SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Index Number : 155615/2012
BEVILACQUA, CHRIS
vs.
CRP/EXTELL PARCEL I, L.P.
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 2/14/14

_____, J.S.C.
ELLEN M. COIN
J.S.C.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 63

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CHRIS BEVILACQUA,

Plaintiff,

-against-

CRP/EXTELL PARCEL I, LP,
CRP/EXTELL PARCEL I GP, LLC,
GERSHON BARNETT,
GARY BARNETT, GERSHON SWIATYCKI,
STROOCK & STROOCK & LAVAN LLP,
as escrow agent,

Defendants.

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INDEX NO. 155615/2012
MOTION DATE Sept. 25, 2013
MOTION SEQ. NO. 004
E-FILED

For Plaintiff:
Held & Hines LLP
By Marc J. Held, Esq.
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718-531-9700

For Defendants:
Boies, Schiller, & Flexner LLP
By Jason Cyrulnik, Esq.
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Papers considered in review of this motion for leave to reargue:

Papers	**Numbered**
Notice of Motion-Affidavits-Exhibits	1
Opposition	2
Reply	3

ELLEN M. COIN, J.:

Plaintiff moves for leave to reargue the Court's grant of defendant's motion to dismiss, dated July 9, 2013. For full factual and procedural details, reference this Court's original decision.

A motion for leave to reargue (1) must be identified specifically as such a motion; (2) must 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; and (3) must be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. (CPLR 2221[d]). A motion to reargue is not meant to be an opportunity to revisit the same arguments as the original motion, but rather "'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.'" (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984] [citing *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]]).

Absence of Pleadings in a Prior Motion

Plaintiff argues for the first time that a copy of the pleadings must be included with the moving papers in a motion to dismiss, and defendant's omission of the pleadings from its moving papers should have warranted outright denial of the motion. This is a new argument that was not made in opposition to the original motion to dismiss, and it is therefore not appropriately before the Court.

Judicial Estoppel

Plaintiff argues that the moving defendant previously took a legal position opposite to its position in this case. He contends that in *Kelly Coffey v. CRP/Extell et al.* (Supreme Court, New York County, 114073/09) and *Yun Sook Park v. CRP/Extell Parcel I*

(12-CV-0917 (GBD)(DCF) [SDNY]), defendant argued that collateral estoppel and *res judicata* do not apply to agency determinations.

The doctrine of judicial estoppel "bars a party who took a certain position in a prior legal proceeding, and who secured a favorable judgment, from assuming a contrary position in another action simply by reasons of a change in interests." (*Stop & Shop Supermarket Co. v Vornado Realty Trust*, 35 AD3d 241, 243 [1st Dept 2006]). The doctrine generally applies to factual positions rather than legal positions. "[A] legal argument is "of 'a different character'" than an inconsistent framing of one's factual pleadings, and therefore not a basis for judicial estoppel." (*Matter of Excelsior 57th Corp. (Kern)*, 218 AD2d 528, 529-30 [1st Dept 1995] [quoting *Kimco of N.Y. v Devon*, 163 AD2d 573, 575]; *Stop & Shop Supermarket Co.*, 35 AD3d at 243 ["[T]he cited statements made by plaintiff's counsel to the Bankruptcy Court were simply legal argument(s) and as such not proper predicates for judicial estoppel"]).

Here, even if plaintiff were correct that defendant had taken inconsistent positions regarding the collateral estoppel effect of the Attorney General's decisions in litigation with other purchasers, the collateral estoppel argument is legal in nature. (Plaintiff's Opp. To Motion to Dismiss at ¶ 54). Plaintiff's present citations refer to inconsistent factual positions, and not legal arguments. (*Tedesco v Tedesco*, 64 AD3d

583, 584 [2d Dept 2009]; *Festinger v Edrich*, 32 AD3d 412, 413 [2d Dept 2006]). For this reason, the doctrine of judicial estoppel is inapplicable here.

Res Judicata and Collateral Estoppel

Plaintiff reiterates his argument that *res judicata* and collateral estoppel do not apply to his complaint. The Court dealt with these issues sufficiently in its original decision, and no further review would benefit judicial economy.

The Martin Act

Plaintiff argues that the Martin Act does not preempt common law claims when they can stand on their own, independent of the Martin Act. Plaintiff faults the Court for excessive reliance on the Court of Appeals decision in *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236, 244 [2009]).

General Business Law article 23-A (the Martin Act) is "New York's 'blue sky' law [enacted] 'to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public, and, thereafter, if appropriate, to commence civil or criminal prosecution'." (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 349-50 [2011], quoting *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 277 [1987]). The "[Attorney General] 'bears sole responsibility for implementing

and enforcing the Martin Act'; [consequently,] there is no private right of action under the statute." (*Kerusa Co. LLC*, 12 NY3d at 244).

Plaintiff correctly asserts that some common law claims are not preempted by the Martin Act. The Court of Appeals has held that a common law claim, for fraud or otherwise, that is not based solely on a sponsor's failure to include what is required under the Attorney General's regulations is not preempted and such a claim can be maintained. (*Assured Guar. (UK) Ltd.*, 18 NY3d at 353-54). However, the Martin Act does preempt claims that arise solely from alleged omissions of disclosures required under the Martin Act. (*Id.* at 353). Thus, while common law fraud claims may proceed outside of the Attorney General's purview, "there is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act." (*Berenger v 231 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012] [citation omitted]).

Here, plaintiff's claims all stem from defendant's alleged omissions from the Offering Plan and Agreement. The alleged disclosure failures involve the financial status and identity of the Sponsor, items that, but for the Martin Act, would not legally have to be disclosed. (*Assured Guar. (UK) Ltd.*, 18 NY3d at 353). Therefore, plaintiff's common law fraud claims are in fact preempted by the Martin Act.

Plaintiff argues that the mere overlap of a common law claim with a claim brought under the Martin Act is not prohibited. (*Id.*). However, at its core, plaintiff's fraud-based claims revolve around information he believes should have been included in the Offering Plan or Agreement because of the Martin Act. The fraud claims relate directly to the allegedly omitted financial status and sponsor identity disclosures and thus cannot avoid preemption.

Non-Sponsor Defendants

Plaintiff argues that the Court should not have granted the motion to dismiss as to the non-moving parties CRP/Extell Parcel I GP, LLC, Gary Barnett, Gershon Barnett, Gershon Swiatycki, as they were not parties to, and should not benefit from, CRP/Extell Parcel I LP's prior legal success in the Attorney General and Article 78 proceedings.

The Court must consider the effect of the preclusion principles vis-à-vis the non-sponsor defendants. The preclusion principles apply of course to the parties in the actual action; however, they also apply to those parties "in privity with a party to the proceeding." (*Buechel v Bain*, 275 AD2d 65, 73 [1st Dept 2000], *aff'd* 97 NY2d 295 [2001]). "Under the concept of privity, collateral estoppel has been said to extend to 'those whose interests are represented by a party to the action.'" (*Id.* [citations omitted]). Specifically, privity extends to "'[persons] who were connected with it to such an extent that

they are treated as if they were parties.'" (*Id.* [citation omitted]).

Thus, New York courts have found privity among partners in a law firm (*Buechel*, 275 AD2d at 73-74); a doctor and his employer where the employer was required to indemnify him in a prior action (*Simmons v New York City Health and Hospitals Corp.*, 71 AD3d 410, 411 [1st Dept 2010]); a realty services company and non-parties who "own and operate" the company (*Prospect Owners Corp. v Tudor Realty Services Corp.*, 260 AD2d 299, 300 [1st Dept 1999]); a party and a non-party that was "acting in its capacity as [the party's] insurer" (*Lewis v City of New York*, 17 Misc 3d 537, 544 [Bronx Co 2007]); and two city agencies with a common source of authority and "inextricably linked" litigation matters (*37-01 31st Ave. Realty Corp. v Safed*, 20 Misc 3d 762, 767 [Civ Ct, Queens County 2008] [*aff'd sub nom. 37-01 31st Ave. Realty Corp. v Mohammed*, 28 Misc 3d 58 [App Term 2010]).

According to the complaint, the individual defendants here are the principals of sponsor defendant CRP/Extell Parcel I LP, and defendant CRP/Extell Parcel I GP LLC is its general partner. Accordingly, these defendants are "united in interest" with the sponsor, as all of plaintiff's claims against defendants devolve from the same documents and facts. Thus, the non-sponsor defendants are deemed in privity with the sponsor for purposes of application of the preclusion principles. (*Buechel*, 275 AD2d at

73-74).

Since the issue of whether defendant CRP/Extell Parcel I LP owed plaintiff the amount of his deposit was decided in the Attorney General action, it must also be considered resolved as against the remaining defendants. Dismissal of the claims against the sponsor defendant removes any foundation for liability as to the non-sponsor defendants, and thus the action was properly dismissed *sua sponte* as against them as well in the interests of judicial economy.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to reargue is granted, and upon reargument, the Court adheres to its prior determination.

This constitutes the decision and order of the Court.

Dated: Feb. 14, 2014

ENTER:

Ellen M. Coin, A.J.S.C.

CASE DISPOSED