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SHORT FORM ORDER

INDEX No. 08-31762

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 1-9-12
ADJ. DATE 3-13-12
Mot. Seq. # 006 - MotD

STL RESTAURANT CORP. and TOM DESANTIS, Plaintiffs, - against - MICROCOSMIC, INC, and THOMAS BRUCKNER, Defendants.	SAPIENZA & FRANK Attorney for Plaintiffs 5550 Merrick Road, Suite 301 Massapequa, New York 11758 LONG, TUMINELLO, BESSO, et al. Attorney for Defendant Microcosmic Inc. 120 Fourth Avenue, P.O. Box 5591 Bay Shore, New York 11706

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 20 - 21; Replying Affidavits and supporting papers 22 - 25; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Microcosmic, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint is determined herein.

This is an action to recover damages arising from the sale and operation of a purported restaurant business known as "Tennessee Jack's Barbeque" located at 148 Carleton Avenue, East Islip, New York. Plaintiff Tom DeSantis (DeSantis) entered into an agreement dated December 5, 2007 in which defendant Microcosmic, Inc. (Microcosmic) by its officer, defendant Thomas Bruckner (Bruckner), agreed to sell and plaintiff DeSantis agreed to purchase a "restaurant business" at said location for the sum of $300,000.00, of which $20,000.00 would be paid at the signing of the agreement, $50,000.00 would be paid at closing, and the remaining $230,000.00 would be paid with the execution and delivery of a promissory note in that sum to defendant. The premises on which the business is operated is owned by a non-party and pursuant to the terms of the agreement, plaintiff DeSantis agreed to assume all the terms and conditions of the lease of the premises.

Defendant Microcosmic represented and warranted in the agreement that the business "is being operated in accordance with all laws, ordinances and rules affecting said business," and that "there are

no violations pending against it to the best of its knowledge in any Local, State or Federal department ..." In addition, the agreement provided that defendant Microcosmic made no representation as to the amount of sales or the condition of the fixtures sold and listed therein other than that the plumbing, heating and electrical equipment or systems would be in working order at the time of closing and that the roof and walls would be free from leaks.

Plaintiff DeSantis subsequently assigned his interest in the agreement to plaintiff STL pursuant to the terms of the agreement. Then, at the closing on February 26, 2008, defendant Microcosmic tendered a bill of sale and assigned the lease and security deposit to plaintiff STL and plaintiff STL, by its president, plaintiff DeSantis, tendered the second payment and gave defendant Microcosmic a promissory note for the remaining $230,000.00 with the personal guaranty of plaintiff DeSantis. The bill of sale indicated that the warranties and covenants in the agreement became a part thereof and would continue in full force and effect.

Less than one month after the closing, on March 19, 2008, the police and fire departments responded to a kitchen fire on the premises and after conducting a permit inspection, the Town of Islip Fire Marshal issued a violation notice to "Tennessee Jacks." The violation notice listed the following: 1) key locks prohibited on inside of exit doors, 2) discontinue use of extension cords and multi-plug adapters, 3) stainless steel hood required for kitchen cooking area (ducts as well), 4) remove dead bolt from dining room exit, 5) smoke detector maintenance records to be submitted to this office, 6) provide portable class "K" extinguisher for kitchen area, 7) failure to maintain smoke detectors, 8) remove slide bolts/latches from kitchen exit door, 9) failure to maintain kitchen suppression system (nozzle missing), 10) provide cover for circuit breaker panel, and 11) failure to display public assembly permit from Islip Fire Marshall's office. Sometime thereafter, plaintiffs ceased operation of the business. Plaintiffs commenced this action on August 19, 2008.[1] They continued to make payments on the note until December 2008.

By their amended and/or supplemental complaint, plaintiffs allege a first cause of action for breach of contract claiming that the business was not being operated in accordance with all laws, ordinances and rules affecting the business and was not in compliance with all laws, codes, rules and regulations for operation of a restaurant; a second cause of action to recover lost income and profits in the sum of $100,000 resulting from the breach of contract; and a third cause of action to recover damages in the sum of $100,000 for substantial repairs and alterations required to make the business compliant with all laws, codes, rules and regulations for the operation of a restaurant.

