SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED **PART** IAS MOTION 43EFM

Justice

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SREENIVASA GADE, GSP REALTY, LLC, ANISH REALTY CORP.

Plaintiff,

- v -

DAVID CARMILI, O2 ELECTRONICS INC.,

Defendant.

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INDEX NO. 656019/2017

MOTION DATE 01/23/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132

were read on this motion to/for DISMISSAL.

ROBERT R. REED, J:

This is an action to recover $550,000, representing the balance due on an alleged $650,000 no interest oral loan. Defendant David Carmili (Carmili) moves to dismiss the First Amended Verified Complaint (the Complaint) (Dkt. 77)[1](CPLR 3211 [a] [1], [5], [7] and [10]), upon documentary evidence, under the doctrines of res judicata and collateral estoppel, for failure to state a claim, and for failure to join a necessary party.

BACKGROUND

The following facts are taken from the Complaint, the party affidavits and the documentary evidence submitted in connection with this motion. Between 2007 and 2012, plaintiff Sreenivasa Reddy Gade (Gade) was employed at a pharmacy located next door to Carmili's medical practice in Ridgewood, New York. During that time, the two were friends who

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

talked and socialized on nearly a daily basis at their places of business. At a meeting in Carmili's office on or about June 24, 2011, Carmili asked to borrow $650,000 from Gade to purchase medical equipment from China, to be resold at a profit. Carmili represented that he could likely complete the transaction immediately, but, at worst, within two to three months -- and said that he had sufficient assets to repay the loan on demand even if the transaction were not completed. Carmili further advised Gade that the purchases would be made by one of Carmili's corporate entities, co-defendant O2 Electronics (O2) (Compl. ¶ 7).

Carmili also offered to pay Gade 6% interest on the loan (*id.*). Gade declined the offer of interest, because he wanted to help Carmili as a friend and to build a business relationship with him (*id.*; Gade Affidavit [Dkt. 120] ¶ 6), Gade asked for a few weeks to consider making the loan (Gade Aff. ¶ 6). On at least three occasions afterward, Carmili repeated his request for the loan, offering the same assurances regarding his intent and ability to repay it (Compl. ¶ 9).

On September 9, 2011, the two met at a restaurant in Astoria and entered into an agreement for a $650,000 loan. Carmili repeated that the investment would be made through O2 and directed Gade to wire the funds to that entity (*id.*, ¶ 10). Gade was still nervous about lending such a large amount of money and delayed the transaction for approximately two weeks (Gade Aff. ¶ 9). However, on September 26, 2011, after Carmili repeated all of his promises, Gade wired the money to O2. Gade employed his corporate entity, co-plaintiff Anish Realty, to transfer $300,000 of the amount, and another entity, co-plaintiff GPS Realty LLC, to transfer the remaining $350,000 (Compl. ¶¶ 11, 15; Gade Aff. ¶ 10).

Immediately before wiring the funds, Gade texted Carmili from the bank to ask who owned O2, and was informed it was Behnam Carmili, Carmili's brother (Gade Aff. ¶ 12; Dkt. 124 [text messages]). Thereafter, between October 2011 and February 2012, Gade made

repeated, urgent requests to both brothers to repay the funds. Each time, Gade was assured by one Carmili brother or the other that the deal was about to be completed and that repayment would be forthcoming in a matter of hours or days (Compl. ¶ 16; Gade Aff. ¶ 11).

On January 31, 2012, Behnam Carmili texted Gade that, although the deal was not yet finished, he would arrange repayment of $100,000 from a different source (Dkt. 125, p. 1). On February 1, 2012, he confirmed that $100,000 had been wired to the Anish account from O2 and stated that the remainder would be sent in a few days (*id.*, p. 2; Compl. ¶ 17; Gade Aff. ¶ 13). On February 16, 2012, however, Carmili texted Gade to advise him of "v[e]ry bad news all the goods were fake it wa[]s international set up fbi is in my brothers warehouse we r devastated" (Dkt. 124, p. 1). Gade received no further payments.

Plaintiffs commenced this action on September 25, 2017. Following some motion practice, plaintiffs filed an amended complaint which sets forth four causes of action: for breach of contract, unjust enrichment, fraud and fraudulent inducement. The instant motion followed.

DISCUSSION

For the following reasons, the motion is denied to the claims for breach of contract and unjust enrichment, and granted as to the claims for fraud and fraudulent inducement.

Breach of Contract

The complaint states a claim for breach of contract. "The elements of such a claim are 'the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages'" (*Markov v Katt*, 176 AD3d 401, 401–02 [1st Dept 2019], *quoting Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept. 2010]). Where a loan is at issue, the plaintiff must ultimately produce evidence of the loan agreement and a failure to

pay (*Capital One Taxi Medallion Fin. v Corrigan*, 147 AD3d 677, 677 [1st Dept 2017]). If an oral loan agreement lacks a specified time for repayment, it is payable on demand (*Abkco Music & Records, Inc. v Montague*, 90 AD3d 402, 402–03 [1st Dept 2011]). Here, plaintiffs have pled that Gade and Carmili reached an oral agreement in September whereby Gade would extend an interest-free $650,000 personal loan to Carmili to allow Carmili to invest using O2 as the vehicle, and that Carmili has failed to repay the $550,000 balance on demand.

In opposition, Carmili avers that he never borrowed any money from Gade or promised to repay him, but merely advised Gade of an investment opportunity in O2 (Carmili Affidavit [Dkt. 91] ¶¶ 4, 9). Carmili states that he separately invested $450,000 of own funds, not Gade's, through O2, and that he never had any ownership interest or employment relationship with that entity, which is owned by his brother Benham (*id.*, ¶¶ 2-3, 6). He claims that whenever he assured Gade that repayment was imminent, he was just relaying information from his brother, who was handling all of the direct negotiations (*id.*, ¶¶ 11). He further asserts that he received no consideration or other benefit from Gade's funds, and that he, his brother and O2 lost all their money to the perpetrator of the fraud, Alex Sualim, who is now in prison and who has been ordered to pay $5.5 million in restitution (*id.*, ¶¶ 18-19). Finally, Carmili notes that after his brother filed for personal bankruptcy, he filed a proof of claim to recover the funds he personally invested; those funds, Carmili asserts, were completely unrelated to the funds Gade invested in O2 (*id.*, ¶¶ 16-17).

Carmili's affidavit, at best, creates a question of fact as to whether the funds at issue were a personal loan to him or a personal investment by Gade. First, it is not dispositive that the funds were paid directly to O2, or that the partial repayment was made by that corporation. The

complaint, supplemented by Gade's testimony that Carmili directed him to deposit the funds into a corporate account for Carmili's benefit, sufficiently pleads a claim for breach of a loan agreement against Carmili individually (*see Shah v Exxis, Inc.*, 138 AD3d 970, 972–73 [2d Dept 2016]). Notably, despite Carmili's claim that the agreement was actually between Gade and O2, the record is devoid of any evidence of communications with O2's alleged owner, Behnam Carmili, until several weeks after the deposit was made. Nor is there any documentation evidencing the existence or terms of an investment agreement between Gade and O2, apart from the deposit of the funds.

Second, the texts between Gade and the two brothers are as consistent, perhaps more consistent, with a loan than an investment. If they all were merely co-investors, the brothers might have bluntly told Gade that his sole remedy was to await the receipt of profits from the deal. Instead, they responded as if he were justified in seeking repayment upon demand, rather than subject to the same risk they undertook. Moreover, Gade did receive $100,000 in partial repayment despite the fact that the deal turned out to be a scam, something to which he would not have been entitled if he were an investor.

Third, defendants' failure to specify what returns or profits Gade was promised weighs against the theory that the deposit was an investment. It defies common sense that he was "investing" in a no profit transaction. And although a no interest loan is somewhat uncommon, it is consistent with Gade's testimony that he was making a temporary advance of the funds out of friendship. It is also consistent with the texts from Behnam repeatedly thanking Gade for his "favor" and his "help" (Dkt. 125, pp. 1, 3).

Finally, it may be of some significance that Carmili has filed secured and unsecured claims totaling $650,000 against his brother's bankruptcy estate (Dkt. 23, schedules D and F).

That sum is equal to the amount allegedly loaned to him by Gade. If Carmili is claiming it as a loss, this would constitute some confirmation that he considered those funds to be his personal investment rather than Gade's.

On a motion 3211(a)(7) to dismiss, a 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 within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Under CPLR 3211(a) (1), dismissal "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). While tax returns or business records may under some circumstances be strong or even dispositive evidence of whether an advance of funds was a loan or an investment (*see Walsh v. Blaggards III Restaurant Corp.*, 131 AD3d 854, 854 1st Dept 2015]; *Sakow v 633 Seafood Rest. Inc.*, 227 AD2d 249, 250 [1st Dept 1996]), no such proof has been submitted on this motion. Carmili's factual affidavit characterizing the funds transferred as an investment is not documentary evidence within the meaning of CPLR 3211(a) (1) (*see Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dep t 2017]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 [1st Dept.2014]). In short, "the documentary evidence submitted in support of defendants' motion does not conclusively refute the allegations in the amended complaint that defendants and plaintiff had an oral loan agreement" (*D'Emilia v Tag Partners, LLC*, 2014 WL 1008118, *4 [Sup Ct, NY Co 2014]).

Unjust Enrichment

The motion to dismiss the claim for unjust enrichment is denied. "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit that in 'equity and good

conscience' should be paid to the plaintiff" (*Maya NY, LLC v Hagler*, 106 AD3d 583, 584–85 [1st Dept 2013]). Such a claim may be based upon the failure to repay an oral loan (*id.*; *Shah*, 138 AD3d 970, 973). A cause of action for unjust enrichment may be pled in the alternative where the existence of an enforceable agreement is disputed (*see PF2 Sec. Evaluations, Inc. v Fillebeen*, 171 AD3d 551, 552 [1st Dept 2019]; *Art & Fashion Group*, 120 AD3d 436, 439).

Carmili argues that he was not "enriched" because the funds were received by O2 and not him. This contention is rejected for the reasons discussed above. If the court assumes the truth of the facts alleged in the complaint, Carmili received a benefit by having the funds invested on his behalf in the corporation. The fact that the money was ultimately lost is immaterial, as Carmili had the use of the funds for investment purposes and benefitted by not having to expend any of his own money.

Fraud/Fraudulent Inducement

The claims for fraud and fraudulent inducement are dismissed. The complaint alleges that Carmili misrepresented the ownership of O2, the intended use of the loan proceeds, and his ability and intention to repay. As a preliminary matter, these allegations are deficient because they are pled entirely upon information and belief (Compl. ¶¶ 30-34; 40-46) and "[s]tatements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud" (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Furthermore, the claim that Carmili misrepresented the ownership of O2 and the use of the funds is contradicted by texts upon which Gade relies, which demonstrate that he knew Behnam owned O2 and was advised of the nature of the venture. Finally, the conclusory allegation that Carmili entered into the contract with an intent not to

perform is insufficient to support a fraud claim (*see Budow Sales Corp. v G. Holdings Corp.*, 171 AD3d 655, 655 [1st Dept 2019] and is merely duplicative of the breach of contract claim (*see Cronos Grp. Ltd. v. XComIP, LLC*, 156 AD3d 54, 62–63 [1st Dept 2017]).

Res Judicata/Collateral Estoppel

Carmili argues that the doctrines of res judicata and collateral estoppel bar Gade's claim because the actual perpetrator of the fraud, Alex Sualim, entered in a court-approved plea agreement in the United States District Court for the District of Arizona (Dkt. 100) on February 2, 2015 requiring him to pay restitution of approximately $13 million to the defrauded investors. Carmili also relies on a September 8, 2014 Canadian civil judgment issued by the Ontario Superior Court of Justice (Dkt. 94), which, in continuing an injunction against Sualim and his businesses, made a preliminary finding that O2 was victim of his fraud. Carmili argues that restitution order covers Gade's losses, and that the Canadian court judgment establishes that all of the monies lost by O2 were investment funds, including Gade's.

"The doctrine of res judicata bars all claims 'arising out of the same transaction or series of transactions' as a claim that was previously resolved 'on the merits' and which the party opposing preclusion had 'a full and fair opportunity to litigate'" (*Platon v Linden-Marshall Contracting Inc.*, 176 AD3d 409, 410 [1st Dept 2019], *quoting Matter of Hunter*, 4 NY3d 260, 269 [2005]). "Under this transactional approach, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy,'" (*id.*, *quoting O'Brien v Syracuse*, 54 NY2d 353, 357 [1981]). In this case, Gade was not a party to the Arizona criminal proceeding or the Canadian civil action which was brought by O2, and did not have an opportunity to litigate any of the issues under review. Carmili's contention that Gade was in privity with O2, or that

Gade would be entitled to share in any restitution made to O2, rests entirely upon the disputed proposition, previously discussed, that Gade was a direct investor in O2 rather than a lender to Carmili. Furthermore, the Canadian judgment was not an adjudication on the merits, but merely a preliminary order regarding injunctive relief. And while the court stated that "[t]here is also evidence that indicates payments made from 02 Electronics' bank account may have been funded by third parties who . . . may have been making inadequately documented loans to 02 Electronics," that tentative, non-binding finding does not identify Gade as one of O2's lenders, or negate the possibility that the funds he deposited in O2 were for the sole benefit of Carmili.

Failure to Join a Necessary Party

Carmili argues, without elaboration or case authority, that Sualim is "clearly a necessary party." CPLR 1001 provides that a person should be joined as a party (1) if necessary to insure that "complete relief is to be accorded between the persons who are parties to the action", or (2) if that person "might be inequitably affected by a judgment in the action." Sualim's participation in this action is not necessary because he is not a party to the alleged loan agreement between the parties, and his rights would not be affected by any judgment rendered in it. Furthermore, Carmili has abandoned any defense of this argument on reply.

Accordingly, it is

ORDERED that defendant David Carmili's motion to dismiss the First Amended Verified Complaint is granted to the extent of dismissing the third cause of action for fraud and the fourth cause of action for fraudulent inducement; and it is further

ORDERED that the motion to dismiss is otherwise denied; and it is further

ORDERED that the Clerk is respectfully directed to mark his records to reflect the said dismissal of the third and fourth causes of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference, via telephone, on September 14, 2020 at 10 a.m.

This constitutes the decision and order of the Court.

7/21/2020
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE