At an IAS Term, Part Comm-7 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 28th day of June, 2013.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

----------X

MOSES STRULOVICH,

Plaintiff,

- against -

Index No. 500860/13

C&L BOILER CORP., VANNGUARD LOCAL DEVELOPMENT CORP.,

Defendants.

----------X

The following e-filed papers numbered 1 to 26 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	6-7 11, 13-18
Opposing Affidavits (Affirmations)	19
Reply Affidavits (Affirmations)	23-26
Affidavit (Affirmation)	
Plaintiff's Memoranda of Law	12, 22

In this action by plaintiff Moses Strulovich (plaintiff) against defendants C&L Boiler Corp. (C&L) and Vannguard Local Development Corp. (Vannguard) (collectively, defendants) seeking specific performance of a contract for the sale of commercial real property and damages, Vannguard moves, by order to show cause, for an order dismissing plaintiff's complaint based upon the failure to state a claim upon which relief may be granted

and/or the defense of mutual mistake as established by documentary evidence. Plaintiff cross-moves for an order disqualifying Andre Ramon Soleil, Esq. and the Law Offices of A. R. Soleil & Company, P.C. from serving as Vannguard or C&L's counsel.

BACKGROUND

Prior to May 30, 1985, Paragon Progressive Community Association Incorporated (Paragon) was the owner of commercial real property, located at 1471-1477 Fulton Street, in Brooklyn, New York, Block 1857, Lot 24. On May 30, 1985, Paragon, by court order, subdivided Block 1857, Lot 24 into two lots, creating a new Lot 24 (Lot 24) and a Lot 127 (Lot 127), and granted Lot 127 to Robert Cradle (Cradle) by deed dated May 30, 1985. However, the Office of the City Register (the City Register) erroneously filed Cradle's May 30, 1985 deed under Lot 24. On July 1, 1985, Paragon transferred the new Lot 24 to Vannguard, which is a New York not-for-profit corporation. The City Register, however, erroneously filed this deed to Vannguard under Lot 127. On December 22, 1987, Cradle transferred Lot 127 to his corporation, C&L, but the City Register also erroneously filed this December 22, 1987 deed to C&L under Lot 24. On July 29, 1998, C&L's title to Lot 127 was extinguished by a tax lien sale.

In March 2000, nearly two years after C&L lost its tile to Lot 127, Audley Chambers (Chambers) purportedly purchased C&L from Cradle, and acquired its various equipment, vehicles, the C&L name, and Cradle's client list and contracts. According to Chambers, he was unaware that C&L had ever owned any real property. Chambers, in an affidavit

submitted by him, asserts that while he was doing his taxes in 2001, his tax preparer informed him that C&L had actually been dissolved for failure to pay New York State taxes in 1992, approximately eight years prior to his purchase of C&L from Cradle. Chambers states that this was fine with him because he still owned the vehicles, equipment, and contracts of C&L, and that he, thereafter, began to operate his business under the d/b/a Beautiful Construction. Cradle died in November 2006. Chambers incorporated Beautiful Construction of NY, Inc. in 2011.

According to Arthur Niles (Niles), who is Vannguard's executive director, Vannguard had lost many of its social service and community development contracts due to governmental budget cuts, and, in 2012, its board of directors was planning to close Vannguard, sell its assets, and terminate it. On February 7, 2012, FSM Acquisitions LLC (FSM), as mortgagee, brought a commercial mortgage foreclosure action against Vannguard (*FSM Acquisitions LLC v Vannguard*, Sup Ct, Kings County, index No. 3097/12) (the FSM action), seeking to foreclose a first mortgage on Lot 24, which had been executed by Vannguard on February 1, 2010. Niles asserts that in June 2012, he was dismayed to discover that the City Register listed C&L, instead of Vannguard, as the owner of Lot 24, and he consulted Vannguard's attorney, Mr. Soleil, Esq. Niles further asserts that following such consultation, Mr. Soleil, Esq., at a board meeting held in July 2012, advised the board of directors that an adverse possession claim could take up to two years to litigate, and that, since Vannguard had no contracts to sustain it, the board of directors then asked Mr. Soleil,

Esq. to negotiate with Cradle or C&L's successor in interest (who, as noted above, is Chambers) regarding Lot 24.

According to Chambers, he was informed by Mr. Soleil, Esq. in September 2012 that the City Register showed that C&L owned Lot 24, and that Vannguard might sue him for adverse possession, but that he could avoid such a lawsuit if he sold Lot 24 and agreed to pay off Vannguard's debts. Chambers states that he agreed that Mr. Soleil, Esq. could be his attorney for the sale of Lot 24, and that he waived any conflict of interests between Vannguard and C&L.

Niles asserts that in or about September 2012, Mr. Soleil, Esq. informed Vannguard's board of directors that he had located Chambers, the purchaser of Mr. Cradle's business, C&L. According to Niles, Mr. Soleil, Esq. proposed that Chambers sell Lot 24 and pay off Vannguard's debts so that Vannguard could terminate quickly, in exchange for Vannguard's agreement that it would not commence an adverse possession claim against him, and Vannguard's board of directors authorized Mr. Soleil, Esq. to negotiate with Chambers.

On October 12, 2012, Vannguard, who was represented by Mr. Soleil, Esq., moved to dismiss the FSM action, contending that it was not the owner of record of Lot 24 and that C&L was the title owner of record of Lot 24. In support of Vannguard's motion, Niles filed an affidavit, dated October 2, 2012, in which he stated that Vannguard did not own Lot 24 and that the owner in fee and legal title holder of Lot 24 was C&L.

On October 22, 2012, C&L, as the seller, entered into a contract for the sale of Lot 24 (the contract) with plaintiff, as the purchaser, whereby C&L agreed to sell Lot 24 to plaintiff for the purchase price of $1,750,000. Plaintiff paid a $175,000 down payment on the signing of the contract, with the balance of $1,575,000 due at the closing of the sale. The contract reflects that Mr. Soleil, Esq. was the attorney for C&L and that plaintiff was represented by Judah Zelmanovitz, Esq., of Fink & Zelmanovitz, P.C., as his attorney.

Paragraph 11 (a) (ii) of the contract stated that the "[s]eller represents and warrants to the [p]urchaser that . . . [s]eller is the sole owner of the [p]remises and has the full right, power and authority to sell, convey and transfer the same in accordance with the terms of this contract." Paragraph 15 of the contract provided: "Closing shall occur on or about December 21, 2012. However, under no circumstance, other than a new written agreement, shall this contract remain in force beyond 1/29/13." Paragraph 23 of the contract set forth that "[i]f [s]eller defaults hereunder, [p]urchaser shall have such remedies as [p]urchaser shall be entitled to at law or in equity, including, but not limited to specific performance." Paragraph 28 (a) of the contract provided that the contract completely expressed the parties' "full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in the contract." Paragraph 28 (j) made the contract subject to a 15-day "due diligence" period, during which time plaintiff would be able to conduct surveys of the property and could cancel for any obvious building defects discovered by him.

Plaintiff asserts that after the contract was signed and the deposit duly tendered by him, defendants disclosed that there were conflicting records as to the ownership of Lot 24, with some records indicating that C&L was the owner, and other records indicating that Vannguard was the owner. Plaintiff alleges that a subsequent examination of the property records indicated that both defendants had taken out various mortgages on Lot 24. Plaintiff claims that on several occasions, he was nonetheless assured by defendants, through Mr. Soleil, Esq. and through the real estate broker, that defendants were interrelated entities with unity of ownership and that they would honor the contract and convey Lot 24 to him.

On November 12, 2012, Fidelity National Law Group (Fidelity), the title insurer at the time of the execution of the July 1, 1985 deed to Lot 24 to Vannguard, became involved in the FSM action and filed a notice of appearance as co-counsel for FSM. By an e-mail dated December 17, 2012, Fay Josovitz, Esq. of the law firm of Fink & Zelmanovitz, P.C. advised Mr. Soleil, Esq. that she had been informed by her title company that "the entity in contract for the premises is not the entity in title," and that "[t]his is a rather large issue as the contract may need to be amended."

Thereafter, Fidelity took the necessary steps to cause the City Register to be corrected, and, on December 28, 2012, the City Register administratively corrected its records to reflect that the December 22, 1987 deed was filed against Lot 127 instead of Lot 24, and that the July 1, 1985 deed was filed against Lot 24 instead of Lot 127. The City Register's records, therefore, now correctly show that Vannguard is the fee simple absolute owner of Lot 24.

This rendered moot the motion by Vannguard to dismiss the FSM action as against it on the basis that it was not the owner of Lot 24.

According to Chambers, at the end of December 2012, Mr. Soleil, Esq. informed him that the City Register's records were corrected to show that Vannguard had always owned Lot 24, and asked him to sign an assumption agreement for the contract that C&L had with plaintiff and to assign that contract to Vannguard. Chambers asserts that he told Mr. Soleil, Esq. that he would allow Vannguard to assume the contact only if he received $200,000, and Mr. Soleil, Esq. told him that he would present his offer to Vannguard's board of directors. In or about January 2012, Mr. Soleil, Esq. allegedly presented Chambers' demand to Vannguard's board of directors, who refused to accept Chambers' offer. Thereafter, Vannguard entered into its own contract for the sale of Lot 24 with another purchaser. Chambers states that he was informed that Vannguard refused his offer, and he acknowledges that C&L has no ownership interest in Lot 24.

By a letter dated February 13, 2013 addressed to Mr. Zelmanovitz, Esq., plaintiff's real estate attorney with respect to the purchase of Lot 24, Mr. Soleil, Esq., as counsel for C&L, returned plaintiff's deposit of $175,000 and advised Mr. Zelmanovitz, Esq. that he could no longer continue to hold this $175,000 check in escrow based upon the contract because C&L was without the legal capacity to sell Lot 24 to plaintiff or anyone else. Mr. Soleil, Esq. further stated, in this letter, that "in conversation, [he had] assured [him that] Vannguard . . . would honor the . . . contract in C&L['s] name, place and stead," but

[u]nfortunately and ultimately, Vannguard . . . and C&L . . . did not reach agreement regarding this contract."

On February 20, 2013, plaintiff filed this action against defendants. On the same date, plaintiff also filed a notice of pendency against Lot 24. Plaintiff's complaint alleges a first cause of action for specific performance, a second cause of action for estoppel, a third cause of action for a declaratory judgment, a fourth cause of action for fraud, a fifth cause of action for breach of contract, a sixth cause of action for breach of express warranty, and a seventh cause of action for injunctive relief. On March 12, 2013, Vannguard interposed an answer, and e-filed its instant order to show cause. On March 29, 2013, plaintiff served and e-filed his cross motion.

DISCUSSION

Plaintiff initially argues that the Vannguard's motion should be denied because Vannguard has already answered his complaint and has admitted the allegations of his complaint by failing to specifically deny his allegations. This argument is unavailing. Pursuant to CPLR 3211 (e), "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a)." Since Vannguard has made its motion within this time period, the court may entertain its CPLR 3211 motion even though it was made after the service of its answer (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:52, at 77-78). Furthermore, CPLR 3211 (e) provides that a motion made based upon CPLR 3211

(a) (7) "may be made at any subsequent time," and, therefore, the ground of failure to state a cause of action may be asserted by Vannguard in its instant motion, notwithstanding its service of an answer (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:53, at 79).

In response to plaintiff's argument that it has admitted the allegations of his complaint by failing to specifically deny them, Vannguard concedes that it omitted to deny certain paragraphs of plaintiff's complaint. However, Vannguard asserts that this is of no moment since it effectively denies them by contradicting their allegations in its affirmative defenses. Specifically, Vannguard's answer, in its first affirmative defense, alleges that plaintiff has failed to state a claim upon which relief can be granted because he fails to allege any contract with Vannguard and fails to plead fraud with the required specificity. Vannguard's answer, in its second affirmative defense, alleges that a defense is established by the documentary evidence of mutual mistake due to the fact that there was a mistake by the City Register which confused title as to Lot 24, and that the corrected documents now show that C&L never entered into a valid contract with plaintiff because it could not sell property which it did not own. Thus, the court, upon construing the allegations set forth in Vannguard's answer, does not find that Vannguard has admitted any liability to plaintiff.

In addressing the grounds for Vannguard's motion, the court notes that "[i]t is well settled that, as a general rule, on a motion to dismiss the complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most

favorable to the plaintiff" (*Gruen v County of Suffolk*, 187 AD2d 560, 562 [2d Dept 1992]; *see also Rosen v Watermill Dev. Corp.*,1 AD3d 424, 425 [2d Dept 2003]). The court must also accept the facts as alleged in the complaint and submissions in opposition to the motion as true and "accord [the] plaintiff[] the benefit of every possible favorable inference" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The court, in accepting the facts alleged in the complaint to be true, must "'determine only whether the facts alleged fit within any cognizable legal theory'" (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2d Dept 2008], quoting *Morris v Morris*, 306 AD2d 449, 451 [2d Dept 2003]). Thus, when evaluating whether a complaint is sufficient to survive a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine 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 (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Ruffino*, 55 AD3d at 818; *Morris*, 306 AD2d at 451). However, "'bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference'" (*Ruffino*, 55 AD3d at 818, quoting *Morris*, 306 AD2d at 451), and dismissal of the complaint pursuant to CPLR 3211 (a) (7) is warranted "in those situations in which it is conclusively established that there is no cause of action" (*Town of N. Hempstead v Sea Crest Constr. Corp.*, 119 AD2d 744, 746 [2d Dept 1986]).

A dismissal pursuant to CPLR 3211 (a) (1) is warranted on the basis that a defense based upon documentary evidence exists where the documentary evidence submitted

"definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim" (*Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Forftis Fin. Servs.v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]). Thus, the court will dismiss a complaint based upon the documentary evidence where such evidence conclusively establishes a defense to the asserted claim as a matter of law and utterly refutes the complaint's factual allegations (*see Leon*, 84 NY2d at 88).

Vannguard argues that it is entitled to dismissal of plaintiff's complaint based upon the documentary evidence of the mistake in the City Register's records which resulted in C&L entering into the contract with plaintiff. It maintains that since it never entered into a contract with plaintiff and C&L never had title to Lot 24, this action cannot be maintained against it. Vannguard further asserts that plaintiff became aware of the title problem by the time of the December 17, 2012 e-mail by his attorney, Ms. Josovitz, Esq., and that plaintiff could not have justifiably relied upon any assurances by its attorney, Mr. Soleil, Esq. Vannguard also argues that the documentary evidence shows that the contract was cancelled, by its own terms, on January 29, 2013.[1] Furthermore, Vannguard argues that none of the causes of action state a cognizable claim as against it.

---

[1]Vannguard asserts that the contract expired, by its own terms on January 29, 2013 pursuant to paragraph 15 since it was never extended by a new written agreement. Plaintiff responds that defendants never declared that time was of the essence, and that it was defendants' failure to perform that prevented the closing. However, it is unnecessary to reach this issue since plaintiff's complaint must be dismissed for the reasons discussed below.

Plaintiff's first cause of action alleges a claim for specific performance. Plaintiff relies upon paragraph 23 of the contract which, as noted above, provided that "[i]f [s]eller defaults hereunder, [p]urchaser shall have such remedies as [p]urchaser shall be entitled to at law or in equity, including, but not limited to specific performance."

However, "[i]n an action for specific performance to enforce a contract, the plaintiff must show, among other things, that the contract is within the power of the defendant to perform" (*75 Christopher St. Corp. v Furman*,138 AD2d 323, 323-324 [1st Dept 1988]; *see also S.E.S. Importers v Pappalardo*, 53 NY2d 455, 464-465 [1981]). Specific performance is available only to one who is a party to the contract sued upon (see *75 Christopher St. Corp.*,138 AD2d at 324; *R & R Homes, Inc. v Gellman*, 144 NYS2d 54, 55 [Sup Ct, Nassau County 1955]). Where the seller under the contract for sale of realty is not the actual record owner, specific performance is not available to the purchaser (*see Xiao Yuan v Li Dan Zhang*, 58 AD3d 723, 723 [2d Dept 2009]; *2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]; *R&R Homes, Inc.*, 144 NYS2d at 55).

Here, it is undisputed that Vannguard was not a party to the contract and that only Vannguard is the actual owner of title to Lot 24. Since Vannguard did not sign the contract, it cannot be enforced as against it (*see Xiao Yuan*, 58 AD3d at 723; *2386 Creston Ave. Realty, LLC*, 58 AD3d at 162). Indeed, as contended by Vannguard, the documentary evidence demonstrates that there was a mistake in the City Register's records as to the

ownership of Lot 24 at the time that C&L executed the contract with plaintiff, and that the contract was entered into under the mistake that C&L held title to Lot 24.

"Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission" (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]; *see also Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 159 [2d Dept 1983]). "The mutual mistake must exist at the time the contract is entered into and must be substantial" since "[t]he idea is that the agreement as expressed, in some material respect, does not represent the 'meeting of the minds' of the parties" (*Matter of Gould*, 81 NY2d at 453; *see also Ryan v Boucher*, 144 AD2d 144, 145 [3d Dept 1988]; *Brauer v Central Trust Co.*, 77 AD2d 239, 243 [4th Dept 1980], *lv denied* 52 NY2d 703 [1981]). Furthermore, it has been held that a plaintiff may be entitled to rescind a contract even where the mistake is unilateral, not mutual, if equity warrants such rescission (*see Rosenblum v Manufacturers Trust Co.*, 270 NY 79, 84-85 [1936]).

Here, the mistake existed at the time of entry into the contract and it was substantial. Indeed, plaintiff's attorney, in the December 17, 2012 e-mail, admitted that this was a "rather large issue" which would require an amendment of the contract. Moreover, there could not have been any meeting of the minds between plaintiff and Vannguard, who was not a party to the contract.

Plaintiff argues, however, that there was no mutual mistake because Vannguard admits that it was aware of the problems with title to Lot 24 prior to C&L's signing of the

contract. He contends that Vannguard conspired with C&L to conceal this from him and promised, through Mr. Soleil, Esq., to proceed with the closing after he discovered this problem.

This argument is unavailing. It is undisputed that Vannguard is a not-for-profit corporation. Not-for-Profit Corporation Law § 509 provides that: "No purchase of real property shall be made by a corporation and no corporation shall sell, mortgage or lease real property, unless authorized by the vote of two-thirds of the entire board, provided that if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient." Thus, Lot 24 could not be conveyed without the assent of two-thirds of Vannguard's directors. Thus, plaintiff could not reasonably rely upon any alleged assurance made by Mr. Soleil, Esq. as to the actions which might or might not be taken by Vannguard's board of directors in the future. Consequently, the court cannot grant specific performance against a not-for-profit corporation which was not a party to the contract, and plaintiff's first cause of action for specific performance must be dismissed (*see* CPLR 3211 [a] [1], [7]; *Xiao Yuan*, 58 AD3d at 723; *2386 Creston Ave. Realty, LLC*, 58 AD3d at 162; *R&R Homes, Inc.*, 144 NYS2d at 55).

Plaintiff's second cause of action for estoppel alleges that defendants made explicit promises to him that they had the ability to, and would convey Lot 24 to him and honor the contract regardless of which entity owned Lot 24 in light of the interrelated nature of the entities. He asserts that he reasonably relied, first, upon defendants' explicit warranty that

C&L was the record owner of the Lot 24 with the ability to convey it, and, then, upon defendants' assurances and promises that they were interrelated and could and would convey Lot 24 to him regardless of which of them actually owned it. He asserts that he reasonably and justifiably relied on these promises by entering into the contract, continuing to spend money on due diligence, leaving his $175,000 deposit tied up with the escrow agent, and forgoing opportunities to use this $175,000 for other business ventures. Plaintiff further asserts that by the February 13, 2013 letter, Mr. Soleil, Esq. admitted that defendants had explicitly assured him that the property would be conveyed to him regardless of which entity owned Lot 24, and that C&L was the record owner of Lot 24 on the contract date. Plaintiff contends that by their actions, defendants are estopped from cancelling the contract.

"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Rock v Rock*, 100 AD3d 614, 616 [2d Dept 2012], quoting *Schwartz v Miltz*, 77 AD3d 723, 724 [2d Dept 2010], *lv denied* 16 NY3d 701 [2011]; *see also Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010]; *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 20-21 [2d Dept 2008]; *Williams v Eason*, 49 AD3d 866, 868 [2d Dept 2008]; *Gurreri v Associates Ins. Co.*, 248 AD2d 356, 357 [2d Dept 1998]). However, "[r]ecovery under the doctrine of promissory estoppel is limited to cases where the promisee suffered [an] unconscionable injury" (*Halliwell v Gordon*, 61 AD3d 932, 934 [2d Dept 2009]; *see also Dunn v B&H Assoc.*, 295

AD2d 396, 397 [2d Dept 2002] *D & N Boening v Kirsch Beverages*, 99 AD2d 522, 523-524 [2d Dept 1984], *affd* 63 NY2d 449 [1984];).

Here, plaintiff maintains that after he became aware of the title defect, Mr. Soleil, Esq. promised that Vannguard would honor C&L's contract with him. However, any alleged assurances given by Mr. Soleil, Esq. cannot show a clear and unambiguous promise by Vannguard, which, as noted above, is a not-for-profit corporation that required the approval of two-thirds of its board of directors for a sale of real property (*see 47 W. 14th St. Corp. v New York Wigs & Plus, Inc.*, 106 AD3d 527, 527 [1st Dept 2013]). There also could be no reasonable and foreseeable reliance by plaintiff. Plaintiff was aware that Vannguard was not a signatory to the contract (*see B&C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 655 [1st Dept 2013]). Moreover, plaintiff was represented by his own attorney and could not reasonably rely upon any alleged assurances by Mr. Soleil, Esq., who was not a party to the contract and did not control Vannguard's board of directors. Thus, inasmuch as Lot 24 could not be conveyed without the assent of two-thirds of Vannguard's board of directors, plaintiff could not have justifiably relied upon any alleged assurance by Mr. Soleil, Esq. without the authorized vote of two-thirds of Vannguard's board of directors approving such sale. Plaintiff has also not suffered an "unconscionable injury" (*Halliwell*, 61 AD3d at 934; *D& N Boeing*, 99 AD2d at 524). Therefore, plaintiff cannot state a viable claim based upon promissory estoppel.

Plaintiff further contends that pursuant to the doctrine of judicial estoppel, Vannguard's claim in the FSM action that it did not own Lot 24 prevents it from now asserting ownership of Lot 24 in this action. This contention is devoid of merit. "The doctrine of judicial estoppel precludes a party from framing his [or her] pleadings in a manner inconsistent with a position taken in a prior judicial proceeding" (*Bono v Cucinella*, 298 AD2d 483, 484 [2d Dept 2002]). However, the doctrine of judicial estoppel "will be applied only 'where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his [or her] interests have changed'" (*id.*, quoting *Kimco of N.Y. v Devon*, 163 AD2d 573, 574-575 [2d Dept 1990]). Since Vannguard did not succeed in its motion to dismiss in the FSM action based upon its assertion that it did not own Lot 24, judicial estoppel is inapplicable (*see Saratoga County Water Auth. v Gibeault*, 103 AD3d 1017, 1020 [3d Dept 2013]; *Finkel v Firestone*, 102 AD3d 735, 736 [2d Dept 2013]; *Bono*, 298 AD2d at 484; *Meyers v Geller*,194 AD2d 595, 595 [2d Dept 1993]). Thus, dismissal of plaintiff's second cause of action is mandated (*see* CPLR 3211 [a] [1], [7]).

Plaintiff's third cause of action for a declaratory judgment seeks a judgment declaring that defendants willfully and materially breached the contract, that the February 13, 2013 cancellation letter was wrongful and null and void, and that defendants are estopped from asserting that they are unable to convey Lot 24. Plaintiff is not entitled to such a declaration. As discussed below, Vannguard, as a non-party to the contract, could not have breached it.

The February 13, 2013 cancellation letter cannot be declared wrongful or null and void since C&L, who did not have title to Lot 24, did not have the capacity to perform the contract and was required to return plaintiff's down payment. In addition, as discussed above, there is no basis upon which Vannguard may be estopped from asserting that it is not required to convey title to Lot 24 to plaintiff. Consequently, dismissal of plaintiff's third cause of action is warranted (*see* CPLR 3211 [a] [1], [7]).

Plaintiff's fourth cause of action for fraud alleges that defendants intentionally concealed and misrepresented the ownership of Lot 24 as part of a scheme to allow them to back out of the contract at will. It alleges that defendants' concealment of the state of title to Lot 24 was fraudulent and that they intended to fraudulently conceal the state of title so as to induce him to purchase Lot 24, while at the same time providing themselves with the ability to back out of the contract at their convenience by claiming the inability to convey Lot 24. Plaintiff asserts that the state of title to Lot 24 was material and was not known by him, that he could not have discovered the state of defendants' title because of defendants' misrepresentations and because defendants capitalized on the interrelated nature of the two entities and filed numerous documents, including mortgages, asserting that C&L was the owner. He further asserts that he reasonably relied on defendants' fraudulent and misleading statements and misrepresentations to his detriment, that he would not have entered into the contract if he had known of the concealed state of title, and that he sustained damages by expending substantial sums in connection with the contract and his due diligence.

To plead a cause of action for fraud in the inducement, a plaintiff must plead "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the [plaintiff] to rely upon it, justifiable reliance of the [plainitff] on the misrepresentation or material omission, and injury [caused as a result of that reliance]" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Jablonski v Rapaljesee Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 710 [2d Dept 2011]; *Northeast Steel Prods., Inc. v John Little Designs, Inc.*, 80 AD3d 585, 585 [2d Dept 2011]; *Hense v Baxter*, 79 AD3d 814, 816 [2d Dept 2010]). Furthermore, where a cause of action is based on a misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]).

Plaintiff has not only failed to plead any fraud by Vannguard with the required specificity and detail required by CPLR 3016 (b), as argued by Vannguard, but plaintiff also cannot satisfy the requisite elements, as stated above, for pleading a fraud claim. Plaintiff cannot show that any material misrepresentation was made by Vannguard to induce him to purchase Lot 24. Indeed, while plaintiff claims that Niles showed him around Lot 24, he asserts that he did so on behalf of the seller, i.e., C&L. Plaintiff does not claim that Vannguard made any promise to him prior to his executing the contract with C&L. Therefore, Vannguard could not have fraudulently induced plaintiff to purchase Lot 24 from C&L. While plaintiff alleges that Vannguard, through Mr. Soleil, Esq., thereafter assured

him that Vannguard would perform the contract in place of C&L or that C&L and Vannguard were interrelated, any such misrepresentations and omissions alleged by plaintiff may not form the basis for his claim of fraudulent inducement to the extent that they were made after he had already entered into the contract to purchase Lot 24 (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 958 [2d Dept 2011]; *DH Cattle Holdings Co. v Smith*, 195 AD2d 202, 208 [1st Dept 1994]).

Moreover, the required element of reliance is necessarily absent. Plaintiff contends that he justifiably relied upon fraudulent misrepresentations and assurances by Mr. Soleil, Esq., as evidenced by his February 13, 2013 letter, in which he stated that he had assured him that Vannguard would honor the contract in C&L's name, place, and stead. However, such alleged fraudulent misrepresentations amount to no more than "[v]ague expressions of hope and future expectation" as to the actions which might be taken in the future by Vannguard's board of directors, which "provide an insufficient basis upon which to predicate a claim of fraud" (*International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]; *see also Mandarin Trading Ltd.*, 16 NY3d at 178; *Roney v Janis*, 53 NY2d 1025, 1027 [1981]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916 [2d Dept 2009]; *Foot Locker Stores, Inc. v Pyramid Mgt. Group, Inc.*, 45 AD3d 1447, 1448 [4th Dept 2007]). Furthermore, as previously discussed, plaintiff, who was represented by his own attorney, could not justifiably rely upon any such assurance by Mr. Soleil, Esq. since he did not control

the vote of Vannguard's board of directors, which was necessary for an approval of a sale of real property.

In addition, it has been held that "where a purchaser has knowledge of any fact, sufficient to put him [or her] on inquiry as to the existence of some right or title in conflict with that he [or she] is about to purchase, he [or she] is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his [or her] claim, to be considered as a *bona fide* purchaser" (*Lucas v J&W Realty & Constr. Mgt.*, Inc., 97 AD3d 642, 643 [2d Dept 2012] [internal quotation marks and citation omitted]). Here, the title problem was a matter of public record since the FSM mortgage was filed against Lot 24 which listed Vannguard as the mortgagor-owner. Moreover, as evidenced by the December 17, 2012 e-mail from plaintiff's attorney, a title search immediately revealed that C&L was not the owner of Lot 24, which further undermines plaintiff's claim of fraud. Therefore, dismissal of plaintiff's fourth cause of action is required (*see* CPLR 3211 [a] [1], [7]).

Plaintiff's fifth cause of action alleges that defendants breached the contract by refusing to close the transaction as required pursuant to the contract. However, since Vannguard was not a party to the contract, there was no privity between it and plaintiff upon which to predicate a breach of contract claim (*see Arker Cos. v New York State Urban Dev. Corp.*, 47 AD3d 739, 740 [2d Dept 2008]). There was no written signed agreement from Vannguard to convey Lot 24. Plaintiff relies upon Mr. Soleil, Esq.'s February 13, 2013

termination letter, in which he stated that although he had orally assured him that Vannguard would honor the contract in place of C&L, Vannguard and C&L did not reach an agreement regarding the contract. Such reliance, however, is unavailing since this letter merely reflects Vannguard's board of directors' decision to not assume the contract.

Plaintiff further argues that the contract is binding upon Vannguard because Niles showed him around Lot 24, gave him his contact information, and told him to call with any questions, and because Niles was sent copies of e-mails in which the contract was negotiated. This argument must be rejected. Plaintiff does not allege that Niles purported to be representing Vannguard, and, in any event, any oral representations by Niles could not be binding upon Vannguard, who could only be bound by the vote of its board of directors. Consequently, Vannguard cannot be held liable to plaintiff for breach of contract, and dismissal of this cause of action must be granted (*see* CPLR 3211 [a] [1], [7]).

Plaintiff's sixth cause of action alleges a breach of express warranty. Specifically, it asserts that defendants warranted, in paragraph 11 (a) (ii) of the contract, that C&L was the sole owner and holder of the interests in Lot 24 and had the ability to convey it. This warranty, however, was made by C&L, not by Vannguard, who did not sign the contract and was not a party to it. Thus, plaintiff's sixth cause of action does not state a viable claim as against Vannguard and its dismissal is required (*see* CPLR 3211 [a] [1], [7]).

Plaintiff's seventh cause of action seeks injunctive relief, enjoining defendants from terminating or cancelling the contract. It asserts that if defendants are permitted to cancel

and terminate the contract, plaintiff will suffer immediate and irreparable injury. Since there is no basis for granting plaintiff such equitable relief, this cause of action must be dismissed (*see* CPLR 3211 [a] [1], [7]).

Plaintiff, by his cross motion, seeks an order disqualifying Mr. Soleil, Esq. and his law firm from serving as Vannguard's counsel or C&L's counsel.[2] Plaintiff argues that Mr. Soleil, Esq. represented both defendants in the subject real estate transaction and made many of the representations that serve as a basis for this action. He contends that Mr. Soleil, Esq. is, therefore, a key witness in this matter and should be disqualified as counsel for either defendant. However, since the court finds that plaintiff's complaint must be dismissed, plaintiff's cross motion is rendered moot.

CONCLUSION

Accordingly, Vannguard's motion to dismiss plaintiff's complaint is granted, and plaintiff's cross motion to disqualify Mr. Soleil, Esq. and his law firm as counsel is denied as moot.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST

[2]C&L has submitted an answer, e-filed on April 8, 2013, by its attorney, Subhana Rahim, Esq. Mr. Rahim, Esq. has the same office address at 32 Court Street, Suite 1107, as well as the same telephone and facsimile numbers as Mr. Soleil, Esq. Plaintiff asserts that it is, therefore, unclear if Mr. Rahim, Esq. works for Mr. Soleil, Esq. or if he has some other association with him. Plaintiff, however, has not made a motion with respect to the disqualification of Mr. Rahim, Esq., who e-filed C&L's answer after plaintiff had brought his cross motion.