NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---X
HECTOR FELICIANO,

Plaintiff,

Index No. **816151/2021E**

Hon. **FIDEL E. GOMEZ**
Justice

- against -

ALAN I. NEWTON and 170278 ATLANTIC AVENUE LLC,

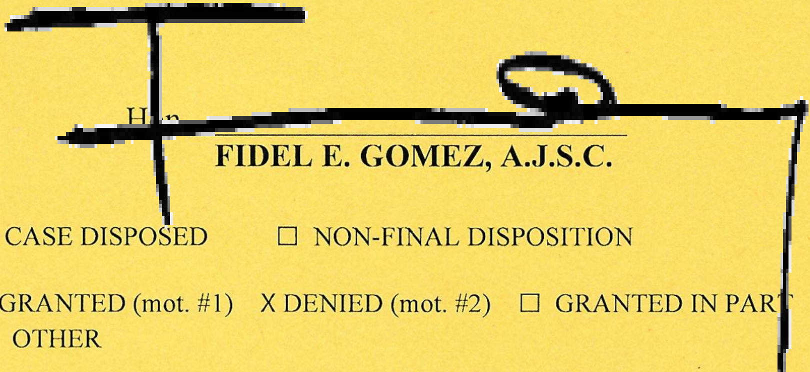
Defendants.
---X

The following papers numbered 1 to 4, read on these motions, noticed on 4/6/2022 and 4/20/2022, and duly submitted as no. 1 on the Motion Calendar of 9/12/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits	2	

Defendants Alan I. Newton and 170278 Atlantic Avenue, LLC's motion and Plaintiff Hector Feliciano's cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 11/16/22



Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE.. X CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. MOTION IS.. X GRANTED (mot. #1) X DENIED (mot. #2) ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.......................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE: ____________

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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HECTOR FELICIANO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **816151/2021E**

ALAN I. NEWTON and 170278 ATLANTIC AVENUE LLC,

Defendants.
---X

Defendants Alan Newton and 170278 Atlantic Avenue, LLC ("Defendants") move for an order dismissing this action pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff Hector Feliciano ("Plaintiff") opposes and cross-moves for summary judgment on his first cause of action.

For the reasons which follow, Defendants' motion is granted, in part, and Plaintiff's cross-motion is denied.

BACKGROUND:

On November 24, 2021, Plaintiff commenced the instant action by filing a summons and verified complaint. The complaint alleges causes of action for breach of contract, unjust enrichment and fraud. The complaint is verified by Plaintiff.

The complaint alleges that on or around October 2020, Plaintiff and Defendant Alan I. Newton ("Mr. Newton") entered into an agreement pursuant to which Mr. Newton purchased the property located at 467 East 143rd Street, Bronx, NY (the "First Premises") from Plaintiff (the "First Agreement") (Compl. ¶ 7). Plaintiff alleges that pursuant to the First Agreement, the First Premises was transferred from Plaintiff to Defendant 170278 Atlantic Avenue, LLC (the "Defendant LLC") (Compl. ¶ 8). Plaintiff alleges that as a result of the First Agreement, he was issued a 1099 and became liable for income taxes in the amount of approximately $40,000.00 (Compl. ¶ 9).

The complaint alleges that on or around October 21, 2021, Plaintiff and Mr. Newton entered into an agreement pursuant to which Mr. Newton purchased the property located at 465 East 143rd Street, Bronx, NY (the "Second Premises") from Plaintiff (the "Second Agreement").

Plaintiff alleges that as an essential part of the Second Agreement, Mr. Newton agreed to pay for the taxes Plaintiff incurred as a result of the sale of the First Premises, and to pay any taxes resulting from the sale of the Second Premises which would be reflected in a 1099 (Compl. ¶ 10). Attached to the complaint as Exhibit A is a one-page agreement, which states that:

> I Hector Feliciano the owner and_Alan I Newton, purchaser of property located a [sic] 465 east 143 street have agreed that all taxes that may derived [sic] from a short sale would be the sole responsibility of the buyer of the property and are due immediately after the sale. If any legal fee are [sic] inquired for the purpose of collecting such taxes the party have [sic] agree to be their liability. Buyer have [sic] also issue [sic] two checks to cover for the short sale taxes on a short sale of 467 east 143 street (the "October 21, 2021 Agreement").

The October 21, 2021 Agreement is signed by Plaintiff and Mr. Newton (Compl., Exhibit A).

The complaint alleges that at the closing on October 21, 2021, Mr. Newton issued checks to Plaintiff in the amounts of $26,507.00 and $13,617.00, which represent the taxes incurred by Plaintiff as a result of the sale of the First Premises (Compl. ¶ 11). Plaintiff alleges that at the time Mr. Newton gave these checks to Plaintiff, Mr. Newton was aware that he had already placed a stop payment on these checks and that they would not be honored by the bank (Compl. ¶ 12). Plaintiff alleges that Mr. Newton gave Plaintiff these checks in order to induce him to complete the sale of the Second Premises (Compl. ¶ 13). Plaintiff alleges that he executed the deed and transferred the Second Premises to Mr. Newton, believing that these checks would be honored (Compl. ¶ 15).

The complaint alleges that immediately after the closing, Plaintiff attempted to deposit the checks, but they were not accepted at the ATM. Plaintiff alleges that when he advised Mr. Newton that the checks were not accepted, Mr. Newton texted him that he should go directly to the bank teller to deposit the checks (Compl. ¶ 16). Plaintiff alleges that Mr. Newton was aware that he had already placed a stop payment on these checks (Compl. ¶ 18). Plaintiff alleges that on or around October 21, 2021, the bank teller informed Plaintiff that the issuer of the checks had already stopped payment on the checks (Compl. ¶ 19). Plaintiff alleges that he demanded that the checks be replaced, but Mr. Newton has refused (Compl. ¶ 20).

The complaint alleges that Plaintiff will incur taxes arising from the sale of the Second Premises in the amount of approximately $90,000.00 (Compl. ¶ 21). Plaintiff alleges that Mr.

Newton has refused to make payment for these taxes (Compl. ¶ 22). Plaintiff alleges that the parties' agreement provides that Mr. Newton would pay legal fees incurred in the collection of such taxes. Plaintiff alleges that he is incurring legal fees as a result of Mr. Newton's failure to pay the taxes, and as such, Mr. Newton is liable for his legal fees (Compl. ¶ 23-25).

On March 1, 2022, Defendants filed the instant motion. On March 10, 2022, Plaintiff filed the instant cross-motion. On September 12, 2022, the motions were marked fully submitted.

DISCUSSION:

Defendants' Motion to Dismiss:

In support of their motion, Defendants submitted, *inter alia*, an affidavit by Mr. Newton; the affidavit of Andrew Bovell, a real estate agent; a Residential Contract of Sale dated January 3, 2020, for the sale of the First Premises (the "First Residential Contract"); a Residential Contract of Sale dated January 3, 2020, for the sale of the Second Premises (the "Second Residential Contract"); and deeds for the two premises.

CPLR 3211(a)(1):

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence".

A document qualifies as "documentary evidence" for purposes of CPLR 3211(a)(1) if it is: (1) unambiguous, (2) of undisputed authenticity, and (3) its contents are essentially undeniable. (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]; *Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 715 [2d Dept 2019]). Documents such as judicial records, mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable, have been found to qualify as documentary evidence (*Mehrhof*, 168 AD3d 713 at 715; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]).

"A court may not dismiss a complaint based on documentary evidence unless 'the factual allegations are definitively contradicted by the evidence or a defense is conclusively established'" (*VXI Lux Holdco S.A.R.L.*, 171 AD3d 189 at 193; *Mehrhof,* 168 AD3d 713 at 715). "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the

court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence" (*Dixon v 105 West 75th Street, LLC*, 148 AD3d 623, 626-627 [1st Dept 2017]).

Breach of Contract (First and Second Causes of Action):

Defendants move to dismiss the causes of action for breach of contract, arguing that the October 21, 2021 Agreement is not enforceable, as Plaintiff did not provide any consideration in exchange for Mr. Newton's alleged promise to pay all taxes owed by Plaintiff on the real estate transactions.

Every contract must be supported by valid consideration (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]; *Oscar Schlegel Mfg. Co. v Peter Cooper's Glue Factory*, 231 NY 459, 461 [1921]; *Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 264 [1st Dept 1995]). "Mutual promises or obligations of parties to a contract, either express or necessarily implied, may furnish the requisite consideration" (*Oscar Schlegel Mfg. Co.* at 461). Consideration consists of "either a benefit to the promisor or a detriment to the promisee" (*Weiner* at 464; *Vista Food Exchange, Inc. v BenefitMall*, 138 AD3d 535, 536 [1st Dept 2016]; *Guzman v Ramos*, 191 AD3d 644, 646 [2d Dept 2021]). It may consist "either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*Lebedev v Blavatnik*, 193 AD3d 175, 183 [1st Dept 2021]). "[T]he parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value. Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny. It is enough that something of 'real value in the eye of the law' was exchanged" (*Apfel v Prudential-Bache Securities, Inc.*, 81 NY2d 470, 475-476 [1993]).

However, "generally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise" (*Lebedev* at 183; *Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017]). "That is, 'since the detriment had already been incurred, it cannot be said to have been bargained for in exchange for the promise'. However, General Obligations Law § 5-1105 makes an exception where the past consideration is explicitly recited in a writing." (*Korff* at 408).

General Obligations Law § 5-1105 provides that:

> A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

"To qualify for the exception, the description of the consideration must not be 'vague' or 'imprecise,' nor may extrinsic evidence be employed to assist in understanding the consideration" (*Korff* at 408). "[I]n seeking the exception afforded by General Obligations Law § 5-1105, resort to [] extrinsic evidence is impermissible" (*Korff* at 410; *Clark v Bank of N.Y.*, 185 AD2d 138, 140-141 [1st Dept 1992] ["In the absence of a writing that can be understood without dependence upon extrinsic evidence and that clearly describes the consideration, a promise derived from past consideration is simply not actionable"]).

Here, Defendants have demonstrated their entitlement to dismissal of the two causes of action for breach of contract. The October 21, 2021 Agreement demonstrates on its face that Plaintiff did not provide any consideration in exchange for Mr. Newton's promise to pay the taxes on the First and Second Premises. The Agreement contains no express consideration or any language from which it can be fairly inferred. Plaintiff does not dispute this fact.

The Court notes that although Plaintiff alleges in his complaint that the October 21, 2021 Agreement was an essential part of the Second Agreement, the documents submitted by Defendants conclusively establish otherwise. The Second Residential Contract demonstrates that the alleged Second Agreement was entered into on January 3, 2020, not on October 21, 2021, as Plaintiff alleges. Although Plaintiff avers in his affidavit in opposition that the Residential Contracts submitted by Defendants are not the final version of the agreements, Plaintiff submitted no evidence to substantiate his conclusory assertion. Moreover, Plaintiff does not deny executing the Residential Contracts. As such, the Second Residential Contract, which makes no mention of the October 21, 2021 Agreement, demonstrates that the October 21, 2021 Agreement, which was executed over a year and nine months after the Residential Contracts were executed, was not a part of the Second Agreement. The October 21, 2021 Agreement also makes no mention of the Second Residential Contract. Thus, Plaintiff's transfer of the deed and the Second Premises to Defendants cannot constitute consideration for the October 21, 2021 Agreement, as it is clear that the October 21, 2021 Agreement is separate and apart from the Second Residential Contract.

Furthermore, Plaintiff's execution of the deed and transfer of the Second Premises to Mr. Newton, which Plaintiff alleges it was induced to do in return for Mr. Newton's promise to pay the taxes on the First and Second Premises, cannot constitute consideration for the October 21, 2021 Agreement, as such action was already agreed to by the parties in the Second Residential Contract. Specifically, paragraph 14(a) states that:

> "Closing" means the settlement of the obligations of Seller and Purchaser to each other under this contract, including the payment of the purchase price to Seller, and the delivery to Purchaser of a Bargain and Sale deed in proper statutory short form for record, duly executed and acknowledged, so as to convey to Purchaser fee simple title to the Premises, free of all encumbrances, except as otherwise herein stated. The deed shall contain a covenant by Seller as required by subd. 5 of Section 13 of the Lien Law.

The Second Residential Contract does not condition the execution of the deed and transfer of the Second Premises on Defendants' payment of Plaintiff's taxes.

As such, the deed and transfer of the Second Premises cannot constitute consideration for the October 21, 2021 Agreement. Thus, the October 21, 2021 Agreement is not supported by valid consideration, and may not be enforced.[1]

Accordingly, Defendants' motion to dismiss the first and second causes of action for breach of contract is granted.

Unjust Enrichment (Third Cause of Action):

Defendants move to dismiss the cause of action for unjust enrichment, arguing, *inter alia*, that the parties' actions are guided by the agreements.

"The theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Mannino v Wells Fargo Home*

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[1] The Court also notes that even if Plaintiff's execution of the deed and transfer of the Second Premises could constitute consideration, it would constitute past consideration, as the execution of the deed and transfer of the Second Premises had already been promised in a prior agreement – the Second Residential Contract.

However, even if these actions could be considered past consideration, the October 21, 2021 Agreement would still not be enforceable, as it makes no mention of it, as required by General Obligations Law § 5-1105. Proof that such actions constituted past consideration would need to be proven extrinsically, which is not permissible (*Korff* at 140; *Clark* at 140-141).

Mortg., Inc., 155 AD3d 860, 862 [2d Dept 2017] [internal quotation marks omitted]). "The essential inquiry in any action for unjust enrichment … is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To plead a cause of action for unjust enrichment, "a plaintiff must allege that (1) the other party was enriched, (2) at that 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" (*Mannino* at 862; *Mandarin* at 182; *McMurray v Hye Won Jun*, 168 AD3d 435, *1 [1st Dept 2019]). Moreover, "[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd.* at 182; *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011] ["although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part"]).

Here, Defendants have demonstrated entitlement to dismissal of the cause of action for unjust enrichment. As Defendants argue, the two Residential Contracts, the existence of which are not disputed, govern the dispute between the parties in this action. Specifically, in the causes of action for breach of contract and unjust enrichment, Plaintiff alleges that he has been harmed as a result of Mr. Newton's failure to pay taxes in exchange for Plaintiff's transfer of the Second Premises to him (Compl. ¶ 26-31, 32-40, 41-46). The Residential Contracts govern the terms regarding the sale and transfer of the First and Second Premises. As such, Plaintiff may not recover in quasi-contract/under a claim for unjust enrichment (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter]; *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]; *Feigen v Advance Capital Management Corp.*, 150 AD2d 281, 283 [1st Dept 1989]; *Weiss v Benetton U.S.A. Corp.*, 124 AD3d 633, 636 [2d Dept 2015]). Plaintiff does not oppose.

Additionally, Defendants have demonstrated that transfer of the deed and the Second Premises to Defendants cannot constitute unjust enrichment, as it was a benefit already contracted for by the parties in the Second Residential Contract (*Kottler v Deutsche Bank AG*, 607 F Supp2d

447, 467 [SDNY 2009] ["[b]argained-for benefits cannot be deemed to unjustly enrich a contracting party"] [internal quotation marks omitted]; *Shilkoff, Inc. v 885 Third Avenue Corp.*, 299 AD2d 253, 253-254 [1st Dept 2002] ["While a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage, plaintiff's cause of action was properly dismissed because it was not unjust for 885 to retain funds obtained pursuant to its clear contractual right."]; *Ittleson v Barnett*, 304 AD2d 526, 528 [2d Dept 2003]).

Accordingly, Defendants' motion to dismiss the third cause of action for unjust enrichment is granted.

<u>CPLR 3211(a)(7)</u>:

Fraud (Fourth Cause of Action):

Defendants move to dismiss the cause of action for fraud, arguing that Plaintiff cannot demonstrate justifiable reliance, as the Residential Contracts had already been executed and mostly performed at the time the October 21, 2021 Agreement was executed.

"The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages" (*Minico Insurance Agency, LLC v AJP Contracting Corp.*, 166 AD3d 605, 607 [2d Dept 2018]; *Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646, 647 [2d Dept 2016]).

CPLR 3016(b) states that: "Where a 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". However, "[a]lthough under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]; *Minico Insurance Agency, LLC* at 607-608).

Here, Defendants have demonstrated entitlement to dismissal of the cause of action for fraud. Defendants have demonstrated that Plaintiff cannot demonstrate justifiable reliance, since Plaintiff was already required to execute the deed and transfer the Second Premises to Defendants pursuant to the terms of the Second Residential Contract, which the parties entered into long before they entered into the October 21, 2021 Agreement. As such, Plaintiff cannot demonstrate that he

relied on Mr. Newton's promise in the October 21, 2021 Agreement that he would pay the taxes or on Mr. Newton's issuance of the checks to execute the deed and transfer the Second Premises to Defendants.

Accordingly, Defendants' motion to dismiss the fourth cause of action for fraud is granted.

Defendants' Motion for Sanctions:

Defendants move for sanctions pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1(c)(1) against Plaintiff and/or his counsel, arguing that the facts did not support the commencement or continuation of this action.

In opposition, Plaintiff argues that sanctions should be awarded in his favor instead, because Defendants' request for sanctions is frivolous.

As a preliminary matter, CPLR § 8303-a is not applicable here, as it relates to "an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime" (CPLR § 8303-a[a]). The instant action does not fall into any of those categories.

22 NYCRR 130-1.1 provides, in relevant part, that:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart.
>
> (c) For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law . . .
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have

been apparent, or was brought to the attention of counsel or the party.

Here, in the exercise of its discretion, the Court declines to award sanctions in Defendants' favor, as Plaintiff's action is not completely bereft of any facts supporting the commencement or continuation of this action (*Caplan v Tofel*, 65 AD3d 1180, 1181 [2d Dept 2009] [holding that whether or not to grant a motion for sanctions pursuant to 22 NYCRR 130-1.1 is discretionary with the Supreme Court]; *Mascia v Maresco*, 39 AD3d 504, 506 [2d Dept 2007]).

Accordingly, Defendants' motion for sanctions is denied.

<u>Plaintiff's Cross-Motion for Summary Judgment</u>:

Plaintiff cross-moves for summary judgment on its first cause of action for breach of contract. Plaintiff seeks summary judgment in the amount of $40,124.00, the total amount of the checks issued by Mr. Newton.[2]

Here, in light of the fact that Plaintiff's causes of action for breach of contract were dismissed for the reasons stated above, Plaintiff's cross-motion for summary judgment on these causes of action is denied as moot.[3]

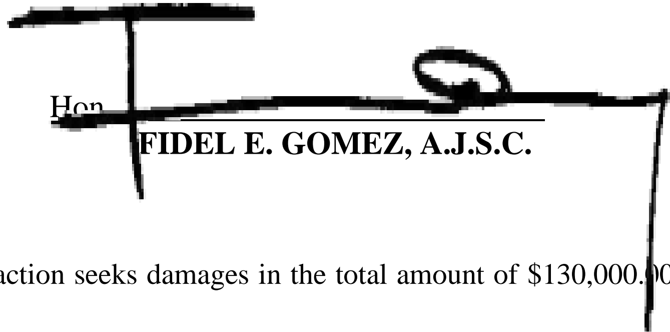
It is hereby

ORDERED that the Clerk dismiss the complaint; and it is further

ORDERED that the Defendants serve a copy of this Decision and Order upon Plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 11/16/22



Hon. **FIDEL E. GOMEZ, A.J.S.C.**

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[2] The Court notes that the first cause of action seeks damages in the total amount of $130,000.00, plus legal fees.

[3] Even if the Court were to consider Plaintiff's cross-motion as if the causes of action for breach of contract had not been dismissed, the motion would be denied, because Defendants have demonstrated that there was a lack of consideration for the checks (*See, i.e., Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009] ["Since plaintiff met his initial burden of demonstrating entitlement to recovery on the note by submitting proof of the note and defendants' default thereon, and defendants have not challenged the authenticity of their signatures on the note, the burden then shifted to defendants to demonstrate lack of consideration as a defense"]; *Di Marco v Bombard Car Co., Inc.*, 11 AD3d 960, 960-961 [4th Dept 2004]).