SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

GREENSTONE/FONTANA CORPORATION f/k/a TOPLINE ADVERTISING, INC.,

Plaintiff/Counterclaim-Defendant,

INDEX NO.: 019510/2006
MOTION DATE: 09/26/2008
MOTION SEQUENCE: 003 and 004

-against-

NEIL FELDSTEIN individually, NEIL BUICK CORPORATION, NEIL LINCOLN-MERCURY/HYUNDAI CORPORATION, WORLDWIDE AUTOMOTIVE, LLC, WORLDWIDE AUTOMOTIVE III, LLC, "XYZ No. 1" through "XYZ No. 50", (the last fifty names being fictitious and unknown to Plaintiff, the persons and/or entities intended being the persons and/or entities, if any, that received and/or benefitted from the services provided by the Plaintiff described in the Verified Complaint),

Defendants/Counterclaim-Plaintiffs,

-against-

TOPLINE ADVERTISING, INC., JEANNE FONTANA, ROBERT WILLIAMS, RON GREENSTONE and REBECCA KOPPRASCH,

Additional Counterclaim-Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Notice of Motion, Affirmation & Exhibits Annexed	2
Affirmations of John M. Brickman in Opposition & Affirmation of Todd H. Hesekiel in Opposition	3
Reply Affidavit of Jeffrey A. Miller in Further Support & Exhibit Annexed	4
Reply Affirmation in Support of Motion for Reargument of Andrew E. Curto	5
Counterclaim Plaintiffs' Memorandum of Law in Opposition to Counterclaim Defendants' Reargument Motions & Appendix	6

The motion by counterclaim defendants Jeanne Fontana, Robert Williams, Ron Greenstone and Rebecca Kopprasch and cross-motion by plaintiffs/counterclaim defendants Greenstone/Fontana Corporation f/k/a Topline Advertising Inc. and additional counterclaim defendant Topline Advertising, Inc., for an order pursuant to CPLR 2221 granting them reargument of this court's order dated June 23, 2008 and upon reargument, dismissing the defendant/counterclaim plaintiffs' Neil Buick Corporation, Neil Lincoln-Mercury/Hyundai Corporation, Worldwide Automotive, LLC and Worldwide automotive III, LLC's second, third and fourth counterclaims is granted to the extent provided herein.

The facts of this case were set forth in this court's decision dated June 23, 2008 and will not be restated here.

In seeking reargument, the plaintiff/counterclaim defendants argue that the defendant/counterclaim plaintiffs' second cause of action sounding in fraud should be dismissed as barred by the doctrine of *res judicata* and collateral estoppel pursuant to the Stipulation of Discontinuance entered into a prior action and pursuant to CPLR 3211(a)(7) as duplicative of the defendant/counterclaim plaintiffs' breach of contract claims. They maintain that this is required because the defendant/counterclaim plaintiffs have not alleged that plaintiffs have made any misrepresentations extraneous or collateral to their contract, which is required not only by the Stipulation of Discontinuance but as a matter of law; plaintiffs have not suffered any damages distinct from their breach of contract claim, which is also required as a matter of law. The

plaintiff/counterclaim defendants also maintain that the third and fourth causes of action sounding in RICO violations should be dismissed as barred by the doctrine of *res judicata* and collateral estoppel pursuant to the Stipulation of Discontinuance entered into in the prior action.

Reargument may be granted where the court misapprehended the relevant facts or misapplied any controlling law. McGill v Goldman, 261 AD2d 593 (2nd Dept. 1999), citing William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept. 1992), lv to app dism. in part, den in part 80 NY2d 1005 (1992), rearg den. 81 NY2d 782 (1993); Foley v Roche, 68 AD2d 558 (1st Dept. 1979), app den. 56 NY2d 507 (1982) .

"Under the transactional approach to *res judicata* issues, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." State of New York v Seaport Manor, 19 AD3d 609, 610 (2nd Dept. 2005) quoting O'Brien v City of Syracuse, 54 NY2d 353, 357 (1981). "A Stipulation of Settlement which discontinues a claim with prejudice is subject to the doctrine of *res judicata*." Id. at 610. And, the doctrine of *res judicata* applies not only to parties of record, but to those in privity with them as well. Id., citing Watts v Swiss Bank Corp., 27 NY 270 (1970).

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7) "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v Ginzburg, 42 NY2d 268 (1977). The facts as alleged must be accepted by the court as true and are to be accorded every favorable inference. On a motion to dismiss for failure to state a cause of action, the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v Orofino Realty Co., 40 NY2d 633, 634 (1976).

In the prior action, with the exception of Worldwide Automotive, the defendants, who were the plaintiffs, advanced causes of action against the plaintiffs - now defendants - sounding in breach of contract, fraud, unjust enrichment, breach of fiduciary duty and the imposition of a constructive trust. In the Stipulation discontinuing that action, the defendant/counterclaim

plaintiffs as plaintiffs stipulated to discontinue all fraud causes of action with prejudice, **except** the breach of contract claims and "any cause[s] of action against defendants [which are] based upon misrepresentations made by defendants, their agents, principals, employees, or assigns, which . . . were extraneous to any contract that was then being negotiated between the parties or existed previously between the parties." (Emphasis added).

The defendants/counterclaim plaintiffs could not have advanced the fraud claim presently advanced in the prior action since, as attested to by their attorneys in opposition to the original motion to dismiss this complaint which is not disputed by the plaintiffs/counterclaim defendants, they lacked the requisite information, i.e., that the billing records, specifically, the Affidavits of Performance, had been altered. For this reason, their second, third and fourth causes of action are not barred by the doctrine of *res judicata*. See, Evans v Monaghan, 306 N.Y. 312 (1954); Morehouse v Town of Horicon Planning Bd., 85 AD2d 769 (3rd Dept. 1981); Kreisburg v Scheyer, 11 Misc3d 818 (Supreme Court Suffolk Co. 2006); compare, Hubbell v Transworld Life Ins. Co. of New York, 50 NY2d 899 (1980) ("[t]here is nothing to indicate the present action grows out of any facts not known when the prior action was brought . . . which subsequently came to light . . . ."); Weisz v Levitt, 59 AD2d 1002 (3rd Dept. 1977) ("the allegations in the second complaint do not contain newly discovered facts.").

Whether the altered Affidavits of Performance relied on in advancing the fraud and RICO claims were sufficiently extraneous to the parties' contract to be able to support a fraud claim is not clear. Compare, e.g., Krantz v Chateau Stores of Canada, Ltd., 256 AD2d 186 (1st Dept. 1986); and Freedman v Pearl, 271 AD2d 301 (1st Dept. 2000). In Krantz v Chateau Stores of Canada, Ltd. the plaintiff alleged, in support of his breach of contract claim, that the defendant failed to pay him 50% of the annual net profit which he had agreed to pay him. He alleged in support of his fraud claim that the defendant provided him with a false and misleading statement reflecting a net loss for the pertinent period thus enabling him to under-compensate him. The court dismissed the fraud claim in Krantz v Chateau Stores of Canada, Ltd., because "the false statement of defendant's net profits was not collateral or extraneous to the contract." Krantz v Chateau Stores of Canada, Ltd., at 187, citing Metropolitan Transp. Auth. v Triumph Adv.

Prods., 116 AD2d 526, 527 (1st Dept. 1986). The court held that "the issue of the amount of the net profits was the crux of the breach of contract claim." Id.

In comparison, in Freedman v Pearlman (supra), the plaintiff alleged in support of his breach of contract claim that the defendant failed to pay him one third of the fees received from a third-party as he had agreed to do. He alleged in support of his fraud claim that the defendant deliberately concealed the amount of fees received from the third-party so that the plaintiff's one-third share was decreased. The Freedman court held that the plaintiff stated a cause of action for fraud that was "sufficiently independent from his cause of action for breach of contract." Freedman v Pearlman, at 304, citing First Bank v Motor Car Funding, 257 AD2d 287, 291-292 (1st Dept. 1999).

Nevertheless, to sustain a cause of action for fraud, "special damages" distinct from a breach of contract claim must be alleged. Manas v VMS Associates, 53 AD3d 451 (1st Dept. 2008); Rivas v Amerimed USA, Inc., 34 AD3d 250 (1st Dept. 2006), citing Tesoro Petroleum Corp. v Holborn Oil Co., 108 AD2d 607 (1st Dept. 1985), app dism. 65 NY2d 637 (1985); Eagle Comtronics, Inc. v Pico Products, Inc., 256 AD2d 1202 (4th Dept. 1998); Rubinberg v Correia Designs, Ltd., 262 AD2d 474 (2nd Dept. 1999); Krantz v Chateau Stores of Canada, Ltd., supra; see also, Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954 (1986). The defendant/counterclaim plaintiffs have not alleged any damages caused by the plaintiff/counterclaim defendants' allegedly fraudulent conduct distinct from the damages suffered as a result of the plaintiff/counterclaim defendants' alleged breach of contract.

For this reason, the motion to dismiss the counterclaim sounding in fraud is granted, and it is SO ORDERED.

The factual predicate for the surviving RICO claims is the same as the fraud claim advanced here. The fraud claim has not been dismissed pursuant to the doctrines of *res judicata* and collateral estoppel; it has been dismissed for failure to state a claim based on the defendant/counterclaim plaintiffs' failure to plead special damages. Again, in light of the defendant/counterclaim plaintiffs' allegations that the factual predicate for their present fraud and RICO claims, i.e., the falsification of billing records, more specifically, the Affidavits of

Performance, was not discovered until after the first action was brought, the RICO claims could not have been asserted in the prior action. The RICO claims are not barred by the doctrine of *res judicata* (see, Evans v Monaghan, supra; Morehouse v Town of Horicon Planning Bd., supra; Kreisburg v Scheyer, supra; compare, Hubbell v Transworld Life Ins. Co. of New York, supra; Weisz v Levitt, supra) and no other grounds for their dismissal have been advanced.

Dated: December 8, 2008

J.S.C.