

**Olshan Frome Wolosky LLP v Kestenbaum**

2025 NY Slip Op 33276(U)

August 29, 2025

Supreme Court, New York County

Docket Number: Index No. 656174/2023

Judge: Lyle E. Frank

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

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

-----X

OLSHAN FROME WOLOSKY LLP

Plaintiff,

- v -

LOUIS KESTENBAUM et al

Defendant.

-----X

**INDEX NO.** 656174/2023

**MOTION DATE** 06/06/2025

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 59, 60, 61

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, the motion is granted in part.

**Background**

Plaintiff Olshan Frome Wolosky, LLP, represented defendants Louis Kestenbaum, Joel Kestenbaum, Fortis Property Group, LLC, FPG Maiden Lane LLC, and FPG Maiden Holding LLC (collectively, except for Louis Kestenbaum who is no longer part of this action, “Defendants”) in three proceedings in New York County (the “Underlying Proceedings”). At one point, after tensions between the parties, they entered into a stipulation regarding Plaintiff’s substitution as counsel in the Underlying Proceedings. The present action is brought by Plaintiff who alleges that Defendants have failed to pay over \$1 million in legal fees. Defendants answered and asserted four counterclaims, largely based on the position that Plaintiff caused them harm by prematurely abandoning representation. Plaintiff moved to dismiss the counterclaims in their entirety, based in large part upon the stipulation. The Court issued an Order on May 9, 2025, dismissing all four counterclaims.

**Standard of Review**

CPLR § 2221(d) allows for a party to make a motion to reargue if it is “identified specifically as such” and requires that it 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.”

### **Discussion**

Defendants bring the present motion for reargument, seeking restoration of the counterclaims for breach of contract, breach of fiduciary duty, and unjust enrichment. They are not challenging the dismissal of the claim for legal malpractice. Defendants argue that the Court overlooked material such as emails that were submitted with the original motion to dismiss and erred in applying the CPLR § 3211 standard. Plaintiff opposes the motion. For the reasons that follow, the motion is granted only as to the restoration of the unjust enrichment counterclaim.

#### ***Breach of Contract Claim Was Properly Dismissed***

Defendants argue that the Court overlooked affirmations that expanded on the pleadings and emails submitted showing the context of the stipulation of withdrawal when dismissing the breach of contract claim based on the stipulation. They argue that there are factual issues going to whether Plaintiff’s behavior in the Underlying Proceedings and leading up to the substitution of counsel constituted a breach of the parties’ retainer agreement. But regardless of whether the Court considered the emails and affidavits, the breach of contract claim was still properly dismissed. As pointed out in the May Order, Defendants did not, and have still not, alleged that they performed under the contract. As this is an essential element of a breach of contract claim, the counterclaim was properly dismissed for failure to state a cause of action. *See, e.g., Weintraub v. F.M.B. Realty Co.*, 196 A.D. 525, 528 [1st Dept. 1921] (complaint was fatally defective due to failure to allege plaintiff’s performance under the contract); *ASKL Enters., Inc.*

*v. NYNEX Long Distance Co.*, 7 A.D.3d 424, 425 [1st Dept. 2004] (plaintiff’s performance an “essential element” of a claim for breach of contract).

*The Breach of Fiduciary Duty Counterclaim*

The May Order dismissed the breach of fiduciary duty counterclaim for failure to allege facts in the requisite detail. Defendants move to reargue the dismissal of the breach of fiduciary duty counterclaim on the basis that the pleading was augmented by the emails and affirmations that provided the specific allegations of misconduct and damages necessary. They allege that Plaintiff put their financial interests above the clients and used the clients’ litigation position as leverage for their personal benefit in the Underlying Proceedings. As a preliminary matter, a court on a motion to dismiss is permitted to consider affidavits and other evidence submitted to remedy defects in the pleadings. *See, e.g., Billig v. Schwartz*, 190 A.D.3d 547, 547 [1st Dept. 2021] (holding that “[e]ven if plaintiffs had failed to properly allege standing, they corrected these perceived defects through the affidavits they submitted in opposition to defendants’ motions to dismiss”).

The allegations of misconduct are that Plaintiff used court and litigation deadlines as leverage to pressure Defendants to pay outstanding legal fees. Generally speaking, an attorney has a fiduciary duty to “honor[] the clients’ interests over the lawyer’s.” *In re Cooperman*, 83 N.Y.2d 465, 472 [1st Dept. 1994]. While a claim for breach of fiduciary duty normally has a “considerably lower standard of recovery” than one for legal malpractice, when the claim is centered around alleged attorney misfeasance the standard is the same and “the plaintiff must establish the ‘but for’ element of malpractice.” *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 10 – 11 [1st Dept. 2008]. As addressed in the May Order’s

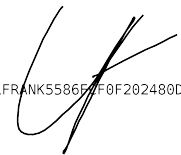
analysis of the dismissed legal malpractice claim, Defendants have failed to allege this element of attorney malpractice. Dismissal of this counterclaim was proper.

The Unjust Enrichment Counterclaim

Defendants argue that the Court erred in dismissing the unjust enrichment counterclaim based on the existence of a contract between the parties, as that counterclaim was pled in the alternative. Furthermore, they argue that the Court overlooked that several of the Defendants were not parties to the contract in question but made payments to Plaintiff that give them grounds to pursue an unjust enrichment counterclaim. When there is a dispute regarding the application of a retainer agreement as to the parties, unjust enrichment may be pursued as an alternative claim. *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 601 [1st Dept. 2014]. The Court’s dismissal of this counterclaim was premature, and therefore reargument is granted to the extent that the unjust enrichment counterclaim is restored. Accordingly, it is hereby

ADJUDGED that the motion is granted in part; and it is further

ORDERED that the counterclaim for unjust enrichment is restored and the order from this Court dated May 9, 2025, is vacated solely to the extent that it dismissed the claim for unjust enrichment.

  
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8/29/2025  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE