrier across the entrance of the Apartment” (amended answer at ¶ 96); (2) intentional infliction of emotional distress; (3) a permanent injunction “enjoin[ing] Plaintiff from engaging in further harassing behavior” (*id.* at ¶ 111); (4) breach of the Cooperative Purchase Agreement “which has resulted in harm to Defendant to ‘peaceably and quietly to have, hold and enjoy the premises’” (*id.* at ¶ 113); and (5) attorneys’ fees, “[p]ursuant to N.Y. RPL § 234 and the Bylaws, Rules and Occupancy Agreement . . .”

### ***Vilensky’s Dismissal Motion***

Before serving his amended answer, Vilensky, on September 28, 2018, moved to dismiss the complaint, pursuant to CPLR 3211 (a) (7). Vilensky contends that the complaint fails to state a cause of action for fraud because it “is filled exclusively with conclusory allegations and is devoid of any facts[,]” “fails to specify what was false or fraudulent . . .” and contains “vague claims made on unspecified ‘information and belief.’” Vilensky also argues that the fraudulent inducement claim fails because “Trump’s vague allegations of Vilensky’s intent not to perform his contractual obligations are . . . insufficient to support a

fraud claim.” Additionally, Vilensky asserts that Trump Village fails to plead special damages as a result of his alleged fraud.

Trump Village, in opposition, asserts that “the discovery to date appear[s] to be supportive of all the allegations that were made ‘upon information and belief’” and “[a]t this early stage it would be premature to dismiss any of the causes of action” because “there is still significant discovery outstanding, including from Vilensky himself.” On the merits, Trump Village argues that “the rescission cause of action is based on fraudulent representations in the application process while the breach of contract claims arise from the alleged breach of contracts and obligations between Vilensky and [Trump Village] once he became an owner.” Trump Village contends that it “should not be precluded from arguing a breach of the occupancy agreement based upon the illegal subletting or transient use separate and apart from the rescission and fraud causes of action related to the numerous misrepresentations that were made at the time Vilensky submitted his application.” Additionally, Trump Village challenges Vilensky’s characterization of the complaint as “barebones,” and contends that it “contains abundant and detailed factual allegations” regarding Vilensky’s alleged misrepresentations in his Application, “including citation to specific sections of the application, acknowledgments and bylaws.” Trump Village specifically requests that “[i]n the event, this Court determines that any cause of action has not been sustained or suffers from pleading deficiencies it is respectfully submitted that [Trump Village] should be granted leave to replead in the Court’s discretion.”

***Trump Village’s Motion to Dismiss Vilensky’s Counterclaims***

On November 15, 2018, Trump Village moved to dismiss Vilensky’s counterclaims. Trump Village argues that Vilensky’s first counterclaim for violation of RPAPL 853 must be dismissed “because Vilensky was never prevented from lawfully occupying his

Apartment.” While Vilensky’s amended answer alleges that “Plaintiff physically prevented Vilensky from entering the Apartment by erecting a physical barrier across the entrance of the Apartment” (amended answer at ¶ 96), Trump Village points to Vilensky’s March 13, 2018 affidavit in support of his motion to amend the answer, in which Vilensky admits that the “physical barrier” was actually “tape.” Trump Village argues that the counterclaim should be dismissed because “Vilensky admits that . . . the tape [did not] actually prevented him from entering or exiting his Apartment.”

Trump Village argues that dismissal of Vilensky’s second counterclaim for intentional infliction of emotional distress is warranted because “the alleged conduct is not ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . .’” Trump Village notes that the conduct alleged in the amended answer is: (1) censoring Vilensky for flicking “a cigarette off his balcony . . .” on October 2015, and (2) “frivolously” charging Vilensky air conditioning fees in July 2016 (amended answer at ¶¶ 104-105).

Trump Village contends that the third counterclaim for a permanent injunction enjoining Trump Village from engaging in “harassing behavior” should be dismissed because “New York does not recognize a common law cause of action for harassment.” Additionally, Trump Village argues that Vilensky is not entitled to a permanent injunction because he “has failed to allege that one of his rights is presently being violated or that his rights have been threatened and are imminently going to be violated.” Trump Village further contends that Vilensky failed to allege that he will suffer irreparable harm without an injunction.

Trump Village contends that the fourth counterclaim for breach of the Cooperative Purchase Agreement should be dismissed because the amended answer fails to specify what Trump Village’s obligations were under the Cooperative Purchase Agreement and what

terms or provisions thereof were allegedly breached. Trump Village further contends that the Cooperative Purchase Agreement is “not a contract, but merely a proposal or an application . . . which [it] may accept or reject.”

Trump Village argues that the fifth and final counterclaim for attorneys’ fees, pursuant to RPL § 234 and the bylaws, rules and Occupancy Agreement, should be dismissed. According to Trump Village, RPL § 234 is irrelevant because it only “applies to landlords and tenants in a lessor-lessee relationship.” Trump Village further argues that the Occupancy Agreement only provides for an award of attorneys’ fees “incurred,” and that Vilensky has not incurred any attorneys’ fees because he is being represented by pro bono counsel.

Vilensky, in opposition, contends that Trump Village’s dismissal motion is “a nullity” because it was filed by the law firm of Rivkin Radler LLP (Rivkin Law Firm), rather than by Trump Village’s counsel of record, Malvina Lin P.C. Vilensky argues that even if the Rivkin Law Firm was to belatedly file a notice of appearance, the motion would still be improper because there is no legal authority for a party to be represented by more than one counsel.

On the merits, Vilensky argues that his first counterclaim states a cause of action for unlawful eviction because Trump Village “sealed [the entrance to his] apartment . . . by erecting a physical barrier, similar to police tape, across his door, and made every indication that he had been removed therefrom.”

Regarding his second counterclaim, Vilensky argues that “Trump’s multiple illegal evictions are more than outrageous enough to state a claim for intentional infliction of emotional distress.” Additionally, Vilensky asserts that his counterclaim for intentional infliction of emotional distress is also based on Trump Village’s “campaign of false accusations, falsely-applied punitive fines for an air conditioner [he] did not have, making

false and defamatory statements about him to an online publication, and commencing frivolous litigation[,]” all of which, in his view, “more than meets the [threshold] standard for ‘extreme and outrageous conduct.’”

Regarding his third counterclaim for a permanent injunction, Vilensky contends that he sufficiently pleaded the need for “a permanent injunction barring Trump [Village] from illegally evicting [him], making false and defamatory allegations about him [to] the media, commencing frivolous lawsuits, and any other behavior intended to injure or harass him.”

Vilensky opposes dismissal of his fourth counterclaim for breach of contract, and clarifies that his amended answer, which specifically alleges that the *Cooperative Purchase Agreement* was breached, should have instead alleged that the *Occupancy Agreement* was breached. Vilensky offers to amend the answer, at the court’s request, to correct this scrivener’s error.

Vilensky opposes dismissal of his fifth and final counterclaim for an award of attorneys’ fees on the ground that “[n]ot-for-profit legal service providers are entitled to an award of attorneys’ fees under the same circumstances as those which entitle private, for-profit counsel to attorneys’ fees, including when their clients are the prevailing party in a case with an applicable fee-shifting statute[,]” such as RPL § 234.

### ***Discussion***

#### ***(1)***

#### ***Applicable Legal Standard***

A motion to dismiss under CPLR 3211 (a) (1) on the grounds that a claim is barred by documentary evidence may be granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense to such claim as a matter of law (*see Goseh v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). To be



considered “documentary,” evidence must be unambiguous and of undisputed authenticity. Mortgages, deeds, contracts, and any other papers, the contents of which are “essentially undeniable,” qualify as documentary evidence (*Sands Point Partners Private Client Group v Fidelity Natl. Title Ins. Co.*, 99 AD3d 982, 984 [2012]).

“In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7) ‘the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail’” (*Quinones v Schaap*, 91 AD3d 739, 740 [2012] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Further, “[w]hen reviewing a defendant’s motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference” (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] quoting *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]), even where, as here, such allegations are made “upon information and belief” (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]).

(2)

### *Vilensky’s Dismissal Motion*

Although Vilensky’s notice of motion seeks to dismiss Trump Village’s entire complaint, his motion only challenges the sufficiency of Trump Village’s first cause of action for fraud. Vilensky argues that the “barebones” complaint fails to allege any facts to support a cause of action for fraud, and that it merely alleges a breach of the Occupancy Agreement.

Vilensky further contends that Trump Village's fraud claim is subject to dismissal because it fails to plead special damages.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Fromowitz v W. Park Assocs., Inc.*, 106 AD3d 950, 951 [2013]).

Vilensky's dismissal motion is denied because the complaint, when construed liberally, sufficiently alleges that Vilensky fraudulently misrepresented that he would be living in the Apartment as a resident when he submitted the Application for consideration by the Board before his purchase. Trump Village sufficiently alleged special damages to support a fraud claim because it alleges that, in reliance on Vilensky's false representations in the Application, Trump Village waived its right of first refusal for the Apartment. Contrary to Vilensky's contention, Trump Village's first cause of action for fraud in connection with his submission of the Application is not premised on Vilensky's subsequent alleged breach of the Occupancy Agreement.

(3)

***Trump Village's Dismissal Motion***

***A. The First Counterclaim – Violation of RPAPL 853***

"RPAPL 853 is the statutory basis for a cause of action to recover treble damages for forcible or unlawful entry" (*Lyke v Anderson*, 147 AD2d 18, 24 [1989]). RPAPL 853 specifically provides:

"If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer."

“To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises” (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82 [1970]). “An actual eviction occurs only when the landlord wrongfully ousts the tenant from physical possession of the leased premises and there must be a physical expulsion or exclusion” (*Marchese v Great Neck Terrace Assocs., L.P.*, 138 AD3d 698, 699-700 [2016]).

Here, Vilensky’s amended answer sufficiently alleges that “on numerous occasions, Plaintiff physically prevented Defendant from entering the Apartment by erecting a physical barrier across the entrance of the Apartment” (amended answer at ¶ 96). While Vilensky clarified in his affidavit submitted in support of his prior motion to amend his answer that the “physical barrier” was actually “tape,” such evidence is in the form of Vilensky’s affidavit which is not “documentary evidence within the meaning of CPLR 3211 (a) (1)” (*Fontanetta v Doe*, 73 AD3d 78, 85 [2010] [affidavits are not documentary evidence within the meaning of CPLR (a) (1)]).

**B. The Second Counterclaim – Intentional Infliction of Emotional Distress**

Vilensky’s second counterclaim for intentional infliction of emotional distress must be dismissed. “The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress” (*Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1014 [2017] [internal quotations omitted]). Even accepting as true the allegations made in support of Vilensky’s second counterclaim, and according him the benefit of every possible favorable inference, Trump Village’s alleged conduct was not so outrageous or extreme as to support an actionable counterclaim for intentional infliction of emotional distress. See, *Taggart v. Costabile*, 131 A.D.3d 243 (2d

Dept. 2015) [landlords were alleged to have failed in taking any steps to remove tenants that were a possible safety risk to the rest of the neighbors]; *Leonard v. Reinhardt*, 20 A.D.3d 510 (2d Dept. 2005) [the Court found that the physical and verbal assault allegedly resulting in emotional distress, while intentional, was duplicative of the causes of action for assault and battery]; *Savva v. Longo*, 8 A.D.3d 551 (2d Dept. 2004) [Plaintiff in a matrimonial action, alleged that when the Defendant stopped paying support and maintenance, Defendant's actions were those of intentional emotional distress, the Court disagreed and found that the pleading failed to maintain an action for intentional emotional distress]; *Brancaleone v. Mesagna*, 290 A.D.2d 467 (2d Dept. 2002) [cause of action for intentional infliction of emotional distress was dismissed as duplicative of the cause of action for defamation]; *Andrews v. Bruk*, 220 A.D.2d 376 (2d Dept. 1995) [The obtaining and use of medical documents to suggest the existence of an extra marital affair and using those documents as evidence in support of a motion, did not constitute extreme and outrageous conduct, although the Court did note that the behavior was not condoned].

**C. The Third Counterclaim – A Permanent Injunction**

Vilensky's third counterclaim for a permanent injunction "to enjoin Plaintiff from engaging in further harassing behavior that has resulted in his emotional distress" (*see* amended answer at ¶ 111) must be dismissed, pursuant to CPLR 3211 (a) (7). It is well established that "[t]o sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2014] [internal quotations omitted]). Vilensky's amended answer fails to allege that a permanent injunction is necessary to protect

Vilensky from a threatened or probable risk posed by Trump Village, or that monetary damages would be inadequate compensation.

**D. The Fourth Counterclaim – Breach of Contract**

Vilensky's fourth counterclaim alleging that Trump Village breached the Cooperative Purchase Agreement must be dismissed because he fails to identify any provision of the Cooperative Purchase Agreement that was breached (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [2004] [holding that "Plaintiff's failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract"]). Such dismissal is with leave to replead to assert a counterclaim for Trump Village's alleged breach of the Occupancy Agreement.

**E. The Fifth Counterclaim – Attorneys' Fees**

RPL § 234 "provides for the reciprocal right of a lessee to recover an attorney's fee when the same benefit is bestowed upon the lessor in the parties' lease" (*Cohan v Bd. of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 AD3d 697, 700 [2013]). Contrary to Trump Village's contention, RPL § 234 is applicable to cooperatives (*id.* at 700 [granting that branch of the petition which was for an attorneys' fee payable by the cooperative corporation, pursuant to RPL § 234]). Furthermore, a party who is represented by pro bono counsel, like Vilensky, is entitled to attorneys' fees under RPL § 234 (*Maplewood Mgmt., Inc. v Best*, 143 AD2d 978, 979 [1988] [RPL § 234 "authorize(s) an award of attorneys' fees to a prevailing litigant who, either because he represented himself or because he obtained free legal assistance, did not become legally obligated to pay the fees"]). For these reasons, Trump Village's motion to dismiss Vilensky's fifth counterclaim for an award of attorneys' fees, pursuant to RPL § 234 and the Occupancy Agreement, is denied.

Accordingly, it is

**ORDERED** that Vilensky's motion to dismiss Trump Village's complaint, pursuant to CPLR 3211 (a) (7), is denied; and it is further

**ORDERED** that Trump Village's motion to dismiss Vilensky's counterclaims, pursuant to CPLR 3211 (a) (7), is granted only to the extent that: (1) the second counterclaim for intentional infliction of emotional distress is dismissed; (2) the third counterclaim for a permanent injunction is dismissed; and (3) the fourth counterclaim for breach of the Cooperative Purchase Agreement is dismissed with leave to replead to assert a counterclaim for Trump Village's alleged breach of the Occupancy Agreement. Service of the amended pleading shall be made within 30 days from the service of notice of entry of this Decision and Order. The remainder of Trump Village's motion is denied.

This constitutes the decision and order of the court.

E N T E R,

*[Handwritten signature]*  
J. S. C.  
HON. CARL J. LANDICINO

KINGS COUNTY CLERK  
FILED

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*[Handwritten initials]*