In addition, plaintiffs allege a fourth cause of action claiming fraudulent inducement by defendant Bruckner and seek a declaration that the purchase agreement was null and void ab initio as well as the return of the full purchase price of $300,000. Plaintiffs claim that defendant Bruckner represented to plaintiffs in the fall of 2007 and at meetings in 2008, prior to the sale, that the business had previously been converted from a tavern to a restaurant, that the business was a legal restaurant

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[1] By order of this Court dated May 3, 2011, this action and the related action entitled Microcosmic, Inc., plaintiff, against STL Restaurant Corp. and Tom DeSantis, defendants under Index number 97430-2011 were joined for trial.

business, that the premises complied with all building and fire codes and regulations, and that the sale of food on the premises was authorized under the business classification as a restaurant. In addition, plaintiffs claim that defendant Bruckner represented that he had employed a professional contractor to ensure that the kitchen area complied with the building and fire code and had assured plaintiffs that all the work had been done in compliance with all applicable codes and regulations. Plaintiffs also claim that defendant Bruckner represented that the business had been inspected by the Town of Islip Fire Marshal and that the business complied with all fire regulations. Plaintiffs further claim that defendant Bruckner's representations were false, that he knew of their falsity and made those representations intending to deceive plaintiff DeSantis and to induce him into entering the purchase agreement, and that plaintiff DeSantis acted in reliance upon said representations that he believed to be true and would not have entered into the agreement but for the false and fraudulent representations. Plaintiffs allege a fifth cause of action claiming fraud and a sixth cause of action claiming unjust enrichment in that defendants failed to transfer a fully operational restaurant business.

In their answer, defendants assert affirmative defenses including that prior to the purchase of the premises, plaintiffs had inspections of the premises and no deficiencies or violations were found, defendants never prevented or attempted to prevent plaintiffs from fully inspecting the premises, and that an inspection of the official records of the Town of Islip would have disclosed no deficiency or violation. Defendants also assert affirmative defenses that defendants did not mislead plaintiffs regarding the condition of the premises nor did they conceal or hide any known defect or violation, and that defendants' responsibilities and representations under the agreement merged into the bill of sale such that defendants are not responsible for occurrences subsequent to the delivery of the bill of sale.

Defendant Microcosmic now moves for summary judgment in its favor dismissing the complaint. Defendant Microcosmic asserts that it is entitled to dismissal of the second and third causes of action inasmuch as lost profits were not foreseeable at the time of contract because its principal, defendant Bruckner, believed that he had obtained the requisite permits, the business was compliant with all applicable laws, codes, rules and regulations, and the business was lawfully being operated as a bar/restaurant, and damages for repairs could have been obviated by plaintiff DeSantis, who had managed the business approximately one month prior to purchase, by having the premises inspected prior to purchase to enable the parties to learn of any deficiencies and to correct them prior to closing. In addition, defendant Microcosmic asserts that the fourth and fifth causes of action are duplicative, that the allegations supporting the fraud claim relate directly to the breach of contract claim, and that in any event there is no evidentiary support for a fraud claim inasmuch as defendant DeSantis testified that he had no proof that defendant Microcosmic was aware that any representations made prior to closing were untrue, no violations were issued against the restaurant by the Town Building Division or Fire Marshal prior to closing which would have given notice that its operation was improper, and defendant Microcosmic had valid permits at the time of closing and the premises had passed all inspections. Defendant Microcosmic also asserts that plaintiffs cannot claim justifiable reliance inasmuch as they failed to make their own due diligence inquiries prior to purchasing the business. Moreover, defendant Microcosmic asserts that since the validity of the agreement has not been challenged, plaintiffs cannot recover in quasi-contract for unjust enrichment, and that in any event, defendant is not in possession of money nor has it obtained a benefit that it cannot in good conscience maintain. Furthermore, defendant Microcosmic asserts that the breach of contract cause of action must be dismissed inasmuch as plaintiffs

have failed to perform their obligation by refusing to remit payment on the note beginning in December 2008 and that none of plaintiffs' allegations demonstrate a breach of the terms of the agreement.

Plaintiffs only submit the affirmation of their attorney in opposition to the motion.

Initially, the Court notes that this motion by defendant Microcosmic was made on December 2, 2011, when it was served, and that by order of this Court dated August 25, 2011, a prior motion by defendant Microcosmic to dismiss the complaint was denied without prejudice with leave to renew for failure to submit a copy of the pleadings. The Court indicated in said order that defendant Microcosmic appeared to be forging a course for summary judgment through the submission of certain evidence but that it had failed to specify that standard in its notice of motion. The note of issue in this action was filed on August 1, 2011. Although plaintiffs contend that the subject motion is untimely, having been made three days after the 120-day deadline for summary judgment motions, it is essentially a renewal of the prior motion and is thus, timely.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, *supra* at 562, 427 NYS2d 595).

Defendant Bruckner explains in his affidavit in support of the motion that he is an officer of defendant Microcosmic and that defendant Microcosmic had acquired the subject restaurant/bar business in 2004, at which time it was known as Lennon's Restaurant and Catering, and continued to operate it as a restaurant/bar for a year after re-naming it Yellow Ledbetters Bar and Grill. In addition, he explains that defendant Microcosmic subsequently changed the menu to barbecue-style food and the name to Tennessee Jacks Barbeque Restaurant and Bar. Defendant Bruckner states that the Town of Islip had issued a permit on or about June 17, 2003 that remained valid for two years and that the issuance of a successive permit required inspections by the Town. According to defendant Bruckner, a permit issued in 2005 was contingent on the installation of a fire suppression system that complied with Town regulations and that following its installation by defendant Microcosmic, a certificate of compliance was issued on March 31, 2006. Also according to defendant Bruckner, an additional permit was obtained in 2007 that was valid until June 30, 2009 and an inspection of the premises in relation to the issuance of said permit revealed the premises to be in compliance with all applicable Fire Code and Building Code requirements. He avers that to his knowledge the premises was in full compliance with all building and fire codes, rules, regulations and laws at the time of closing. Defendant Bruckner asserts that the violations detailed in the violation notice dated March 18, 2008 did not exist at the time of closing. He argues that plaintiff DeSantis could easily and inexpensively have remedied the listed violations to make the premises compliant and continue operating the business, instead plaintiff DeSantis ceased the

business' operation and is claiming that said violations are significant enough to constitute a breach of the purchase agreement in an attempt to avoid his obligations under the agreement and the promissory note. Defendant Bruckner states that with respect to one of the listed violations, he and the property owner offered to pay for the welding of the existing pressed steel hood in the kitchen cooking area so that it would be in compliance with the fire code but plaintiffs refused their offer.

The deposition testimony of defendant Bruckner reveals that when he purchased Lennon's Restaurant and Catering in 2004 and continued to operate it for a year after re-naming it Yellow Ledbetters Bar and Grill, the business involved the sale of beverages with the incidental sale of food, and that he then changed the operation in August 2005 to add barbeque food and both food sales and beverage sales increased. He was unsure of the ratio of food sales to beverage sales but believed that the ratio of 80 percent food to 20 percent beverage to be inaccurate, that the beverage sale percentage was higher. Defendant Bruckner explained that he used a broker to sell the business, which he characterized as a restaurant and bar.

The deposition testimony of plaintiff DeSantis reveals that prior to purchase of the business he went to inspect the premises on several occasions, saw that the business was being operated as a restaurant, had an accountant check the books, and approximately one month prior to closing he worked as a manager of the business and everything ran well. According to plaintiff DeSantis, prior to purchasing the business he determined that 80 percent of gross sales were attributable to food and 20 percent to beverages, that is, liquor. In addition, plaintiff DeSantis testified that his attorney conducted a search of Town records prior to entering into the agreement, that he discussed the search results with his attorney, and that the search revealed that "we were able to operate the business there" but that the records of the search did not include a search of building and zoning department records for existing violations nor for existing operation related permits. He also testified that he observed the liquor license and food [service establishment] permit and knew that the liquor license was valid but did not independently verify the food [service establishment] permit. He also reviewed the lease.

Plaintiff DeSantis further testified that after he became the owner of the business he continued to operate the business in the same manner, serving food and beverages and providing entertainment two nights a week. The business was in continuous operation, with the exception of a kitchen fire, and the percentage of gross sales remained the same as prior to purchase. Plaintiff DeSantis explained that after he received the violation notice he went to the office of the Town's Fire Marshal and was sent from there to the Town's Building Department. According to plaintiff DeSantis, the person he saw at the Town's Building Department, whose name he does not know, told him that he could not serve food on the premises because the certificate of occupancy permitted use as a bar or tavern but not as a restaurant. He did not receive any summons or violation from the Town concerning the serving of food on the premises but was warned that it was an illegal business and that if left uncorrected, he would not be allowed to operate the business.

Defendant Bruckner testified at his deposition that he told plaintiff DeSantis that he was selling a restaurant and bar business, and plaintiff DeSantis testified that defendant Bruckner told him the business was a restaurant. Plaintiff DeSantis emphasized that he had wanted to purchase a restaurant, not a bar, but that he became the owner of a bar as a result of the transaction. In addition, plaintiff

DeSantis testified that he assumed that defendant Bruckner knew that his representations were untrue since defendant Bruckner should have known the nature of the business that he owned. Plaintiff DeSantis believed that food could not be served in a bar whereas food can be served in a restaurant and that the legal operation of the business was rendered impossible.

Regarding plaintiffs' first cause of action, the elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see* ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; ***Furia v Furia***, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]; *see also* ***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]).

The Town of Islip Code § 68-3 (b) defines "Bar, Tavern or Nightclub" as:

> An establishment principally engaged in the sale and service of alcoholic beverages for on-premises consumption, subject to regulatory authority of the New York State Liquor Authority and consisting of one or more of the following characteristics: age restrictions or cover charges for admission; listening or dancing to music provided by live entertainment, disc jockeys, jukeboxes or the like; and hours of operation which extend beyond the normal dining times for dinner. The accessory or incidental sale of foods or snacks shall not entitle such a use to be considered restaurant or minor restaurant use under other provisions of this Code, but the permanent or temporary removal or relocation of tables and chairs from such an establishment to permit any of the aforesaid characteristics shall constitute the creation of a bar, tavern, or nightclub use.

The Town of Islip Code § 68-3 (b) defines "Restaurant" as:

> An establishment engaged in the sale of prepared food intended for immediate consumption either on premises or off premises or both on premises and off premises and which is otherwise not defined as a fast-food restaurant, minor restaurant, accessory restaurant or bar, tavern or nightclub. A restaurant shall not include a drive-through window, and the sale, service and consumption of alcoholic beverages shall be clearly accessory to the food service use.

The deposition testimony reveals that the business sold to plaintiffs was operating in the semblance of the Town Code definition of a restaurant rather than a bar or tavern. In addition, defendant Bruckner signed, on behalf of defendant Microcosmic, the agreement expressly stating that "the Seller is the owner and licensee of a Restaurant business." Moreover, defendant Microcosmic submits, and defendant Bruckner mentions in his affidavit, a certificate of compliance/occupancy dated April 17, 2006 from the Town's Building Division. Said certificate certified that the improvements on the subject premises conformed substantially with the terms and requirements of the New York State Building Code and the Town of Islip Zoning Ordinance. The certificate lists the improvements as consisting of a commercial building (bar) built in approximately 1935 with a certificate of compliance

and public assembly permit, an addition to the commercial building with a certificate of occupancy and public assembly permit, and a fire suppression system (Microcosmic) with a certificate of compliance dated March 31, 2006. Said certificate specifically indicates that "[t]he above improvements or any part thereof shall not be used for any purpose other than for which they are certified." Inasmuch as the zoning laws concerning the legal use of the premises affect the legality of the operation of the business, defendant Microcosmic failed to show that the business was being operated as a bar in accordance with the certificate of compliance/occupancy dated April 17, 2006. Therefore, defendant Microcosmic has failed to establish that pursuant to the terms of the agreement, the "restaurant" business sold to plaintiffs was "being operated in accordance with all laws, ordinances and rules affecting said business" such that its request for summary judgment dismissing the first cause of action for breach of contract is denied.

It is well settled that the theory underlying damages is to make good or replace the loss caused by the breach of contract (*see* ***Brushton-Moira Cent. School Dist. v Fred H. Thomas Assocs., P.C.***, 91 NY2d 256, 669 NYS2d 520 [1998]). Damages are meant to return the parties to the point at which the breach arose and to place the non-breaching party in as good a position as it would have been had the contract been performed (*see id.*). In an action to recover damages for breach of contract, "the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (***Kenford Co. v County of Erie***, 73 NY2d 312, 319, 540 NYS2d 1 [1989]; *see* ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, 97 AD3d 716, 949 NYS2d [2d Dept 2012]; ***Yenrab, Inc. v 794 Linden Realty, LLC***, 68 AD3d 755, 759, 892 NYS2d 105 [2d Dept 2009]).

"A claim for lost profits is generally a claim for special or extraordinary damages" (***Yenrab, Inc. v 794 Linden Realty, LLC***, *supra* at 759; *see* ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, *supra*). "Lost profits may be recoverable for breach of a contract if it is demonstrated with certainty that such damages have been caused by the breach, and the alleged loss is capable of proof with reasonable certainty. There also must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time the contract was made" (***Blinds to Go [U.S.], Inc. v Times Plaza Dev., L.P.***, 88 AD3d 838, 839-840, 931 NYS2d 105 [2d Dept 2011]; *see* ***American List Corp. v U.S. News & World Report***, 75 NY2d 38, 43, 550 NYS2d 590 [1989]; ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, *supra*; ***Reads Co., LLC v Katz***, 72 AD3d 1054, 1056, 900 NYS2d 131 [2d Dept 2010]). Here, defendant Microcosmic established its prima facie entitlement to judgment as a matter of law dismissing plaintiffs' second cause of action for lost income and profits by showing that such damages were not contemplated by the parties when entering into the agreement (*see* ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, *supra*; ***Reads Co., LLC v Katz***, *supra*). The agreement's terms show that there was no intent by the parties to allow for economic loss as a potential basis for damages in the event of a breach (*see* ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, *supra*; ***Awards.com, LLC v Kinko's, Inc.***, 42 AD3d 178, 834 NYS2d 147 [1st Dept 2007], *affd* 14 NY3d 791, 899 NYS2d 123 [2010]; *compare* ***Ashland Mgt. v Janien***, 82 NY2d 395, 404-405, 604 NYS2d 912 [1993]). In opposition, plaintiffs failed to raise a triable issue of fact (*see* ***Crystal Clear Dev., LLC v Devon Architects of New York, P.C.***, *supra*). Therefore, defendant Microcosmic is granted summary judgment dismissing plaintiffs' second cause of action.

The third cause of action to recover damages for substantial repairs and alterations required to make the business compliant with all laws, codes, rules and regulations for the operation of a restaurant fails to allege a viable independent cause of action separate from the first cause of action for damages for breach of contract (*see generally* ***Aglione v Stonegate at Grasmere Condominium I***, 170 AD2d 470, 565 NYS2d 559 [2d Dept 1991]). Therefore, defendant Microcosmic is granted summary judgment dismissing the third cause of action.

The equitable relief sought by plaintiffs for alleged fraud, fraudulent inducement, and unjust enrichment is unavailable to them under the circumstances (*see* ***Stollsteimer v Kohler***, 77 AD3d 1259, 910 NYS2d 581 [3d Dept 2010]). "[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (***Schumaker v Mather***, 133 NY 590, 596, 30 NE 755 [1892]; *see* ***Jachetta v Vivona Estates, Inc.***, 249 AD2d 512, 672 NYS2d 111 [2d Dept 1998]). "[W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented" (***Rodas v Manitaras***, 159 AD2d 341, 343, 552 NYS2d 618 [1st Dept 1990]). The facts related to the legality of the operation of the business were matters of public record ascertainable with relatively minor effort and were not exclusively within defendants' knowledge (*see* ***Stollsteimer v Kohler***, *supra*). Plaintiff DeSantis admitted at his deposition that he observed a copy of the food service establishment permit during the one month that he worked as manager prior to closing. Even if defendants' representations could be construed to mean that the certificate of occupancy or certificate of compliance of the premises permitted the use of the premises for the operation of a restaurant business, any reliance by plaintiffs upon said representation was not reasonable where the terms of the certificate of occupancy or certificate of compliance, both public records, were not within defendants' exclusive knowledge (*see* ***Jordache Enterprises, Inc. v Gettinger Assocs.***, 176 AD2d 616, 575 NYS2d 58 [1st Dept 1991], *lv to appeal dismissed* 80 NY2d 925, 589 NYS2d 311 [1992]).

Plaintiff DeSantis could have insisted on seeing the certificate of occupancy or certificate of compliance for the premises as a condition to closing to make sure that the certificate(s) allowed for the operation of a restaurant and could have inquired as to whether there were any outstanding violations against the premises and/or business from the Town's Building Department or Fire Marshal and hired someone to inspect the premises prior to closing. Plaintiffs failed to do so and they "cannot now be heard to complain that they have been defrauded. It was their own lack of diligence that is responsible for their current predicament" (*see* ***McManus v Moise***, 262 AD2d 370, 371, 691 NYS2d 166 [2d Dept 1999]; ***Rodas v Manitaras***, *supra*). In addition, plaintiffs' recovery for unjust enrichment is barred by the valid and enforceable agreement (*see* ***Whitman Realty Group, Inc. v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]). Plaintiffs have failed to demonstrate the existence of triable issues of fact (*see* ***Whitman Realty Group, Inc. v Galano***, *supra*). Therefore, defendant Microcosmic is granted summary judgment dismissing plaintiffs' fourth cause of action for fraudulent inducement, fifth cause of action for fraud, and sixth cause of action for unjust enrichment.

Accordingly, the instant motion is granted solely to the extent that plaintiffs' second, third, fourth, fifth and sixth causes of action are dismissed. Plaintiffs' first cause of action for breach of contract is severed and continued.

Dated: 12/4/12

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**