

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Moulton, J.P., Mendez, Gesmer, O'Neill Levy, Michael, JJ.

7012 AVAIL HOLDING LLC,
 Plaintiff-Respondent,

Index No. 656431/22
Case No. 2024-07297

-against-

ICM FUNDING LLC et al.,
Defendants-Appellants.

Justin F. Pane, P.C., Bohemia (Justin F. Pane of counsel), for appellants.

Abrams Fensterman, LLP, Lake Success (Rachelle Rosenberg of counsel), for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about October 22, 2024, which, to the extent as appealed from as limited by the briefs, granted so much of plaintiff's motion to dismiss defendants' counterclaims for breach of contract (first counterclaim), unjust enrichment (third counterclaim), and to pierce the corporate veil (fourth counterclaim), granted plaintiff's motion for a protective order and an order quashing defendants' nonparty subpoenas, and denied defendants' cross-motion for vacatur of the note of issue or, in the alternative, for post-note of issue discovery, unanimously modified, on the law, to deny plaintiff's motion insofar as it sought to dismiss the counterclaim for breach of contract and to reinstate that counterclaim, and otherwise affirmed, without costs.

Supreme Court should not have dismissed the counterclaim for breach of contract. On a motion to dismiss we must deem the allegations to be true and afford plaintiff every favorable inference. The allegations in that counterclaim, including the

claim that defendants “fully performed” under the relevant agreements, adequately stated a cause of action (*see* CPLR 3211[a][7]; *Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 135-136 [1st Dept 2017]). Furthermore, we reject plaintiff’s contention that the documentary evidence — namely, an admission in defendants’ original answer that defendant ICM Funding LLC “delivered 45 out of the 59 mortgage loan assignments and related documents to plaintiff,” along with supporting deposition testimony — provides the grounds for dismissal of the counterclaim under CPLR 3211(a)(1). The admission was made in the original answer not in defendants’ joint amended answer, and therefore carries little or no weight. The joint amended answer denied the allegation that ICM Funding had delivered the mortgage loan assignments. The documentary evidence does not utterly refute defendants’ allegations that they fully performed their contractual obligations and does not conclusively dispose of the counterclaim as a matter of law (*see Optical Communications Group, Inc. v Worms*, 217 AD3d 458, 459 [1st Dept 2023]).

The counterclaim for unjust enrichment was properly dismissed, as there is no bona fide dispute as to the existence of a valid contract (*see Kramer v Greene*, 142 AD3d 438, 441-442 [1st Dept 2016]). Moreover, the unjust enrichment counterclaim repeated almost verbatim the same allegations as the counterclaim for breach of contract (*see Shear Enters., LLC v Cohen*, 189 AD3d 423, 425 [1st Dept 2020]).

Moreover, Supreme Court properly dismissed the fourth counterclaim, which purports to interpose a cause of action to pierce the corporate veil. The counterclaim, which alleges facts to support an alter ego recovery against plaintiff’s principal, fails because veil-piercing is not a standalone cause of action (*see Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015]). We note that in

affirming dismissal of the fourth counterclaim, we do not determine that the alter ego allegations were conclusory or otherwise insufficient to support an alter ego finding with respect to the reinstated counterclaim for breach of contract; rather, we merely affirm Supreme Court's finding that there is no independent cause of action for piercing the corporate veil.

Defendants fail to show that Supreme Court abused its discretion in any of its rulings on defendants' discovery-related motions. Nonetheless, Supreme Court may reopen discovery to the extent required by the reinstatement of the counterclaim for breach of contract.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: July 2, 2026

A handwritten signature in black ink, appearing to read "Susanna Molina Rojas". The signature is fluid and cursive, with the first name "Susanna" being more prominent.

Susanna Molina Rojas
Clerk of the Court