UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TAHARQA ALEEM and TAJIDDIN ALEEM,

Plaintiffs,

– against –

EXPERIENCE HENDRIX, L.L.C., RAINBOW GUITARS, INC., HARVEY MOLTZ, and ROCK & ROLL HALL OF FAME & MUSIC, INC.,

Defendants.

OPINION AND ORDER

16 CIV. 9206 (ER)

Ramos, D.J.:

Plaintiffs TaharQa Aleem and Tajiddin Aleem bring this action against Experience Hendrix, L.L.C. ("Experience"), Rainbow Guitars, Inc. ("Rainbow"), Harvey Moltz ("Moltz"), and the Rock & Roll Hall of Fame & Music ("Hall of Fame," and collectively, "Defendants"), alleging breach of contract, conversion, replevin, promissory estoppel, and slander of title. Before the Court is Experience's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, Experience's motion is hereby GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND[1]

In the fall of 1968, Jimi Hendrix, the world-renowned musician, gifted two of his guitars to the Ghetto Fighters, a band consisting of twin brothers TaharQa Aleem and Tunde Ra Aleem

[1] The following facts, accepted as true for purposes of the instant motion, are based on allegations in Plaintiffs' Complaint ("Compl.") (Doc. 3). *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). The facts recited herein do not constitute findings of fact by this Court.

(the "Aleem Brothers").[2] Compl., at ¶¶ 11–12. The two guitars were an Acoustic Black Widow ("Black Widow") and a Mosrite Joe Maphis Doubleneck ("Doubleneck," and collectively, the "Guitars"). *Id*. at ¶ 12.

In August 1995, the Aleem Brothers sought to raise money by selling one of the Guitars at a public auction with the assistance of Christie's Fine Art Auctioneers. *Id*. at ¶ 15. At the time, the suggested value of each guitar was approximately $200,000. *Id*. at ¶ 16. When she became aware of the potential sale, Janie Hendrix, acting as an agent of Jimi Hendrix's estate, which does business as Experience, explained to the Aleem Brothers that the Hendrix family wished to display the Guitars publicly rather than see them sold at public auction. *Id*. at ¶¶ 21–22. Subsequently, the Aleem Brothers and Janie Hendrix on behalf of Experience entered into an oral licensing agreement, pursuant to which Experience agreed to publicly display the Guitars with ownership and title attributed to the Aleem Brothers. *Id*. at ¶¶ 24–25. In return, Plaintiffs would be compensated $30,000. *Id*. Plaintiffs allege that pursuant to the agreement, both parties further agreed to the return of the Guitars to the Aleem Brothers upon the repayment of $30,000 to Experience. *Id*. Plaintiffs maintain that the Guitars are presently displayed in the Hall of Fame with ownership properly attributed to the Aleem Brothers as required by the agreement. *Id*. at ¶ 28.

Shortly after the parties reached the agreement, the Guitars were delivered to Janie Hendrix and the Aleem Brothers were paid $30,000.00. *Id*. at ¶ 26. Plaintiffs claim that pursuant to the agreement, title to the Guitars remained with them and possession was conveyed to Janie Hendrix and Experience through a revocable license. *Id*. at ¶ 27.

[2] Although not mentioned in the Complaint, Tunde Ra Aleem passed away in 2014. Doc. 24. In their memorandum in opposition to this instant motion, Plaintiffs allege that prior to his passing, Tunde Ra Aleem assigned his interest in the Guitars to his other brother, Tajiddin Aleem. *Id*. This allegation does not appear in the Complaint.

In the fall of 2015, Plaintiffs were made aware of pending litigation by Experience against Rainbow, an Arizona-based guitar company, and its owner, Moltz, regarding the ownership of the Black Widow. *Id*. at ¶ 32. Thereafter, in September 2016, Plaintiffs sent Janie Hendrix a notice seeking the return of the Guitars in exchange for $30,000 as required by their oral agreement. *Id*. Plaintiffs did not receive a response. *Id*. at ¶ 33.

II. PROCEDURAL BACKGROUND

Plaintiffs commenced the instant action by the filing of a summons with notice on November 15, 2016 in the Supreme Court of the State of New York, indicating an intent to assert claims for breach of contract, conversion, and slander of title against Defendants and Janie Hendrix. Doc. 1. On November 29, 2016, Experience and Janie Hendrix removed the action to this Court pursuant to 28 U.S.C. §§ 1332 and 1441. *Id*. Plaintiffs filed their complaint on December 19, 2016, asserting two additional claims of promissory estoppel and replevin. Compl.

On February 10, 2017, the Court held an initial conference during which Experience and Janie Hendrix were granted leave to file the instant motion. Additionally, counsel for Experience and Janie Hendrix further confirmed that because Janie Hendrix had acted within her official capacity only, Plaintiffs' counsel agreed to dismiss the action against her with prejudice. On February 17, 2017, Experience filed the instant motion. Doc. 18.

III. LEGAL STANDARD

A. RULE 12(b)(6) MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6), the Court is required to accept as true all factual allegations in the complaint and to draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). However, the Court is not required to credit legal conclusions, bare assertions or conclusory allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain enough factual matter to state a claim to relief that is plausible on its face. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). Accordingly, a plaintiff is required to support its claims with sufficient factual allegations to show "more than a sheer possibility that a defendant has acted unlawfully." *Id*. If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570).

Though a plaintiff may plead facts alleged upon information and belief, "where the belief is based on factual information that makes the inference of culpability plausible," *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010), such allegations must be "'accompanied by a statement of the facts upon which the belief is founded.'" *Navarra v. Marlborough Gallery, Inc.*, 820 F. Supp. 2d 477, 485 (S.D.N.Y. 2011) (quoting *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 385 (S.D.N.Y. 2006)); *see also Williams v. Calderoni*, No. 11 Civ. 3020 (CM), 2012 WL 691832, at *7- 8 (S.D.N.Y. Mar. 1, 2012) (finding

pleadings on information and belief insufficient where plaintiff pointed to no information that would render his statements anything more than speculative claims or conclusory assertions). A complaint that "tenders naked assertions devoid of further factual enhancement" will not survive a motion to dismiss under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted) (brackets omitted).

B. EXTRINSIC EVIDENCE

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a district court generally must confine itself to the four corners of the complaint and look only to the allegations contained therein. *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Any written instrument attached to a complaint or document incorporated in it by reference may be deemed part of the complaint itself. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). In addition, a court may consider materials submitted by a defendant with a Rule 12(b)(6) motion where the plaintiff has "actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Id*. at 48. If matters outside the pleadings are presented with a Rule 12(b)(6) motion, the Court has the option to either "exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material." *Willing v. Suffolk Cnty. Dep't. of Soc. Servs.*, No. 09 Civ. 5285 (ADS)(ETB), 2010 WL 2736941, at *2 (E.D.N.Y. 2010) (quoting *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000)) (internal quotation marks omitted).

In support of its motion to dismiss, Experience submitted two declarations by Dorothy Weber and a declaration by Edwin McPherson. Docs. 20, 26. Similarly, in opposition to the motion, Plaintiffs filed three declarations by Natraj Bhushan, TaharQa Aleem, and Tajiddin

Aleem, respectively. Docs. 21–23. However, all six declarations constitute extrinsic evidence that contain additional factual allegations not referenced or relied upon in the Complaint. Since the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleadings without considering the substantive merits of the case, *Global Network Commc'n v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006), the Court has not considered the declarations submitted by either party in ruling on the instant motion.

In the Complaint, Plaintiffs refer to and rely upon plaques adjacent to the public display of the Guitars at the Hall of Fame to support their ownership allegations. Compl., at ¶ 28. Accordingly, the Court takes into consideration the images of the plaques on public display at the Hall of Fame submitted by Experience. Doc. 20-4. A review of the plaques, however, is not dispositive on the issue of ownership because the language supports both Plaintiffs and Experience. Both plaques state that the Guitars are part of the "Collection of Experience Hendrix LLC". *Id*. They also state that Jimi Hendrix "gave [the Guitars] to TaharQa (sp) and TundeRa Aleem who were part of the Ghetto Fighters," but provide no further history, thus suggesting that title may yet remain with the Plaintiffs.

IV. DISCUSSION

A. TAJIDDIN ALEEM AS AN IMPROPERLY NAMED PLAINTIFF

In their motion to dismiss, Experience argues that Tajiddin Aleem is not a real party in interest pursuant to Rule 17(a)(1) of the Federal Rules of Civil Procedure. Doc. 19. The only information listed in the Complaint about Tajiddin is that he is an "individual[] residing in the State of New York." Compl., at ¶ 1. Rule 17(a)(1) requires that an action "'be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). The provision further defines specific categories of plaintiffs that "may sue in their own names without joining the person for

whose benefit the action is brought," including, *inter alia*, an executor, administrator or trustee. *Id*. Here, Plaintiffs fail to allege in the Complaint that Tajiddin falls under any of the permitted categories of plaintiffs who have standing pursuant to Rule 17(a)(1). *Monahan v. Pena*, No. 08 Civ. 2258 (JFB)(ARL), 2009 WL 2579085, at *3 (E.D.N.Y. 2009) (dismissing plaintiff's breach of contract action for lack of standing where the action was brought in the plaintiff's own name but he was "plainly not a party to that contractual agreement, and not an intended third-party beneficiary") (citing *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 627 F.Supp. 1202, 1212 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 90 (2d Cir. 1987); (*Wein v. Fensterstock*, No. 04 Civ. 4640 (RO), 2004 WL 2423684, at *1 (S.D.N.Y. 2004)). By its terms, the Complaint alleges that Hendrix gifted the Guitars to TaharQa and Tunde Ra Aleem. Compl., at ¶ 12. Nowhere is Tajiddin named as part of that transaction. The Complaint further states that after they entered into the licensing agreement, title remained with the Aleem Brothers, who are defined in the Complaint as Taharqa and Tunde Ra, but not Tajiddin. Compl., ¶¶ 11, 27.

However, in their memorandum in opposition, Plaintiffs maintain that Tunde Ra assigned his interest in the Guitars to Tajiddin prior to his passing in 2014, thereby justifying Tajiddin's right to enforce the claims in the instant litigation. Doc. 24. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), however, the Court must confine itself to the four corners of the complaint and look only to the allegations contained therein. *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Here, nowhere in the Complaint do Plaintiffs allege that Tunde Ra assigned his interest in the Guitars to Tajiddin. Accordingly, the Court finds that Plaintiffs have failed to establish Tajiddin as a real party in interest under Rule 17(a)(1) and dismisses him from the instant litigation.

B. STATUTE OF FRAUDS AND BREACH OF CONTRACT

Experience argues that Plaintiffs' claims arising from the oral agreement should be dismissed based on the New York Statute of Frauds ("Statute of Frauds"). Doc. 19, at 11–13. The Statute of Frauds requires certain contracts, agreements or transactions to be in writing. N.Y. Gen. Oblig. Law § 5-701. The purpose of the law is "'to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury.'" *Foster v. Kovner*, 44 A.D.3d 23, 840 N.Y.S.2d 328, 331 (N.Y. App. Div. 2007) (quoting *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 453, 483 N.Y.S.2d 164, 472 M.E.2d 992 (1984)). Consideration of the Statute of Frauds as an affirmative defense is appropriate on a motion to dismiss, given that such a motion is intended to weed out meritless claims. *Zeising v. Kelly*, 152 F. Supp. 2d 335, 343 (S.D.N.Y. 2001) (citing *Rosbach v. Industry Trading Co., Inc.*, 81 F. Supp. 2d 522, 524 (S.D.N.Y. 2000)). If an asserted contract falls within its ambit, the Statute of Frauds is a complete bar. *Norminjil Sportwear Corp. v. T G Y Stores, Inc.*, 644 F. Supp. 1 (S.D.N.Y. 1985).

The parties disagree on the nature of the oral agreement, thereby implicating whether Article 1 or Article 2 of the New York Uniform Commercial Code ("UCC") applies to the action at hand. Experience maintains that the oral agreement constitutes the sale of tangible goods, thereby triggering the provisions of Section 2-201 of Article 2. Doc. 19 at 16. Alternatively, Plaintiffs maintain that the oral agreement represents the sale of a license permitting Experience to publicly display the Guitars which implicates Section 1-207 of Article 1. Compl., at ¶¶ 24–25. On the facts of this case, the distinction is immaterial because under either section, the transaction violates the Statute of Frauds.

UCC Section 1-207 requires a contract for the sale of personal property in excess of $5,000 to be in writing.[3] The accompanying official comment clarifies that Section 1-207 applies to the sale of "general intangibles" as "defined in Article 9." Official Comment, N.Y. U.C.C. § 1-207 (McKinney 2014). UCC Article 9 defines the term "general intangible" as "the residual category of personal property…that is not included in the other defined types of collateral." N.Y. U.C.C. § 9-102 (McKinney 2014). Because Article 9 does not define the term "license," a license constitutes a general intangible. Furthermore, courts have recognized various types of licenses as general intangibles. *See In re TerreStar Networks, Inc.*, 457 B.R. 254, 268 (S.D.N.Y. 2011) (finding government licenses by the Federal Communications Commission as constituting general intangibles), *In re Gordon Car and Truck Rental, Inc.*, 75 B.R. 466, 470 (N.D.N.Y. 1987) (finding franchise licenses to constitute general intangibles). In the instant case, given that the licensing agreement between the parties represents a contract for the sale of a general intangible in excess of $5,000, the Court analyzes the parties' agreement under Section 1-207 to determine whether it violates the Statute of Frauds.

