

JPMorgan Chase Funding Inc. v Hehman
2017 NY Slip Op 31178(U)
May 31, 2017
Supreme Court, New York County
Docket Number: 653040/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
JPMORGAN CHASE FUNDING INC.,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 653040/2016

RICHARD ALLEN HEHMAN,

Defendant.

Mot. Seqs. 002, 003

-----X
RICHARD ALLEN HEHMAN,

Third-Party Plaintiff,

-against-

JPMORGAN CHASE & CO.,

Third-Party Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for, *inter alia*, breach of contract.

In motion sequence 002, plaintiff, JP Morgan Chase Funding Inc. (“JPMC Funding”), now moves pursuant to CPLR 3211(a)(1), (7), and (b) to dismiss the counterclaims and affirmative defenses contained in *pro se* defendant, Richard Allen Hehman’s (“Hehman”) Answer. In motion sequence 003, third-party defendant, JP Morgan Chase & Co. (“JPMC”), moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the defendant/third party defendant, Hehman’s third party complaint (“Third-Party Complaint”).

Factual Background

In June 2000, Hehman an employee of JPMC, entered as a partner into a private equity investment program known as the 2000 MD Investment Program (“Investment Program”), which

offered the “potential for higher returns higher than those available even from a general portfolio or private equity investments, due to a built-in system of recourse and non-recourse financing (“Leverage”)” (Compl ¶¶2, 12-13, 18-19, 22-23, 40; JPMC Funding MOL p.2; Opp. mot seq. 003, p.4). The offer to participate in the Investment Program was made pursuant to the terms of an offering memorandum (“Offering Memorandum”) (¶17; Opp. mot seq. 003, p.5). Participation in the Investment Program was established by purchasing a limited partner interest in Sixty Wall Street Fund, L.P. (“Partnership”) (Compl. ¶¶2, 13-14).

In 2000, JPMC Funding, the designated lender for the Investment program, extended to Hehman, a participant in the Investment Program, a Full Recourse Loan totaling \$16,949.76, (Compl. ¶¶1, 22-23, 32-33, 44-45). Based on the performance of the investments in the annual program, Hehman’s share of the program’s investment proceeds proved insufficient to repay his Full Recourse Loan, and thus, he became obligated to repay the loan (¶¶6-7, 25-27). Hehman’s Full Recourse Loan matured on June 9, 2010 and accordingly, the full amount (\$16,949.76, plus interest of \$9,386.20) became due and payable (¶62).

When Hehman failed to make any payment despite demands made, JPMC Funding commenced this action alleging: (1) breach of contract; (2) breach of implied contract; (3) money lent; (4) unjust enrichment; and (5) account stated.

Hehman filed his answer (“Answer”) asserting as affirmative defenses: (1) accord and satisfaction; (2) estoppel; (3) statute of limitations; (4) violation of duty of good faith and fair dealing; (5) laches; (6) “improper demand for payment at an address that [JPMC] knew or should have known was not that of [Hehman]” (Ans. p.2); and (7) fraud.

Additionally, Hehman alleged several counterclaims (collectively “Counterclaims”),

including: (1) breach of contract; (2) breach of implied contract; (3) unjust enrichment; (4) harassment; (5) fraud; and (6) indemnification.

In turn, Hehman commenced a Third-Party action against JPMC.

Motion Sequence 002

JPMC Funding's Motion to Dismiss the Affirmative Defenses and Counterclaims

In support of its motion to dismiss, JPMC Funding argues that Hehman's counterclaim that JPMC Funding breached the Release and Non-Disparagement Provisions of the Separation Agreement (the "Separation Agreement"), which addressed Hehman's leave of active employment from JP Morgan & Co. fails. The Release Provision only encompasses claims, causes of action and liabilities existing prior to the December 28, 2000 execution date of the Separation Agreement. JPMC Funding's claims and causes of action against Hehman on the Full Recourse Loan, and Hehman's liability with respect to that Loan did not exist prior to the execution of the Separation Agreement. As of the date of the execution of the Separation Agreement, "there was no way to tell whether [Hehman's] share of any future investment proceeds would prove sufficient to cover his Full Recourse Loan," and therefore Hehman's liability to repay the loan, and JPMC Funding's claims or causes of action did not exist as of the date of the Separation Agreement (JPMC Funding, MOL p.11). Instead, pursuant to the terms of the Agreement of Limited Partnership of Sixty Wall Street Fund, L.P. ("Partnership Agreement"), Hehman did not become personally liable on the Full Recourse Loan until the maturity of that Loan, which was June 9, 2010-after the execution of the Separation Agreement (Compl., Ex. 1, Partnership Agreement at § 4.03(a)(i)).

Further, whether the Full Recourse Loan "was known" by the parties to the Separation

Agreement when they entered into the Agreement is irrelevant, since the Agreement only concerns whether any claims, causes of action or liabilities with respect to the Full Recourse Loan existed as of December 2000.

Moreover, JPMC Funding did not breach the Release Provision, since the unambiguous language of the Release Provision establishes that JPMC, and not JPMC Funding, was the only entity releasing Hehman from existing claims or liabilities.

Further, like the Release Provision, the Non-Disparagement Provision by its plain terms applies to JPMC, not JPMC Funding. Moreover, Hehman's counterclaim that JPMC Funding made derogatory and critical statements about him through the Complaint fails, as Hehman fails to identify any disparaging statements within the Complaint. Further, Hehman does not allege any damages resulting from the allegedly defamatory and disparaging statements. The Complaint sets forth neutral factual allegations, and does not impugn the character of Hehman. Finally, to the extent Hehman alleges a defamation claim, JPMC Funding is shielded from liability under the absolute privilege afforded to statements made in litigation.

Next, Hehman's counterclaim that an implied contract existed between him and JPMC Funding fails, since Hehman admits that: "Pursuant to that contract implied in fact, [Hehman] granted the release to [JPMC Funding] and made certain other material businesses promise as reflected in the Separation Agreement to [JPMC Funding]" (JPMC Funding, MOL p.16; Ans. ¶33).

Further, the Answer fails to state a counterclaim for unjust enrichment. Hehman alleges that he conferred a benefit on JPMC Funding "in the form of [Hehman's] general release in favor of, and other material promises" to JPMC Funding in the Separation Agreement (Ans. ¶38), and

admits that the Separation Agreement covers the subject matter of the unjust enrichment counterclaim.

And, Hehman's harassment claim likewise fails, since he fails to allege any facts alleging improper conduct on behalf of JPMC Funding and New York does not recognize a claim for common law harassment. Moreover, to the extent Hehman pleads a claim for abuse of process, such claim fails; the commencement of this action is insufficient to establish abuse of process.

As to the fraud and/or fraudulent inducement counterclaim, Hehman's allegation that JPMC Funding misrepresented its future intent to perform under the Separation Agreement is insufficient to establish a cause of action for fraud (*MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 928 N.Y.S.2d 229 [1st Dept 2011]) ("General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim"). Further, Hehman fails to plead his fraud claim with the requisite particularity pursuant to CPLR 3016(b).

Finally, Hehman does not state a counterclaim for indemnification since he fails to allege any losses or liabilities to any third party for which JPMC Funding could be held responsible. Moreover, to the extent that Hehman's claim for indemnification alternatively requests specific performance, JPMC Funding has established that it did not breach the Release Provision.

Hehman's Opposition

In opposition to JPMC Funding's motion to dismiss, Hehman first argues that the "offer to participate in the Investment Program was made to 'senior executive officers' by the entirety of [JPMC]" to Hehman, and therefore, the Release Provision encompassed the Full Recourse Loan (Opp. mot. seq. 002, p.8).

Further, JPMC Funding's motion to dismiss is premature, since JPMC (which issued the Separation Agreement) is an integral part of this action and has not answered the Third-Party Complaint.

Moreover, the Full Recourse Loan was released pursuant to the Release Provision since it arose from Hehman's employment and was executed prior to the execution of the Separation Agreement.

Furthermore, Hehman argues that an issue of fact exists as to whether it would be fair to enforce the "[Release Provision] against [Hehman's] claims when [Hehman] was given the-take-it-or-leave-it proposition of signing the [Separation Agreement] or not receiving the payment" (p.9). Additionally, the "Transfer Agreement was obtained unconscionably and in violation of the Separation Agreement" (p.9).

Finally, as to the fraud counterclaim, Hehman alleges that he properly alleged the "fraud in the form of tortuous [sic] interference" (p.9).

JPMC Funding's Reply

In reply, JPMC Funding argues that the Release Provision does support Hehman's breach of contract counterclaim, since the Provision only applies to claims or liabilities arising prior to the execution of the Separation Agreement. Further, Hehman's claim that he believed the Separation Agreement encompassed the entirety of J.P Morgan & Co. Inc., and that the Separation Agreement was ambiguous as to which entities it applies fails since the Release Provision specifically applies only to JPMC and not JPMC Funding.

Moreover, Hehman fails to address JPMC Funding's argument that the breach of the Non-Disparagement Provision counterclaim should be dismissed. Further, Hehman fails to

address JPMC Funding's arguments to dismiss his breach of implied contract, unjust enrichment, harassment, fraud, and indemnification counterclaims.

Additionally, Hehman's claim that JPMC acted fraudulently "in the form of tortuous [sic] interference" fail, since the counterclaim is not pleaded with the requisite specificity. Moreover, Hehman's fraud claim is duplicative of his breach of contract claim.

Additionally, Hehman fails to oppose JPMC Funding's arguments to dismiss the affirmative defenses of accord and satisfaction, estoppel, statute of limitations, breach of good faith and fair dealing, laches, and improper demand for payment at an improper address.

Motion Sequence 003¹

JPMC's Motion to Dismiss the Third-Party Claims

In support of its motion to dismiss, JPMC argues that it has not undertaken any action to violate the terms of the Release Provision, since it was JPMC Funding that initiated the suit against Hehman for the outstanding Full Recourse Loan obligation.

As to Hehman's breach of the Non-Disparagement Provision claim, Hehman fails to identify any disparaging statements made by JPMC. Moreover, any statements made about Hehman "through [JPMC] Funding's complaint," are attributable to JPMC Funding, not JPMC. Further, Hehman's conclusory allegation that JPMC Funding is the alter ego of JPMC is insufficient to establish JPMC's violation of the Release Provision.

Hehman's Opposition

In opposition, Hehman argues that if the "Separation Agreement doesn't encompass any

¹In addition to relevant arguments contained in the motion to dismiss, opposition, and reply, under motion sequence 002, JPMC and Hehman make the following arguments under motion sequence 003.

subsidiary or affiliate of [JPMC] then [JPMC] deceived and defrauded” Hehman (Opp. mot. seq. 003, p.10-11). Further, Hehman entered the Separation Agreement under the belief that it was being made by JPMC, and therefore, that the Agreement released him from his obligation to repay the Full Recourse Loan.

JPMC's Reply

JPMC argues that since JPMC Funding, and not JPMC instituted the suit against Hehman on the Full Recourse Loan, and that Hehman has failed to demonstrate that JPMC is the alter ego of JPMC Funding, Hehman’s breach of contract claim against JPMC fails.

As to the fraud claim, Hehman fails to allege any misrepresentation made by JPMC to induce him to enter into the Separation Agreement that are unrelated to JPMC’s obligations under the Agreement itself.

Discussion

Pursuant to CPLR 3211(b), “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit” (CPLR 3211[b]). The “standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense (*see Winter v. Leigh-Mannell*, 51 A.D.2d 1012 [1976]). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied” (*Matter of Ideal Mutual Ins. Co. v. Becker*, 140 A.D.2d 62, 67, 532 N.Y.S.2d 371 [1st Dept 1988]). However, where affirmative defenses “merely plead conclusions of the law without any supporting facts,” the affirmative defenses should be dismissed pursuant to CPLR § 3211[b]” (*Fireman's Fund Ins. Co. v. Farrell*, 57 A.D. 3d 621, 723 [2d Dept 2010]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss*, 104 A.D.3d at 403; *Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v. Hack*, 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]).

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins.*

Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). “Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Mill Financial*, 122 A.D.3d at 103, citing *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

To be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (*Fontanetta v. Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v. Next Management, LLC*, 40 Misc. 3d 1240(A), 2013 WL 5033149 [Sup. Ct. N.Y. County 2013]; *Philips South Beach, LLC v. ZC Specialty Ins. Co.*, 55 A.D.3d 493, 867 N.Y.S.2d 386 [1st Dept 2008] (documentary evidence “apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based”). To constitute documentary evidence, the papers must be “essentially undeniable” and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1st Dept 2014], citing Siegel, Practice Commentaries, *supra*, at 2)).

At the outset, the Court finds that JPMC Funding’s motion to dismiss is not premature. Hehman cites no authority indicating that the absence of third-party defendant JPMC’s answer renders plaintiff JPMC Funding’s pre-answer motion premature.

Affirmative Defenses

Fraud

To plead fraud, Hehman must allege a misrepresentation or omission of a material fact,

falsity, knowledge by the wrongdoer, justifiable reliance on the deception, and the resulting injury (*Rather v. CBS Corporation*, 886 N.Y.S.2d 121 [1st Dept 2009]; *Waggoner v. Caruso*, 886 N.Y.S.2d 368 [1st Dept 2009]). Further, allegations of fraud are insufficient “where the only claim of fraud relates to a breach of contract, and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud [internal quotation marks omitted]” (*Mendelovitz v. Cohen*, 37 A.D.3d 670, 671 [2d Dept 2007] [citations omitted]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b), sufficient to permit a “reasonable inference” of the alleged misconduct (*Eurycleia v. Seward & Kissel*, 12 N.Y.3d 553, 883 N.Y.S.2d 147 [2009]).

The allegations alleged in the Answer are insufficient to establish fraud. Specifically, the claim that JPMC Funding made promises to induce Hehman’s execution of the Separation Agreement, but JPMC Funding “lacked any intention to perform them,” is not sufficient, as a matter of law, to state a claim of fraud (Ans. ¶45). The allegation that JPMC Funding “mislead [sic] and deceived Defendant, by making certain material business promises in the Separation Agreement that it can’t perform. . . .”, and additional allegation in opposition that JPMC Funding “fraudulently” and “to gain advantage,” breached the Separation Agreement (Opp. mot. seq. 002, p.9), are insufficient on their own to meet the heightened pleading standard required by CPLR 3016(b). Accordingly, the part of JPMC Funding’s motion to dismiss Hehman’s affirmative defense of fraud, is granted.

Counterclaims

Breach of Contract

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due

performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*US Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 950 N.Y.S.2d 127 [1st Dept 2012]; *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]).

JPMC Funding submits documentary evidence refuting Hehman's counterclaim that JPMC Funding failed to release him from the Loan pursuant to the Separation Agreement. The Release Provision of the Separation Agreement, states in pertinent part:

[JPMC] hereby releases and forever discharges [Hehman] from all claims, agreements, causes of action, demands, or liabilities of any nature, *existing at any time prior to the execution of this Agreement*, whether now known or claimed including without limitation, all claims arising from or relating to your employment with [JPMC] and/or the termination of your employment . . . (Levi Aff. Ex. A, Separation Agreement, at p. 4) (emphasis added).

JPMC Funding's claim against Hehman on the Full Recourse Loan, however, did not exist at the time the Separation Agreement was executed. First, the Partnership Agreement states that any proceeds received by the Partnership with respect to a Partnership investment are to be distributed as payments, as relevant herein, first on any unpaid interest on the participating partner's Full Recourse Loans, then, on the participating partner's outstanding Full Recourse Loan principal (Compl., Ex. 1, Partnership Agreement at §7.01(c)(iii)-(iv)). Next, the Offering Memorandum states that if the proceeds of the Partner Investment are insufficient to reimburse the "Lender [JPMC Funding] for the Full Recourse Loans extended to such participating limited partner . . . , such limited partner will be required to repay the Lender in full the aggregate principal amount of such Full Recourse Loans (plus interest accrued thereon)" (Compl., Ex. 3, Offering Memorandum at Art. V, p.49).

Hehman became personally liable on the Full Recourse Loan on June 9, 2010. Section 4.03(a)(i) of the Partnership Agreement states that the Full Recourse Loan shall be due and payable on the 10th anniversary of the date Hehman was admitted to the Partnership as a limited partner. Hehman was admitted into the partnership “on or about June 9, 2000 [internal quotation marks omitted]” (Compl. ¶34). Therefore, the Full Recourse Loan became due and payable on June 9, 2010. Notably, the 2006 Letter notified Hehman that the Full Recourse Loan was to reach maturity on June 9, 2010, at which time Hehman would be required to repay the Full Recourse Loan principal and interest.

Further, in December 2000, the time of the execution of the Separation Agreement, JPMC Funding had no way of knowing that the proceeds of the Partner Investment would be insufficient to pay any unpaid interest or the principal amount on behalf of Hehman’s Full Recourse Loan. Notably, JPMC made Hehman aware *in 2006* that it was “highly unlikely that proceeds from investments will be sufficient to repay the Full Recourse Loan and accrued interest” (Compl., Ex. 4, July 28, 2006 Letter from JPMC to Hehman (“2006 Letter”).

Thus, when the Separation Agreement was executed, JPMC Funding did not have an existing claim or cause of action against Hehman for the Full Recourse Loan. Since the Release Provision only encompasses claims and causes of action existing at any time *prior* to the execution of the Separation Agreement, the Release Provision does not encompass the Full Recourse Loan.

That JPMC Funding’s claim arose from Hehman’s employment at JPMC, and that the Full Recourse Loan was executed prior to the Separation Agreement is inconsequential, since the Release Provision specifically releases Hehman from claims or causes of action “existing at

any time prior” to the execution of the Separation Agreement. As discussed above, JPMC Funding’s claim on the Full Recourse Loan did not exist until after the execution of the Separation Agreement.

And, even assuming the Release Provision encompassed the Full Recourse Loan, the Provision was entered into by third party defendant JPMC, not the plaintiff JPMC Funding herein. The unambiguous language of the Separation Agreement identifies J.P Morgan & Co., and not JPMC Funding, as a party to the Agreement. Moreover, the Separation Agreement does not define JPMC’s subsidiaries or affiliates as part of the Agreement (*Consol. Edison Co. of N.Y. v. United Coastal Ins. Co.*, 216 A.D.2d 137, 137, 628 N.Y.S.2d 637, 637 [1st Dept 1995] (“The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning” [internal quotation marks omitted]). Hehman’s argument that ambiguities exist as to whether JPMC Funding is included as a party to the Separation Agreement likewise fails.

Hehman’s argument that JPMC Funding is the alter ego of JPMC is vague and conclusory, and thus fails to demonstrate that JPMC controlled JPMC Funding (Ans. ¶16) (*Marino v. Vunk*, 39 A.D.3d 339, 340, 835 N.Y.S.2d 47, 49 [1st Dept 2007], quoting *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436, 529 N.Y.S.2d 777 [1st Dept 1988] (“Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action”); *Metro. Transp. Auth. v. Triumph Advert. Prods., Inc.*, 116 A.D.2d 526, 528, 497 N.Y.S.2d 673, 675 [1st Dept 1986] (“Mere conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil”)).

And, even if JPMC Funding was the alter ego of JPMC, Hehman's claim for breach of the Release Provision fails since, as discussed above, the Release Provision does not encompass the Full Recourse Loan, and therefore JPMC Funding's action to recover the Full Recourse Loan (plus interest) did not breach of the Release Provision.

Hehman's reliance on *Johnson v. Lebanese Am. Univ.* (84 A.D.3d 427, 922 N.Y.S.2d 57 [1st Dept 2011]), is misplaced. The court in *Johnson* held that, on plaintiff's motion for summary judgment, it would be unfair to enforce the release provision discharging defendant employer from any claims plaintiff employee may have against it, where plaintiff was given the "take-it-or-leave-it proposition of signing the document or not receiving" wages and benefits plaintiff had already earned (*Johnson*, 84 A.D.3d at 431). Here, Hehman does not allege that the payments made under the Separation Agreement constituted previously earned wages and benefits.

Accordingly, the branch of JPMC Funding's motion to dismiss Hehman's counterclaim for breach of contract of the Release Provisions, is granted.

