

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1400

CA 13-00881

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

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TRA-LIN CORPORATION, DOING BUSINESS AS SAMSON  
FUEL AND TRUCKING, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

EMPIRE BEEF CO., INC., DEFENDANT,  
STEVEN H. LEVINE AND LORI LEVINE,  
DEFENDANTS-APPELLANTS.

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CULLEY, MARKS, TANENBAUM & PEZZULO LLP, ROCHESTER (AMY L. DIFRANCO OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

MANGIONE & ASSOCIATES, P.C., ROCHESTER (RANDALL D. HILDERBRANDT OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 16, 2012. The order denied the motion of defendants Steven H. Levine and Lori Levine seeking, inter alia, to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint is dismissed against defendants Steven H. Levine and Lori Levine.

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, breach of contract and fraud against defendant Empire Beef Co., Inc. (Empire) and a single cause of action for fraud against Steven H. Levine and Lori Levine (defendants), after Empire rescinded payment for fuel deliveries made by plaintiff to Empire. Supreme Court erred in denying defendants' motion seeking, inter alia, to dismiss the amended complaint against them pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Even affording the cause of action for fraud against defendants a liberal construction and accepting the facts alleged as true (see *Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that plaintiff alleges therein only that defendants, as corporate officers, knew of or participated in Empire's decision to induce plaintiff to enter into a contract that Empire did not intend to honor, and "such allegations do not state a cause of action [for] fraud" (*Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111). The alleged fraudulent representation was directly related to and contained within a specific provision of the contract, and "[i]t is well settled that a cause of action to recover damages for fraud may not be maintained when the only fraud charged relates to

a breach of contract" (*Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d 643, 644).

Entered: January 3, 2014

Frances E. Cafarell  
Clerk of the Court