

<b>Compass Concierge, LLC v 142 Duane Realty Corp.</b>
2023 NY Slip Op 30340(U)
February 2, 2023
Supreme Court, New York County
Docket Number: Index No. 157509/2021
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

INDEX NO. 157509/2021

COMPASS CONCIERGE, LLC,

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

142 DUANE REALTY CORP. and STEPHEN CORELLI

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24 were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this breach of contract action, plaintiff moves, pursuant to CPLR 2221(d), for leave to reargue its cross motion for summary judgment and the motion to dismiss submitted by defendants 142 Duane Realty Corp. (142 Duane) and Stephen Corelli (collectively, defendants). Defendants oppose the motion.

Factual and Procedural Background

As set forth in this Court’s August 1, 2022 order (NYSCEF Doc No. 19), in April 2019, plaintiff and 142 Duane entered into a renovation services agreement by which plaintiff would pay various contractors to perform “non-structural” work on a penthouse apartment owned by 142 Duane (the property) (Doc Nos. 1-2). The agreement, which was signed by plaintiff and Corelli as 142 Duane’s “[a]uthorized [s]ignatory,” provided that 142 Duane would repay plaintiff for covering the contractors’ costs from either the proceeds of the property’s sale or directly from 142 Duane itself if the property failed to sell within 12 months of the agreement’s execution (Doc No. 2).

Plaintiff commenced the instant action in August 2021 after the property failed to sell and its demands for repayment went unanswered, asserting causes of action against defendants for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, and unjust enrichment (Doc No. 1). Before answering, defendants moved to dismiss the complaint, arguing, among other things, that claims against Corelli were improper and that the breach of the implied covenant of good faith and fair dealing, quantum meruit, and unjust enrichment claims against defendants were duplicative of the breach of contract claim (Doc Nos. 6-7). Plaintiff opposed the motion and cross-moved for summary judgment, arguing that it made a prima facie showing that it was entitled to judgment as a matter of law on its breach of contract claim as evidenced by a copy of the agreement (Doc Nos. 12-14). Defendants opposed the cross motion, arguing that summary judgment was premature because issue had not been joined (Doc No. 17). In reply, plaintiff argued that several exceptions for allowing pre-answer summary judgment were applicable (Doc No. 18).

By decision and order of August 1, 2022, this Court denied plaintiff's cross motion and partially granted defendants' motion to dismiss (Doc No. 19). It was determined that plaintiff's cross motion was premature because it was made prior to an answer by defendants and none of the recognized exceptions for pre-answer summary judgment applied (Doc No. 19). Regarding the claims against Corelli, the documentary evidence provided by defendants demonstrated that Corelli was not a party to the agreement and thus, none of plaintiff's four causes of action could be maintained against him. With respect to the claims against 142 Duane, the breach of the implied covenant of good faith and fair dealing claim was dismissed as duplicative; however, the quantum meruit and unjust enrichment claims survived dismissal because factual questions remained regarding the existence of an enforceable agreement (Doc No. 19).

Plaintiff now moves, pursuant to CPLR 2221(d), for leave to reargue defendants' motion to dismiss and its cross motion for summary judgment, and, upon reargument, for an order denying the motion to dismiss and granting it summary judgment (Doc Nos. 22-23). Defendants oppose the motion (Doc No. 24).

### Legal Analysis and Conclusions

Plaintiff contends that dismissal of the claims against Corelli was incorrect because this Court overlooked the possibility that Corelli could have signed the agreement in his individual capacity and as an authorized signatory for 142 Duane. It contends further that this Court misapprehended the law in dismissing its breach of the implied covenant of good faith and fair dealing claim as duplicative while allowing its claims of quantum meruit and unjust enrichment to remain. Lastly, it contends that this Court erred in denying its summary judgment motion because "the unambiguous contract exception" prevented prematurity, and because it made a prima facie showing that it was entitled to recovery.

Defendants oppose, arguing that no facts were overlooked and no law was misapprehended by the Court in deciding the original motions.

"A motion for reargument, addressed to the discretion of the court, 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. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [citations omitted]; *accord Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

Here, defendant fails to establish that the law was misapprehended in determining that its claim for breach of the implied covenant of good faith and fair dealing was duplicative. The First

Department has repeatedly held that such a claim must be dismissed as duplicative of a breach of contract claim when “both claims arise from the same facts and seek the identical damages for each alleged breach” (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010] [citation omitted]; see *Polaris Venture Partners VI L.P. v AD-Venture Capital Partners L.P.*, 179 AD3d 548, 548-549 [1st Dept 2020]). Plaintiff’s citation to *Shatz v Chertok* (180 AD3d 609 [1st Dept 2020]) is unpersuasive because that case involved a breach of fiduciary duty claim, not a breach of contract claim (see *id.* at 611 [“(P)laintiff sufficiently pleaded a claim for breach of the covenant of good faith and fair dealing, and was entitled to plead it in the alternative or in addition to the fiduciary duty claim.”]).

Plaintiff also fails to establish that the law was misapprehended in determining that its cross motion for summary judgment was premature. “A motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to” (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985] [citations omitted]; see *Stone Column Trading House Ltd. v Beogradska Banka A.D.*, 139 AD3d 577, 578 [1st Dept 2016]; Siegel & Connors, NY Prac § 279 [6th ed. 2018]). The “unambiguous contract exception” cited by plaintiff only applies when a court intends to treat a motion to dismiss as a motion for summary judgment (see *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318-320 [1st Dept 1987]), “[which] is not the case here, where [plaintiff] moved directly for summary judgment” (*SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 AD3d 610, 611 [1st Dept 2022]).

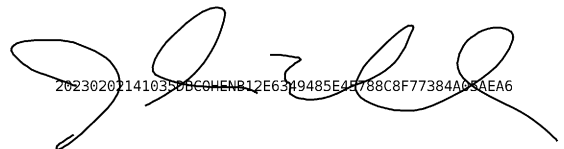
Finally, plaintiff fails to establish that this Court overlooked Corelli’s capacity to sign the agreement in dismissing all claims against him. Its contention that his status as an authorized signatory “does not conclusively establish that Corelli did not also sign the [agreement] in his individual capacity” is identical to the argument it made in opposition to the original motion to

dismiss and was directly addressed in the decision. Thus, that issue has been “carefully considered and decided by [this Court]” (*Fosdick v Town of Hempstead*, 126 NY 651, 653 [1891]; see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992], *lv dismissed and denied* 80 NY2d 1005 [1992]).

Accordingly, it is hereby:

ORDERED that plaintiff’s motion for leave to reargue is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in person at 71 Thomas Street, Room 305, at 10:00 a.m. on April 18, 2023, unless the parties submit a stipulation by 3:00 p.m. the day before in accordance with the Part rules.



2023020214103506COHEN12E6319485E44788C8F77384A05A6A6

2/2/2023  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE