Drummond Decatur & State Props., LLC v 10500 Drummond Rd. Partners LP
2017 NY Slip Op 30727(U)
April 7, 2017
Supreme Court, New York County
Docket Number: 650815/2014
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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DRUMMOND DECATUR AND STATE PROPERTIES, LLC,

Plaintiff,

-against-

10500 DRUMMOND ROAD PARTNERS LP, 10551 DRUMMOND DECATUR ROAD PARTNERS L.P., 7601 STATE ACQUISITION LP, and SAM MARKOWITZ, individually,

Defendants.

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Index No. 650815/2014

Motion Seq. No. 003

Motion Date: 11/15/16

BRANSTEN, J.

In this action, Plaintiff Drummond Decatur and State Properties, LLC ("Drummond") brings breach of contract and fraud claims, stemming from its acquisition of several properties from Defendants 10500 Drummond Road Partners LP, 10551 Drummond Decatur Road Partners L.P., 7601 State Acquisition LP (collectively the "Defendant Entities"), and Sam Markowitz. In the Second Amended Complaint, Plaintiff alleges Defendants breached the Agreement and fraudulently induced Plaintiff to purchase the Properties. Defendants now seek dismissal of the Second Amended Complaint, pursuant to CPLR 3211(a)(1) and (7).

I. Background[1]

The Defendant Entities are Pennsylvania limited partnerships that owned three properties located at 10500 Drummond Road, 10501 Drummond Road, and 7601 State Road (the "Properties") in Philadelphia, Pennsylvania. Defendant Sam Markowitz directly or indirectly controls each of the Defendant Entities. Compl. ¶ 7.

In August 2012, the Defendant Entities entered into the Purchase and Sale Agreement (the "Agreement") to sell the Properties to Plaintiff's predecessor in interest, 391 Leonard St. LLC, for $17,100,000 (the "Purchase Price"). In or about November 2012, Plaintiff and Defendants closed on the properties (the "Closing"). This action arises from events surrounding the Agreement and Closing.

A. *The Roof Repairs*

Plaintiff alleges at the time the Agreement was executed, Defendants represented that repairs on the roof had been performed and Plaintiff relied on that representation in entering into the Agreement. *Id.* ¶¶ 41-42. After the Closing, Plaintiff was advised by Materials Processing Corporation, a tenant at the 10500 Drummond Road property, that the roofing repairs had not been completed. *Id.* ¶ 63. Plaintiff subsequently demanded Defendants complete the necessary repairs on the 10500 Drummond Road Property. After

[1] All references to the complaint herein are to the Second Amended Complaint, which is the subject of this motion.

the Closing, Sam Markowitz represented to Plaintiff and the tenant that the roof repairs would be made by Defendants, but the repairs were never made. *Id.* ¶ 65.

B. *The Clear Channel Lease*

In 2008, Clear Channel Outdoor ("Clear Channel") and Defendant 7601 State Acquisition L.P. entered into a trespass lease agreement for the 7601 State Road property (the "Clear Channel Lease"). *Id.* ¶ 29. The purpose of the Clear Channel Lease was to maintain a billboard structure on an adjacent property. *Id.*, Ex. B.

Before the Agreement was executed with Plaintiff, Defendants represented that there were no trespass leases or other encumbrances on the Properties. *Id.* ¶ 31. Plaintiff alleges the Clear Channel Lease was not of record at the time Plaintiff performed its title search and Plaintiff only discovered the existence of the lease around July 2014. *Id.* ¶¶ 30, 68. Plaintiff also alleges after the Closing Defendant 7601 State Acquisition L.P. continued to receive rental payments due under the Clear Channel Lease without notifying Plaintiff. *Id.* ¶ 69.

C. *The City Wide Lease*

Prior to the Agreement, on or about January 1, 2012, Defendants and City Wide Roofing, Inc. ("City Wide") entered into a written lease agreement at the 7601 State Road property for a term of four years (the "City Wide Lease"). *Id.* ¶ 18. Plaintiff alleges Defendants, specifically Sam Markowitz, made promises to City Wide during the

negotiation of the City Wide Lease that City Wide would be permitted to get out of the lease at any time if it was not satisfied with the space, even if the lease had a specific term. *Id.* ¶ 16.

In or about August 2012, Plaintiff and Defendants began discussions regarding the sale of the Properties. Plaintiff advised Defendants that it would not enter into the Agreement to purchase the Properties without long term leases in place. *Id.* ¶ 23. In response, Defendants provided Plaintiff with the City Wide Lease and represented the lease, including the length in years, was enforceable against City Wide. *Id.* ¶ 24. Plaintiff alleges it relied upon Defendant's representation of the term and enforceability of the City Wide lease in entering into the Agreement. *Id.* ¶ 27.

After the Closing, City Wide notified Plaintiff it intended to vacate the 7601 State Road property and terminate the lease. Ultimately, City Wide did in fact vacate the property and cease payments under the lease. *Id.* ¶¶ 59-60. As a result, Plaintiff brought an action against City Wide in the United States District Court Eastern District of Pennsylvania, which was later settled by the parties. *Id.* ¶ 62; Eisenberger Affirm. ¶ 4, Ex. D.

D. *The Instant Action*

Plaintiff initiated this action by summons and complaint, asserting four claims for breach of contract, fraud, unjust enrichment and rescission. On May 29, 2014, Defendants

moved to dismiss the complaint in its entirety.[2] By Order and Decision dated December 16, 2015, this Court granted the motion to dismiss as to the fraud, unjust enrichment and rescission claims and denied the motion as to the breach of contract claim. Plaintiff subsequently filed a two-count Second Amended Complaint alleging breach of contract and fraud. Presently before the Court is Defendants' motion to dismiss the Second Amended Complaint, pursuant to CPLR 3211(a)(1) and (7).

II. Discussion

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed in a light most favorable to the plaintiffs, all factual allegations must be accepted as true and all inferences which reasonably flow therefrom must be resolved in favor of the plaintiff. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

[2] Defendants' motion to dismiss was fully submitted on August 4, 2014. On August 27, 2014, Plaintiff filed the First Amended Complaint. In a letter dated September 10, 2014, Defendants requested the Court apply the motion to dismiss to the amended complaint.

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

A. *Breach of Contract*

Defendants contend Plaintiff's breach of contract claims are barred by documentary evidence, or in the alternative, Plaintiff fails to state a claim for breach of contract.

1. Documentary Evidence

First, Defendants argue Plaintiff's breach of contract claim for roof repairs should be dismissed because the Agreement provides Plaintiff took the Properties "as is" upon Closing and Defendants had no obligation to make post-Closing repairs. Second, Defendants argue Plaintiff's breach of contract claims for the City Wide Lease and Clear

Channel Lease should be dismissed because Section 13 of the Agreement establishes a three-month period after Closing to bring claims and Plaintiff failed to raise the claims within that period.

a. The Roof Repairs

Plaintiff alleges Defendants breached the Agreement by failing to complete roof repairs at the Properties. Defendants argue the Agreement explicitly states Plaintiff agreed to take the properties "as is, where is, with all faults" upon Closing. *See* Agreement § 25(c). Section 25 of the Agreement is titled "Property Conveyed 'As Is' and Disclaimer of Representations and Warranties." Section 25(c) provides Plaintiff has not relied upon any warranties, representations, or guaranties, except those expressly set forth in Section 13(a) or elsewhere in the Agreement. Section 13(a) does not reference roof repairs. Thus Defendants argue Plaintiff took the Properties "as is," waived any rights to dispute the conditions of the Properties and is explicitly precluded from bringing claims against Defendants based on the roof repairs.

Plaintiff contends Defendants' obligation to complete the roof repairs survived Closing pursuant to Section 10 of the Agreement. Although Section 10 is titled "Covenants; Pre-Closing Rights and Obligations of Seller," Plaintiff argues Section 10 imposes an obligation on Defendants to complete the roof repairs, even after Closing. Section 10(a)(iii) of the Agreement provides Defendants are required to make any repairs

pursuant to the leases and the roofs shall be free of leaks. Furthermore, Section 10(e) provides "the provisions of this Section 10 shall survive the Closing."

Whether a contract is ambiguous is a question of law for the court and is to be determined by looking "within the four corners of the document." *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 570 (2002). Here, it is unclear whether Defendants' obligation to repair the roof survived the Closing. Defendants offer Section 25(c) in support of their argument that any obligation Defendants had to complete the roof repairs ended upon Closing. Plaintiff relies on Section 10(e) to argue the obligation to complete the repairs survived Closing. Thus, the Agreement is not unambiguous as to the issue of roof repairs and Defendants' motion to dismiss Plaintiff's breach of contract claim pursuant to CPLR 3211(a)(1) is denied.

b. The City Wide Lease and Clear Channel Lease

Plaintiff alleges Defendants breached Section 13 of the Agreement by failing to disclose Defendants' oral promise to City Wide that City Wide may terminate its lease at any time. Plaintiff also alleges Defendants breached Section 13 by failing to disclose the existence of Clear Channel's trespass lease affecting the 7601 State Road property, which granted Clear Channel access to maintain a billboard on an adjacent property. Defendants argue Plaintiff's breach of contract claims should be dismissed because Section 13(b) of

the Agreement established a three-month period after Closing to bring claims and Plaintiff failed to notify Defendants within the three-month period.

Section 13 of the Agreement provides the parties' representations and warranties. Pursuant to Section 13(a)(iv) Defendants represented to Plaintiff that:

> The information concerning the Leases is accurate as of the date hereof, and there are no leases, tenancies or occupancies in the Premises not arising out of the Leases of any space in the Premises other than those set forth herein . . . . Furthermore . . . 2. none of the Leases has been modified, amended or extended . . . [and] 9. true and complete copies of the Leases have been delivered to Purchaser or its counsel by Seller . . . .

Moreover, Section 13(a)(xii) provides "[t]o the Seller's actual knowledge, there are no unrecorded easements, leases, licenses, rights of way or other instruments or documents affecting the Premises . . . ." Defendants acknowledge the representations in Section 13(a) apply to the Clear Channel Lease and City Wide Lease.

However, Defendants argue Section 13(b) constitutes a survival clause that requires any action based upon the breach of a Section 13(a) representation be initiated within the survival period or, in the alternative, requires Plaintiff to have notified Defendants of any breach within the survival period. Section 13(b) provides "[a]ll of the representations and warranties contained in Section 13(a) shall survive the Closing for a period of three (3) months."

Where the motion to dismiss is based on documentary evidence under CPLR 3211(a)(1), "such motion may be appropriately granted only where the documentary

evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Section 13(b) is completely silent as to *potential* claims for breaches of the warranties and representations in Section 13(a). Thus, Section 13(b) does not unambiguously set forth an intention for a shorter period of limitations or a notice period.

Furthermore, Plaintiff alleges Defendants intentionally withheld information regarding the City Wide and Clear Channel Leases. Defendants should not be permitted to hide behind Section 13(b) when they allegedly did not tell the truth regarding the City Wide Lease and failed to disclose the existence of the Clear Channel Lease.

This Court does not find an imposition of a three-month limitation to bring a claim based on breach of warranty. Nor does this Court find Defendants operated in good faith in failing to disclose the existence of the Clear Channel lease and communication with City Wide. Therefore, Defendants' motion to dismiss Plaintiff's breach of contract claims for the City Wide Lease and Clear Channel Lease pursuant to CPLR 3211(a)(1) is denied.

2. Failure to State a Claim

Next, Defendants seek dismissal of Plaintiff's breach of contract claims pursuant to CPLR 3211(a)(7) for failure to allege Defendants' breach and damages. The elements of

a claim for breach of contract include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). On a motion to dismiss for failure to state a claim, all factual allegations in the complaint must be accepted as true and all inferences which reasonably flow therefrom must be resolved in favor of the plaintiff. *See Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). Here, Defendants argue Plaintiff fails to allege breach and damages; the existence of a contract and plaintiff's performance are not at issue.

a. The Roof Repairs

Defendants argue Plaintiff fails to identify any post-Closing repairs they were obligated to perform and thus Plaintiff fails to allege breach of the Agreement. However, this Court has already sustained Plaintiff's breach of contract claim for the roof repairs asserted under the prior complaint and Defendants did not appeal the decision. *See* Decision & Order dated Dec. 16, 2015, at 5:9-10. As found in the previous Order, Plaintiff sufficiently alleges the Agreement obligated Defendants to complete the roof repairs and Plaintiff was forced to incur costs to complete the repairs itself. In addition, Defendants merely repeat the same arguments raised in their initial motion to dismiss. Therefore, the motion to dismiss the breach of contract claim for roof repairs is denied based on law of the case. *See Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

b. The Clear Channel Lease

Next, Defendants contend Plaintiff fails to allege breach of the Agreement as to the Clear Channel Lease. As explained previously, Defendants entered into the Clear Channel Lease prior to the Agreement and the lease provided Clear Channel access to the 7601 State Road property so that it could maintain a billboard on an adjacent property.

Plaintiff sufficiently alleges Defendants owed an obligation to disclose any leases or other encumbrances affecting the properties. Section 13(a)(iv) of the Agreement provides, in relevant part, "[t]he information concerning the Leases is accurate . . . and there are no leases, tenancies or occupancies in the Premises not arising out of the Leases of any space in the Premises other than those set forth herein." Defendants did not provide Plaintiff with the Clear Channel Lease and Plaintiff did not discover the existence of the Lease until after the Closing. Moreover, Defendants continued to receive payment from Clear Channel after the Closing unbeknownst to Plaintiff. Finally, Plaintiff alleges it suffered damages as a result of Defendants' failure to disclose. Therefore, Defendants' motion to dismiss Plaintiff's breach of contract claim for the Clear Channel Lease is denied.

c. The City Wide Lease

Finally, Plaintiff alleges Defendants breached Section 13 of the Agreement by failing to disclose Defendants' oral promise that City Wide could terminate the City Wide Lease at any time. *See* Compl. ¶ 78. Pursuant to Section 13(a)(2) of the Agreement, Defendants represented "[n]one of the Leases has been modified, amended or extended and

there are no written promises, understandings or commitments between Seller and any person or entity which would be binding on Purchaser except as stated in the Leases."

Here, Plaintiff fails to allege Defendants breached Section 13(a)(2) of the Agreement. First, Plaintiff does not allege the City Wide Lease was invalid or otherwise unenforceable. Second, Plaintiff does not allege the lease has been modified, amended or extended. Plaintiff concedes the City Wide Lease did not contain a written provision permitting City Wide to terminate the lease. *Id.* ¶ 19. In fact, any oral promise about the term of the City Wide Lease would be precluded because the City Wide Lease required modifications of its term be in writing. *See Tenber Assocs. v. Bloomberg L.P.*, 51 A.D.3d 573, 574 (1st Dep't 2008) (finding oral modification of lease generally precluded where lease required modification of its terms be in writing); Markowitz Affirm. ¶ 3, Ex. B § 30. Third, Plaintiff later sought to enforce the lease after City Wide terminated its tenancy, further evidencing its validity. Compl. ¶ 62. Therefore, Plaintiff fails to allege Defendants breached the Agreement and Defendants' motion to dismiss Plaintiff's breach of contract claim regarding the City Wide Lease is granted.

B. *Fraud*

Plaintiff alleges Defendants fraudulently induced it to purchase the Properties. Specifically, Plaintiff alleges Defendants made material misrepresentations regarding the completion of roof repairs, the existence of other encumbrances on the Properties and a valid and enforceable lease with City Wide. Defendants argue Plaintiff's fraud claims

should be dismissed because Plaintiff fails to allege its claims with specificity, fails to allege the elements of fraud and the claims are duplicative of the breach of contract claims.

In order to plead fraud, New York law requires (1) a misrepresentation or a material omission of fact (2) which was false and known to be false by defendant, (3) made for the purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on the misrepresentation or material omission, and (5) injury. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). Pursuant to CPLR 3016(b), a plaintiff alleging fraud must state the circumstances constituting the wrong in sufficient detail to "permit a 'reasonable inference' of the alleged misconduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008).

1. The Roof Repairs

Plaintiff alleges Defendants represented the roof repairs had been performed and others would be performed, in order to induce Plaintiff to enter into the Agreement. Compl. ¶ 41. Defendants argue Plaintiff's fraudulent inducement claim regarding the roof repairs should be dismissed because Plaintiff failed to allege the elements for fraud and the fraud claim is duplicative of the breach of contract claims.

To the extent Plaintiff alleges additional roof repairs would be completed in the future, the fraud claim is duplicative of the breach of contract claim. *See Eastman Kodak Co. v. Roopak Enters., Ltd.*, 202 A.D.2d 220, 222 (1st Dep't 1994). A party may allege fraudulent inducement along with breach of contract "only if the misrepresentations alleged

consist of more than mere promissory statements about what is to be done in the future." *Id.*

Yet, Defendants' alleged representation that the roof repairs had already been completed is a misrepresentation of a present fact. A representation of present facts is collateral to the contract and therefore involves a separate breach of duty. *See First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 292 (1st Dep't 1999) (finding misrepresentation of material fact regarding warranties constituted a fraud claim notwithstanding existence of breach of contract claim). Accordingly, Plaintiff's fraudulent inducement claim is not duplicative of the breach of contract claim.

However, Plaintiff fails to allege its reliance on Defendants' alleged misrepresentation was reasonable, as is required to allege fraud under New York law. Plaintiff merely provides conclusory allegations that it reasonably relied on Defendants' representations without alleging facts or evidence indicating that its reliance was reasonable. *See Modell's N.Y., Inc. v. Noodle Kidoodle, Inc.*, 242 A.D.2d 248, 250 (1st Dep't 1997) (dismissing fraud claim for failure to allege reliance with specificity).

Plaintiff does not allege it conducted due diligence inspections of the properties prior to the Closing. Moreover, as a condition precedent to Closing under the Agreement, Defendants were required to hire a licensed roof company to inspect and repair the roof of each property, and provide a five year guarantee as to the continued use of the roofs. *See* Compl., Ex. A § 11(a)(v). Plaintiff concedes Defendants never provided the roof guarantee at Closing, yet, Plaintiff nevertheless purchased the Properties without it. Plaintiff does

not allege, nor does the Court find, Plaintiff's reliance on Defendants' representation was reasonable. Therefore, Defendants' motion to dismiss the fraudulent inducement claim is granted. *See Siemens Solar Indus. v. Atl. Richfield Co.*, 251 A.D.2d 82, 82 (1st Dep't 1998) (finding claim of reasonable reliance precluded where party had opportunities to obtain knowledge of matters that are subject to alleged misrepresentations).

2. The Clear Channel Lease

Next, Plaintiff alleges Defendants represented that there were no undisclosed encumbrances to the Properties while knowing that representation was false. Defendants represented to Plaintiff that there were no trespass leases or other encumbrances to the Properties. Compl. ¶ 31. Here, Plaintiff sufficiently alleges misrepresentation of a material fact and Defendants' knowledge that the statement was false when made. Plaintiff also alleges Defendants intended to induce Plaintiff to enter into the Agreement and Plaintiff would not have entered into the Agreement if it had known that the representation was false. *Id.* ¶¶ 92, 94-95. In addition, Plaintiff alleges it conducted a title search on the Properties, but due to the nature of the trespass lease, Clear Channel's tenancy was not discoverable and Plaintiff did not learn of the Clear Channel Lease until 2014. *Id.* ¶ 30. Therefore, Plaintiff adequately pleads a claim for fraudulent inducement.

That notwithstanding, Defendants argue Plaintiff's claim for fraudulent inducement is duplicative of the breach of contract claim because Plaintiff's arguments are founded on the terms of the agreement. A claim for fraud is duplicative of a claim for breach of contract

where it merely restates a breach of contract claim "i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep't 1999). Fraud claims must be based on some additional representation other than the contract itself, which was fraudulent when performed. *See Gotham Boxing Inc. v. Finkel*, 18 Misc. 3d 1114(A), *10 (Sup. Ct. N.Y. Cnty. 2008) (discussing First Department jurisprudence on breach of contract and fraud claims).

In *First Bank*, First Bank and Motor Car Funding entered into a loan purchase agreement which gave First Bank the right to purchase loans from Motor Car. *See First Bank*, 257 A.D.2d at 289. The loan purchase agreement also included warranties that the loans would satisfy certain underwriting guidelines. In the course of offering loans to First Bank, Motor Car misrepresented pertinent facts about the loans so it would appear the loans satisfied the warranties and First Bank would purchase the loans. *Id.* The First Department held the fraud claim was not duplicative of the breach of contract claim, although the representations also breached the warranties in the agreement. *Id.* at 292. The First Department reasoned First Bank's claim sounded in fraud, rather than breach of contract, because First Bank was induced to purchase loans it would not have had the obligation, nor the desire, to purchase but for Motor City's intentional misrepresentation. *See id.*

Here, Plaintiff argues Defendants' representations were intended to induce it to enter into the Agreement. Defendants representation that there were no other encumbrances on the Properties was made prior to the execution of the Agreement and was

intended to induce Plaintiff to enter into the Agreement. Therefore, Plaintiff's claim for fraud is not duplicative of the breach of contract claim, and Plaintiff has stated a claim for fraudulent inducement. Accordingly, Defendants' motion to dismiss Plaintiff's fraud claim based on the Clear Channel Lease is denied.

3. The City Wide Lease

Finally, Plaintiff alleges Defendants committed fraud by making false representations regarding the terms and enforceability of the City Wide Lease. Plaintiff alleges Defendants made an oral promise to City Wide that it would be able to terminate the lease at any time, regardless of the terms of a written lease. During discussions with Plaintiff regarding the sale of the Properties, Defendants allegedly represented the City Wide Lease, including the length in years, was enforceable against City Wide. But Defendants did not disclose the oral promise to City Wide. Compl. ¶¶ 24-25. Thus, Plaintiff alleges Defendants misrepresented the length and enforceability of the City Wide Lease. *Id.* ¶ 26.

In order for fraud to be actionable, there must be a misrepresentation of an existing fact. *See Irving Trust Co. v. La Pilar Realty Inc.*, 56 A.D.2d 532, 532 (1st Dep't 1977). Here, there was a valid and enforceable written lease with City Wide. The City Wide Lease required any modification of its terms be in writing. *See* Markowitz Affirm. ¶ 3, Ex. B § 30. Plaintiff concedes the City Wide Lease did not contain any written provisions permitting City Wide to terminate the lease. Compl. ¶ 19. Thus, any oral promise about

the terms of the City Wide Lease was precluded. *See Tenber Assocs. v. Bloomberg L.P.*, 51 A.D.3d 573, 574 (1st Dep't 2008) (affirming dismissal of claims based on oral modification of lease where lease required modification of its terms be in writing). Furthermore, Plaintiff later sought to enforce the lease after City Wide terminated its tenancy. Therefore, Plaintiff fails to establish Defendants made material misstatements of fact and Defendants' motion to dismiss the City Wide Lease fraud claim is granted.

C. *Claims Against Sam Markowitz, as an Individual*

Plaintiff also brings claims against Sam Markowitz, as an individual, alleging he committed fraud and abused the privilege of doing business in the corporate form. Compl. ¶¶ 8-9. Defendants contend the claims against Sam Markowitz should be dismissed because Section 23(f) of the Agreement provides there is no personal liability for breaches of the Agreement and Plaintiff fails to allege grounds to pierce the corporate veil. The claims against Sam Markowitz, as an individual, are dismissed for the following reasons.

First, Sam Markowitz is not a party to the Agreement and thus cannot be held liable for breach of the Agreement. *See Albstein v. Elany Contracting Corp.*, 30 A.D.3d 210, 210 (1st Dep't 2006) (affirming dismissal of breach of contract claims against individual where contractual privity was with corporate defendant). Second, Plaintiff fails to provide any reason to pierce the corporate veil. Piercing the corporate veil generally "requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or

wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993). Some indicia of a situation warranting veil-piercing include (1) the absence of corporate formalities, (2) inadequate capitalization, (3) commingling of assets and (4) use of corporate funds for personal purposes. *See Shisgal v. Brown*, 21 A.D.3d 845, 848 (1st Dep't 2005).

Plaintiff fails to allege any grounds for veil-piercing existed in the Defendant Entities. That is, Plaintiff does not allege the Defendant Entities lacked corporate formalities or were inadequately capitalized. Nor does Plaintiff allege Sam Markowitz commingled assets or used corporate funds for personal purposes. Therefore, the breach of contract claim against Sam Markowitz as an individual is dismissed.

In addition, Plaintiff fails to allege with sufficient particularity the material misrepresentations Sam Markowitz made to Plaintiff. Plaintiff only offers a single conclusory allegation that Sam Markowitz "repeatedly provided assurances that the roof repairs would be made by Defendants." Compl. ¶ 56. Moreover, Plaintiff fails to allege Sam Markowitz made any fraudulent statements that inured to his own personal benefit, for which he would be personally liable. There are no allegations that Sam Markowitz received any money other than the money he would have received from his position with the Defendant Entities. Therefore, the fraud claim against Sam Markowitz as an individual is dismissed. *See Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993) (dismissing fraud claim based on conclusory allegations).

D. *Defendants' Request to Strike the Jury Demand and for Attorneys' Fees*

Finally, Defendants request to strike the jury demand and request an award of attorneys' fees. Defendants argue the parties agreed to waive the right to a jury trial in Section 23(r) of the Agreement and are entitled to an award of attorneys' fees pursuant to Section 21(c). These requests are premature.

Plaintiff has stated a viable claim for fraudulent inducement and requested rescission of the Agreement as relief. To the extent Plaintiff has a viable fraudulent inducement claim, for which the requested relief is rescission of the Agreement, it is premature to permit Defendants to rely on Section 23(r) to strike the jury demand. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Grp., LLC*, 19 A.D.3d 273, 275 (1st Dep't 2005) (holding fraud in the inducement offers relief of rescission of the contract, rendering it unenforceable by the culpable party).

In addition, Defendants would only be entitled to attorneys' fees pursuant to Section 21(c) of the Agreement if they were prevailing parties. As Plaintiff has claims that survive Defendants' motion to dismiss, Defendants have not prevailed and the request for attorneys' fees is premature. Therefore, Defendants' requests to strike the jury demand and award attorneys' fees are denied.

Accordingly, Defendants' motion to dismiss is granted as to Plaintiff's breach of contract claim based on the City Wide Lease and Plaintiff's fraud claims based on the roof repairs and the City Wide Lease. The motion to dismiss is denied as to all other claims.

III. Conclusion

Therefore, for the reasons stated herein, Defendants' motion seeking dismissal is granted in part and denied in part.

Dated: New York, New York
April 7, 2017

ENTER

Hon. Eileen Bransten, J.S.C.