

<b>Greenberg v Meyreles</b>
2014 NY Slip Op 33946(U)
December 9, 2014
Supreme Court, Nassau County
Docket Number: 1485/13
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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NEIL H. GREENBERG,

Plaintiff,

- against -

AL MEYRELES and ADVANCED AIR AMBULANCE  
CORP.,

Defendant.

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TRIAL/IAS PART 34  
NASSAU COUNTY

Index No.: 1485/13  
Motion Seq. Nos.: 03, 04  
Motion Date: 09/23/14  
09/23/14

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**The following papers have been read on these motions:**

	Papers Numbered
<u>Notice of Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 04), Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Further Support of Motion (Seq. No. 03) and in Opposition to Cross-Motion (Seq. No. 04) and Exhibit</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting him summary judgment on his first cause of action for breach of contract against defendant Advanced Air Ambulance Corp. ("AAAC") and awarding him the sum of \$24,490.00, plus interest from October 18, 2012.

Defendants oppose the motion and cross-move, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the cross-motion.

[\* 2]

Plaintiff commenced this action to recover damages for breach of contract and fraud. *See* Plaintiff's Affirmation in Support Exhibit A.

By order dated October 16, 2013, the Honorable Margaret C. Reilly, J.S.C. denied defendants' motion to dismiss the Verified Complaint for lack of jurisdiction and failure to state a cause of action and denied plaintiff's cross-motion for an order granting a default judgment.

In Justice Reilly's Order, the Court found that the Verified Complaint states viable causes of action for breach of contract and fraud.

Notably, "[a] motion to dismiss, which addresses merely the sufficiency of the pleadings, is distinct from a motion for summary judgment, which searches the record and looks to the sufficiency of the underlying evidence." *Kidd v. Delta Funding Corp.*, 299 A.D.2d 457, 751 N.Y.S.2d 267 (2d Dept. 2002); *Del Castillo v. Bayley Seton Hosp.*, 232 A.D.2d 602, 649 N.Y.S.2d 41 (2d Dept. 1996). *See also Dischiavi v. Calli*, 111 A.D.3d 1258, 975 N.Y.S.2d 266 (4<sup>th</sup> Dept. 2013); *Mobarak v. Mowad*, 55 A.D.3d 693, 865 N.Y.S.2d 344 (2d Dept. 2008).

Pursuant to a Confirmation Agreement dated October 18, 2012, plaintiff hired defendant AAAC for the air transport of his brother, Garrett Walker, from San Juan, Puerto Rico, to the Bronx, New York, on Saturday, October 20, 2012. Plaintiff agreed "to pay the total amount of \$14,340.00 US dollars, payable to Advanced Air Ambulance, Corp., by bank-wire transfer, to be sent and received, no later than Friday, October 19, 2012." *See* Plaintiff's Affirmation in Support Exhibit C. Plaintiff testified that he had a few telephone conversations before and after the Confirmation Agreement was executed. *See* Plaintiff's Affirmation in Support Exhibit D p. 35.

The Confirmation Agreement further provided that "[t]his price on a Jet aircraft will include the following:

Dedicated air ambulance

A.L.S. certified medical equipment on board- incl. ventilator

A.C.L.S. medical personnel on board - RN & RT

One passenger to accompany the patient

The cost of ground transportation at each end.” See Plaintiff’s Affirmation in Support Exhibit C.

On or about October 19, 2014, plaintiff paid defendant AAAC, via electronic wire transfer, the sum of \$24,490.00 for its services.

In support of his motion for summary judgment on his breach of contract claim, plaintiff alleges that defendant AAAC failed to perform its duties and obligations as required by the agreement. In particular, plaintiff alleges the following breaches of contract:

- Defendant AAAC arranged the flight through AmericanJets, a third party, due to defendant AAAC’s aircraft being out of service for maintenance.
- The aircraft operated by AmericanJets was “puny” and did not have the equipment plaintiff contracted for.
- Defendants did not provide a respiratory therapist
- The ground transportation was inadequate, in that an emergency situation took place due to a lack of electricity and oxygen.

Plaintiff argues that, since the agreement refers to defendant AAAC’s website located at [www.flyambu.com](http://www.flyambu.com), the contents of the website containing various representations, including photographs of its services, medical equipment and fleet are incorporated by reference therein. See Plaintiff’s Affirmation in Support Exhibit E.

Defendants cross-move (Seq. No. 04) for summary judgment dismissing plaintiff’s causes of action for breach of contract and fraud. Defendants also seek to dismiss plaintiff’s claim for punitive damages.

In opposition to the motion (Seq. No. 03) and in support of their cross-motion (Seq. No. 04), defendants argue that the “breach of contract’ action is really a negligence action in sheep’s clothing” (see Defendants’ Affirmation in Opposition and Support ¶ 14); defendants complied.

with the provisions of the contract; the contents of the website, including any representations made therein, were not "incorporated by reference" into the contract; defendants provided a "Learjet 35" and a "dedicated air ambulance"; both the nurse and paramedic on board were trained as respiratory/airway technicians; the flight crew consisted of Edwin Thompson, ACCS RN, Respiratory Airway Tech, and Victor Diodato, ACCS Paramedic, Respiratory Airway Tech; and defendant AAAC was not responsible for the condition of the ground ambulance.

Plaintiff opposes defendants' cross-motion on the grounds that: it is untimely; issues of fact exist as to whether defendants breached the agreement; issues of fact exist as to whether defendant Al Meyreles can be held liable for fraudulent inducement; and punitive damages are warranted.

Initially, this Court will address the timeliness of defendants' cross-motion (Seq. No. 04).

The Certification Order signed by the parties states that motions for summary judgment must be filed within ninety (90) days of the filing of the Note of Issue. *See* Plaintiff's Affirmation in Further Support and in Opposition Exhibit A. The Note of Issue was filed on June 3, 2014. *See id.* Plaintiff filed his motion (Seq. No. 03) on September 4, 2014. Defendants filed their cross-motion (Seq. No. 04) on September 16, 2014.

An untimely cross-motion for summary judgment may be considered by the court where "a timely motion for summary judgment was made on nearly identical grounds." *Wernicki v. Knipper*, 119 A.D.3d 775, 989 N.Y.S.2d 318 (2d Dept. 2014); *Homeland Insurance Company of New York v. National Grange Mut. Ins. Co.*, 84 A.D.3d 737, 922 N.Y.S.2d 522 (2d Dept. 2014). "In such circumstances, the issues raised by the untimely cross-motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR § 3212(a)) to review the merits of the untimely cross motion.

Notably, a court, in deciding the timely motion, may search the record and award summary judgment to a nonmoving party.” *Wernicki v. Knipper, supra* quoting *Homeland Insurance Company of New York v. National Grange Mut. Ins. Co., supra*. See also CPLR § 3212(b).

Under the circumstances, this Court will consider the cross-motion (Seq. No. 04).

The branch of the cross-motion (Seq. No. 04) which seeks to dismiss the causes of action against defendant Al Meyreles (“Meyreles”) is granted.

Defendant Meyreles testified that he is the operations manager for defendant AAAC. See Plaintiff’s Affirmation in Support Exhibit G. Rashid Muhammad Abbara testified that he is the President of defendant AAAC and a sixty percent (60%) shareholder; defendant Meyreles is the Vice President and a forty percent (40%) shareholder; and defendant Meyreles had no input or other involvement in the content of the website. See Plaintiff’s Affirmation in Support Exhibit F.

It is settled that “[a] breach of contract cause of action cannot stand against an individual unless the individual is a signatory to the contract.” *Tutura v. Siegel*, 40 A.D.3d 227, 833 N.Y.S.2d 385 (2d Dept. 2007). See also *Natoli v. NYC Partnership Housing Development Fund Co., Inc.*, 103 A.D.3d 611, 960 N.Y.S.2d 137 (2d Dept. 2013).

Defendant Meyreles established his *prima facie* entitlement to judgment as a matter of law by showing that he executed the subject contract solely in his capacity as a corporate officer and without any intent to become personally liable on the contract. See *Gordon v. Teramo & Company, Inc.*, 308 A.D.2d 432, 764 N.Y.S.2d 144 (2d Dept. 2003). Moreover, the Confirmation Agreement itself states that it was entered into between plaintiff and defendant AAAC. Plaintiff, in opposition, has failed to raise a triable issue of fact. See *Gordon v. Teramo & Company, Inc., supra*.

The Court will now address the breach of contract action.

“The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of the contract, and (4) resulting damages.” *Kausal v. Educational Prods. Info.*, 105 A.D.3d 909, 964 N.Y.S.2d 550 (2d Dept. 2013); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 921 N.Y.S.2d 260 (2d Dept. 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 893 N.Y.S.2d 237 (2d Dept. 2010).

To satisfy the damages element of a cause of action for breach of contract, the pleadings must allege that the breach “directly and proximately caused” the plaintiff’s injury. *See Weiss v. TD Waterhouse*, 45 A.D.3d 763, 847 N.Y.S.2d 94 (2d Dept. 2007); *Rose Lee Mfg. v. Chemical Bank*, 186 A.D.2d 548, 588 N.Y.S.2d 408 (2d Dept. 1992).

Here, issues of facts exist as to whether defendant AAAC breached the contract and whether plaintiff sustained damages. Hence, neither party is entitled to judgment as a matter of law on the causes of action for breach of contract. *See Citibank (S.D.), N.A. v. Brown-Serulovic*, 97 A.D.3d 522, 948 N.Y.S.2d 331 (2d Dept. 2012).

Turning to the fraud cause of action, it is well settled that “[t]he elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages.” *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 931 N.Y.S.2d 377 (2d Dept. 2011). *See also Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009); *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 836 N.Y.S.2d 509 (2007); *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996); *Orchid Const. Corp. v. Gonzalez*, 89 A.D.3d 705, 932 N.Y.S.2d 125 (2d Dept. 2011). “Damages are limited to actual loss, not to provide compensation for a possible gain.” *Hense v. Baxter*, 79

A.D.3d 814, 914 N.Y.S.2d 200 (2d Dept. 2010). See also *Lama Holding Co. v. Smith Barney*, *supra* at 421.

Here, the alleged misrepresentations set forth in the fraud cause of action are not sufficiently distinct from the breach of contract cause of action to constitute a separate cause of action. See *LIUS Group International Endwell, LLC v. HFS International, Inc.*, 92 A.D.3d 918, 939 N.Y.S.2d 525 (2d Dept. 2012); *Church of St. India Malayalsm Congregation of Greater N.Y. v. Bryant Installations, Inc.*, 85 A.D.3d 706, 925 N.Y.S.2d 131 (2d Dept. 2011). The alleged fraud merely duplicates the breach of contract action. See *Refreshment Mgt. Servs. Corp. v. Complete Off. Supply Warehouse, Inc.*, 89 A.D.3d 913, 933 N.Y.S.2d 312 (2d Dept. 2011). The fraud cause of action arises out of identical circumstances as the cause of action alleging breach of contract and does not allege that a misrepresentation resulted in any loss independent of the damages allegedly incurred for breach of contract. See *LIUS Group International Endwell, LLC v. HFS International, Inc.*, *supra*; *Havell Capital Enhanced Mun. Income Fund, L.P. v. Citibank, N.A.*, 84 A.D.3d 588, 923 N.Y.S.2d 479 (1<sup>st</sup> Dept. 2011).

The branch of the cross-motion (seq. No. 04) which seeks to dismiss the punitive damages claim is granted.

“An award of punitive damages is warranted where the conduct of the party being held liable ‘evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness.’” *Brown v. Maple3, LLC*, 88 A.D.3d 224, 928 N.Y.S.2d 740 (2d Dept. 2011) quoting *Pellegrini v. Richmond County Ambulance Serv., Inc.*, 48 A.D.3d 436, 851 N.Y.S.2d 268 (2d Dept. 2008) quoting *Buckholz v. Maple Garden Apts., LLC*, 38 A.D.3d 584, 832 N.Y.S.2d 255 (2d Dept. 2007); *Shovak v. Long Is. Commercial Bank*, 50 A.D.3d 1118, 858 N.Y.S.2d 660



(2d Dept. 2008). No such showing has been made here.


In view of the foregoing, plaintiff's motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting him summary judgment on his first cause of action for breach of contract against defendant Advanced Air Ambulance Corp. ("AAAC") and awarding him the sum of \$24,490.00, plus interest from October 18, 2012, is hereby **DENIED**.

The branch of defendants' cross-motion (Seq. No. 04) which seeks to dismiss all of the causes of action against defendant Meyreles is **GRANTED**.

The branch of defendants' cross-motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting defendant AAAC summary judgment on its breach of contract action is hereby **DENIED**. The branch of defendants' cross-motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting defendant AAAC summary judgment as to the fraud cause of action is hereby **GRANTED**. The branch of defendants' cross-motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting defendant AAAC summary judgment as to punitive damages claim is also hereby **GRANTED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 11, 2014, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:   
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
December 9, 2014

**ENTERED**

DEC 11 2014