National Convention Servs., LLC v FB Intl., Inc.

2023 NY Slip Op 34042(U)

November 14, 2023

Supreme Court, New York County

Docket Number: Index No. 654445/2015

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE, *Justice*	PART 60M
NATIONAL CONVENTION SERVICES, LLC,EXSERVE, INC., Plaintiff, - v - FB INTERNATIONAL, INC., Defendant.	INDEX NO. 654445/2015
	MOTION DATE 10/28/2022, 10/28/2022
	MOTION SEQ. NO. 009 010
	DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 423, 424, 425, 426, 427, 428, 429, 430, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 465, 468, 469, 470, 471, 472, 473, 474, 475, 490, 491, 492, 493

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 010) 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 466, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

The essence of this contentious 2015 case distills down to whether the parties entered into a joint venture or not. This decision addresses mot. seq. nos. 009 and 010 that the court consolidates for disposition. In mot. seq. no. 009, National Convention Services, LLC ("NCS") and its affiliate ExServ, Inc. ("Exserv") (jointly, "Plaintiffs") seek an order: (1) granting them partial summary judgment, pursuant to CPLR 3212, with respect to the "account stated" claim in their Second Amended Complaint (SAC; EDOC 301) against defendant FB International, Inc. ("FB"); (2) dismissing FB's counterclaim as time-barred with respect to certain invoices FB issued to NCS that predate June 16, 2010; and (3) dismissing the third-party complaint of Alma USA, LLC ("Alma"), FB's affiliate.

In mot. seq. no. 010, FB and third-party plaintiff Alma ("FB/Alma") seek an order, pursuant to CPLR 3211 and 3212, partially dismissing the SAC as well as the affirmative defenses in the so-called "Plaintiff/Counterclaim Defendants' Fourth Amended Reply/Answer to the Counterclaim Complaint" (PFARA; EDOC 309). For the reasons below, the court denies the various forms of relief Plaintiff's motion requests. FB/Alma's motion is granted only to the extent of dismissing the first seventeen (17) affirmative defenses in the PFARA and is otherwise denied.

Background and Procedural History

NCS and Exserv are contractors who provide labor services to various trade shows throughout the U.S. (SAC, ¶¶ 1-4). Plaintiffs and FB have worked together since the mid-1990s. Plaintiffs provided labor services for "installing and dismantling trade shows," and FB "rent[ed] out equipment, carpet and exhibitor booths to exhibitors" at the shows (*id.*, ¶ 7). Starting in February 2009, Plaintiffs provided services to FB upon request, and later invoiced FB for the services. FB made only "occasional payments" to Plaintiffs (*id.*, ¶¶ 10-11). FB continued to order services from Plaintiffs through September 2014. Plaintiffs invoiced FB each time after they provided services. FB ordered services for over 127 trade shows, but according to plaintiff, the invoices for services "are still outstanding and due" (*id.*, ¶ 12). The principal amount FB allegedly owes on these invoices, without accrued interest, is approximately $4,676,470 (*id.*, ¶ 13). FB has made partial payments according to plaintiff.

NCS commenced this case (index no. 654445/2015) in December 2015. The original complaint asserted 123 causes of action for breach of contract against FB (FB/Alma Brief at 2). In June 2016, FB/Alma commenced a separate case against NCS (index no. 653199/2016) that sounded in "breach of contract, promissory estoppel and unjust enrichment, to recover nearly $4.8 million NCS owed on FB's invoices [for services rendered by FB]" (*id.*). On December 23, 2016,

the two cases were consolidated under the 2015 index number (*id.*). In January 2017, FB filed an answer with affirmative defenses and counterclaims to NCS's original complaint (EDOC 53). NCS filed an answer with affirmative defenses to FB's counterclaims (EDOC 65) (*id.* at 2-3).

In December 2018, NCS moved to amend its complaint. The proposed first amended complaint reduced the 123-counts in the original complaint to just three counts: "breach of contract," "account stated," and a "declaratory judgment" that a joint venture existed between the parties (*id.* at 3). On March 4, 2019, the court granted NCS's motion to amend (*id.*; referencing EDOC 201 [granting order] and EDOC 203 [first amended complaint ("FAC")]). FB moved to dismiss (mot. seq. no. 006) the FAC and NCS's amended answer to FB's counterclaims (*id.*; referencing EDOC 207). On March 30, 2020 (EDOC 299), the court denied FB's motion and ruled that "it will be up to the finder of fact to determine the truth of what aspect, if any, of the parties' complicated relationship constituted a joint venture" (*id.* at 3; quoting court order).

In April 2020, Alma filed its third-party complaint (EDOC 300) and FB interposed its answer with defenses and counterclaims to the FAC (*id.*). In May 2020, NCS filed the SAC (amending the FAC as of right), removing its "recently added cause of action for declaratory relief concerning the alleged joint venture," and asserting the declaratory relief claim as a "counterclaim" to "FB's Counterclaim to NCS' Second Amended Answer to FB's Counterclaim" (*id.*; referencing EDOC 302). In June 2020, FB interposed its answer with defenses and counterclaims to the SAC (*id.* at 4; referencing EDOC 306 [FB Answer/Counterclaim]).

In July 2020, NCS interposed its amended answer to the FB Answer/Counterclaim and asserted a "declaratory relief" counterclaim to the FB Answer/Counterclaim (*id.*; referencing EDOC 307). In August 2020, FB interposed a Notice of Rejection (EDOC 308), advising NCS

that its "counterclaim to counterclaim" pleading was rejected as improper under New York law (*id.*). After, NCS filed the PFARA (EDOC 309; supra), purporting to remove its "counterclaim to counterclaim" for declaratory relief, while "cutting and pasting the identical paragraphs and re-labeling them as an affirmative defense" in the PFARA (*id.*, referencing PFARA at 8-5, ¶¶ 1-33).

In April 2022, NCS filed the Note of Issue. On April 8, 2022, the court directed that the parties file summary judgment motions within 120 days of Note of Issue's filing (EDOC 365). In June 2022, FB filed a motion (mot. seq. no. 008) for an order seeking, inter alia, discovery sanctions against NCS (EDOC 367). On September 6, 2022, the court denied FB's motion for sanctions. In its ruling, the court noted that the parties have spent an "inordinate amount of court time" engaging in discovery disputes, even though this action has been pending for seven years and a special referee was appointed to mediate the discovery disputes (EDOC 459). In October 2022, FB appealed the order to the Appellate Division, First Department (EDOC 467). The Appellate Division, First Department affirmed this court on November 14, 2023.

With regard to mot. seq. no. 009, in August 2022, Plaintiffs filed a brief in support (Plf. Brief; EDOC 424), FB/Alma interposed its opposition (Def. Opposition; EDOC 475), and Plaintiffs replied in October 2022 (Plf. Reply; EDOC 490). With respect to mot. seq. no. 010, in August 2022, FB/Alma filed a brief in support (FB/Alma Brief; EDOC 442), Plaintiffs interposed opposition (Plf. Opposition; EDOC 476), and FB/Alma replied in October 2022 (FB/Alma Reply; EDOC 489).

Legal Standards

Initially, the movant must make a prima-facie showing of entitlement to summary judgment as a matter of law, tendering sufficient credible evidence to eliminate disputed material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court should deny the

motion if the movant fails this showing (*id.*). Where the movant makes this showing, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact requiring a trial (*id.*). The court should deny the motion if there is doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Where different conclusions may be reasonably drawn from the evidence, the court should also deny the motion (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995]). However, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Rotuba Extruders, Inc., v Ceppos,* 46 NY2d 223, 231 [1978]).

Discussion

I. Plaintiffs' Motion (Motion Sequence Number 009)

Plaintiffs' motion seeks summary judgment with respect to the "account stated" claim in the SAC, dismissal of certain FB's invoices as time-barred, and dismissal of Alma's third-party complaint. According to plaintiffs, this case involves two types of trade shows: (1) those shows where Plaintiffs and FB were in a "vendor-subcontractor relationship," for which they invoiced FB; and (2) those shows where the parties were in a "joint venture" for the "Curve Shows" but where FB denies the alleged joint venture and asserts counterclaims against NCS for not paying FB's invoices (Plf. Brief at 1). Plaintiffs seek to dismiss FB's counterclaims as time barred with respect to certain FB invoices (*id.* at 1-2). Plaintiffs also seek to dismiss all of Alma's third-party claims for Alma's own unpaid invoices (*id.* at 2).

A. *Argument in Support of Plaintiffs' Motion*

Plaintiffs argue that: (1) FB received all invoices for the 126 trade shows that Plaintiffs submitted and that "every one of them are listed in FB's own records;" (2) the affidavit of

Plaintiffs' president, James Angellino (Angellino Affidavit; EDOC 443), describes the "regular office procedures for sending invoices to FB, which is independently sufficient to meet Plaintiffs' prima facie burden;" (3) FB never timely objected to the invoices (a list of which is annexed as "Schedule 1,") totaling $4,670,610; and (4) FB made partial payments on the invoices.

Plaintiffs argue that because FB "received and retained the invoices without objection for a reasonable time, defendant's silence gave rise to an actionable account stated warranting summary judgment for plaintiff," and that FB's multiple partial payments to Plaintiffs are "independently sufficient to create an account stated as a matter of law" (*id.* at 11; citing, inter alia, *Rosenberg Selsman Rosenzweig & Co. v Slutsker*, 278 AD2d 145, 145 [1st Dept 2000], and *Parker, Chapin, Flattau & Kimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977]).

With respect to FB's six counterclaims (breach of contract, promissory estoppel, account stated, quantum meruit, unjust enrichment and setoff) Plaintiffs argue those claims that "accrued before June 16, 2010 are time-barred." Plaintiffs explain these counterclaims relate to Curve Shows that took place more than six years before FB/Alma commenced the FB/Alma case against NCS on June 16, 2016 (*id.* at 11-13; citing CPLR 213 [2]). A list of the FB invoices that predated June 16, 2010 (defined as "Early FB Invoices") is annexed as "Schedule 2" to Plaintiffs' Brief.

As to Alma's third-party complaint, Plaintiffs argue that the claims against NCS should be dismissed because Alma asserts a claim against NCS, a plaintiff, not against "a person not a party," as CPLR 1007 requires.

