You Jie Zhu v Beacon Intl., Inc.
2013 NY Slip Op 34120(U)
December 13, 2013
Supreme Court, Westchester County
Docket Number: 51551/2012
Judge: Alan D. Scheinkman

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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YOU JIE ZHU and TANBO RESTAURANT, INC.,

Plaintiffs,

-against-

BEACON INTERNATIONAL, INC. and GUANG YANG LI, a/k/a ANDY LI,

Defendants.

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Index No. 51551/2012

Motion Seq. # 003
Motion Date: October 11, 2013

DECISION & ORDER

Scheinkman, J:

Defendants Beacon Int'l, Inc. ("Beacon")[1] and Guang Yang Li (a/k/a Andy Li) ("Li") (together "Defendants") move pursuant to CPLR 3211(a)(1), (5) and (7) for an order dismissing the Amended Complaint of Plaintiffs You Jie Zhu ("Zhu") and Tanbo Restaurant, Inc. ("Tanbo") (together "Plaintiffs"). Plaintiffs oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history in this case is set forth in this Court's prior Decision and Order dated June 3, 2013 (the "June 2013 Decision"), the substance of which is incorporated herein by reference.

In the June 2013 Decision, the Court granted Defendants' motion for summary judgment, though it did so without prejudice and with leave to Plaintiffs to move to amend their complaint to assert a cause of action for violation of New York Real Property Law § 442-e. within thirty days of the date of the Decision.

Plaintiffs timely filed their motion to amend on June 25, 2013. The Court thereafter held a conference on August 7, 2013 at which the Court and counsel agreed that the motion to amend would be withdrawn without prejudice, that Defendants would consent to

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[1]Although Beacon is sued herein as Beacon International, Inc., based on the submissions on this motion, it appears that the proper defendant in this action is actually named Beacon Int'l, Inc.

the interposition of the amended complaint, and that Defendants would then timely move to dismiss the amended complaint.[2] The agreed upon procedure was followed and this motion ensued.

In their amended complaint, the allegations of which the Court must assume are true for purposes of this motion, Plaintiffs claim that Plaintiff Zhu is an individual residing in Yonkers, New York and Plaintiff Tanbo is a New Jersey corporation that is presently inactive. According to Plaintiffs, although Defendants failed to reveal this fact to Plaintiffs, Defendant Beacon "is an inactive New York corporation, dissolved by an Annulment of Authority on December 24, 2002" (Amended Complaint at ¶¶ 3, 12). Plaintiffs further allege that Defendant Li listed 9A Rewee Street, Brooklyn, New York as the address for Beacon International, Inc. In the agreement between the parties described below, but that this is not a valid address (*id.* at ¶7). Plaintiffs allege that Li is an individual residing in Queens (*id.* at ¶4) and that he is/was either the sole shareholder of Beacon or the sole active shareholder of Beacon.

Plaintiffs allege that, on or about August 2, 2010, they entered into an Agreement with "Beacon International Inc., c/o Guang Yang Li" (*id.* at ¶5), whereby Li was to act as Plaintiffs' agent in securing a lease of premises in the Freehold Raceway Mall where Plaintiffs would operate a Japanese restaurant (*id.* at ¶ 8). Li is claimed to have signed the Agreement as project manager (*id.* at ¶ 14). In exchange for his services, Li was to be paid a total of $75,000 (*id.* at ¶ 10) – $50,000 when a formal proposal was provided to Li by the Landlord and $35,000 when the rental agreement was signed (*id.* at ¶ 11). However, say Plaintiffs, Li is not, and was not, a licensed Real Estate Broker in New York or New Jersey (*id.* at ¶13).

In the Amended Complaint, Plaintiffs allege that the Agreement was made by Li as an individual (not as a corporate representative) and further allege that the Landlord's proposal to Plaintiffs was sent to Li individually and not Beacon and that it was sent to a residential address of 1709 65th Street, Brooklyn, New York and not Beacon's corporate address (*id.*, ¶¶15, 18-19).

In support of their piercing the corporate veil, Plaintiffs allege, on information and belief:

> (1) that as the sole shareholder or the sole active shareholder of Beacon, Li "dominated the corporate policy of Beacon International" "to commit a violation of law which caused Plaintiff's injury, to wit: acted as a Real Estate Broker without a license" (*id.* at ¶¶ 22-24);

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[2]This agreement enables the Court to address the merit of the amendment just once, rather than potentially twice with different legal standards applying to each review. Perhaps more importantly, it enabled the parties to avoid the expense and delay of potentially having duplicative rounds of motion practice. The Court expresses its appreciation to counsel for their cooperation in this regard.

(2) that Li disregarded corporate formalities in the operation of Defendant Beacon International by ... failing to maintain a corporate bank account, commingling corporate and individual funds, failing to have any corporate meetings, failing to maintain corporate records, failing to engage in any corporate resolutions, and failing to maintain a corporate premises" (*id.* at ¶ 26).

Plaintiffs assert a single cause of action for violation of New York's Real Property Law ("RPL") § 442-e in that Defendant Li acted as a Real Estate Broker without a required license and is therefore personally liable to Plaintiffs pursuant to RPL § 442-e(3). The damages sought range from $75,000 to $300,000.

DEFENDANTS' CONTENTIONS IN SUPPORT OF THEIR MOTION

In support of their motion, Defendants submit:

(1) an affidavit from Defendant Li wherein Mr. Li avers that Beacon Int'l, Inc. has "maintained its status as a corporation in good standing in the State of New York since it was formed in January, 2009" and that it maintained "an office at 1709 65th Street, Brooklyn, New York, which address is associated with a commercial store" (Affidavit of Guang Yang Li, sworn to September 12, 2013 at ¶¶ 3, 5, 6);

(2) an affirmation from Defendants' counsel Humayun Z. Siddiqi, Esq., the purpose of which is to attach: (i) the Amended Complaint (Ex. 1), (ii) the Project Agreement dated September 4, 2010 (Ex. 2), (iii) a printout from the New York Department of State website confirming the active good standing status of Beacon Int'l Inc. (Ex. 3), (iv) an excerpt from Google Maps showing the existence of 9 Rewe Street, Brooklyn, New York (Ex. 4), (v) the deed to the property known as 1709 65th Street, Brooklyn, New York (Ex. 5), (vi) a printout of the street view from Google Maps of 1709 65th Street (Ex. 6), (vii) Plaintiffs' original complaint (Ex. 7), and (viii) various papers submitted in connection with the Defendants' prior motion for summary judgment and Plaintiffs' withdrawn motion to amend (Exs. 8-10); and

(3) a memorandum of law.

Defendants contend the Amended Complaint must be dismissed because:

(1) the claim is barred by law of the case as Plaintiffs are claimed to have admitted that their first cause of action in the first complaint included their claim for violation of RPL § 442-e[3] and this Court dismissed that cause of action in connection with its grant of

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[3]In support, Defendants' rely on Plaintiffs' reply memorandum to their withdrawn motion to amend wherein they state that the first cause of action in their original complaint wherein Plaintiffs alleged a breach of contract and further alleged that Defendants failed to carry out the contract in a lawful manner, was meant to encompass defendants' failure to hold a real estate brokers license (Siddiqi Aff., Ex. 8 at III).

Defendants' motion for summary judgment in the June 2013 Decision;

(2) Defendant Li may not be held individually liable since (i) Plaintiffs' allegations for piercing the corporate veil are entirely conclusory and fail to meet the particularized requirements under CPLR 3013; and (ii) the minor typographical error of naming Beacon International Inc. rather than Beacon's real name – Beacon Int'l Inc. – does not support a basis for imposing liability on Li.

For their factual recitation, Defendants offer the following:

(1) based on the printout from the New York State Department of State website, Beacon Int'l, Inc. is a corporation in good standing (Siddiqi Aff., Ex. 3);

(2) that the Court may take judicial notice that 9 Rewe Street, Brooklyn, New York does exist based on the printout from Google Maps (Siddiqi Aff., Ex. 4);

(3) the address to which the Proposal was mailed is not Li's residential address and is instead a commercial property (as evidenced by the Google Maps photo, Siddiqi Aff., Ex. 6), it is owned by Agostino Oliveri and Caterina Oliveri (as evidenced by the deed, Siddiqi Aff., Ex. 5), Li has attested that he has never resided there and Beacon maintained offices at the property (Li Aff. at ¶¶6,7).

In support of the branch of their motion which seeks to dismiss the Amended Complaint based on law of the case, Defendants argue that the first breach of contract cause of action included the allegation that "Defendants failed to carry out the contract in 'a lawful manner' based on Plaintiffs' counsel's concession (to which Plaintiffs are bound) that such an allegation "encompass[ed] defendants' failure to hold a real estate brokers license. The intent at the onset of this suit was to support the third cause of action with defendant's violation of the Real Property Law'" (Defs' Mem. at 7). Thus, it is argued, "Plaintiffs' inclusion of a claim for violation of the *RPL* within their cause of action for breach of contract and the Court's dismissal of the same after granting Plaintiff a full and fair hearing on the issue binds the Court to its previous determination dismissing the claim and irrevocably precludes Plaintiffs from reasserting such a claim in their Complaint" (*id.* at 8).

In support of the branch of their motion which seeks to dismiss the Complaint as against Defendant Li, Defendants claim that the Amended Complaint "makes no explicit allegation to the effect that [Plaintiffs] were directly contracting with Defendant Li" (*id.* at 8).[4] According to Defendants, because Plaintiffs did not specifically dispute the Statement of Undisputed Fact contained in Defendants' prior motion for summary judgment that "Beacon and You Jie Zhu entered into a Project's (sic) Agreement" and only disputed the date of the Agreement (*id.*), Plaintiffs cannot now dispute the identities of parties to the Agreement (Zhu and Beacon (*id.* at 9). Defendants further attempt to refute Plaintiffs' effort to impute

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[4]This is simply not accurate as Paragraph 15 of the Amended Complaint plainly reads: "This Agreement was executed by Defendant Li as an individual, not as someone designated as an officer, director or other authorized person for Beacon International Inc."

Defendant Li's actions on behalf of Defendant Beacon as being the actions solely of Defendant Li since a corporation can only act through an individual. Thus, Li, it is contended, cannot be individually liable based on "the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (*id.* at 13-14, *quoting Worthy v New York City Hous. Auth.*, 21 AD3d 284, 286 [1st Dept 2005]).[5]

It is Defendants' contention that Plaintiffs' piercing of the corporate veil theory fares no better since it is well settled that "'a business can be incorporated for the very purpose of enabling its proprietor to escape personal liability, ... [and] the corporate form is not lightly to be disregarded'" even where it is owned by a single shareholder (*id.* at 8, *quoting Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 1029 [2d Dept 2005]). "[T]the burden on the proponent seeking to pierce the corporate veil is heavy ... [and] [t]he proponent must show that the person or persons who are in control of the corporation 'through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene ....'" (*id.* at 10, *quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). Defendants assert that under *Matter of Morris*, a plaintiff must allege both an abuse of the corporate form and injury resulting from the abuse and the pleading must be particularized (CPLR 3013) "'to show that the person or persons who are in control of the corporation 'are actually doing business in their individual capacities, shuttling their personal funds in and out of the corporation[] without regard to formality and to suit their immediate convenience'" (*id.* at 10-11, *quoting Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]). According to Defendants, the Amended Complaint contains merely a boilerplate recitation without supporting facts to support the first prong required by *Matter of Morris* – *i.e.*, that Li is the sole shareholder, that he dominates the corporate policy, and that he disregarded corporate formalities[6] (*id.* at 13). Further, that Plaintiffs have failed to allege anything with regard to the second prong since nowhere do Plaintiffs allege that "Plaintiffs suffered injury from any abuse of the corporate form, or that piercing the corporate veil is necessary to prevent fraud or abuse" (*id.* at 16).

Defendants refute Plaintiffs' assertion that Li had the landlord's proposal delivered to himself at his home address by relying on the above referenced "documentary evidence" that this was a commercial property at which Beacon maintained its offices for a short time (*id.* at 15).

Defendants argue that Plaintiffs are not entitled to stave off dismissal by requesting discovery under CPLR 3211(d) because Plaintiffs "had ample opportunity to conduct discovery of Defendants and that the particular issue of piercing the corporate veil was entirely relevant to the causes of action contained in their initial complaint" (*id.* at 15).

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[5]The quotation is actually from the concurring opinion of Justices Tom and Saxe.

[6]These textbook conclusory allegations, according to Defendants, are "'failing to maintain a corporate bank account, commingling corporate and individual funds, failing to have any corporate meetings, failing to engage in any corporate resolutions, and failing to maintain a corporate presence'" (Defs' Mem. at 13).

In response to Plaintiffs' allegation that Li is personally liable based on the non-existence of Beacon International and its address listed in the Agreement, Defendants rely on the fact that Beacon Int'l, Inc. (the actual counterparty to the contract as evidenced by Li's signature on behalf of "Beacon Int'l, Inc.") existed at the time of the execution of the Agreement and currently exists and that 9 Rewee Street, Brooklyn, New York exists. The error is understandable according to Defendants since Beacon International, Inc. and Beacon Int'l Inc., are indistinguishable phonetically, and Defendant Li is a person whose first language is not English (*id.* at 17).[7] Therefore, according to Defendants "[b]oth of these ambiguities should be wholly disregarded as it 'is a cardinal principle of contract interpretation that mistakes in grammar, spelling or punctuation should not be permitted to alter, contravene or vitiate manifest intention of the parties as gathered from the language employed'" (*id.* at 14, *quoting Banco Espírito Santo, S.A. v Concessionária do Rodoanel Oeste S.A.*, 100 AD3d 100, 109 [1st Dept 2012]). Thus, Defendants argue that because Plaintiffs' Amended Complaint does not allege that Plaintiffs believed they were contracting with the dissolved entity – Beacon International, Inc. – or that Defendants represented themselves as being associated with the dissolved entity Beacon International, Inc., this misspelling cannot support a basis for individual liability as against Li (*id.* at 18-19).

Defendants contend that Li's signing the Agreement immediately above the line for signature by the Project Manager cannot subject him to personal liability since "an authorized agent cannot be held personally liable for performance unless they clearly and explicitly assume such liability" (*id.* at 19) and Plaintiffs have not alleged that "there was a 'clear and explicit' assumption of liability on the part of Defendant Li" (*id.* at 19).

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In their opposition, Plaintiffs submit an attorney affirmation, the only purpose of which is to annex this Court's June 2013 Decision, the Amended Complaint and the Agreement. They also submit a memorandum of law wherein they recite their version of the underlying facts to this action.

As Plaintiffs describe it, Li, who is not a licensed real estate broker in either New York or New Jersey, undertook to help Zhu find a restaurant location and that they agreed to a location in the Freehold Raceway Mall in Freehold, New Jersey (Pltfs' Opp. Mem. at 3). Plaintiffs argue that when Li obtained the proposed deal from the landlord, it was addressed to Li and not to Beacon. Further, say Plaintiffs, the parties executed a Project Agreement in August or September 2010 between Plaintiffs and "Beacon International, Inc. c/o Guang Yang Li (collectively, Project Manager)" which provided that Plaintiff was looking for a suitable business location and desired to be introduced to a prospective landlord or developer and that Defendants "desire to find and introduce prospective ... landlords ... who will be willing to make rental space to, in exchange for the payment by [Plaintiff] to [Beacon] of a Project Management fee as specified in this Agreement" (*id.* at 4). After Plaintiffs executed the lease

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[7]Li does not support this claim in his affidavit, making no assertions about his knowledge of, or communication skills in, the English language.

on the Freehold Mall space, Li was paid the entire $75,000 for procuring the space (*id.* at 4).

Front and center in Plaintiffs' opposition is that the motion should be denied pursuant to CPLR 3211(d) since any "'boilerplate' allegations may be considered facts unavailable to the plaintiff that will be found during a very brief additional discovery period" (*id.* at 5).

Addressing Defendants' law of the case argument, Plaintiffs assert that based on the plain language of the June 2013 Decision – "no decision was made upon the merits of plaintiffs' potential RPL 442-e claim" (*id.* at 6).

According to Plaintiffs, Li may not only be individually liable based on a piercing of the corporate veil theory since Beacon was his alter ego, in addition, he may be individually liable under RPL § 442-3 because he "personally, acted as a real estate broker without a license" (*id.* at 7) – *i.e.*, he took money for engaging in conduct that resulted in a real estate transaction. Thus, it is Plaintiffs' position that because a corporation can only act through individuals, Li's individual liability for his criminal act "is supported by myriad criminal cases in which a corporation is Indicted for criminal acts, along with the individual members of the corporation who engaged in the actual conduct" (*id.* at 8, *citing People v NMDU,* 170 Misc 2d 790 [Sup Ct, NY County 1996]).

Plaintiffs further point to the following "facts" as evidencing that Li was acting in his individual capacity rather than on behalf of Beacon: (1) the correspondence between the landlord and Li was not addressed to either the 9A Rewee or the Rewe Street address upon which the Defendants now rely or the Hanford Street address listed in the printout on Beacon found on the New York State Department of State website, (2) the emails between the landlord and Li never indicated that they were from any Beacon entity (although Plaintiffs do not reference any evidence supporting this "fact"); and (3) the wording of the Agreement which lists the counterparty as "Beacon International, Inc. c/o Guang Yang Li ... collectively, Project Manager" (*id.* at 9). Plaintiffs argue that even if this Court were to overlook the fact that Beacon International was a company that was not authorized to do business in New York and that the address listed for it in the Agreement did not exist, the use of the word collectively "can only refer to both Beacon and Guang Yang Li as 'Project Manager,' and therefore, each defendant is individually liable to plaintiffs" (*id.*). It is Plaintiffs' position that these alleged typographical errors create a question of fact over whether Li was acting for himself rather than on behalf of a company.

Plaintiffs claim that the action is also properly asserted as against Li based on a piercing of the corporate veil, arguing that RPL § 442-e was enacted to prevent fraud against the public by making it a crime to accept a fee for a real estate transaction without being licensed. Plaintiffs contend that the Amended Complaint is sufficient in this regard since it alleges Li's improper usage of Beacon in this fraudulent/criminal endeavor and his complete domination of Beacon with respect to this transaction.

Plaintiffs further point out that while Defendants contend that the documentary evidence definitively establishes that Plaintiffs entered into the Agreement with Beacon Int'l based on Plaintiffs' admission of this in their original response to Defendants' Statement of

Undisputed Facts, the reality is that Plaintiffs only admitted to contracting with Beacon – not Beacon Int'l (*id.* at 12). According to Plaintiffs, the Agreement also does not disprove that Li was acting as a real estate broker since RPL § 442-e does not require that there be a contractual relationship between the parties – only that a person act as a real estate broker. Thus, because the documentary evidence does not resolve all factual issues as a matter of law, the Amended Complaint should not be dismissed.

DEFENDANTS' REPLY

In further support of their motion, Defendants' counsel submits an affirmation in which he attaches: (1) the "Joint One Page Statement of Facts & Parties Contentions" that Plaintiffs' and Defendants' counsel submitted in connection with the Preliminary Conference; and (2) Plaintiffs' response to Defendants' Statement of Undisputed Facts Defendants submitted in support of the motion for summary judgment. Defendants also submit a reply memorandum.

As their legal argument, in further support of the dismissal of the Amended Complaint based on law of the case, Defendants repeat their prior arguments and point out that because Plaintiffs have failed to present any evidence that they did not have a full and fair opportunity to litigate this issue, Plaintiffs' Amended Complaint must be dismissed (Defs' Reply at 4).

Defendants distinguish the case cited by Plaintiffs in support of their argument that in criminal cases individuals may be indicted for the criminal acts undertaken by the company by arguing that the case cited involved a criminal prosecution, not a violation of a statute which provides for civil redress. According to Defendants, the law is directly contrary to Plaintiffs' position since in *Rodolitz Organization v Secondary Mtge. Resources, Inc*, (175 AD2d 277 [2d Dept 1991]), the Appellate Division, Second Department held that "liability with respect to [RPL] § 442-e should not be imputed to an officer/employee of a company even when such officer/employee was not a signatory of the underlying agreement determined to be a brokerage agreement" (*id.* at 5).

With regard to Plaintiffs change of heart in that they are now contending that they contracted with Li rather than Beacon, Defendants contend that such allegations are insufficient to salvage this action as against Li because the factual claims here are flatly contradicted by the documentary evidence which shows Beacon as the sole contractant to the Agreement with Plaintiff. Defendants again rely on Plaintiffs' admission in their reply to Defendants' Statement of Undisputed Facts, as well as the Joint Statement prepared by Plaintiffs' counsel, which state that "Plaintiff entered into a contract on or about August, 2011 for certain services from Beacon International" (*id.* at 6). Further, Defendants contend that this Court already ruled in its June 2013 Decision that the only counterparty to the Agreement was Beacon – not Li (*id.* at 6-7). In response to Plaintiffs' contentions that Li was acting as a real estate broker for himself, Defendants again rely on the well settled principle that a corporation can only act through its officers but that an officer is not subject to liability for acts taken furtherance of the corporation's business unless there is clear evidence of intent to substitute or superadd his personal liability and there are no such allegations in the Amended Complaint.

Indeed, say Defendants, Plaintiffs do not allege that Li was not acting in his capacity as an employee/officer/agent of Beacon. Defendants argue that the Court should disregard Plaintiffs' factual assertions concerning Li's correspondence with the landlord that are unsupported by any evidence.

As to Plaintiffs' contention that piercing is viable based on Li's domination of Beacon, Defendants, relying on *East Hampton Union Free School Dist. v Sandpepple Builders, Inc.* (66 AD3d 122 [2d Dept 2009]), *affd* 16 NY3d 775 [2011]), argue that allegations supporting domination of the corporation by the defendant in the dealings with plaintiff are not enough. Further, Defendants assert that Plaintiffs cannot oppose simply based on their argument that something could come up during discovery and, according to Defendants, Plaintiffs were fully aware of this issue throughout the discovery process yet all they can produce to date is a boilerplate allegation. And in response to Plaintiffs' assertion that an agreement for violation of RPL § 442-e is unnecessary, Defendants point out that nowhere in the Amended Complaint do Plaintiffs allege an oral contract with Li and, indeed, any such a contract would run afoul of the Statute of Frauds (*id.* at 12).

STANDARD OF REVIEW ON A MOTION TO DISMISS

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys – Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary (*Fontanetta v Doe, supra*).[8]

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

To the extent that Plaintiff's claims turn on a contract, the actual provisions of the

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[8]Thus, there are a number of exhibits that do not qualify that are annexed to Defendants' moving papers including the Google map printouts and Mr. Li's affidavit.

contract – rather than Plaintiffs' characterization of the terms in their pleading – are controlling (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74, 82 [1st Dept 2005]). Therefore, "[w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1)" (*159 Broadway N.Y. Assoc. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; *see also Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, "[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint"]).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss, the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra).*

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein,* 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern,* 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]).[9] On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty*

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[9]Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]; *Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; *Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.,* 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.,* 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis,* 95 AD2d 822 [2d Dept 1983]).

Co., 40 NY2d 633, 635-636 [1976]).

Here, Plaintiffs, by not submitting any evidentiary material, have elected to stand on their pleading alone.

THIS COURT DID NOT PREVIOUSLY RESOLVE WHETHER PLAINTIFFS HAD A VIABLE CLAIM FOR VIOLATION OF RPL § 442-e SO THE LAW OF THE CASE DOCTRINE IS NOT IMPLICATED

In addition to moving to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), Defendants also seek the dismissal of the Complaint pursuant to CPLR 3211(a)(5) based on law of the case.

The law of the case doctrine is frequently applied when courts of coordinate jurisdiction attempt to revisit an issue decided by another court in an ongoing lawsuit or where a trial court rendered a decision on an interlocutory issue that was later the subject of a decision on appeal. The doctrine seeks to prevent the re-litigation of issues of law that have been determined at an earlier stage of the case (*Brownrigg v New York City Housing Auth.*, 29 AD3d 721 [2d Dept 2007]). "The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Kopsidas v Krokos*, 18 AD3d 822, 823 [2d Dept 2005]). The primary purpose of the doctrine is to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case (*People v Evans*, 94 NY2d 499, 504 [2000]). This is, of course, not a consideration here as this Court was the court that rendered the prior decision. On the other hand, parties are entitled to rely on decisions previously rendered and a same court is not free to change or recall its decisions willy-nilly. Thus, the granting of a motion for summary judgment establishes the law of the case as to the issues essential to that determination, a result that is binding on the court that rendered the determination (*Duckett v Wilson*, 31 AD3d 865, 868 [3d Dept 2006]; *accord Brownrigg v New York City Housing Authority, supra*).

The Court does not agree that it previously determined in its June 2013 Decision that Plaintiffs did not have a viable claim for violations of RPL § 442-e; rather, the Court observed that Plaintiffs had a potentially meritorious claim for violations of the statute.

It is important to review the context in which the Court made its observation. In in response to Plaintiffs' opposition and cross-motion for summary judgment based on Defendants' violation of RPL § 442-e, Defendants argued vociferously that the Court should not grant summary judgment to Plaintiffs on the basis of the statute since "summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded" and that Plaintiffs should not be entitled to raise the claim after the close of discovery as that would deprive Defendants the right to conduct discovery on whether Defendants acted as brokers (Defs' Reply at 8-9). After considering the arguments presented on both sides, the Court agreed with Defendants that it should not grant summary judgment on an unpleaded claim holding in its June 2013 Decision:

The Court believes that Plaintiffs have a potentially meritorious claim for a violation of RPL § 442-e, though such a claim is currently unpleaded and, as such, the Court is not going to search the record and grant summary judgment to Plaintiffs on such an unpleaded claim.

"While under certain circumstances, a summary judgment application may be entertained based on a theory of recovery not pleaded, the general rule is that summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded (*see*, Siegel, Practice commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3212:11, at 319). This requirement 'is intended to show the court precisely what the parties' positions are'" (*Moscato v City of N.Y.*, 183 AD2d 599, 601 [1st Dept 1992]). Thus, while courts may grant summary judgment on an unpleaded cause of action by amending the pleading to conform it to the proof (*Weinstock v Handler,* 254 AD2d 165, 166 [1st Dept 1998]) "if the proof supports such a claim and if the opposing party has not been misled to its prejudice" (*Kramer v Danalis*, 49 AD3d 263, 264 [1st Dept 2008]), the general rule is that summary judgment may not be obtained on an unpleaded claim given the prejudice that results to the opposing party nor may the Court deny summary judgment based on such an unpleaded cause of action (*Mezger v Wyndam Homes, Inc.,* 81 AD3d 795, 796 [2d Dept 2011] [improper to deny a motion for summary judgment based on an unpleaded theory raised for the first time in opposition papers]; *see also Silber v New York Life Ins. Co.,* 92 AD3d 436 [1st Dept 2012]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.,* 15 AD3d 523 [2d Dept 2005]; *Medina v Sears, Roebuck and Co.*, 41 AD3d 798 [2d Dept 2007]; *Galatti v Alliance Funding Co., Inc.*, 228 AD2d 550 [2d Dept 1996]).

Whether Plaintiffs should be entitled to amend their Complaint at this late date to assert this cause of action and what remedies, if any, the Court would invoke to ameliorate the prejudice (if any) that could result from a grant of such a motion need not be decided at present. It bears mentioning that if such a claim is allowed to be pleaded, it would be irrelevant whether or not the inaccuracies in the financial statement or Defendants' lack of a license caused Plaintiffs' damages (*e.g.,* contrary to Defendants' position, whether or not Plaintiffs would not have retained Defendants if they had known Defendants were unlicensed and the representation in the lease that Plaintiffs had no brokers in connection with the lease would be wholly irrelevant).

Based on the foregoing, the Court shall grant Defendants' motion for summary judgment, **without prejudice and with leave to**

> **Plaintiffs to file a motion to amend their Complaint (CPLR 3025[b]) to assert this new cause of action**, within 30 days of the date of this Decision and Order. Defendants are, of course, free to oppose the application for leave to amend. The parties are invited to address whether additional discovery is required with respect to the license issue (June 2013 Decision at 16-18 [emphasis added]).

Defendants' attempt to contort the clear import of this Decision, which by its terms did not resolve the issue over whether Plaintiffs had a viable claim for violations of RPL § 442-e and specifically granted Defendants' motion but without prejudice to Plaintiffs' right to seek to amend the Complaint to add this claim, is baseless and there is no law of the case bar to this new claim.

The Court next turns to whether Plaintiffs have alleged sufficient facts to hold Li individually liable for this violation.

THE AMENDED COMPLAINT SUFFICIENTLY PLEADS A BASIS FOR LI'S INDIVIDUAL LIABILITY UNDER RPL § 442-e

Plaintiffs' claim against Li arises from his alleged provision of real estate brokerage services in connection with the Freehold Raceway Mall lease. Pursuant to RPL § 440-a and RPL § 442-e, if it is ultimately determined that (1) Li signed the Agreement in his individual capacity, (2) the Agreement involved the provision of real estate broker services, and (3) that Li was unlicensed, then Li may be liable for, at a minimum, the return of the commission paid by Plaintiffs.

In their Amended Complaint, Plaintiffs rely on several different theories as predicates for establishing Li's individual liability; namely: (1) Li should be held individually liable based on the way the Agreement is phrased "Beacon and Li, collectively Project Manager" or that it was Li and not Beacon who performed the brokerage services and an agreement is unnecessary under RPL § 442-e; (2) Li should be held individually liable based on his dominion and control over Beacon such that the corporate veil of Beacon should be pierced; or (3) Li should be held individually liable since at the time the parties executed the Agreement, Beacon was a company that had been dissolved by proclamation.

If the only legal theories under which Plaintiffs sought to hold Li liable were a piercing of the corporate veil theory and/or his liability for signing on behalf of a non-existent entity, the Court would dismiss the action as against Li.

The Court agrees that Plaintiffs' piercing allegations are wholly insufficient as they are entirely conclusory and unaccompanied by any assertions of specific facts to warrant those conclusory assertions. To adequately allege a basis for piercing the corporate veil, a plaintiff must assert that (1) the corporate form was abused to achieve fraud, or that the corporation has been so dominated by an individual or another corporation that the corporation has become the alter ego of the individual or another corporation whose business it primarily transacted, and (2) that such abuse or domination was used to commit fraud or

inequity to the plaintiff which resulted in an injury to the plaintiff (*Matter of Morris*, 82 NY2d at 141-142; *Weinstein v Willow Lake Corp.*, 262 AD2d 634 [2d Dept 1999]; *East Hampton Union Free School Dist., supra*). Allegations such as failure to observe corporate formalities, undercapitalization of the corporation, intermingling of corporate and personal funds, use of corporate funds for personal purposes, overlap in ownership and directorship, and common use of office space and equipment are often used to support such a basis of liability (*East Hampton Union Free School Dist. v Sandpebble Bldg., Inc., supra*; *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1st Dept 1996]). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris*, 82 NY2d at 142).

Measured by this standard, Plaintiffs' conclusory allegations that Li exercised dominion and control over Beacon and that they shared a common address are patently insufficient (see *Albstein v Elany Contr. Corp.*, 30 AD3d 210 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]; *Mondone v Lane*, 106 AD3d 1062 [2d Dept 2013]; *Triemer v Bobsan Corp.*, 70 F Supp 2d 375, 377 [SD NY 1999]; *Matter of Sharon Towers, Inc. v Bank Leumi Trust Co. of N.Y.*, 250 AD2d 509 [1st Dept 1998]; *F&M Precise Metals, Inc. v Goodman*, 2004 NY Slip Op 51004[U], 4 Misc 3d 1023[A] [Sup Ct, Nassau County 2004]).

Plaintiffs' assertion that the Court should deny Defendants' motion based on their need for discovery (CPLR 3211[d]) is unavailing, because of the complete inadequacy of Plaintiffs' piercing allegations, as well as the fact that Plaintiffs have already had more than six months to conduct discovery in this case, which included the deposition of Defendant Li. In the absence of any colorable allegations that Beacon was the mere alter ego of Li, in the absence of any citation to any testimony by Li in the deposition already taken as supporting the piercing theory, and in the absence of any claim that Defendants prevented (by objection or otherwise) the questioning of Li as to the piercing issue, the Court declines to require Li to submit further discovery pursuant to CPLR 3211(d) simply because Plaintiffs hope that they might stumble upon facts to substantiate their conclusory veil piercing allegations (*Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]; *De Capriles v Lopez Lugo*, 293 AD2d 405 [1st Dept 2002]).

There is no basis for Li's individual liability based on the misnomer found in the Agreement, *i.e.*, the parties' use of Beacon International, Inc. rather than Beacon's actual name, Beacon Int'l, Inc. This error, standing alone, is inconsequential, since the misstatement of the corporate name does not itself reflect an intention to bind Li personally (*Matter of D&B Constr. of Westchester, Inc.*, 2008 NY Slip Op 52172[U], 21 Misc 3d 1125[A] [Sup Ct, Westchester County 2008]; see also *JMT Bros. Realty, LLC v First Realty Builders, Inc.*, 51 AD3d 453 [1st Dept 2008]; *Harmon v Ivy Walk Inc.*, 48 AD3d 344 [1st Dept 2008], *lv denied* 11 NY3d 702 [2008]; *Quebecor World (USA), Inc. v Harsha Assoc., L.L.C.*, 455 F Supp 2d 236 [WD NY 2006]; *Spanierman Gallery, PSP v Love*, 320 F Supp 2d 108 [SD NY 2004]).

This being said, the Agreement (which is documentary evidence) does not itself conclusively establish whether Li signed only in his representative capacity or whether he signed the Agreement individually, or both. The Amended Complaint sufficiently alleges a basis for liability against Li under RPL § 442-e and this branch of Defendants' motion shall be

denied.

It is well settled that a person or entity who is not a party to a contract cannot be held liable for its breach (*HDR, Inc. v International Aircraft Parts, Inc.*, 257 AD2d 603 [2d Dept 1999]; *National Survival Game of New York, Inc. v NSG of LI Corp.*, 169 AD2d 760 [2d Dept 1991]). "Under New York law, ... 'an individual who signs a contract on behalf of a corporation, indicates her representative capacity on the contract, and exhibits no intention to assume personal liability for the corporation's breaches is not subject to personal liability'" (*San Diego County Empl. Retirement Assn. v Maounis*, 749 F Supp 2d 104, 128 [SD NY 2010], *quoting Hudson Venture Partners, L.P. v Patriot Aviation Group, Inc.*, 1999 WL 76803 at *6 [SD NY 1999]). Thus, "[a] person who signs a writing solely as a corporate officer is not personally obligated on any contract evidenced by the writing even though the text of the writing states that the officer is to be personally obligated" (*Herman v Ness Apparel Co.*, 305 AD2d 217, 218 [1st Dept 2003]). An agent can only be held liable if "there is clear and explicit evidence of the agent's 'intention to substitute or superadd his personal liability for, or to, that of his principal'" (*Star Video Entertainment, L.P. v J&I Video Distrib., Inc.*, 268 AD2d 423, 423-424 [2d Dept 2000], *quoting Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6 [1964]; *see also Integrated Mktg. and Promotional Solutions, Inc. v JEC Nutrition, LLC*, 2006 WL 3627753 [SD NY 2006]).

In *Salzman Sign Co. v Beck* (10 NY2d 63 [1961]), the Court of Appeals held that a president of a corporation who signed his name to a contract as president was not personally liable on the contract despite the clause in the contract that "the officer signing on behalf of [the] corporation, hereby personally guarantee[s] the payments hereinabove provided for" because

> everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice once as an officer and again as an individual. There is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer ... We think the better rule is the one used here that is, that the statement in the contract purporting to bind the signing officer individually is not sufficient for the Statute of Frauds purposes without some direct and explicit evidence of actual intent (*Salzman Sign Co.*, 10 NY2d at 67).

To determine whether an agent's signature on a contract renders the agent personally liable, courts in New York focus on five factors:

> "[1] the length of the contract, [2] the location of the liability provision(s) in relation to the signature line, [3] the presence of the signatory's name in the agreement itself, [4] the nature of the negotiations leading to the contract, and [5] the signatory's role in the corporation" .... The Second Circuit has also suggested examining the structure and content of the signature lines to

> determine whether the agent intended to sign in his official capacity only .... Although two signature lines are not required in order to impose personal liability on the agent, the existence of only one signature line weighs against imposition of personal liability (*Integrated Mktg. and Promotional Solutions Inc., supra,* 2006 WL 3627753 at * 3, *quoting Cement and Concrete Workers Dist. Council Welfare Fund v Lollo*, 35 F3d 29, 35 [2d Cir 1994]).

The Court notes that, in *Saltzman*, the signature lines were as follows:

Lesile 575 Corp. L.S.
Irving Beck pres L.S.

Further, the contract in question in *Saltzman* did not name Beck as a guarantor. Rather, the contract, a pre-printed form, contained the following: "Where the Purchaser is a corporation, in consideration of extending credit to it, the officer or officers signing on behalf of such corporation, hereby personally guarantee the payments hereinabove provided for."

Turning to the factors identified in the governing case law, the first factor – the length of the contract – weighs in favor of the Plaintiffs since the Agreement is only a page and a half in length and, therefore, "this is not a case in which a single sentence in a lengthy contract created trap for an unwary agent" (*Paribas Props., Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989]; *see also Florence Corp. v Penguin Constr. Corp.*, 227 AD2d 442 [2d Dept 1996]). The second factor – the location of the provision purporting to bind Li individually -- is neutral since the provision that suggests that Li together with Beacon were to be viewed collectively as Project Manager is on the page preceding his signature as Project Manager. Even if this factor weighed in Li's favor, this factor in and of itself is insufficient to warrant dismissal of the Complaint (*see Integrated Marketing and Promotional Solutions Inc., supra; Yellow Book of NY, LP v DePante,* 309 AD2d 859, 860 [2d Dept 2003]). The third factor – whether the signatory is personally named in the document – weighs in favor of the Plaintiffs since Li is personally named in the Agreement. There is a basis upon which it could be concluded that the parties intended to bind both Li and the corporation given the use of the word "collectively" as the definition for Project Manager. While Defendants seek to mitigate this construction by contending that Li had limited abilities with regard to the English language, this is not supported by admissible evidence and, in any event, even if Li had so stated in an affidavit, such contention could not properly be considered on a motion to dismiss.[10]

While Defendants also contend that the use of "c/o" was intended simply to indicate that any correspondence for Beacon be sent to Beacon c/o Li,[11] this argument puts

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[10]It is also not implausible that Plaintiff had issues with English language communication as well.

[11]The Business Dictionary explains the use of c/o as: "An abbreviation that is used to direct correspondence to a particular place. It is typically used for an addressee who is not at the usual place where he or she would receive correspondence. For example, a letter could be sent to 'BC Company, c/o John Smith' or 'XYZ Company, c/o Human

much weight on the parties being proficient in the English language, a fact not established by documentary evidence on this record. Moreover, the the Court observes that the opening recital lists a location for Li ("9A Rewee Street, Brooklyn, New York 11211") but fails to list anything following the ensuing boilerplate recital "a corporation with its principal office located at." While the listing of Li's address as a place to send communications for the corporation would explain the absence of an address for the corporation and make it reasonable to think that communications were intended to go to Li as an agent for the corporation, such a conclusion is undercut by the fact that Li, in his own affidavit, does not explain whose address, if anyone's, was 9A Rewee Street. Li states that Beacon's office was at 1709 65th Street, Brooklyn and he never resided there. While Li's affidavit does not negate the prospect that he was receiving communications at that address, since Li does not state that he was receiving communications at that address on behalf of the corporation, it can not be said that Defendants have shown *prima facie* that the "c/o" meant only that Li was receiving corporate communications at the address. Further, any determination as to whether the address was or was not intended as place for Li to receive communications on behalf of Beacon is beyond what is permissible on a motion to dismiss. Accordingly, this factor, if it weighs in anyone's favor, tends to favor Plaintiffs.

With regard to the fourth factor – the nature of the negotiations leading to the document – at this stage of this proceeding, and on this record, the Court is unaware of the nature of the negotiations; accordingly, this factor is neutral (*Integrated Mktg. and Promotional Solutions Inc., supra*).

With regard to the fifth factor – the signatory's role in the entity – it appears that Li is likely the sole shareholder, or at a minimum the majority shareholder of Beacon.

While there is only one signature line – which weighs against imposition of personal liability – the use of the word "Project Manager" rather than an indication that Li was signing as the officer of Beacon suggests that the one signature line would not be controlling (*see, e.g., Bonnant v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 467 Fed Appx 4 [2d Cir 2012]; *Yellow Book Sales and Distrib., Co. v Mantini,* 85 AD3d 1019 [2d Dept 2011]; *Star Video Entertainment, supra*; *Paribas Props. Inc., supra*, 146 AD2d at 525; *30 Broad, LLC v Lawrence*, 2006 NY Slip Op 51316[U], 12 Misc 3d 1179[A] [Sup Ct NY County 2006]).

The Court does not view *Rodolitz Organization v Secondary Mtge. Resources, Inc.* (175 AD2d 277 [2d Dept 1991]) as controlling since that case involved a motion for summary judgment – a different standard of review than a motion to dismiss – and further, in *Rodolitz*, unlike this case, the written agreement was unambiguous in that the individual defendant had signed on behalf of the corporation in his representative capacity.

Based on the foregoing, the Court shall deny the branch of the Defendants' motion which seeks to dismiss the Amended Complaint as against Defendant Li.

Finally, the Court hereby schedules a conference for January 10, 2014, for the

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Resources department'" (http://www.businessdirectory.com/c-o.htm)

purpose of determining the need for any further discovery in this action as to the one remaining issue – whether the Agreement should be construed or interpreted such that Li signed it only in his representative capacity or in his individual capacity, or both.

The Court notes that Plaintiffs have sued Beacon International, Inc. and, while Defendants for the purposes of arguing that Li should not be considered personally bound have asserted that Beacon International, Inc. is not the correct entity, Defendants have not explicitly set forth any reason to dismiss the action as against the named entity. Nor has defense counsel shown or alleged that they have any authority to represent Beacon International, Inc. Rather, the Court takes it that defense counsel is acting on behalf of Beacon, improperly named as Beacon International, Inc.. Conversely, Plaintiffs have not as yet sought to substitute Beacon for the entity they named. Whether substitution of parties is appropriate shall also be considered at the conference.

CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Notice of Motion to Dismiss dated September 13, 2013; Affirmation of Humayun Z. Siddiqi, Esq. in Support of Defendants' Motion to Dismiss dated September 13, 2013, together with the exhibits annexed thereto; Affidavit of Guang Yang Li in Support of Defendants' Motion to Dismiss, acknowledged September 12, 2013;

2) Memorandum of Law in Support of Defendants' Motion to Dismiss dated September 13, 2013;

3) Affirmation of Stacey Van Malden, Esq. in Opposition to Defendants' Motion to Dismiss, together with the exhibits annexed thereto;

4) Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint;

5) Affirmation of Stacey Van Malden, Esq. in Opposition to Motion for Summary Judgment dated March 6, 2013, together with the exhibits annexed thereto; and

6) Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss dated October 10, 2013.

Based on the foregoing, it is hereby

ORDERED that the motion by Defendants Beacon Int'l, Inc. (sued herein as Beacon International, Inc.) and Guang Yang Li (a/k/a Andy Li) to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) is denied; and it is further

ORDERED that the parties shall appear for a conference on January 10, 2014 at 9:30 a.m. which conference shall not be adjourned without the prior written permission of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 13, 2013

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

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