

<b>Cohen v Peerless Props. Corp.</b>
2021 NY Slip Op 31329(U)
April 9, 2021
Supreme Court, Kings County
Docket Number: 522238/2018
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 360 Adams Street, Brooklyn, New York, on the 9th day of April, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
ALBERT COHEN,

Index No.: 522238/2018

*Plaintiff,*

-against-

PEERLESS PROPERTIES CORP., RICHARD DINERMAN, ADELL REALTY, GROUP, INC., ODELIA M. BERLIANSHIK, BRIGHTON 5 EQUITIES, LLC, MALKIEL BERLIANSHIK, AVI ROSENGARTEN, GELFAND REALTY INC., BORIS GELFAND and ARTUR KOMOV,

DECISION AND ORDER

Motions Sequence #3, #4

*Defendants.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	45-55, 61-72,
Opposing Affidavits (Affirmations).....	86-89, 91-100,
Reply Affidavits (Affirmations) .....	101-103, 107-109

After a review of the papers and oral argument on the motion the Court finds as follows:

This action arises out of a failed real estate transaction involving property located at 3058 Brighton 5<sup>th</sup> Street, Brooklyn, N.Y. (the "Premises" or "Property"). The Plaintiff, Albert Cohen (hereinafter the "Plaintiff") claims in his amended complaint that he made a \$550,000 offer to purchase the Property, which the Federal Home Loan Mortgage Corporation ("Freddie Mac") purportedly owned, and which Freddie Mac's selling agents, Defendants Peerless Properties Corp.

and Richard Dinerman (hereinafter referred to individually or as “Defendant Peerless” or “Peerless”) listed for public sale. The Plaintiff further alleges that he was not given the opportunity to purchase the Property and that this failure resulted in damages for which he demands to be compensated.

Plaintiff states that the Property was initially purchased by Defendant Brighton 5 Equities, LLC (“Defendant Brighton”) on June 7, 2017 for \$290,000. Plaintiff contends that this was clearly a purchase price less than the proposed offer price Plaintiff had allegedly communicated to his brokers, Defendants Gelfand Realty, Inc., Boris Gelfand and Artur Komov (hereinafter the “Gelfand Defendants”). The Plaintiff also alleges in his amended complaint that the Property was thereafter sold by Brighton to non-party 3058 Bracha, LLC (hereinafter “Bracha”) for \$700,000.00. The Plaintiff further claims that thereafter, Defendant Bracha conveyed the property, to non-party Ohy, LLC (hereinafter “Ohy”) for \$1,750,000.00, on April 16, 2018.

On January 17, 2020, this Court issued a Decision and Order in relation to a motion (motion sequence #1) made by Defendant Peerless and a motion (motion sequence #2) made by the Plaintiff. Defendant Peerless moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint in its entirety. The Plaintiff cross-motion sought leave of the Court to amend the complaint in order to add additional defendants. The Decision and Order dismissed the Plaintiff’s first, second, third and sixth causes of action against Defendant Peerless. The first cause of action in the initial complaint was for breach of contract as against Defendant Peerless. The Court found that a breach of contract claim was not properly plead, as the Plaintiff failed to state that an agreement existed between the Plaintiff and Peerless. The second and third causes of action for negligence and negligent misrepresentation, respectively, were also dismissed. These causes of action were dismissed because the Court found that the Plaintiff failed to show that 1) Peerless had a duty to

the Plaintiff and 2) that the Plaintiff had reasonably relied upon some misrepresentation made to the Plaintiff by Peerless. This Decision and Order denied Peerless' application to dismiss the causes of action for unjust enrichment, and fraud and deceit, and the cause of action against Defendant Dinerman based upon alleged *ultra vires* actions. The Decision and Order also granted the Plaintiff's application to serve a supplemental summons and amended complaint that added Gelfand Realty, Inc., Boris Gelfand and Artur Komov as Defendants.

The Plaintiff thereafter filed his amended complaint through NYSCEF on June 2, 2020. Plaintiff's amended complaint raises causes of action against the Gelfand Defendants for breach of contract, negligence, negligent misrepresentation, unjust enrichment, fraud and deceit, and breach of fiduciary duty. The Plaintiff also seeks damages against Defendants Boris Gelfand and Artur Komov personally. The Plaintiff's amended complaint also raises causes of action against Defendant Peerless for unjust enrichment, and fraud and deceit, and seeks damages against Defendant Dinerman personally. Finally, the amended complaint asserts causes of action against Defendants Brighton 5 Equities, LLC, Odelia M. Berlianshik, Adell Realty Group, and Malkiel Berlianshik (hereinafter referred to individually or collectively as the "Brighton Defendants") for negligence, negligent misrepresentation, unjust enrichment, fraud and deceit, and breach of fiduciary duty. The Plaintiff also seeks damages against Defendants Odelia M. Berlianshik and Malkiel Berlianshik, personally, as the purported principals of Defendants Adell Realty Group and Brighton 5 Equities, respectively.

Defendant Peerless now moves (motion sequence #3) for an Order pursuant to CPLR 2221(d), granting Defendant Peerless leave to reargue the prior motion as it relates to the Decision and Order of this Court dated January 17, 2020 (the "Prior Decision"). Specifically, the motion seeks to reargue and ultimately dismiss the Plaintiff's surviving causes of action as against the



Peerless Defendants, namely the fourth cause of action for unjust enrichment, the fifth cause of action for fraud and deceit and the seventh cause of action seeking personal liability as against Defendant Dinerman. The motion also seeks to dismiss these causes of action as reflected in the Plaintiff's amended complaint as well. As to the Plaintiff's cause of action for unjust enrichment, the Peerless Defendants contend that the cause of action is insufficiently plead as it "fails to allege that defendant received something of value which belongs to the plaintiff." (See Plaintiff's Memorandum of Law, Page 5). As to the cause of action for fraud and deceit, the Plaintiff argues that it should be dismissed as "neither the Complaint nor the Amended Complaint contains a material misrepresentation, or a material omission of fact made by Peerless or Dinerman to the Plaintiff which was false and which Peerless or Dinerman knew to be false." (See Plaintiff's Memorandum of Law, Page 10). Finally, as to the cause of action seeking personal liability against Defendant Dinerman, the Peerless Defendants contend that the Plaintiff did not sufficiently plead facts showing that Defendant Dinerman "exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff." (See Plaintiff's Memorandum of Law, Page 15).

The Plaintiff opposes this motion and argues that it should be denied. The Plaintiff contends that the Court did not previously misapprehend the law as it relates to its Prior Decision and that the motion made by the Peerless Defendants are identical to those arguments made and considered by the Court. Further, the Plaintiff contends that the relationship between the Plaintiff and the Peerless Defendants is not too attenuated as to bar an action for unjust enrichment, as "property acquisitions frequently involve brokers on both sides of a property acquisition." (See Plaintiff's Affirmation in Opposition, Paragraph 19). As to the Plaintiff's cause of action for fraud and deceit,

the Plaintiff contends that the alleged failure of the Peerless Defendants to communicate the Plaintiff's offer "was made for the purpose of inducing the plaintiff to rely upon a belief such offer was made." (See Plaintiff's Affirmation in Opposition, Paragraph 26).

The Gelfand Defendants makes a pre-answer application (motion sequence #4) for an Order pursuant to CPLR 3211(a)(1) and (7), seeking to dismiss the Plaintiff's Amended Complaint as it relates to the Gelfand Defendants. The Gelfand Defendants acknowledge that they acted as brokers for the Plaintiff but contend that they duly communicated the Plaintiff's offer to the Peerless Defendants regarding the Property, but that these communications were ignored. The Gelfand Defendants contend that a breach of contract claim cannot be sustained without a contract, and that the other claims against the Gelfand Defendants should be dismissed based upon the affidavit of Defendant Artur Komov. In opposition, the Plaintiff contends that the motion by the Gelfand Defendants should be denied as it fails to satisfy the standards of CPLR 3211(a)(1) and (7).

### Motion Sequence #3

The Court finds that the motion by the Peerless Defendants should be treated solely as one made pursuant to CPLR 2221 and not one made pursuant to CPLR 3211(a)(7). In general, an original complaint is superseded by the amended complaint. *See Golia v. Vieira*, 162 AD3d 863, 864, 80 N.Y.S.3d 297, 298 [2d Dept 2018]. "The original complaint is no longer viable, inasmuch as the amended complaint 'takes the place of the original pleading.'" *Taub v. Schon*, 148 AD3d 1200, 1201, 51 N.Y.S.3d 127, 129 [2d Dept 2017], quoting *100 Hudson Tenants Corp. v. Laber*, 98 A.D.2d 692, 470 N.Y.S.2d 1, 1 [1<sup>st</sup> Dept 1983]. However, a second motion cannot seek dismissal on the same grounds raised during a prior motion, even where an amended complaint

has been filed, if that subsequent motion seeks dismissal of the same claims. See *B.S.L. One Owners Corp. v. Key Int'l Mfg., Inc.*, 225 AD2d 643, 643, 640 N.Y.S.2d 135, 136 [2d Dept 1996]. Instead, a party must seek to address a prior decision, even where a subsequent amended complaint has been filed, by seeking to reargue the prior determination. See *Ramos v. City of New York*, 51 AD3d 753, 754, 858 N.Y.S.2d 702, 703 [2d Dept 2008]. As a result, that aspect of the motion by the Peerless Defendants seeking dismissal pursuant to CPLR 3211(a)(7) is denied.

“A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.” *McGill v. Goldman*, 261 AD2d 593, 594, 691 N.Y.S.2d 75, 76 [2d Dept 1999]. What is more, “a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented.” *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375, 781 N.Y.S.2d 125, 126 [2d Dept 2004]. Also, a motion for leave to reargue is not an opportunity for a litigant to reargue issues previously addressed and decided. See *Anthony J. Carter, DDS, P.C. v. Carter*, 81 AD3d 819, 820, 916 N.Y.S.2d 821 [2d Dept, 2011].

#### Unjust Enrichment

The Peerless Defendants contend that the Court was incorrect as it relates to that aspect of the Prior Decision which denied its application to dismiss the Plaintiff's cause of action against Peerless for unjust enrichment. The Peerless Defendants contend that the Plaintiff's cause of action for unjust enrichment fails to allege a necessary element of an unjust enrichment claim, namely that any of the Peerless Defendants received and retained something of value that belonged to the Plaintiff. Both the complaint and amended complaint state that “Defendants have withheld



information from the Plaintiff and Seller.” The cause of action thereafter alleges that “Defendants have therefore been unjustly enriched at the expense of the Plaintiff by profiting from having the subject property sell at a significantly reduced amount.” In the underlying Decision and Order the Court noted that “[t]he 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.” *Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC*, 114 A.D.3d 888, 889, 981 N.Y.S.2d 135, 137 [2<sup>nd</sup> Dept, 2014]. In furtherance thereof, the Court found that the Plaintiffs had sufficiently plead a cause of action for unjust enrichment in as much as “the Plaintiff states in his Complaint that the Moving Defendants have withheld information and as a result have ‘been unjustly enriched at the expense of the Plaintiffs, by profiting from having the subject property sell at a significantly reduced amount.’” After a review of the instant application, the Court finds that the Plaintiff has failed to properly plead a cause of action for unjust enrichment given that it did not make reference to the Peerless defendants having received and retained something of value that belonged to the Plaintiff. See *Goel v. Ramachandran*, 111 AD3d 783, 791, 975 N.Y.S.2d 428, 438 [2d Dept 2013]. Moreover, there is no indication that the Plaintiff had any communication with Peerless. As a result, the Court modifies the Prior Decision as it relates to this cause of action for unjust enrichment and it is hereby dismissed as against the Peerless Defendants.

The Peerless Defendants also contend that the Court was incorrect as it relates to that aspect of the Prior Decision which denied Peerless’ application to dismiss the Plaintiff’s cause of action against it for fraud and deceit. The Peerless Defendants argue that the Plaintiff did not plead in either his complaint or his amended complaint that any of the Peerless Defendants had made a material misrepresentation upon which the Plaintiff relied. The Peerless Defendants contend that any allegations of misrepresentation were made by other Defendants and that any attribution by



those Defendants to the Peerless Defendants is not sufficient to maintain a cause of action for Fraud and Deceit. In the original complaint the Plaintiff alleged that “Defendants represented to the Plaintiff that the real estate transaction that he was involved with, and in which he presented an offer, was a legitimate transaction.” The amended complaint, which now references the additional parties, makes no new allegations regarding the Peerless Defendants. Accordingly, the Court finds that the complaint and the amended complaint fail to set forth any dates or details of the Peerless Defendants alleged misstatements or misrepresentations. See *Lee Dodge, Inc. v. Sovereign Bank, N.A.*, 148 AD3d 1007, 1008, 51 N.Y.S.3d 531, 533 [2d Dept 2017]. As a result, the Court modifies the Prior Decision as it relates to this cause of action for fraud and deceit and it is hereby dismissed as against the Peerless Defendants. What is more, given that the remaining causes of action have been dismissed after reargument, the afore-referenced cause of action as against Defendant Dinerman personally is also dismissed.

#### Motion Sequence #4

**On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.**

*Kinnear v. Cefoli*, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, “[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” Furthermore, “[a]lthough on a motion to dismiss plaintiff’s allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal

conclusions with no factual specificity - are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

**“[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84 NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).**

*Feggins v. Marks*, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019]

The Court denies the Gelfand Defendants’ application made pursuant to CPLR 3211(a)(1). The Gelfand Defendants contend that the affidavit of Artur Komov in conjunction with documentation, including an email and other communications, conclusively disposes of the Plaintiff’s claim. The affidavit of Defendant Arthur Komov recounts the relationship between the Plaintiff and the Gelfand Defendants in connection with the Premises in some detail and concludes that the Gelfand Defendants “properly communicated Plaintiff’s offer to the Peerless Defendants, we have met our obligations to the Plaintiff and the Complaint and Amended Complaint should be dismissed. It is, moreover, in our interest to communicate every offer in order to make a profit.” (See Gelfand Defendant’s Motion, Komov Affidavit, Paragraph 20). However, this is insufficient to meet the standard of CPLR 3211(a)(1). “A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” *Sullivan v. State*, 34 AD3d 443, 445, 824 N.Y.S.2d 135, 136 [2d Dept 2006], quoting *Nevin v. Laclede Profl. Prod., Inc.*, 273 AD2d 453, 711 N.Y.S.2d 735 [2d Dept



2000]. In the instant matter, the affidavit by Defendant Arthur Komov is insufficient to meet the standards set forth by CPLR 3211(a)(1). However, “[n]either affidavits, deposition testimony, nor letters are considered ‘documentary evidence within the intendment of CPLR 3211(a)(1).’” *Granada Condo. III Ass’n v. Palomino*, 78 AD3d 996, 997, 913 N.Y.S.2d 668, 669 [2 Dept 2010].

Turning to the merits of the Defendants’ application made pursuant to CPLR 3211(a)(7), the Court finds that the Gelfand Defendants’ motion is granted as it relates to the Plaintiff’s First Cause of Action in the Amended Complaint for Breach of Contract. The Plaintiff states in his Amended Complaint (Paragraph 32) that the “Plaintiff entered into a written agreement in which the Plaintiff offered to purchase the subject premises, for the sum of \$550,000.00, with the expectation that the offer would be submitted to the Seller for consideration.” The Plaintiff also alleges (Paragraph 33) that “[o]n or about May 4, 2017, a written offer to purchase the subject premises was signed and submitted by Plaintiff, and on or about May 3, 2017, a multiple offer procedure form was signed by the Plaintiff and submitted to the Defendants Gelfand Realty Inc, Boris Gelfand and Artur Komov.”

As this Court found in the Prior Decision in relation to the Plaintiff’s previously dismissed breach of contract claim as against the Peerless Defendants, the Plaintiff has not stated that an agreement existed between himself and the Gelfand Defendants. “The essential elements of a breach of contract cause of action are ‘the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach.’” *Canzona v. Atanasio*, 118 A.D.3d 837, 838, 989 N.Y.S.2d 44, 47 [2<sup>nd</sup> Dept, 2014], *quoting Dee v. Rakower*, 112 A.D.3d 204, 976 N.Y.S.2d 470 [2<sup>nd</sup> Dept, 2013]. Here, “[t]he plaintiff’s allegations regarding the alleged oral agreement were too vague and indefinite to plead a breach of contract cause of action.” *Canzona v. Atanasio*, 118 A.D.3d 837, 839, 989



N.Y.S.2d 44, 47 [2<sup>nd</sup> Dept, 2014]. The Plaintiff simply appears to indicate that he made an offer that was submitted to the Gelfand Defendants and that the offer was not conveyed. Given that no contract existed between the Plaintiff and the Gelfand Defendants, a breach of contract claim cannot survive. As a result, the Gelfand Defendants' motion is granted as it relates to the Plaintiff's First Cause of Action in the Amended Complaint for Breach of Contract. The Plaintiff does not allege a contractual relationship with Gelfand.

The remainder of the Gelfand Defendants' application made pursuant to CPLR 3211(a)(7) is denied. The Gelfand Defendants allege in their memorandum of law (Page 6) that the remaining causes of action in which they are named should be dismissed as "the allegations levelled against the Moving Defendants amount to 'factual claims which are flatly contradicted by the evidence' and as such, cannot be presumed to be true, even on a motion to dismiss." What is more, the Gelfand Defendants also state that they have fulfilled all that was required of them and the Complaint and Amended Complaint should be dismissed. (See Motion by Gelfand Defendants, Komov Affidavit, Paragraph 20). However, this is not the standard. Defendant has not shown that there is no significant dispute. The Plaintiff has asserted sufficient allegations as part of his amended complaint to articulate his causes of action. "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Makris v. Darus-Salaam Masjid, New York, Inc.*, 91 AD3d 729, 730, 936 N.Y.S.2d 325, 326 [2d Dept 2012]. However, "on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to

rebut a defense asserted by the moving party” *Sokol v. Leader*, 74 AD3d at 1181, 904 N.Y.S.2d 153 [2d Dept.2010]. As a result, the remainder of the Gelfand Defendants’ motion is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

The motion by the Peerless Defendants (motion sequence #3) is granted. The action and any cross-claims are dismissed as against the Peerless Defendants, namely, Defendants Peerless Properties Corp. and Richard Dinerman.

The motion by the Gelfand Defendants (motion sequence #4) is granted solely to the extent that the Plaintiff’s cause of action against the Gelfand Defendants for Breach of Contract is dismissed. The Gelfand Defendants shall have 30 days from service of notice of entry of this Decision and Order to interpose an answer.

The caption is amended and shall read as follows:

-----X  
ALBERT COHEN,  
*Plaintiff,*

Index No.: 522238/2018

-against-

ADELL REALTY, GROUP, INC.,  
ODELIA M. BERLIANSHIK, BRIGHTON 5  
EQUITIES, LLC, MALKIEL BERLIANSHIK, AVI  
ROSENGARTEN, GELFAND REALTY INC., BORIS  
GELFAND and ARTUR KOMOV,  
*Defendants.*

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This constitutes the Decision and Order of this Court.

ENTER:

  
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Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK  
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