At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Chemung County Courthouse, Elmira, New York, on the 5th day of April, 2019.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CHEMUNG

VIVEROS FITNESS, LLC,

Plaintiff,

DECISION AND ORDER

-vs-

Index No. 2018-2465

JB2 FITNESS, LLC and JONATHAN BRIGGS,
Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFF: LANDY & ROSSETTIE, PLLC
By: Damian M. Rossettie, Esq.
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COUNSEL FOR DEFENDANTS: UNDERBERG & KESSLER LLP
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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court to consider the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Viveros Fitness LLC ("Viveros"); as well as the Cross-Motion filed by Defendants JB2 Fitnees LLC ("JB2") and Jonathan Briggs ("Briggs"), to consolidate this matter with another case which has been filed by Defendants. For the reasons set forth herein, Plaintiff's Motion is denied, and Defendants' Cross-Motion is denied without prejudice.

Viveros commenced this action by the filing of a Notice of Motion for Summary Judgment in Lieu of Complaint under CPLR 3213, on December 17, 2018, seeking to recover money pursuant to a Note. The Note was executed in the context of an Asset Purchase Agreement, whereby JB2 was buying a fitness franchise from Viveros. Plaintiff submitted an affidavit from Marita Lopez ("Lopez"), a representative of Viveros, attesting to the execution of the Note, and attaching a copy of the subject Note, dated May 1, 2018 executed by JB2 as borrower, and Briggs as guarantor. The loan amount was for $62,866, and provided for monthly payments commencing on August 1, 2018. Defendants allegedly failed to make any payments on the Note, and are, therefore, in default. Lopez also stated that she had communicated with Briggs, and he refused to make payment as guarantor under the Note. Based on these factors, Viveros filed this Motion for Summary Judgment in Lieu of Complaint.

Defendants opposed the Plaintiff's motion, and filed a Cross-Motion on March 19, 2019, seeking to consolidate this action with an action apparently filed on March 19, 2019 by Briggs and JB2 against Viveros and others, seeking rescission of the Asset Purchase Agreement. Briggs claimed that Enrique Viveros, an officer or managing member of Viveros, provided false or misleading information as to material facts to induce Briggs to buy the fitness facility. Specifically, Briggs alleged that Mr. Viveros knew that the revenue numbers provided to Briggs were overstated and that the revenue for the fitness facility was in sharp decline. Briggs claims he would not have entered into the purchase agreement except for this misleading information.

Viveros did not file any reply to the opposition papers.

CPLR §3213 provides that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." The most common example fitting in this statute is "a negotiable instrument for the payment of money-an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time.... Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable...The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." *Weissman v. Sinorm Deli*, 88 NY2d 437, 444 (1996) (internal citations and end citation omitted). This case involves a Note with a promise to pay a certain sum of money ($62,866) with interest at 2% from May 1, 2018. This is the typical kind of situation to which CPLR §3213 could apply.

However, in this case, JB2 and Briggs have raised a claim that the contract and Note should be rescinded due to fraudulent inducement, as well as Plaintiff's own breach of contract. It is not entirely clear why a separate action was brought to make that claim, instead of a counterclaim and/or a third party action. Nonetheless, the opposition to this current motion provides affidavit evidence that Briggs was misled and/or induced into entering into this Asset Purchase Agreement by Plaintiffs' misrepresentations. Defendants also included a copy of the Asset Purchase Agreement with their opposition papers. That agreement provides, in pertinent part, that the buyers' purchase was based in reliance upon the seller's representations, and that seller warranted that no information or document provided by seller contained any untrue statements of a material fact or omitted material facts, and that the obligation concerning the accuracy of statements of material facts would continue for 1 year beyond the closing. Briggs contends that Mr. Viveros provided false or misleading revenue information, inducing Briggs and JB2 to enter into the Asset Purchase Agreement.

Where the Note is "inextricably intertwined with the obligations contained in the purchase agreement", and a breach of that agreement is alleged, summary judgment on the Note should not be granted. *A+ Assocs v. Naughter*, 236 AD2d 655, 656 (3rd Dept. 1997); *See Fitzpatrick v. Animal Care Hosp., PLLC*, 104 AD3d 1078 (3rd Dept. 2013); *Tibball v. Catalanotto*, 269 AD2d 386 (2nd Dept. 2000); *Ingalsbe v. Mueller*, 257 AD2d 894 (3rd Dept. 1999). Here, the Asset Purchase Agreement pertained to the purchase of the fitness facility; the Note was for the money to complete the purchase; and the Asset Purchase Agreement contained warranties by the seller as to the truth and accuracy of information provided, and that the buyer was relying upon the seller's representation. The Court finds that the Note and asset purchase agreement are inextricably intertwined. Further, Defendants' claim that they were fraudulently induced into entering into the Asset Purchase Agreement was sufficient to raise triable issues of fact sufficient to defeat Plaintiff's motion. *See e.g. Lorber v. Morovati*, 83 AD3d 799 (2nd Dept. 2011); *Kehoe v. Abate*, 62 AD3d 1178 (3rd Dept. 2009).

In Defendants' Cross-Motion pursuant to CPLR §602, they seek to consolidate this action with an action they apparently commenced on March 19, 2019. Defendants' Notice of Cross-Motion indicates that the second action is captioned as JB2 Fitness LLC and Briggs v. Viveros Fitness, Viveros, Lopez and Vivloz Holding LLC. However, the Verified Complaint which was attached to the Cross-Motion was a different caption listing only Viveros Fitness LLC and Enrique Viveros as defendant in that action. In addition, the Court was not provided with evidence that the other case has actually been filed, such as a date stamped copy of the summons and complaint, or if the Verified Complaint attached to the Cross-Motion is the actual complaint that was filed. Without evidence that there is actually another pending action, and in light of the discrepancy between the Notice of Cross-Motion and the attached Summons and Complaint, the Court finds it would be premature to grant consolidation.

Accordingly, Plaintiff's Motion for Summary Judgment in lieu of Complaint is DENIED. The Court deems the Plaintiff's moving papers to be the Complaint, and Defendants are directed

to file any Answer to the Complaint within 20 days of Plaintiff's service of this Decision and Order upon Defendants. Defendants' Cross Motion is DENIED WITHOUT PREJUDICE.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 18, 2019
Elmira, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice