SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

----------X

ASAF LERMAN,

Plaintiff,

- v -

2211 THIRD AVENUE MAZAL HOLDINGS LLC,2211 THIRD AVENUE MAZAL LLC,2211 THIRD AVENUE LLC,HAP INVESTMENTS LLC,AMIR HASID, ERAN POLACK

Defendant.

----------X

INDEX NO. 654567/2022

MOTION DATE 11/13/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101 were read on this motion to/for DISMISSAL.

Defendants' motion to dismiss plaintiff's second through fifth causes of action against all defendants and to dismiss plaintiff's first cause of action against all defendants except for 2211 Third Avenue Mazal Holdings LLC is granted.

Background

This action began as a motion for summary judgment in lieu of complaint arising out of an agreement between plaintiff and 2211 Third Avenue Mazal Holdings LLC ("Holdings") and was based on breach of a promissory note to repay a loan. These two parties were the only ones named in the caption and the only two parties to the loan. Because the amount of interest could not be readily discerned, the case was converted to a plenary action and plaintiff added many additional defendants. The Court observes that plaintiff subsequently discontinued the case as against defendant 2211 Third Avenue LLC (NYSCEF Doc. No. 64).

In the current complaint, plaintiff contends that the defendants engaged in fraud by inducing plaintiff to extend the loan maturity date and to increase the amount of the loan. Specifically, he insists that defendants Hasid and HAP Investments LLC ("HAP") made material misrepresentations about the financial condition of Holdings, including about the financial projections for the development of a property located at 2211 Third Avenue in Manhattan.

Plaintiff insists that in December 2018, Holdings executed a promissory note to plaintiff evincing a $500,000 loan in connection with the property at 2211 Third Avenue. He claims that later that month HAP successfully convinced him to up his "investment" to $700,000 and a new promissory note showing this increased "investment" was executed that contained a maturity date of one year with an option to extend it another year (to December 2020). Plaintiff argues that defendant Hasid (on behalf of HAP) convinced him to enter into this agreement. Plaintiff alleges that in December 2019, Holdings utilized its option and extended the maturity date to December 2020. However, Holdings then failed to pay the balance due.

Defendants move to dismiss. They claim that the complaint contains confusing allegations about the various defendants in an attempt to pierce the corporate veil and hold all the defendants liable under the agreement plaintiff executed with Holdings. Defendants argue that plaintiff did not detail the allegedly fraudulent misrepresentations that were made to him in connection with his loan.

Defendants point out that plaintiff makes various allegations upon information and belief, including that both defendant 2211 Third Avenue Mazal LLC ("Mazal") and HAP are controlling principals, members, and managers of Holdings. They also observe that various allegations are made about 2211 Third Avenue LLC although defendants insist that they have no idea which entity plaintiff is talking about (plaintiff later discontinued the claims against this

entity). Defendants stress that the complaint is bereft of sufficient details about the alleged fraud committed by defendants and how that affects plaintiff's decision to loan money to Holdings.

In opposition, plaintiff submits an affirmation in which he claims that defendant Hasid spoke with him on behalf of Hasid's company (defendant HAP) in order to induce plaintiff to loan money. He claims that Hasid provided him with financial projections for the building and assurances that the loan would be timely repaid. Plaintiff insists he was told to wire money to a defendant Mazal instead of Holdings but, before he wired the money, he increased the amount of the loan based on discussions with Hasid.

Plaintiff explains that Hasid informed him that defendant Polack was no longer involved with HAP (according to plaintiff, Polack was adjudged to be a fraudster in Israel). He claims he would not have invested without this assurance. Plaintiff contends that he started to become uneasy and demanded his money back after learning that Polack was still the CEO of HAP. He admits that he received $200,000 "from HAP and/or Mazal" and later got another $10,000 (NYSCEF Doc. No. 83, ¶ 8).

Discussion

"A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion

attacking a well-pleaded cognizable claim" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134, 980 NYS2d 21 [1st Dept 2014]).

Breach of Contract

Defendants admit that the breach of contract claim was sufficiently pled as against Holdings. But they insist that this claim should be dismissed as against the remaining defendants.

Plaintiff argues that he detailed the circumstances under which he was induced to enter into the agreement. He insists that Holdings is merely a shell company and that the individual managing members of a corporation can be held liable for that corporation's torts.

The Court dismisses this cause of action as against all defendants except for Holdings. There is no dispute that the underlying loan and promise to repay was solely between Holdings and plaintiff (*see* NYSCEF Doc. No. 49 [the final note]). Nothing submitted on this record establishes that any of the new defendants should be held liable under a corporate veil piercing theory (*Spectra Sec. Software, Inc. v MuniBEX.com, Inc.*, 307 AD2d 835, 836, 763 NYS2d 313 [1st Dept 2003]). Simply because others, such as defendant Hasid, were involved in the negotiating process does not automatically render them personally liable under a breach of contract theory.

"Piercing the corporate veil requires a showing that: (1) the owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*First Capital Asset Mgt., Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 116, 755 NYS2d 63 [1st Dept 2002]). In this Court's view, the allegations make out a straightforward breach of contract action against Holdings, the entity with which plaintiff contracted. But they do not

sufficiently allege complete domination or how that alleged domination was used to commit a fraud. Plaintiff only offers conclusory assertions without the requisite detail to explain why the Court should sustain causes of action against the other defendants on the breach of contract claim. And, while plaintiff is correct that an individual may be liable for the *torts* of an entity of which he or she is a member, he did not adequately explain how that applies to a breach of contract cause of action. And there is no allegation that plaintiff obtained a guaranty of payment (or of collection) from any individual related to the loan.

Put another way, the Court views the discussion about the actual ownership of the building (plaintiff says that Holdings didn't actually own the property) and various representations made by defendants as irrelevant to this cause of action. Plaintiff explains in opposition that after these discussions he agreed to loan an initial amount of $500,000 and that he later increased the total to $700,000 (NYSCEF Doc. No. 83 at 1-2). But he later received various payments, including $200,000 in July 2019, and insists that over $600,000 remains due and owing (*id*. at 2-3). The record shows that plaintiff loaned money to Holdings and he received some, but certainly not all, of what was due.

Fraudulent Inducement

Similarly, the Court dismisses the second cause of action for fraudulent inducement. "To state a cause of action to recover damages for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*651 Bay St., LLC v Discenza*, 189 AD3d 952, 953-54, 137 NYS3d 374 [2d Dept 2020]).

Defendants correctly point out that plaintiff's allegations for this cause of action do not contain specific actions by each defendant; instead, plaintiff engages in a "group pleading" that fails to sufficiently separate the allegations between each defendant.

Moreover, plaintiff failed to meet the heightened pleading standard required for this cause of action as the allegations in the complaint do not contain details about the alleged misrepresentations and how they were a proximate cause of plaintiff's decision to enter into the agreement with Holdings. The Court also observes that "[a] cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (*651 Bay St., LLC*, 189 AD3d at 954 [internal quotations and citations omitted]). That is precisely what plaintiff appears to allege here; namely, that defendants misrepresented whether or not Holdings would be able to repay the loan.

And, as defendants emphasize, nothing in plaintiff's opposition (including plaintiff's affirmation) detail what was false in the various projections or documents supplied to plaintiff as part of the negotiating process. To the extent that plaintiff is alleging that future promises about the expected success of the building project were false, that is not an actionable basis for fraud (*GE Oil & Gas, Inc. v Turbine Generation Services, L.L.C.*, 168 AD3d 563, 564, 93 NYS3d 5 [1st Dept 2019] [noting that a promise about a prediction or expectation cannot form the basis of a fraud claim arising out of a misrepresentation]).

The document uploaded with the label "revenue information" (NYSCEF Doc. No. 86) appears to be written originally in Hebrew and no official translation was included in accordance with CPLR 2101. This document does not compel the Court to deny this branch of the motion. And it is not clear how this document, a promise about future actions, could form the basis of a fraud claim. After all, this case is about the alleged failure to repay a loan. It was not an

"investment" whereby plaintiff expected to receive some sort of return based on the success of the building project. Whether the projections came to fruition are irrelevant because plaintiff's return was not based upon those projections.

Unjust Enrichment & Breach of Good Faith and Fair Dealing

The Court dismisses these two causes of action (the third and fourth claims) on the grounds that they are both duplicative of the breach of contract claim.

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff. . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]). The Court views the unjust enrichment claims as a duplication of the breach of contract claim. Plaintiff alleges, in part, that "[i]t is against good will and equity to permit Defendants to accept the Loan and fail to pay Plaintiff pursuant to the terms of the Final Note" (NYSCEF Doc. No. 47, ¶ 118). That directly replicates 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" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104, 992 NYS2d 20 [1st Dept 2014]). Here, plaintiff alleges that "[he] would not have entered into the Final Note without the agreement of Holdings and HAP to repay the principal and interest when due and that "[plaintiff's] reasonable expectations of performance by Holdings and HAP were undermined by the breach of the covenant of good faith and fair dealing" (NYSCEF Doc. No. 47, ¶¶ 125 and 126). That does not assert facts separate from the breach of contract claim. Instead, it reiterates the point that Holdings simply did not pay back the loan.

Fifth Cause of Action

In this claim, plaintiff alleges that defendants "violated Section 10b of the Securities and Exchange Act of 1934, as amended and Role [sic] 10b-5 thereunder" (*id*. ¶ 140). The parties agree that in order to pursue this type of claim, the generally elements of a fraud claim apply (material misrepresentation, knowledge of its falsity, attempts to induce reliance and justifiable reliance as well as damages).

Plaintiff argues that defendant produced fabricated revenue projections for Holdings and the falsely insisted that Holdings owned the building. He also complains that defendants engaged in affinity fraud—namely that defendant took advantage of the fact that plaintiff and many of the defendants as well as non-parties were Israelis.

The Court dismisses this cause of action. As noted above, claims about possible future revenue projections are not actionable. In addition, plaintiff has not explained why it would make a difference who owned the building (which of course is easily determined by a simple due diligence computer search). For instance, there is no allegation that plaintiff's loan was secured by the property itself or that plaintiff was unable to foreclose on the property because of a misrepresentation about the ownership of the property.

And plaintiff cited to no caselaw about affinity fraud and how it could form the basis of a fraud claim in New York. Moreover, the claim does not adequately allege how the loan at issue is a security under either state or federal securities law and this cause of action is not pled with the requisite particularity.

Summary

The majority of plaintiff's opposition claims that he loaned the money because he was provided with materials about future projections concerning the building project. But "mere

puffery, opinions of value or future expectations" do not sustain a fraud claim based on alleged misrepresentations" (*Sidamonidze v Kay*, 304 AD2d 415, 416, 757 NYS2d 560 [1st Dept 2003]). To be sure, if an investor was convinced to invest and promised returns based on material misrepresentations, then that would state a claim based upon fraud. But, here, plaintiff was not an investor.

Instead, plaintiff was a lender – he loaned money to Holdings – and that loan was not secured by the property and there were no guarantors. And plaintiff received some (but not all) of what he claims he was owed. That renders the alleged misrepresentations as immaterial because the amount he was entitled to receive was not dependent on the success (or failure) of the building project or on which entity actually owned the property. At a macro level, the Court questions the significance of the ownership of the property on this record. Assuming that Holdings did not own the property has little bearing on the repayment of the loan. Plaintiff did not allege that his loan operated as a mortgage secured by the property itself.

Moreover, as defendants point out, the complaint is rife with confusing and contradictory assertions that make it difficult to ascertain plaintiff's exact theories for recovery. Although plaintiff claims that Holdings did not actually own the property in his opposition papers, the complaint alleges that "Upon information and belief, Holdings is the direct or indirect owner of the Property" (NYSCEF Doc. No. 47, ¶ 17). And he also alleges that Mazal, HAP and 2211 Third Avenue LLC (an entity that plaintiff has since discontinued from this case) were all direct or indirect owners of the subject property (*id*. ¶¶18-20). But those facts are not material for this unguaranteed and unsecured loan.

The instant decision should not be read to offer an opinion about possible enforcement efforts in the event that plaintiff prevails against Holdings and Holdings is unable to satisfy a

judgment. But plaintiff does not assert that Holdings is insolvent or raise claims pursuant to the Debtor & Creditor Law. And a theoretical inquiry about what entities or individuals may be liable in the event that Holdings cannot satisfy a judgment is premature. The instant complaint simply fails to adequately allege how any of the non-signatories to the agreement should be held liable—which is tantamount to being deemed guarantors -- because Holdings did not pay back the full amount it promised to pay plaintiff.

The Court finds that the issues surrounding service (which includes plaintiff's cross-motion for an extension of time to serve) are moot in light of this decision.

Accordingly, it is hereby

ORDERED that defendant's motion is granted and all claims against defendants 2211 THIRD AVENUE MAZAL LLC, HAP INVESTMENTS LLC, AMIR HASID, and ERAN POLACK are severed and dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff's second, third, fourth and fifth causes of action are severed and dismissed as against defendant 2211 THIRD AVENUE MAZAL HOLDINGS LLC and this defendant is directed to answer pursuant to the CPLR.

See NYSCEF Doc. No. 79 for details about the next conference.

11/16/2023
DATE

ARLENE P. BLUTH, J.S.C.

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