SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
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SLATED IP, LLC,

Plaintiff,

-against-

THE INDEPENDENT FILM DEVELOPMENT GROUP, LLC, ROBERT ALEXANDER and BARNET LIBERMAN,

Defendants.

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Index No.: 650029/2013

Mtn Seq. Nos. 004, 005, 006 & 008

DECISION AND ORDER

JEFFREY K. OING, J.:

This action arises under two agreements between plaintiff Slated IP, LLC ("Slated") and defendant The Independent Film Development Group, LLC ("IFDG"), an "Asset Purchase Agreement" ("AP Agreement") and a "Senior Secured Note and Security Agreement" ("Note"), both dated August 1, 2011. Slated asserts claims against IFDG and its principals, defendants Robert Alexander ("Alexander") and Barnet Liberman ("Liberman"), as alter egos of IFDG. Specifically, the five-count amended complaint asserts claims for piercing the corporate veil (first cause of action), breach of contract (second cause of action), unjust enrichment (third cause of action), account stated (fourth cause of action), and recovery of chattel under article 71 of the CPLR (fifth cause of action). In their combined answer, defendants assert three counterclaims for breach of contract and

the covenant of good faith and fair dealing, fraudulent inducement, and misrepresentation.

Reliefs Sought

Mtn Seq. No. 005

Slated moves, pursuant to CPLR 3212, for summary judgment on its claims, and dismissal of the counterclaims.

Mtn Seq. No. 004

Defendants move to vacate the note of issue.

Mtn Seq. No. 006

Defendants move to vacate the March 4, 2015 order of the Honorable Ira Gammerman, JHO ("3/4/15 Order").

Mtn Seq. No. 008

Defendants move for leave to amend their answer.

These four motions are consolidated for disposition.

Facts

Pursuant to the AP Agreement, Slated sold to IFDG the "Festival Genius Product ... and all related assets, including all related 'Intellectual Property,' 'Intellectual Property Rights' and 'Documentation' ..., as more fully set forth in this Agreement ... (collectively, the 'Assets')" (Anderson Aff. Ex. 1 at 1). According to the AP Agreement, the Festival Genius Product is "an online scheduling and iPhone application for

uploading and presenting film schedules to festival attendees" (Id. at 2). Under the AP Agreement, IFDG:

> acknowledge[d] that it is purchasing the Assets "as-is, where-is," except as expressly provided in this Agreement, including the representations and warranties expressly provided in this Agreement, which representations and warranties shall survive the Closing until, but only until May 1, 2012. The maximum indemnification obligation of [Slated] to [IFDG] under this Agreement will be an amount equal to that portion of the Purchase Price that has actually been paid by [IFDG] to [Slated].

(Id., § 5.4). In another provision of the AP Agreement, the parties agreed that Slated's "representations and warranties ... shall survive the Closing until May 1, 2012" (Id., § 4).

The AP Agreement provided for a purchase price of $500,000 (Id. at Ex. B to AP Agreement). $125,000 of the purchase price was paid on June 28, 2011 and another $125,000 was paid at closing (Id.). The remaining $250,000 was payable "in the form of a senior secured promissory note and security agreement, bearing interest at the minimum Federal rate established from time to time by the Internal Revenue Service, at Closing (the 'Note')" (Id.). The AP Agreement also provided that "[t]he entire principal amount of the Note, plus accrued interest, will be payable on December 1, 2012," and that "[t]he Note will be secured by a first priority security interest in the Assets" (Id.).

The Note defined IFDG as the "Debtor" and Slated as the "Holder" (Anderson Aff., Ex. E at 1). Under the Note, IFDG agreed to pay Slated "$250,000, plus interest ..., without any set-off, counterclaim or deduction. The amount of any due but unpaid principal and/or accrued interest shall be hereinafter collectively referred to as the 'Entire Note Balance'" (Id.). The Note defined the "'Maturity Date'" as "December 1, 2012," at which point "the Entire Note Balance shall become due and payable without notice or demand" (Id., § 2). It provided that "[a]ll payments ... shall be made by wire transfer of funds to such account as the Holder may designate in writing to the Debtor at least seven (7) days in advance of the Maturity Date" (Id.). Under section 11 of the Note, IFDG "waive[d] demand, notice, protest and all other demands and notices in connection with the delivery, acceptance, performance, default or enforcement of th[e] Note, except as may otherwise be provided herein" (Id. at 3).

Section 7 of the Note, titled "Defaults; Remedies," provided:

> (a) It shall be an event of default ("Event of Default") under this Note if: (i) the Entire Note Balance shall not be paid within ten (10) calendar days of the date that it is due and payable .... Upon the happening of any such Event of Default beyond all applicable notices and opportunities to cure, the entire indebtedness with accrued interest thereon due

> under this Note shall accelerate and become immediately due and payable at the option of Holder without further notice and without regard to the scheduled maturity date set forth herein and Holder may proceed to exercise any rights or remedies that Holder may have by law or under this Note.

(Id. at 2).

Legal Analysis

Mtn Seq. No. 005

Slated argues that it is entitled to summary judgment on each of its claims, and to dismissal of IFDG's counterclaims. Defendants counter that the motion should be denied due to Slated's fraudulent conduct and lack of consideration under the AP Agreement and Note.

Second Cause of Acton (Breach of Contract)
Second and Third Counterclaims (Fraud and Misrepresentation)

Slated submits the executed Note and the affidavit of Jennifer Anderson ("Anderson"), the chief operating officer of Slated's managing member, Slated, Inc. Anderson proffers a letter, dated November 19, 2012, whereby Slated sent wiring instructions to IFDG for payment of $250,000, plus interest, under the Note, claiming a total amount due of $259,025 (Anderson Aff. ¶ 28 and Ex. D). Anderson represents that IFDG neither responded to this letter nor issued any payment, and that, because more than ten days have elapsed since the Maturity Date,

IFDG is in default under the Note (Anderson Aff., ¶ 29). Anderson also proffers a second letter, dated December 12, 2012, whereby Slated agreed "to extend IFDG's time to cure its default under the Note to no later than 5:00 p.m. on Monday, December 17, 2012" (Id., ¶ 30 and Ex. E). Anderson represents that IFDG, again, did not respond to this letter or issue any payment in response (Anderson Aff., ¶ 31).

Defendant Alexander conceded that IFDG never paid the $250,000 owed under the AP Agreement and Note (Anderson Aff., Ex. F at 163-164). This evidence is prima facie proof establishing Slated's breach of contract cause of action (Eastbank v Phoenix Garden Rest., 216 AD2d 152, 152 [1st Dept 1995]["[p]laintiff established a prima facie case by proof of defendant['s] execution of a promissory note in the principal sum of $200,000, ... and defendants' failure to make payment upon proper demand"]); Gateway State Bank v Shangri-La Private Club for Women, 113 AD2d 791, 791-792 [2d Dept 1985]["plaintiff has established a prima facie case by proof of the note and a failure to make payments called for by its terms"], affd 67 NY2d 627 [1986]).

In opposition, defendants argue that their counterclaim for fraudulent inducement provides a complete defense to -- or at the very least raises a factual issue concerning -- Slated's breach

of contract cause of action. This counterclaim is based upon allegations that, prior to entering into the AP Agreement, Slated represented that it had ongoing ticketing integration relationships and works-in-progress with, and on-going development support from, Agile Ticketing Solutions, Titan Ticketing, and Sundance (Answer, ¶ 53). Slated allegedly represented that "there was the likelihood and strong possibility that Sundance would contract with [IFDG] for the next festival," and that Slated "had supported over 70 festivals in the 12 months prior to August 1, 2011" (Id.). According to defendants, these representations were falsely made to induce IFDG to enter into the AP Agreement.

Defendants also submit the affidavit of defendant Liberman, IFDG's sole manager and CEO.[1] He claims that Slated made additional fraudulent representations. For instance, Slated represented that the Festival Genius software at issue was supported by patent and other intellectual property law, and by "certain documentation" (Liberman Aff., ¶¶ 7(F)-(I)). Slated also allegedly misrepresented in the AP Agreement that it "owned the original Software and all improvements to the Software," that Slated was an operating company engaged in the business of using

[1] Defendant Alexander passed away in May 2015 (Liberman Aff., ¶ 7(A)(ii).

Festival Genius," and that the Festival Genius software was production software (Id., ¶ 7(J)-(K) and ¶ 8).

Contrary to defendants' argument, their allegations of fraud are based upon either "mere surmise, conjecture and speculation" (Gateway State Bank, 113 AD2d at 792), or upon Slated's alleged "prediction or opinion" concerning the Festival Genius software, neither of which is sufficient to raise a factual issue on summary judgment (Marx v Mack Affiliates, 265 AD2d 202, 203 [1st Dept 1999]; Roney v Janis, 77 AD2d 555, 557 [1st Dept 1980][fraud claim "cannot be based upon a statement of future intentions, promises or expectations which were speculative or an expression of hope at the time when made, rather than an assumption of fact"), affd 53 NY2d 1025 [1981]). Significantly, whether the Festival Genius software was supported by intellectual property law and owned by Slated, the efficacy of the software and its suitability to IFDG's needs, and the nature of Slated's operations are facts that were verifiable by defendants through the exercise of ordinary diligence so as to apprise themselves of the risks of the transaction (HSH Nordbank AG v UBS AG, 95 AD3d 185, 194-195 [1st Dept 2012]). Defendants' failure to conduct such diligence precludes the use of their fraud counterclaim as a defense in this action. For these reasons, defendants' fraud argument fails to raise a factual issue as to Slated's second

cause of action. A review of defendants' third counterclaim for "intentional and/or willful misrepresentation" demonstrates that it is based upon the same alleged misrepresentations as the fraud counterclaim (Answer, ¶¶ 63-68). As such, it too fails to raise a factual issue.

Nonetheless, defendants maintain that a factual issue exists as to whether there was a failure of consideration for the Note and the AP Agreement. This argument is based upon deposition testimony purportedly showing that Slated did not own improvements to the Festival Genius software, and defendants' assertion that Slated failed to provide documentation to IFDG. The argument is unavailing. Anderson's testimony cited by defendants merely states that "the improvements on the Festival Genius software since the date that it was acquired by Slated IP, LLC from B-Side were paid for by Slated, Inc. or Slated LLC," and that "payroll would have been made through the bank account which was either Slated, LLC or Slated, Inc." (Liberman Aff., Ex. 4 at 103). When specifically asked whether Slated, LLC or Slated, Inc. "owned the improvements that were made to the Festival Genius software," Anderson responded: "I don't know what you mean by own. It was part of the software. I mean, improvements made to the software are implicitly part of that asset ...." (Id. at 104). Such testimony does not constitute an "unequivocal

admission that [Slated] did not own the improvements to the Software," as argued by defendants (Defendants' Opp Brief at 14). Defendants' citation to the testimony of Duncan Cork ("Cork") fares no better. He, on behalf of Slated, testified that he did not know who owned the improvements to the Festival Genius software (Liberman Aff. Ex. 5 at 99). In short, the deposition testimony cited by defendants does not support the conclusion that Slated did not own improvements to the Festival Genius software, and this evidence fails to raise a factual issue.

In any event, Slated proffers the affidavit of Slated, Inc.'s president and chief executive officer, Stephan Paternot ("Paternot"). Paternot states that Slated purchased the Festival Genius software from B-Side Entertainment, Inc. ("B-Side") on March 16, 2010, and he submits a copy of the purchase agreement as an exhibit (Paternot Aff., ¶ 6 and Ex. A). That agreement described the intellectual property "Assets" transferred as "the Festival Genius software," and it included a "US Patent Application Publication" number which corresponds with an assignment from B-Side to Slated that was recorded with the United States Patent and Trademark Office ("USPTO") on June 1, 2010 (Id., ¶ 8 and Ex. B; see also Paternot Aff., Ex. C [showing additional trademarks registered and recorded with the USPTO, which were assigned from B-Side to Slated on March 16, 2010, and

then from Slated to IFDG on August 1, 2011, the date of the AP Agreement and Note herein]). In addition, Paternot represents in his affidavit that Slated, Inc. has no rights in any of the Festival Genius assets, as "Slated, Inc. assigned any rights that it might have had in the subject assets to Slated," which Slated then transferred to IFDG (Paternot Aff., ¶¶ 10-11). This evidence shows that any rights in the Festival Genius software owned by Slated were transferred to IFDG, undermining IFDG's argument that there was a failure of consideration.

Moreover, the AP Agreement defined "documentation" as:

> all materials related to the Assets, including the Festival Genius Product and the Intellectual Property and Intellectual Property Rights, in written or other tangible form (including in electronic form or on magnetic media) and including the following: User Documentation, system summaries, system design, flow charts, functional or technical specifications, logical models, architectures, plans, instructional training course materials, and other supporting or programming materials.

(Anderson Aff., Ex. A, § 1). IFDG points to the deposition testimony of its chief technology officer, Matthew Goldfarb ("Goldfarb"), who testified that he requested certain documentation but never received it (Anderson Aff., Ex. G at 142-143). Unclear, however, is whether this testimony refers to the "documentation" defined in the AP Agreement. In any event, the

record demonstrates that defendants fail to raise a factual issue

concerning a failure of consideration. Nor does any other deposition testimony cited by IFDG raise a factual issue concerning Slated's delivery of documentation (Defendants' Opp Brief at 13). The testimony of Cork does not refer to this issue (Liberman Aff., Ex. 7 at 31-33). Anderson did not know if there was any "documentation" as that term is defined in the AP Agreement (Id., Ex. 8 at 87-88). Paternot testified that he did not know if Slated received "documentation" when it purchased the Festival Genius software (Id., Ex. 9 at 26-27).

None of defendants' seven affirmative defenses raises a factual issue or otherwise defeats Slated's prima facie showing on the breach of contract claim against IFDG. The first, fifth, and sixth affirmative defenses, based upon failure to state a cause of action and other pleading defects, are refuted by this Court's holding, supra, on Slated's breach of contract claim. Defendants fail to identify any parties that should be joined (second affirmative defense). Nor is there any discernible basis for the third affirmative defense, based upon collateral estoppel, unclean hands, or waiver. Defendants fail to identify any culpable conduct, illegality, or fraud by Slated that would support the fourth affirmative defense. The seventh affirmative defense, based upon piercing the corporate veil, pertains to the individual defendants, not to IFDG.

Accordingly, for the foregoing reasons, Slated's motion for summary judgment on its second cause of action for breach of contract is granted as against IFDG on the principal amount of $250,000. That branch of branch of the motion seeking to dismiss defendants second and third counterclaims for fraud and misrepresentation is granted, and they are dismissed.

In addition, the Note entitles Slated to $250,000, "plus interest, payable at the rate, time and manner provided in Section 1 of this Note" (Anderson Aff., Ex. C at 1). The Note provides that it "shall bear interest at an annualized rate equal to the minimum applicable federal rate ..., as published on a monthly basis by the Internal Revenue Service," and that interest "shall be calculated on the basis of the actual number of days the principal sum of this Note is due and payable and outstanding, as provided herein" (Id., § 1). Thus, although Slated is entitled to interest under the Note, it fails, on this record, to make a prima facie showing that it is owed interest in the amount of $9,025, as is claimed by Slated in its moving papers. Therefore, issue as to the amount of interest due and owing is respectfully referred to a Special Referee to hear and determine.

Slated also seeks to recover costs and expenses incurred in enforcing its rights under the Note. The Note provides that:

> If Holder retains an attorney in connection with any Event of Default or at maturity or to collect, enforce or defend this Note, then Debtor agrees to pay to Holder, in addition to principal and interest owing to Holder hereunder, all out-of-pocket costs and expenses incurred by Holder in trying to collect this Note, including reasonable attorneys' fees, that are awarded to Holder in respect thereof by a court of competent jurisdiction.

(Anderson Aff., Ex. C, § 7 at 2-3).

Similarly, the AP Agreement provides that, "[i]n any action brought to construe or enforce this Agreement, the prevailing party shall receive in addition to any other remedy to which it may be entitled, compensation for all costs incurred in pursuing such action, including, but not limited to, reasonable attorneys' and expert witnesses' fees and costs" (Anderson Aff., Ex. A, § 7.5).

The record is clear -- defendants' failure to pay $250,000 when due constituted an Event of Default and a breach of the Note. Accordingly, Slated is entitled to out-of-pocket costs and expenses incurred in its collection efforts (DDS Partners v Celenza, 6 AD3d 347, 349 [1st Dept 2004][awarding the plaintiff "reasonable attorneys' fees and costs expended in connection with the enforcement of its rights to collect on the note"]).

Slated represents that, as of March 20, 2015, it has incurred $122,933.36 in legal fees and costs, and continues to incur such costs and expenses (Landau Aff., ¶ 55).

Notwithstanding this representation, the issue of the amount of Slated's reasonable attorneys' fees, costs and expenses is respectfully referred to a Special Referee to hear and determine.

Third Cause of Action (Unjust Enrichment)
Fourth Cause of Action (Account Stated)
Fifth Cause of Action (Article 71)

Slated's third cause of action for unjust enrichment is dismissed as duplicative of its breach of contract claim (Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012]["unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]). Moreover, as summary judgment is granted on Slated's breach of contract claim, Slated's motion for summary judgment on the fourth cause of action for an account stated -- which is based on the same facts and seeks the same relief as the breach of contract claim -- is denied and the fourth cause of action is dismissed (Simplex Grinnell v Ultimate Realty, LLC, 38 AD3d 600, 600 [2d Dept 2007]["[a] cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract"]).

The fifth cause of action claims that Slated has superior right to possession of the Assets, and seeks a declaration of its superior rights, possession of the Assets, and a preliminary injunction or temporary restraining order (Amended Complaint, ¶¶

81-85). On January 23, 2013, this Court heard oral arguments on Slated's preliminary injunction motion (NYSCEF Doc. No. 286). At that time, this Court held that article 71 had no application, that the chattel was owned by defendants, and that money damages were a sufficient remedy (Id. at 27-28). This holding is law of the case, and the fifth cause of action is dismissed (Karasik v Karasik, 172 AD2d 294, 294-295 [1st Dept 1991]; Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590, 591 [1st Dept 1990]).

First Cause of Action (Alter Ego Claim)

Slated also seeks summary judgment on its first cause of action, which seeks to pierce the corporate veil of IFDG to hold Alexander and Liberman personally liable for IFDG's obligations under the AP Agreement and the Note. In opposition, and consistent with their seventh affirmative defense, defendants argue that piercing the corporate veil is not a separate cause of action. Defendants also argue that Slated's failure to allege fraud makes it impossible to determine the timing of defendants' improper conduct. Defendants admit that the $250,000 owed to Slated "was always available," but claim that "IFDG had more than 20 good and sufficient reasons not to pay it" (Defendants' Opp Brief at 19).

Generally, "a corporation exists independently of its owners, who are not personally liable for its obligations, and

... individuals may incorporate for the express purpose of limiting their liability" (East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 126 [2d Dept 2009], affd 16 NY3d 775 [2011]).

> [P]iercing the corporate veil 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.
>
> While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. 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 v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141-142 [1993][internal citations omitted]). "Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (East Hampton Union Free School Dist., 66 AD3d at 127 [internal quotation marks and citation omitted]).

Here, the veil-piercing claim is based on allegations that Alexander and Liberman owned and controlled IFDG, rendered the company inactive on December 15, 2012, and transferred all of its assets to IndiePix Films, Inc. ("IndiePix") at that time, that is, two weeks after the Maturity Date of the Note and four days after they caused IFDG to default on its payment obligations under the Note (Amended complaint, ¶¶ 34, 52; Anderson Aff., Ex. C, § 2). Slated claims that Alexander and Liberman formed IndiePix on November 9, 2012 in the State of Nevada, that they are 100% owners of IndiePix, and that IndiePix's address is the same as Alexander's principal place of business (Amended complaint, ¶¶ 4, 35). According to Slated, "IFDG depended entirely on contributions from defendants Alexander and Liberman in order to meet is obligations," and by transferring IFDG's assets to IndiePix rendered IFDG an undercapitalized shell and caused it to breach its obligations under the AP Agreement and Note (Id., ¶¶ 36-39). The amended complaint further alleges that Alexander and Liberman "systematically commingled personal and IFDG funds," and "treated IFDG as a shell for their personal business and individual dealings" (Id., ¶¶ 46-47). Slated claims that, when IFDG executed the Note and AP Agreement, "Alexander and Liberman caused IFDG to transfer the Festival Genius Product to Festival Genius, LLC" (Id., ¶ 49). Slated claims that

"Alexander and Liberman continue to do business, including the use of the Festival Genius Product, through their wholly owned companies, Festival Genius, LLC, IndiePix Films, Inc., and IndiePix Unlimited, LLC all of which are housed in the same building [as Alexander's principal place of business]" (Id., ¶ 54).

These allegations sufficiently state a claim for alter ego liability (Holme v Global Mins. & Metals Corp., 22 Misc 3d 1123(A), 2009 NY Slip Op 50252(U), *6 [Sup Ct, NY County 2009]["allegations that the Individual Defendants transferred money, shares, and assets to enrich themselves and their other companies, including [a co-defendant entity], while stripping Global of its assets and making it judgment proof, sufficiently allege[d] a wrong or injustice against [the plaintiff] which resulted in his injury"], affd 63 AD3d 417 [1st Dept 2009]). Moreover, while "a separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation" (9 E. 38th St. Assoc. v Feher Assoc., 226 AD2d 167, 168 [1st Dept 1996]), the alter ego claims asserted in the amended complaint are based upon claims against IFDG, and, through IFDG, the individual defendants. Therefore, defendants' ninth affirmative defense, which claims that piercing

the corporate veil is not an individual cause of action, is dismissed.

Slated's proffered evidence, however, fails to demonstrate entitlement to summary judgment on its veil-piercing claim at this juncture. Specifically, Slated relies on the deposition testimony of Alexander and Goldfarb. Alexander testified that IFDG stopped operating in December 2012 because "the business was in disarray" (Anderson Aff., Ex. F at 81). The staff had been reduced by eight people, some staff had resigned, and by September 2012 IFDG's staff was reduced to five people. (Id. at 84). Alexander further testified that, as a result, "a lot of phone calls ... were not being answered. ... It was a messy situation" (Id.). In addition, payroll taxes remained unpaid, "there were too many people on staff and the amount of payroll taxes were too high" (Id. at 81-82, 86). Although Alexander conceded that IFDG never paid the second $250,000 owed under the AP Agreement, the payment due on December 1, 2012 was not a factor in defendants' decision to shut down IFDG. (Id. at 163-164, 167). Alexander testified:

> the question was the immediate need to reduce our own personal operating costs, which we saved, you know, so we eliminated - we sold the assets - when the IRS gave us permission, we sold the assets of the company to a third company that I'm not a part of and I assumed the liabilities that the IRS asked me to and I resigned my position. That was unrelated to the sale.

(Id. at 167-168). According to Alexander, an entity called "IndiePix Unlimited ... wasn't an operating company. It was a shell .... They didn't have staff. It was set up for accounting and brand name reasons and that sort of thing" (Id. at 87).

Goldfarb testified that he left IFDG for "financial reasons" (Anderson Aff., Ex. G at 40). He further testified that he was not being paid regularly and "sometimes gave up a paycheck to make sure that one of the other employees was paid" and believed this situation was due to "a cash flow problem" (Id. at 41-42). Goldfarb testified that when IFDG transferred its assets to IndiePix in 2012 he continued his employment with IndiePix (Id. at 33-34). None of his duties changed at IndiePix (Id. at 61).

Although this evidence tends to suggest that Alexander and Liberman controlled IFDG, and that they intentionally withheld payment on the Note, Slated fails to make a prima facie showing that Alexander and Liberman's domination and control over IFDG was used solely to commit a fraud or wrong against Slated. Rather, the evidence cited by Slated raises a factual issue as to whether IFDG's inability to pay the balance due under the Note was due to the individual defendants' alleged improper conduct or IFDG's deteriorating financial condition. Accordingly, Slated's motion for summary judgment against defendants Alexander and Liberman, as alter egos of IFDG, is denied.

Defendants' Remaining Counterclaim

Slated next seeks summary judgment dismissing defendants' first counterclaim, which is based upon Slated's alleged breach of the AP Agreement and the duty of good faith and fair dealing with respect to that agreement. Specifically, defendants aver that Slated failed to deliver the Assets or sufficient documentation of the Assets, that the "System and Assets" were defective and did not perform as represented and warranted, and that Slated breached its representations and warranties generally (Answer, ¶¶ 48(A)-(G)).

As a preliminary matter, in the first paragraph of the Note, IFDG agreed to pay off the Note ($250,000 plus interest) "without any set-off, counterclaim or deduction" (Anderson Aff., Ex. C at 1). This provision of the Note alone precludes IFDG's counterclaim to the extent that it relates to the Note (Bank of Suffolk County v Kite, 49 NY2d 827, 828 [1980][enforcing "explicit waiver of 'the right to interpose any defense, set-off or counterclaim whatsoever' [citation omitted]"; Sterling Natl. Bank v Biaggi, 47 AD3d 436, 436 [1st Dept 2008][enforcing absolute and unconditional waiver of "any and all rights to assert any defense, set-off, counterclaim or cross claim of any nature whatsoever"]; Chemical Bank v Allen, 226 AD2d 137, 138 [1st Dept 1996][same]).

In any event, the AP Agreement expressly states that Slated's representations and warranties "shall survive the Closing until May 1, 2012" (Anderson Aff., Ex. A, §§ 4 and 5.4). Here, there is no dispute that defendants did not assert any claims for breaches of representations or warranties until filing their answer in March 2013. Therefore, the breach of contract claim is untimely under the AP Agreement (2626 Bway LLC v Broadway Metro Assoc., LP, 85 AD3d 456, 456 [1st Dept 2011][unambiguous contracts "must be enforced as written"]; CPLR 201 ["[a]n action ... must be commenced within the time specified in this article unless ... a shorter time is prescribed by written agreement"]). Furthermore, to the extent that defendants' first counterclaim is based upon breach of the covenant of good faith and fair dealing, that claim is dismissed as duplicative of the breach of contract counterclaim (Salomon v Citigroup Inc., 123 AD3d 517, 518 [1st Dept 2014]).

Accordingly, that branch of Slated's motion to dismiss defendants' first counterclaim is granted, and it is dismissed.

Mtn Seq. Nos. 004 and 006

On February 24, 2015, defendants moved to vacate the note of issue for the purpose of conducting additional discovery. On March 30, 2015, defendants moved to vacate JHO Gammerman's 3/4/15 Order. These motions are based upon the same underlying

discovery sought by defendants. The parties dispute whether the 3/4/15 Order was an order or merely a recommendation, which would determine the procedural mechanism used to challenge JHO Gammerman's rulings and conclusions.

Under CPLR 3104(b), "[a] judicial hearing officer may be designated as referee" (CPLR 3104(a)[stating that a referee may "supervise all or part of any disclosure procedure"]). Under CPLR 3104(c), subject to certain exceptions not applicable here, "[a] referee ... shall have all the powers of the court." CPLR 3104(d) provides that "[a]ny party ... may apply for review of an order made under this section by a referee."

The 3/4/15 Order was issued in the context of JHO Gammerman's supervision of discovery, ordered by this Court on December 18, 2013 (NYCSEF Doc. No. 35). Therefore, JHO Gammerman's conclusion concerning discovery is deemed an order (CPLR 3104(c)). When the parties appeared before JHO Gammerman on March 4, 2015, they addressed the outstanding discovery sought by defendants. After hearing defendants' arguments, JHO Gammerman concluded that discovery was complete and that no further discovery was necessary. Pursuant to CPLR 3104(d), this Court grants defendants' motion to the extent of reviewing the 3/4/15 Order, and, for the reasons stated on the record by JHO Gammerman, this Court adopts and adheres to JHO Gammerman's

ruling that discovery is complete and no further discovery is necessary. In that regard, this Court notes that defendants have had ample opportunity to complete discovery and no further discovery is necessary. Therefore, defendants' motion seeking reversal and vacatur of the 3/4/15 Order is denied. For these same reasons, the motion to vacate the note of issue is denied.

Mtn Seq. No. 008

Defendants' seek leave to amend their answer to assert new affirmative defenses, counterclaims, and third-party claims against Slated, Inc., Paternot, Cork and Anderson.

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012][internal quotation marks and citations omitted]).

As a preliminary matter, pursuant to JHO Gammerman's supervision of discovery, defendants were given until November 12, 2014 to move for leave to amend their answer to include the individual claims now asserted in the proposed amended answer, subject to preclusion for failure to do so (3/4/15 Tr. at 8-9). Defendants did not move for leave to amend until more than a year

later, on December 17, 2015 (NYSCEF Doc. No. 162). Accordingly, the motion for leave to amend is denied.

Moreover, as discussed, supra, all of defendants' counterclaims are untimely under the AP Agreement's provision that Slated's "representation and warranties ... shall survive the Closing until May 1, 2012"(Anderson Aff., Ex. A, §§ 4 and 5.4) and/or waived by IFDG's representation in the Note that it would pay the balance due "without any set-off, counterclaim or deduction" (Id., Ex. C at 1).

In any event, the proposed amendments are insufficient as a matter of law. Here, the proposed amended answer, affirmative defenses, and counterclaims ("Proposed Amended Answer") seek to add four affirmative defenses. The proposed eighth affirmative defense claims that Slated "did not own or have title to the software and other of the 'Assets' ... which it purportedly sold to IFDG, resulting in, among other things, a lack of consideration" (Proposed Amended Answer, ¶ 47). The proposed tenth affirmative defense claims that the AP Agreement and Note "lacked adequate consideration" (Id., ¶ 49). The proposed eleventh affirmative defense is based upon Slated's alleged "fraud and fraud in the inducement, which bar and preclude its claims" (Id., ¶ 50). For the reasons discussed, supra, in connection with Slated's summary judgment motion, defendants'

argument concerning lack of consideration fails to raise a factual issue, and defendants' fraud-based counterclaims were dismissed. Accordingly, these proposed new affirmative defenses are without merit.

The proposed ninth affirmative defense is based upon allegations that Slated lacks standing to bring this action because its owners were Slated's alter egos and, in that capacity, caused injury to defendants. Along the same lines, defendants' proposed first amended counterclaim alleges that Paternot, Cork, and Anderson were officers of Slated's managing member, Slated, Inc., and alter egos of Slated (Proposed Amended Answer, ¶¶ 56-59, 75). Defendants allege that Slated was undercapitalized, never duly organized, and failed to adhere to corporate formalities, rendering it unable to fulfill its obligations to IFDG under the AP Agreement, and resulting in IFDG not receiving the Assets and Festival Genius software under the AP Agreement (Id., ¶¶ 63-74, 76). In this regard, defendants claim that Paternot, Cork, and Anderson breached Slated's representations under the AP Agreement (Id., ¶¶ 77-82).

While these allegations claim that Slated breached the AP Agreement, they fail to show that Paternot, Cork and Anderson used their alleged domination over Slated "to commit a fraud or wrong against the [defendants] which resulted in [defendants']

injury" (Matter of Morris, 82 NY2d at 141). Nor do defendants allege that these individuals used Slated "as a mere device to further their personal rather than the corporate business" (Id. at 141). Thus, there is no underlying misconduct to support defendants' veil-piercing counterclaims or their ninth affirmative defense. Nor do defendants cite to legal authority suggesting any connection between veil-piercing and standing, further undermining defendants' ninth affirmative defense.

In essence, defendants allege that Slated, under the control of its managing member, breached the AP Agreement. As discussed, supra, "a corporation exists independently of its owners, who are not personally liable for its obligations, and ... individuals may incorporate for the express purpose of limiting their liability" (East Hampton Union Free School Dist., 66 AD3d at 126). Allegations seeking to pierce the corporate veil must be supported "by particularized statements detailing fraud or other corporate misconduct," which are not alleged here (Sheinberg v 177 E. 77, 248 AD2d 176, 177 [1st Dept 1998]).

Accordingly, defendants' proposed ninth affirmative defense, and the first amended counterclaim against Paternot, Cork and Anderson, are insufficient as a matter of law.

Defendants' proposed second and third amended counterclaims restate their original counterclaims for fraudulent inducement

and misrepresentation, adding alter ego claims against Paternot, Cork, and Anderson (Proposed Amended Answer, ¶¶ 94-103, 105-111). As discussed, supra, the alter ego claims against these individuals are legally insufficient. Moreover, as discussed, supra, in connection with Slated's summary judgment motion, the remainder of defendants' fraud-based counterclaims were dismissed as legally insufficient. Therefore, the proposed amendment is denied with respect to defendants' second and third counterclaims.

Defendants also seek to add a fourth counterclaim for misrepresentation, based upon allegations that Paternot, Cork and Anderson perpetrated a fraud against IFDG, acting "intentionally ... approaching a criminal indifference and otherwise perpetrated a fraud on the general public" (Id., ¶ 114). Similarly, defendants' proposed new fifth counterclaim alleges that these individuals "acted negligently or grossly negligent or recklessly," and that they "had a special or privity-like relationship with IFDG, imposing a duty to impart correct information to IFDG" (Id., ¶¶ 117-118). These individuals also allegedly "had special knowledge or should have had special knowledge of the Assets and information concerning the Assets, including the facts upon which the foregoing representations and warranties were based" (Id., ¶ 119). Defendants claim that IFDG

relied upon the representations and warranties of these individuals, who acted intentionally, "approaching a criminal indifference and otherwise perpetrated a fraud on the general public" (Id., ¶ 121).

These proposed fraud-based claims are duplicative of the defendants' counterclaim for breach of contract, as they "are based on alleged fraudulent misrepresentations related to [Slated's] obligation[s] under their agreements" (RGH Liquidating Trust v Deloitte & Touche LLP, 47 AD3d 516, 517 [1st Dept 2008]). The fraud-based claims are also legally insufficient for failure to allege justifiable reliance (HSH Nordbank AG, 95 AD3d at 194-195; see also *Karfunkel v Sassower*, 105 AD3d 459, 460 [1st Dept 2013][plaintiff's failure "to inquire about the specifics of the transaction or to conduct due diligence ... preclude[d] his claim of justifiable reliance on defendant's alleged ... representations as a matter of law"]). To the extent that these proposed new counterclaims are based upon a theory of negligent misrepresentation, they are legally insufficient because "a 'special relationship' giving rise to a duty to impart correct information [cannot] be discerned from the arm's length dealings between the parties alleged in the [proposed Amended Answer]" (Andres v LeRoy Adventures, 201 AD2d 262, 262 [1st Dept 1994]). Nor does the proposed amended pleading state any factual basis --

let alone particularized allegations -- supporting the allegation that a fraud was perpetrated "on the general public" (Proposed Amended Answer, ¶¶ 114, 121); see also CPLR 3016(b)["[w]here a cause of action or defense is based upon misrepresentation [or] fraud, ... the circumstances constituting the wrong shall be stated in detail"]). As such, the proposed new fourth and fifth counterclaims are legally insufficient.

Based on the foregoing, defendants' motion for leave to amend is denied in its entirety.

Accordingly, it is hereby

ORDERED that defendants' motion (mtn seq. no. 004) to vacate the note of issue is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment (mtn seq. no. 005) is resolved as follows:

(1) summary judgment on the second cause of action of the amended complaint is granted with regard to liability against defendant The Independent Film Development Group, LLC in the amount of $250,000, plus interest through December 1, 2012 as provided in the parties' Senior Secured Note and Security Agreement, and, thereafter, until the date of entry of the decision herein, and for attorneys' fees, costs and expenses, and the only triable

issues of fact arising on this cause of action are the amount of interest to which plaintiff is entitled on the $250,000 through December 1, 2012 under the parties' Senior Secured Note and Security Agreement and date of entry hereof and the amount of attorneys' fees, costs and expenses that plaintiff may recover against defendant The Independent Film Development Group, LLC;

(2) defendants' affirmative defenses and counterclaims are dismissed;

(3) plaintiff's third, fourth, and fifth causes of action are dismissed;

(4) the portions of plaintiff's action that seek interest under the parties' Senior Secured Note and Security Agreement through December 1, 2012 and entry hereof and recovery of attorneys' fees, costs and expenses are severed and the issues of the amount of interest and expenses that plaintiff may recover against defendant The Independent Film Development Group, LLC are respectfully referred to a Special Referee to hear and determine, as permitted by CPLR 4317(b);

and the motion is otherwise denied; and it is further

ORDERED that defendants' motion (mtn seq. no. 006) to review, reverse, and vacate the order of the Honorable Ira Gammerman, JHO, dated March 4, 2015, is granted to the extent of reviewing said order, pursuant to CPLR 3104(d), and, upon such review, this Court adopts and adheres to said order and the motion to reverse and vacate is denied; and it is further

ORDERED that defendants' motion for leave to amend the answer (mtn seq. no. 008) is denied; and it is further

ORDERED that this action shall continue with respect to plaintiff's first cause of action against defendants Robert Alexander and Barnet Liberman; and it is further

ORDERED that counsel shall appear for a status conference on September 27, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/1/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.