Promerica Fin. Corp. v Inmoholdings, Inc.
2012 NY Slip Op 33222(U)
August 13, 2012
Sup Ct, NY County
Docket Number: 650082/12
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [illegible] L. [illegible] J.S.C. **Justice**

PART 45

Index Number : 650082/2012
PROMERICA FINANCIAL
vs.
INMOHOLDINGS INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | **No(s).** ____

Answering Affidavits — Exhibits ____ | **No(s).** ____

Replying Affidavits ____ | **No(s).** ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants dismissing the complaint against them on jurisdictional grounds is GRANTED in part and DENIED in part per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Dated: August 13, 2012

[signature], J.S.C.
[illegible] L. [illegible]

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

PROMERICA FINANCIAL CORPORATION,

Plaintiff,

- against -

INMOHOLDINGS, INC., ABELARDO PACHANO BERTERO, individually, ABELARDO PACHANO BERTERO, as representative and authorized signatory of other shareholders of Banco de la Produccion S.A., BANCO DE LA PODUCCION S.A., and RODRIGO PAZ DELGADO,

Defendants.

Index No.: 650082/12

DECISION AND ORDER

Motion Sequence Nos. 002 and 003

MELVIN L. SCHWEITZER, J.:

This matter arises out of a Letter of Intent (LOI) and a Draft Stock Purchase Agreement (Draft SPA) (collectively, the Agreements) concerning the purchase and sale of a controlling interest in shares of an Ecuadorian bank known as *Banco de La Produccion S.A.* (Produbanco). It involves claims for breach of contract, breach of the duty of good faith, tortious interference with contract, and tortious interference with prospective economic advantage.

In Motion Sequence No. 002, defendants Produbanco and Rodrigo Paz Delgado (Paz)[1] move pursuant to Civil Practice Law and Rules (CPLR) Section 3211 (a) (8), dismissing the Complaint insofar as it is pled against them on the grounds that since neither of these foreign defendants have minimum contacts with New York, nor consented to its jurisdiction, this court lacks personal jurisdiction over them.

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[1]The parties refer to Mr. Delgado as "Paz" in their papers and this Court does the same herein for consistency.

[* 3]

In Motion Sequence No. 003, defendants Inmoholdings, Inc. (Inmoholdings) and Abelardo Pachano Bertero (Pachano)[2] move (a) pursuant to CPLR 3211 (a) (7), dismissing the Complaint as pled against them for the failure to state a claim; (b) to strike Promerica's demand for punitive damages, attorneys' fees, and specific performance because none of these remedies are available in the LOI; and (c) to quash the potential service of the Complaint upon the unidentified shareholders of Produbanco

The motions are consolidated for disposition.

Background

The Parties

Accepting the allegations in the Complaint as true, the following facts emerge: Promerica is a Panamanian corporation with its principal place of business in Panama City, Panama. Complaint, ¶ 9. Promerica owns Ecuador's eighth largest bank and, as part of its business expansion, desired to obtain a controlling interest in Produbanco, an Ecuadorean banking corporation with its principal place of business in Quito, Ecuador. *Id.*, ¶ 19. This acquisition would provide a unique opportunity for Promerica's banking business in Ecuador, creating additional product lines, economies of scale, and strategic locations in Ecuador's key business districts. *Id.*, ¶ 19

Promercia sought to acquire this interest from Inmoholdings, a Panamanian corporation with its principal place of business in Panama City, Panama that owns 42% of Produbanco's stock, and a group of Produbanco's shareholders who collectively own approximately 16% of the

[2] The parties refer to Mr. Bertero as "Pachano" in their papers and this Court does the same herein for consistency.

stock (the Shareholders). *Id.*, ¶¶ 10, 18. The Shareholders are represented by Pachano, Produbanco's President and CEO, who resides in Quito, Ecuador. *Id.*, ¶¶ 2, 11. Paz is Chairman of the Board of Produbanco, an Inmoholdings shareholder, and resides in Quito, Ecuador. *Id.*, ¶¶ 14, 28.[3]

The LOI

On July 22, 2011, Promerica, Inmoholdings, and Pachano[4] executed the LOI for Promerica to purchase 58% of Produbanco's outstanding shares from Inmoholdings and the Shareholders. *Id.*, ¶ 21. The LOI, attached as Exhibit A to the Complaint, provides in relevant part:

> Due Diligence. Following the date hereof, [Promerica] shall promptly begin conducting diligence on the Company. . . .

Id., ¶ 4.

> Good Faith; Cooperation. Each of the parties hereto agrees to proceed in good faith to negotiate, and, if agreed to, execute and deliver the Purchase Agreement, and consummate the transactions contemplated herein. . . .

Id., ¶ 6.

* * *

> Agreement in Favor of Transaction: [Inmoholdings and Pachano, individually and as a representative of the Shareholders] hereby agree to execute the Purchase Agreement and sell the [Produbanco] Shares to Promerica on the terms and conditions set forth herein. Promerica hereby agrees to execute the Purchase Agreement and purchase the Shares . . . on the terms and conditions set forth herein subject to satisfactory completion of [Promerica's] due diligence review of [Produbanco].

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[3] Produbanco, Pachano, Inmoholdings, and Paz are collectively referred to as the "Defendants."

[4] Throughout the Complaint, Promerica alleges that Pachano acted both individually and as representative of the other Shareholders.

[* 5]

Id., ¶ 10.

* * *

> Jurisdiction; Service of Process; Waiver of Jury: Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, the Binding Provisions may be brought against any of the parties hereto in the courts of the State of New York, County of New York . . . and each of the parties hereto consents to the jurisdiction of such courts. . . .

Id., ¶ 13.

* * *

> Intention of the Parties. Except for Sections 6-15, which shall be binding (the "Binding Provisions"), this Letter of Intent is not intended to be a binding agreement, and shall not give rise to any obligations between the parties. . . .

Id, ¶ 15.

* * *

Promerica avers that it performed due diligence on Produbanco, at substantial expense, after the parties executed the LOI. Complaint, ¶ 24.

The Draft SPA

At some unspecified point, Promerica began to negotiate the terms of the Purchase Agreement with Produbanco, Inmoholdings, and Pachano. *Id.*, ¶ 25. By November 7, 2011, these parties reached an agreement on all of the customary terms for a transaction such as this and reduced their understanding to writing. *Id.*, ¶ 26. A copy of the unsigned Draft SPA, which bears the header "H&W Draft 11/07/11," is attached as Exhibit B to the Complaint. *Id.*, Ex. B.

The Draft SPA is missing several terms, including the execution date, *Id.*, at 1; the number of shares that Inmoholdings and the Shareholders own, *Id.*, at 8; the purchase price of the shares, *Id.*, at 14-15; appointments as power of attorney, *Id.*, at 16; specifics about meeting dates prior to the closing, *Id.*, at 41; and limitations on indemnity, *Id.*, at 50. Moreover, the Draft SPA

includes remarks and comments, including the need for further discussions with counsel, *Id.*, at 10-11, 15; and reference to a forthcoming expert opinion, *Id.*, at 15. There are also blank signature pages for Produbanco, Inmoholdings, and five individual Shareholders. *Id.*, p. 64.

The Failure to Execute the Transaction

On or about November 13, 2011, Promerica became aware that Paz coerced Inmoholdings and Pachano into refusing to execute the Draft SPA and from performing their other contractual obligations. Complaint, ¶ 28. This was not premised on Paz's disagreement with any of the material terms of the LOI or the Draft SPA, but rather on his quest to obtain unjustifiable and improper personal gain from the transaction. *Id.*, ¶ 29. Specifically, Paz allegedly demanded that (a) his fellow Inmoholdings shareholders pay him a larger percentage of the sale proceeds than his ownership interest entitled him to or that Produbanco pay him an undeserved bonus, in violation of Ecuadorean law; (b) he be exempt from the representations and warranties in the Draft SAP; and (c) Produbanco make a loan, on below market terms, to a soccer team of which Paz is president. *Id.*, ¶ 30. In a further attempt to frustrate the transaction and avoid its obligations under the LOI, Inmoholdings, at the behest of Paz, took action to divest its only asset, the Produbanco shares, to four other entities. *Id.*, ¶ 36.

Promerica Commences this Action

Promerica commenced this action on or about January 10, 2012. It avers that the Defendants, all of whom are domiciled in either Panama or Ecuador, consented to this court's jurisdiction through the LOI and Draft SPA. *Id.*, ¶ 15.[5]

[5] Inmoholdings and Pachano do not dispute that they are subject to this Court's jurisdiction.

In Count I, Promerica alleges that Inmoholdings, Pachano, and Produbanco breached the Draft SPA by refusing to sell their shares in Produbanco to Promerica. *Id.*, ¶42. Promerica further alleges that Inmoholdings and Pachano refused to perform their other obligations under the LOI, thereby resulting in a breach of that agreement. *Id.*

In Count II, Promercia contends that Inmoholdings and Pachano breached the LOI by refusing to agree to the material terms of the transaction and not executing the Draft SPA. *Id.*, ¶ 47.

Promerica alleges in Count III that Inmoholdings and Pachano breached the obligation to negotiate in good faith pursuant to LOI ¶ 6 by refusing to finalize the Draft SPA. It further alleges that Inmoholdings, Pachano, and Produbanco breached the duty of good faith by failing to perform their obligations under the Draft SPA. *Id.*, ¶ 52.

In Count IV, Promerica contends that Paz tortiously interfered with the Agreements by orchestrating the scheme to prevent Produbanco, Inmoholdings, and Pachano from executing the transaction. *Id.*, ¶ 58.

Similarly, in Count V, Promerica alleges that Paz tortiously interfered with the LOI by coercing Inmoholdings and Pachano into refusing to sell their shares to Promerica. *Id.*, ¶ 66.

Finally, Promerica avers in Count VI that Paz tortiously interfered with Promercia's prospective economic advantage by frustrating performance under the Agreements. *Id.*, ¶ 70.

Additionally, Promerica seeks punitive damages, reasonable attorneys' fees and costs, and specific performance of both the LOI and Draft SPA. *Id.*, at 24.

Defendants Move to Dismiss

On or about March 13, 2012, Defendants moved to dismiss the Complaint. In Motion Sequence No. 002, Produbanco and Paz move pursuant to CPLR 3211 (a) (8), alleging that this court does not have personal jurisdiction over them because (a) they are not signatories to the LOI, and therefore not bound to its forum selection clause; (b) the Draft SAP was never executed, thereby rendering it, and its forum selection clause, unenforceable; and (c) neither have minimum contacts in New York.[6]

In opposition, Promerica contends that (a) Produbanco and Paz are bound by the LOI, and, consequently, its forum selection clause because they are "closely related" to this dispute as their interests are predicated upon those of the LOI's signatories; (b) the Draft SPA is a binding preliminary agreement, of which Produbanco is a party and Paz is "closely related", and (c) Produbanco engages in continuous transactions with New York-based banks, thereby rendering it subject to this Court's jurisdiction.

In Motion Sequence No. 003, Inmoholdings and Pachano move (a) pursuant to CPLR 3211 (a) (7) dismissing Counts I and III as pled against them and Count II in its entirety alleging that (i) the parties never executed the Draft SPA, to wit, rendering it unenforceable and (ii) the LOI does not obligate the parties to consummate the transaction; (b) to strike Promerica's demand for punitive damages because such an award is not recoverable for a claim sounding in ordinary breach of contract; (c) to strike the demand for attorneys' fees as the LOI provides that each party is to pay its own fees; (d) to strike the demand for specific performance because the LOI does provide for this remedy; and (e) to quash potential service of the Complaint upon the

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[6] Motion Sequence No.:002, seeks dismissal of Counts I & III as against Produbanco and Counts IV, V, and VI in their entirety.

unidentified shareholders of Produbanco because the Complaint is vague as to the identity of these individuals.

In opposition, Promerica argues that (a) the Draft SPA is an enforceable preliminary agreement, as all the necessary terms were agreed upon; (b) the LOI binds the parties to consummate the transaction; (c) the demand for punitive damages, attorneys' fees and costs, and specific performance are not subject to dismissal under CPLR 3211 (a) (7); and (d) it has the right join the unnamed Shareholders in this action at a later date, if necessary.

Discussion

The Draft SPA

Before addressing defendants' arguments for dismissal, the court will address whether, and to what extent, Promerica can viably rest any claims on the Draft SPA. Defendants argue the Draft SPA – an unexecuted, preliminary document – is unenforceable and cannot serve as the basis for any of the claims that Promerica asserts in this action. *Jordan Panel Systems Corp. v Turner Construction Co.*, 45 AD3d 165, 166, 841 NYS2d 561, 562 (1st Dept 2007). Promerica attempts to circumvent this well-established rule by relying on an analytical framework utilized by certain federal and New York State courts whereby preliminary documents, under certain conditions, may be enforced.

Promerica posits that the Draft SPA is a "Type I Preliminary Agreement" (Type 1 Agreement), defined by some courts as a complete agreement that reflects a meeting of the minds on all material issues, and binds all parties to the contractual objective. *See e.g. IDT Corp. v Tyco Group S.A.R.L.*,54 AD3d 273, 863 N.Y.S. 2d 30 (1st Dept 2008) *aff'd* 13 NY3d 209, 215 (2009) *citing Brown v Cara,* 430 F3d 148 (2d Cir 2005). Stated differently, a Type 1 Agreement

may be enforced if it evidences that the parties assented to the material terms of the transaction despite the fact that other terms are left open for further discussion. *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce,* 70 AD3d 423, 894 NYS2d 47 (1st Dept 2010).

In order for a court to ascertain whether there is even the possibility that a Type 1 Agreement may be enforced, there must be a manifestation that the parties agreed to be bound by its terms. *180 Water Street Assoc. LP v Lehman Bros. Holdings, Inc.*, 7 AD3d 316, 776 NYS2d 278 (1st Dept 2007). The distinguishing factor from the line of cases discussing Type 1 Agreements and the instant matter is that those cases involved an *executed* agreement, which demonstrated the parties' assent to its terms and conditions. *See e.g. EQT Infrastructure Limited v Smith*, No. 11-CV-0462 (CS), 2012 WL 933097 (SDNY March 12, 2012) ("Type 1 Preliminary Agreements *are executed* with the expectation of a subsequent, more formal agreement.") (*emphasis added*). Here, to the contrary, there is no evidence that the parties acceded to the Draft SPA's terms because none of them signed it. *Nueva El Barrio Rehabilitacion De Vivienda y Economica, Inc. v Moreight Realty Corp.*, 87 AD3d 465, 928 NYS2d 62 (1st Dept 2012). Moreover, the Draft SPA's missing terms, commentaries, and variations from the LOI – such as omission of the inclusion of Produbanco as a named party – moot any contention that the LOI's execution manifests defendants' intention to be bound by the Draft SPA. *Cf. Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 828 NE2d 593 (2005). As such, there is no basis for the court to hold that the Draft SPA is susceptible of enforcement, and, accordingly, all claims that derive from the Draft SPA are dismissed with prejudice.

Motion Sequence No. 002

Produbanco and Paz argue that they are not subject to this court's jurisdiction. Jurisdiction is a threshold issue, and CPLR 3211 (a) (8) permits a party to dismiss claims against a defendant on the ground that "the court has not jurisdiction over the person of the defendant." *Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 808 NYS2d 3 (1st Dept 2005). The exercise of personal jurisdiction over a defendant must be authorized by the CPLR and in accordance with "traditional notions of fair play and substantial justice" as required by the due process clause of the United States Constitution. CPLR 301; CPLR 302; *International Shoe Co. v State of Washington,* 326 U.S. 310, 316 (1945). While the burden to demonstrate the existence of jurisdiction over a defendant rests on the plaintiff to defeat a pre-answer motion to dismiss, a court must view the jurisdiction allegations in a light most favorable to the plaintiff and resolve all doubts in its favor. *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001). Each of Produbanco and Paz's arguments for dismissal will be addressed, in turn.

Produbanco and Paz's "Close Relationship" to the LOI.

Promerica seeks to assert jurisdiction over Produbanco and Paz through the forum selection clause contained in LOI ¶ 13. Complaint, ¶ 15. While Promerica admits that neither Produbanco nor Paz are signatories to the LOI, it nonetheless relies on a principle held by certain courts that non-signatories "may be bound to a forum selection clause if the entity is 'closely related' to the dispute such that it becomes foreseeable that it will be bound." *Freeford Ltd. v Pendleton,* 53 AD3d 32, 857 NYS2d 62 (1st Dept 2008).

This "close relationship" among non-signatory, signatory, and dispute is rooted in a shared pecuniary interest. Indeed, courts that have bound non-signatories to a forum selection

clause have done so when the entity involved received a substantial financial benefit, or suffered a potential risk, in the underlying agreement and the dispute arising therefrom. Subsidiaries, successors-in-interest, corporate directors, and third-party beneficiaries – all of whom stood to gain or lose monetarily from the transaction at issue – are among those that have been held to be so bound. *See e.g. Montoya v Cousins Chanos Casino, Inc.*, 34 Misc 3d 1211(A), 943 NYS 793 (NY Sup 2012) (binding to the forum selection clause the signatory's only officers and shareholders, who consequentially were the only beneficiaries of its profits and losses); *Dogmoch Intern. Corp. v Dresdner Bank AG*, 304 AD2d 396, 757 NYS2d 557 (1st Dept 2003) (binding the subsidiary corporation to the forum selection clause because of its financial stake in the underlying transaction); *In't Private Satellite Prtnrs, L.P. v Lucky Cat Ltd.,* 975 F Supp 483 (WDNY 1997) (holding a successor-in-interest, that assumed its predecessor's rights and obligations, bound to the forum selection clause).

Applying this reasoning here, Produbanco does not fall within the ambit of foreseeability. To be sure, the majority ownership of Produbanco is at stake in this transaction. But it is difficult to ascertain the direct pecuniary effect that this transaction will have on Produbanco if and when 58% of its ownership is transferred to Promerica. The LOI contemplates that Promerica will tender payment to Inmoholdings and the Shareholders in exchange for the majority ownership of Produbanco. As such, the direct pecuniary effect of this transaction lies with Promerica, Inmoholdings and the Shareholders. Indeed, there is no indication that Produbanco stands either to gain or lose financially upon the consummation of this transaction. Promerica does not offer any analysis to this effect, and even if one were advanced premised on the synergies that might be created between Promerica and Produbanco, such an argument would be speculative at best as

opposed to a clear, discernible direct benefit/risk as articulated in the case law, *supra*. Accordingly, the court finds that Produbanco is not bound to the forum selection clause.[7]

The analysis, however, is quite different for Paz. Inmoholdings' sole asset is its stock in Produbanco, and Paz, as one of Inmoholdings' shareholders, undisputedly has a financial stake in the transaction's outcome. *Montoya*, 34 Misc 3d 1211(A) (NY Sup 2012). In the event this transaction were consummated, a portion of the payment that Promerica would tender to Inmoholdings for its stock ultimately would find its way to Paz.

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[7] It also is worth noting that the complaint here does not seek to confer jurisdiction over Produbanco based on its alleged business activities in New York. Rather, the sole basis is Produbanco's alleged consent to this court's jurisdiction through the LOI, discussed *supra*. Complaint, ¶ 15. The only reference to Produbanco "doing business" in New York is as an additional basis for laying venue in New York County. Notwithstanding, the court will address the parties' briefing on this discrete issue.

Produbanco submits the affidavit of Pachano who, with first hand knowledge, attests that Produbanco does not conduct business anywhere in the United States, nor does it solicit any U.S. or New York-based customers. Affidavit of Pachano in Support of Produbanco and Paz's Motion to Dismiss, ¶ 9 (B). Furthermore, Pachano attests that Produbanco's only connection to New York are (a) correspondent banking relationships with banks to facilitate international transactions for its customers and (b) an investment brokerage account with a New York financial institution that contains a credit line used to maintain bank liquidity, as is common in the banking industry. Reply Affidavit of Pachano in Further Support of Produbanco and Paz's Motion to Dismiss, ¶¶ 11, 13-16, 21.

It is well-settled under New York law that a corresponding banking relationship between a foreign bank and a New York financial institution does not provide sufficient grounds to exercise personal jurisdiction over a foreign bank. *Nemestky v Banque de Developpement de la Republica Du Niger*, 48 NY2d 962, 401 N.E. 2d 388 (1979). Equally settled is that a foreign bank's maintenance of a New York account for purposes of issuing letters of credit will not support a finding of general jurisdiction under New York law. *Landoil Resources Corp. v Alexander & Alexander Services, Inc.*, 77 NY2d 28, 556 NE2d 488 (1990). Through its submissions premised on first hand knowledge, Produbanco has sufficiently established that its only connection to New York is through these accounts which, in and of themselves, do not rise to the level of doing business in New York for jurisdictional purposes.

In the face of this submission, Promerica is duty bound to come forth with definite evidentiary facts in order to defeat the motion. *Flannery v General Motosrs Corp.*, 214 AD2d 297, 625 NYS2d 556 (1st Dept 1995). In opposition, Promerica submits the affidavit of Francesco Martin, Promerica's Managing Director, who attests without corroboration that Produbanco engages in significant corresponding banking relationships, investment accounts, and credit facilities with various New York banks. Moreover, he avers that a "substantial" portion of Produbanco's asserts – 20% – are held in New York. Affidavit of Francesco Martin in Opposition to Inmoholdings and Pachano's Motion to Dismiss, ¶ 23. Mr. Martin's affidavit contains purely conclusory allegations about Produbanco's conduct, which are neither based on first hand knowledge nor supported by evidentiary materials. *Badjer v Lehigh Val R.R. Co.*, 45 AD2d 601, 360 NYS2d 523 (4th Dept 1974). At most, Mr. Martin merely attests that Produbanco maintains correspondent banking relationships and a single account in New York, which, in and of themselves, are insufficient to support a finding of "doing business" in New York. Accordingly, this court does not find any basis to support a finding that Produbanco transacts business in New York. Therefore, and in conjunction with the findings stated *supra*, the complaint as pled against Produbanco is hereby dismissed with prejudice.

In addition, the forum selection clause expressly permits a party seeking to enforce "any rights arising out" of the LOI to commence such an action in New York County. Complaint, Ex. A, ¶ 13. The phrase *any* is all encompassing, and assuredly includes the tort claims asserted against Paz that are dependent on, and involve the same operative facts, as the breach of contract claim. *Weingard v Telepathy, Inc.*, No. 05-CV-2024 (MBM), 2005 WL 2990645 (SDNY November 7, 2005). Any argument to the contrary is belied by the plain and ordinary meaning of the phrase.

The court thus finds that Paz is closely related to Inmoholdings and this dispute so as to subject him to personal jurisdiction in New York. The motion to dismiss the complaint as pled against Paz is denied.

<u>Motion Sequence No.003</u>

Counts I, II, and III

Inmoholdings and Pachano move to dismiss the Complaint as pled against them under CPLR 3211(a) (7) for failure to state a cause of action. In considering a CPLR 3211 (a) (7) motion, the court must accept plaintiff's allegations as true and the complaint must be accorded "the benefit of every possible favorable inference." *CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 565, 915 NYS2d 2 (1st Dept 2010) *quoting Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972, 638 NE2d 511 (1994). The CPLR 3211 (a) (7) test is not whether the complaint states a cause of action, but whether plaintiff has one. *See Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970 (1976).

In Counts I and II, Promerica alleges that Inmoholdings and Pachano breached the LOI by, respectively, refusing to abide by its terms and failing to execute the Draft SPA. The elements of

a breach of contract claim are (1) the making of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages. *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 612 NYS2d 146 (1st Dept 1994). All of the elements of the cause of action must be properly pled in order to avoid dismissal. *Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585, 520 NYS2d 7 (1st Dept 1987).

With respect to the formation and purported breach of the LOI, Promerica alleges as follows:

> On July 22, 2011, Promerica and Defendants Inmoholdings and Pachano, individually and as a representative of other shareholders, executed the LOI for them to sell, and for Promerica to purchase, 58% of the outstanding shares of Produbanco . . . (LOI ¶ 1). The LOI, comprised of 16 numbered paragraphs, provides in clear and unequivocal terms that paragraphs 6 through 15 are binding upon the Parties (*Id.* ¶ 15). The LOI obligated the Parties to execute a Purchase Agreement by which Inmoholdings and Pachano, individually, and as a representative of other shareholders, would sell, and Promerica would purchase, 58% of the shares of Produbanco (*Id.* ¶ 10) . . .

Complaint, ¶ 21.

> By November 7, 2011, [the Parties] reached an agreement on all of the remaining customary terms, and all the agreed upon terms were memorialized in the Purchase Agreement . . . The Purchase Agreement was in final form, was in the possession of counsel to all Parties, and was simply awaiting the signature of the Parties. . . .

Id, ¶ 26.

* * *

> Although the Parties has reached an agreement on all terms in the Purchase Agreement, Defendants refused to perform their obligations under, or sign, the Purchase Agreement. . . .

Id, ¶ 29.

Specific to Count II, Promerica avers that Inmoholdings and Pachano "breached the LOI by refusing to sign the Purchase Agreement." *Id,* ¶ 47. Inmoholdings and Pachano counter that Count II should be dismissed because the LOI does not obligate the parties to consummate the transaction. For this argument they rely on LOI ¶ 6, which states that the transaction's execution is contingent upon the parties' agreement to its terms. *Id.*, Ex. A, ¶ 6.

This argument is unavailing. While LOI ¶ 6 indeed contains such provisional language, it must be read in context of the entire paragraph, however. LOI ¶ 6 states that *if* the parties reach an agreement, then they *are obligated* to consummate the transactions in accordance with the LOI's Binding Provisions. *Id.* It is here that Promerica rests its allegations, namely, that the parties had, in fact, agreed to all the material terms but Inmoholdings and Pachano refused to execute and complete the transaction, thereby breaching the LOI. As such, Promerica proffers a reasonable interpretation of the LOI and sufficiently states a claim for breach of contract. The motion to dismiss Count II is denied.

With respect to Count I, Promerica alleges that Inmoholdings and Pachano breached the LOI "by refusing to . . . perform their other obligations under . . . the LOI." Complaint, ¶ 42.[8] This pleading, however, is insufficient because it fails to allege the specific contractual provision upon which the claim for breach is based. *Kraus v Visa Int. Serv. Ass'n.*, 304 AD2d 408, 756 NYS2d 853 (1st Dept 2003). As such, the court cannot divine from the complaint on which of the LOI's ten potentially enforceable provisions Promerica rests its claim. Accordingly, the motion to dismiss Count I is granted, without prejudice.

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[8] The portion of Count I alleging breach of the Draft SPA is dismissed for the reasons stated *supra*.

In Count III, Promerica alleges that Inmoholdings and Pachano breached their contractual obligation in LOI ¶ 6 to negotiate the terms of the transaction in good faith. Specifically, Promerica alleges that:

> Upon entering the LOI, Promerica, Inmoholdings and Pachano . . . each had a duty to negotiate the remaining terms of the Purchase Agreement in good faith. (LOI ¶ 6.) Furthermore, upon reaching an agreement on all the terms in the Purchase Agreement, [the Parties] each had a duty of good faith to perform their obligations under the Purchase Agreement.

Complaint, ¶ 50.

* * *

> Inmoholdings [and] Pachano . . . breached their duty of good faith by refusing to conduct further negotiations in order to memorialize the terms of the Purchase Agreement . . . and by refusing their obligations under . . . the LOI.

Id., ¶ 52.

Here, Promerica sufficiently pleads that the LOI obligates the parties to negotiate in good faith, and that Inmoholdings and Pachano failed to do so. Whether Inmoholdings and Pachano failed to negotiate in good faith is a question of fact that cannot be resolved on a pre-answer motion to dismiss. *Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 854 NYS2d 89 (1st Dept 2008). Accordingly, the motion to dismiss Count III is denied.

The motion to strike the demand for punitive damages is denied. Whether a plaintiff is entitled to punitive damages is a factual issue that is not the proper subject of a pre-answer motion to dismiss. *Home Insurance Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481 (1990).

The motion to strike the demand for attorneys' fees is granted. It is well established under New York law that litigants pay their own costs, absent a statute or contract that provides for the

contrary. *Chapel v Mitchell*, 84 NY2d 345 (1994). Here, the LOI – the only potentially enforceable contract – does not contain such a provision, rendering such a demand improper. *No. 1 Funding Center, Inc. v H & G Operating Corp.*, 48 AD3d 908, 853 NYS2d 178 (3d Dept 2008).

The motion to strike the demand for specific performance is denied. Whether Promerica ultimately can obtain specific performance of the LOI is an issue that cannot be resolved at this juncture. *Lottridge v Lottridge*, 73 Misc 2d 614, 342 NYS2d 251 (N.Y. Sup. 1973).

Finally, the motion to quash service on the unidentified shareholders is denied. Inmoholdings and Pachano have not presented any cognizable argument, nor cited to any controlling precedent, for the court to deny Promerica the possibility to move, in the future, to amend the complaint to include the other, so far unnamed, Shareholders in this litigation.

Accordingly, it is

ORDERED that the motion to dismiss all claims premised on the Draft SPA is granted with prejudice; and it is further

ORDERED that the motion to dismiss the complaint as against Produbanco is granted with prejudice; and it is further

ORDERED that the motion to dismiss the complaint as against Paz is denied; and it is further

ORDERED that the motion to dismiss Count I is granted without prejudice; and it is further

ORDERED that the motion to dismiss Count II is denied; and it is further

ORDERED that the motion to dismiss Count III as pled against Inmoholdings and Pachano is denied; and it is further

ORDERED that the motion to strike the demand for punitive damages is denied; and it is further

ORDERED that the motion to strike the demand for attorneys' fees is granted; and it is further

ORDERED that motion to strike the demand for specific performance is denied; and it is further

ORDERED that motion to quash service on the unidentified Shareholders is denied.

This constitutes the Decision and Order of the court.

Dated: August 13, 2012

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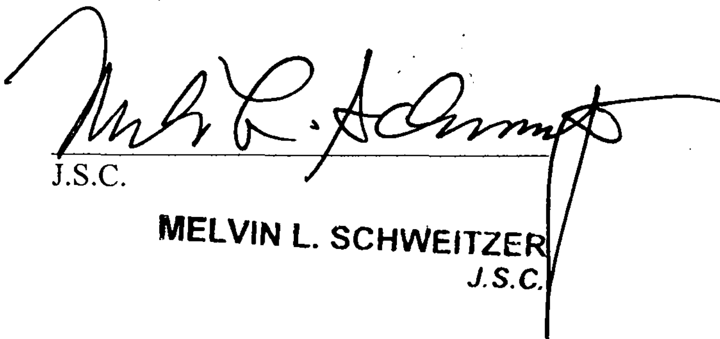

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.