

At the term of the Supreme Court of the State of New York, held in and for the County of Rockland, at 1 South Main Street, New City, NY 10956 on October 10, 2024

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MICHAEL SABO and MLS REAL ESTATE  
CONSULTANTS INC

Plaintiffs

Index No.: 033619/2022

*-against-*

DECISION AND ORDER  
(Motion Sequence 3)

SOL EISENBERG a/k/a CHAIM EISENBERG,  
MOSHE EISENBERG,  
MIDDLETOWN NORTH DEV. LLC,  
48 NORTH REALTY 2019 LLC, and  
VALLEY VIEW EQUITIES CORP.,

Defendants

-----X  
Greenwald, J.

The following NYSCEF Doc. Nos. 60-82 were considered by the Court in deciding Defendants' Notice of Motion (Motion Sequence 3):

RELEVANT BACKGROUND

Defendants file the instant for an order dismissing the Verified Complaint pursuant to CPLR R 3211(a)(1), (3), (5), (7) and (10). Defendants argue that (i) it has a defense founded upon documentary evidence; (ii) plaintiffs do not have the legal capacity to maintain the instant action; (iii) the claims by Plaintiffs are barred by the doctrine of res judicata; (iv) the Complaint fails to state a causes of action upon which relief may be granted; and (v) the Court should not proceed in the absence of a necessary party.

Defendants contend that the issues raised by Plaintiffs have been litigated, and the doctrine of res judicata should apply. Defendants argue that Plaintiffs raised a fraud and conspiracy claim in a prior action before this Court. By Decision and Order (Thorsen, J.) dated July 10, 2023, determined that there was no fraud or conspiracy as it relates to the alleged breach of contract; that Plaintiff could not be afforded damages, as damages are calculated by what a party actually lost, not what it could or would have gained. Defendants argue that Plaintiff's alleged fraud-based

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damages are non-existent.

Defendants argue further that Plaintiff fails to state any facts to support its cause of action in tortious interference, as there was no intentional inducement on its part which rendered performance impossible and caused the actual breach. Defendants aver that the prior decision speaks to this issue as the court determined that Plaintiff's inability to close on June 6, 2019, is what led to the termination of that contract, and there was no evidence of interference in that matter. Defendants argue further that Plaintiffs' interference claims fail to specifically identify which business relations it alleges Defendants interfered with or conduct that was motivated for the sole purpose of harming plaintiff. Defendants declare that Plaintiffs remaining claims regarding breach of covenant of good faith and fair dealing and unjust enrichment should also be dismissed as the contract at issue, was null and void upon Plaintiff's inability to deliver possession of the property, as Plaintiffs contract with the property owner was cancelled. Defendants aver that Plaintiff was refunded the down payment, as agreed so there was no breach of covenant of good faith and fair dealing or unjust enrichment.

Plaintiffs argue that the court must accept its allegations as true, and the causes of action asserted by Plaintiffs sets forth cognizable claims against the moving defendants. Plaintiffs argue that the prior dismissal were not dismissals on the merit so res judicata does not apply. Plaintiffs contend that their claims against the individual defendants are sound in tortious interference and fraud based on their individual acts. Plaintiffs state the decision of the prior court was not addressing its claims against these defendants, but its claims against the property owners Roei Gamil and Royco Properties, LLC. Plaintiffs argue that Defendants' representation about their funding to purchase the property was false and intentionally made for the sole purpose of hindering Plaintiffs' ability to close on the property; which resulted in Plaintiffs contract for the property being cancelled, and the property owner and Defendants could therefore bypass Plaintiff in the sale. These are the acts which Plaintiff asserts are the basis of its claims.

#### DISCUSSION

Upon review of a motion made pursuant to CPLR 3211, we are required to accept as true the allegations of the complaint. While factual claims flatly contradicted by indisputable documentary evidence are not entitled to such consideration where the pleaded facts state a cause of action, documentary evidence may result in dismissal only where "it has been shown that a

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material fact as claimed by the pleader ... is not a fact at all and ... no significant dispute exists regarding it. Thus, the documents relied on must flatly disprove the allegations contained in the complaint for dismissal to be granted. *See, Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001].

Pursuant to the doctrine of res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. Thus, res judicata applies to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior [action]. *See, Lazides v P & G Enterprises*, 58 AD3d 607, 609 [2d Dept 2009].

Here, Defendants demonstrate that Plaintiffs filed an action in New York County, under Index Number with the same claims against the same defendants, with the exception of the unjust enrichment claim. While Plaintiff argues that such was not done on the merits, however the Decision and Order (Chan, J.) dated July 7, 2022, states plaintiff failed to demonstrate prima facie merit of its claims and failed to provide a reasonable excuse to vacate the default, given the lengthy amount of time involved. Thus, the decision is deemed on the merits. Under the doctrine of res judicata, once a claim is brought to a final conclusion, all other claims between the same parties ... arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. Thus, the doctrine bars not only claims that have been raised in a prior action between the parties but matters that could have been raised in such prior action, arising from the same factual grouping. *See, Greenaway v Clifton & Classon Apt. Corp.*, 191 AD3d 958 [2d Dept 2021]. Plaintiffs' arguments that the decision was not on the merits are unavailing, especially when coupled with a duplicitous action now brought in a different county.

Even as this issue could have been raised in the prior action, the Court finds it necessary to address this claim. The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered. *See, Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]. Plaintiffs infer

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that Defendants were enriched by purchasing the property directly from the property owner, instead of through Plaintiffs. However, it is well settled law that a plaintiff bringing an unjust enrichment action may not recover as compensatory damages the costs that the defendant avoided.

Where a defendant saves by avoiding costs and expenses that otherwise would have been payable, those avoided payments do not constitute funds held by the defendant at the expense of the plaintiff. *See, E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 456-57 [2018]. Even if Plaintiffs allegations are taken as true, Plaintiffs fail to sufficiently establish a cause of action for unjust enrichment.

Defendants have established its basis to dismiss the complaint pursuant to CPLR 3211 (a)(1), (3), (5), (7) and (10). Thus, Defendants' Notice of Motion (Motion Sequence 3) to dismiss the complaint is **granted**.

Accordingly, it is hereby,

ORDERED, that Defendants' Notice of Motion (Motion Sequence 3) to dismiss the complaint is **granted**.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: October 10, 2024  
New City, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.