NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VICTOR OLTEANU,

Plaintiff,

- against -

MOTEK GROUP NY LLC a/k/a MOTEK GROUP LLC, JOE MASHIEH, OREN KRAIEM, DENNIS HOME INSPECTION LLC, SEYUN BACH, AMIRIAN, SOLEIMAN & ASSOCIATES, LLP, and MY HOME ADVISORS, LLC,

Defendants.

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Index No. **32556/2020E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 3, read on this motion, noticed on 5/9/2022, and duly submitted as no. 5 on the Motion Calendar of 5/9/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendant Oren Kraiem's motion to dismiss the complaint is decided in accordance with the Decision and Order annexed hereto.

Dated:
7/6/22

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: September 12, 2022 at 3:00 p.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VICTOR OLTEANU,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **32556/2020E**

MOTEK GROUP NY LLC a/k/a MOTEK GROUP LLC, JOE MASHIEH,[1] OREN KRAIEM, DENNIS HOME INSPECTION LLC, SEYUN BACH, AMIRIAN, SOLEIMAN & ASSOCIATES, LLP, and MY HOME ADVISORS, LLC,

Defendants.

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Defendant Oren Kraiem ("Defendant") moves pursuant to CPLR 3211(a)(5) and (a)(7) for an order dismissing the second cause of action for unjust enrichment as pled against him in the Second Amended Verified Complaint (the "Second Complaint"). Plaintiff Victor Olteanu ("Plaintiff") opposes.

For the reasons which follow, Defendant's motion is denied.

BACKGROUND:

On October 27, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint. The complaint alleged causes of action for fraud, conspiracy to defraud, and fraudulent misrepresentation as against Defendant. It did not allege a cause of action for unjust enrichment against Defendant.

On January 22, 2021, Defendants Motek Group NY LLC ("Motek NY"), Motek Group LLC ("Motek"), and Joe Mashieh ("Mashieh") (collectively, the "Motek Defendants")[2] moved to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (a)(7).

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[1] This Court's Decision and Order dated May 20, 2022 ordered Plaintiff to file and serve a copy of the Second Amended Verified Complaint, removing Motek and Mashieh from the caption. It appears that Plaintiff has yet to comply with this directive.

[2] Motek and Mashieh were dismissed from this action by the Court's (McShan, J.) Decision and Order dated January 19, 2022. However, the Court will use the designation "the Motek Defendants" in this Decision and Order for simplicity's sake.

On February 8, 2021, Plaintiff filed a cross-motion to the Motek Defendants' motion to dismiss, seeking leave to amend the complaint pursuant to CPLR 3025(b) to add causes of action for conversion and unjust enrichment, and to add certain defendants.

On March 10, 2021, Defendant filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

On January 19, 2022, the Court (McShan, J.) issued a Decision and Order on the Motek Defendants' motion to dismiss the complaint, and Plaintiff's cross-motion for leave to amend the complaint. In that Decision and Order, the Court (McShan, J.) held that Plaintiff's proposed Amended Verified Complaint sufficiently pled the cause of action for unjust enrichment, and granted Plaintiff's application to amend his pleadings to include My Home Advisors, LLC ("MHA") as an additional defendant.

On January 20, 2022, the Court (McShan, J.) issued a Decision and Order on Defendant's prior motion to dismiss. In that Decision and Order, the Court dismissed the fraud, conspiracy to defraud, and fraudulent misrepresentation causes of action against Defendant.

On February 15, 2022, Plaintiff filed the Amended Verified Complaint (the "Amended Complaint"). The Amended Complaint included a cause of action for unjust enrichment against Motek NY[3] and Defendant and MHA (the "MHA Defendants"). The cause of action is identical to that which was included in the proposed Amended Verified Complaint.

On March 3, 2022, Plaintiff filed the Second Complaint. The Second Complaint alleges a cause of action for unjust enrichment against Motek NY and the MHA Defendants. It is identical to that which was included in the Amended Complaint.

The Second Complaint alleges that Motek sold the home located at 2779 Marion Avenue, Bronx, NY (the "Property") to Plaintiff (Second Compl., ¶ 16).

Plaintiff alleges that Defendant was the listing agent for the Property (Second Compl., ¶ 18), and that he acted as an agent for MHA, a real estate firm, and the Motek Defendants with respect to the sale of the Property (Second Compl., ¶ 19-20).

