

**138-140 W. 32nd St. Assoc. LLC v 138-140 W. 32nd  
St. Assoc.**

2014 NY Slip Op 32734(U)

October 20, 2014

Supreme Court, New York County

Docket Number: 152064/13

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

138-140 WEST 32<sup>ND</sup> STREET ASSOCIATES LLC,

Plaintiff,

INDEX NO. 152064/13

-against-

MOTION SEQ. NO. 003

138-140 WEST 32<sup>ND</sup> STREET ASSOCIATES, a New  
York general partnership, JOSEPH SIMHON and  
DAVID SIMHON,

Defendants.

The following papers were read on this motion by plaintiff to reargue and cross-motion by defendants to reargue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Before the Court is a motion by the plaintiff, pursuant to CPLR 2221(d) for, *inter alia*, leave to reargue the Prior Order of this Court dated April 14, 2014 (April Order) in which the Court cancelled plaintiff's Notice of Pendency. Also before the Court is a cross-motion by the defendants, pursuant to CPLR 2221(d), for leave to reargue the portion of this Court's April Order in which the Court denied dismissal of plaintiff's third and fourth causes of action for a preliminary/permanent injunction and fraud/misrepresentation, respectively. Defendants seek that upon reargument, this Court dismiss those causes of action. Plaintiff is in opposition to this cross-motion.

Previously before this Court in motion sequence 002 was an Order to Show Cause by plaintiff 138-140 West 32<sup>nd</sup> Street Associates, LLC (plaintiff), pursuant to CPLR 2221(d), to reargue the prior Order of this Court dated April 14, 2014 in which the Court granted defendants' motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and 6514(a) to

the extent that plaintiff's causes of action for specific performance and declaratory judgment were dismissed and the notice of pendency cancelled. In a decision dated May 30, 2014, the Court denied plaintiff's motion finding that plaintiff failed to demonstrate that the Court overlooked or misapprehended any matters of fact or law which would have changed the determination of the prior motion. Specifically, the Court noted that it had already found the relevant Contract to be void, and as a result, there is no independent basis for plaintiff's cause of action for injunctive relief.

#### DISCUSSION

In support of their cross-motion, defendants maintain that the claim for fraud and misrepresentation should have been dismissed because this cause of action is insufficient on its face for lacking the specificity as required by CPLR 3016(b). It is defendants' contention that the elements of fraud are not pled but rather the complaint states vague, non-specific conclusory allegations. Additionally, defendants assert that the fraud claim is derivative of the breach of contract claim and since the Court has already determined that the contract is void, the plaintiff is relieved of the effect of the alleged fraud. As a result, defendants believe the fraud claim has been rendered academic.

In opposition, plaintiff asserts, among other things, that while the fraud claim relates to the contract, the circumstances under which defendant Joseph Simhon negotiated and signed the contract are separate from the enforceability of the contract. Thus, plaintiff maintains that even if the contract is not enforceable, Joseph Simhon remains liable for his personal misrepresentations. Moreover, plaintiff asserts that defendants' argument that the fourth cause of action was not pled with specificity was not raised in defendants' original motion to dismiss and therefore cannot form the basis for reargument.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; see *Kent v 534 E.*

11th St., 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). "A motion for reargument . . . is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or]. . . to provide a party an opportunity to advance arguments different from those tendered on the original application" (*id.* at 567-568; see also *Mariani v Dyer*, 193 AD2d 456 [1st Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

Plaintiff's motion to reargue is denied as plaintiff already sought this requested relief in motion sequence 002 which was resolved in the aforementioned May 30, 2014 Order issued by this Court. As to the portion of defendants' cross-motion which seeks to reargue the April Order as it relates to the third cause of action for injunctive relief, the Court notes that defendants' arguments in support thereof are improperly raised for the first time herein and cannot be asserted in the context of a motion to reargue (see *Mariani*, 193 AD2d at 458). However, the Court in its May Order has already established that the contract is void and there is no independent basis for injunctive relief. Accordingly, the third cause of action in plaintiff's complaint is dismissed.

As to the cause of action for fraud, based upon the papers before the Court, plaintiff has not demonstrated that this Court in its April Order overlooked or misapprehended any matters of fact or law which would have changed the previous determination (see CPLR 2221[d][2]). Specifically, plaintiff correctly points out that defendants did not raise the issue of specificity regarding the fraud claim in their original motion to dismiss. A motion to reargue is an improper vehicle by which to assert new arguments that were not previously tendered in the original application (see *Mariani*, 193 AD3d at 458). With regards to defendants' assertion that the

fraud claim is derivative of the breach of contract claim and should be dismissed, that argument is also improper on a motion to reargue since it was never previously argued on the defendants' original motion to dismiss (*see id.*). As such, defendants' cross-motion to reargue, as it relates to the fourth cause of action for fraud, is denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion to reargue is denied as moot; and it is further,

ORDERED that plaintiff's third cause of action for injunctive relief asserted in its complaint is hereby dismissed; and it is further,

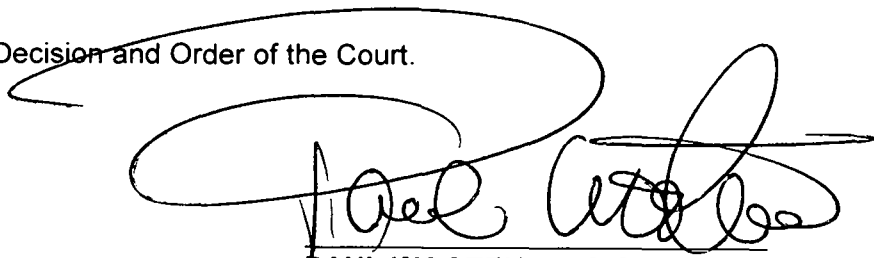
ORDERED that the portion of defendants' cross-motion to reargue the prior Order of this Court, dated April 14, 2014, as it relates to the fourth cause of action is denied; and it is further,

ORDERED that the parties are directed to appear for a compliance conference on November 12, 2014 at 11:00 a.m.; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/20/14

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST