[* 1]

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

PRESENT: _____ PART 10

Index Number : 103339/2010

SERBETCIOGLU, AYKUT

VS

R.N. JOSEPH FINE JEWELRY

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

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

Mot Seq # 3, 4+5 consolidated for determination. 8 10/7/10

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

FILED

MAR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/11

_____ 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

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------X

AYKUT SERBETCIOGLU,

Plaintiff,

-against-

R.N. JOSEPH FINE JEWELRY LLC d/b/a R.N. JOSEPH FINE ARTS LTD., RNJA COMPANY, LLC, RONALD SAFDIEH, JOSEPH SAFDIEH, and JUMEIRAH HOSPITALITY & LEISURE (USA) INC.,

Defendants.

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Decision and Order

Index № 103339/10
Seq. 003, 004, 005

Present:
Hon. Judith J. Gische, JSC

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

Papers	**Numbered**
Motion Seq No. 003	
Fine/Safdieh defs' n/m (3211) w/BK affirm, RS affid, exhs	1
Pltff opp w/ AS affid, DLC affirm exhs	2
Fine/Safdieh further support w/DB affirm, RS affid, exh	3
Motion Seq. No. 004	
Fine/Safdieh OSC (increase undertaking) w/DB affirm, RD affid, exhs	4
Pltff opp w/DLC affirm, AS affid, exhs	5
Fine/Safdieh reply w/BS affirm, RS affidm exh	6
Motion Seq. No. 005	
Pltff n/m (3211) w/DLC affirm, AS affid, exhs	7
Fine/Safdieh opp w/DB affirm, DS affid, exhs	8
Pltff's reply w/DLC affirm, AS, JD affids, exhs	9
Other	
Transcript OA 10/7/10	10
Order 11/21/10	11

JUDITH GISCHE, J.:

This is a dispute over merchandise which plaintiff Aykut Serbetcioglu (Serbetcioglu)

purchased at a retail shop located in the Jumeirah Essex House hotel in New York City. The owners and/or operators of the shop, defendants R.N. Joseph Fine Jewelry LLC, sued herein as R.N. Joseph Fine Jewelry LLC d/b/a R.N. Joseph Fine Arts, Ltd., RNJA Company, LLC, Ronald Safdieh, Daniel Safdieh and Joseph Safdieh move, under motion sequence number 003, and pursuant to CPLR 3211 (a) (1), (5) and (7), for an order dismissing plaintiff's third, fourth and fifth causes of action. Under motion sequence number 004, defendants move, by order to show cause, for an order modifying the order of attachment dated May 28, 2010; and under motion sequence number 005, plaintiff moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing defendants' counterclaims, and pursuant to CPLR 305 (c), for an order granting him leave to amend the caption, nunc pro tunc. Motion sequence numbers 003, 004 and 005 are consolidated for disposition.

By written stipulation of discontinuance, dated August 19, 2010, and confirmed on the record of October 7, 2010, plaintiff discontinued, without prejudice, its complaint against defendant Jumeirah Hospitality & Leisure (USA) Inc. (Jumeirah H&L). This includes a dismissal of plaintiff's sixth cause of action which charged only Jumeirah H&L with violation Real Property Law § 231.

According to his complaint, on May 5, 2009, plaintiff was a paying guest at the Jumeirah Essex House, a luxury hotel in midtown Manhattan more commonly known by its former name the Essex House. Inside the Essex House were commercial retail shops, or "galleries," including those owned and operated by defendants who, according to plaintiff, openly displayed numerous items of jewelry, art and antiques with signs indicating that some of these items were genuine "Fabergé" pieces and/or otherwise authentic antiques. Serbetcioglu alleges that he spent many

hours over the course of May 5 -7, 2009, speaking with Ronald Safdieh, Daniel Safdieh and Joseph Safdieh about various items, including the authenticity of pieces he was interested in purchasing, especially those identified as Fabergés. Serbetcioglu purchased four pieces on one day and he returned to the galleries the next day and purchased 16 more. It is the 16 items, for which Serbetcioglu paid $250,000.00, which are the subject of this lawsuit.