The Second Complaint alleges that Plaintiff contacted Defendant and MHA (the "MHA Defendants"), the brokers for the Property, as he was interested in purchasing the Property (Second Compl., ¶ 30-31). Plaintiff alleges that Defendant acted as an agent for MHA in representing the

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[3] The Amended Complaint alleges the cause of action against Motek NY only, whereas the proposed Amended Verified Complaint alleged it against the Motek Defendants.

Property (Second Compl., ¶ 32). Plaintiff alleges that he decided to purchase the Property, relying on the representations made in the listing and the representations made by the MHA Defendants that all of the renovations would be completed prior to closing (Second Compl., ¶ 35). Plaintiff alleges that based on the listing and the misrepresentations made by the MHA Defendants, as well as a home inspection report issued by Dennis Home Inspection, LLC, he entered into a Residential Contract of Sale with the Motek Defendants dated July 24, 2018 (Second Compl., ¶ 41).

Plaintiff alleges that the closing for the Property occurred on or around October 11, 2018 (Second Compl., ¶ 44). Plaintiff alleges that on the morning of the closing, Plaintiff and the MHA Defendants met at the Property to do a final walk through of the Property (Second Compl., ¶ 45). Plaintiff alleges that at the walk through, the MHA Defendants reiterated to Plaintiff that the Property had been newly renovated and stated that: (a) the roof was new, (b) all renovations were complete, and (c) that, as a result of the renovations, the Property had increased in value by hundreds of thousands of dollars (Second Compl., ¶ 46). However, Plaintiff alleges that there were issues with the Property, such as water on the kitchen floor, unconnected gas boiler, and mold on the basement walls (Second Compl., ¶ 47-53). Plaintiff alleges that the MHA Defendants told him that the water on the kitchen floor was from the window having been left overnight, and that it would dry. Plaintiff alleges that these statements were fraudulent and were misrepresentations intended to induce him to continue with the closing (Second Compl., ¶ 48-50). Plaintiff alleges that the MHA Defendants assured him that the Motek Defendants would fix the mold at their cost (Second Compl., ¶ 54).

The Second Complaint alleges that Plaintiff discovered additional damage to the kitchen floor after taking possession of the Property, which had been knowingly and intentionally concealed by the Motek Defendants and the MHA Defendants (Second Compl., ¶ 62). Plaintiff also alleges that he was advised by his homeowners' insurance company that the roof was in a defective condition prior to his purchase of the Property (Second Compl., ¶ 68). Plaintiff further alleges that although at the walk through prior to the closing, every room had a gas baseboard heater, when Plaintiff took possession of the Property, every gas baseboard heater had been removed and replaced with an electric heater without his knowledge or permission (Second Compl., ¶ 82).

Plaintiff alleges that Motek NY and the MHA Defendants were enriched in that they received the full amount of the purchase price for the Property from Plaintiff (Second Compl., ¶ 132). Plaintiff alleges that he paid the purchase price to Motek NY, and MHA received a

commission on the purchase (Second Compl., ¶ 133). Plaintiff alleges that it is against equity and good conscience to allow Motek NY and the MHA Defendants to retain the full amount of the purchase price for the Property because, although it was advertised as fully renovated, the Property required multiple repairs, costing Plaintiff more than $200,000.00 (Second Compl., ¶ 134). As a result, Plaintiff seeks judgment against Motek NY and the MHA Defendants,[4] jointly and severally, in the amount of at least $750,000.00, plus punitive damages (Second Compl., ¶ 135).

On April 4, 2022, Defendant filed the instant motion. On May 9, 2022, the motion was marked fully submitted.

DISCUSSION:

Law of the Case:

"The doctrine of LOTC [law of the case] is a rule of practice premised upon sound policy that once an issue is judicially determined, further litigation of that issue should be precluded in a particular case" (*In re Part 60 RMBS Put – Back Litigation*, 195 AD3d 40, 47 [1st Dept 2021]).

"While it shares some characteristics of a larger family of kindred concepts, including res judicata and collateral estoppel, it is not identical. All these concepts contemplate that the party opposing preclusion had a full and fair opportunity to litigate the underlying determination. LOTC [law of the case], however, differs in that it only addresses the potentially preclusive effect of judicial determinations made during a single litigation and before a final judgment is rendered. In addition, while res judicata and collateral estoppel are 'rigid rules of limitation,' LOTC [law of the case] has been described as 'amorphous' and involving 'an element of discretion'" (*Id. at 47-48*; *Aspen Specialty Ins. Co. v RLI Ins. Co., Inc.*, 194 AD3d 206, 212 [1st Dept 2021]). Law of the case "requires that the underlying legal determination on which preclusion is based was resolved on the merits". As such, law of the case "is more like collateral estoppel, which precludes only those issues that have actually been litigated" (*In re Part 60 RMBS* at 48; *Katz v Hampton Hills Associates General Partnership*, 186 AD3d 688, 690 [2d Dept 2020]).

"[I]n determining whether law of the case applies, the procedural posture and evidentiary burdens of the litigants must be considered" (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012]).

[4] The Second Complaint states that judgment should be granted against Motek NY and Dennis Home (Second Compl., ¶ 135). The preceding paragraphs, as well as the wherefore clause, demonstrate that Plaintiff intended to make the allegations against the MHA Defendants, not Dennis Home.

Here, on January 19, 2022, the Court (McShan, J.) issued a Decision and Order on Plaintiff's cross-motion to amend the complaint. In that Decision and Order, the Court found that the proposed cause of action for unjust enrichment was sufficiently pled. Contrary to Plaintiff's argument, this holding is not law of the case so as to bar the instant motion to dismiss. The motion on which the Court made its decision was a motion to amend the complaint. There is a difference in procedural posture between a motion to amend and a motion to dismiss. The former requires that the proponent establish that the pleading not be patently devoid of merit (*US Bank, N.A. v Murillo*, 171 AD3d 984, 985-986 [2d Dept 2019]), while the latter requires that the proponent establish that the pleading fails to state a cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). As such, the doctrine of the law of the case does not apply here (*See Katz* at 690; *see also A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 107 AD3d 503, 503 [1st Dept 2013]).

Accordingly, the Court has considered Defendant's motion.

CPLR 3211(a)(5) - Collateral Estoppel:

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 5. the cause of action may not be maintained because of . . . collateral estoppel . . ."

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity" (*Buechel v Bain*, 97 NY2d 295, 303 [2001]), "whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determinations" (*Buechel* at 303-304; *Blanc-Kousassi v Carrington*, 144 AD3d 470, 471 [1st Dept 2016]; *Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006]; *Coleman v J.P. Morgan Chase Bank, N.A.*, 190 AD3d 931, 932 [2d Dept 2021]; *Lennon v 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 69 [2d Dept 2021]). However, the doctrine of collateral estoppel is flexible, and "the enumeration of these elements is intended

merely as a framework, not a substitute, for case-by-case analysis of the facts and realities. 'In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of . . . fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*Buechel* at 304; *In re Hofmann*, 287 AD2d 119, 123 [1st Dept 2001]). "[C]laim preclusion never arises between codefendants in a prior action unless they represented adverse interests in the prior action as to a claim that was in fact litigated between them" (*Rojas v Romanoff*, 186 AD3d 103, 110 [1st Dept 2020]).

"A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of 'the realities of the [prior] litigation,' including the context and other circumstances which * * * may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him. Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation" (*Ryan* at 501).

Here, Defendant has not demonstrated that "the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party" (*Buechel* at 303-304). Defendant merely argues that:

> Regarding his motion to move on the grounds of collateral estoppel or issue preclusion, the annexed decisions on prior motions to dismiss claims in the first summons and complaint, properly decided certain facts, submitted by documents from the Defendants, that should preclude the elements of unjust enrichment. Particularly as the [sic] concern the attenuated benefit received by moving Defendant and the inability to plead a benefit to moving Defendant (Defendant's Memorandum of Law, p. 3).

Saliently, Defendant's motion fails because there has been no prior action, the *sine qua non* for the application of collateral estoppel.

Moreover, other than attaching all of the prior Decisions and Orders issued in this action, Defendant makes no other argument in support of his motion for dismissal pursuant to CPLR 3211(a)(5). Defendant does not refer to or cite any portion of the prior Decisions and Orders in support of his motion.

The Decision and Order dated January 20, 2022, which decided Defendant's prior motion to dismiss, only considered the three causes of action then being alleged against Defendant: fraud, conspiracy to defraud, and fraudulent misrepresentation. There was no unjust enrichment cause of action being alleged at that time, and no motion to dismiss a cause of action for unjust enrichment, which did not exist at that time. In that Decision and Order, the Court granted Defendant's prior motion to dismiss, finding that "Plaintiff failed to allege scienter; and although Plaintiff alleges reliance, he fails to allege reasonable reliance upon Defendant's alleged misrepresentations" (Decision and Order dated January 20, 2022, p. 5). The Court also found that "Plaintiff's failure to plead justifiable reliance is fatal to his second and fourth causes of action rooted in fraud as alleged against Kraiem" (Decision and Order dated January 20, 2022, p. 6). The Court dismissed the civil conspiracy cause of action, finding that "there is no other defendant committing the alleged conspiracy to defraud and the underlying tort claims have been dismissed" (Decision and Order dated January 20, 2022, p. 6). The Decision and Order does not state anywhere that the Court made any determinations as to whether Defendant has or has not received a benefit or as to whether Plaintiff does or does not have the ability to plead a benefit received by Defendant. Again, Defendant does not refer to or cite to any portion of the other prior Decisions and Orders to demonstrate when and if the Court made a determination on this issue.

Accordingly, Defendant's motion to dismiss the Second Complaint pursuant to CPLR 3211(a)(5) based on collateral estoppel is denied.

CPLR 3211(a)(7):

CPLR § 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action."

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'.

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [". . . affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'"]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]). The facts alleged in such affidavits must also be assumed to be true (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Id.; Cruciata v O'Donnell*, 149 AD3d 1034 [2d Dept 2017]).

A complaint must contain all essential facts to provide notice of the claim asserted (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Accordingly, vague and conclusory allegations will not suffice (*Id.* at 239; *Fowler v American*, 306 AD2d 113, 113 [1st Dept 2003]) and a complaint suffering such affliction ought to be dismissed for failure to state a cause of action (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1994]; *O'Riordan v Suffolk Chapter*, 95 AD2d 800, 800 [2d Dept 1983]).

"When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff has stated a cause of action to whether it has one'. . . . [I]f the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]). However, "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" (*Baumann v Hanover Community Bank*, 100 AD3d 814, 816 [2d Dept 2012]; *Paino v Kaieyes Realty, LLC*, 115 AD3d 656, 657 [2d Dept 2014]).

Generally, affidavits submitted on a motion to dismiss pursuant to CPLR 3211(a)(7) are "intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Even if an affidavit submitted by a defendant to attack the sufficiency of a pleading is considered, it "will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] conclusively establishes that plaintiff has no cause of action" (*Basis Yield Alpha Fund (Master)*, 115 AD3d 128 at 134; *see also Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]).

"The theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Mannino v Wells Fargo Home Mortg., Inc.*, 155 AD3d 860, 862 [2d Dept 2017] [internal quotation marks omitted]). "The essential inquiry in any action for unjust enrichment … is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To plead a cause of action for unjust enrichment, "a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mannino* at 862). Moreover, "[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd.* at 182; *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011] ["although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part"]).

Defendant makes a number of arguments pursuant to CPLR 3211(a)(7). Defendant first argues that the complaint does not allege a cause of action for unjust enrichment, because it does not state that Defendant was enriched. This argument is without merit. Plaintiff alleges in paragraph 132 of the Second Complaint that: "Motek NY and the MHA Defendants were enriched in that, inter alia, they received the full amount of the purchase price for the Property advertised as fully renovated from top to bottom from Plaintiff" (Second Compl., ¶ 132). The Second Complaint defines "MHA Defendants" as Defendant and MHA (Second Compl., p. 1).

Defendant also argues that Defendant's alleged enrichment is too attenuated from Plaintiff, as the monies of alleged enrichment passed through two intermediaries before Defendant received any payments. This argument is without merit. The Second Complaint sufficiently pleads direct contact and a relationship with Defendant that could have caused reliance or inducement (*See, e.g., Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408-409 [1st Dept 2011] ["Further, although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part"]). The Second Complaint alleges, *inter alia*, that: Defendant was the listing agent for the Property (Second Compl., ¶ 18), that Defendant acted as an agent for MHA and the Motek Defendants with respect to the sale of the Property (Second Compl., ¶ 19), that Plaintiff

contacted the MHA Defendants, brokers for the Property, as he was interested in purchasing the Property, and that Defendant acted as an agent for MHA in representing the Property (Second Compl., ¶ 30-32), that Plaintiff decided to purchase the Property based upon the representations made in the listing and the representations made by the MHA Defendants (Second Compl., ¶ 35), that at the walk through, the MHA Defendants reiterated that the Property had been newly renovated, that the roof was new, all renovations were complete, and that the Property had increased in value (Second Compl., ¶ 46), and that the MHA Defendants represented to Plaintiff that the water on the kitchen floor would dry, which was intended to induce Plaintiff to continue with the closing (Second Compl., ¶ 48-50). Plaintiff also alleges that Motek NY and the MHA Defendants were enriched as they received the full amount of the purchase price for the Property (Second Compl., ¶ 132).

The two cases Defendant cites are inapposite to the facts at hand. In *Mandarin Trading, Ltd. v Wildenstein,* (16 NY3d 173 [2011]), the Court found that the plaintiff's unjust enrichment cause of action failed because the pleadings did not allege a relationship between the parties. Likewise, in *Georgia Malone & Co., Inc. v Rieder,* 19 NY3d 511 [2012], the Court affirmed the dismissal of the cause of action for unjust enrichment against Rosewood, finding that "the relationship between Malone [plaintiff] and Rosewood is too attenuated because they simply had no dealings with each other" (*Georgia Malone & Co., Inc.* at 517-518). The Court went on to state that "the complaint does not assert that Rosewood and Malone had any contact regarding the purchase transaction" (*Id.* at 518). As explained above, the Second Complaint sufficiently alleges direct contact and a relationship with Defendant.

Finally, Defendant argues that the unjust enrichment cause of action must be dismissed because there is an agreement between him and MHA, his employer, which governs his receipt of commission. This argument is without merit. It is true that "[w]here the parties execute[d] a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*Ashwood Capital, Inc. v OTG Management, Inc.*, 99 AD3d 1, 10 [1st Dept 2012]; *Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 112 [1st Dept 2005]). However, here, Defendant submitted no evidence in support of this argument. Defendant's affidavit does not mention any agreement for commission between him and MHA. The only place Defendant mentions this alleged agreement is in the memorandum of law, authored by counsel, who does not purport to

have any personal knowledge regarding any such agreements. As such, Defendant has not demonstrated that there is a contract governing the subject matter at hand.[5]

The Court notes that Defendant submitted a copy of his affidavit submitted with his prior motion to dismiss (Defendant's Exhibit D). An affidavit does not constitute documentary evidence (*Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]). In any case, Defendant's affidavit merely contradicts the allegations in the Second Complaint, and at best, raise questions of fact insufficient to warrant a dismissal of the complaint (*Basis Yield Alpha Fund (Master)*, 115 AD3d 128 at 134).[6]

Accordingly, Defendant's motion to dismiss the Second Complaint against him pursuant to CPLR 3211(a)(7) is denied.

It is hereby

ORDERED that this matter is scheduled for a **Preliminary Conference** on **September 12, 2022, at 3:00 p.m.** It is further

ORDERED that the Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 7/6/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

[5] The Court also notes that the fact pattern in *Colon v Teicher*, 8 AD3d 606 [2d Dept 2004] is dissimilar to that at issue in this action. In *Colon*, plaintiff, a real estate salesperson, sued defendant, a seller of estate property, alleging that he had been unjustly enriched by permitting a second salesperson from another firm to intervene to complete the sale that plaintiff had been arranging, and that as a result, she had lost her commission. The court in *Colon* found that the unjust enrichment cause of action was barred as plaintiff was only entitled to receive commission from her employer, with whom she had an agreement for the receipt of commission.

By contrast, here, Plaintiff, a buyer of real property, sued Defendant, a listing agent, for unjust enrichment based on his receipt of some portion of the purchase price of the Property. Unlike in *Colon*, Defendant is not suing Plaintiff for lost commissions.

[6] The Court notes that although the affidavit refers to Exhibits, they are not attached to the affidavit and were not submitted with the motion.