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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

MOSHE MOSBACHER and M. MOSBACHER DIAMOND CORP.,	**TRIAL/IAS PART: 16 NASSAU COUNTY**
Plaintiffs,	**Index No: 4972-11**
-against-	**Motion Seq. No: 1**
JP MORGAN CHASE BANK, N.A.,	**Submission Date: 12/2/11**
Defendant.	

The following papers having been read on this motion:

Notice of Motion, Affidavits in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Further Support.....x

This matter is before the Court for decision on the motion filed by Defendant JP Morgan Chase Bank, N.A.("Chase" or "Defendant") on August 23, 2011 and submitted on December 2, 2011. For the reasons set forth below, the Court denies the motion.

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1), (3), (5) and (7), dismissing this action in its entirety.

Plaintiffs Moshe Mosbacher ("Mosbacher") and M. Mosbacher Diamond Corp. ("Corp.") (collectively "Plaintiffs") oppose Defendant's motion.

B. The Parties' History

These parties were involved in a prior related action ("Related Action") titled *JPMorgan Chase Bank, N.A. v. M. Mosbacher Diamond Corp. and Moshe Mosbacher a/k/a Moishe Mosbacher a/k/a Moishe S. Mosbacher*, Nassau County Index Number 010794/09. The Related Action was the subject of a decision by the Honorable Daniel Palmieri dated April 26, 2010

("Related Decision") (Ex. F to Capuano Aff. in Supp.).

In the verified complaint in the Related Action ("Related Complaint") (Ex. D to Capuano Aff. in Supp.), plaintiff Chase asserted three causes of action: 1) on or about August 31, 1998, Corp. made and delivered to Chase a Business Revolving Creditlink Agreement ("BRCA") reflecting Corp.'s promise to pay the principal sum of up to $100,000, which was subsequently increased in the amount of $7,500 at Corp.'s request, and failed to pay sums owing on the BRCA; 2) on or about August 31, 1998, Mosbacher guaranteed Corp.'s payments under the BRCA, and is liable for payments owed by Corp. under the BRCA; and 3) pursuant to the BRCA and guarantee, defendants are liable for attorney's fees and other costs incurred in enforcing the BRCA and guarantee.

In their verified answer to the Related Complaint ("Related Answer") (Ex. E to Capuano Aff. in Supp.), Corp. and Mosbacher asserted four affirmative defenses. In its fourth affirmative defense, alleging negligent misrepresentation, Corp. and Mosbacher alleged that Chase "forced the corporate defendant out of business without working capital by refusing to restore the revolving credit line and funds to the defendant[']s bank account after promising to do so after the tax lien was resolved."

The Verified Complaint in the instant action ("Instant Complaint") (Ex. H to Capuano Aff. in Supp.) contains three (3) causes of action: 1) Chase breached its implied covenant of good faith and fair dealing, and is liable for negligent misrepresentation, with respect to Corp., by virtue of its failure to pay a tax lien ("Tax Obligation") and restore Plaintiffs' revolving line of credit as promised, and its refusal to grant Corp. access to its account so that it could satisfy the Tax Obligation; 2) Chase is liable for negligent misrepresentation, and breached its implied covenant of good faith and fair dealing, with respect to Corp. by failing to cooperate with Corp. in restoring its line of credit which led to the cessation of Corp.'s business operations; and 3) Chase breached its implied covenant of good faith and fair dealing, and is liable for negligent misrepresentation, with respect to Mosbacher by its failure to pay the Tax Obligation, resulting in Mosbacher losing his income and assets.

The Instant Complaint includes the allegation that:

> The determination of the [Related Decision] that the plaintiffs' [sic] stated valid claims against Chase Bank for negligent misrepresentation and for breach of the implied covenant of good faith and fair dealing, are *res judicata* in this action.

Instant Compl. at ¶ 7

In support of Chase's instant motion, Shirley M. Herring ("Herring"), a First Vice President of Chase, affirms that on August 31, 1998, Corp. executed the BRCA (Ex. A to Herring Aff. in Supp.). On September 15, 2008, Corp. opened a Chase Business Classic Account ("Business Account"), as reflected by the signature card ("Signature Card") provided (*id.* at Ex. B). By executing the Signature Card, Mosbacher, on behalf of Corp., acknowledged receipt of Chase's Customer Agreement ("Customer Agreement") (*id.* at Ex. C) and agreed to be bound by its terms and conditions.

Paragraph 3 of the BRCA provides, in pertinent part, as follows:

> [Chase] is not obligated to honor a request for a Loan on an account which is deemed delinquent or after the occurrence of an Event of Default.

