SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED FRIED Justice

E-FILE PART 60

BROWN, ROBERT

INDEX NO. 600876/10

MOTION DATE

- v -

MOTION SEQ. NO. 001

NOBLE INC.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/1/2010

HON. BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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ROBERT BROWN and RB GROUP LLC, :

Plaintiffs, :

-against- : Index No. 600876/10

NOBLE, INC. and THOMAS CARUSO, :

Defendants. :

----------x

Appearances:

For Plaintiffs:

Eckert Seamans Cherin & Mellott, LLC
10 Bank Street, Suite 1061
White Plains, NY 10606

Riyaz G. Bhimani, Esq.

For Defendants:

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Robert Hilzik, Esq. (Of counsel)
Richard F. Gluszak, Esq.

FRIED, J.:

This is a breach of contract action brought by the plaintiffs Robert Brown and RB Group LLC ("RB Group") against the defendants Noble, Inc. ("Noble") and Thomas Caruso. Before me is Caruso's motion to dismiss the complaint, pursuant to CPLR 3211(a)(1), (a)(3) and (a)(7).[1]

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[1] The defendant Noble takes no part in this motion and has appeared in this action by service of a separate verified answer. (Bhimani Aff, Exh E).

On June 8, 2009, in connection with a loan, Noble executed a promissory note in favor of Brown in the amount of $150,000, plus ten percent interest (the "Note"). The defendant Caruso, as President of Noble, was its signatory to the Note. The terms of the Note required Noble to make monthly interest-only payments to Brown of $1,250 between July 2009 and June 2010 and, thereafter, monthly payments of $5,671.71 until December 2012. (Note, ¶ 1).

On July 7, 2009, Noble and Brown entered into an accounts receivable purchase agreement, pursuant to which Noble agreed to sell certain accounts receivable worth $84,270.96 and Brown agreed to purchase those accounts receivable for a sum of $79,214.70 (the "Agreement"). The terms of the Agreement required Noble to make bi-weekly payments to Brown in repayment of the purchase price and a six percent fee. (Agmt, ¶¶ 1, 3). The Agreement imposes no obligations and affords no benefits individually upon Caruso, who was a signatory to the Agreement, on behalf of Noble. The plaintiff RB Group is a party to neither the Note nor the Agreement.

In the complaint, the plaintiffs allege that the defendants have breached the Note and the Agreement by failing to make payments, pursuant to their terms. Specifically, they claim that the defendants have paid the plaintiffs a total of only $10,000 in interest-only payments, with respect to the Note. (Compl, ¶ 26). With respect to the Agreement, they claim that the defendants have paid a total of only $29,623.08. (Compl, ¶ 19). The plaintiffs further claim that the defendants last made a payment on February 24, 2010, when their check for $500 was returned for insufficient funds. (Compl, ¶¶ 20-21).

On April 7, 2010, the plaintiffs served the complaint upon the defendants, asserting six causes of action: breach of contract, unjust enrichment, breach of implied covenant of good faith and fair dealing, promissory estoppel, fraud and misrepresentation and indemnity. The plaintiffs agreed to the defendants' request to extend their time to answer the complaint until May 31, 2010, which was effectively until June 1, 2010 by virtue of the Memorial Day Holiday. On June 7, 2010, Caruso served the instant motion upon the plaintiffs.

By his motion, Caruso argues that the complaint should be dismissed because, although named a party to the Agreement, no contractual relationship was formed between himself and the plaintiffs because there is an absence of consideration, and he is not a party to the Note. Thus, he argues that the plaintiffs have failed to state a claim against him, pursuant to CPLR 3211(a)(7).

The plaintiffs argue that Caruso's motion should be denied as untimely and because the claims in the complaint are sufficiently plead. In that regard, CPLR 3211(e) provides:

> At 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. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading[.]

Therefore, this statute requires that the responding party adhere to the basic time limit that is either serving a motion or a responsive pleading prior to the time for service of response papers has expired. Although the statute excepts a motion to dismiss based upon subsection (a)(7) from the mandate that it only be made prior to the time for service of response papers

has expired, the basic time limit of the statute must still be met. Here, this time limit was not met because Caruso has served no response papers and his motion was served several days after the time to respond expired.

Thus, Caruso's motion is untimely. However, because I find that his motion is meritorious, in that the plaintiffs have indeed failed to state a cause of action against him individually, it would be contrary to the interests of judicial economy to deny the motion and allow meritless causes of action to continue, simply because Caruso served the motion only several days after his time to respond expired. (*See Riddick v City of New York*, 4 AD3d 242, 245 [1st Dep't 2004] ["[A] prompt decision on a meritorious motion serves the interests of judicial economy[.]"]). Moreover, the plaintiffs' have identified no prejudice that they will incur as a result of the complaint being dismissed as against Caruso. To the contrary, the action will continue against the defendant Noble, who, unlike Caruso, is properly identified as a party to both the Note and the Agreement.

Furthermore, contrary to the plaintiffs' contention that the untimeliness of Caruso's motion mandates denial, the case law they cite is not analogous to the instant motion because there the defendants' motions were not denied solely on the basis of untimeliness. (*See Specht v Lanzuter Benevolent Assoc.*, No. 105143/08, 2010 WL 1047677 [NY County Mar. 15, 2010] [finding the defendants' motion untimely as served one month late and also contradicted by documentary evidence, precluding dismissal pursuant to CPLR 3211[a][1]]; *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, No. 603259/03, 2005 WL 5351322 [NY County Apr. 1, 2005] [finding the defendants' motion untimely as served nine months late, however, in "view of the strong policy in favor of resolving claims on the

merits, and the particular circumstances of this case -- including the Moving Defendants' potentially meritorious defenses to at least certain of plaintiff's causes of action, the lack of any apparent prejudice accruing to plaintiff as a result of the Moving Defendants' delay . . ." granted the defendants leave to serve late answers]).

Thus, I now turn to the merits of the motion.

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the plaintiff is afforded the "benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Id.* at 88). Under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." (*Sud v Sud*, 211 AD2d 423, 424 [1st Dep't 1995]).

First Cause of Action - Breach of Contract

"[T]he essential elements to pleading a breach of contract cause of action under New York law are: (1) that plaintiff and defendant made a contract; (2) that consideration existed; (3) that the plaintiff performed; (4) that the defendant breached the contract; and (5) that the plaintiff suffered damages as a consequence." (Haig, Com. Litig. in New York State Courts § 59:12 [2d ed.]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dep't 1986]).

Caruso argues that the plaintiffs' breach of contract cause of action must be dismissed because there is an absence of consideration and, without such, there can be no breach. (*See Furia*, 116 AD2d at 695; CPLR 3211[a][1]). Specifically, he contends that, in his individual capacity, he neither received a benefit nor suffered a detriment under the Note or the Agreement.

Notwithstanding this, the plaintiffs appear to attempt to assign upon the defendants equal liability for the alleged breaches of the Note and the Agreement, simply by grouping Noble and Caruso together throughout the complaint. However, the plaintiffs fail to submit any evidence in support of their claim of individual liability against Caruso. Indeed, it is apparent on the face of the Note that Caruso is not a party. With respect to the Agreement, it is apparent that although Caruso is a signatory in his capacity as President of Noble, the Agreement imposes no obligations upon him individually.

In any event, to bring such a claim of individual liability against Caruso, the plaintiffs are required to plead facts sufficient to warrant piercing of the corporate veil. (*See East Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 126 [2d Dep't 2009] ["A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff."]). The complaint is utterly devoid of such allegations and, therefore, the plaintiffs' breach of contract claim must be dismissed. (*See* CPLR 3211[a][7]).

Second Cause of Action - Unjust Enrichment

"To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at the party's expense and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 19 [2d Dep't 2008] [internal quotation marks omitted]). Here, the complaint is also devoid of allegations that Caruso individually benefitted at the expense of the plaintiffs as a result of an alleged breach of the Note or the Agreement. Rather, the plaintiffs simply group Noble and Caruso together in an attempt to assign equal liability. This is insufficient. Thus, the plaintiffs' unjust enrichment claim also must be dismissed.

Third Cause of Action - Breach of Implied Covenant of Good Faith and Fair Dealing

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). In the complaint, it is alleged that the defendants breached the covenant of good faith and fair dealing by failing to pay the plaintiffs, pursuant to the terms of the Note and Agreement. (Compl, ¶¶ 58-65). Thus, this claim is plainly duplicative of the plaintiffs' breach of contract claim. In any event, having dismissed the plaintiffs' cause of action for breach of contract against Caruso, their claim of breach of duty of good faith and fair dealing also cannot survive. (*See Jacobs Private Property, LLC v 450 Park LLC*, 22 AD3d 347, 347-48 [1st Dep't 2005] [dismissing cause of action for breach of implied covenant of good faith and fair dealing as duplicative of insufficient breach of contract cause of action]).

Fourth Cause of Action - Promissory Estoppel

To state a cause of action for promissory estoppel, the plaintiff must allege the existence of "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an inquiry sustained in reliance thereon." (*Braddock v Braddock*, 60 AD3d 84, 95 [1st Dep't 2009] [internal quotation marks omitted]). In the complaint, the plaintiffs fail to identify "a clear and unambiguous promise" made by Caruso upon which they relied to their detriment. Indeed, as discussed above, by grouping the defendants together in a conclusory fashion throughout the complaint, the plaintiffs fail to distinguish between the alleged wrongful conduct of Noble and Caruso. Moreover, the complaint is devoid of allegations with respect to the existence of a mere promise made by Caruso to the plaintiffs; rather the plaintiffs merely allege that Caruso made certain representations. (*See* Compl, ¶¶ 10-11). As such, their cause of action against Caruso for promissory estoppel must be dismissed.

Fifth Cause of Action - Fraud and Misrepresentation

To state a claim for fraud or misrepresentation, the plaintiff must allege "a knowing misrepresentation of a present material fact with the intent to deceive." (*Glatt v Mariner Partners, Inc.*, 63 AD3d 428, 429 [1st Dep't 2009]). In addition, CPLR 3016 provides that "[w]here the cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Here, the complaint is again devoid of allegations that Caruso individually engaged in fraudulent conduct or made material misrepresentations to the detriment of the plaintiffs, let alone the existence of any particularized allegations. This is

insufficient. Therefore, the plaintiffs' cause of action for fraud and misrepresentation against Caruso must also be dismissed. At argument, I granted the plaintiffs' oral request for leave to amend. Thus, the plaintiffs may move to amend with the submission of an affidavit containing the requisite particularity.

Sixth Cause of Action - Indemnity

In the complaint, the plaintiffs allege that "Noble and Caruso are obligated to indemnify and hold Plaintiffs harmless for any and all liabilities, obligations, penalties, claims, costs and expenses, together with costs and attorneys fees . . . ." (Compl, ¶ 81). However, they fail to identify the contractual provision upon which they rely.

There is no such indemnification provision in the Agreement. In the Note, where the defendant Noble is referred to in the recitals as the "Company," the following provision clearly and unequivocally imposes an indemnification obligation upon Noble but not upon Caruso:

> Expenses of Collection. The Company agrees to pay the holder's reasonable charges, costs and expenses, including reasonable attorneys' fees, incurred or paid by holder in connection with the collection and enforcement this [sic] Note.

(Note, ¶ 6). Thus, the plaintiffs' cause of action for indemnification against Caruso must be dismissed.

Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed as to the defendant Caruso and the caption shall be accordingly amended; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 1 , 2010

ENTER:

J.S.C.
HON. BERNARD J. FRIED