SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. **PART** 3
Justice

Index Number : 651526/2011
PHILIPS INTERNATIONAL
vs.
PEKTOR, LOUIS
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO. 651526/2011
MOTION DATE 11/30/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6-7-13

Eileen Branston J.S.C.
EILEEN BRANSTEN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
----------X

PHILIPS INTERNATIONAL INVESTMENTS, LLC,

Plaintiff,

-against-

LOUIS PEKTOR, LISA PEKTOR, CAPITAL TRUST, INC., 3174 AIRPORT ROAD, LP, 3773 CORPORATE PKY, LP, 3701 CORPORATE PKY, LP, 7562 PENN DRIVE, LP, 7355 WILLIAM AVE, LP, 7277 WILLIAM AVE, LP, 947 MARCON BLVD, LP, 964 MARCON BLVD, LP, 954 MARCON BLVD, LP, 944 MARCON BLVD, LP, 764 ROBLE ROAD, LP, 2196 AVE C, LP, 2041 AVE C, 754 ROBLE ROAD, LP, 2202 HANGAR PLACE, LP, 2201 HANGAR PLACE, LP, 1640, 1650 1660 VALLEY CENTER PKY, LP, 1605 VALLEY CENTER PKY, LP, 1560 VALLEY CENTER PKY, LP, 1550 VALLEY CENTER PKY, LP, 1530 VALLEY CENTER PKY, LP, 1525 VALLEY CENTER PKY, LP, 1510 VALLEY CENTER PKY, LP, 1455 VALLEY CENTER PKY, LP, 1495 VALLEY CENTER PKY, LP, 83, 85, 87, 89 S COMMERCE WAY, LP, 57 S COMMERCE WAY, LP,

Defendants.
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Index No. 651526/2011
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BRANSTEN, J.

This matter comes before the Court on Defendants' motion for renewal of their prior motion to dismiss. Specifically, Defendants seek to renew their argument for dismissal of Count Five of the Plaintiff's Complaint, which asserted unjust enrichment

against all twenty-six Limited Partnership defendants (the "Partnership Defendants"). Plaintiff opposes. For the reasons that follow, Defendants' motion is denied.

I. Background[1]

In early 2010, Plaintiff Philips International Investments, LLC ("Philips") and Defendants Louis Pektor and Lisa Pektor (collectively "the Pektors") formed a joint venture (the "Joint Venture") "with the purpose of purchasing, planning, and managing a portfolio of thirty-three commercial and industrial properties in Pennsylvania's Lehigh Valley region" (the "Properties"). (Pektor Affidavit in Support of Motion to Dismiss ("Pektor Aff."), Ex. A ("Compl.") ¶ 36.)

On April 13, 2010, the Joint Venture contracted with Liberty Property Limited Partnership ("Liberty") to purchase the Properties for $131,500,000 (the "Sales Contract" or the "Purchase"). (Compl. ¶ 39.) The Joint Venture formed six limited partnerships to hold title for the Properties (the "Limited Partnerships"). *Id.*

On May 21, 2010, Philips and the Pektors executed a letter agreement memorializing the Joint Venture (the "Joint Venture Agreement"). *Id.* at ¶ 37. The Joint Venture Agreement provided that Philips and the Pektors would each receive fifty percent

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[1] Unless otherwise stated, all facts are taken from this court's decision dated May 21, 2012.

of the profits generated by the Properties. *Id.* at ¶ 38. Philips also agreed to pay for and conduct all due diligence related to the purchase (the "Due Diligence"). *Id.* The Joint venture was to repay Philips' due diligence costs with a 10% annualized preferred return prior to the distribution of the Joint Venture's profits. *Id.* Philips incurred $572,647.69 of due diligence costs. *Id.* at ¶ 42.

While conducting the Due Diligence, Philips "discovered a problem" with respect to one of the Properties then under lease by T-Mobile USA (the "T-Mobile Property") which, Philips alleges, made the Purchase "not economically viable." *Id.* at ¶ 43.

On July 8, 2010, Philips filed for bankruptcy on behalf of the Limited Partnerships. (Pektor Aff., Ex. F.) Philips does not mention the bankruptcy proceeding in the complaint or otherwise explain why it initiated the bankruptcy proceedings. The Pektors claim that they did not consent to the bankruptcy filing. They assert that they believed that the filing was made in bad faith. (Pektor Aff. ¶ 9.) The Pektors did not sign any of the papers submitted in the bankruptcy proceeding. *Id.* at ¶ 10. Following the bankruptcy proceeding, Philips "agreed to having the Joint Venture exercise its termination rights under the Sales Contract." (Compl. ¶ 44.)