In order for a contract to be enforceable under Section 1-207, a plaintiff must establish five elements: "(1) a writing; (2) indicating a contract of sale between the parties; (3) at a specified or defined price; (4) the subject matter must be reasonably defined; and (5) it must be signed by the party to be charged." *Sel-Leb Marketing, Inc. v. Dial Corp.*, No. 01 Civ. 9250 (SHS), 2002 WL 1974056, at *6 (S.D.N.Y. 2002). Here, Plaintiffs fail to satisfy at least three out of the five elements. Because both parties concede that the sale occurred solely via an oral

[3] Section 1-207 (Statute of Frauds for Kinds of Personal Property Not Covered) provides that a "contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent. N.Y. U.C.C. § 1-207(a).

agreement, there is no writing signed by both parties indicating a contract of sale. Accordingly, the Court holds that the agreement into which the parties entered violates the Statute of Frauds under Section 1-207, and therefore Plaintiffs are barred from enforcing the contract.

Assuming that the oral agreement represents the actual sale of the Guitars, as Experience suggests, the contract remains unenforceable because it violates the Statute of Frauds under Section 2-201. Pursuant to Experience's theory, it purchased the Guitars in exchange for $30,000. Doc. 19, at 18. Under New York law, "a contract for the sale of goods for the price of $500 or more is not enforceable" without contemporaneous writing "sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." N.Y. U.C.C. § 2-201(1) (McKinney 2014); *Hoffman v. Boone*, 708 F. Supp. 78, 80 (S.D.N.Y. 1989) (applying Section 2-201 to the sale of art in excess of $500).

In order for a contract to be valid under section 2-201, a plaintiff must establish four elements: (1) a writing; (2) indicating a contract for sale between the parties; (3) specifying a quantity of goods; and (4) signed by the party to be charged. *See Ellig v. Molina*, 996 F. Supp. 2d 236, 243 (S.D.N.Y. 2014). As discussed in detail *supra*, Plaintiffs have failed to satisfy at least three out of the four elements because there is no signed writing indicating a contract for sale of the Guitars. *Robins v. Zwirner*, 713 F. Supp. 2d 367, 376 (S.D.N.Y. 2010) (barring enforcement of an oral agreement for the sale of a painting priced over $500 under Section 2-201 because plaintiff provided no signed writing indicating a contract for sale). Accordingly, the Court holds that the oral agreement into which the parties entered violates the Statute of Frauds under Section 2-201, and therefore Plaintiffs are barred from enforcing the contract.

Accordingly, Experience's motion to dismiss Plaintiffs' claim for breach of contract is granted. *Zeising v. Kelly*, 152 F. Supp. 2d 335, 344 (S.D.N.Y. 2001) (dismissing plaintiff's claim for breach of contract because the underlying agreement violates the Statute of Frauds).

C. CONVERSION AND REPLEVIN

Plaintiffs assert claims for conversion and replevin based on Experience's failure to return the Guitars after Plaintiffs' requests. Compl., ¶¶ 34–48. Under New York law, an action for conversion and replevin should proceed under a contract theory when the plaintiff is essentially seeking enforcement of a contractual duty. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 583 N.Y.S.2d 957, 593 N.E.2d 1365, 1369 (N.Y. 1992); *see also Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 899 (2d Cir. 1980) ("If the only interest at stake is holding the defendant to a promise, the courts have said that the plaintiff may not transmogrify the contract claim into one for tort."). Accordingly, courts have dismissed actions for conversion and replevin that are duplicative of a claim for breach of contract. *Usov v. Lazar*, No. 13 Civ. 818 (RWS), 2013 WL 3199652, at *7 (S.D.N.Y. 2013) (dismissing plaintiff's claims for conversion and replevin because they arose only from allegations that defendant did not return an object in violation of a contract). However, courts have dismissed actions for conversion and replevin that merely recast a claim for breach of contract even after finding a contract to be unenforceable because it violates the Statute of Frauds. *Nasso v. Bio Reference Laboratories, Inc.*, 892 F. Supp. 2d 439, 447, 454 (E.D.N.Y. 2012) (dismissing plaintiff's claim for conversion as duplicative of his claim for breach of contract even though the purported contract was found to be invalid for violating the Statute of Frauds). Therefore, an action for conversion and replevin can only be maintained if plaintiff alleges that defendant violated a legal duty independent from any contractual obligations.