Plaintiff was given a handwritten bill of sale/invoice, dated May 7, 2009, listing all 16 items. At the top of the invoice is printed the name "RNJA Company LLC r/a R.N. Joseph Fine Arts Ltd.// Essex House" and its location at "160 Central Park So.// New York, NY 10019." The invoice separately identifies each of the objects, including the 13 objects which Serbetcioglu understood to be genuine Fabergés.

It is alleged that Ronald Safdieh told Serbetcioglu that certificates of authenticity for the items he purchased would be mailed to him within the next 10 days. Relying upon these assurances, on May 6, 2009, plaintiff wrote out two checks, one, back-dated to May 5, 2009, in the sum of $150,000, was made payable to "RNJA," and the second, post-dated to May 7, 2009, in the sum of $100,000.00, was made payable to "RNJA Co. LLC." The two checks, totaling $250,000.00 were negotiated, or cashed, within the next few days.

According to the complaint, plaintiff returned to the galleries on June 10, 2009, for the purpose of having two of the items repaired and to inquire about the certificates of authenticity which he had not received. He spoke with Ronald Safdieh, who, allegedly, assured him that the items were genuine and that the certificates of authenticity were forthcoming, and he was given a handwritten receipt for the items needing repair. The complaint further alleges that, when the certificates of authenticity had not arrived by the fall of 2009, and plaintiff's phone calls went

unanswered, plaintiff sought the help of an expert to examine the pieces for their authenticity and value.

Upon learning that the pieces were actually modern forgeries of little monetary value, Serbetcioglu commenced the instant action to recover the $250,000.00 he paid defendants, plus punitive damages in the amount of $1 million. The summons and complaint, which were filed on or about February 26, 2010, contain six causes of action: breach of contract (first); breach of warranty (second); fraudulent inducement (third); unjust enrichment (fourth); and violations of General Business Law (GBL) § 349 (fifth) and Real Property Law § 231 (sixth), which, as stated above, has since been discontinued.

Issue was joined by service of defendants answer, on or about July 1, 2010, and despite the fact that discovery remains outstanding, defendants move, under motion sequence 003, for a dismissal of the third, fourth and fifth causes of action, including plaintiff's demand for punitive damages under GBL § 349. Defendants also move for a dismissal of the claims against the individually named defendants.

While it is undisputed that most of the items plaintiff purchased were not authentic Fabergés, or otherwise antique, the parties sharply dispute what was said, or represented to plaintiff, which lead him to spend the $250,000.00.

Turning to the fraudulent inducement claim, defendants seek a dismissal of this claim on the grounds that: (1) the alleged oral representations were contradicted by the subsequently written invoice/bill of sale which plaintiff signed on May 7, 2009, and which contains no representation about the authenticity of any of the itemized pieces; (2) if a conflict exists between alleged oral representations and the terms of a subsequent written contract (the invoice/bill of

sale), then a claim of reliance on oral statements was not reasonable; (3) it was unreasonable for plaintiff to expect that he was purchasing 16 antique pieces, 13 of which were genuine Fabergé objects, for only $250,000.00; and (4) the allegations underlying the fraud claim are redundant to those underlying his contract claim.

It is well settled that on a motion to dismiss a claim pursuant to CPLR 3211 (a) (7), 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" (*Leon v Martinez*, 84 NY2d 83, 87 - 88 [1994]). At issue is whether plaintiff has stated a claim for fraudulent inducement with sufficient particularity, and not, as argued by defendants, whether there is merit to this claim (CPLR 3211 [a] [7], CPLR 3212).

It is well settled that "[o]ne who fraudulently makes a representation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereon . . . is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation" (Restatement [First] of Torts § 525; *see Channel Master Corp. v Aluminum Ltd. Sales,* 4 NY2d 403, 407 [1958]). By alleging in his complaint that defendants induced plaintiff to pay $250,000.00 for "fake" merchandise when they made what they knew to be false and misleading statements about the authenticity, quality and origins of the merchandise, and by convincing him that he could rely on their statements through their promise of certificates of authenticity, plaintiff sufficiently particularized his pleadings to state this cause of action. Defendants assertions that they merely represented the items as having been made "in the style of Faberge," and that the lawsuit is fueled by nothing more than "buyers' remorse," are defenses which are not relevant on a CPLR 3211 (a) (7) motion to dismiss.

With respect to that aspect of defendants' motion which demands that the fraudulent inducement claim be dismissed because it contains allegations which also support plaintiff's breach of contract claim, their argument lacks merit. Unlike situations in which fraud claims are dismissed as duplicative of breach of contract claims because the allegations "merely relate[] to a contracting party's alleged intent to breach a contractual obligation" (*Caniglia v Chicago Tribune - N.Y. News Syndicate,* 204 AD2d 233, 234 [1st Dept 1994] [citation omitted]),

Serbetcioglu's allegations pertain to present malfeasance. Specifically, the complaint alleges that plaintiff relied on representations which pertained to present fact, that the pieces he was interested in were genuine, and not to some future performance. Additionally, "a misrepresentation of material fact that is collateral to the contract and serves an as inducement for the contract, is sufficient to sustain a cause of action alleging fraud" (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2nd Dept 2008] [internal quotation marks and citation omitted]), and plaintiff's fraudulent inducement claim is not precluded merely by the fact that the same set of circumstances underlies both claims (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Also denied is that aspect of defendants' CPLR 3211 motion which demands a dismissal based on "reasonableness." Specifically, defendants assert that the complaint does not state a cause of action because it was not reasonable for anyone, including plaintiff, to believe that he could pay $250,000.00 for 13 genuine Fabergé objects, as opposed to what he received, objects made "in the style Fabergé." Defendants also suggest that any purported reliance was unreasonable because Serbetcioglu was a sophisticated buyer. However, questions regarding Serbetcioglu's knowledge and the reasonableness of his reliance on defendants' alleged representations, are fact intensive, require discovery and are not properly resolved on a motion pursuant to CPLR 3211 (a) (7) (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010]).

Defendants also move for a dismissal of this claim on the ground that there exists documentary evidence which directly contradicts his repeated allegations that he relied to his detriment on the alleged misrepresentations (CPLR 3211 [a] [1]). New York has long

recognized that a dismissal pursuant to CPLR 3211 (a) (1) "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88). To this end, defendants offer a copy of the subsequently written invoice which plaintiff signed, and which itemizes his purchase without identifying them as authentic or genuine Fabergés.

While an examination of the invoice confirms defendants' assertion that it does not contain language identifying the pieces as genuine Fabergés, the same invoice is also notable for the fact that it does not contain any disclaimer language alerting the consumer not to rely on oral representations made prior to purchase. Additionally, plaintiff submits his own documentary evidence to counter defendants' proof and to show that they did represent the pieces to be "Fabergé," and/or antiques, and not merely as objects manufactured "in the style of Fabergé." Plaintiff submits: (1) a copy of a handwritten "invoice" page which defendants used as a receipt for the two items plaintiff brought back for repairs on June 10, 2009. On it, are the words "repair 1 Fabergé egg, 1 cigar holder"; (2) copies of the photographs Ronald Safdeih and/or other defendants purportedly provided to him depicting the items he purchased. On these photographs are handwritten notations identifying the items as either: "old 19c," "19c," or "20c"; and (3) a copy of plaintiff's expert's report describing the items and noting that many of them came with fitted cases marked "Fabergé." In light of the above, defendants' documentary evidence (the invoice) does not establish a defense to the asserted fraudulent inducement claim as a matter of law.

Defendants also move for a CPLR 3211 (a) (7) dismissal of plaintiff's cause of action pursuant to GBL § 349. GBL § 349 provides, at subsection (a), that "[d]eceptive acts or

practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." The New York courts recognize that a typical claim under this statute involves "an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999] [internal citation omitted]).

Defendants argue that the statute is inapplicable because the disputed interaction involved a private, single transaction which in no way affected the general public (and that it was not reasonable for plaintiff to rely on any purported misstatements).

The issue is whether the complaint adequately pleads that defendants engaged in a consumer-oriented act or practice that was deceptive or misleading in a material way and that plaintiff was injured by reason of such act or practice (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). The complaint meets these pleading requirements as it contains allegations that the subject transaction involved a consumer-oriented retail shop which sells merchandise to consumers in a tourist-filled hotel in midtown Manhattan, and that the shop's windows and display cases contained signs indicating that the merchandise was authentic Fabergé or otherwise antique. The complaint further alleges that the shop's salespersons made representations and assurances confirming the authenticity of the merchandise, which they knew to be "cheap imitations," or "fakes," and that they did so with the intent to deceive the public at large and the individual consumers who entered the shop, such as plaintiff, in particular. Based on these allegations, the complaint adequately states the elements of a GBL § 349 claim.

Also denied is defendants' motion to dismiss plaintiff's claim for punitive damages. Where a violation of GBL § 349's prohibitions is found, subsection (h) permits recovery of

plaintiff's actual damages or fifty dollars, which ever is greater. Furthermore, the court has the discretion to award punitive damages by increasing "the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this action." Given that the motion to dismiss plaintiff's GBL § 349 (a) claim is denied, a dismissal of this aspect of the complaint would be premature.

Turning to plaintiff's fourth cause of action for unjust enrichment, "[a]s a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (*Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695 [2nd Dept 2009], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). The theory of plaintiff's lawsuit was that he was "tricked" into paying a large sum of money for "cheap" imitations of Fabergé pieces by defendants' deliberate misrepresentations as to the authenticity and value of the items, and that but for the deceit, the invoice, or contract, would not exist.

Discovery in this action is in its early stages. Neither party has submitted probative evidence as to the value of the merchandise sold to plaintiff, and there is no resolution as to the issue of whether the invoice/contract should be upheld. "Inasmuch as plaintiff['s] allegations present a bona fide question as to whether the parties' agreement was valid and enforceable, or was instead procured by fraud, the unjust enrichment claim should [be] permitted" (*Gordon v Oster*, 36 AD3d 525 [1st Dept 2007]), at least until the parties have had an opportunity to complete discovery.

Defendants also seek a dismissal of all claims against Joseph Safdieh on the grounds that

he, at the age of 13 years old, is legally an infant (CPLR 3211 [a] [5]). Plaintiff concedes that dismissal of the complaint as against a 13-year old would be appropriate, however, plaintiff demands that defendants provide competent, documentary proof confirming his infancy. Should this occur, plaintiff requests that he be permitted to substitute the name of "Joseph Safdieh" with "John Doe," so as not to leave out an, as of yet, unidentified proper person from this action.

According to Serbetcioglu, during the transaction at issue, he was helped by Ronald and Daniel Safdieh, and was also helped by and/or introduced to, an individual by the name of "Joseph." Given the early procedural posture of these proceedings and the fact that: (1) the invoice reads "R.N. Joseph Fine Arts Ltd."; (2) one or more of the entities contain the name "Joseph" in its corporate title; (3) defendants have not submitted adequate proof that there is no other (non-infant) individual associated with the galleries whose name is Joseph Safdieh; and (4) defendants have not provided competent proof of age of the currently named Joseph Safdieh to establish his status as an infant, the motion to dismiss the complaint as against "Joseph Safdieh" is denied with leave to renew upon proper papers. If and when defendants make the necessary showing, plaintiff may seek leave to amend the caption of his complaint. . . . . .

The balance of defendants' motion, under motion sequence 003, seeks a dismissal of the claims as against the individually named defendants on the ground that plaintiff has failed to allege sufficient facts to justify piercing the corporate veil and hold them liable in this action. Defendants contend that plaintiff does not allege the essential elements for piercing the corporate veil, namely that: "the owners exercised complete domination of the corporation in respect to the transaction attached; and . . . that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of*

Taxation & Fin., 82 NY2d 135, 141 [1993]).

Plaintiff opposes the motion on the alternative ground that these defendants acted in bad faith, committing acts which were fraudulent and deceitful, and therefore, they are not entitled to the protections of the corporate veil.

"The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the privilege is not without its limits. Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" (*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966] [internal quotation marks and citations omitted]). Under the appropriate facts and circumstances, a corporate officer can be held "individually liable for fraudulent acts or false representations of his own, or in which he participates, even though his actions . . . may be in furtherance of the corporate business" (*A-1 Check Cashing Serv. v Goodman*, 148 AD2d 482 [2nd Dept 1989]; *see* 15 NY Jur 2d, Business Relationships, § 1079).

In this action, as with others, the decision to pierce the corporate veil will ultimately depend on the facts and circumstances particular to that instance (*Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 146 [2nd Dept 2009]). While plaintiff has adequately stated his third, fourth and fifth causes of action, he has also asserted factual allegations against the individually named defendants which are independent from his factual allegations against the corporate defendants. The pleadings allege that the individual defendants knew that the items were not genuine Fabergé pieces during their negotiations with, or sales pitch to, Serbetcioglu, and that they used the corporate entities as vehicles to perpetuate the fraud (*see Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44 [1980]).

New York has long recognized that a breach of a contract between a plaintiff and a corporate defendant can be

> a mere incidental event that flowed from . . . [tortious] acts. We recognize that under the rule heretofore enunciated a corporate officer acting in good faith should be permitted to discharge his corporate duties unhampered by the fear of personal tort liability which would normally attach to a stranger who induced the breach of a contract. But when, if as here, the officer commits fraudulent, deceitful acts motivated by a personal desire for monetary gain at the expense of the plaintiff, we see no reason to shroud him with a mantle of immunity upon the fictitious theory that he was protecting the interest of the corporation, its stockholders and creditors in the performance of this duties as a corporate officer

(*Buckley v 112 Cent. Park S., Inc.*, 285 App Div 331, 335 [1st Dept 1954]).

Given the essence of the allegations of fraud, misrepresentation and deceit contained in the complaint, coupled with defendants' presumptive knowledge of their own corporate structure, it is appropriate for plaintiff to pursue discovery to ascertain whether there are grounds to pierce the corporate veil (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]).

Because resolution of the issues raised under motion sequence 005, in which plaintiff moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing defendants' first counterclaim for libel and second counterclaim for malicious prosecution, conclusively resolves the issues raised under motion sequence 004, this court will address these motions in reverse numerical order.

In their first counterclaim, defendants charge plaintiff with publishing false and defamatory statements with actual malice, wanton disregard, and recklessness in order to embarrass defendants and to expose them to public contempt, ridicule, aversion and disgrace. According to defendants, an article which appeared in the New York Post on March 21, 2010,

contains statements made by plaintiff accusing defendants of having "'tricked' him into purchasing "fake" items. They offer the following statements, quoted from the article, as proof libel:

> "[t]he R.N. Joseph Jewelry store in the Jumeirah Essex House hotel sold him a massive collection of faux Fabergé items last May;"
> "[t]hey told me the collection had belonged to a famous Fabergé collector. . . They said they would give me this collection at an amazing price;" and
> "[i]n September, he got the news from an appraiser that the items were made in Brighton Beach"

(Defendants' Verified Answer and Counterclaims, ¶¶ 16 - 22).

While the facts alleged in a defendant's counterclaims are accorded the same favorable inference are those contained in a plaintiff's complaint (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 279 [1st Dept 2004]), the issue before this court is whether the statements contained in the New York Post article are protected by the absolute privilege accorded to matters being litigated.

Plaintiff does not deny that the statements attributed to him are disparaging of defendants. Rather, the gravamen of his motion is that they are protected by Civil Rights Law § 74 which states, in relevant part, that "[a] civil action cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any judicial proceeding." This protection, which has long been afforded to newspaper publishers and their reporters/journalists, has been extended to persons, such as plaintiff, who speak with journalists about a particular lawsuit (*McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]; *Fishof v Abady,* 280 AD2d 417, 417 - 418 [1st Dept 2001]; *Ford v Levinson*, 90 AD2d 464, 465 [1st Dept 1982]). Plaintiff argues that the alleged defamatory words are non-actionable because they

relate to the instant lawsuit which was commenced prior to the article's publication, and which is the subject of the article. Plaintiff also points out that defendants are not pursuing a defamation claim against the New York Post or the author of the article, Stefanie Cohen. This, he contends, show that defendants' sole intent in bringing this counterclaim was to harass him.

Defendants have not shown that the language contained in the New York Post article should not be protected by the absolute privilege accorded to matters being litigated. Their attempts to place the quoted statements outside these protections by speculating as to the effect they might have on the article's readers, and by identifying certain words that are not present in the complaint as offensive, are unavailing. In *Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.* (49 NY2d 63, 68 [1979]), the Court of Appeals stated, in relevant part, that:

> When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author.

When viewed in conjunction with the complaint, the offending words cannot be deemed actionable as they are substantially accurate in their reflection of the allegations contained in the complaint, and are, therefore, privileged (Park Knoll Associates v. Schmidt, 59 NY2d 205 [1983]; Joseph v. Larry Dorman, P.C., 177 AD2d 618, 619 [2nd Dept. 1991]).

Defendants' second counterclaim, denominated as one for malicious prosecution, accuses plaintiff of causing them to suffer damages in the amount of $5 million, by naming their landlord, Jumeirah H&L, as a defendant. Defendants assert that they were actively negotiating a renewal of their lease (then set to expire on December 14, 2010) until plaintiff involved

Jurmeirah H&L in this action. They contend that, by making false and misleading representations in his complaint, plaintiff knowingly, willfully, intentionally and with reckless disregard for defendants' rights, caused Jumeirah H&L to refuse defendants' request for a renewed lease in the Essex House (Plaintiff's Reply Aff., Exhibit 12). Defendants also seek punitive and exemplary damages as a result of plaintiff's conduct in this regard.

To state a (counter) claim for malicious prosecution, defendants must allege that plaintiff initiated a proceeding despite a lack of probable clause, that the proceeding was terminated in defendants' favor, that plaintiff acted with malice, and that defendants sustained special injury (*see Honzawa v Honzawa*, 268 AD2d 327, 329 [1st Dept 2000]; *Campion Funeral Home v State of New York*, 166 AD2d 32, 36 [1st Dept], *lv denied* 78 NY2d 859 [1991]). This counterclaim for malicious prosecution cannot proceed because there has been no termination of Serbetcioglu's action, favorable or otherwise. "At the very least [defendants] must await the completion of the [underlying] action and then bring an action for civil malicious prosecution at which time the merits of their arguments can be assessed properly" (*Curiano v Suozzi*, 63 NY2d 113, 118 [1984]; *see also Kaye v Trump*, 58 AD3d 579 [1st Dept 2009], *lv denied* 13 NY3d 704 [2009]).

Additionally, plaintiff's motion to dismiss the malicious prosecution counterclaim cannot be defeated by defendants' attempt, through their opposition papers, to convert it into one sounding in tortious interference with contractual relations. Even if both claims (malicious prosecution and tortious interference with contractual relations) emanate from Jumeirah H&L's refusal to extend the lease, a motion for leave to replead the counterclaim must adhere to the pleading directives set forth in CPLR 3013, 3014 and 3211 (e). Compliance with the "require[ment] that the proposed new pleading be supported by evidence as on a motion for

summary judgment" is not optional (*Walter & Rosen v Pollack*, 101 AD2d 734, 735 [1st Dept 1984], *JDA Capital Partners, L.P. v BNP Paribas Prime Brokerage, Inc.*, 2009 WL 2980506; *see also Colleran v Rockman*, 232 AD2d 322, 323 [1st Dept 1996]). Submission of this evidence is especially relevant given plaintiff's submission of a sworn affidavit from the general manager of the Essex House directly contradicting defendants' assertions with respect to the lease renewal (Plaintiff's Reply Aff., Exhibit 11).

That aspect of plaintiff's motion which seeks to amend the caption to reflect the fact that R.N. Joseph Fine Arts Ltd. is a separate and distinct entity from R. N. Joseph Fine Jewelry LLC, and not a "d/b/a," is granted despite defendants' opposition. Defendants assert that it would be improper for the court to grant the motion because jurisdiction was never obtained over R.N. Joseph Fine Arts, Ltd. Specifically, they assert that, because the summons and complaint were personally served upon Daniel Safdieh, who is not an authorized person to accept service on behalf of this corporate entity, service was defective and jurisdiction was not obtained (*see* sworn affidavit of Ronald Safdieh).

Regardless of whether Daniel Safdieh was authorized to accept service, defendants waived their objection to jurisdiction. Defendants did not raise the affirmative defense of lack of jurisdiction in their answer, and they did not timely move to dismiss the complaint as against R.N. Joseph Fine Arts, Ltd. on the basis of defective service (*see Worldcom, Inc. v Dialing Loving Care*, 269 AD2d 159 [1st Dept 2000]). Furthermore, defendants engaged in conduct which amounted to a waiver of the purported jurisdictional defect when they, including R.N. Joseph Fine Arts Ltd, moved this court, by order to show cause, for affirmative relief under CPLR 2508 and CPLR 6212 (*see Flaks, Zaslow & Co. v Bank Computer Networks Corp.*, 66

AD2d 363, 366 -367 [1st Dept], *appeal dismissed* 47 NY2d 951 [1979]; CPLR 3211 [e]).

Having offered no other meaningful objection to the amendment, it is appropriate for plaintiff to amend his complaint to reflect the proper names of the defendant corporate entities. Upon review of the pleadings, it is evident that the nature of the parties' respective pleadings would remain unchanged by permitting the misnamed "R.N. Joseph Fine Jewelry LLC d/b/a R.N. Joseph Fine Arts Ltd." to be amended to read "R.N. Joseph Fine Jewelry LLC" and "R.N. Joseph Fine Arts Ltd.," and that permitting the amendment would not cause substantial prejudice to the rights of any party (*Opiela v May Indus. Corp.*, 10 AD3d 340, 341 [1st Dept 2004]; *ICD Group Intl. v Achidov*, 284 AD2d 244, 245 [1st Dept 2001]; CPLR 305 [c]; *see also* CPLR 3025 [b]).

Finally, defendants' motion, under motion sequence 004, for an order increasing the amount of plaintiff's undertaking, or, in the alternative, for an order releasing the defendants' money being held in escrow, is resolved as follows.

On May 27, 2010, this court granted a Temporary Restraining Order (TRO) directing defendants not to dispose of, assign, encumber, secrete, or remove any of their assets from the state without court approval, and to cease their "loss of lease" sale then underway at their retail premises at the Essex House.[1] However, due to defendants' need to conduct business, the parties resolved the TRO by way of a written stipulation, dated May 28, 2010 (Stipulation), which required defendants to obtain a surety bond or other similar adequate security, or to deposit

[1]In support of his motion, by order to show cause, for equitable relief, plaintiff had submitted photographic evidence that defendants had signs in their gallery windows reading "Everything Must Go," "Lost Our Lease," and the like.

$300,000.00 into an attorney's escrow account. Upon documentary proof of defendants' compliance, plaintiff was then required to obtain a surety bond or other similar adequate security, or to deposit $15,000.00 into an attorney's escrow account. Both sides made cash deposits into their respective attorney's escrow accounts. Defendants point out the added stipulation, at paragraph seven, which permitted defendants to pursue their rights and remedies under Articles 25 and 62 of the CPLR upon their service of an answer and any affirmative defenses and counterclaims.

In support of their current motion to either increase plaintiff's undertaking or release their $300,000.00 being held in escrow, defendants offer their version of the events, including the injuries they allegedly sustained, as evidence of the strength of their counterclaims for libel and malicious prosecution. They explain that the $15,000.00 undertaking is insufficient to secure a judgment on their counterclaims, and that the escrowed $300,000.00 exceeds the $250,000.00 that plaintiff spent on the merchandise. They also assert that Serbetioglu's status as an illegal immigrant who has overstayed his visa, mandates that the plaintiff's undertaking be increased to at least $600,000.00, to protect a judgment they might secure on their counterclaims should he leave the country prior to payment of such judgment.

Plaintiffs response is twofold. First, that defendants' motion, pursuant to Articles 25 and 62 of the CPLR, was and is premature based upon his motion to dismiss the counterclaims on which it is premised, and second, that defendants mischaracterize the basis for which his $15,000.00 was placed into escrow. According to plaintiff, the $15,000.00 was never intended as a pre-judgment security, but rather, it was intended to cover defendants' costs in case a judgment is ultimately rendered in defendants' favor. Plaintiff also asserts that, because

defendants had not answered the complaint, asserted affirmative defenses or interposed counterclaims at the time the Stipulation was executed, there would have been no legal basis for requiring plaintiff to post prejudgement security in any amount. Finally, in response to defendants' assertions that he is in the United States illegally, plaintiff submits a copy of a letter from the US Department of Homeland Security, dated December 1, 2009, which approves and grants, indefinitely, his request for asylum in the United States, thereby eliminating that as a basis for requiring prejudgment security (Plaintiff's Aff. in Opp., Exhibit C).

Defendants' motion to modify the order of attachment is denied, as this court is dismissing the counterclaims and there are no other changed circumstances entitling defendants to the request relief.

Accordingly, it is

ORDERED that those aspects of defendants' motion, under motion sequence 003, which seek an order dismissing plaintiff's third and fifth causes of action are denied; and it is further

ORDERED that that aspect of defendants' motion, under motion sequence 003, which seeks an order dismissing plaintiff's fourth cause of action sounding in unjust enrichment is denied without prejudice to renew upon completion of discovery; and it is further

ORDERED that that aspect of defendants' motion, under motion sequence 003, which seeks an order dismissing the complaint as against Joseph Safdeih based upon infancy (CPLR 3211 [a] [5]), is denied with leave to renew upon proper papers; and it is further

ORDERED that defendants' motion, under motion sequence 004, for an order modifying the order of attachment dated May 28, 2010, is denied; and it is further

ORDERED that that aspect of plaintiff's motion, under motion sequence 005, which

seeks an order dismissing the counterclaims set forth in defendants' answer is granted and the first and second counterclaims are dismissed; and it is further

ORDERED that that aspect of plaintiff's motion, under motion sequence 005, which seeks an order granting plaintiff leave to amend the caption to read "R.N. Joseph Fine Jewelry LLC" and "R.N. Joseph Fine Arts Ltd.," is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a conference in Room 232, 60 Centre Street, New York, New York, on **April 28, 2011, at 9:30 a.m.**; and it is further

ORDERED that any relief requested not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 18, 2011

So Ordered;

Hon. Judith J. Gische, JSC

FILED

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COUNTY CLERK'S OFFICE