Fraud

Hehman's counterclaim for fraud fails for the same reasons his affirmative defense of fraud fails. Further, inasmuch as Hehman pleads tortious interference as part of his fraud counterclaim, Hehman is required to demonstrate "the existence of a valid contract between the [Hehman] and a third party, [JPMC Funding's] knowledge of that contract, [JPMS Funding's] intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 [1996]; *Foster v. Churchill*, 87 N.Y.2d 744, 749 [1996]). As previously discussed, Hehman does not state a counterclaim for breach of contract, and therefore his

prospective counterclaim for tortious interference of contractual relations likewise fails.

Accordingly, the branch of JPMC Funding's motion to dismiss Hehman's counterclaim of fraud and/or tortious interference, is granted.

Third-Party Claims

Breach of Contract

Hehman's Third-Party Claim for breach of contract of the Release Provision likewise fails for the same reasons his counterclaim of breach of contract of that Provision against JPMC Funding fails. Therefore, the part of JPMC's motion to dismiss Hehman's Third-Party Claim for breach of contract of the Release Provisions, is granted.

Fraud

Hehman's third-party fraud claim also does not state a claim for the same reasons his affirmative defense of fraud fails to state a claim (*see Lama Holding Co.*, 88 N.Y.2d at 424). Additionally, JPMC correctly argues that Hehman's fraud claim is duplicative of his breach of contract claim. Where, as here, the alleged fraud relates to JPMC's obligation pursuant to the Separation Agreement, Hehman must plead misrepresentations that were collateral and extraneous to the Agreement itself (*see RGH Liquidating Trust v. Deloitte & Touche LLP*, 47 A.D.3d 516 [1st Dept 2008]). Here, the alleged misrepresentations were not collateral or extraneous to the Separation Agreement. Specifically, Hehman's breach of contract claim is based in-part on the alleged misrepresentation by JPMC that it was releasing him from all claims and liabilities (Third-Party Compl. ¶¶ 23-27). Therefore, the part of JPMC's motion to dismiss Hehman's counterclaim of fraud and/or tortious interference, is granted.

Hehman's Remaining Affirmative Defenses, Counterclaims, and Third-Party Claims

Hehman's remaining various affirmative defenses include: accord and satisfaction; estoppel; statute of limitations; breach of good faith and fair dealing; laches; and "improper demand of payment at an address," and fraud (Ans. at 2). The Answer and Third-Party Complaint contain additional counterclaims and Third-Party Claims, respectively, including: breach of contract in violation of the Non-Disparagement Clause; implied contract; unjust enrichment; harassment; indemnification; and specific performance. Hehman does not address JPMC Funding or JPMC's arguments in support of dismissal of same, and, as such, Hehman has abandoned his remaining affirmative defenses, counterclaims, and Third-Party Claims (*see Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] (failure to address claims indicates an intention to abandon them); *Kronick v. L.P. Thebaull Co.*, 70 A.D.3d 648, 649 [2d Dept 2010] (plaintiff abandoned her claim "by failing to oppose the branch of the defendant's motion which was to dismiss it"). Accordingly, the parts of JPMC Funding and JPMC's motions to dismiss Hehman's remaining affirmative defenses, counterclaims, and Third-Party Claims, is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of plaintiff, JP Morgan Chase Funding Inc.'s motion to dismiss defendant, Richard Allen Hehman's, affirmative defenses pursuant to CPLR § 3211(b) (mot. seq. 002), is granted. It is further

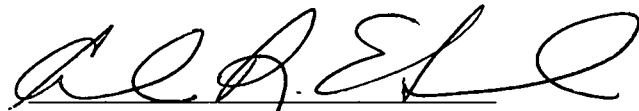
ORDERED that the branch of plaintiff, JP Morgan Chase Funding Inc.'s motion to dismiss defendant, Richard Allen Hehman's, counterclaims pursuant to CPLR § 3211(a)(1) and (7) (mot. seq. 002), is granted. It is further

ORDERED that the branch of third-party defendant, JP Morgan Chase & Co.'s motion to dismiss third-party plaintiff, Richard Allen Hehman's, third-party claims pursuant CPLR § 3211(a)(1) and (7) (mot. seq. 003), is granted. It is further

ORDERED that JP Morgan Chase Funding Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 31, 2017



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.