SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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INDEX NO. 651581/2016

JERRY OHLINGER'S MOVIE MATERIAL STORE, INC., and CHRISTOPHER MARLBOROUGH, as Executor of the Estate of Jerry Ohlinger,

MOTION DATE 09/09/2020

MOTION SEQ. NO. 007

Plaintiff,

- v -

LEGEND MOVIE POSTERS CORPORATION, LEGEND MOVIE POSTERS ENTERPRISE CORPORATION, DAVID RICHE, and XINGLING HU

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 188, 189, 190, 191, 192, 193, 194, 195, 196, 201, 202, 203, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 226, 227, 228, 229, 236, 238, 239, 241

were read on this motion to/for DISMISS.

In this action for rescission of a settlement agreement, the plaintiffs move pursuant to CPLR 3211 to dismiss the defendants' counterclaim and pursuant to 22 NYCRR 130-1.1 for sanctions against the defendants. The defendants oppose the motion and cross-move to compel the plaintiffs to provide an accounting and proof of insurance. For the following reasons, the plaintiff's motion is granted in part, and the defendants' cross-motion is denied.

On September 14, 2015, the parties executed a settlement agreement (the "settlement agreement") resolving an action commenced by plaintiff Jerry Ohlinger's Movie Material Store, Inc. ("JOMMS") in the United States District Court for the District of New Jersey (the "DNJ"). Under the settlement agreement, JOMMS was to remove its inventory from a New Jersey warehouse, which defendant Legend Movie Posters Corporation ("Legend") had agreed to rent for JOMMS's use in connection with a joint venture agreement between JOMMS and Legend, by December 31, 2015. Plaintiff Jerry Ohlinger, now deceased, visited the warehouse to segregate the portion of inventory allocated to JOMMS in the settlement agreement throughout the month of December 2015. He completed removal of JOMMS's inventory by the requisite date. In January 2016, however, Ohlinger discovered that some of the items he had organized and prepared for the move were missing. On January 26, 2016, JOMMS's counsel provided a list of all items JOMMS believed to be missing to the defendants' counsel and asked defendants to account for the missing items. The defendants did not do so. This action ensued.

The defendants removed this action to the United States District Court for the Southern District of New York (the "SDNY") on April 7, 2016. Following an evidentiary hearing held by the SDNY on January 20, 2017, the action was remanded. The operative corrected amended complaint was filed on October 1, 2019, in accordance with an order from the SDNY to conform the plaintiffs' damages allegations to the SDNY's remand order. The defendants filed an answer to the corrected amended complaint on October 21, 2019. The answer includes a counterclaim stating that the plaintiffs "are attempting to fraudulently use this Court to relitigate a case they brought in the [DNJ] and ultimately agreed to settle" and that they "falsely allege that defendants were not in compliance with the [DNJ]'s discovery orders." The defendants conclude that "[s]uch conduct is an attempt to commit fraud not only on defendants, but both this Court and the [DNJ]." They further claim they have been injured by "defendants' [sic] fraudulent acts" because they have had to spend time and resources litigating this matter, and demand damages in the sum of $250,000.00.

It is well settled that when assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004).

Here, the defendants have not labeled their counterclaim and it is not entirely clear to the court what cause of action they sought to bring. To the extent the defendants' claim sounds in fraud, malicious prosecution, abuse of process, or attorney deceit, the plaintiffs correctly contend that the claim fails. As to fraud, the defendants have not pleaded that they were deceived by any allegedly fraudulent statement. See Amalfitano v Rosenberg, 12 NY3d 8 (2009). Similarly, the defendants have identified no proceeding that terminated in their favor, a necessary element of a malicious prosecution claim. See Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267 (1st Dept. 2005). The defendants have also failed to allege that the plaintiffs abused the civil process by using the process in a perverted manner to obtain a collateral objective. See Curiano v Suozzi, 63 NY2d 113 (1984); Casa de Meadows Inc. (Cayman Islands) v Zaman, 76 AD3d 917 (1st Dept. 2010). Finally, there is no basis for an attorney deceit claim against the plaintiffs, none of who are attorneys. See NY Jud L § 487.

Ironically, while the defendants open their opposition with the complaint that the plaintiffs "consistently refer[] to defendant Chatoff/Richie [sic] in a disparaging manner," the remainder of their submissions are devoted almost exclusively to a narrative account of the alleged bad behavior of the plaintiff's counsel in other courts. Indeed, the affirmation of the defendants' attorney ultimately devolves into an airing of grievances against his adversary and what he calls "'new age' litigation, where truth or honestly [sic] is [sic] no longer a part of legal advocacy

matter." However, the far more serious deficiency in the defendants' submissions is that they are wholly devoid of any legal authority supporting whatever counterclaim they intended to bring. The defendants state only that the "facts strongly suggest there has been quite a bit of fraudulent behavior which defendants have every right to have addressed in a court of law through their counterclaim." The facts they refer to are the plaintiffs' commencement of this action after the DNJ action settled, the defendants' allegation that the plaintiffs breached the settlement agreement, the plaintiffs' initial failure to sue for the amount in the SDNY's remand order upon remand, and the defendants' assertion that the plaintiffs lied about whether the defendants complied with discovery orders.

Initially, whatever may have happened in other courts, the record before this court belies the defendants' claim that they have always complied with discovery orders. In fact, the defendants repeatedly refused to comply with this court's directives, resulting in the striking of the defendants' answer pursuant to 22 NYCRR 202.27. The defendants were permitted to file a new answer when the plaintiff subsequently filed the corrected amended complaint. Further, to the extent the defendants seek to challenge the plaintiffs' claims based on the principle of *res judicata* or collateral estoppel, the court has already denied relief on such grounds in two prior orders dated August 24, 2018, and December 13, 2019. Most importantly, even if the foregoing facts were all taken as true, none give rise to a cognizable fraud-based claim. The defendants' counterclaim must be dismissed.

The defendants justify their request for an accounting and proof of insurance with a single sentence stating that "these are the terms the parties agreed upon previously." No further elaboration is provided. Since the defendants identify no legal basis for their entitlement to the relief requested, the cross-motion is denied.

As to the branch of the plaintiffs' motion seeking sanctions pursuant to 22 NYCRR 130-1.1(a) as a result of the defendants' conduct in this action and other, related actions, the court finds that under the applicable legal standards, the imposition of sanctions is not currently warranted. Therefore, the plaintiffs' application for sanctions is denied without prejudice.

Accordingly, it is,

ORDERED that the plaintiffs' motion to dismiss the defendants' counterclaim and for sanctions is granted to the extent that the defendants' counterclaim is dismissed in its entirety pursuant to CPLR 3211(a)(7), and motion is otherwise denied without prejudice; and it is further,

ORDERED that the defendants' cross motion for an accounting and proof of insurance from the plaintiffs is denied in its entirety; and it is further,

ORDERED that the parties shall appear for a telephonic status conference on February 4, 2021, at 11:00 a.m.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/10/2020
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
SEQ 007		GRANTED		DENIED	X	GRANTED IN PART		OTHER
SEQ 007 X-MOT		GRANTED	X	DENIED		GRANTED IN PART		OTHER