B. _*FB/Alma's Opposition to Plaintiffs' Motion*_

After Plaintiffs failed to timely serve the summons for the 2015 complaint, plaintiffs started another action in 2016 by filing and serving an identical summons and complaint via the New York Secretary of State. Then plaintiffs requested the court to deem this service timely or grant

them more time to serve (Def. Opposition at 1-2; referencing EDOC 3). FB opposed Plaintiffs' motion to deem service timely, cross-moved to dismiss Plaintiffs' 2015 complaint, and started the FB/Alma case on June 16, 2016 against Plaintiffs, seeking to recover $4.8 million owed with respect to the FB/Alma invoices (*id.* at 2; referencing EDOC 28). In July 2016, Plaintiffs responded to FB's cross-motion by filing a "procedurally improper cross motion," requested the court to consolidate the 2015 case with the 2016 FB/Alma case and, upon consolidation, to strike FB's claims based on invoices prior to June 16, 2010 (*id.*; referencing Early FB Invoices and EDOC 26).

On December 23, 2016, the court: (1) dismissed counts 1 to 21 of the 2015 complaint based on invoices dated prior to December 31, 2009 (totaling $754,000) as time-barred (defined as "Plf. Time-Barred 2009 Claims"); (2) consolidated the 2015 case with the FB/Alma case; and (3) denied Plaintiffs' motion to strike the claims in the FB/Alma case as time-barred (*see* EDOC 49).

FB/Alma notes that: (1) Plaintiffs, in support of their cross motion, stated that they would consent to allow FB/Alma to "interpose all direct claims" in the FB/Alma case as "counterclaims/cross claims against Plaintiffs;" and (2) the order consolidating the cases did not specify the "party designations" of NCS, FB and Alma (i.e., NCS is a plaintiff in the 2015 case and a defendant in the FB/Alma case, FB is a defendant in the 2015 case and a plaintiff in the FB/Alma case, and Alma is a plaintiff in the FB/Alma case but not a party in the 2015 case) (*id.* at 2-3). FB/Alma further notes that, even though Alma is the third-party plaintiff in its complaint against NCS, Alma interposed its direct claims in the FB/Alma case against NCS in accordance with Plaintiffs' prior consent, "by incorporating by reference the operative paragraphs" in Alma's third-party complaint filed against NCS in the FB/Alma case (*id.* at 4).

As to the invoices relating to the "business relationship" between FB and NCS, FB asserts that, beginning in 2009, the parties agreed to "off-set" each other's invoices and that a final payment would be made when the parties settled all invoices (*id.* at 4-5; referencing the affidavit of Susan Paik [Paik Affidavit, ¶ 5; EDOC 472], vice president of FB and wife of Fabrizio Bartolozzi, FB's principal). FB also asserts that, between 2009 and 2014, FB sent "numerous emails" to NCS to discuss issues and objections relating to NCS's invoices (including but not limited to NCS's 126 invoices), but NCS "routinely failed to provide FB the back-up support FB requested" (*id.* at 5; referencing Paik Affidavit, ¶ 6). FB further asserts that the "partial payments" to NCS reflected in FB's records were not for the disputed NCS invoices but were for "other invoices that are completely separate from the disputed invoices at issue," and that FB did not and does not owe NCS money (*id.*). Additionally, FB asserts that the amount NCS owes to FB exceeds the amount NCS alleges FB owes (*id.* at 6).

FB argues that, as a matter of law, the account stated claim is duplicative of the breach of contract claim (citing, inter alia, *Dubinsky v Levine*, 200 AD3d 574 [1st Dept 2021] [*Dubinsky*]). FB also argues that the 126 invoices underlying Plaintiffs' claims include the dismissed "Plf. Time-Barred 2009 Claims," that Plaintiffs try to "resurrect" these time-barred claims by relying on a new "rolling account" theory that incorporates the last of their 126 invoices from February 14, 2014. FB argues this theory is "fatal" because a "rolling account" is the same as a "running account" or "account current" and, therefore, by its nature, is "an antithesis of an account stated" (*id.* at 7, citing, inter alia, *Watson v Gillespie*, 205 AD 613, 623 [1st Dept 1923] [running account is account not stated and reflects "unsettled account between two parties"] [internal quotation marks and citations omitted]).

FB also argues that there are no issues of material fact regarding plaintiffs' "account stated" claim because: (1) plaintiffs offer no evidence showing FB and NCS had "a meetings of the minds," in that NCS's principal, Angellino, has admitted that FB disputed the amounts FB allegedly owed (referencing Angellino Affidavit at ¶ 13); (2) Plaintiffs try to create an "implied agreement where none exists" by asserting that FB "regularly made partial payments" on NCS invoices, but offer no evidence to connect these payments to the invoices at issue; (3) if FB made partial payments against NCS invoices, Plaintiffs should have credited the payments against the alleged unpaid account, yet Plaintiffs seek an identical amount ($4,670,613) for their breach of contract and account stated claims; (4) Plaintiffs' own records show that FB's alleged unpaid balance is $3,687,061, about $1,000,000 less than what they seek on summary judgment; (5) the alleged failure to object to a portion of the account balance does not constitute an "implied agreement as to the whole" and, in any event, FB timely objected to the NCS invoices; and (6) there was no agreement as to the accounting and the numbers (*id.* at 6-12; referencing various exhibits, hearing transcript and caselaw).

With respect to FB's counterclaims, FB argues that the counterclaims that arose before June 16, 2010 (as reflected by the Early FB Invoices) are not time-barred. FB argues that Plaintiffs disregard the "relation-back doctrine" under CPLR 203 (f), providing that a claim in an amended pleading "is deemed to have been interposed at the time the claims in the original pleadings were interposed, unless the original pleading does not give notice of the transactions...to be proved pursuant to the amended pleading" (*id.* at 13; quoting CPLR 203 [f] and citing *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 (1st Dept 2017) [*O'Halloran*]). FB also argues that when a defendant is sued in a separate case, its claims relate back for limitation purposes when the new case is consolidated with the original case to the commencement date of the original case (*id.*,

referencing *DeLuca v Baybridge at Bayside Condominium 1*, 5 AD3d 533, 535 [2d Dept 2004] [*DeLuca*]).

FB also argues that the "doctrine of equitable recoupment" under CPLR 203 (d) is applicable to the counterclaims involving the Early FB Invoices. FB explains that the doctrine allows a defendant to assert otherwise untimely claims that "arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief" (*id.* at 14; referencing CPLR 203 [d] and *Carlson v Zimmerman,* 63 AD3d 772 [2d Dept 2009]).

With respect to Alma's third-party complaint against NCS, FB argues that the complaint is proper, despite Plaintiffs' contention that the complaint asserts "a claim against NCS, a plaintiff, not against 'a person not a party,' as required by CPLR 1007." FB argues that the contention "elevates form over function and focuses on hyper-technical pleading distinctions" that are unimportant (Def. Opposition at 16-17). FB explains that when this court consolidated the FB/Alma case into this case under index no. 654445/2015, it did not specify an "amended caption for the consolidated actions," nor did the court specify/clarify the "party designations," that resulted in Alma being "inartfully" identified as a "counterclaim plaintiff" where Alma was not a defendant in either action (*id.* at 17-18). FB asserts that this "misnomer" may be remedied by amending the case caption so long as the parties are apprised and not prejudiced. FB also asserts that, irrespective of Alma's party designation, Plaintiffs were well-apprised of Alma's status and its claims (*id.* at 18-19; citing, inter alia, *Opiela v May Indus. Corp.*, 10 AD3d 340 [1st Dept 2004]).

C. *Analysis of Parties' Contradictory Positions*

As demonstrated above, the parties take divergent positions with respect to the various issues raised in Plaintiffs' motion, the first of which is the account stated claim.

1. *Plaintiffs' Account Stated Claim*

FB's threshold argument is that this claim is "duplicative" of the breach of contract claim. The argument is unpersuasive. Notably, in the case FB relies upon, *Dubinsky, supra,* the appellate court held that, because the parties had a retainer agreement, the plaintiff's account stated and breach of contract claims were duplicative. Because the defendant paid the amount plaintiff sought under the agreement, both claims were not viable at the same time. Similarly, in another case FB relies upon, *Suverant LLC v Brainchild, Inc.*, 191 AD3d 513, 515 [1st Dept 2021] (*Suverant*), the appellate court noted the existence of a valid contract and dismissed the plaintiff's account stated claim as duplicative of its breach of contract claim. However, these cases are distinguishable. Here, in its answer, FB denies that a contract existed between the parties (EDOC 434, ¶¶ 22-27). As FB disputes the contract's existence, dismissal of the account stated claim, premised **solely** on its being "duplicative" of the breach of contract claim, is improper (*Federated Fire Prot. Sys. Corp. v 56 Leonard St. LLC*, 170 AD3d 432, 433 [1st Dept 2019] [account stated claim was "independent of the underlying agreement"]).

FB next argues that Plaintiffs' attempt to "resurrect" the account stated claim by relying on the "rolling or running" account theory is without merit as to the Time-Barred 2009 Claims that this court dismissed on December 23, 2019 (Def. Opposition at 6). In reply, Plaintiffs do not dispute the court order's validity. Instead, they argue that FB failed to raise any issue as to the time-barred claims in their pending or prior motions to dismiss (Plf. Reply at 8). However, clearly, Plaintiffs' argument cannot revive the claims this court has already determined are time-barred.

Plaintiffs' other argument, that FB tries to paint a "false distinction" between "account stated" and "rolling or current account," is also unpersuasive. As FB points out, in *Ryan Graphics Inc. v Bailin*, 39 AD3d 249 [1st Dept 2007] (*Bailin*), the court noted that an account stated is "an agreement" between the parties to an account "based on prior transactions...with respect to the correctness of the account items and balance due," that "assumes the existence of some indebtedness between the parties" or "an express agreement to treat the statement as an account stated [but an account stated] cannot be used to create liability where none otherwise exists" (*Bailin* at 250-251 [internal quotation marks and citations omitted])." Quoting *Watson v Gillespie*, 205 AD 613, 623 [1st Dept 1923], supra, FB asserts that: (1) "an account current is in its very nature the antithesis of an account stated;" (2) "an account current is an account not stated; a running account;" and (3) "contract law appl[ies] to account stated" where "the minds of the parties must meet" (Def. Opposition at 7).

In their reply, Plaintiffs failed to address or challenge *Bailin*. Their attempt to distinguish *Watson* is unpersuasive, because in the case they cite, *Newburger-Morris Co. v Talcott*, 219 NY 505, 511 (1916) (*Talcott*), the Court of Appeals stated that "an account stated may sometimes result from the retention of accounts current without objection [but] **the result does not always follow [in that] it varies with the circumstances [including] the relation between the parties**". As FB also notes, in *Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 153-154 (1975) (*Interman*), the Court of Appeals explained that *Newburger-Morris Co. v Talcott*, 219 NY at 511 (1916) indicated that "the very meaning of an account stated is that **the parties have come together and agreed upon the balance of indebtedness**...so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained"

([emphasis added]). Based on the language in these decisions, an account stated claim requires an element of consent or a meeting of the minds with respect to the balance of indebtedness.

Yet, Plaintiffs argue that FB's meeting of the minds assertion "misses the point" because an account stated arises when a defendant retained invoices without objection for a reasonable time or made partial payments. Plaintiffs cite to cases including *Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500 [1st Dept 2011]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]; and *Walter Conston Alexander & Green, P.C. v Vintage Creations, Ltd.*, 203 AD2d 203 [1st Dept 1994]. However, most of these cases involved an attorney-client or other fiduciary relationship.

Further, plaintiffs' fail to address *Interman* that, in turn, cited to *Corr v Hoffman*, 256 NY 254, 266 (1931). In *Corr*, the Court of Appeals observed that, while a "fiduciary relationship" between the parties may be relevant for determining whether "from acceptance of an account, without objection, an agreement should be implied that the account is correct, [but] it does not preclude parties who are capable of contracting with each other from entering into such an agreement." Moreover, in *Dragonetti Bros. Landscaping Nursery & Florist, Inc. v Verizon N.Y.*, Inc., 208 AD3d 1125, 1126 (1st Dept 2022), the First Department dismissed an account stated claim because "there was no alleged agreement between the parties to an account based upon prior transactions with respect to the account items and balance due." The First Department also cited to *Interman* for the rule that an account stated claim fails where there is "no written instrument by which the defendant expressly obligated itself to make the payments required by the accounts stated" (*id.*).

Here, Plaintiffs do not allege that they and FB were in a fiduciary relationship as to the invoices concerning the account stated claim. In fact, they assert that the parties were in a vendor-

subcontractor relationship with respect to the account-stated claim. Plaintiffs also do not allege that there was an agreement with FB regarding the latter's acknowledgment of debt or that both parties were incapable of entering into such an agreement, as noted in *Corr*, supra. Hence, in light of the Court of Appeals and First Department decisions described above, absent an **agreement** based on the parties' prior transactions with respect to the "correctness of the account items and balance due," Plaintiffs' account stated claim does not appear to stand on solid legal grounds.

The parties hold conflicting positions with respect to their own characterization of the record. As FB notes, there are disputed issues of fact regarding the account stated claim, such as: (1) whether there was "a running account involving [the] offsetting of respective invoices;" (2) whether there was "a meeting of the minds" of the parties regarding the alleged $4.6 million account with FB; (3) whether FB timely objected to the NCS invoices; (4) whether FB's actions amounted to an "implied promise to pay" the balance alleged owed to Plaintiffs; and (5) the amount of damages that can be proven by competent evidence (FB Opposition at 12). Accordingly, the existence of disputed issues of fact precludes summary judgment with respect to the account stated claim to the extent not time barred.

2. *Plaintiffs' Request to Dismiss FB's Counterclaims Predating June 16, 2010*

CPLR 203 (f) states that "[a] claim asserted in an **amended pleading** is deemed to have been interposed at the time the claims in the **original pleading** were interposed unless the original pleading does not give notice of the transactions...to be proved pursuant to the amended pleading" (CPLR 203 [f] [emphasis added]). FB argues that the Early FB Invoices "relate back" to the commencement of this case on December 31, 2015 (the original complaint's filing date). Meanwhile, plaintiff argues FB's original counterclaims on January 16, 2017 tolled the statute of limitations (EDOC 53). However, for the purposes of this motion "Plaintiffs have assumed that

FB's counterclaims relate back to June 16, 2016," the FB/Alma case's commencement date (*David B. Nelson, M.D., P.C. v Stroh*, 303 AD2d 499 [2d Dept 2003]).

Plaintiffs assert that their claims and FB's counterclaims involve two different types of shows: (1) those where the parties were in a vendor-subcontractor relation and for which Plaintiffs invoiced FB (i.e., NCS' invoices at issue) and (2) those relating to the Curve Shows where the parties were in a "joint venture" where FB invoiced NCS (which form the basis of FB's counterclaims). Plaintiffs argue that because of this, there is an insufficient "tight nexus" between the claims and counterclaims to trigger application of the equitable recoupment doctrine (*id.*, citing, inter alia, *USI Sys. AG v Gliklad*, 176 AD3d 555, 557 [1st Dept 2019] [section 203 (d) is unavailable to counterclaimant where the counterclaims do not arise out of the same transactions alleged in the complaint]).

Plaintiffs' effort to distinguish the two types of shows is premature. Notably, FB denies that the Curve Shows were a "joint venture." Also, in the March 30, 2020 decision, the court denied FB's motion to dismiss the amended complaint because of contradictory evidence and noted that it would be "up to the finder of fact to determine the truth of what aspect, if any, of the parties' complicated relationship constituted a joint venture" (EDOC 299 at 2).

Accordingly, because the existence of a joint venture remains a disputed material issue of fact (despite the ample opportunities afforded to the parties to resolve the protracted dispute through discovery), and even though FB's reliance on CPLR 203 (f) in opposition is misplaced (as discussed above), this branch of Plaintiffs' motion seeking to dismiss the FB Early Invoices predating June 16, 2010 is denied.

3. *Plaintiffs' Request to Dismiss the Alma Third Party Complaint*

In opposing Plaintiffs' request to dismiss Alma's third-party complaint, FB/Alma asserts that plaintiffs elevate "form over function" and that Plaintiffs have waived any challenges to Alma's claims in this action (Def. Opposition at 16-19). In reply, Plaintiffs failed to respond to FB/Alma's assertions, or otherwise challenge FB/Alma's legal and factual arguments in support of the statement that "Alma's complaint and claims are proper and should not be dismissed" (*id.*). Accordingly, the portion of the motion seeking dismissal of Alma's third-party complaint as against NCS is denied.

II. FB/Alma Motion (Motion Sequence Number 010)

In the FB/Alma motion, pursuant to CPLR 3211 and 3212, FB/Alma seeks an order dismissing Plaintiffs' SAC and PFARA and granting FB/Alma summary judgment on its counterclaim for breach of contract. In the "preliminary statement" portion of its brief in support, FB/Alma asserts that, while Plaintiffs collected about $10 million from the 40 Curve Shows, Plaintiffs did not pay FB a "single penny." FB/Alma explains the reason for nonpayment was unsurprising because the parties transacted business with each other and applied "offsets" for the products and services that each was providing to the other (FB/Alma Brief at 1). FB/Alma also asserts that FB's invoices to NCS (about $4.6 million) between 2009 and 2014 were offset against NCS's invoices to FB (about $4.5 million) for the 127 "other trade shows" that took place over the same time. This, according to FB, was the "true reason" why the total amounts of NCS's and FB's respective invoices were "so close in number" (*id.*). FB/Alma further asserts that Plaintiffs, through the SAC and the PFARA, are asking this court to "disregard the law" and to make "findings of disputed fact" to declare that the parties were in a "joint venture" as to the Curve Shows and that the FB invoices are "faux and void" (*id.* at 2).

By this motion, FB/Alma moves for an order: (1) dismissing all the affirmative defenses (especially the "joint venture" and "declaratory judgment" defenses) asserted in the PFARA, pursuant to CPLR 3211 (b); (2) dismissing Plaintiffs' claims asserted in the SAC, pursuant to CPLR 3211 (a) (1) and (a) (7); and (3) granting FB summary judgment on its breach of contract counterclaim against NCS, pursuant to CPLR 3212.

A. *The Single Motion Rule*

In opposition to the FB/Alma motion, Plaintiffs contend that the motion is barred by the single motion rule under CPLR 3211 (e), which states that "a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion should be permitted" (Plf. Opposition at 7-9; quoting relevant part of the statute). Pointing out that FB/Alma had filed a motion (mot. seq. no. 006) to dismiss the FAC pursuant to, inter alia, CPLR 3211(a), Plaintiffs assert that this motion (mot. seq. no. 010), again based on CPLR 3211(a), is barred by the single motion rule (*see Bailey v Peer State Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]). Plaintiffs also assert that, because the account stated and breach of contract claims in the SAC are identical to those in the FAC, it is "irrelevant" that FB/Alma did not raise the arguments they now make in their current motion (*id.* at 7-8; citing *Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694 [1st Dept 2016] [affirming lower court decision denying defendant's second motion to dismiss as violating single motion rule because defendant had opportunity to raise current arguments in prior motion]).

In addition, Plaintiffs assert that, even though the current motion seeks to dismiss the affirmative defenses pursuant to CPLR 3211 (b) rather than 3211 (a), because the court has denied FB/Alma's prior motion and stated that the existence of the alleged joint venture is a disputed issue of fact, this motion implicates the concerns underlying the single motion rule, which is to protect

the pleader from being harassed by repeated CPLR 3211 (a) motions and to conserve judicial resources (*id.* at 9; citing *Oakley v County of Nassau*, 127 AD3d 946 [2d Dept 2015]). Further, Plaintiffs assert that the branch of this motion seeking summary judgment should be denied because FB/Alma previously filed for summary judgment relief, and the court stated at the December 11, 2019 hearing that "[it] [would not] entertain successive summary judgment motions in this case" (*id.*; quoting transcript [EDOC 484 at 24] and citing *Jones ex rel Cline v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010] [successive summary judgment motions denied where no showing of newly discovered evidence or other justification was made]).

In reply, FB/Alma contends that the single motion rule "is limited to pre-answer motions to dismiss" and does not apply to this motion because CPLR 3211 (e) states that "*[a]t any time before service of the responsive pleading is required*, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted," and that Plaintiffs "misleadingly omitted" the statute's "*opening words*" (FB/Alma Reply at 1-4; quoting statute [emphasis added by FB/Alma]). While acknowledging that the statute is intended to preclude duplicative and repeated postponements of service of the answer, FB/Alma contends that the CPLR 3211 (a) defense "is not lost" and may be later raised in another form, such as in a summary judgment motion (*id.*, citing inter alia, *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]). FB/Alma asserts that because this motion is "not a pre-answer motion," and is "being made as, and in a procedural posture of, a summary judgment motion pursuant to CPLR 3212," the single motion rule is inapplicable here.

FB/Alma's assertion is unpersuasive because it does not explain: (1) how and why the "opening words" in CPLR 3211 (e) negate or limit the intent of the statute, and (2) the meaning of "in the procedural posture of a summary judgment motion." In fact, this motion explicitly seeks

dismissal of the SAC's breach of contract and account stated claims pursuant to CPLR 3211 (a) (1) and (a) (7) and, as a separate matter, summary judgment in favor of FB/Alma for the breach of contract counterclaim pursuant to CPLR 3212. Therefore, the branch of the motion seeking CPLR 3211 (a) relief violates the single motion rule because FB/Alma sought CPLR 3211 (a) relief in its prior motion to dismiss (motion sequence no. 006). Moreover, FB/Alma cannot deny, as noted in the March 30, 2020 court order, that its prior motion to dismiss was made before an answer was filed.

With respect to the part of the motion seeking summary judgment, this relief is different from that requested in the prior motion. As the court noted in the March 30, 2020 order, summary judgment relief was denied then because "the case is still in the discovery phase [and] discovery disputes have been involved and protracted" (EDOC 299 at 1). Moreover, as to that branch of this motion seeking dismissal of Plaintiffs' affirmative defenses, because the requested dismissal relies on CPLR 3211 (b), as opposed to CPLR 3211 (a), the single motion rule under CPLR 3211(e) is inapplicable.

B. *Disposition of Plaintiffs' Breach of Contract and Account Stated Claims*

Even though Plaintiffs' motion (mot. seq. no. 009) does not seek summary judgment in favor of the breach of contract claim, FB/Alma argues that the breach of contract and the account stated claims should be dismissed as to ExServ, and the account stated claim should be dismissed as to NCS (FB/Alma Brief at 20-21). FB/Alma argues that: (1) because "all 127 invoices show NCS's name on the top" and ExServ's name "does not appear anywhere on the invoices," both claims should be dismissed as to ExServ, pursuant to CPLR 3211 (a) (1) and (a) (7) (FB/Alma Brief at 20); and (2) because the account stated claim is "duplicative" of the breach of contract

claim and both are based on "identical" NCS invoices, the account stated claim should be dismissed under CPLR 3211 (a) (7).

FB/Alma's arguments are unpersuasive because the single motion rule precludes repeated motions seeking CPLR 3211 (a) relief. Even assuming FB/Alma's motions do not violate the rule, the cases FB/Alma relies upon, *Dubinsky v Levine*, 200 AD3d 574 [1st Dept 2021], and *Suverant LLC v Brainchild, Inc.*, 191 AD3d 513, 515 [1st Dept 2021], are inapposite because the facts are distinguishable. Notably, while repeating many of the same assertions in their summary judgment motion (mot. seq. no. 009), Plaintiffs concede that if summary judgment is granted on the accounted stated claim, the court "will not need to proceed to trial on Plaintiffs' breach of contract claim" (Plf. Opposition at 17-18).

Accordingly, the relief requested in this branch of FB/Alma's motion seeking partial dismissal of the claims in the SAC is denied. In so ruling, the court notes that denying FB/Alma's requested relief does not mean granting Plaintiffs' summary judgment relief as to their account stated or breach of contract claim, for the reasons also explained above.

C. *Disposition of FB's Breach of Contract Counterclaim Against NCS*

FB argues FB's invoices to NCS reflect that FB provided products and services to NCS, but NCS made only partial payments. FB contends it sustained $4.6 million in damages due to the nonpayment and breach (FB/Alma Brief at 21-22). In opposition, NCS contends that FB is not entitled to summary judgment because: (1) FB admitted the existence of a joint venture; (2) in the March 2020 order, the court noted the existence of disputed issues of fact regarding the alleged joint venture, and the existence of a joint venture is a "valid defense to FB's claim, [which] will fail if the factfinder determines that there was a joint venture;" and (3) FB's assertion of a valid breach of contract claim is based on its counsel's affirmation, who has "no personal knowledge of

the purported contractual relationship" between the parties. Again, the issue of whether or not there was a joint venture renders summary judgment on FB's breach of contract counterclaim impossible to grant at this juncture. Accordingly, this branch of FB/Alma's motion seeking summary judgment on its breach of contract claim is denied.

D. *Disposition of PFARA's Affirmative Defenses Pursuant to CPLR 3211 (b)*

FB/Alma argues that the PFARA contains 23 affirmative defenses, but the first 22 are boiler plate legal conclusions without factual support, and thus the court should dismiss them (FB/Alma Brief at 6-7). As to the twenty-third defense, that alleges the parties agreed to contribute to a joint venture, FB/Alma argues that Plaintiffs disregard the March 30, 2020 court ruling (noting the issues of disputed facts regarding the alleged joint venture), but Plaintiffs nonetheless seek a declaration under CPLR 3001 that the "joint venture" existed (*id.* at 7). FB/Alma also points to the "evolution" or the procedural history regarding Plaintiffs' attempts to label the various forms of their requested relief as "declaratory judgment," "counterclaims" and/or "affirmative defenses" (*id.* at 7-9).

FB/Alma argues that Plaintiffs' declaratory judgment relief regarding the existence of a joint venture, as stated in the PFARA, is without merit for various reasons. First, FB/Alma argues there is no justiciable controversy because Plaintiffs admitted that, as of August 10, 2020, the shows pertaining to the alleged joint venture have been completed. Second, the court should dismiss the declaratory judgment defense/claim because the March 30, 2020 order indicated the existence of disputed issues of fact. Third, a declaratory judgment that all FB invoices issued to NCS were "faux and void" does not state a defense. Finally, FB/Alma argues that plaintiff failed to join Event Design Group ("EDG"), a necessary party that plaintiffs' president, Angellino, owns. FB/Alma claims the evidence shows that CurveExpo, the operator of the Curve Shows, did not

sign any contract with Plaintiffs. Rather, EDG signed the contracts with CurveExpo, and the proceeds from such shows were deposited into EDG's bank account for which only Angellino has signatory authority (*id.* at 16-20).

CPLR 3211 (b) provides that a motion to dismiss may be based on the ground that "a defense is not stated or has no merit," and in addressing such motion, "the court should apply the same standards it applies to motions to dismiss pursuant to CPLR 3211 (a) (7)" (*Bank of America, N.A. v 414 Midland Ave. Assocs., LLC,* 78 AD3d 746, 748-749 (2d Dept 2010). Allegations of "bare legal conclusions" without credible supporting statements are not entitled to consideration (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994] [addressing CPLR 3211 [a][7] standards]).

Here, the first 17 affirmative defenses in the PFARA rely on boiler plate legal conclusions without sufficient factual support. Therefore, the court dismisses these 17 defenses pursuant to CPLR 3211 (b). However, with respect to the more substantive affirmative defenses relying on the existence of a joint venture, FB takes the contrary position from that which it relied on to defeat NCS' motion for summary judgment on the joint venture claim. Now, FB argues there is no evidence of a joint venture. However, as this court has already ruled, there are heavily disputed issues of fact as to whether the parties had a joint venture or not. A trial is necessary to resolve them.

E. *Disposition of FB's Argument that Plaintiffs Failed to Join a Necessary Party*

The existence of a joint venture is a primary disputed issue of fact for trial. Thus, whether EDG is a "necessary party" that needs to the joined in that dispute as well as Plaintiffs' joint venture defense is a secondary issue that need not be determined now. As Plaintiffs note in their opposition: (1) if the factfinder determines that there was a joint venture, FB/Alma's counterclaim

for unpaid invoices will fail, and EDG's presence in this action will not be required; and (2) if there was no joint venture, any involvement by EDG will be "irrelevant" and FB/Alma's counterclaim will "proceed in the ordinary course" against Plaintiffs (Plf. Opposition at 14). Further, FB/Alma has been aware of the existence of EDG in the context of the Curve Shows since at least March 4, 2019. FB/Alma's counsel stated in open court on that date that "[w]e're going to have to put a counterclaim, new parties are going to be joining...there's going to be a lot more discovery" (EDOC 485 at 65). Considering the statement and the opportunity for additional discovery, FB/Alma could have added EDG as a new or necessary party to this case years ago.

Finally, in the September 6, 2022 decision addressing FB's motion for sanctions, the court noted that, even though a special referee was appointed to deal with protracted discovery disputes in this case, that have been ongoing for years, the parties have been unable to work cooperatively to resolve their issues which, in turn, resulted in the court spending an "inordinate amount of time" attempting to break the entrenched deadlock (EDOC 459). These motions reflect "the recalcitrance of the parties and sheer volume of picayune and inconsequential discovery disputes that have populated this case for seven years," and now the parties have to "proceed to trial by ambush having charted their course" (order dated April 7, 2022; EDOC 365 [final conference order]).

Accordingly, it is

ORDERED that, Plaintiffs' motion (mot. seq. no. 009) is denied; and it is further

ORDERED that, the court grants FB/Alma's motion (mot. seq. no. 010), only to the extent of dismissing the first seventeen (17) affirmative defenses asserted in the "Plaintiff/Counterclaim

Defendants' Fourth Amended Reply/Answer to the Counterclaim Complaint" (EDOC 309) and otherwise denies the motion; and it is further

11/14 /2023				MELISSA A. CRANE, J.S.C.		
DATE						
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE