[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

FARZIN SHIMIAIE AND CATHERINE SHIMIAIE

Plaintiffs,

-against-

DAVID SHADAN AND NILI SHADAN

Defendants.

MOTION SEQ. NO.: 001
MOTION DATE: 7/14/11

INDEX NO.: 21301/10

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Notice of Cross Motion.....2
Reply Affirmation.....3

Motion pursuant to **CPLR §§3211[a][7], 3016[b]** by the defendants David Shadan and Nili Shadan for an order dismissing the plaintiffs' complaint.

Cross motion by the plaintiffs Farzin Shimiaie and Catherine Shimiaie pursuant to (1) **CPLR §3025[b]** for leave to file an amended complaint; and/or alternatively; (2) for leave to replead their claims pursuant to **CPLR §3211[e]**.

By summons and verified complaint dated April, 2010, the plaintiffs Farzin and Catherine Shimiaie – who are husband and wife – commenced the within action as against David Shadan and his wife, Nili Shadan to recovery on a series of personal loans.

The verified complaint alleges that during the sixteen month period between August, 2008, and December of 2009, the plaintiffs made eight separate loans to the defendants, by which they claim to have advanced in total, the sum of $321,400.00 (Cmplt., ¶¶ 5-6). The complaint – which sets forth claims sounding in fraud, conversion, breach of contract, and unjust enrichment – does not reveal the specific reason why the loans were made nor indicate precisely for what purpose the defendants intended to utilize the funds advanced.

The parties' loan obligations were apparently never memorialized in formal, written agreements and varied in principal amounts from $100,000.00 (loan "One") to $11,250.00 (loan "Three") – with most carrying similar, installment-type repayment terms, together with interests rates ranging from 9.8% to 16% (Cmplt.,¶¶ 9, 13, 17, 26).

According to the plaintiffs, the defendants agreed to provide the plaintiffs with a series of post-dated checks in connection with loans One and Five, which were to be deposited by the plaintiffs on a monthly basis (Cmplt.,¶¶ 9-10; 24-26).

The plaintiffs claim that they deposited the first eight post-dated checks for loan One, all of which cleared and were paid. With respect to loan Five, the defendants allegedly requested that the plaintiffs return the first four post-dated checks, although these four payments were in fact made – albeit in substituted form through cash and/or by credit card payments (Cmplt., ¶¶ 34, 36, 38-39).

At some point in July of 2009, the defendants defaulted on the loans after making partial repayments of only $69,200.00, thereby allegedly leaving a currently unpaid balance due of some $252,200.00 (Cmplt., ¶¶ 11-12; 19-22; 48-52). The plaintiffs claim that they later discovered that the bank account on which the post-dated, loan Five checks were drawn, had been closed before the defendants wrote the post-dated checks (*e.g.*, Cmplt., ¶¶ 44-45).

The gravamen of the fraud claim is that, *inter alia*, the plaintiffs made the additional loans in reliance upon: (1) the defendants' allegedly fraudulent and "continued representations" relative to their ability and intent to repay all of the loans made; and (2) the initial and "good" partial payments on loans One and Five – conduct which the plaintiffs claim was tantamount to a conspiracy to defraud and/or a "Ponzi-like scheme" (Cmplt., ¶¶ 61-62).

The defendants now move pre-answer to dismiss the complaint arguing, *inter alia*, that the plaintiffs' fraud claim is both duplicative of the breach of contract cause of action and lacks the factual specificity required by **CPLR §3016[b]**. The defendants further contend that the complaint (with respect to all causes of action): (1) does not adequately plead independent acts of wrongdoing as against codefendant Nili; and (2) in general does set forth facts sufficient to support an award of punitive damages – which have been demanded in connection with each cause of action pleaded.

The plaintiffs oppose the motion and cross move for leave to replead and/or to file the amended pleading attached to their motion papers (CPLR, *former*, §3211[e]; 3025[b])(Khan Aff., Exh., "1"). The defendants' motion should be granted to the extent indicated below. The plaintiffs' cross motion is **denied.**

Preliminarily, and insofar as discernable from the parties' current submissions (***cf.*, CPLR §2214[c])**, the record indicates that the defendants' motion has been made pre-answer. Accordingly, since it appears that the plaintiffs' time to file an amended pleading as a matter of right has not yet expired (*see,* **CPLR §3025[a]**), the noticing of a formal motion for leave to amend is unnecessary (*see,* **CPLR §3025[a];** *Livadiotakis v. Tzitzikalakis*, 302 AD2d 369, 370 *see also*, *Terrano v. Fine*, 17 AD3d 449, 451-452).

Significantly, while service of an amended complaint generally supersedes a prior-served pleading (*Nimkoff Rosenfeld & Schechter, LLP v. O'Flaherty*, 71 AD3d 533; *Pourquoi M.P.S., Inc. v. Worldstar Intern., Ltd.*, 64 AD3d 551) – and although the defendants' motion to dismiss primarily focuses on the plaintiffs' original complaint – the Court will nevertheless construe the defendants' motion to dismiss as additionally directed to the amended pleading attached to the plaintiffs' cross motion (*see, 49 West 12 Tenants Corp. v. Seidenberg*, 6 AD3d 243, 244; *see also, Terrano v. Fine*, *supra,* 17 AD3d at 449; *cf., Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 251 AD2d 35, 38).

In any event, even upon favorably construing the amended complaint (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), the Court agrees that the fraud (second) cause of action pleaded therein is lacking in merit.

The elements of a cause of action sounding in fraud are: a material misrepresentation of an existing fact; made with knowledge of the alleged falsity; an intent to induce reliance thereon; justifiable reliance upon the misrepresentation; and damages (*see, Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a cause of action sounding in fraud (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 318 [1995]).

Additionally, "[a] claim rooted in fraud must be pleaded with the requisite particularity under **CPLR §3016 [b]**" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, *supra,* 12 NY3d at 559; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]; *Lanzi v. Brooks*, 43 NY2d 778, 779-780 [1977]; *Brualdi v. IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960), and must identify where appropriate, "specific dates and [other] items" needed to clearly apprise a defendant of the incidents complained of in the complaint (*Scott v. Fields*, 85 AD3d 756, 758; *Moore v. Liberty Power Corp., LLC*, 72 AD3d 660, 661; *Morales v. AMS Mortg. Services, Inc.*, 69 AD3d 691, 692). "Conclusory allegations" will not "satisfy this requirement" (*Dumas v. Fiorito*, 13 AD3d 332, 333 *see, Cohn v. Titan Drilling Corp.*, 79 AD3d 925, 926).

"Although there is certainly no requirement of 'unassailable proof" at the pleading stage" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, *supra*, 12 NY3d at 559), the subject complaint – even as amended – does not adequately allege facts which make out the requisite elements of a fraud claim; namely, the complaint does not allege with sufficient particularity that the defendants made representations concerning material facts which were false and known by the defendant to be false at the time they were made; and further, that the defendants made those representations with the express purpose of inducing the plaintiff to rely upon them (*Brualdi v. IBERIA, Lineas Aereas de España, S.A.*, *supra*, 79 AD3d at 960; *Cohn v. Titan Drilling Corp.*, 79 AD3d 925, 926-927)(*see*, Cmplt., ¶¶ 8-10).

While the amended complaint opens with generalized, prefatory averments that, *inter alia*, the defendants made continued misrepresentations with respect to their intention and ability to repay the loans (*e.g.*, A. Cmplt., ¶¶ 8-12), the allegations which follow are conclusory and fail to depict with the requisite degree of specificity, a scheme to defraud predicated on an alleged "ongoing course of [fraudulent] conduct (A. Cmplt., ¶¶ 8-10).

More particularly, the amended complaint never specifies precisely when the alleged misstatements were made and does not describe – except in summary fashion – the content of the offending misrepresentations (*see generally, Scott v. Fields*, 85 AD3d 756, 758; *Moore v. Liberty Power Corp., LLC*, 72 AD3d 660, 661; *Morales v. AMS Mortg. Services, Inc.*, 69 AD3d 691, 692; *Daly v. Kochanowicz*, 67 AD3d 78, 90). Nor does the complaint identify the specific codefendant to whom each alleged misstatement is being attributed (*see*, *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 AD2d 736) – or plainly allege that the defendants harbored a present intent to deceive the plaintiffs, or that they made the alleged statements with knowledge of their falsity at the time they were made (*J.M. Builders & Associates, Inc. v. Lindner*, 67 AD3d 738, 742; *Ross v. DeLorenzo*, 28 AD3d 631, 636; *Excel Realty Advisors, L.P. v. SCP Capital, Inc.*, ___Misc.3d___, 2010 WL 5172417 [Supreme Court, Nassau County 2010 *cf., WIT Holding Corp. v. Klein*, 282 AD2d 527, 528]). Rather, the complaint essentially relies on generic averments which: (1) lump the defendants together; and (2) then assert that they collectively made undifferentiated misstatements during a sixteen month period over which the loans were made (*Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, *supra,* 84 AD2d 736 *see also*, *Mandracchia v. 901 Stewart Partners, LLC*, ___ Misc.3d ___, 2009 WL 5078846 [Supreme Court, Nassau County 2009]; *Bianco v. AXA Equitable Life Ins. Co.*, ___Misc.3d___, 2009 WL 3780684 [Supreme Court, Nassau County 2009] *see also, Henry v. City of New York*, *Henry v. City of New York*, ___F.Supp2d ___, 2007 WL 1062519, at 5 [E.D.N.Y. 2007][a plaintiff may not in general "rely on sweeping references to [fraudulent] acts by all or some of the defendants"]).

The amended complaint also fails to describe with particularity, a continuous or ongoing conspiracy or scheme; rather, it primarily recounts the payment histories of each loan and then repeatedly alleges that the additional loans were made in reliance upon, *inter alia*, the defendants' "continued misrepresentations" – none of which are particularly described or linked in any way, to the payment history recounted (*e.g.*, A. Cmplt., ¶¶ 19, 22, 26, 31, 37, 39, 47). However, absent fact-specific averments which support an inference of fraud (*cf. Eurycleia Partners, LP v Seward & Kissel, LLP*, *supra*, 12 NY3d at 560), the inclusive claim that the defendants actually *made* certain payments required under loan contracts, does not plead the existence of a fraudulent "Ponzi" scheme or, for that matter, demonstrate that the defendants thereby breached a collateral or extraneous duty sounding in tort (*see generally, New York University v. Continental Ins. Co., supra*; *Clark-Fitzpatrick, Inc. v. Long Island R. Co., supra*; *Bella Maple Group, Inc. v. Attias*, 78 AD3d 1092, 1093; *Pastavilla Makarnacilik Sanyi Ticaret as v. Wakefern Food Corp.*, ___Misc.3d___, 2010 WL 2158239 [Supreme Court, Nassau County 2010])

With respect to the existence of a collateral tort duty, the complaint essentially alleges that the defendants promised or assured the plaintiffs that "the loans would be paid" (A. Cmplt., ¶¶ 10-12), *i.e.*, that the defendants would perform their contractual duties – or at most, that they "misrepresented their intention to perform in the future under the contract" (*J.M. Builders & Associates, Inc. v. Lindner*, *supra,* 67 AD3d 738, 742; *Ross v. DeLorenzo*, *supra*, 28 AD3d 631, 636 *cf., WIT Holding Corp. v. Klein*, *supra*, 282 AD2d 527, 528). These averments, however, constitute little more than a recasting of the plaintiffs' breach of contract cause of action, into one sounding in tort (*New York University v. Continental Ins. Co., supra,* 87 NY2d 308, 318; *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389-390 [1987]; *Cohn v Titan Drilling Corp., supra,* 79 AD3d 925 *see generally, Empire 33rd LLC v. Forward Ass'n Inc.*, 87 AD3d 447, 448-449; *Weinstein v. Natalie Weinstein Design Associates, Inc.,* 86 AD3d 641, 642-643; *Venables v. Sagona,* 85 AD3d 904, 906).

Accordingly, those branches of the motion which are to dismiss the second, fraud cause of action should be granted.

That branch of the defendants' motion which is to strike the claim for punitive damages should also be granted since the allegations made do not identify conduct so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages (*Hoeffner v. Orrick, Herrington & Sutcliffe LLP,* 85 AD3d 457, 924 NYS2d 376 *see generally, Ross v. Louise Wise Services, Inc., supra,* 8 NY3d 478, 489; *Stormes v. United Water New York, Inc.*, 84 AD3d 1351, 1352; *Marlowe v. Ferrari of Long Island, Inc.*, 61 AD3d 645, 646)(A. Cmplt., ¶¶ 60, 63, 69).

Significantly, and even assuming that a viable fraud claim had been pleaded, "'[p]unitive damages are not available 'in the ordinary fraud and deceit case' * * * but are permitted only when a "defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'" (*Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458, *quoting from, Ross v. Louise Wise Servs., Inc.*, *supra*, 8 NY3d at 489; *Walker v. Sheldon*, 10 NY2d 401, 405 [1961]).

The Court agrees, however, that the allegations advanced as against codefendant Nili Shadan with respect to the plaintiffs' remaining claims are sufficient at this pre-discovery juncture of the proceedings.

Lastly, since the amended complaint already contains a repleaded version of the fraud claim – a claim also deemed insufficient by the Court – the plaintiffs' alternative request for leave to replead their fraud theory is **denied** (*e.g.*, *Island Surgical Supply Co. v. Allstate Ins. Co.*, 32 AD3d 824, 825 *see also*, *Clark v. Pfizer, Inc.*, 64 AD3d 536; *Mancuso v. Rubin*, 52 AD3d 580, 584 *cf.*, CPLR, *former*, 3211[e]; *Janssen v. Incorporated Village of Rockville Centre*, 59 AD3d 15, 27-28).

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief beyond that granted above. Accordingly, it is,

ORDERED that the motion pursuant to **CPLR §§3211[a][7], 3016[b]** by the defendants David Shadan and Nili Shadan for an order dismissing the plaintiffs' complaint is **granted** to the extent that the fraud cause of action and the claims for punitive damages are dismissed and/or stricken, and the motion is otherwise **denied,** and it is further,

ORDERED that the plaintiffs' cross motion is **denied.**

This constitutes the Order of the Court.

Dated: October 7, 2011

Diana Kimmel
J.S.C.

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE