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6-9-10

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

PRESENT: JUDITH J. GISCHE PART 10
Justice

Moshe Deutsch

- v -

Tober Logistics, Inc.

INDEX NO. 113789/08

MOTION DATE

MOTION SEQ. NO. 002

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

FILED
JUN 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

with CC scheduled July 15, 2010 @ 9:30 a.m.

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

Dated: 6/4/10

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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MOSHE DEUTSCH,

Plaintiff,

-against-

TOBER LOGISTICS, INC., YONATHAN BENHAIM & STEVEN SCHNEIDER,

Defendants.

----------x

DECISION/ORDER
Index No.: 113789/08
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Notice of motion, MD affid, exhibits	1
SK affirm in opp, YBH affid, exh	2
MD affid, exhs	3
SK sur-reply affirm, exh	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of contract. Plaintiff moves: [1] for summary judgment in his favor against the defendants Tober Logistics, Inc., Yonathan Benhaim and Steven Schneider (collectively herein referred to as the "individual defendants") (CPLR § 3212); and [2] for an order striking the defendants' answer for failure to provide discovery (CPLR § 3126). The defendants oppose the motion and contend that issues of fact preclude summary judgment and/or that summary judgment is premature (CPLR § 3212 [f]).

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available (CPLR § 3212, Brill v. City of New York, 2 NY3d

648 [2004]).

The following facts are based upon documentary evidence. This suit arises from a Purchase Agreement dated on or about March 2008 (the "Agreement"), as well as two separate promissory notes purportedly executed in connection therewith. Plaintiff has provided the Agreement to the court which was signed by him and each individual defendant, Benhaim and Schneider, the later two signing as "purchaser & guarantor", on March 20, 2008. The Agreement provides that plaintiff, on behalf of Samon Storage, Inc. and Jade Logistics, Inc., would sell a business to Tober Group and or Tober Logistics Inc. The purchased assets were specifically "free from all liens, encumbrances and liabilities, except as otherwise provided in the [Agreement]", and included: [1] a schedule of assets annexed as exhibit "A" to the Agreement; [2] plaintiff's rights, title and interest in a particular telephone number; [3] the goodwill of the business; and [4] the assignment of third party contracts set forth as exhibit "B" to the Agreement.

Under the Agreement, the purchase price of the business was $300,000, to be paid pursuant to a separate promissory note. Plaintiff has provided a promissory note dated March 27, 2008, which was executed by plaintiff and Tober as well as the individual defendants, whereby all the defendants agreed to pay plaintiff $1,000 per week for 300 weeks (the "$300,000 Note").

Plaintiff has also provided a second promissory note dated March 27, 2008 whereby Tober and the individual defendants agreed to pay to plaintiff the principal sum of $100,000 on or before April 30, 2009, with interest only payments of $1000.00 due monthly on the first of each month commencing May 1, 2008 (the "$100,000 Note"). In

his affidavit, plaintiff maintains that the $100,000 Note was also made as part of the sale of plaintiff's business. However, the $100,000 Note is not specifically referenced in the Agreement.

According to plaintiff, the defendants have failed to make any payments due under either note. Plaintiff, therefore, seeks summary judgment on both Notes, and a judgment for the total amount due thereunder (first and second causes of action). Plaintiff also seeks reimbursement for his legal fees, costs and disbursements incurred by prosecuting this action (third cause of action).

The defendants' answer contains general denials, affirmative defenses and a counterclaim. The affirmative defenses are: [1 and 2] failure to state a cause of action; [3] lack of personal jurisdiction; [4] failure to serve the defendants; [5] that the defendants did not breach the agreement or violate a duty owed to plaintiff; [6] that any damages were the sole result of plaintiff's conduct, mistake and/or conduct of non-parties outside the defendants' control; [7] that the amended complaint is "frivolous, a sham, and states no substantial question of law or fact"; [8] that the defendants acted with good faith and without any fraud, negligence or malice; [9] that the plaintiff's claims are barred by the doctrines of collateral estoppel, release, waiver, laches, unclean hands, duress, illegality and/or accord and satisfaction; [10] offset; [11] statute of limitations; [12] that the amended complaint is barred by the failure of a condition precedent; [13] that the complaint is barred for failure to plead with particularity; [14] that the amended complaint is barred in by plaintiff's contributory negligence and/or comparative fault; [15] that damages are limited or barred under New Jersey law; [16] failure to mitigate damages; [17] that the individual defendants are not liable; [18] *res*

judicata; and [19] lack of consideration.

The defendants have also asserted a counterclaim for fraud.

In opposition to the instant motion, the defendants contend that the Agreement is unenforceable because it was entered into under duress and was induced by fraud. The defendants maintain that the merger clause in the agreement should not bar parol evidence since the agreement was the product of fraud in the inducement and/or was based upon fraudulent misrepresentations. In his affidavit, Benhaim[1] makes numerous factual representations in support of these claims. He claims, to wit, that in 2008, he and defendant Schneider were operating Tober Logistics, Inc., which was a storage business located at 100 Pulaski Street, Bayonne, NJ. At that time, plaintiff was operating a similar business at a different space at the same location known as Samon Storage, Inc. and/or Jade Logistics, Inc.

At some point, the individual defendants began subleasing some space from plaintiff, including a parking lot where the individual defendants stored cars (the "subleased premises"). For that space, plaintiff charged the defendants $3,000 a month in rent.

In or about March 2008, plaintiff wanted to return to Israel, and therefore sought to sell his business "quickly." During the course of negotiations about the sale of plaintiff's business, plaintiff "made certain representations to [the defendants] that [plaintiff's] business had a certain number of set customers, from which [the defendants]

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[1] Although he is sued in this action as "Yonathan Benhaim", in his affidavit, he spells his name as "Yoni Ben Haim" and claims to be the defendant in herein. Accordingly, the court's reference to "Benhaim" assumes that "Yonathan Benhaim" is also known as "Yoni Ben Haim."

could expect a certain amount of regular income." The defendants have provided to the court a document which they claim detailed the plaintiff's portrayal of his business' expenses and receivables. In short, the defendants contend that they relied on this document and plaintiff's other oral representations, which were false, and which induced the defendants to buy plaintiff's business. The defendants claim that the list of monthly customers was "bogus."

Benhaim further states that at a Starbucks, plaintiff put a proverbial "gun" to his and Schneider's heads, to get them to sign the Agreement and Notes, while threatening that if they did not sign "there and then", the defendants would have to move the cars out of the subleased premises or alternatively the $3,000 monthly rent would be immediately raised to $10,000. The defendants contend that these facts demonstrate the type of duress and coercion sufficient to compel the court to rescind the Agreement.

As for the subleased premises, the Agreement specifically provided that as a condition to closing thereupon, the Landlord of the subleased premises must agree to the assignment of "the lease at 100 Pulaski Street, Bayonne, New Jersey." The failure to obtain the assignment permitted either party to elect to terminate the Agreement "unless [plaintiff] obtained the [defendants'] written consent to an additional thirty (30) day extension of said contingency period."

The defendants further maintain that plaintiff falsely represented to them that: [1] he had "pre-paid rent for the months of April at $50,000 and for May 2008 at $50,000"; [2] "obtained the landlord's consent to an assignment of the lease"; and [3] that the defendants "would be entitled to a refund of [plaintiff's] security deposit with the landlord of an additional $50,000." The defendants claim that these prepayments and the

security deposit were the basis for the $100,000 Note that they executed in favor of the plaintiff.

After the defendants took over the plaintiff's premises, the landlord denied that an assignment had ever been executed and commenced eviction proceedings against the defendants, causing the defendants "to be locked out of the premises and lose all of [their] equipment and inventory which had been stored there." The defendants claim that the defendant breached section 3.2 of the Agreement by failing to obtain the landlord's consent to an assignment of the lease to the defendants.

Lastly, the defendants claim that the defendant also breached paragraph 4.1 g. of the Agreement, which provided that:

> There are no actions or proceedings, in law or in equity, pending against [Samon Storage Inc. and Jade Logistics, Inc.] in any Court, nor [do Samon Storage Inc. and Jade Logistics, Inc. have] any knowledge of any threatened actions against [them].

The defendants claim that after they took over the premises, the landlord claimed that plaintiff and/or his business owed it $15,000 for water main repairs undertaken by the landlord. The defendants claim they paid the landlord the $15,000 "in the hopes of convincing the landlord to still consent to an assignment of the lease" but "the landlord took [their] money, [and] still did not agree to the assignment."

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in

admissible form (Friends of Animals v Associated Fur Mfrs, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film , 3 NY2d 395 [1957]).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

Where it appears that facts essential to justify opposition may exist but cannot then be stated, the court may deny a motion for summary judgment (R.C.S. Farmers Markets Corp. Best Section End v. Great Amer. Ins. Co., 56 NY2d 918, 920-921 [1982]).

I. Discovery issues

At the outset, the court must address whether the plaintiff is entitled to discovery sanctions in the form of an order striking the defendants' answer. In his motion-in-chief, plaintiff generally claims that the defendants have failed to comply with the discovery in this case in a "dilatory, evasive and obstructive manner." The defendants' attorney claims in his affidavit that prior counsel for the defendants was supposed to appear for a deposition, but because of conditions beyond his control, was running late that day.

Apparently, the deposition did not take place because of defendant's counsel's lateness, and/or because plaintiff's attorney would or could not wait for the delayed deposition to take place. In reply, the plaintiff takes exception with the defendant's counsel's version of events, and maintains that an order striking the defendants' answer is warranted.

There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to the adverse parties (Lirit v. S.H. Laufer World, Inc., 84 AD2d 704 [1st Dept 1981]). Therefore, actions should be decided on their merits whenever possible and the harsh penalty of striking pleadings should only be imposed where the failure to comply was willful, contumacious or due to bad faith (Bassett v. Bando Sangsa Co., 103 AD2d 728 [1st Dept 1984]; Carter v. Baldwin Transp. Corp., 215 AD2d 256 [1st Dept 1995]). Based on the foregoing, plaintiff has failed to establish that the draconian penalty of striking the defendants' answer is warranted here because the defendants' failure to appear for a deposition was not willful, contumacious or due to bad faith. Accordingly, that branch of plaintiff's motion to strike the defendants' answer must be denied.

Relatedly, the court will also consider whether, as the defendants claim, summary judgment is premature. Defendant claims that additional facts exist which would support their counterclaim and defenses, and that these facts can only be discovered if they depose the plaintiff. CPLR § 3212 (f) broadly provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and

may make such other order as may be just." Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept 2004]; Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 [1st Dept 2006]).

At bar, the only information that defendants claim they need is the opportunity to depose plaintiff. However, for the reasons that follow, even if summary judgment is premature, the defendants have demonstrated a triable issue of fact sufficient to defeat the instant motion. In any event, since this case cannot be fully disposed of at this stage (no dispositive motions were made with respect to the defendants' counterclaim), the court will schedule a compliance conference so that an expedited discovery schedule can be set to get this case back on track. The parties are directed to appear in Part 10 on July 15, 2010 at 9:30 a.m.

II. Substantive issues

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damage (Furia v. Furia, 116 AD2d 694 [2d Dept 1986]). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp., 93 NY2d 584 [1999]).

A plaintiff suing on a promissory note establishes a *prima facie* case when he

shows an obligation for the payment of money under the terms of the instrument and the failure to pay in accordance with such terms (see e.g. European Am. Bank v Competition Motors, 182 AD2d 67, 71 [2d Dept 1992]). Once such a showing is made, the burden shifts to the defendants to demonstrate by admissible evidence the existence of a genuine issue of fact.

While the plaintiff has established the existence of the notes and the defendants' failure to make any payments thereunder, material issues of fact as to whether the defendants were fraudulently induced to enter into the Agreement and the notes preclude summary judgment (*see i.e.* GTE Automatic Elec. Inc. v. Martin's Inc., 127 AD2d 545 [1st Dept 1987]). Since there is no contention by plaintiff that he held the notes in due course, the defense of fraudulent inducement may properly be asserted against him (*see* UCC 3-306 [b]; Silber v. Muschel, 190 AD2d 727 [2d Dept 1993]). Moreover, in the absence of a merger clause in the notes, evidence of oral representations allegedly made by plaintiff is not precluded by the parol evidence rule (*see* Pan Atlantic Group, Inc. v. Isacsen, 114 AD2d 1022 [2d Dept 1985]; *see generally* Chimart Associates v. Paul, 66 NY2d 570 [1986]). In any event, the parol evidence rule would not bar the defendants from submitting evidence of the oral representations with respect to their fraud counterclaim (*see* Sabo v. Delman, 3 NY2d 155 [1957]).

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment (Channel Master Corp. v Aluminum Ltd. Sales, 4 NY2d 403, 406-408 [1958]; Megaris Furs v Gimbel Bros., 172 AD2d 209, 213 [1991]).

On this record, the nature and terms of the business transactions between the parties is complicated and unclear, and plaintiff has not shown that these parties were sophisticated business-persons dealing at arms-length (*cf.* Berlind v. Heinfling, 176 AD2d 452 [1st Dept 1991]). The court rejects the plaintiff's argument that the defendants' allegations of fraud and misrepresentation are conclusory and without evidentiary support in the record (*cf.* Spielman v. Acme Nat. Sales Co., 159 AD2d 918 [3d Dept 1990]). The defendants have alleged with sufficient particularity that the plaintiff made a number of affirmative misrepresentations which, if true, may constitute fraud in the inducement (*see* Slavin v. Victor, 168 AD2d 399 [1st Dept 1990]; Pan Atlantic Group v. Isacsen, *supra*). Defendants maintain that plaintiff grossly inflated the "average monthly receivables" of the business and lied about the number of regular monthly customers it had. The defendants have submitted a document which apparently memorializes these misrepresentations. Other misrepresentations include $100,000 of pre-paid rent, which the defendants maintain was the basis for the $100,000 Note they executed in favor of the plaintiff, and the plaintiff's purported assignment of the subleased premises to the defendants.

There are also other questions of fact which are material to the dispute at hand. While plaintiff claims that the notes were executed in connection with the Agreement, plaintiff has failed to provide any explanation for why the notes are made for $400,000 plus interest thereon, while the purchase price under the Agreement is only for $300,000. There is also the question as to whether the plaintiff misrepresented the debts and liability of the business to induce the defendants to enter into the subject agreements.

However, many of the affirmative defenses must be dismissed. As was already stated herein, plaintiff has indeed stated a cause of action for breach of the promissory notes. Accordingly, the first, second and seventh affirmative defenses are hereby severed and dismissed.

The third and fourth affirmative defenses, lack of personal jurisdiction have been waived (CPLR § 3211 [e]). Accordingly, the third and fourth affirmative defenses are hereby severed and dismissed.

The fifth affirmative defense, that the defendants have not breached the Agreement or otherwise violate a duty owed to the plaintiff thereunder is dismissed since it is vague and otherwise is not a defense to any the plaintiff's claims which are premised upon the promissory notes.

To the extent that the sixth affirmative defense alleges theories that the plaintiff and/or other non-parties are somehow responsible for the plaintiff's damages, this defense has been abandoned, and is otherwise subsumed by the tenth affirmative defense seeking an offset against plaintiff's damages and the defendants' sole counterclaim. Accordingly, the sixth affirmative defense is hereby severed and dismissed.

The eighth affirmative defense, that the defendants acted in good faith and without fraud, negligence or malice, is vague and unrelated to the causes of action asserted against them in the case-in-chief. Accordingly, the eighth affirmative defense is hereby severed and dismissed.

The ninth affirmative defense, that the complaint is barred by the doctrines of collateral estoppel, release, waiver, laches, unclean hands, duress, illegality and/or

accord and satisfaction, must also be dismissed. At the outset, the defendants have not advanced any argument in support of any of the aforementioned doctrines, other than duress, specifically economic duress. On a motion for summary judgment, the defendants must lay bare their proofs and demonstrate a triable issue of fact (Lo Breglio v. Marks, 105 AD2d 621 [1st Dept 1984] *affd* 65 NY2d 620 [1985]; Friends of Animals v Associated Fur Mfrs, *supra*). Having failed to meet this burden, these abandoned doctrines are unavailing.

The defendants' duress defense is also rejected. An instrument is voidable on the basis of economic duress where the defendants can allege and prove that they were (1) forced to sign the instrument (2) by means of a wrongful threat (3) that precluded the exercise of free will (4) which will result in irreparable harm or injury to him (Sosnoff v. Carter, 165 AD2d 486 [1st Dept 1991]). The defendants have failed to establish that the plaintiff made a wrongful threat, insofar as there is no showing that the plaintiff did not have the right to terminate the sublease agreement or increase the rent due thereunder (Coutts Bank (Switzerland) Ltd. v. Anatian, 261 AD2d 307 [1st Dept 1999]; Edison Stone Corp. v. 42nd Street Development Corp., 145 AD2d 249 [1st Dept 1989]). Nor have the defendants set forth what discovery they would need from plaintiff in order to bolster this defense. Moreover, mere financial pressure is insufficient to constitute duress (*see* Louis Hackmeyer, Inc. v. New Warsaw Bakery, Inc., 197 AD2d 677 [2d Dept 1993]). Accordingly, the defendant's economic duress defense is dismissed.

The tenth affirmative defense of offset does not need to be dismissed at this time. Whether the defendants are entitled to an offset is an issue that remains for trial.

However, the eleventh affirmative defense is without merit. The breach of the promissory notes allegedly occurred in April 2008, and this action was commenced well within the six-year statute of limitations applicable to this action. Accordingly, the eleventh affirmative defense is hereby severed and dismissed.

The twelfth affirmative defense, that the compliant is barred for failure of a condition precedent, has been abandoned by the defendants on this motion to dismiss. In any event, there are no conditions precedent in either promissory note. Accordingly, the twelfth affirmative defense is hereby severed and dismissed.

The thirteenth affirmative defense, failure to plead with specificity, must be dismissed. Plaintiff is not required to plead a breach of contract action with specificity (*cf.* CPLR § 3016). Accordingly, the thirteenth affirmative defense is hereby severed and dismissed.

The fourteenth affirmative defense based upon contributory and/or comparative negligence has no place in an action in law. Accordingly, this defense is hereby severed and dismissed.

The fifteenth affirmative defense, that damages are limited or barred under New Jersey law, is contravened by the express language of the promissory notes providing that New York law shall control. However, if the defendants prevail in their fraud defense and the contracts are rescinded, choice of law may indeed become an issue. Therefore, the fifteenth affirmative defense should not be dismissed at this time.

The sixteenth affirmative defense, failure to mitigate damages, again has no place in an action for breach of contract. Plaintiff has no common-law or contractual duty to mitigate damages in this context. Accordingly, the sixteenth affirmative defense

is hereby severed and dismissed.

The seventeenth affirmative defenses, that the individual defendants are generally not liable, is not subject to dismissal at this time. While it may be an open-ended defense, the fact that the plaintiff has failed to demonstrate entitlement to summary judgment at this juncture against these defendants renders this aspect of plaintiff's motion premature.

The eighteenth cause of action alleging *res judicata* is dismissed. The defendants' failure to come forth with any proof in support of this defense causes it to be infirm.

Finally, the nineteenth cause of action, alleging lack of consideration, cannot be dismissed at this time in light of the court's determination, above, that there are issues of fact as to whether the Notes were induced by fraudulent misrepresentations.

Wherever the defendants' arguments based upon the plaintiff's breach of the Agreement fit in, these arguments are unavailing to the extent that the defendants have not asserted a counterclaim sounding in breach of contract, and the amended complaint is not premised on the Agreement. Accordingly, the defendants arguments with respect thereto are rejected.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted only to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and eighteenth affirmative defenses are hereby severed and dismissed; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that the parties shall appear in Part 10 on July 15, 2010, at 9:30 a.m. for a compliance conference so that an expedited discovery schedule can be set.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 4, 2010

So Ordered:

HON. JUDITH J. GISCHE,J.S.C.