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

PRESENT: EDWARD H. LEHNER Justice

PART 19

Index Number : 603597/2005
FAULKNER, DELOIS
VS
BEER, ANDREW E.
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

motion is decided in accordance with accompanying memorandum decision

FILED
DEC 26 2007
COUNTY CLERK'S OFFICE
NEW YORK

FILED
DEC 26 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: DEC 21 2007

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: PART 19

----------X

DeLois Faulkner, as Trustee of the DeLois J. Faulkner Trust and as Trustee of the Stanley J. Boydston Trust, Josephine B. Smith, Douglas M. Lawson, as Trustee of the Douglas M. Lawson Associates Inc. Profit Sharing Plan and Trust, and Michael Karlin as Trustee of the MD 1998 Irrevocable Trust,

Plaintiffs,

-against-

Index No. 603597/05

Andrew E. Beer, Nustar.com, Inc., Susan Callister Beer, and J. Stephen Anderson,

Defendants.

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FILED
DEC 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

LEHNER, J:

Plaintiffs are investors in the defendant Delaware corporation, Nustar.com Inc. (Nustar). Defendant Andrew E. Beer (Beer) served as Chairman, President and Treasurer of Nustar. The remaining named defendants, Susan Callister Beer, Beer's wife, and J. Stephen Anderson, were both directors and officers of Nustar. Plaintiffs assert that Beer defrauded and manipulated them into buying vastly overpriced shares of Nustar, a high-risk start-up venture, for which he utilized his wife and other associates to control. Plaintiffs allege that, through oral and written promises, as well as through the issuance of fraudulent promotional material and financial statements, Beer induced plaintiffs to buy and then hold their investments in Nustar, even though Nustar stock was essentially worthless.

Defendants now move for an order, pursuant to CPLR 3211 (a) 7, dismissing the complaint on the ground that it fails to state a cause of action.

BACKGROUND

Beer founded Nustar in 1994. In its Offering Memorandum, Nustar stated that it would engage in, among other things, "[i]ncubating internet companies that can be developed into quality growth businesses" (Aff. of Paul T. Shoemaker, Exh H, at 16). According to the complaint, both prior to and after founding Nustar, Beer represented himself and his associates as uniquely well qualified and successful investment advisors, who were in the "highest percentile of money managers in the world" (Complaint, ¶ 13). Before founding Nustar, Beer, together with Jack R. Orben, was a principal and manager of AFS Group and its subsidiary Starwood Corporation (Starwood), a successful investment program for wealthy investors. After founding Nustar, Beer began actively soliciting investors in its new program, drawing in large part on the pool of Starwood investors. Plaintiffs allege that, starting in or about 1993, they entrusted funds to investment counseling and management by Beer and his associates. (id., ¶ 14).

In February 1997, Nustar issued a presentation booklet/prospectus (the Prospectus) to its investors. Plaintiffs allege that Nustar later issued additional documents that targeted wealthy investors, including a 1997 brochure entitled "An Ideal Investment Opportunity"; a private offering memorandum for two million shares of Minority Common Stock at $100 per share commencing July 20, 1999 (the First Offering Memorandum); and a private offering memorandum for two million shares of Minority Common Stock at $100 per share updated on December 31, 1999, and commencing on April 1, 2000 (the Second Offering Memorandum). Plaintiffs assert that none of the promotional material they were given included adequate cautions or disclaimers, and that Beer assured them that Nustar was a safer investment than the conservative stocks and bonds they had held. Plaintiffs also assert that these documents

contained material misrepresentations and/or omissions that were orally repeated by defendants, and which plaintiffs relied upon to their detriment. Specifically, plaintiffs allegedly relied upon the following:

1. *The Orben Statement.* Plaintiffs allege that were assured that there would be continuity between Starwood's successful management team and Nustar's management team. The Prospectus stated that Orben was chairman of Nustar. However, Orben resigned as the chairman of Nustar two years before the Prospectus was published and before plaintiffs invested in Nustar. Plaintiffs allege that they were never informed that the management team would not be as promised.

2. *The Symbiotic Relationship Statement.* Plaintiffs contend that the Prospectus falsely stated that, due to a "symbiotic relationship" between Nustar and AFS Group, Starwood would allow Nustar to use AFS Group's office staff, equipment, and research and development, and thus, Nustar would be able to put all funds raised to immediate productive use without any startup or overhead costs to Nustar (Complaint, ¶ 32). Plaintiffs allege that Nustar revoked this promise when it eventually acquired AFS Group in 1998, and thereby assumed all of AFS Group's expenses and overhead (id.).

3. *The "75/25" Statement.* Plaintiffs assert that Beer told them, both orally and in writing, that an investment in Nustar was "conservative, prudent and responsible," that Nustar's capitalization would be primarily in growth stocks, and that "75% of the funds raised [would be invested] in a diversified portfolio of quality publicly traded companies," while only 25% would be "allocated to start-up ventures" (id., ¶ 24). Plaintiffs allege that, despite these representations, defendants never abided by this ratio and never informed plaintiffs of a change in this ratio prior

to seeking investments from them.

4. *The "No Capital" Statement.* Plaintiffs allege that the Prospectus falsely stated that Nustar would seek to invest in non-public businesses "whose capital expenditures were not overwhelming," and that the Offering Memorandum falsely stated that Nustar would invest in "service businesses, in emerging growth areas, requiring little or no capital."

5. *The Financial Statements.* Plaintiffs allege that the annual reports annexed to the Offering Memorandum contained false financial statements, including lists of Nustar holdings with dollar values "as valued by management" (id., ¶ 46). Plaintiffs contend that "[t]hese investments and so-called 'assets' were in fact over-valued at the time and later turned out to be worthless" (id.).

6. *The "Dilution" Statement.* The Second Offering Memorandum states that the potential dilution to investors participating in the offering would be 12 to 15%. Plaintiffs allege that Beer orally confirmed this potential dilution statement in his numerous high pressure sales conversations with plaintiff Douglas M. Lawson (Lawson). Lawson contends that this statement was a critical representation that he relied upon in deciding to invest in Nustar. Lawson further contends that this statement was false because immediately after he purchased 5,000 shares of Nustar, his investment was diluted by more than 75 percent.

7. *The "Redemption" Statement.* Plaintiffs assert that, at the time of their investment, they were told that investors could redeem their shares at any time for liquid net asset value. Despite this representation, in February 2001, when the stock market declined, Nustar notified the stockholders that its management team had decided to institute a "moratorium" on redemptions.

8. *Other Material* Misstatements. Plaintiffs allege that they were not told that the company managing Nustar, Venvestec, was closely held by defendants and had no debt or equity capital, nor were they informed that several of the investments made by Nustar were in companies closely held by defendants which also lacked debt and equity capital. Plaintiffs claim that those investments were made to shift money to the individual defendants, and that doing so reduced the net asset value of Nustar. They assert that they were unable to redeem their shares, and that their investments are now worthless.

Defendants emphasize numerous warnings contained in the Offering Memorandum cautioning investors of the risks that the price of the securities may go down and that the predictions may not be met. They emphasize that in the middle of the title cover of the Offering Memorandum, it prominently states in all capital, italicized and bold letters: "THIS OFFERING INVOLVES A HIGH DEGREE OF RISK. SEE RISK FACTORS." It directs potential investors to the area of the Offering Memorandum detailing the risky and uncertain nature of an investment in Nustar. Defendants contend that, besides these general assertions, the Risk Factors conclude with a substantial paragraph describing the fact that many of the statements in the Offering Memorandum were "forward looking" within the meaning of the federal securities laws (Offering Memorandum, at 60). Further, defendants point out that the risks of investing in Nustar, and warnings that there could be no assurances about results, appeared throughout the Offering Memorandum and were not confined solely to the Risk Factors section.

The first entry of the Offering Memorandum appearing after the table of contents states, in relevant part, that: "THERE IS AT PRESENT NO PUBLIC MARKET FOR THESE SECURITIES. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THE INVESTMENT FOR AN INDEFINITE PERIOD OF TIME" (id. at 4). Further, the paragraph that followed noted that sales of the securities would be made only to persons who were either qualified institutional investors or accredited investors as defined in the federal securities laws (id.). The Offering Memorandum further cautioned that it should not be "RELIED UPON AS A PROMISE OR REPRESENTATION AS TO THE FUTURE OPERATIONS OR PROFITABILITY OF THE COMPANY" (id. at 5).

Plaintiffs first filed a complaint in federal court in July of 2003. In that action, plaintiffs alleged that, in violation Sections 10 (b) and 20 (a) of the Securities Exchange Act of 1934 (15 USC § 78j [b]) and Rule 10b-5 (17 CFR 240.10b-5), defendants had defrauded them into buying millions of dollars worth of vastly overpriced shares of Nustar, which was controlled by the individual defendants. Plaintiffs also asserted state law claims for fraudulent misrepresentation, breach of fiduciary duty, negligent misrepresentation and breach of contract.

Subsequently, the defendants moved to dismiss the federal complaint for failure to state a claim. On February 5, 2005, Judge George B. Daniels granted the motion and dismissed the complaint on the ground that the written materials relating to the investments had fully disclosed the risks involved and that thus, under the "bespeaks caution" doctrine, plaintiffs could not state a claim for securities fraud. Judge Daniels also dismissed the state law claims for fraudulent and negligent misrepresentation, breach of fiduciary duty and breach of contract, without prejudice (Faulkner v Beer, 2005 WL 476976 [SD NY 2005])

After filing an appeal to the United States Court of Appeals for the Second Circuit, plaintiffs commenced this action in October of 2005.

On September 8, 2006, the Court of Appeals for the Second Circuit vacated Judge Daniels' decision on the ground that the record was not entirely clear as to whether all of the plaintiffs had received the documentation containing the cautionary statements, ruling:

> The district court relied on a variety of documents, including the Offering Memoranda, Annual Reports, and a Prospectus, in deciding to dismiss the complaint. However, the court conducted no analysis of which plaintiffs had received which documents either before or after they invested, though none of the plaintiffs appears to have claimed to have received all of the documents attached to the complaint. For example, although the district court relied heavily on the cautionary language of the Offering Memoranda dated July 20, 1999 and April 1, 2000, the complaint states that, except for Lawson, all of the plaintiffs invested before either of the Offering Memoranda was issued. Only the complaint's description of Lawson's investment asserts that he received either of the Offering Memoranda. The amended complaint does not mention any other plaintiff receiving an offering memorandum or deciding to invest in Nustar in reliance on it. It is not clear whether the other plaintiffs had or had not relied on either of the Offering Memoranda in making or maintaining their investments. Dismissal under Rule 12 (b) (6) critically depends on whether specific plaintiffs had invested before the issuance of the Offering Memoranda, Annual Reports and Prospectus. For example, if a plaintiff had not received a copy of either Offering Memorandum, then that plaintiff's claims could not be dismissed based on warnings of risk in those documents.
>
> The factual problems are not limited to which plaintiffs received the Offering Memoranda; the same difficulties exist regarding which plaintiffs received which Annual Reports and which received the Prospectus. The district court appears to have assumed that all plaintiffs had received all of the documents attached to the complaint. However, the terms of the complaint itself clearly put that factual assumption in dispute.

(Faulkner v Beer, 463 F3d 130, 135).

Subsequently, by notice of dismissal dated September 19, 2006, plaintiffs withdrew their claims in the federal action "without prejudice," and proceeded to prosecute their claims in this action.

DISCUSSION

In support of their motion to dismiss, defendants argue that the complaint fails to state a cause of action because: (1) the fraud claim does not allege false representations of fact and the allegations that improper projections were made are inadequate; (2) the fraud claim is barred by the statute of limitations; (3) the claims for breach of fiduciary duty and negligent misrepresentation are precluded because there is no private right of action under the Martin Act; and (4) the contract claims are without merit.

Fraudulent Misrepresentation (First Cause of Action)

Plaintiffs' fraud claim centers on defendants' predictions concerning the potential for appreciation in their investments. Defendants contend that, because the Offering Memorandum and the other investment documents were replete with warnings and cautions notifying investors of the risks that the price of the securities may go down, and that the predictions may not be met, under the "bespeaks caution" doctrine (see DeMaria v Andersen, 318 F3d 170 [2d Cir 2003]; Halperin v eBanker USA.com, Inc., 295 F3d 352 [2d Cir 2002]), this cautionary language was sufficient to preclude liability for the allegedly fraudulent misrepresentations. Defendants emphasize that the district court has already concluded that the cautionary statements contained in the Offering Memorandum were sufficient to shield defendants from liability under the "bespeaks caution" doctrine, and that thus, the fraud claim should be dismissed by this court as well on the same grounds.

However, in making this argument, defendants ignore the fact that Justice Daniels' ruling was vacated by the Second Circuit on the ground that it was unclear whether all of the plaintiffs had received the offering documents containing the cautionary statements. Before materials outside the record may become the basis for a dismissal, it must be clear that there exist no disputed issues of fact regarding the relevance of the document (see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582 [2005]). The present record does not satisfy this condition. As little or no discovery has been conducted in this action, it is still unclear which plaintiffs received the offering documents at issue. If a plaintiff did not received a copy of the Offering Memorandum prior to investing in Nustar, then that plaintiff's claims cannot be dismissed based on warnings of risk in that document. Accordingly, defendants' arguments that all plaintiffs were clearly put on notice of the risks involved in investing in Nustar by virtue of the cautionary statements contained in the Offering Memorandum cannot serve as the basis for a dismissal of plaintiffs' fraud claim.

Defendants also contend that the fraud claim is barred by the statute of limitations. The statute of limitations applicable to plaintiffs' fraud claim is as follows:

> 8. an action based on fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

CPLR 213 (8). Defendants argue that, based upon the allegations of the complaint, it is clear that all of the plaintiffs, except Lawson, invested in Nustar more than six years prior to the October 7, 2005 filing of this action (see Complaint, ¶ 15 [plaintiff DeLois J. Faulkner invested in August 1997, January 1999, March 1999 and May 1999]; ¶ 36 [plaintiff Josephine B. Smith invested in

May 1997 and March 1999]; ¶ 38 [plaintiff Michael Karlin invested in his capacity as trustee of a trust for the benefit of Mark and Margaret Damon in May 1999]; ¶ 40 [plaintiff Lawson invested in July of 2000]).

However, contrary to defendants' contentions, the time when plaintiffs each made their initial investments does not necessarily signal the accrual of their claim for fraud. The doctrine of equitable tolling can prevent a defendant from pleading the statute of limitations as a defense where, by fraud, misrepresentation or deception, he or she induced the plaintiff to refrain from filing a timely action (Simcuski v Saeli, 44 NY2d 442 [1978]; Green v Albert, 199 AD2d 465 [2d Dept 1993]). Here, plaintiffs allege that defendants continued to make material misrepresentations about the nature of plaintiffs' investments and the value thereof up to the time that plaintiffs filed their federal complaint in July 2003, including fraudulent financial reports for the years 2000 and 2001, and a phone message left by Beer for Smith on November 7, 2003 containing material misrepresentations about the true value of her investments (see Complaint, ¶¶ 37, 58). Plaintiffs further allege that defendants sent them written statements confirming the safety of Nustar at least 39 times in 47 documents, from 1997 through the present (id., ¶ 47). Thus, plaintiffs assert, their cause of action accrued within six years prior to the filing of the complaint in this action.

Accepting plaintiffs' allegations as true, as I must (see Leon v Martinez, 84 NY2d 83 [1994]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), these allegations are sufficient, at this early stage of the litigation, to prevent defendants from successfully asserting a statute of limitations defense.

Accordingly, defendants' motion for dismissal of plaintiffs' cause of action for fraudulent misrepresentation is denied.

Breach of Fiduciary Duty and Negligent Misrepresentation (Second, Third and Fifth Causes of Action)

The second, third and fifth causes of action contained in the complaint are claims for breach of fiduciary duty and negligent misrepresentation. Defendants contend that such claims are replete with allegations of dishonesty and deception (see Complaint, ¶ 82 [plaintiffs allege that defendants breached their fiduciary duty "by their misrepresentations and misconduct described hereinabove"]; id., ¶ 87 [in their negligent misrepresentation cause of action, plaintiffs allege that defendants provided them with "false information" and "concealed from them material facts concerning the value of Nustar and their investments therein"]). As such, defendants argue that these claims are barred under the Martin Act, New York's version of the Blue Sky laws which grants the Attorney General the power to regulate fraud and deception in the sale of securities (General Business Law § 352-c), and must be dismissed.

The court rejects this contention. In Kramer v W10Z/515 Real Estate Limited Partnership, 44 AD3d 457 [1st Dept 2007]), the Appellate Division recently overturned prior holdings and ruled that the Martin Act does not preclude a private party from prosecuting claims for fraudulent and deceptive practices in connection with the sale of securities, even if the alleged fraudulent conduct is such that the Attorney General would be authorized to bring an action against the defendant under the Martin Act. Accordingly, plaintiffs' claims for breach of fiduciary and negligent misrepresentation are not barred by such law. See also, Scalp & Blade, Inc. v Advest, Inc., 281 AD2d 882, 883 [4th Dept 2001] [refusing to dismiss claims for breach of

fiduciary duty and negligent misrepresentation on the ground that "[n]othing in the Martin Act, or in the Court of Appeals cases construing it, precludes a plaintiff from maintaining common-law causes of action based on such facts as might give the Attorney-General a basis for proceeding civilly or criminally against a defendant under the Martin Act"]; Cromer Finance Ltd. v Berger, 2001 WL 1112548 [SD NY 2001] [holding that the Martin Act did not preclude a common-law negligence claim as the Court of Appeals had not yet ruled on the issue and the lower courts were split]).

Accordingly, the branch of defendants' motion to dismiss the breach of fiduciary duty and negligent misrepresentation claims is denied.

Breach of Contract (Fourth Cause of Action)

Plaintiffs' fourth cause of action alleges breach of an "Oral Redemption Agreement" and a "Written Redemption Agreement" against all of the defendants. Plaintiffs allege that, under the terms of the Oral Redemption Agreement, "Beer expressly promised Plaintiffs, as a condition of their investing in Nustar that, if the Plaintiffs so chose, they could retrieve the money they had invested ... by Nustar's redemption of their stock" (Complaint, ¶ 94). Plaintiffs further allege that defendants later memorialized that agreement with the Written Redemption Agreement, "which unilaterally, without the advance consent of the Plaintiffs, qualified that promise with a 2-year time requirement and a redemption calculation clause calling for redemption at 'Liquid Net Asset Value'" (id.). According to plaintiffs, after they attempted to exercise the Written Redemption Agreement four years later, defendants unilaterally rescinded that redemption agreement by declaring a "moratorium" on redemptions (id., ¶¶ 94, 96).

As a general rule, in order for someone to be liable for a breach of contract, that

person must be a party to the contract (Smith v Fitzsimmons, 180 AD2d 177, 180 [4th Dept 1992] ["As a general rule, privity or its equivalent remains the predicate for imposing liability for nonperformance of contractual obligations"]; Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club, 156 AD2d 550, 551 [2d Dept 1989]; HDR, Inc. v International Aircraft Parts, Inc., 257 AD2d 603, 604 [2d Dept 1999] ["Neither of these defendants was a party to the contract alleged to have been breached. As such, they cannot be bound by the contract"]).

As alleged in the complaint, only Nustar was allegedly obligated to redeem plaintiffs' shares pursuant to the Oral Redemption Agreement and the Written Redemption Agreement. The breach of contract cause of action contains no allegations concerning any of the individual defendants. Thus, privity of contract does not exist – nor has it been alleged – between plaintiffs and the individual defendants. Indeed, "'[t]he decisions are clear that an officer or director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken'" (Countrywide Publications v Kable News Co., 74 AD2d 522 [1st Dept 1980] [citations omitted]). "'To hold otherwise would be a dangerous doctrine and would subject corporate officers and directors continually to liability on corporate contracts and go far toward undermining the limitation of liability which is one of the principal objects of corporations'" (id.). See also, Citicorp Retail Services v Wellington Mercantile Services, 90 AD2d 532, [2d Dept 1982] ["Officers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract merely because they have made decisions and taken actions that resulted in the

corporation's breaching its contract"]). Although plaintiffs argue, in opposition to the motion, that allegations of bad faith, acting outside the scope of duties, or personal profit can support a breach of contract action against individual corporate officers, plaintiffs' cause of action for breach of contract contains no such allegations (see Complaint, ¶¶ 93-98).

For the foregoing reasons, that portion of the fourth cause of action relating to the Written Redemption Agreement does not state a cause of action against the individual defendants, and must be dismissed against all defendants except Nustar. But, for other reasons, that portion of the fourth cause of action relating to the Written Redemption Agreement must be dismissed against all defendants, including Nustar. In order to allege a valid breach of contract claim, a plaintiff must be able to prove damages (see Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). Indeed, "damages are an essential element of a breach of contract cause of action" (Orville v Newski, Inc., 155 AD2d 799, 800 [3d Dept 1989], appeal dismissed 75 NY2d 946 [1990]).

The relevant provision of the Written Redemption Agreement provided for redemption at liquid net asset value (Complaint, ¶ 94), but plaintiffs do not allege that Nustar had a positive net liquid asset value at the time of their alleged "exercise" of the Written Redemption Agreement. To the contrary, plaintiffs allege that Nustar's "'Liquid Net Asset Value' [was] essentially worthless." (id., ¶ 57). As such, plaintiffs cannot allege that they have sustained any contract damages, and this cause of action must be dismissed (see Marbax Assocs. Ltd. Partnership v Resources Property Improvement Corp., 196 AD2d 727 [1st Dept], lv denied 82 NY2d 662 [1993] [breach of contract claim dismissed where limited partnership sustained no contract damages from failure of defendants to repay loan obligations to limited partners on demand, where partnerships were not obligated to pay respective limited partners until respective

defendants came forward with payments]; see also National Cleaning Contractors v Uris 380 Madison Corp., 84 AD2d 718 [1st Dept 1981] [defendant's counterclaim for breach of contract dismissed where it sustained no damages due to alleged breach]).

In addition, the claims based upon the Oral Redemption Agreement are barred by the parol evidence rule. The complaint alleges that the Written Redemption Agreement, a later memorialization of the Oral Redemption Agreement, constituted an enforceable contract, and indeed, plaintiffs allegedly elected to enforce it (see id., ¶ 94 ["Plaintiffs attempted to exercise the Written Redemption Agreement four years later"]). As such, any claims relating to the Oral Redemption Agreement must be dismissed. "The parol evidence rule bars admission of antecedent or contemporaneous oral representations to vary or add to the terms of a written agreement" (SAA-A, Inc. v Morgan Stanley Dean Witter & Co., 281 AD2d 201, 203 [1st Dept 2001]). See also, Braten v Bankers Trust Co., 60 NY2d 155 [1983] [; Rong Rong Jiang v Tan, 11 AD3d 373 [1st Dept 2004].

Accordingly, in light of the existence of the Written Redemption Agreement, plaintiffs are precluded from claiming that they relied on defendants' prior oral representations contained in the Oral Redemption Agreement (see Jarecki v Shung Moo Louie, 95 NY2d 665 [2001] [extrinsic evidence cannot alter contract terms]; Longo v Butler Equities II, L.P., 278 AD2d 97 [1st Dept 2000] [rejecting plaintiff's claim that he had received prior oral representations that contradicted the express written terms of the limited partnership agreement]).

Plaintiffs seek to avoid the application of the parol evidence rule by citing to Iandoli v Asiatic Petroleum Corp. (57 AD2d 815 [1st Dept], appeal dismissed 42 NY2d 1011 [1977]). That case, however, is completely inapposite. There, the plaintiff asserted that there was a writing which needed to be supplemented by parol evidence. The Court declined to

dismiss plaintiff's contract claim, holding that the written contract need not contain all the material terms, and that some terms could be supplied through parol evidence. However, that is not the issue here. Rather, the issue at hand is whether plaintiffs can assert that there was an antecedent Oral Redemption Agreement while, at the same time, asserting that there was a Written Redemption Agreement. Pursuant to the parol evidence rule, they cannot.

Plaintiffs also contend that evidence of the Oral Redemption Agreement "is admissible under [an] exception to the parol evidence rule: mistake and fraud" (Pl. Opp., at 26). Plaintiffs assert that defendants "fraudulently misrepresented the substance of the Written Redemption Agreement so that plaintiffs believed they were signing a document permitting them to withdraw their investments at any time without any notice requirement" (id.). However, plaintiffs do not make this allegation in their breach of contract cause of action (see Complaint, ¶¶ 93-98). Indeed, this cause of action contains no reference to unilateral mistake or fraud or bad faith. Instead, this cause of action asserts that defendants breached the redemption agreements by refusing to honor plaintiffs' demand for redemption (see id.). Hence, the fourth cause of action for breach of contract is dismissed.

In summary, the motion of defendants to dismiss the complaint is denied except with respect to the fourth cause of action which is dismissed. Defendants shall have 20 days after service of a copy of this order with notice of entry in which to serve an answer.

This decision constitutes the order of the court.

Dated: December 21, 2007

ENTER:

J.S.C.

EDWARD H. LEHNER