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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 101173/2008

MIDDLE MMC, LLC

VS.

JENKINS, ELIZABETH MCKAY

SEQUENCE NUMBER : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE 4/11/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

FILED

MAY 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants to dismiss the complaint pursuant to (1) CPLR §3211 (a)(1) on the ground that their defense is founded upon documentary evidence; (2) CPLR §3211 (a)(5) on the ground that the action may not be maintained by reason of prior release by plaintiff, Middle M, LLC of its claims; (3) CPLR §3211 (a)(7) for failure to state a cause of action; (4) CPLR §3211 (a)(10) for failure to join a necessary party; and (5) Section 130-1.1(c) and 22 NYCRR 130-1.1(c) for an award to defendants of costs, attorneys' fees, and sanctions, is denied, in its entirety; and it is further

ORDERED that the cross-motion by plaintiff for a default judgment is denied; and it is further

ORDERED that defendants serve an answer to the Amended Complaint within 30 days of the date of this decision; and it is further

ORDERED that the parties appear for a preliminary conference on August 5, 2008, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 5/27/08

J.S.C.

HON. CAROL EDMEAD

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

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

----------X

MIDDLE M LLC,

Plaintiff,

Index No. 101173-2008

-against-

ELIZABETH MCKAY JENKINS and
EMJ DESIGNS LLC,

Defendants.

----------X

MEMORANDUM DECISION

In this action to rescind a certain settlement agreement, defendants Elizabeth McKay Jenkins ("Ms. Jenkins") and her company EMJ Designs LLC ("EMJ") (collectively "defendants") move to dismiss the complaint pursuant to (1) CPLR §3211 (a)(1) on the ground that their defense is founded upon documentary evidence; (2) CPLR §3211 (a)(5) on the ground that the action may not be maintained by reason of prior release by plaintiff, Middle M, LLC ("Middle M") of its claims; (3) CPLR §3211 (a)(7) for failure to state a cause of action; (4) CPLR §3211 (a)(10) for failure to join a necessary party; and (5) Section 130-1.1(c) and 22 NYCRR 130-1.1(c) for an award to defendants of costs, attorneys' fees, and sanctions.

Factual Background[1]

Ms. Jenkins is a fashion designer who began her own line of women's clothing in 2006. Ms. Jenkins sought a financial backer with whom to partner and launch her new line. After speaking with several investors, Scott M. Heath ("Heath") approached Ms. Jenkins. Heath, a principal of SMH Partners LLC ("SMH"), was engaged in the wholesale apparel business under

[1] The facts are taken from Middle M's Amended Complaint and the Complaint filed by defendants under Index No. 603582-2007.

the trade name, "*Bushwacker*" and represented to Ms. Jenkins that he could secure manufacturing, warehousing, and distribution support for her design work and apparel line.

In June 2006, Ms. Jenkins began designing her apparel line from her home under the label "*Lyall by Liz*." With Heath's assistance, Ms. Jenkins formed EMJ to operate as a design company. At Heath's recommendation, in July 2006, Heath and Ms. Jenkins formed a limited liability company named "Middle M" as a vehicle for the design, manufacture and distribution of Ms. Jenkins' apparel line. In August 2006, Ms. Jenkins changed the label and trademark of her label to *Elizabeth McKay* (the "Mark").

Thereafter, on September 13, 2006, Heath and EMJ entered into a Limited Liability Company Management Agreement (the "Management Agreement"). Under the Management Agreement, Heath was the Managing Member, with 60% interest in Middle M, and EMJ had a 40% interest in Middle M. EMJ contributed $80,400 and one year of Ms. Jenkins' design services as initial capital. Heath contributed as initial capital $600 and administrative resources, warehousing for the company's products, and access to credit available to SMH. According to Middle M, the principal purpose of the Management Agreement was to establish a fully equipped showroom and design studio, plus an experienced office staff at Heath's location on West 39th Street, New York, New York.

Middle M claims that Heath, as 60% member of Middle M, expended over $100,000 for expenses to promote Ms. Jenkins and EMJ's business, and Ms. Jenkins and EMJ warranted and represented to Middle M that (1) only a Spring 2008 Line had been created by Ms. Jenkins and EMJ and (2) no design work of any kind had been commenced by Ms. Jenkins and EMJ on the Fall 2008 Line (the "Representations").

According to Ms. Jenkins, by January 2007, she became aware that the factory engaged by Heath had stopped production and that Heath was facing financial problems. Ms. Jenkins maintains that by that time, Heath acknowledged having underestimated the startup expenses for Middle M, refused to share with her the financial matters of the company, and created a verbally abusive, and intolerable working environment. Heath also refused to provide Ms. Jenkins with an employment agreement pursuant to the Managing Agreement. Ms. Jenkins also noticed that the apparel designed under *Bushwacker* began to look similar to her own designs, and that Heath and SMH converted her designs for use as *Bushwacker* designs. Heath also asserted a proprietary interest in the Mark as a trademark of Middle M, notwithstanding the fact that ownership of the Mark is the property of EMJ and Ms. Jenkins.

On October 29, 2007, Ms. Jenkins and EMJ commenced an action against Heath, SMH, Middle M and DOES 1-10 to dissolve Middle M, to enjoin Middle M, Heath, and SMH from using the Mark, for damages for breach of the Management Agreement, breach of fiduciary obligations owed by Heath and SMH, and damages for theft of trade secrets and unfair competition by Heath and SMH.

Thereafter, on November 19, 2007, Heath, Ms. Jenkins and EMJ entered into a "Settlement Agreement and Release" (the "Settlement Agreement"). The Settlement Agreement provided that:

> 1. **Ongoing Business of Middle M.** The SMH Partics [SMH and Heath (collectively, the "Heath Parties")] may conduct the ongoing business of Middle M through and including June 30, 2008. From the date hereof until June 30, 2008, Middle M's business will be limited to completion of work necessary to fill seasonal orders for "Spring 08." Subject to such limitation, Middle M may use the trade name *Elizabeth McKay*, together with any distinctive logos, labels and Marks heretofore used by Middle M in association with the *Elizabeth McKay*

name and the *Elizabeth McKay products* designed, manufactured and sold by Middle M . . . .

2. **Dissolution of Middle M.** No later than June 30, 2008, the [Heath] Parties will wind up the affairs of Middle M and cause Middle M to be dissolved.

* * * * *

4. **Trademark Rights.** Middle M's license for use of the *Elizabeth McKay* trade name and trademark is expressly limited in accordance with the provisions of paragraph 1 of this Agreement. Middle M shall have no rights in or to the *Elizabeth McKay* trade name and trademark except those specifically conferred by this Agreement, which rights are exclusive and which rights expire as of July 1, 2008. On July 1, 2008, the exclusive right to the *Elizabeth McKay* trade name and trademark reverts to EMJ.

* * * * *

6. **Discontinuance of Action.** Upon execution of this Settlement Agreement the EMJ Parties will prepare and cause to be filed . . . a stipulation discontinuing this Action, with prejudice. . . .

7. **Release by the EMJ Parties.** Upon execution of this Settlement Agreement, the EMJ Parties . . . hereby fully and forever release and discharge the SMH Parties . . . from any and all claims, demands, losses, costs, damages, rights and causes of action, debts, liabilities and obligations whatsoever . . . which the EMJ Parties ever had, now have or hereafter can, shall or may have . . . whether raised in connection with this Action and whether or not previously asserted or assertable, known or unknown, other than the claims to enforce this Settlement Agreement.

8. **Release by the SMH Parties.** Upon execution of this Settlement Agreement, the SMH Parties . . . hereby fully and forever release and discharge the EMJ Parties . . . from any and all claims, demands, losses, costs, damages, rights and causes of action, debts, liabilities and obligations whatsoever . . . which the EMJ Parties ever had, now have or hereafter can, shall or may have . . . whether raised in connection with this Action and whether or not previously asserted or assertable, known or unknown, other than the claims to enforce this Settlement Agreement.

9. **Prior Agreements/Amendments.** This Agreement supersedes any prior understanding or agreement, either written or oral, between the parties with respect to the subject matter hereof, and shall constitute the entire agreement of the parties with respect to the matters contained herein. To the extent that any provision of this Agreement, or the implementation thereof, is in conflict with the LLC Agreement, the provisions of this Agreement control . . . .

> 10. **Warranties.** Each of the parties hereto expressly warrants and represents to the other parties hereto . . . (iii) that such party has read this Agreement and fully understands the nature and consequences of the terms of this Agreement and agrees to be legally bound by it; . . . (v) that such party has received independent legal advice from its attorneys with respect to its rights, as well as the consequences of signing this Agreement.
>
> * * * * *
>
> 12. **Breach of this Agreement.** No breach or failure to perform any terms of this Settlement Agreement . . . which would otherwise constitute a material breach of this Agreement, shall be considered a material breach of this Settlement Agreement, unless within five (5) business days after receiving written notice of the breach the party alleged to be in breach does not cure the same.

On January 24, 2008, Middle M[2], through Heath, commenced the instant action for a declaration determining the rights and obligations of the parties under the Settlement Agreement, and enjoining defendants from communicating with and soliciting Middle M's Sales Representatives to sell defendants' 2008 Fall Line and from interfering with Middle M's exclusive rights to the *Elizabeth McKay* trade name until July 1, 2008.[3]

On January 25, 2008, counsel for defendants served a Notice to Cure upon Middle M, asserting that Middle M's action constituted a material breach of the Settlement Agreement, and that Middle M's failure to discontinue this action would result in defendants seeking sanctions

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[2] Plaintiff commenced this action in the name of Middle MMC, LLC.

[3] In the Complaint, Middle M alleges that notwithstanding their obligation to do so, Ms. Jenkins and EMJ failed to exercise their control over the management of Middle M. Further, Ms. Jenkins and EMJ breached their fiduciary duty to the members of Middle M by (1) creating a Fall 2008 Line under the name and style of "Elizabeth McKay" from the inception of Middle M, July 24, 2006, through November 19, 2007, (2) making the false Representations to Heath; (3) upon information and belief, utilizing the designs created at Middle M's location prior to the date of the Settlement Agreement, creating a new business name "Fox Hunt" and soliciting Middle M's vendors who acquired the McKay Spring Line, to also acquire McKay's Fall 2008 Line; and (4) failing to disclose the creation of McKay's Fall 2008 Line. Middle M also alleges that the Representations by Ms. Jenkins and EMJ led to Middle M's execution of the Settlement Agreement, that Middle M relied upon the Representations to its detriment and that Middle M would not have entered into the Settlement Agreement if it knew of the true state of facts. Further, Ms. Jenkins and EMJ knew or should have known that their Representations to Heath to induce him to enter into the Settlement Agreement were false.

and costs against Middle M.

Subsequently, on February 4, 2008, Middle M filed and served an Amended Complaint to correct plaintiff's name in the caption, and supplant the causes of action in the original Complaint with a single cause of action seeking rescission of the Settlement Agreement and Release.

On February 5, 2008, counsel for Ms. Jenkins and EMJ sent a second Notice to Cure pursuant to Article 13 of the Settlement Agreement, again asserting that Middle M's failure to discontinue the rescission cause of action would result in defendants seeking sanctions and costs.

Defendants' Motion

In support of dismissal of the Amended Complaint, defendants argue that the rescission cause of action is premised upon the alleged "fraud in the inducement." Thus, the Amended Complaint must also sufficiently allege the essential elements of fraudulent misrepresentation, and Middle M's allegations, made upon "information and belief" are patently insufficient to support the essential elements of fraud. Additionally, since the contract sought to be rescinded and voided contains a release, the language of any merger clauses therein contained must be considered in determining whether documentary evidence precludes a cause of action, and the standard is especially strict in that the plaintiff must allege every material element of fraud with specific and detailed evidence in the record. Middle M failed to allege that the claimed misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; plaintiff's allegation of defendants' knowledge concerning the falsity and reliance are stated "upon information and belief"; and there are no allegations concerning the detriment which Middle M claims will befall it in the absence of rescission or the factual basis for the conclusion that

Middle M is without any adequate remedy at law.

Furthermore, the merger clause in the Settlement Agreement expressly indicates that the Settlement Agreement "supersedes any prior understanding or agreement, either written or oral, between the parties . . . and shall constitute the entire agreement of the parties . . . ." The Settlement Agreement also contains a release, whereby the parties expressly released each other from all claims, demands, losses, and causes of action, whether or not raised in connection with "this Action," whether or not "known or unknown," other than claims to enforce this Settlement Agreement. Thus, as the merger clause was negotiated at arm's length and inserted by sophisticated parties in their Settlement Agreement, in which Middle M specifically acknowledged that it was not relying upon any oral representations, parol evidence is barred.

Even if Middle M's allegation that defendants misrepresented the status of Elizabeth McKay's Fall 2008 Line is accepted as true, the language and provisions of the Settlement Agreement and Release foreclose any allegation of justifiable reliance on defendants' lack of intent to go forward with the Fall 2008 Line. The terms of the Settlement Agreement granted to Middle M no rights whatsoever to any season other than Spring 2008, and specifically prohibited Middle M from designing any *Elizabeth McKay* branded products, including "Spring 2008" products.

Furthermore, Middle M's suggestion that, in the absence of the Settlement Agreement and Release, defendants would have moved forward with the operation of Middle M without incident, ignores the fact that the Settlement Agreement was induced by the commencement of defendants' action for dissolution of Middle M, and not by any representations made by the defendants.

And, Middle M's suggestion that Ms. Jenkins' "control" of Middle M was somehow used unfairly is also incredible since the Management Agreement clearly designates Heath as the Managing Member, the beneficial owner of a 60% interest in Middle M, and the provider of all services and other resources to operate Middle M. In fact, Middle M overlooks the fact that the very relief requested to reinstate the *status quo* requires the reinstatement of the defendants' Complaint to dissolve Middle M.

Defendants also argue that Middle M's Release is an absolute bar to this Action, that the failure to join Heath and SMH as necessary parties warrants dismissal of the action, and that the frivolous nature of the Complaint warrants sanctions, costs, and attorneys' fees.

Middle M's Opposition and Cross-Motion

In response, Middle M cross moves for an order pursuant to CPLR §3215 granting a default judgment against the defendants for their failure to serve an Answer to the Amended Complaint within 30 days of its service.

Further, Middle M opposes the motion, arguing that the Amended Complaint is pleaded in sufficient detail to meet the requirements of CPLR §3016(b). In further opposition, Middle M submits the affidavit of Heath, wherein he states that in discussing the terms of the Settlement Agreement, Ms. Jenkins represented that only a Spring 2008 Line had been created and that no design work had been commenced by Ms. Jenkins and EMJ for an *Elizabeth McKay* Fall 2008 Line during the period between September 13, 2006 and the date the Settlement Agreement was executed. Health also attests that Ms. Jenkins intended to grant him trademark rights to the Mark until July 1, 2008. Further, Middle M paid defendants' rent, salaries, and other design costs for its showroom so that (1) the Spring 2008 Line created by Ms. Jenkins would continue to

completion by Middle M, and not create confusion in the marketplace with a competing Fall 2008 Line, and (2) Middle M could recoup its expenses. Heath thereafter learned that during the time Ms. Jenkins was engaged in business with Middle M, she covertly prepared an *Elizabeth McKay* Fall 2008 Line utilizing the staff and personnel of Middle M paid for by Middle M, to prepare the Fall 2008 designs therefor.

Middle M also contends that the attorney affirmation upon which defendants' motion is based, is made by someone who was not present at any of the meetings or discussions related to the events herein, and thus, is made by someone without personal knowledge. Thus, the Court should totally disregard the attorney affirmation, and it statements concerning the Middle M Agreement, and the Settlement Agreement and Release. The copy of the Settlement Agreement in connection with defendants' Complaint against Heath, SMH, and Middle M, submitted by defendants, is also unsigned. The only person with knowledge of the facts is Ms. Jenkins, who has not answered the Amended Complaint or provided an affidavit of facts in lieu of service of a responsive pleading. In the absence of Ms. Jenkins' affidavit with sufficient detail to meet the requirements of CPLR §3211(a)(1), (5) and (7), the defendants' motion must be denied.

Middle M also argues that defendants' 3211 (a) and (b) motion is untimely. The Supplemental Summons and Amended Complaint was personally served upon defendants on February 4, 2008 and filed in the County Clerk's office on February 6, 2008. Defendants' time to Answer expired on February 25, 2008, as February 24th fell on a Sunday. If defendants contend a period within 30 days of February 4th, then the Answer was due by March 6th. Rather than Answer or otherwise respond by February 4th or March 6th, or seek an extension of time, defendants made a meritless CPLR 3211 motion to dismiss on July 1, 2008. Thus, defendants'

motion, brought only to delay the prosecution of this action, is time-barred.

According to Middle M, the actual situation is that defendants, prior to the execution of the Settlement Agreement of November 19, 2007 (in connection with defendants' action), found another backer for *Elizabeth McKay* Fall 2008 Line at a better price and terms than with the plaintiff, and defendants' goal is to reap the benefits of the Fall 2008 Line without compensating plaintiff for the sums expended in its creation and development.

Defendants' Reply

In further support of its motion and in opposition to the cross-motion for default judgment, defendants argue that the absence of a supporting affidavit from someone with knowledge is of no moment. The only question relevant to defendants' motion is whether the documentary evidence submitted conclusively establishes a defense to plaintiff's cause of action as a matter of law. The authenticity of the documents submitted by defendants is not disputed. Heath's contentions that the parties negotiated the terms of the Settlement Agreement for months prior to its execution and that the negotiations were directly between the parties, are belied by the terms of the Settlement Agreement which indicate that the Agreement was made in conjunction with the lawsuit for dissolution commenced one month earlier.

Defendants do not dispute that rights to the Mark were conveyed by the Settlement Agreement. However, Middle M's right to the Mark expired as of July 1, 2008, and Middle M's business, until June 30, 2008, was limited to completion of work necessary to fill seasonal orders for "Spring '08."

Furthermore, plaintiff's cross-motion for a default judgment lacks merit. The Summons and Amended Complaint was served pursuant to CPLR 308.2. and 33-1(a). Proof of service was

filed with the Court on February 6, 2008. Thus, service was deemed complete as of February 18, 2008, "10 days after such filing. . . ." CPLR Rule 320 provides that if the summons is served pursuant to CPLR 308.2, the appearance shall be made within 30 days after service is complete, which in this case, would be March 19, 2008. Since defendants' motion was served on March 18, 2008, the motion was timely.

Finally, the Court should award sanctions against plaintiff. Plaintiff did not address defendants' request for sanctions, and plaintiff's opposition and cross-motion are frivolous. Further, plaintiff's actions have necessitated two unwarranted Court appearances, one to address a baseless temporary restraining order and another based on plaintiff's refusal to consent to an adjournment of a preliminary conference until defendants' motion was decided.

Analysis

At the outset, the Court determines that plaintiff's cross-motion for a default judgment against defendants for failure to serve an Answer to the Amended Complaint lacks merit. Middle M served the Amended Complaint upon Ms. Jenkins upon a person of suitable age and discretion, followed by a mailing, pursuant to CPLR 308.2. When personal service is made pursuant to CPLR 308.2, "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing . . . ." Proof of service of the Amended Complaint was filed on February 6, 2008, and thus, service would be deemed complete on February 16, 2008. However, since February 16, 2008 fell on a Saturday, service is deemed complete on Monday, February 18, 2008.

Contrary to Middle M's contention, defendants' time to Answer did not expire on

February 25, 2008. CPLR 320(a), which governs a defendant's appearance, provides that "The defendant appears by serving an answer . . . or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons, except that if the summons was served . . . pursuant to . . . subdivision two . . . of section 308 . . . the appearance shall be made within thirty days after service is complete." Thus, defendants' time to Answer, appear or otherwise move to dismiss expired 30 days after February 18, 2008, or March 19, 2008.

Middle M claims, without any documentary support, that defendants "made a meritless CPLR 3211 motion to dismiss" on "July 1, 2008." However, defendants' motion is dated March 18, 2008 and defendants contend that their motion was served on March 18, 2008. Also, in light of the fact that the motion was stamped by the Clerk on March 20, 2008, there appears to be no basis for Middle M's suggestion that the motion was made on July 1, 2008. Thus, the Court finds that defendants' motion is not time-barred, and defendants have not defaulted in their appearance in this Action. As such, the motion for a default judgment is denied.

CPLR §3211 (a)(1)

A party may move pursuant to CPLR §3211 (a)(1) for dismissal of one or more causes of action on the ground that "a defense is founded upon documentary evidence" where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]). Where documentary evidence and undisputed facts negate or dispose of the claims

in the complaint or conclusively establish a defense, dismissal under CPLR §3211(a)(1) is warranted (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

The documentary evidence upon which defendants rely is the Settlement Agreement and its terms found in paragraph 9 concerning prior agreements/amendments, paragraph 10, concerning warranties, and paragraphs 7 and 8 regarding the release of all claims.

Contrary to defendants' contention, a general merger clause such as that contained in the parties' Settlement Agreement does not operate to bar parol evidence of fraud in the inducement (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 798 NYS2d 14 [1st Dept 2005]). Only where the parties expressly disclaim reliance on the particular misrepresentations is extrinsic evidence barred (*id. citing Citibank, N.A. v Plapinger*, 66 NY2d 90, 95-96, 495 NYS2d 309 [1985]; *First Nationwide Bank v 965 Amsterdam*, 212 AD2d 469, 471, 623 NYS2d 200 [1995]).

Paragraph 9 states that the Settlement Agreement supersedes any prior understanding or agreements and that the Settlement Agreement constituted the entire agreement of the parties. Such language, however, does not address the reliance of any party upon representations made prior to the execution of the Settlement Agreement. In such case, paragraph 9 would bar any parol evidence, and thus, any claim that either party relied upon the misrepresentation of the

other in the execution of the Settlement Agreement. However, paragraph 9 binds the parties to the terms of the Settlement Agreement, and precludes either party from asserting rights, obligations, or any prior agreement not found therein. The absence of any language in Paragraph 9 indicating that the parties were not relying on any representations made by the other party, does not preclude either party from asserting that representations were made by the other party to induce the other to execute the Settlement Agreement. Therefore, the claim of rescission based on misrepresentation or fraud is not barred by Paragraph 9.

Nor does paragraph 10 contain any reference that the parties were not relying on the representations made by the other. The representations and warranties made by each party in Paragraph 10 sets forth each party's authority to enter into the Agreement, each party's understanding of the terms and the consequences of the Agreement, and each party's representation that they have received legal advice concerning the signing of the Agreement.

Further, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, this rule has no application in an action to rescind a contract containing a general merger clause on the ground of fraud (*Sabo v Delman*, 3 NY2d 155 [1957]). In such a case, it is clear evidence of the assertedly fraudulent oral misrepresentation may be introduced to avoid the agreement. "Indeed, if it were otherwise, a defendant would have it in his power to perpetrate a fraud with immunity, depriving the victim of all redress, if he simply has the foresight to include a merger clause in the agreement" (*Id.*; *cf. Danaan Realty Corp. v Harris*, 5 NY2d 317 [1959] [distinguishing *Sabo* (*supra*) which dealt with the usual merger clause, since the merger clause in *Danaan* included a disclaimer as to specific representations that purchaser acknowledges that no representations have been made, that the

contract was entered into after full investigation, and that neither party relied upon any statement or representation, not embodied in this contract, made by the other]). "A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference whether the fraud goes to the factum or whether it is preliminary to the execution of the agreement itself" (*Id.*, *citing Bridger v Goldsmith*, 143 N.Y. 424, 428 [1894]).

Thus, there being no specific disclaimer of reliance upon oral representations, paragraphs 9 and 10 in the Settlement Agreement do not bar Middle M's action for rescission based on fraud.

Similarly, neither paragraph 7 nor paragraph 8 containing a release of all claims other than those to enforce the Settlement Agreement constitute a defense to the rescission claim based on fraud. A release is enforceable in the absence of fraud, duress, illegality or mutual mistake (*Mangini v McClurg*, 24 NY2d 556 [1969]; *Mergler v Crystal Props. Assocs.*, 179 AD2d 177 [1992]; *see Mangini v McClurg*, 24 NY2d 556, 301 NYS2d 508 [1969] [fraud is a ground for setting aside a release]). Thus, it has been held that where a complaint alleges fraud in the procurement of a release either by way of an equitable action to rescind or by way of an action at law for damages sustained as a result of the release, a motion to dismiss which is based solely on the release should be denied (*Anger v Ford Motor Co. Dealer Dev.*, 80 AD2d 736, 437 NYS2d 165 1981 [4th Dept 1981] *citing Newin Corp. v Hartford Acc. & Ind. Co.*, 37 NY2d 211, 217, 371 NYS2d 884; *Goldsmith v National Container Corp.*, 287 NY 438; *Smith v A. A. Truck Renting Corp.*, 13 AD2d 1035, 217 NYS2d 244; *Troisi v Central Trust Co.*, 86 NYS2d 726, *affd*, 274 AD 1026, 86 NYS2d 479; *Gordon v Pushkoff*, 67 NYS2d 873, affd. 272 AD 872, 72 NYS2d 402).

In light of Middle M's claim of fraud in the inducement of execution of the Settlement Agreement, including the releases, the releases do not serve as a complete bar to Middle M's claim of rescission (*Purta v Cisz*, 42 AD2d 594, 344 NYS2d 737 [2d Dept 1973]).

Defendants' reliance on *Citibank, N.A. v Plapinger*, 66 NY2d 90, 495 NYS2d 309 [1985]) is misplaced. In *Citibank*, defendants sought to avoid the implications of a guarantee they signed, which was "absolute and unconditional" irrespective of any lack of validity or enforceability of the guarantee. The Court held that the defendants were precluded from alleging fraud in the inducement, as "the substance of defendants' guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks' oral promise of an additional line of credit. To permit that would in effect condone defendants' own fraud in "deliberately misrepresenting [their] true intention" when putting their signatures to their "absolute and unconditional" guarantee.

Here, not only is there no disclaimer of reliance upon oral representations, there is also nothing contained within the release indicating that it is "absolute or unconditional" notwithstanding the lack of validity or enforceability of the Settlement Agreement. Although the Settlement Agreement was negotiated at arm's length among business people, the language of the release herein is not inconsistent with the claim of reliance on the oral representations allegedly made by Ms. Jenkins.

Thus, dismissal of the Amended Complaint based on documentary evidence pursuant to CPLR §3211(a)(1) is denied.

CPLR §3211 (a)(5)

Under CPLR §3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "the cause of action may not be maintained because of . . . release." Where a defendant seeks dismissal of the complaint on the ground that the demand set forth therein had been released, but plaintiff claims to have been induced to sign the release, by false representations, a motion by defendant to dismiss under CPLR 3211(a)(5) should be denied without prejudice *(Troisi v Central Trust Co.*, 86 NYS2d 726, *affd* 274 AD 1026, 86 NYS2d 479 [1947]). As stated above, Middle M's complaint contains a claim of fraudulent inducement to sign the Settlement Agreement, containing the release in question. Therefore, the motion to dismiss based on a release signed on Middle M's behalf cannot be granted at this juncture.

CPLR §3211 (a)(7)

In determining a CPLR §3211(a)(7) motion to dismiss the complaint for failure to state a cause of action, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The sole criterion is whether "from the four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). On the other hand, while

factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, when evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

The sole cause of action in Middle M's Amended Complaint is for rescission of the Settlement Agreement based on fraudulent misrepresentation. Rescission of such a contract may be granted when a party was induced to enter into it by fraud or misrepresentation (*Witham v VFinance Investments, Inc.*, 17 Misc 3d 1136, 851 NYS2d 75 [Supreme Court, New York County 2007]).

Bare allegations of fraud, however, are insufficient to state such a cause of action (*Edison Stone Corp. v 42nd Street Dev Corp.*, 145 AD2d 249, 538 NYS2d 249 [1st Dept 1989] *citing Greschler v Greschler,* 71 AD2d 322, 422 NYS2d 718, *mod. on other grounds,* 51 NY2d 368, 434 NYS2d 194, 414 N.E.2d 694.) To plead a cause of action based on fraud, a party must allege representation of a material existing fact, falsity, scienter, deception and injury (*Edison Stone Corp. v 42nd Street Dev Corp.*, 145 AD2d 249 [1st Dept 1989] *citing Reno v Bull, supra,* 226 NY 546, 550). Furthermore, each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016(b), which requires, in the case of a cause of action based on fraud, that "the circumstances constituting the wrong shall be stated in detail." CPLR §3016(b) "imposes a more stringent standard of pleading than the generally applicable 'notice of the transaction' rule of CPLR §3013, and complaints based on fraud . . . which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed [citations

omitted]" (*Lanzi v Brooks,* 54 AD2d 1057, 1058, 388 NYS2d 946 [3d Dept 1976], *affd,* 43 NY2d 778, 402 NYS2d 384 [1977]; *see,* 60 *N. Y.Jur.2d,* Fraud & Deceit, § 227).

The Amended Complaint alleges that Ms. Jenkins made representations that as of the date of the Settlement Agreement, she had created only a Spring 2008 Line and had not performed any design work for the Fall 2008 Line of any kind. Middle M also alleges such representations were material misrepresentations, that were known to be untrue, and that they were made for the purpose of inducing Heath and Middle M to execute the Settlement Agreement. It is further alleged that Middle M relied upon the representations to Heath's detriment, and that had Heath and Middle M known that the representations were false, he and Middle M would not have executed the Settlement Agreement. Such allegations are sufficient to sustain a claim for fraud (*see Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 747 NYS2d 441 [1st Dept 2002]). That the claim that defendants' knew such representations were false was made on "information and belief" is not fatal. The factual basis underlying the claim that defendants' knew that their representations were false when made, lies within the knowledge of the defendants, and will be borne through discovery.

Thus, these allegations state a viable claim for rescinding the Agreement based on fraudulent inducement.

Contrary to defendants' contention, that the rights to the Mark revert to EMJ after June 30, 2008 and that Middle M's right to use the Mark was limited to completing and fulfilling the orders for the Spring 2008 Line does not defeat plaintiff's claim of justifiable reliance. The alleged misrepresentation that only a Spring 2008 Line had been created, and that Ms. Jenkins had not performed any design work for the Fall 2008 Line allegedly defeated Heath's expectation

that there would not be any confusion in the marketplace with a competing Fall 2008 Line also by Ms. Jenkins. Any marketing by a competing Fall 2008 Line during the period through July 1, 2008 allegedly prevents Middle M and Heath from recouping its expenses of over $100,000 invested in the production and sale of the Spring 2008 Line. And, EMJ's exclusive right to the Mark did not revert to EMJ until July 1, 2008. Ms. Jenkins' marketing of the Fall 2008 Linc during the period prior to July 1, 2008 indicates that she allegedly used Middle M's staff and personnel to promote her Fall 2008 line in violation of Middle M's rights to use the Mark until July 1, 2008 under the Settlement Agreement, and in contradiction to her representation that no design work had been prepared for the Fall 2008 Line.

Therefore, defendants' motion to dismiss the complaint for failure to state a claim of fraud to support its rescission cause of action is denied.

CPLR §3211 (a)(10)

CPLR §3211 (a)(10) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court should not proceed in the absence of a person who should be a party." In order to warrant dismissal for failure to join a necessary party, defendants must demonstrate that the joinder of Heath and SMH is necessary to accord full relief to the parties presently joined or that Heath and SMH would be inequitably affected by any judgment that might result in this action (*Amsellem v Host Marriott Corp.*, 280 AD2d 357, 721 NYS2d 318 [1st Dept 2001]; *CBS Corp. v Dumsday*, 268 AD2d 350, 353, 702 NYS2d 248 [1st Dept 2000]). Though not cited by defendants, CPLR §1001(a) states that necessary parties are those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in

the action" (CPLR §1001 (a)).

The Settlement Agreement Middle M seeks to rescind was made between defendants Ms. Jenkins and her company EMJ, plaintiff Middle M, and Heath and his company SMH in connection with Ms. Jenkins' and EMJ's case against Heath and his company for breach of contract and tort claims. Heath, however, verified the Amended Complaint herein and filed this action in the name of Middle M, to rescind the Settlement Agreement to which he and his company are parties. Thus, as a member of Middle M, who filed the Amended Complaint for fraud and rescission, and as a member of SMH, joinder of Heath and SMH is not necessary to accord full relief to the parties herein. Nor can it be said that Heath and SMH would be *inequitably* affected by any judgment that might result in this action. Thus, dismissal for failure to join a necessary party is unwarranted.

Sanctions

Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR § 130-1.1 et seq.), permits the court to impose sanctions, including reasonable attorney's fees, for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]).

An examination of the allegations in this case reveals no basis to find that Middle M's filing of the Amended Complaint and refusal to consent to an adjournment were "frivolous" within the meaning of Rule 130. Thus, an award of costs and attorney's fees was is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to dismiss the complaint pursuant to (1) CPLR §3211 (a)(1) on the ground that their defense is founded upon documentary evidence; (2) CPLR §3211 (a)(5) on the ground that the action may not be maintained by reason of prior release by plaintiff, Middle M, LLC of its claims; (3) CPLR §3211 (a)(7) for failure to state a cause of action; (4) CPLR §3211 (a)(10) for failure to join a necessary party; and (5) Section 130-1.1(c) and 22 NYCRR 130-1.1(c) for an award to defendants of costs, attorneys' fees, and sanctions, is denied, in its entirety; and it is further

ORDERED that the cross-motion by plaintiff for a default judgment is denied; and it is further

ORDERED that defendants serve an answer to the Amended Complaint within 30 days of the date of this decision; and it is further

ORDERED that the parties appear for a preliminary conference on August 5, 2008, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: May 27, 2008

Hon. Carol Robinson Edmead, J.S.C.