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

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Schneider, ARTHUR

- v -

JARMAIN, BRIAN

INDEX NO. 116942/09
MOTION DATE 3/2/10
MOTION SEQ. NO. 001
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

The instant motion (sequence 001) is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant Brian A. Jarmain for an order, pursuant to CPLR §§3211(a)(1) and (a)(7), dismissing the complaint of plaintiffs Arthur A. Schneider, Executive Merriment, Corp., and Executive Lodging, Inc. is granted, and plaintiffs' motion is hereby dismissed in its entirety ; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/6/10

HON. CAROL EDMEAD J.S.C.

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: PART 35

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ARTHUR A. SCHNEIDER, EXECUTIVE MERRIMENT, CORP., and EXECUTIVE LODGING, INC.,

Plaintiffs,

-against-

BRIAN A. JARMAIN,

Defendant.

Index No. 116942/09

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of contract, defendant Brian A. Jarmain ("defendant") moves for an order, pursuant to CPLR §§3211(a)(1) and (a)(7), dismissing the Complaint of plaintiffs Arthur A. Schneider ("Schneider"), Executive Merriment, Corp. ("Merriment"), and Executive Lodging, Inc. ("Lodging") (collectively "plaintiffs"). Defendant also seeks to recover his costs and attorneys' fees.

Background

Schneider is the owner and president of corporate plaintiffs Merriment and Lodging, which own the Memory Motel and the real property known as 692 Montauk Highway, Montauk, New York (collectively, the "Property"). Defendant is the vice president of Silver Point Capital LP, which is based in Greenwich, Connecticut.

In their Complaint, plaintiffs allege six causes of action: (1) breach of contract, (2) fraudulent misrepresentation, (3) negligent misrepresentation, (4) breach of the duty of good faith and fair dealing, (5) promissory estoppel, and (6) punitive damages. Plaintiffs are seeking $1 million in compensatory damages, $1 million in punitive damages, and attorneys fees, costs

and expenses of this action.

According to the Complaint, in 2004, Merriment was indebted to Business Loan Center, Inc. ("BLC") under the terms of a $1 million mortgage, which was secured by a first lien on the Property. When Merriment defaulted on the mortgage, on or about May 2, 2005, plaintiffs secured a loan of $1.4 million from Stillwater Capital Partners, Inc. (the "Stillwater Loan") to avoid foreclosure and repay the balance due to BLC.

During the summer of 2005, Schneider was informed that defendant wanted to buy the Property. Thus, in September 2005, Schneider met with defendant, and defendant persuaded Schneider to sell defendant the Property outright, keeping Schneider on to run the entire operation as manager (Complaint, ¶ 22). At the meeting, defendant allegedly told Schneider that he was an attorney; defendant is not listed as an attorney in the database maintained by the State of New York for attorneys licensed in New York State (Complaint, ¶¶ 23, 24).

On or about October 6, 2005, defendant told Schneider that he was no longer interested in purchasing the Property outright, but instead wanted to form a partnership between Schneider and defendant to own the Property. Defendant allegedly offered to contribute to a newly formed partnership 50% of the fair market value of the Property, based on an appraisal to be conducted on the Property, and defendant and Schneider agreed to work on determining the fair market value of the Property in order to determine the purchase price to be paid by defendant, and obtain financing to pay off the Stillwater Loan. Plaintiffs allege that the parties further agreed that when the new business venture was formed, Schneider would continue to operate the business on behalf of the partnership.

On or about November 5, 2005, Schneider began to express concern to defendant about

the required payoff of the Stillwater Loan, and emphasized to defendant that time was of the essence to secure replacement financing, as the Stillwater Loan was set to mature in January 2006. Plaintiffs allege that defendant repeatedly assured Schneider that he was working with mortgage brokers, appraisers, and other professionals to secure the financing, and that if there would be any late payment charges or penalties on the Stillwater Loan due to a payoff after the maturity date, he would absorb the costs (Complaint, ¶ 34).

On December 5, 2005, defendant confirmed in writing to Schneider their earlier discussions that upon receipt of the appraisal of the Property, the parties would formalize their agreement on the material terms of the partnership (Complaint, ¶ 40). On or about December 6, 2005, defendant paid Schneider $3,000, to reimburse Schneider for the costs of an appraisal of the Property, further illustrating defendant's actions as a partner in the business, plaintiffs allege (Complaint, ¶ 39).

In January 2006, Merriment defaulted on the Stillwater Loan.

On February 9, 2006, defendant entered into a Letter of Intent with Schneider, explaining the parties' intent to enter into a transaction whereby defendant would acquire one-half of the stock of Lodging and Merriment and secure a commitment for financing (Complaint, ¶ 45; *see* the "Letter of Intent" attached to defendant's motion).

On March 28, 2006, upon being informed that Schneider had arranged a favorable deal for refinancing the Stillwater Loan, defendant asked Schneider to send him the material terms of the new loan.

In April 2006, Shinhan Bank agreed to extend to Merriment a loan that was to be executed in July 2006 (the "Shinhan Loan").

In the meantime, the parties continued to exchange information necessary to complete the formation of the partnership and to secure the Shinhan Loan. Defendant provided Schneider and Shinhan Bank with proof of his income, including his Internal Revenue Service W-2 Form for 2005, his individual income tax returns for the years of 2003 -2005, and a personal financial statement as of March 20, 2006 – information and documents that plaintiffs contend "a prudent and reasonable businessperson would never provide unless he or she was fully committed to entering or joining a business venture" (Complaint, ¶ 49).

On May 20, 2006, defendant "suddenly and without warning" informed Schneider that he would not be honoring his promises to form and join a partnership with Schneider (Complaint, ¶ 50). Notwithstanding Schneider's continued attempts to persuade defendant to deliver on his promises, on December 3, 2006, defendant confirmed in writing that he would not enter into a business venture with plaintiffs (Complaint, ¶¶ 51, 52).

Plaintiffs allege that, as a result of defendant's abandonment of the partnership and deal, plaintiffs incurred damages, including late fees, charges and penalties on the Stillwater Loan, legal fees, the proceeds of the sale of half his interest in the Property and lost business opportunities (Complaint, ¶¶ 53-57).

In their motion, which comprises an affidavit from defendant (*see* "defendant's affd.") and a memorandum of law ("MOL"), defendant first argues that the Complaint lacks specific facts to establish plaintiffs' six causes of action, pursuant to CPLR §3211(a)(7).

Regarding plaintiffs' first claim for breach of contract, defendant contends that the Complaint fails to allege the existence of a final contract between plaintiffs and defendant, which is an essential element. The Complaint shows nothing more than an agreement to agree and

negotiate the essential terms of their transaction, which is unenforceable. The Letter of Intent further makes clear that there was no agreement between the parties. Defendant attests that in May 2006, the negotiations for defendant's purchase of the Property ended and there was no formal agreement on the pertinent terms of the sale of the Property and its operations (defendant's affd., ¶¶ 12-13). On this basis alone, the Complaint should be dismissed, defendant argues.

Defendant further contends that the allegations of the Complaint demonstrate that the essential terms of the transaction were still being negotiated. Nowhere in the Complaint do plaintiffs allege any material terms of the alleged agreement between the parties, *i.e.* the date of final agreement, the agreed purchase price, and the agreed value of the Property. Since the essential terms of the transaction were never finalized and the Complaint makes no allegations to the contrary, plaintiffs failed to establish the existence of an agreement with defendant.

Defendant further argues that plaintiffs fail to identify how they performed under the contract and the exact provisions of the agreement with which defendant failed to comply.

Regarding plaintiffs' second claim for fraudulent misrepresentation, defendant argues that the claim is duplicative of plaintiffs' breach of contract claim, and that the bare-bones allegations of the Complaint do not meet the pleading standards for a claim involving fraud. Defendant contends that plaintiffs merely state that defendant made assurances to Schneider about entering into a partnership agreement and paying certain late fees and penalties if incurred. These claims do not differ from plaintiffs' breach of contract allegations, except that there is an added allegation that defendant made these assurances knowing they were false and that plaintiffs would rely upon them. Further, the Complaint is "completely devoid of information" that

establishes when these alleged assurances were made, how plaintiffs relied upon them and what damages resulted from such reliance. Finally, plaintiffs cannot say they relied on these assurances, as they agreed in the Letter of Intent that the parties would not be bound until a final agreement was executed. Because plaintiffs fail to plead the cause of action with particularity, and the cause of action is duplicative of the breach of contract claim, it must be dismissed, defendant argues.

Regarding plaintiffs' third claim for negligent misrepresentation, defendant argues that the Complaint fails to meet the pleading standards for such a claim. Without the existence of a contractual relationship between the parties and any allegations that there was a relationship so close as to approach contractual privity and create a duty of care, the cause of action must fail, defendant contends. Moreover, without facts about what statements made by defendant were negligent, how plaintiffs relied on those alleged statements, and the damages that resulted, plaintiffs cannot establish this cause of action.

Regarding plaintiffs' fourth claim for breach of duty of good faith and fair dealing, defendant argues that plaintiffs' allegations are merely conclusory, and duplicative of plaintiffs' breach of contract claim. Defendant further argues that even if the Complaint pleaded an independent claim, without being able to establish the existence of a contract, plaintiffs cannot establish the elements of this claim. Defendant cannot be alleged to prevent the performance of an agreement when no agreement in fact exists.

Plaintiffs' fifth claim for promissory estoppel also must fail, defendant argues, because the Complaint contains no specific allegations as to a clear and unambiguous promise from defendant to plaintiffs, or what plaintiffs did in reliance on that alleged promise.

Regarding plaintiffs' sixth claim for punitive damages, defendant argues that nothing in the Complaint establishes the necessary elements, particularly, that defendant's actions were aimed at the public.

Additionally, defendant argues that plaintiffs' Complaint should be dismissed, pursuant to CPLR §3211(a)(1), because the Letter of Intent belies plaintiffs' allegation. The Letter of Intent makes clear that the parties were not bound and had no "legal obligations" to one another until they executed a "definitive agreement." Accordingly, such documentary evidence establishes a defense to plaintiffs' claims, the Complaint should be dismissed.

Finally, defendant argues that Statute of Frauds also requires that the Complaint be dismissed. Defendant contends that a contract for the sale of real property must be in writing to be enforceable. Here, the parties were negotiating a contract under which defendant would purchase the Property. Thus, it is clear from the allegations of the Complaint that the essence of this transaction was a real estate sale. However, nothing in the Complaint alleges that the terms of the purported final agreement were ever recorded on paper and signed by the parties. As a result, plaintiffs, at best, are seeking to enforce an agreement that is void under the Statute of Frauds.

In opposition,[1] regarding the branch of defendant's motion to dismiss pursuant to CPLR §3211(a)(1), plaintiff argues that defendant does not specifically identify the documentary evidence that serves as the basis for his motion. In any event, defendant's discussion of the one quote from the Letter of Intent fails to explain how the quote refutes plaintiffs' allegations or establishes a defense as a matter of law. Other provisions of the Letter of Intent belie the

[1]Plaintiffs' opposition comprises an attorney affirmation and memorandum of law (collectively, "opp.").

purportedly exculpatory quote, plaintiffs argue. For example, Section 2 of the Letter of Intent demonstrates that defendant agreed to continue to make good faith efforts to secure financing for Lodging and would provide a personal guaranty. This clause and others like it indicate that the Letter of Intent was intended to be more than merely an "agreement to agree," plaintiffs argue.

Plaintiffs further argue that nowhere does defendant's motion consider the effects of the negotiations, meetings, due diligence and other events that occurred between the parties subsequent to the February 9, 2006 Letter of Intent. Plaintiffs contend that a May 3, 2006 letter from Schneider to East Coast Venture Capital, Inc. ("East Coast") "lays out the key terms of the joint venture" (the "May 3, 2006 Letter"). Plaintiffs argue that they possess other documentary evidence that vitiates the import of the exculpatory clause of the Letter of Intent. Therefore, the Letter of Intent fails to conclusively refute the allegations in the Complaint or establish a defense to plaintiffs' claims.

As to the branch of defendant's motion seeking dismissal pursuant to CPLR §3211(a)(7), plaintiffs argue that, contrary to defendant's contention that no binding enforceable contract exists, defendant obligated himself to plaintiffs under the promises he made. In 2005, Schneider offered defendant an interest in the Property. Defendant accepted the offer, as evidenced by his actions in 2006, before he reneged. As consideration, defendant provided a number of promises to Schneider. Defendant also acted as a Schneider's partner, holding himself out to third parties as Schneider's partner. For example, in order to secure financing for the Property, defendant informed Shinhan Bank and East Coast that he was Schneider's partner. Defendant also supplied these companies with his personal financial statements, W-2 form and tax returns. Thus, Shinhan Bank, East Coast, and other third parties believed that defendant was Schneider's

partner, as any objective reasonable person would have believed, plaintiffs argue.

Regarding their breach of contract claim, plaintiffs argue that they clearly have alleged the existence of a contract between the parties. They further contend that their allegations must be regarded as true, and all inferences are to be resolved in their favor. Accordingly, their breach of contract claim should not be dismissed.

Regarding their negligent misrepresentation and promissory estoppel claims, plaintiffs argue that, as they have asserted the existence of a contractual relationship between the parties, these causes of action should not be dismissed.

Regarding plaintiffs' fraudulent misrepresentation claim, plaintiffs contend that the allegations set forth in the Complaint sufficiently state the detailed circumstances of this cause of action. In addition, the allegations describe how defendant fraudulently intended to string Schneider along with the false hope of entering into a joint venture with defendant, for defendant's own deceptive purposes. Accordingly, this cause of action should not be dismissed.

Regarding plaintiffs' claim of the breach of the duty of good faith and fair dealing, plaintiffs argue that "as actual, purported or prospective partners," defendant and Schneider each had a duty to conduct themselves with good faith and to deal fairly with each other. In addition, Schneider relied on defendant's financial expertise based on his professional credentials in the field, as well as on defendant's assertion to Schneider that he was an attorney (*see* Complaint, ¶¶ 23-24). Plaintiffs further argue that the claim is not duplicative of their breach of contract claim, as it is not based on identical circumstances. Instead, the claim speaks to the reliance Schneider placed on defendant as a friend, partner and advisor.

Regarding their request for punitive damages, plaintiffs argue that the Complaint clearly

alleges that defendant's conduct reflects that of the members of the distressed lending field who prey on unsuspecting small business owners. Such lenders attempt to swoop in on vulnerable and desperate business owners and steal their hard-earned assets for next to nothing. Plaintiffs further argue that a message should be sent to the financial community that predatory practices will not be tolerated.

Finally, should the Court find that plaintiffs' pleadings are insufficient, plaintiffs requests leave to amend their Complaint to include additional information as required by the Court.

In reply, defendant argues that notwithstanding plaintiffs' allegations of negotiations, meetings and due diligence occurring subsequent to February 9, 2006, plaintiffs cannot dispute that the Letter of Intent controls, and the parties never executed any definitive written agreement at any time after February 9, 2006.

Defendant further argues that there was never an enforceable *oral* agreement between the parties, and that there was never an intention to be bound by such an oral agreement. Defendant goes on to point out that plaintiffs fail to contest his argument regarding the Statute of Frauds.

Regarding plaintiffs' fraudulent misrepresentation claim, defendant maintains that the Complaint fails to allege any specific deceptive actions taken by defendant. Further, plaintiffs fail to address his contention that New York law does not permit a cause of action sounding in fraud to be based solely on a mere failure to perform promises in the future.

Defendant maintains that plaintiffs have failed to demonstrate that their claims of negligent misrepresentation and breach of the duty of good faith and fair dealing are not duplicative of their breach of contract claim.

Regarding plaintiffs' claim for promissory estoppel, defendant contends that nothing in

plaintiffs' opposition suggests the existence of a clear and unambiguous promise between the parties. Therefore, the claim must be dismissed.

Regarding plaintiffs' request for punitive damages, defendant argues that a demand for punitive damages does not amount to a separate cause of action for pleading purposes. Defendant also contests what he describes as plaintiffs' attempt to pigeonhole defendant's alleged actions with those of "members of the distressed lending field who . . . attempt to swoop in on vulnerable and desperate business owners and steal their hard-earned assets for next to nothing." The Complaint fails to allege that defendant stole or attempted to steal anything, or that defendant's purported conduct was part of a pattern of similar conduct directed at the public generally.

Finally, defendant contends that although plaintiffs do not discuss the May 3, 2006 Letter attached to their attorney's affirmation, it seems that plaintiffs are offering the letter as evidence of a contract between the plaintiffs and defendant. Even assuming that May 3, 2006 Letter is authentic, it does not change the fact that there is no enforceable agreement between the parties, defendant argues. The May 3, 2006 Letter is not written by or to defendant. Defendant never executed it, or even acknowledged its receipt. It is nothing more than a self-serving letter from one of the plaintiffs to a non-party. Thus, the Court should disregard it.

Discussion

Dismissal pursuant to CPLR §3211(a)(1) and (7)

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence (*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1 [1st

Dept 2004]). The term "documentary evidence" referred to in CPLR 3211(a)(1) "typically means . . . out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes '[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based'" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 (NY Ct Cl), 2003 NY Slip Op. 50590, *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20 and 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06). Where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, [Sup Ct New York County 2006], *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88

[1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank* at 228). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Breach of Contract

To state a cause of action for breach of contract, plaintiffs' first cause of action, the proponent of the pleading must specify the (1) making of an agreement, (2) the performance by that party, (3) breach by the other party, and (4) resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 2006 NY Slip Op 50497 [U] [NY Sup 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc.*, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Here, plaintiffs have failed to state a cause of action for breach of the Letter of Intent,

and/or breach of an oral agreement subsequent to the Letter of Intent.[2]

It is undisputed that the parties executed the Letter of Intent. It is further undisputed that plaintiffs performed according to the terms of the Letter of Intent. However, the evidence in the record flatly contradicts plaintiffs' allegations that defendant breached the Letter of Intent.

The Letter of Intent provides, in relevant part:

> The intent of this letter ("letter") *is to summarize the recent discussions concerning a potential transaction* pursuant to which Brian Jarmain ("Jarmain"') will (i) acquire, directly or indirectly, fifty percent (50%) of the issued and outstanding capital stock of each of Executive Merriment Corp. ("EMC") and Executive Lodging, Inc. ("ELI" and, together with EMC, collectively, the "Sellers"); and (ii) secure a commitment for financing to refinance the existing mortgage indebtedness of ELI (collectively, the "Transaction"). Sellers and Jarmain are collectively referred to in this letter as the "Parties."
>
> Set forth below [is] . . . an outline of the steps *that will be taken by the Parties to continue negotiating the terms and conditions* of the Transaction:
>
> 1. General. Sellers and Jarmain *shall continue to work together in good faith on an exclusive basis to negotiate the terms of the Transaction*. . . . Following such review [of the business operations, etc.], Jarmain and Sellers shall negotiate in good faith a mutually acceptable purchase price . . . .
>
> 2. Financing. Prior to the date of this letter Jarmain has made, and *shall continue to make, good faith efforts to secure a commitment to refinance the existing indebtedness of ELI on terms that are reasonably satisfactory to Jarmain and Sellers*. . . .
>
> *3. Non-binding Proposal. Except as set forth in Section 4*[3]*, this letter is intended to serve*

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[2]The Court notes that plaintiffs' pleading for breach of contract mirrors plaintiffs' pleading for promissory estoppel. Plaintiffs allege that defendant made promises to Schneider to enter into a business venture with him, plaintiffs relied on defendant's promises to their detriment, defendant broke his promises to Schneider, and as a result, plaintiffs have suffered damages in the amount of $1 million (Complaint, ¶¶58-62). However, in according plaintiffs every favorable inference, the Court also notes that while plaintiffs do not specifically allege the making of an agreement, plaintiffs refer to the Letter of Intent in their Complaint (Complaint, ¶ 45). Further, while plaintiffs do not attach the Letter of Intent to their Complaint, a discussion regarding a potential joint business venture is memorialized in the Letter of Intent. In addition, in their opposition, plaintiffs refer to an oral agreement between the parties "subsequent to" the February 9, 2006 Letter of Intent (opp., pp. 3-4).

[3]Section 4 is a confidentiality section.

as a non-binding statement of interest regarding the Parties' interest in entering into the Transaction. Except as set forth in Section 4, unless and until Sellers and Jarmain execute a definitive agreement, neither Party will be under any legal obligations with respect to the other. Additionally, the Parties acknowledge that this letter does not state all of the essential terms and conditions of the Transaction.

***

5. Conditions. This letter is subject to and expressly conditioned upon, among other things (i) satisfactory completion of due diligence, *(ii) the negotiation and execution of definitive agreements relating to the Transaction, on terms mutually acceptable to Sellers and Jarmain,* and (iii) Jarmain's receipt of a commitment for financing on terms reasonably acceptable to Jarmain.

***

7. Entirety. *This letter constitutes the entire understanding and agreement between the Parties with respect to its subject matter and supersedes all prior or contemporaneous agreements*, representations, warranties and understandings of such Parties, whether oral or written. No promise, inducement, representation or agreement, other than as expressly set forth herein, has been made to or by the Parties. *This letter may be amended only by written agreement, signed by the Parties.*
(Emphasis added).

It is well settled that "a mere agreement to agree" is not an enforceable contract (*Prospect Street Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 213 [1st Dept 2005]). In *Prospect*, the First Department determined that a letter on which the plaintiff relied in its contract action was a mere agreement to agree because "it was expressly conditioned on the 'execution of a definitive agreement satisfactory in form and substance' to both sides, and nothing in the complaint or record reflects that this condition was waived" (*id.*). The Court further noted that the letter "manifested an intent not to be bound unless there was such a definitive agreement or a waiver thereof. The intent not to be bound is also manifested in the references in the letter to a 'proposed' commitment and a 'proposed' transaction" (*id.*) (citations omitted); *see also Aksman v Xiongwei Ju*, 21 AD3d 260, 261-262 [1st Dept 2005] [holding that a letter of intent to enter joint venture was merely a non-binding proposal to agree, because it expressed "the parties'

intention to enter into a contract 'at a later date' and nowhere states that they intend to be legally bound until such future agreement is reached"]; *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher,* 52 NY2d 105 [1981] ["It is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, *in which a material term is left for future negotiations*, is unenforceable. This is especially true of the *amount to be paid for the sale or lease of real property*] [emphasis added]).

Here, contrary to plaintiffs' arguments, nothing in the Letter of Intent indicates that defendant was legally bound to acquire a 50% interest in the Property. The opening paragraph makes clear that the document is merely a summary of "the recent discussions concerning a *potential transaction*" between defendant and plaintiff (Letter of Intent, p. 1) (emphasis added). The second paragraph states that the parties were still "negotiating the terms and conditions of the Transaction" (*id.*). Section 1 explains that the potential transaction was at the stage of review, and that "[f]ollowing such review, [the parties] shall negotiate in good faith a mutually acceptable price for [defendant's] direct or indirect acquisition" of the 50% interest in the Property. Section 3 makes clear that the Letter of the Intent is legally nonbinding until the parties execute a "definitive agreement" and that the letter does *not* state "all of the essential terms and conditions of the Transaction." Section 5 states that the Letter of Intent is subject to certain conditions, notably "the negotiation and execution of *definitive agreements* relating to the Transaction, on terms mutually acceptable" to plaintiffs and defendant (*id.*) (emphasis added). Plaintiffs fail to allege that such a definitive agreement was ever executed. Section 5 also states that the Letter of Intent can be amended only by a subsequent written agreement by the parties. Plaintiffs fail to point to any such written agreement.

While plaintiffs allege that on May 20, 2006, "suddenly and without warning," defendant informed Schneider that "he would not be honoring his promises to form and join a partnership with Schneider" to buy the Property (Complaint, ¶ 50), such conduct on defendant's part does not constitute a breach of the Letter of Intent, as a matter of law.[4]

Here, the Letter of Intent demonstrates the absence of a definitive agreement between the parties containing the material terms of a joint venture to purchase the Property.

The Letter of Intent specifically obligates defendant to "continue to make, good faith efforts to secure a commitment to refinance [Lodging's debt] on terms that are reasonably satisfactory to [the parties]" (Letter of Intent, Section 2). The allegations in the Complaint demonstrate that defendant made such an effort. Plaintiffs allege that "from October 2005 to May 2006, *Schneider and the Defendant* continued to arrange for appraisals of the Property, negotiate the value of the Property, and work on arrangements for refinancing the debt on the Property" (Complaint, ¶ 38) (emphasis added). Plaintiffs further allege:

> On March 28, 2006, upon being informed by Schneider that he had arranged a favorable deal for refinancing the Stillwater Loan, the Defendant asked Schneider to send him the material terms of the new loan.
>
> ***
>
> In the meantime, the Parties continued to exchange information necessary to complete the formation of the partnership and to secure the Shinhan Loan.
>
> The Defendant provided Schneider and Shinhan with proof of his income, including highly confidential information such as his Internal Revenue Service Form W-2 for 2005, his individual income tax returns for the years ended December 31, 2003, 2004 and 2005,

[4]The Court notes that neither party provide any details about what precipitated defendant's decision not to pursue a definitive agreement to purchase the Property. Plaintiffs only allege that after Schneider tried to persuade defendant to reconsider, on "December 3, 2006, the Defendant wrote to Schneider *in a message filled with misrepresentations of the facts leading to the dispute*, and confirmed that he would not deliver on his promises and enter into a business venture" with plaintiffs (Complaint, ¶ 52) (emphasis added). The Court notes that plaintiffs fail to provide a copy of a December 3, 2006 message, and defendant fails to mention same. Defendant contends only that in "May 2006 *discussions broke down* and the negotiations for my purchase of the Property ended."

> and a personal financial statement as of March 20, 2006 – information and documents that a prudent and reasonable businessperson would never provide unless he or she was fully committed to entering or joining a business venture.
> (Complaint, ¶¶ 46-49)

Therefore, the evidence in the record flatly contradict plaintiffs' allegations that defendant breached the Letter of Intent.

In their opposition, plaintiffs allude to an oral agreement made between the parties after they executed the February 9, 2006 Letter of Intent (opp., pp. 3-4). However, in support of their contention, plaintiffs only recite the same promises defendant allegedly made leading up to the parties' executing the Letter of Intent (opp., p. 5). Plaintiffs fail to provide any details as to the essential terms of the parties' purported oral agreement, including the specific provisions of the agreement upon which liability is predicated when defendant made such an agreement, or the material terms of any such an agreement (*Volt Delta Resources LLC, supra*).

Further, General Obligations Law §5-703 makes clear that contracts for the sale of any real property, or any interest therein, are void unless accompanied by a writing and signed by the party to be charged, or his or her lawful agent. For example, in *Goebel v Raeburn* (289 AD2d 43 [1st Dept 2001]), an action alleging breach of contract to buy real property, the First Department held that "the motion court properly found that a letter from plaintiff's counsel to defendant's counsel and a letter from defendant's counsel to plaintiff did not constitute writings sufficient to take the alleged agreement out of the Statute of Frauds, since the relied upon writings failed to state all the material terms of a complete agreement." The Court went on to note that "the letters themselves reveal that the parties had not intended to be bound until a further formal contract was negotiated and executed" (*id.*).

Additionally, although the May 3, 2006 Letter from Schneider to East Coast is dated after

the Letter Intent, it does not constitute an agreement executed by plaintiffs and defendant. The May 3, 2006 Letter states in relevant part:

> The following is the breakdown of the partnership at the closing of the new loan. Executive Merriment Corp. and Executive Lodging Corp. are both Chapter S Corporations and will continue to be after the conclusion of the financing. Mr. Brian Jarmain *is buying into both the above mentioned Corporations at a 50% level* with the remaining 50% under my ownership. Due to the fact that the physical building is owned by the entity of Executive Merriment Corp, Mr. Jarmain will also be 50% owner of the property. The financial commitment of Mr. Jarmain's purchase is $1,050,000 or 65.5% of the new mortgage amount. The monthly mortgage payments will be made by the business entity's ongoing revenue stream which has been a constant increasing amount since our inception in 1999.
> (Emphasis added)

While the May 3, 2006 Letter represents that defendant "is buying" the Property, and contains some material terms, it is not an agreement *between the parties* or *signed by the parties*. Therefore, it fails to demonstrate that defendant agreed to those material terms.

Finally, while plaintiffs contend that they possess "other documentary evidence that vitiates the import of the exculpatory clause of the Letter of Intent" (opp., p. 4), plaintiffs do not allege that they possess an agreement executed by the parties that demonstrates a definitive agreement by plaintiff to purchase the Property.

Therefore, as plaintiffs fail to sufficiently allege the existence of an enforceable written or oral agreement to purchase the Property, plaintiffs fail to state a claim for breach of same. Accordingly, plaintiffs' breach of contract claim is dismissed.

Fraudulent Misrepresentation

Regarding plaintiffs' fraudulent misrepresentation claim, it is well settled that in order to recover for fraud, the movant "must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made,

justifiable reliance by the [movant], and resulting injury. CPLR 3016 (b) requires that these elements of fraud be pleaded in detail. In addition, the damages incurred by reason of the fraudulent conduct must be actual pecuniary losses" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006] [citations omitted]).

Contrary to defendant's argument, plaintiffs' pleading contains sufficient detail. In their Complaint, plaintiffs allege that, upon information and belief, defendant's true intention with respect to the Property was to intensify Schneider's and the Property's financial situation rather than improve it, so defendant could acquire the Property for pennies on the dollar. Plaintiffs further allege that defendant embarked on a course of stringing Schneider along as the Property teetered toward foreclosure by Stillwater, and instilling Schneider with false hope that their joint business venture would be a financial success, all the while planning to take the businesses from Schneider for nothing or next to nothing. Defendant was using this strategy to unfairly obtain private and proprietary business and financial information from Schneider to gain an inappropriate advantage in negotiating with Schneider (Complaint, ¶¶ 30-32).

Plaintiffs further allege:

> The Defendant willfully, maliciously and fraudulently made false and misleading representations to Schneider with the intent to deceive him.
>
> The Defendant's fraudulent misrepresentations included *assuring Schneider that they would enter into a partnership agreement when an appraisal report would be received and assuring Schneider that he would absorb any late fees, charges and penalties associated with the repayment of the Stillwater Loan.*
>
> The Defendant knew that those assurances were false and misleading when he made them.
>
> The Plaintiffs relied on the Defendant's misrepresentations and, as a result, suffered damages in the amount of one million dollars ($1,000,000.00).
> (Complaint, ¶¶ 64-67) (emphasis added).

As the Complaint demonstrates, defendants' alleged misrepresentations are stated in detail. However, plaintiffs' claim fails, because it is duplicative of their breach of contract action.

"It is recognized that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract" (*Miller v Volk & Huxley Inc.*, 44 AD2d 810 [1st Dept 1974]; *Comtomark, Inc. v Satellite Communications Network, Inc.*, 116 AD2d 499, 500 [1st Dept 1986] [holding that a contract action "may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation"]). More recently, the First Department explained that unless the tort liability arises from a breach of a duty independent of a breach of contract, then the claim will fail (*Moustakis v Christie's, Inc.*, 2009 WL 4911273, 1 [1st Dept 2009]; *Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1 Dept 2001]). In *Coppola*, the plaintiff's fraud claim was "based on the allegation that [the defendant] harbored the undisclosed intention from the outset to never comply with the parties' stock purchase agreement." The First Department noted that "the claimed fraud was not collateral or extraneous to the contract, did not allege any damages, including those for foregone opportunities, that would not be recoverable under a contract measure of damages and failed to plead a breach of duty separate from a breach of the contract" (*id.* at 42) (citations omitted). The Court went on to hold that the plaintiff's fraud claim was properly dismissed as merely duplicative of his breach of contract claim.

Here, plaintiffs fail to allege a breach of a duty separate from breach of contract, and they seek to recover the exact same damages as under the breach of contract claim, *i.e.* $1 million. Further, plaintiffs do not allege that defendant's alleged fraudulent intent related to *an additional*

oral assurance not embodied in the terms of the Letter of Intent that was allegedly breached, nor do plaintiffs allege that such intent was evidenced by defendant's conduct shortly after entering into the agreement (*cf. Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112 [1995]; *see also, Gotham Boxing Inc. v. Finked*, 18 Misc 3d 1114, 856 NYS2d 498 [Supreme Court New York County 2008] [stating "The critical factual distinction between *Graubard*, in which the Court of Appeals upheld a fraud claim that was related to a contract claim, and *Coppola*, in which the First Department dismissed a fraud claim as duplicative, seems to be that in *Graubard*, the fraud claim was based on a particular oral assurance offered by the defendant, in addition to the promises recorded in the written agreement, and the fraudulent intent "was not asserted in conclusory fashion but was evidenced by defendant's conduct shortly after entering into the agreement" . . . . In contrast, in *Coppola*, the plaintiff did not refer to any particular representation or conduct by the defendant other than that reflected in the terms of the agreement"]). Notably, plaintiffs allege that defendant's conduct from October 2005 through May 2006, indicated that defendant was still planning to purchase the Property (Complaint, ¶ 38).

Also, it is well settled that representations such as those emphasized above at issue herein that are not statements of existing fact but are merely expressions of future expectations or that are promissory in nature at the time made and relate to future actions or conduct are insufficient to support a cause of action or counterclaim for fraud (*Transit Management, LLC v Watson Industries, Inc.*, 23 AD3d 1152, 803 NYS2d 860 [4th Dept 2005] ["representation that Professional would loan money to Watson Industries in exchange for 49% ownership relates solely to future expectations and thus cannot support that part of the third counterclaim alleging fraud]). Accordingly, plaintiffs fraudulent misrepresentation claim is dismissed.

Negligent Misrepresentation

Likewise, plaintiffs' claims for negligent misrepresentation also cannot be sustained (*see Ansari v New York University*, 1997 WL 257473, *6 [SDNY 1997] [holding that the plaintiff alleged no special relationship, independent of the contract, from which a duty of care for negligent misrepresentation would arise, as "plaintiff and defendants were involved in an ordinary buyer and seller relationship"]).

Breach of the Duty of Good Faith and Fair Dealing

Plaintiff fails to state a cause of action for breach of an implied obligation of good faith. Although such an obligation may arise and be enforced as an implied term of a contract there was no contract between plaintiff and defendant (*Levine v Yokell*, 258 AD2d 296, 685 NYS2d 196 [1st Dept 1999] (internal citations omitted)).

Promissory Estoppel

Plaintiffs' promissory estoppel claim also fails. A successful pleading of promissory estoppel requires a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise (*Esquire Radio & Electronics, Inc. v Montgomery Ward & Co., Inc.*, 804 F 2d 787, 793 [1986]). Here, while plaintiffs' pleading contains all of the required elements (Complaint, ¶ 77-80), the inclusion of the condition in the Letter of Intent requiring a definitive agreement precludes the element of detrimental reliance. The First Department explained in *Prospect, supra*:

> The legal insufficiency of the contract cause of action requires the dismissal of the promissory estoppel claim as well, since the inclusion of the condition [that the subject purchase agreement depended upon the execution of definitive agreement] precluded the element of detrimental reliance. . . . Since the promissory estoppel claim is precluded by the terms of the letter, the rule that a detailed showing of the elements of promissory estoppel need not be shown to survive a pre-answer motion to dismiss is irrelevant here;

the deficiency is not in the completeness of the allegations, but in their contradiction. (*Prospect* at 214)

Plaintiffs contend that in 2005 and 2006 defendant made the following promises: (1) for an interest in the Property, defendant would inject capital in the amount of $1,050,000, based on the fair market value of the Property, (2) defendant would diligently work to obtain financing for the Property on favorable terms, (3) defendant would reimburse Schneider for all additional liabilities incurred as the result of defaulting on the outstanding debt of $1.4 million owed on the Stillwater Loan, which was due in January 2006, and (4) defendant would provide a personal guarantee to Shinhan Bank for financing arranged by Schneider (plaintiffs' MOL, p. 2). However, Section 7 of the Letter of Intent contains an integration clause that makes clear that the document supersedes "*all prior or contemporaneous agreements*, representations, warranties and understandings of the Parties, whether oral or written." Therefore, the Letter of Intent precludes plaintiffs' detrimental reliance on any of defendant's promises. Accordingly, plaintiffs' claim is dismissed.

Punitive Damages

Plaintiffs have failed to sufficiently allege a cause of action for punitive damages. "Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime,'" (*Prozeralik v Capital Cities Comm., Inc.*, 82 NY2d 466, 479 [1993], *quoting* Prosser and Keeton, Torts §2, at 9 [5th ed 1984]). Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber,* 73 NY2d 246, 254 [1989]). Furthermore, a cause of action for punitive damages cannot stand as a separate cause of action since it constitutes merely an element of the single total claim for damages on the

underlying causes of action *(APS Food Systems, Inc. v Ward Foods, Inc.*, 70 AD2d 483, 421 [1st Dept 1979], *citing Goldberg v New York Times*, 66 AD2d 718 [1st Dept 1978]; *Kallman v Wolf Corporation.*, 25 AD2d 506 [1st Dept 1966]). And, the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights *(see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]).

Here, as a separate claim, plaintiffs allege that defendants' actions "were done knowingly, willfully and with purposeful and wanton disregard for the Plaintiffs' rights and the duties owed to them, and exemplify the worst characteristics of distressed lending vultures" (Complaint, ¶ 82), and such actions were "disgraceful, duplicitous, conscience-shocking and against public policy" (*id.* at 83). Further, in their opposition, plaintiffs contend:

> As described in the Complaint, the Defendant's conduct reflects that of the members of the distressed lending field who prey on unsuspecting small business owners. They attempt to swoop in on vulnerable and desperate business owners and steal their hard-earned assets for next to nothing. A message should be sent to the financial community that predatory practices will not be tolerated.
> (opp., p. 8)

However, such allegations are insufficient to sustain a claim for punitive damages against defendant. First, while plaintiffs allege that defendant worked in "distressed lending" for Silver Point Capital (Complaint, ¶ 23), they fail to allege that defendant ever sold or tried to sell

plaintiffs a loan. Second, defendant's actions as described in the Complaint and plaintiffs' submissions do not appear to rise to the level of outrageous and malicious conduct. Instead, the record demonstrates only that plaintiffs and defendant planned to enter into a joint venture, the parties executed the Letter of Intent and took steps toward that goal, and for some reason or reasons undisclosed to the Court, defendant changed his mind and ended the negotiations (plaintiff's affd., ¶ 12). Finally, plaintiffs fail to sufficiently allege that defendant's actions were aimed at the general public. Instead, it is clear from plaintiffs' submission that they are seeking to vindicate plaintiffs' private rights, and not public rights. Accordingly, plaintiffs' cause of action for punitive damages is dismissed.

Leave to Amend

It is well settled that leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]). Further, leave to amend "may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required procedure to permit the court to pass upon the merits of the leave for amendment" (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984], *citing East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept 1970]).

Here, in a sentence on the last page of their opposition, plaintiffs request leave to amend

their Complaint "to include additional information as required by the Court," should the Court find plaintiffs' pleadings to be insufficient (opp., p. 9). However, plaintiffs do not cross move for leave to amend, pursuant to CPLR §3025(b), nor have they provided the Court with a proposed Amended Complaint, pursuant to CPLR §3211[e] (*see Hickey v National League of Professional Baseball Clubs*, 565 NYS2d 65, 66 [1st Dept 1991] ["Plaintiff's application for leave to amend, contained in a single sentence without even the most conclusory indication of what the new pleadings would be, was properly denied. This Court has construed CPLR 3211(e) to require that the proposed new pleadings be supported by evidence as on a motion for summary judgment"]; *Abbott v Herzfeld & Rubin, P.C.*, 202 AD2d 351, 352 [1st Dept 1994] [holding that leave to replead was properly denied because the plaintiffs did not provide "proposed new pleadings supported by evidence as on motion for summary judgment"]).

Further, plaintiffs fail to make any evidentiary showing that would justify the Court's granting them leave to amend its Answer. Accordingly, plaintiffs' request is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Brian A. Jarmain for an order, pursuant to CPLR §§3211(a)(1) and (a)(7), dismissing the complaint of plaintiffs Arthur A. Schneider, Executive Merriment, Corp., and Executive Lodging, Inc. is granted, and plaintiffs' motion is hereby dismissed in its entirety ; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 6, 2010

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD