SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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PROSPECT FUNDING HOLDINGS L.L.C.,

Plaintiff,

-against-

SHANNON PAIZ; JON L. NORINSBERG, ESQ.; THE LAW OFFICES OF JON L. NORINSBERG, ESQ.; and JON NORINSBERG,ESQ., PLLC,

Defendants.

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Index Number: 652396/2016

Sequence Number: 002, 003, 004, 005, 006

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 14, were used on [1] the Norinsberg Defendants' motion, pursuant to CPLR 3211(a)(1) & (7), to dismiss; [2] plaintiff's motion, pursuant to CPLR 3215, for a default judgment; [3] the Norinsberg Defendants' motion, pursuant to CPLR 2004, to extend time to oppose plaintiff's motion for a default judgment; [4] Norinsberg Defendants' motion, pursuant, essentially, to 22 NYCRR §§ 1200.26 & 1200.33, to strike and impose sanctions; [5] plaintiff's cross-motion, pursuant, essentially, to 22 NYCRR §§ 1200.26 & 1200.33, to impose sanctions; and [6] plaintiff's motion, pursuant to CPLR 3212, for summary judgment:

	Papers Numbered:
The Norinsberg Defendants' Motion to Dismiss (Motion Seq. 002)	
Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation - Exhibits	3
Plaintiff's Motion for a Default Judgment (Motion Seq. 003)	
Notice of Motion - Affirmation - Exhibits	4
Affirmation in Opposition - Paiz Affidavit - Exhibits	5
Reply Affirmation	6
The Norinsberg Defendants' Motion to Extend Time to Oppose Motion Seq. 003 (Motion Seq. 004)	
Notice of Motion - Affirmation - Exhibit	7
Affirmation in Opposition - Exhibits	8
The Norinsberg Defendants' Motion to Strike & Impose Sanctions (Motion Seq. 005)	
Notice of Motion - Affirmation - Exhibits	9
Notice of Cross-Motion + Affirmation in Opposition - Exhibits	10
Reply Affirmation	11
Plaintiff's Motion for Summary Judgment (Motion Seq. 006)	
Notice of Motion - Affirmation - Exhibits	12
Affirmation in Opposition	13
Reply Affirmation	14

Upon the foregoing papers: (1) the Norinsberg Defendants' motion to dismiss is granted in part and denied in part; (2) plaintiff's motion for a default judgment is denied, solely as moot; (3) the Norinsberg Defendants' motion to extend time to oppose the motion for a default judgment is denied, solely as moot; (4) the Norinsberg Defendants' motion to strike and impose sanctions is denied; (5) plaintiff's cross-motion for sanctions is denied; and (6) plaintiff's motion for summary judgment is hereby held in abeyance pending joinder of issue.

Background

Plaintiff, Prospect Funding Holdings, L.L.C., is engaged in the business of advancing money to litigants commencing personal injury lawsuits. Defendant Shannon Paiz is one such plaintiff, who commenced a personal injury action in Nassau County, Docket No. 2:10-cv-02632 ("Underlying Lawsuit"). On or about September 21, 2012, Paiz entered into a purchase agreement ("Agreement") with plaintiff for the sale of contingent proceeds, pending the Underlying Lawsuit's resolution. The Agreement names defendants Jon L. Norinsberg, Esq., Jon Norinsberg, Esq., PLLC, and The Law Offices of Jon L. Norinsberg, Esq. (collectively, "Norinsberg Defendants") as Paiz's attorney in the Underlying Lawsuit. Attached to the Agreement is an Irrevocable Letter of Direction & Attorney Acknowledgment ("Acknowledgment"), which states that Paiz irrevocably directs the Norinsberg Defendants "to place an assignment, consensual lien and security interest against any and all of the settlement proceeds due [her] from the [Underlying Lawsuit]," and "to protect and satisfy this assignment ... per the Purchase Agreement [she] executed with [plaintiff] before releasing any funds to [herself]." The Acknowledgment is initialed and acknowledged by Mr. Norinsberg, on behalf of the firm. Thereafter, pursuant to the Agreement and Acknowledgment, plaintiff provided funding to defendants in the sum of $39,397.

The Underlying Lawsuit was eventually resolved, and Paiz received settlement funds of an undisclosed amount. Plaintiff alleges that defendants breached the Agreement and Acknowledgment by disbursing funds to themselves before paying plaintiff the $352,468 balance that defendants owed plaintiff. On or about November 28, 2015, the Norinsberg Defendants sent plaintiff a check marked "final payment" in the sum of $50,000. Plaintiff alleges that this amount did not satisfy the full amount that defendants owed to plaintiff. On or about November 9, 2012, plaintiff filed a UCC Financing Statement, compelling defendants to disburse any remaining proceeds from the Underlying Lawsuit to plaintiff to fulfill the terms of the Agreement and Acknowledgment.

The Instant Action

On May 4, 2016, plaintiff commenced this action, setting forth causes of action, against all defendants, for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) unjust enrichment; (4) promissory estoppel; (5) negligent misrepresentation; (6) money had and received; and (7) conversion. Plaintiff also names separate causes of action, against the Norinsberg Defendants only, for (8) breach of fiduciary duty and (9) constructive fraud.

By motion dated June 17, 2016, the Norinsberg Defendants moved, pursuant to CPLR 2004 and 3012(d), to extend their time to answer the complaint. By Decision and Order dated August 11, 2016, this Court granted the Norinsberg Defendants' motion, as the request for an extension was made before their answer was due.

By motion dated October 21, 2016, the Norinsberg Defendants now move, pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint. The Norinsberg Defendants' main argument is that they are not a party to the Agreement, received no monetary benefits from the Agreement, and never personally guaranteed any payments owed to plaintiff, and, thus, are not legally obligated to plaintiff. In opposition, plaintiff (1) argues that Mr. Norinsberg's initials on the Acknowledgment, on behalf of his firm, makes the Norinsberg Defendants a party to the Agreement; and (2) requests leave to replead its claims for negligent misrepresentation and conversion, as the Norinsberg Defendants point out that plaintiff's allegations fail to make use of certain trigger words, such as "special relationship" and "for the purpose of." In reply, the Norinsberg Defendants argue that leave should not be granted because it "would be futile."

By motion dated November 28, 2016, plaintiff now moves, pursuant to CPLR 3215, for a default judgment, as against Paiz only. By motion dated December 1, 2016, the Norinsberg Defendants now move, pursuant to CPLR 2004, to extend their time to oppose plaintiff's motion for a default judgment. On January 25, 2017, plaintiff e-filed an affidavit prepared by Paiz, dated December 28, 2016 ("Paiz Affidavit"), in support of its motion. The Paiz Affidavit states, inter alia: (1) her acknowledgment that the Norinsberg Defendants' $50,000 payment was not the full amount due pursuant to the Agreement; (2) that Mr. Norinsberg told her that he had worked with litigation funding companies, such as plaintiff, before, and that he would convince plaintiff to accept less money than plaintiff was owed; (3) that after she became aware of the instant action, she met with Mr. Norinsberg, who told her he would be unable to represent her in the instant action due to a conflict of interest; and (4) that Mr. Norinsberg asked her to lie about her legal representation, telling her to inform others that her represented her, even though he did not. By letter dated March 9, 2017, plaintiff withdrew its motion for a default judgment as against Paiz, as they had settlement the matter.

By motion dated February 28, 2017, the Norinsberg Defendants now moves, pursuant, essentially, to 22 NYCRR §§ 1200.26 & 1200.33, to strike the Paiz Affidavit and impose sanctions on plaintiff. The Norinsberg Defendants argue, inter alia: (1) that plaintiff impermissibly communicated with Paiz because she is an adverse party represented by counsel, specifically, by Mr. Norinsberg, and that plaintiff was aware of this fact; (2) that plaintiff created an impermissible conflict of interest by inducing Paiz to sign an affidavit which was "wholly contrary to her own legal interests"; and (3) that plaintiff falsely induced Paiz to settle by misrepresenting to her that the Norinsberg Defendants were the only reason the case was not already settled. The Norinsberg Defendants further argue that sanctions are appropriate because plaintiff induced Paiz to make false and misleading statements in the Paiz Affidavit in order to further its own legal interests in this lawsuit. On March 9, 2017, plaintiff cross-moved, pursuant, essentially, to 22 NYCRR §§ 1200.26 & 1200.33, for sanctions, arguing that the Norinsberg Defendants falsely advised plaintiff, on multiple occasions, not to speak to Norinsberg's client, Paiz, when in fact he did not represent her in the instant action.

By motion dated March 9, 2017, plaintiff now moves, pursuant to CPLR 3212, for summary judgment against all defendants. On March 20, 2017, the Norinsberg Defendants requested additional time to oppose plaintiff's motion for summary judgment, stating that Mr. Norinsberg had just completed a five-week trial in Supreme Court, Kings County, and had two pending class actions that required his immediate attention. On March 24, 2017, plaintiff opposed the Norinsberg Defendants' request, citing that this is not their first request for an extension. By opposition dated April 6, 2017, the Norinsberg Defendants argue that plaintiff's motion for summary judgment should be dismissed as premature, as CPLR 3212(a) requires joinder of issue before such a motion may be made. In a letter to the Court dated April 26, 2017, plaintiff replied, stating that it was amenable to holdings its motion in abeyance until issue is joined.

Discussion

I. Norinsberg Defendants' Motion to Dismiss is Granted in Part, Denied in Part (Motion Seq. 002)

Pursuant to CPLR 3211(a)(1), a dismissal on the ground that the action is barred by documentary evidence is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. See Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 (2002) ("such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"). Dismissal, pursuant to CPLR 3211(a)(7), is warranted only if, accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-88 (1994); Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. See Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action).

Plaintiff has sufficiently stated a cause of action for breach of contract, which requires a plaintiff to allege: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach thereof; and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425, 426 (1st Dept 2010). Here, the Acknowledgment, which was initialed and executed by Mr. Norinsberg, reiterates defendants' irrevocable promise to honor plaintiff's security interest in any proceeds obtained in the Underlying Lawsuit, which establishes near privity. See Allianz Underwriters Ins. Co. v Landmark Ins. Co., 13 AD3d 172, 175 (1st Dept 2004) (plaintiff "has alleged a 'near privity' relationship, sufficient to overcome a motion to dismiss ... [W]here the relationship is so close a to touch the bounds of privity, an action may be maintained"); see also Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson, 73 NY2d 417 (1989) (Cardozo J.) ("We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law"). The complaint also alleges facts that speak to the other elements of the claim, such as the fact (1) that plaintiff performed under the Agreement, by loaning defendants the money to commence the Underlying Lawsuit, (2) that defendants breached the Acknowledgment when they failed to repay plaintiff's loan in full, and (3) that plaintiff suffered monetary damages as a result of defendants' breach. Additionally, the Norinsberg Defendants' argument that they never received consideration to support a contractual obligation is unavailing; they received consideration by virtue of the monetary advance to Paiz, which allowed Paiz to receive litigation funding and, in turn, benefitted the Norinsberg Defendants in several ways: (1)

plaintiff's loan supported Paiz's living costs so that the Underlying Lawsuit may be maintained; and (2) the loan allowed Paiz to continue the Underlying Lawsuit for more money, rather than having to settle quickly, for less money, due to indigency.

The Norinsberg Defendants' request to dismiss plaintiff's claim for breach of the covenant of good faith and fair dealing is hereby granted, as duplicative of plaintiff's breach of contract claim. See Mill Financial, LLC v Gillett, 122 AD3d 98, 104 (1st Dept 2014) ("the claim for breach of the covenant of good faith and fair dealing must be dismissed since it is duplicative of the breach of contract claim. Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed").

Plaintiff has sufficiently stated a cause of action for unjust enrichment. To state a claim for unjust enrichment, a plaintiff must allege that (1) the other party was enriched; (2) at plaintiff's expense; and (3) that it would be against equity and good conscience to permit the other party to retain what is sought to be recovered. See Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 (2011). In the complaint, plaintiff alleges that (1) the Norinsberg Defendants benefitted monetarily from the loan, which funded the Underlying Lawsuit, and (2) that as a proximate result, it "suffered, and will continue to suffer, substantial monetary damages."

Plaintiff has sufficiently stated a cause of action for promissory estoppel. To prevail on a theory of promissory estoppel, a plaintiff must establish (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on that promise; and (3) injury caused by the reliance. See Condor Funding, LLC v 176 Broadway Owners Corp., 147 AD3d 409, 411 (1st Dept 2017). Here, plaintiff (1) submits the Acknowledgment, alleging a sufficiently clear and unambiguous promise; and (2) alleges that it relied on that promise and was injured when defendants failed to pay it back. The Norinsberg Defendants' argument that plaintiff failed to allege detrimental reliance is unavailing. Pleadings are offered a liberal construction, and a plaintiff need not specifically use the words "detrimental reliance" to sufficiently allege facts that fit within the cognizable legal theory of detrimental reliance. See Wood v Duff-Gordon, 222 NY 88, 91 (1917) (Cardozo, J.) ("The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal"); see also Morone v Morone, 50 NY2d 481, 484 (1980) ("On a motion to dismiss a complaint we accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory"). Here, plaintiff alleges that it relied on the Acknowledgment and the Norinsberg Defendants' representations therein when, pursuant to the Agreement, it loaned Paiz money, which sufficiently makes out a claim for promissory estoppel.

Plaintiff has sufficiently stated a cause of action for negligent misrepresentation. Plaintiff's request for leave to replead this claim is denied, solely as unnecessary. The Court agrees with the Norinsberg Defendants that such an amendment would be futile, as plaintiff has already alleged facts sufficient to fit within the cognizable legal theory of negligent misrepresentation. A claim for negligent misrepresentation requires a plaintiff to demonstrate (1) the existence of a special relationship imposing a duty on defendant to impart correct information to plaintiff; (2) that the information was incorrect; and (3) detrimental reliance on the information. See J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). Although plaintiff fails to use the words "special relationship," it has pled facts that sufficiently allege that the parties' relationship is one borne out of "near privity." See Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson, supra. The complaint alleges facts – *i.e.*, that the Norinsberg Defendants acknowledged their obligations to plaintiff by executing the Acknowledgment – from which it can be inferred that there was a special relationship between the parties, which caused plaintiff's detrimental reliance and subsequent damages. See North Star Contr. Corp. v MTA Cap. Constr. Co., 120 AD3d 1066, 1070 (1st Dept 2014) ("a court will find a special relationship if the record supports a relationship so close as to approach that of privity") (internal quotations omitted); see also Georgia Malone & Co., Inc. v Ralph Rieder, 86 AD3d 406, 409 (1st Dept 2011) ("Based on these assurances, [plaintiff] continued to [perform]. Thus, [plaintiff] has sufficiently pleaded that there was direct contact and a relationship with [defendants] that could have caused reliance or inducement"). Plaintiff further alleges that (1) the information was incorrect, as defendants failed to repay plaintiff before disbursing settlement proceeds collected on the Underlying Lawsuit to themselves, in violation of the Agreement and Acknowledgment; and (2) plaintiff suffered damages as a result of defendants' nonpayment.

Plaintiff has sufficiently stated a cause of action for money had and received. The essential elements of a cause of action for money had and received are that (1) defendant received money belonging to plaintiff; (2) defendant benefitted from receipt of the money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money. See Lebovits v Bassman, 120 AD3d 1198, 1199 (2d Dept 2014). In its complaint, plaintiff alleges that (1) Paiz accepted plaintiff's loan; (2) defendants benefitted from that money; and (3) defendants should not be permitted to keep the funds. The Norinsberg Defendants' argument that this claim is barred by the existence of the Agreement, which is a valid and enforceable contract governing this matter, is unavailing. The Norinsberg Defendants dispute the validity of a contractual relationship between themselves and plaintiff, and plaintiff is entitled to assert additional, even inconsistent, causes of action until the legal issue is determined. See Sabre Intern. Sec., Ltd. v Vulcan Capital Mgmt., Inc., 95 AD3d 434, 438-39 (1st Dept 2012) ("Although the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies") (internal quotations and citations omitted).

Plaintiff has sufficiently stated a cause of action for conversion. An action for conversion of money may be made out where there is "a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." See Thys v Fortis Sec. LLC, 74 AD3d 546 (1st Dept 2010). In the complaint, plaintiff alleges that Paiz, in accepting a specific, identifiable sum of monies from it, breached her obligation by failing to repay the loan. Plaintiff further alleges that the Norinsberg Defendants breached their obligation by failing to repay plaintiff before disbursing the settlement funds to themselves and Paiz. The Norinsberg Defendants' argument that the claim should be dismissed merely because it does not use the exact words "for the purpose of" is unavailing. See Wood v Duff-Gordon, 222 NY 88, 91 (1917), supra. Furthermore, as the Norinsberg Defendants deny that there is contractual privity between themselves and plaintiff, the conversion claim is not predicated on a mere breach of contract, and need not be dismissed. See Sabre Intern. Sec., Ltd. v Vulcan Cap. Mgmt., Inc., supra.

Plaintiff has sufficiently stated a cause of action for breach of fiduciary duty. To state a claim for breach of fiduciary duty, a plaintiff must allege that (1) defendant owed it a fiduciary duty; (2) defendant committed misconduct; and (3) plaintiff suffered damages caused by the misconduct. Here, the facts as alleged make out a cognizable legal theory for breach of fiduciary duty. The Norinsberg Defendants' argument that the parties have, at best, an arm's length business relationship that does not give rise to a fiduciary relationship is unavailing. Here, the complaint alleges that, apart from the terms of the Agreement, the parties created a relationship of higher trust – *i.e.*, in the form of the Acknowledgment. See EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 20 (2005) ("a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, the [parties] created a relationship of higher trust than would arise from the underwriting agreement alone").

Plaintiff has sufficiently stated a cause of action for constructive fraud. In order to set forth a cause of action for constructive fraud, a plaintiff must allege (1) a representation of a material fact; (2) the falsity of that representation; (3) its justifiable reliance on that representation; and (4) resulting injury. See Monaco v New York Univ. Med. Ctr., 213 AD2d 167, 168-69 (1st Dept 1995). Here, the facts as alleged in the complaint make out a cognizable legal theory for constructive fraud. The complaint alleges (1) that the Norinsberg Defendants represented that plaintiff would be repaid its loan; (2) plaintiff justifiably relied on defendants promise to repay the loan, as the Norinsberg Defendants executed the Acknowledgment; (3) that plaintiff was not in fact repaid; and (4) that plaintiff was damaged by defendants nonpayment. The Norinsberg Defendants reiterate the same argument–that plaintiff's claim only alleges an arm's length business relationship– as they do for plaintiff's breach of fiduciary duty claim; however, it is equally unavailing here. See Great Eagle Intern. Trade, Ltd. v Corporate Funding Partners, LLC, 104 AD3d 731, 732 (2d Dept 2013) ("At this early juncture, accepting the factual allegations in the complaint as true ... and according the plaintiffs every favorable inference, the plaintiffs adequately pleaded facts from which it could be inferred that these individuals were involved in or knew about the alleged fraudulent conduct"). As defendants received the settlement monies, plaintiff had to rely on defendants.

Accordingly, the Norinsberg Defendants' motion, pursuant to CPLR 3211(a)(1) & (7), to dismiss plaintiff's claims is denied, except as to plaintiff's claim for breach of the covenant of good faith and fair dealing, which is hereby dismissed.

II. Plaintiff's Motion for a Default Judgment is Denied (Motion Seq. 003, 004)
Plaintiff's motion for a default judgment as against Paiz is hereby denied, solely as moot, as plaintiff has reached a private settlement with Paiz and has withdrawn the motion. Additionally, the Norinsberg Defendants' motion to extend time for Paiz to oppose the motion for a default judgment also is hereby denied, solely as moot.

III. Norinsberg Defendants' Motion to Strike the Paiz Affidavit is Denied (Motion Seq. 005)
The Norinsberg Defendants' motion to strike the Paiz Affidavit is hereby denied. The Norinsberg Defendants have failed to establish that plaintiff violated 22 NYCRR §§ 1200.26 & 1200.33, as they have submitted no evidence (1) that they represent Paiz in the instant action, and thus, that any communication between plaintiff and Paiz is improper; or (2) that plaintiff offered Paiz an unlawful inducement for signing off on her affidavit. See 22 NYCRR 1200.33 ("a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer *knows to be represented by another lawyer in the matter*") (emphasis added); see also Warder v Board of Regents of Univ. of State of N.Y., 53 NY2d 186, 197 (1981) ("There must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it").

IV. Norinsberg Defendants' Motion, and Plaintiff's Cross-Motion, for Sanctions is Denied (Motion Seq. 005)
Neither side is entitled to sanctions for frivolous litigation or for any other reason. The Norinsberg Defendants' request to impose sanctions on plaintiff is hereby denied, as the record was, and still is, unclear as to whether Paiz is represented by the Norinsberg Defendants in the instant action and, thus, whether plaintiff improperly reached out to Paiz directly to reach a settlement. The Court, in its discretion, further denies plaintiff's request to impose sanctions on the Norinsberg Defendants, because although the Norinsberg Defendants have made multiple requests for an extension of time to respond, their conduct does not rise to the level of frivolous conduct such that sanctions are warranted. See generally Pickens v Castro, 55 AD3d 443, 444 (1st Dept 2008) ("Trial judges should be accorded wide latitude to determine the appropriate sanctions for dilatory and improper attorney conduct and we will defer to a trial court regarding sanctions determinations unless there is a clear abuse of discretion").

V. Plaintiff's Motion for Summary Judgment is Denied (Motion Seq. 006)
A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

As a preliminary matter, the Norinsberg Defendants' opposition to plaintiff's motion for summary judgment, dated April 6, 2017, will be considered on the merits, in the Court's discretion, on the grounds that, at that time, Mr. Norinsberg had just completed a five-week trial in Supreme Court, Kings County, and, more importantly, in the interest of reaching the merits of the case. See CPLR 2004. Furthermore, the Norinsberg Defendants' original request was for a one-month extension, from March 20, 2017 to April 20, 2017, but they ended up e-filing their opposition on April 6, 2017, a mere two weeks late. Given the short delay, the Court finds that the delay did not prejudice plaintiff. See A&J Concrete Corp. v Arker, 54 NY2d 870, 872 (1981) ("It is within the court's power to grant an extension where it is established, as it was in this case, that the delay in service was not willful or length and that it did not cause any prejudice to the parties").

Pursuant to CPLR 3212(a), plaintiff's motion for summary judgment is premature,, as issue has not yet been joined. See CPLR 3212(a) ("Any party may move for summary judgment in any action, after issue has been joined") ; see also Miller v Schreyer, 257 AD2d 358, 361 (1st Dept 1999) ("No answer is contained in the record and, pursuant to CPLR 3212(a), summary judgment is premature prior to joinder of issue"). Furthermore, plaintiff concedes that it is amenable to holding its motion for summary judgment in abeyance until issue is joined. Therefore, the instant motion is hereby denied, without prejudice, solely as premature.

The Court has considered the parties' other arguments and finds them unavailing and/or non-dispositive.

Accordingly, (1) the Norinsberg Defendants' motion to dismiss is granted in part and denied in part; (2) plaintiff's motion for a default judgment is denied, solely as moot; (3) the Norinsberg Defendants' motion to extend time to oppose the motion for a default judgment is denied, solely as moot; (4) the Norinsberg Defendants' motion to strike and impose sanctions is denied; (5) plaintiff's cross-motion to impose sanctions is denied; and (6) plaintiff's motion for summary judgment is hereby denied, without prejudice, solely as premature.

The Court encourages the parties to use it as a resource to attempt settlement. A call to (646) 386-3181 can get the ball rolling.

Conclusion

1. The Norinsberg Defendant's motion to dismiss is hereby granted in part and denied in part. The clerk is hereby directed to dismiss plaintiff's claim for breach of the covenant of good faith and fair dealing **only**;
2. Plaintiff's motion for a default judgment is hereby denied, solely as moot, as it has been withdrawn;
3. The Norinsberg Defendants' motion to extend time to oppose the motion for a default judgment is hereby denied, solely as moot;
4. The Norinsberg Defendants' motion to strike the Paiz Affidavit and to impose sanctions is hereby denied;
5. Plaintiff's cross-motion to impose sanctions is hereby denied; and
6. Plaintiff's motion for summary judgment is hereby denied, without prejudice, solely as premature.

The clerk is hereby directed to enter judgment accordingly.

Dated: January 25, 2018

Arthur F. Engoron, J.S.C.