

**Board of Mgrs. of Astoria Homes Condominium v
Los Vamos, LLC**

2019 NY Slip Op 32158(U)

May 8, 2019

Supreme Court, Queens County

Docket Number: 712364/2018

Judge: Joseph Risi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Joseph Risi
Acting Supreme Court Justice

IA Part 3

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BOARD OF MANAGERS OF ASTORIA HOMES
CONDOMINIUM,

Index
Number: 712364/2018

Plaintiff,

DECISION / ORDER

-against-

LOS VAMOS, LLC, RAMESH SARVA, PSRS
REALTY GROUP, and PARAAG SARVA,

Motion Seq. No.: 1

Defendants.

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FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by defendants Los Vamos, LLC, Ramesh Sarva, PSRS Realty Group, and Paraag Sarva (collectively referred to as defendants), to dismiss the complaint pursuant to CPLR §3211 (a)(1), (3), (7), and (10), for sanctions against plaintiff, and for attorney’s fees, costs and disbursements.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits EF 12-17
Answering Affidavits - Exhibits EF 18-21
Reply Affidavits EF 22-29

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for monetary damages sounding in 1) breach of contract, 2) negligent misrepresentation, 3) breach of the housing merchant warranty, 4) consumer protection and violation of General Business Law §§ 349 and 350, and 5) breach of fiduciary duty/waste. Plaintiff Board of Managers of Astoria Homes Condominium (plaintiff), is an association of condominium unit owners which consists of the elected members of the condominium’s

Board of Managers (the Board) of premises located at 20-33 45 Street, in the County of Queens. The condominium is a three-story structure consisting of three residential apartments.

In the complaint, plaintiff has alleged that Los Vamos, LLC (Los Vamos), was the developer and Sponsor of the condominium and that it was identified as such in the Offering Plan, and that Ramesh Sarva was a principal and a managing general partner of Los Vamos. Plaintiff has alleged that Los Vamos engaged Paraag Sarva and PSRS Realty Group (PSRS), to market and sell the condominium units to the general public. Plaintiff has further alleged that Paraag Sarva was a member and President of PSRS and that Paraag Sarva and PSRS acted as the managing agent of the condominium. Plaintiff has alleged that during the time that Los Vamos controlled the Board, Ramesh Sarva was a member, Vice President and Treasurer of the Board.

Plaintiff has alleged that Ramesh Sarva and Los Vamos failed to construct the premises in compliance with the Offering Plan specifications or any of the three amendments that they filed to said Offering Plan, and failed to construct it in compliance with all applicable government codes, rules, regulations and construction industry standards. Defendants have now moved to dismiss the complaint pursuant to CPLR §3211 (a)(1), (3), (7), and (10), and for attorney's fees, costs and disbursements.

Initially, the court notes that although defendants have moved to dismiss the complaint pursuant to CPLR §3211 (a)(10), which provides that "the court should not proceed in the absence of a person who should be a party," defendants have failed to adequately address this branch of their motion to any of the causes of action contained in the complaint. Defendants have, thus, not satisfied their burden and are not entitled to dismissal of the complaint in its entirety pursuant to CPLR §3211 (a)(10).

Next, defendants have argued that the complaint must be dismissed in its entirety pursuant to CPLR §3211 (a)(3), for plaintiff's lack of capacity to sue, because the complaint fails to allege that plaintiff commenced the instant action pursuant to a majority vote of the unit owners of the Astoria Homes Condominium. CPLR §3211 (a)(3) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the party asserting the cause of action has not legal capacity to sue. Factual allegations in a complaint are accepted as true and given every favorable inference on a pre-answer motion to dismiss for a plaintiff's alleged lack of capacity to sue (CPLR §§ 3026, 3211 [a][3]; see *Matter of Graziano v County of Albany*, 3 NY3d 475, 481 [2004]; see also *Lazar v Merchants' Nat. Properties, Inc.*, 45 Misc 2d 235, 236 [Sup Ct, New York County 1964], *affd Lazar v Merchants' Nat. Properties Inc.*, 23 AD2d 630 [1st Dept 1965]).

In the complaint, plaintiff has alleged that it consists of the elected members of the condominium's Board and that it is empowered to act on behalf of the unit owners pursuant to Real Property Law §339-dd, which provides that "[a]ctions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit." While Real Property Law §339-dd permits plaintiff in this matter to bring suit on behalf of the individual condominium owners, the legal effectiveness of plaintiff's actions depend upon its authority to act within the constraints of the Board's Bylaws.

The record before the court contains, among other things, a copy of the Board's Bylaws, and the affidavit of non-party Jose Sanchez (Sanchez), President of plaintiff, who has annexed to his affidavit a copy of a "Secretary's Certificate of Adoption of Resolution of the Board of Managers of Astoria Homes Condominium," dated November 19, 2018. The Board's Bylaws provides, at paragraph 2.11.1, that "...all determinations by the Board shall be made at a meeting of the Board at which a quorum thereof is present. At the Board meeting, a majority of the members thereof shall constitute a quorum, and the votes of a majority of such members present shall constitute the decision of the Board." The Certificate of Adoption of Resolution dated November 19, 2018, signed by non-party Adam Koch, Vice President and Secretary of plaintiff, provides that at a meeting of the Board held on June 21, 2018, at which a quorum was present, plaintiff was authorized to commence the instant action. This evidence has demonstrated that plaintiff had the legal capacity to commence the instant action. Therefore, defendants have failed to satisfy their burden as to CPLR §3211 (a)(3), and are not entitled to dismissal of the complaint in its entirety on this branch of their motion.

Defendants have also moved to dismiss the complaint pursuant to CPLR §3211 (a)(1) and (7). CPLR §3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]). CPLR §3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action."

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the

benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR §3026; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). In general, on a 3211 motion, “[t]he court is limited to ‘an examination of the pleadings to determine whether they state a cause of action’” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; see *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]). “Whether the plaintiff can ultimately establish the allegations ‘is not part of the calculus’” (*Aberbach v Biomedical Tissue Services, Ltd.*, 48 AD3d 716, 717–18 [2d Dept 2008], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Etzion v Etzion*, 62 AD3d 646, 651 [2d Dept 2009]).

Although defendants contend that plaintiff has failed to allege causes of action against PSRS because it is an entity that does not exist, a careful reading of the allegations of the complaint has demonstrated that plaintiff has sufficiently alleged that PSRS is an entity duly organized and existing under the laws of the State of New York. Nor have defendants presented documentary evidence to support their contention. Therefore, defendants have failed to demonstrate their entitlement to dismissal of the complaint in its entirety as against PSRS pursuant to CPLR §3211 (a)(1) or (7).

The court will now discuss each of plaintiff’s causes of action. Plaintiff’s first cause of action sounds in breach of contract against Los Vamos. While defendants have argued that plaintiff has failed to state a cause of action against Ramesh Sarva, individually, a careful review of the allegations contained in the complaint have demonstrated that plaintiff has not attempted to allege such a cause of action against Ramesh Sarva. However, the allegations have sufficiently alleged the elements of a cause of action for breach of contract against Los Vamos (see *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]), and defendants have not demonstrated through documentary evidence their entitlement to dismissal of this cause of action. As such, defendant is not entitled to the dismissal of the first cause of action for breach of contract against Los Vamos, pursuant to CPLR §3211 (a)(1) or (7).

Defendants have argued that plaintiff’s second cause of action sounding in negligent misrepresentation against all defendants is duplicative of the breach of contract cause of action and that plaintiff has failed to state this claim with particularity. “The elements of a cause of action sounding in negligent misrepresentation include: (1) an awareness by the maker that the statement is to be used for a particular purpose, (2) reliance by a known party on the statement in furtherance of that purpose, and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance” (*Ford*

v Sivilli, 2 AD3d 773, 774 [2d Dept 2003]). “A claim for negligent misrepresentation is not separate from a breach of contract claim where the plaintiff fails to allege a breach of any duty independent from contractual obligations” (*Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d Dept 2016], quoting *Bd. of Managers of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]; see also *OP Sols., Inc. v Crowell & Moring, LLP*, 72 AD3d 622 [1st Dept 2010]).

Upon a review of the allegations contained in the complaint, giving plaintiff the benefit of every favorable inference and giving the allegations a liberal construction, the court finds that plaintiff has alleged facts which fit within a cognizable legal theory, in this case, one for negligent misrepresentation. Despite defendants’ contentions, the allegations set forth by plaintiff have stated that each of the defendants made representations to plaintiff. Plaintiff has alleged that a relationship existed between it and defendants which gave rise to a separate duty independent of defendants’ contractual obligations (*see generally Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d at 684). Additionally, defendants have not pointed to any documentary evidence that resolves all factual issues as a matter of law as to this cause of action (*see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). Therefore, defendants are not entitled to dismissal of the second cause of action pursuant to CPLR §3211 (a)(1) or (7).

Plaintiff’s third cause of action sounds in breach of the housing merchant warranty against Los Vamos and Ramesh Sarva. Defendants have argued that the Offering Plan contained the Housing Merchant Implied Warranty and that this cause of action is, thus, duplicative of the first cause of action for breach of contract, that neither Los Vamos, nor Ramesh Sarva provided any Housing Merchant Implied Warranty to anyone, and that plaintiff has failed to alleged that the unit owners have properly invoked the remedies of the Housing Merchant Implied Warranty by giving notice to the builder.

Article 36-B of the General Business Law contains the provisions of § 777–a, which is more commonly known as the Housing Merchant Implied Warranty,

“(1) specifies different durations for the guarantee of skillful construction of various parts of a building, including the plumbing, electrical, heating, cooling, and ventilation systems; (2) excludes specified entities, and patent defects, from statutory remedy coverage; (3) identifies the scope of the protection with regard to goods sold incidentally with the dwelling, such as stoves, refrigerators, air conditioners, and so forth; and (4) describes the procedures needed to make a claim” (*Fumarella v Marsam Development, Inc.*, 92 NY2d 298 [1998]).

The record contains, among other things, a copy of the Offering Plan, which provides for the “Rights and Obligations of the Sponsor,” at page 49, paragraph (w), that “Pursuant to New York State General Business Law § 777-A, the Housing Merchant Implied Warranty applies to the Astoria Homes Condominium. Sponsor fully incorporates said statute as if more fully set forth herein...” Document 8 annexed to the Offering Plan, at page 215, more fully provides the terms of the Housing Merchant Implied Warranty.

A careful reading of the terms of the Offering Plan and the allegations contained in the complaint has demonstrated that, with regard to Los Vamos, plaintiff has failed to sufficiently allege that a Housing Merchant Implied Warranty was made to plaintiff outside of the terms of the Offering Plan. Therefore, inasmuch as plaintiff has failed to sufficiently allege a separate warranty was made, the third cause of action against Los Vamos sounds in the nature of a contractual obligation, which is duplicative of plaintiff’s breach of contract claim. Therefore, defendants have adequately demonstrated that plaintiff has failed to state a cause of action for breach of the Housing Merchant Implied Warranty against Los Vamos and that cause of action is, hereby, dismissed.

With regard to the third cause of action as alleged against Ramesh Sarva, based upon an examination of the allegations contained in the complaint, affording those allegations a liberal construction, presuming them to be true, and affording plaintiff the benefit of every favorable inference, the court has determined that plaintiff has sufficiently alleged facts that fit within a cognizable legal theory and stated a cause of action for breach of the Housing Merchant Implied Warranty against Ramesh Sarva. Plaintiff has alleged that Ramesh Sarva affirmatively represented that the premises was in compliance with all applicable government codes, rules, regulations and construction industry standards, which was false, and that this constituted a breach of the Housing Merchant Implied Warranty.

Furthermore, contrary to defendant’s contention, plaintiff has alleged in the complaint that on or about November 28, 2017, it complied with the written notice requirement of General Business Law §777-a (4)(a). The documentary evidence presented has failed to resolve all factual issues as a matter of law and conclusively dispose of plaintiff’s claim (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). Therefore, defendants have failed to demonstrate their entitlement to the dismissal of the third cause of action against Ramesh Sarva pursuant to CPLR §3211 (a)(1) or (7).

Plaintiff’s fourth cause of action sounds in consumer protection and violation of General Business Law §§349 and 350 against all defendants. Defendants argue that plaintiff has failed to state a cause of action by failing to allege sufficient facts to support a legally cognizable claim, that plaintiff has failed to allege any conduct by any of the defendants which had a broad impact on consumers at large in order to constitute a violation of these

sections. General Business Law §349, entitled “Deceptive acts and practices unlawful,” provides the following:

“(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful. (b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules. (c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest. (d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts. (e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement. (f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules. (g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry. (h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or

both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff..."

"The elements of a cause of action to recover damages for deceptive business practices under General Business Law §349 are that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice" (*Air & Power Transmission, Inc. v Weingast*, 120 AD3d 524, 525 [2d Dept 2014]). "Deceptive acts or practices may be considered 'consumer oriented' when they have a broad impact on consumers at large" (*Flax v Lincoln Nat. Life Ins. Co.*, 54 AD3d 992, 994 [2d Dept 2008]; see *Air & Power Transmission, Inc. v Weingast*, 120 AD3d at 525; *Yellow Book Sales and Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663, 665 [2d Dept 2012]). Therefore, "as a threshold matter, plaintiffs claiming the benefit of [the statute] ... must charge conduct of the defendant that is consumer-oriented" (*Tiffany Tower Condominium, LLC v Ins. Co. of Greater New York*, 164 AD3d 860, 863 [2d Dept 2018], quoting *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]).

General Business Law §350, entitled "False advertising unlawful," provides that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." To state a claim under section 350, a plaintiff must allege that "the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury" (*Andre Strishak & Assoc., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002]; see *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d at 25; *Yellow Book Sales and Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d at 665).

Upon a careful reading of the complaint, the court has determined that plaintiff has failed to sufficiently allege facts to support a cause of action against Paraag Sarva and PSRS for violation of General Business Law §§349 and 350. However, accepting the allegations contained in the complaint as true, giving them a liberal construction and affording plaintiff the benefit of every favorable inference, the court has concluded that plaintiff has sufficiently alleged facts to state the elements of a claim for violation of General Business Law §§349 and 350 against Los Vamos and Ramesh Sarva. Moreover, no documentary evidence presented by defendants has satisfied their burden on this branch of their motion (see *AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). Therefore, while plaintiff's fourth cause of action for violation of General Business Law §§349 and 350 is dismissed against Paraag Sarva and PSRS, defendants have failed to demonstrate their entitlement to dismissal

of the fourth cause of action against Los Vamos and Ramesh Sarva pursuant to CPLR §3211 (a)(1) or (7).

Plaintiff's fifth cause of action sounds in breach of fiduciary duty/waste against Paraag Sarva and PSRS. Defendants have argued that the complaint fails to sufficiently allege the elements of a cause of action for breach of a fiduciary duty because no relationship of any kind existed between plaintiff and Paraag Sarva or plaintiff and PSRS, that no fiduciary relationship existed between them, that no fiduciary duty could have been breached, and that the cause of action has not been pled with the requisite particularity.

"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 *Renu Hausen v N. Fork Radiology, P.C.*, ___ AD3d ___, 2019 NY Slip Op 02687 [2d Dept 2019]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d at 807). "A fiduciary relationship exists between two persons when one of them is under a duty to act for ... the benefit of another upon matters within the scope of the relation" (*Varveris v Zacharakos*, 110 AD3d 1059, 1059 [2d Dept 2013], quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d at 19).

"A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d at 808; see *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2d Dept 2011]). A member of the initial Board and managing agents of a condominium owe a fiduciary duty to individual unit owners in their management of the common property (see *Caprer v Nussbaum*, 36 AD3d 176, 193 [2d Dept 2006]; *Bd. of Managers of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 325-26 [2d Dept 1993]).

After a careful reading of the allegations contained in the complaint, affording them a liberal construction, presuming the facts as alleged to be true, and affording plaintiff the benefit of every favorable inference, the court has determine that plaintiff's fifth cause of action sounding in breach of fiduciary duty/waste, does fit within a cognizable legal theory. A review of the allegations has demonstrated that plaintiff has sufficiently alleged that Paraag Sarva and PSRS had what amounted to a fiduciary relationship with plaintiff and that Paraag Sarva and PSRS engaged in misconduct which directly caused damages to plaintiff.

Contrary to defendants' contention, reading the allegations contained in the complaint as a whole, plaintiff has sufficiently alleged instances in which Paraag Sarva and PSRS committed misconduct which formed the basis of the claim. Acts such as, including but not limited to, concealing identified deficiencies such as to the foundation and waterproofing of

the building, substandard workmanship, the use of substandard materials, non-compliant ventilation, and improper roof installation. Furthermore, defendants have not pointed to sufficient documentary evidence to satisfy their burden. Therefore, defendants are not entitled to dismissal of the fifth cause of action pursuant to CPLR §3211 (a)(1) and (7).

Lastly, while defendants have also moved for sanctions against plaintiff, they have failed to adequately address this branch of their motion and are not entitled to such relief.

Accordingly, the branches of defendants' motion to dismiss plaintiff's third cause of action sounding in breach of the Housing Merchant Implied Warranty only against Los Vamos, and to dismiss the fourth cause of action for violation of General Business Law §§ 349 and 350 only against Paraag Sarva and PSRS for are granted, and those causes of action are, hereby, dismissed. Defendants' motion is otherwise denied in its entirety.

This is the decision and order of the Court.

Dated: ~~April~~ May 8, 2019

5/8/19

Hon. Joseph Risi, A.J.S.C.

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY