

<b>YDRA, LLC v Mitchell</b>
2014 NY Slip Op 33455(U)
May 16, 2014
Supreme Court, Queens County
Docket Number: 20692/11
Judge: Bernice D. Siegal
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**ORIGINAL**

Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

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YDRA, LLC,

Plaintiff,

-against-

John A. Mitchell, Mitchell & Incantalupo,  
Christopher V. Papa R.A., A.I.A., Wax Ferraro  
Architect, P.C., Whitestone 8888 Corp., Paul Sklar,

Defendants.

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Index No.: 20692/11  
Motion Date: 2/4/14  
Motion Cal. No.: 169  
Motion Seq. No.: 5

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QUEENS COUNTY CLERK  
FILED

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §2221(d) granting leave to reargue an order of this Court dated November 21, 2013 entered December 8, 2013, and served by first-class mail with notice of entry on December 18, 2013, which granted defendant Paul Sklar’s motion to dismiss the complaint as against him pursuant to CPLR §3211; and (2) upon reargument, denying defendant Sklar’s motion to dismiss and reinstating plaintiff’s causes of action against him.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff moves for an Order pursuant to CPLR 2221(d) to reargue the Decision and Order of this court dated November 21, 2013 wherein the court granted Defendant Paul Sklar’s (“Sklar”) motion for an order dismissing the complaint as against Sklar pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7).

### Facts

Whitestone 8888 Corp ("8888") was formed by Martin Sklar and David Coleman for the purpose of building a structure and obtaining the necessary documents for approval of a one family structure. Sklar only became an officer of 8888 after both Martin Sklar and David Coleman passed away.

YDRA and 8888 entered into a contract of sale November 13, 2008 for the sale/purchase of real property located at 165-05 Cyers Lane, Beechhurst, New York 11357. The closing occurred on January 7, 2009 and title passed to YDRA.

On January 21, 2010, YDRA's application to the building department for a permit for the construction of a single family dwelling was denied.

YDRA brings the within action, as against Sklar, to hold Sklar personally responsible for the representations made when acting on behalf of 8888. YDRA contends that Sklar never disclosed that he was acting on behalf of a corporation or that 8888 was the owner of the property.

The Residential Contract of Sale ("Contract") was signed by Sklar, but the Contract states that sale is between 8888 and YDRA.

In addition, the Contract states in Section 28(a) that "[a]ll prior understandings, agreements, representations and warranties, oral or written, between seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon anyone else that is not set forth in this contract."

### Discussion

CPLR §2221(d)(2) provides, in pertinent part, that: "[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 . . . .” “A motion for reargument is addressed to the discretion of the court.” (*Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 [2<sup>nd</sup> Dept 2001]; *see also V. Veeraswamy Realty v. Yenom*, 71 A.D.3d 874, 874 [2<sup>nd</sup> Dept 2010]; *Barnett v. Smith*, 64 A.D.3d 669, 670 [2<sup>nd</sup> Dept 2009]; *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654 [2<sup>nd</sup> Dept 2007].) In essence, the purpose of a motion for leave to reargue is to allow a party to either demonstrate that the court misapplied the law or misapprehended or overlooked the facts in its earlier decision. (*Mazinov v. Rella*, 79 A.D.3d 979, 980 [2<sup>nd</sup> Dept 2010]; *Barnett*, 64 A.D.3d at 670–71; *Pryor v. Commonwealth Land Title Insurance Co.*, 17 A.D.3d 434, 435–36 [2<sup>nd</sup> Dept 2005]; *Spatola v. Tarcher*, 293 A.D.2d 523, 524 [2<sup>nd</sup> Dept 2002]; *Murray v. City of New York*, 283 A.D.3d 560, 560–61 [2<sup>nd</sup> Dept 2001]; *Frisenda*, 280 A.D.2d at 515; *Diorio v. City of New York*, 202 A.D.2d 625, 626 [2<sup>nd</sup> Dept 1994].)

Herein, Plaintiff failed to establish that the court misapplied the law or misapprehended the facts in the November 21, 2013 Order. (*Butler v. City of Rye Planning Com'n*, 114 A.D.3d 937 [2<sup>nd</sup> Dept 2014].) Plaintiff contends that this court already ruled, in the March 5, 2013 Order, that Plaintiff has sufficiently pled a cause of action in fraud when the court granted Plaintiff’s motion to amend the complaint. However, the burden on a motion for leave to amend is not the same as the burden for a motion to dismiss. Leave to amend a pleading is freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. (See CPLR §3025(b); *Bloom v. Lugli*, 102 A.D.3d 715 [2<sup>nd</sup> Dept January 16, 2013]; *Greco v. Christoffersen*, 70 A.D.3d 769 [2<sup>nd</sup> Dept 2010].) Conversely, a motion to dismiss pursuant to CPLR 3211(a)(1) may be granted if “documentary evidence utterly refutes [the] plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law.” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Services, Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Services, Inc.*, 20 N.Y.3d 59,

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63 [2012].) Herein, the documentary evidence, specifically the provision of the Contract which states that “[a]ll prior understandings, agreements, representations and warranties, oral or written, between seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon anyone else that is not set forth in this contract,” refutes Plaintiff’s allegations. Furthermore, the evidence submitted established that Sklar never personally retained an architect and that 8888 had retained Christopher Papa to conduct all research.

**Conclusion**

For the reasons set forth above, Plaintiff’s motion to reargue pursuant to CPLR §2221(d) is denied.

Dated:

*May 16, 2014*

*Bernice Siegal*  
Bernice D. Siegal, J. S. C.

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