Paragraph 7 of the BRCA provides, in pertinent part, as follows:

> If any Event of Default occurs, then [Chase's] obligation to make Loans shall immediately terminate, and the Loans together with accrued interest thereon shall be immediately due and payable.

Paragraph 7(j) of the BRCA provides that an Event of Default occurs when a lien is placed against the assets of Corp. by a creditor other than Chase. Paragraph 7(h) of the BRCA provides that an Event of Default occurs when Chase determines that there has been an "adverse change in the financial or business condition" of Corp.

Under the terms of the Signature Card, Corp. acknowledged receipt of, and agreed to be bound by, the Customer Agreement. The Customer Agreement contains the following language in bold type and capital letters on page 19 of the Customers Agreement:

> **YOU AGREE THAT WE SHALL NOT BE LIABLE FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES REGARDLESS OF THE FORM OF ACTION AND EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

Defendants' counsel affirms that Chase filed a motion for summary judgment in the Related Action. In the Related Decision, the Court granted Chase's motion with respect to Moshe and Mosbacher's first, second and third affirmative defenses based on lack of jurisdiction, unenforceability of the Mosbacher guaranty and Statute of Frauds, respectively. The Court in the Related Decision ruled that the first, second and third affirmative defenses in the Related Answer were "without merit" (Related Dec. at p. 5).

With respect to the fourth counterclaim in the Related Answer, based on negligent misrepresentation, the Court in the Related Action ruled that:

> "[t]his defense raises factors beyond the simple fact of the default in payment, which alone is addressed by the plaintiff's affiant, Heffleman. The statements of [Chase's] attorney concerning the circumstances surrounding the tax lien and the decision by [Chase] personnel to withhold credit is not stated to have been made on personal knowledge, and is thus without probative force [citations omitted]. The Court therefore finds that with respect to this claim [Chase] has failed to make out its *prima facie* case, which requires that the motion be denied to that extent.
>
> Dismissal of this defense would have been denied in any event. In essence, the recitation of the events by Mosbacher surrounding [Corp.'s] default raises an issue of fact as to a breach of the implied covenant of good faith and fair dealing, which is read into every contract [citations omitted].
>
> Related Dec. at p. 7

Chase's counsel affirms that neither Defendants nor Chase raised the theory of the implied covenant of good faith and fair dealing in their motion and opposition papers in the Related Action, copies of which are provided (Ex. G to Capuano Aff. in Supp.). Chase disputes Plaintiffs' allegation that the Court in the Related Decision ruled that Plaintiffs "stated valid claims against" Chase.

Chase's counsel affirms, further, that a Certificate of Incorporation for Corp. was filed in the Office of the County Clerk of New York County on April 17, 1995. Corp. was dissolved by proclamation on July 29, 2009 ("Dissolution") as reflected by the printout provided from the New York State, Department of State's website (Ex. I to Capuano Aff. in Supp.). That documentation reflects that, as of August 2, 2011, Corp.'s status was inactive due to a "Dissolution by Proclamation/Annulment of Authority (Jul 29, 2009)."

In opposition, Plaintiffs' counsel notes that the Related Decision outlined the affidavit of Mosbacher in the Related Action, which Chase did not rebut. Mosbacher previously asserted, *inter alia*, that: 1) on December 16, 2008, the New York State Department of Taxation and Finance ("Tax Department") erroneously imposed a tax lien on Corp.'s account; 2) two days later, Chase received notice that, upon the remittance of $15,000, the lien and levy on the account would be released; 3) Mosbacher presented a notarized letter instructing Chase to send the $15,000 to the Tax Department; 4) as of December 24, 2008, Chase refused to comply, and did not send the tax payment until around January 20, 2009; 5) given the nature of Mosbacher's business, which involved wholesale diamonds, he was unable to conduct business with an active account and credit line and his business was destroyed.

C. The Parties' Positions

Chase submits that it has demonstrated its right to dismissal of the Instant Complaint in light of the fact that 1) Plaintiffs' assertion that the Court in the Related Action determined that Plaintiffs stated valid claims against Chase is inaccurate; 2) Corp. lacks standing to maintain this action in light of the Dissolution; 3) the BRCA explicitly provides that a) Chase is not obligated to honor a request for a Loan on a delinquent account, or after an Event of Default; b) Chase's obligation to make Loans immediately terminated upon the filing of the tax lien, which constituted an Event of Default pursuant to ¶ 7(j); and 4) Plaintiffs are barred from recovering consequential damages in light of the language in the Customer Agreement expressly providing that Chase is not liable for indirect, special or consequential damages.

Plaintiffs submit that 1) as Chase did not appeal the Related Decision, Justice Palmieri's conclusion that Plaintiffs' claims for negligent misrepresentation were "fit for a trier of fact" (Sarfaty Aff. in Opp. at ¶ 7) becomes the law of the case as to the parties; and 2) the waiver language in the Customer Agreement does not bar the instant action because Plaintiffs are seeking actual damages. Plaintiffs note that the Related Decision included determinations that, in light of Mosbacher's allegations regarding Chase's delay in paying Plaintiffs' tax obligation, there existed "an issue of fact...as to the good faith and fair dealing of [Chase] in its handling of the tax lien, [barring] summary judgment with respect to the fourth defense" (Prior Dec. at pp. 9-10).

In reply, Chase submits that 1) in light of the fact that Mosbacher and Corp. did not assert the doctrine of good faith and fair dealing in the Related Action, and it was the Court in the Related Action who raised that issue *sua sponte*, Chase did not have the opportunity to litigate that issue in the Related Action and the doctrines of law of the case, collateral estoppel and res judicata are inapplicable; 2) Plaintiffs have failed to plead the elements of a negligent misrepresentation action in light of their inability to establish a special or privity-like relationship between the parties, and/or damages suffered as a result of Chase's conduct; 3) the contractual provision in the Customer Agreement clearly bars Plaintiffs' claims as the damages sought by Plaintiffs are, in fact, consequential damages; and 4) the implied covenant of good faith and fair dealing does not negate Chase's explicit rights under the parties' agreements.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to

CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

CPLR § 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity, or standing, to sue. Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. *Matter of Eaton Assoc. Inc. v. Egan*, 142 A.D.2d 330, 334-335 (3d Dept. 1988), citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984), *reh. den.*, 468 U.S. 1250 (1984). Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. *Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). A plaintiff must thus demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dept. 2006), citing *Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339 (1976).

B. Law of the Case

The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. *Brownrigg v. New York City Housing Authority*, 29 A.D.3d 721, 722 (2d Dept. 2006). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision. *Id.* The doctrine

may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence. *Id.*

C. Res Judicata

The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 (2008), quoting *Matter of Grainger* [*Shea Enters.*], 309 N.Y. 605, 616 (1956). Under New York's transactional approach to *res judicata*, 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 on different theories or seeking a different remedy. *Id.* at 533-534, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). Courts should apply a pragmatic test to determine whether particular claims are part of the same transaction for *res judicata* purposes. This involves analyzing (a) whether the facts are related in time, space, origin or motivation, (b) whether they form a convenient trial unit, and (c) whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *Maybaum v. Maybaum*, 933 N.Y.S.2d 43, 47 (2d Dept. 2011), citing *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100-101 (2005), quoting Restatement [Second] of Judgments § 24[2].

D. Collateral Estoppel

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. *Maybaum*, 933 N.Y.S.2d at 47, citing *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999), quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine applies if the issue in the second action is identical to an issue that was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. *Id.* at 48, quoting *Parker*, 93 N.Y.2d at 349.

E. Application of these Principles to the Instant Action

The Court concludes that, in light of Justice Palmieri's determination in the Related Action that there existed issues of fact regarding Mosbacher and Corp.'s claims of negligent misrepresentation by Chase warranting the denial of Chase's motion to dismiss that affirmative

defense, Chase's instant motion is precluded by the doctrine of collateral estoppel. Chase is attempting to relitigate, in the Instant Action, the issue of the viability of Plaintiffs' negligent misrepresentation claim, which was clearly raised in the Related Action and decided against Chase by virtue of Justice Palmieri's denial of Chase's motion for judgment dismissing Mosbacher and Corp.'s affirmative defense based on negligent misrepresentation. The Court concludes that Chase had the opportunity to litigate the issue in the Related Action in light of the fact that Mosbacher and Corp. raised the affirmative defense of negligent misrepresentation in the Related Action, and moved to dismiss that affirmative defense in its motion for summary judgment in the Related Action.

In light of the foregoing, the Court denies Defendants' motion..

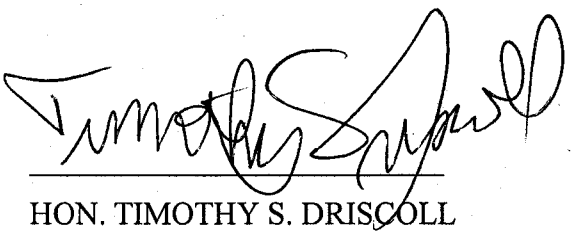
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on March 8, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 15, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.