Here, Plaintiffs base their claims for conversion and replevin on Experience's repudiation of its contractual obligation to return the Guitars upon request. Plaintiffs' claims for conversion and replevin are based on the same allegations upon which Plaintiffs raise their claim for breach of contract. Plaintiffs do not allege an alternative legal duty outside of the oral agreement for Experience to return the Guitars. *Rolls-Royce Motor Cars, Inc. v. Schudroff*, 929 F. Supp. 117, 124 (S.D.N.Y. 1996) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated … [T]his legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract."). The Court finds Plaintiffs' action for conversion and replevin to be duplicative of their claim for breach of contract. Accordingly, Plaintiff's claims for conversion and replevin are dismissed without prejudice.

Furthermore, Experience argues that Plaintiffs' claim for conversion is time-barred by the applicable statute of limitations. Under New York law, a claim for conversion is subject to a three-year statute of limitations. *Calcutti v. SBU, Inc.*, 224 F. Supp. 2d 691, 702 (S.D.N.Y. 2002). A cause of action for conversion ordinarily accrues immediately upon the wrongful exercise of dominion over another's property. *Wallace Wood Properties, LLC v. Wood*, 669 Fed. Appx. 33, 34 (N.Y. 2016). However, "[w]here the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property." *Seanto Exports v. United Arab Agencies*, 137 F. Supp. 2d 445, 451 (S.D.N.Y. 2001) (quoting *Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993). Here, the limitations period for Plaintiffs' claim for conversion commenced in September 2016, when Plaintiffs demanded the return of the Guitars but failed to receive a response from

Experience. Compl., at ¶ 32. Given that Plaintiffs filed the instant litigation in December 2016, Plaintiffs' cause of action for conversion is therefore not time-barred by the statute of limitations.

D. PROMISSORY ESTOPPEL

In the alternative to their claim for breach of contract, Plaintiffs assert a quasi-contractual claim for promissory estoppel against Defendants. Compl., at ¶¶ 59–70. Promissory estoppel "provides [a] remedy for persons who detrimentally rely upon the promises of others and are injured thereby." *Gellerman v. Oleet*, 164 Misc. 2d 715, 718, 625 N.YS.2d 831 (2d Cir. 1995). Even if a contract is barred by the Statute of Frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from plaintiff's reliance on the alleged promise. *Castellotti v.Free*, 138 A.D.3d 198, 204 (2016). To prevail on a claim for promissory estoppel, a plaintiff must establish three elements: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise was made, and (3) an injury to the party to whom the promise was made by reason of the reliance. *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 44 (2d Cir. 1995). "When promissory estoppel is interjected to overcome a valid Statute of Frauds defense, it 'has been strictly construed to apply only in those rare cases where the circumstances [are] such as to render it unconscionable to deny the oral promise upon which the promisee has relied.'" *Robins v. Zwirner*, 713 F. Supp. 2d 367, 376 (S.D.N.Y. 2010) (quoting *Stillman v. Townsend*, No. 05 Civ. 6612 (WHP), 2006 WL 2067035, at *2–3 (S.D.N.Y. 2006).

Reading the complaint in the light most favorable to the Plaintiffs, the Court finds that the Complaint sufficiently establishes a claim for promissory estoppel at this stage, but just barely. First, Plaintiffs allege a clear and unambiguous promise by Experience to return the Guitars upon receiving $30,000. Compl., at ¶ 25. Second, Plaintiffs claim to have reasonably and foreseeably

relied upon Experience's promise, such that they transferred possession of the Guitars to Experience in the first place. *Id*. at ¶ 63–66. Lastly, Plaintiffs allege injuries sufficiently severe to be "unconscionable." *See Merex A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 827 (2d Cir. 1994) (defining "unconscionable injury" as "beyond that which flows naturally (expectation damages) from the non-performance of the unenforceable agreement."). In essence, Plaintiffs allege unconscionability based on Experience's conversion of the two historic, iconic and extremely valuable items for "a mere $30,000". Compl., at ¶ 63. Having pleaded the necessary elements to establish a plausible claim for promissory estoppel at this stage, Plaintiffs' claim survives the instant motion.

E. SLANDER OF TITLE

Plaintiffs assert a claim for slander of title based on the allegations made by Experience, Rainbow, Moltz and Janie Hendrix in a separate litigation concerning the ownership rights of the Black Widow. Compl., at ¶¶ 71–75. In New York, a claim for slander of title requires: (1) that a defendant made "a communication falsely casting doubt on the validity of [plaintiff's] title, (2) reasonably calculated to cause harm, and (3) resulting in special damages." *39 College Point Corp. v. Transpac Capital Corp.*, 810 N.Y.S.2d 520, 521 (N.Y. App. Div. 2d Dep't 2006) (internal citation marks omitted). Furthermore, "New York law also requires that Plaintiff demonstrate that the statements are made with 'malice' or 'at least a reckless disregard for their truth or falsity.'" *Nials v. Bank of Am.*, No. 13 Civ. 5720 (AJN), 2014 WL 2465289, at *4 (S.D.N.Y. May 30, 2014) (quoting *Abraham v. Am. Home Mortg. Servicing, Inc.*, 947 F. Supp. 2d 222, 236 (E.D.N.Y. 2013).

The slander of title claim is dismissed. First, it is untimely. "Under New York law, slander of title claims are subject to a one-year statute of limitations, which begins to run on the

date the allegedly slanderous statements are uttered." *Reach Music Pub., Inc. v. Warner/Chapell Music, Inc.*, No. 09 Civ. 5580 (LTS), 2011 WL 396252, at *6 (S.D.N.Y. 2011). Plaintiffs ground their claim for slander of title on the allegedly slanderous statements made by Defendants in a separate litigation that commenced in the early fall of 2015. Compl., at ¶ 29. However, Plaintiffs did not commence the instant litigation until December 19, 2016. Having passed the one-year statute of limitations, the Court dismisses Plaintiff's slander of title claim as untimely.

Even if timely, however, it would still be subject to dismissal because none of the allegations in the Complaint plausibly support a claim for slander of title under New York law. First, Plaintiffs fail to allege that Defendants made any communication falsely casting doubt on the validity of Plaintiffs' title to Black Widow. The Complaint simply asserts that Defendants "have each plead false and reckless claims against each other which cast doubt on the Plaintiffs' valid claim of title to the Black Widow." Compl., at ¶ 72. The allegation is conclusory and vague and, in any event, does not identify any "communication." Second, Plaintiffs do not provide sufficient factual support to establish that they are entitled to special damages. *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435, 441 (1960) (dismissing plaintiff's slander of title claim for failure to plead special damages because it merely alleged that it incurred $5 million in damages and made no attempt to itemize its damages). Lastly, Plaintiffs do not submit any facts to suggest that the purported communications were made with malice or that they were false. *Horton v. Wells Fargo Bank N.A.*, No. 16 Civ. 1737 (KBF), 2016 WL 6781250, at *7 (S.D.N.Y. Nov. 16, 2016) (dismissing plaintiff's slander of title claim for, *inter alia*, failure to plead malice behind defendant's communications). Accordingly, the Court dismisses Plaintiffs' claim for slander of title.

F. LEAVE TO AMEND

In their opposition to Experience's motion, Plaintiffs request leave to amend their complaint to the extent that the Court determines that factual allegations are lacking. Doc. 24. Under Rule 15(a) of the Federal Rules of Civil Procedure, the Court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Nonetheless, denying leave to amend is proper where the amendment would be futile. *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009). An amendment is considered futile where the plaintiff is unable to demonstrate that he would be able to cure the defects in a manner that would survive a motion to dismiss. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) ("The problem with [plaintiff's] cause of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied.").

Here, the Court grants Plaintiffs leave to amend its claims for conversion and replevin. Additionally, the Court grants Plaintiffs leave to replead Tajiddin Aleem's standing as a real party in interest in the instant case. However, because the Statute of Frauds bars Plaintiffs from enforcing the oral agreement, any attempt to replead the claim would be futile. Similarly, any attempt to replead a claim for slander of title would be futile because it would be untimely. Accordingly, the Court denies Plaintiffs' leave to amend their action for breach of contract and slander of title.

CONCLUSION

For the reasons set forth above, Experience's motion to dismiss Plaintiffs' complaint is GRANTED. Plaintiffs are granted leave to replead their claims for conversion and replevin as well as Tajiddin Aleem's standing. Plaintiffs' amended complaint shall be filed, if at all, on or before July 28, 2017. The parties are directed to appear for a status conference on August 3, 2017 at 11:00am. The Clerk of the Court is respectfully directed to terminate the motion, Doc. 18.

It is SO ORDERED.

Dated: July 20, 2017
New York, New York

Edgardo Ramos, U.S.D.J.