Philips claims to have held extensive discussions with the Pektors regarding how to move forward with the Purchase in light of the Limited Partnerships' bankruptcy and the problems with the T-Mobile property. *Id.* at ¶ 44. Phillips alleges that they

considered the possibilities of bringing a lawsuit against Liberty or renegotiating the Purchase to exclude the T-Mobile Property. *Id.* Philips asserts that it relied on these discussions with the Pektors when it agreed to terminate the Sales Contract. *Id.*

Philips alleges that, while discussing the future of the Joint Venture and the Purchase with Philips, the Pektors were secretly negotiating with Capital Trust to purchase the Properties independently of the Joint Venture. (Compl. ¶ 45.) Philips argues that the Pektors induced Philips to terminate the Sales Contract so that they could purchase the Property without Philips. *Id.* at ¶ 47. Philips claims that the Pektors did so in order to keep the benefit of the Philips's expenditures for Due Diligence and other costs of negotiating the Purchase as well as all of the profits that would be generated by the Properties. *Id.*

Finally, Philips claims that on April 6, 2011, the Pektors, acting on behalf of themselves and Capital Trust, formed the Partnership Defendants. Allegedly, the Pektors, acting as agents for Capital Trust, then purchased the Properties from Liberty through the Partnership Defendants. *Id.* at ¶ 49.

Philips brought the instant action on June 2, 2011. Relevant to the instant motion for renewal, Philips asserted a claim for unjust enrichment against the Partnership Defendants. In the Court's May 21, 2012 Opinion, the Court denied Defendants' motion

to dismiss as it pertained to this unjust enrichment claim brought against the Partnership Defendants.

On August 3, 2012, Defendants filed the motion for renewal now pending before the Court.

II. Analysis

Defendants seek renewal of their motion to dismiss the unjust enrichment claim asserted against the Partnership Defendants. In order to carry its burden for a grant of renewal, PMS was required to "demonstrate that there has been a change in the law that would change the prior determination." CPLR 2221(e)(2).

Here, Defendants assert that a Court of Appeals decision issued after this Court's May 21, 2012 Opinion – *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511 (2012) – constituted a "change in the law," justifying renewal under CPLR 2221(e)(2). Defendants point to the dissenting opinion in *Georgia Malone*, arguing that the dissenters' disagreement with the majority regarding the elements necessary to plead unjust enrichment demonstrates that the majority opinion effected a change in the law.

This argument fails to provide a basis for renewal. As an initial matter, a dissenting opinion cannot provide the basis for a renewal motion. Instead, a renewal motion should be predicated on an actual court ruling.

Moreover, to the extent that Defendants argue that the *Georgia Malone* majority opinion effected a "change in law" or a clarification of the law, such argument likewise fails. In *Georgia Malone*, the Court of Appeals affirmed the dismissal of an unjust enrichment claim, citing approvingly to precedent. In particular, the Court cited to two recent decisions – *Sperry v. Crompton*, 8 N.Y.3d 204 (2007) and *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 (2011) – to support its ruling. *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516-19 (2012) 746-48. Thus, while Defendants urge that *Georgia Malone* constitutes a departure from *Sperry* and *Mandarin Trading*, review of the *Georgia Malone* opinion itself demonstrates otherwise.

Accordingly, Defendants have not demonstrated the "change in the law" necessary to support a motion for renewal. *See Jackson v. Westminster House Owners Inc.*, 52 A.D.3d 404, 405 (2008) (denying motion for renewal where asserted "change in law" merely reaffirmed precedent and did not establish new law or clarify prior law).

In addition, the Court notes that Defendants argue for the first time on this motion that Plaintiff fails to allege the "prior contractual or other close relationship with the [] Partnership Defendants" necessary to state an unjust enrichment claim. (Defs.' Moving Br. at 8.) Defendants contend that this argument was "unsettled" prior to *Georgia Malone*. *Id.* However, both *Sperry* and *Mandarin Trading* dismissed unjust enrichment claims on this basis, i.e. for failure to plead a relationship between plaintiff and defendant

that would support an unjust enrichment claim. *See Mandarin Trading Ltd.*, 16 N.Y.3d at 182 ("Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated."); *Sperry*, 8 N.Y.3d at 215-16 (same). Thus, this legal argument was available to Defendants at the time the original motion to dismiss was filed. Defendants simply did not raise it then. Therefore, Defendants cannot raise the argument now in the guise of a "change in law" justifying a motion to renew.

In short, Defendants seek another bite at the apple through this motion for renewal. Defendants did not appeal the Court's prior ruling. Instead, Defendants bring this motion seeking to have the Court reverse its own ruling after Defendants' right to appeal expired. For the reasons noted above, Defendants have not presented a meritorious motion for renewal.

(*Order follows on next page.*)

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendants' motion to renew its motion to dismiss Count Five of the Complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 7, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.