SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

----------X

YOU JIE ZHU and TANBO RESTAURANT, INC.,

Plaintiffs,

-against-

BEACON INTERNATIONAL, INC. and GUANG YANG LI, a/k/a ANDY LI,

Defendants.

----------X

Index No. 51551/2012

Motion Seq. # 001
Motion Date: March 22, 2013

DECISION & ORDER

Scheinkman, J:

Defendants Beacon Int'l, Inc. ("Beacon")[1] and Guang Yang Li (a/k/a Andy Li) ("Li") (together "Defendants") move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the Complaint of Plaintiffs You Jie Zhu ("Zhu") and Tanbo Restaurant, Inc. ("Tanbo") (together "Defendants"). Plaintiffs oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

This action was initiated by Plaintiffs' filing a copy of their Summons and Complaint in the Court's efiling system ("NYSCEF") on February 2, 2012. The action arises from services Defendants provided in connection with Plaintiffs' entry into a lease for, and then a contract to renovate, certain space located in the Freehold Raceway Mall in Freehold, New Jersey (the "Premises"), for the purposes of developing and operating a Japanese Restaurant. The services Defendant Beacon was to provide were set forth in the "Project's Agreement" dated August 2, 2010 entered into between Zhu and Beacon International, Inc. (Affirmation of Humayun Z. Siddiqi, Esq. ["Siddiqi Aff."], Ex. 5 [hereinafter "Agreement"]).

On June 15, 2012, the Court held a Preliminary Conference ("PC") and signed a PC Order calling for a discovery cut-off of December 4, 2012 and a trial readiness conference for December 5, 2012. Following the PC, the parties engaged in discovery and the Court

[1]Although Beacon is sued herein as Beacon International, Inc., based on the evidence submitted in connection with this motion, it appears that the proper defendant in this action is actually named Beacon Int'l, Inc.

certified the case as trial ready at the Trial Readiness Conference on December 14, 2012. This motion ensued.

Plaintiffs claim that, in connection with Defendants' services in obtaining space for Plaintiffs in the Premises, Li told Plaintiffs that the landlord's required that the tenants possess a certain minimal level of financial assets and that Zhu responded that he did not possess the required financial assets (Complaint at ¶¶ 12-14). According to Plaintiffs, Li, unknown to Plaintiffs, prepared a false personal financial statement which overstated Zhu's assets and forged Zhu's name thereto (*id.* at ¶¶ 15-16). The essence of Plaintiffs' claim is that, but for Defendants' preparation and submission of the false financial statement to the landlord overstating Zhu's finances, the landlord would have never agreed to have leased the Premises to Plaintiffs and Plaintiffs would not have sustained any damages. Plaintiffs also allege that Defendants provided them with an attorney who failed, at the direction of Defendants, to advise Plaintiffs of critical provisions in the lease (*id.* at ¶¶ 21-22). It is alleged that following the lease's execution, Plaintiffs spent $160,000 in renovating the space, only to learn that the landlord would require another $500,000 in renovations to comply with all building codes, and rules and regulations of the landlord (*id.* at ¶¶ 26-27).

Plaintiff allege further that, when they advised the landlord that they were not financially able to spend the necessary monies to complete the renovations, the landlord responded that, based on the financial statement that had been provided in the lease negotiations, Plaintiffs' position was untrue since they had the financial resources. It was at that time that Plaintiffs learned of the false financial statement that had been provided on their behalf. When Plaintiffs provided the landlord with correct financial information, they were able to negotiate a settlement through the termination of the lease in exchange for $50,000 (*id.* at ¶ 31). In this action, Plaintiffs seek to recover the $285,000 in damages they contend they sustained by reason of Defendants' wrongful acts.

Plaintiffs' First Cause of Action for fraud reads that "Defendant made a false representation of material fact, in that he filed falsified information in order to induce the landlord to make an offer to Plaintiff, but told plaintiff that it was defendant's relationship with the landlord which induced landlord to offer a lease .... Defendant knew that his statement to Plaintiff was false ... Defendant made the representation to Plaintiff to induce Plaintiff to pay Defendant the fee agreed to in the contract between the parties ... Plaintiff justifiably relied upon the statement of the defendant ... Plaintiff was injured as a result of said statement in the amount of $285,000" (Complaint at ¶¶ 33-38).

The Second Cause of Action for breach of fiduciary duty alleges that because Defendants acted as a paid agent of Plaintiffs, there existed a fiduciary relationship and that rather than acting in Plaintiffs' best interests, Defendants acted to further their own interests by failing to make truthful and complete disclosures to Plaintiff, thereby obtaining an improper advantage at Plaintiffs' expense (Complaint at ¶¶ 39-44).

As their Third Cause of Action for breach of contract, Plaintiffs allege that the

parties[2] entered into the Agreement and Plaintiffs paid Defendants $75,0000 for the work they performed to act as an agent to procure a lease for the Tanbo Japanese Restaurant in the Freehold Mall. However, Defendants breached the agreement by failing to perform it in "a legal manner", causing Plaintiffs to sustain damages in the amount of $285,000, which damages were "foreseeable, in that opening a restaurant, various sums would have to be paid out for renovations to the work space" (Complaint at ¶ 51).

In their Answer, Defendants admit that (1) Plaintiff Zhu entered into a contract with Beacon Int'l Inc., (2) as part of the process the landlord required that Plaintiffs have a certain minimal level of financial assets and that Li told Zhu about this requirement, but other than these admissions, Defendants deny the remaining material allegations of the Complaint. Defendants also assert various affirmative defenses including that Plaintiffs have failed to state a claim upon which relief may be granted, accord and satisfaction and that by entering into the lease agreement Plaintiffs "waived any liability arising from or occurring as a result of a failure to comply with provisions of the lease agreement" (Answer at ¶ 26).

DEFENDANTS' CONTENTIONS IN SUPPORT OF THEIR MOTION

In support of their motion, Defendants submit (1) a Statement of Undisputed Facts; (2) an affirmation from counsel attaching the pleadings (including Defendants' first demand for production of documents) and the documentary evidence and the deposition excerpts upon which Defendants rely; (3) an affidavit from Defendant Li; and (4) a memorandum of law.

In his affidavit, Li avers that he is the Vice President of Beacon Int'l Inc., which he contends has "maintained its status as a corporation in good standing in the State of New York since it was formed in January, 2009" (Affidavit of Guang Yang Li, acknowledged March January 29, 2013 ["Li Aff."] at ¶ 4). He contends that Beacon acts as a consultant to individuals who seek to establish restaurants in shopping malls (Li Aff. at ¶ 5).

He asserts that with regard to the Premises, the landlord required that prospective tenants provide a personal financial statement and that Plaintiffs requested that he assist them in preparing the financial statement. According to Li, he was not aware of any minimum financial asset requirement necessary to obtain a lease for the premises. Li avers that in connection with his preparation of the financial statement on Plaintiffs' behalf, he was advised by Zhu that his cousin Zhu Jian Hui ("Benny"), the other shareholder of Tanbo, would provide Li with the information necessary to fill out the financial statement form (*id.* at ¶ 10). He states that he filled out the form based on information provided by Zhu and Benny and that

---

[2]Since the counterparty to the Agreement was Beacon and not Li, it is evident that the sole basis for liability on the contract as against Li is predicated on the allegations in the Complaint concerning Beacon International's non-existence at the time of the entry into the Agreement due to its having been dissolved by proclamation for failure to pay franchise taxes in 2002. However, it appears that the actual counterparty was Beacon Int'l Inc. and that the reference to Beacon International Inc. was a typographical error.

after he completed the form on or about July 26, 2010, he requested that Benny ask Zhu to sign it but Benny advised him in a phone call on or about July 27, 2010 that Zhu had no email or fax access at his restaurant and that Zhu was authorizing Li to sign it on his behalf and submit it to the landlord. Li contends he followed the directions and submitted the financial statement to the landlord on or about July 27, 2010 (*id.* at ¶ 14).

With regard to the selection of the contractor for the build-out of the premises, Li asserts that although he had recommended that Plaintiffs and Benny use a licensed general contractor who had experience in build-outs in shopping malls, Plaintiffs disregarded his advice and retained a general contractor unknown to Li. He avers that through the period of Plaintiffs' lease, the landlord would frequently send Li emails summarizing the build-out, which began in February or March 2010. He contends that during the course of their dealings, Plaintiffs never voiced dissatisfaction with the services provided by either Beacon or himself (*id.* at ¶ 20).

In their memorandum of law, Defendants, relying on the language of the Agreement, argue that pursuant to the Agreement's terms, Beacon was required to obtain space for Plaintiffs in the Freehold Raceway Mall and that $40,000 of the $75,000 payment had to be paid upon the signing of the Agreement with the other $35,000 due upon the signing of the lease for the premises. Further, Defendants argue, the lease provided that Beacon would not be required to negotiate the actual terms of the lease (Defs' Mem. at 3-4, *citing* Agreement).

Relying on the printout from the New York State Department of State's website attached to counsel's affirmation, Defendants argue that Beacon Int'l Inc. is a New York corporation formed in January 2009 which has been a corporation in good standing since its formation (Defs' Mem. at 2, *see* Siddiqi Aff., Ex.1 and Li Aff. at ¶4).

With regard to the personal financial statement, Defendants argue that while the landlord required that a financial statement be submitted as part of the application process, the financial statement "contains no reference to the possession of certain minimal assets on the part of prospective tenants" (Defs' Mem. at 4, *citing* Siddiqi Aff., Ex. 6). Further, say Defendants, Plaintiff Zhu admitted at his deposition that "he was not aware of any requirement that he possess a minimal level of assets" and further admitted that he never "communicated to Defendant Li that he did not possess sufficient assets to obtain a lease" (Defs' Mem. at 4, *citing* Zhu Tr. at 22-23). Zhu did not know what the financial requirements to obtain a lease were, for example, he did not know if the required level of assets was $250,000, $500,000 or $1,000,000 (Defs' Mem. at 4, *citing* Zhu Tr. at 23).

Defendants further highlight that while the Complaint references a forged personal financial statement that greatly overstates Zhu's assets, Zhu "only became aware of the existence of the financial statement on the day he was deposed ... just prior to deposition and after being shown a copy of the same by his attorney" (Defs' Mem. at 5, *citing* Zhu Tr. at 29-30).

In support of the argument that Benny acted as Zhu's authorized agent, Defendants rely on Zhu's deposition testimony to the effect that "Benny was authorized to

represent Plaintiffs ... in their dealings with Defendants" (Defs' Mem. at 4, *citing* Zhu Tr. at 13-14, 24). Further, Defendants point out that Zhu admitted at his deposition that he provided the financial information to be used in the form to Benny who in turn forwarded it to Li (Defs' Mem. at 4-5, *citing* Zhu Tr. at 25). And, based on Li's averment in his affidavit, he filled out the form based on the information that had been provided.

To show that the information contained in the financial statement was within the ballpark of Zhu's actual finances, Defendants rely on Zhu's deposition testimony wherein he admitted that his assets as of the date of the personal financial statement to be "a house with a market value between $600,000 and $700,000, a Mercedes-Benz, and a half an interest in a restaurant he estimated to be worth $50,0000. The house had a mortgage of approximately $200,000" (Defs' Mem. at 4-5, *citing* Zhu Tr. at 26-28). By comparison, the personal financial statement lists the assets as a home with a value of $700,000 and a mortgage of $117,000, a car worth $37,500, cash on hand of $160,000, cash in banks of $35,000, and $200,000 for the restaurant Zhu already owned in Yonkers (*i.e.*, Lucky Way Restaurant).

In response to the allegations that Defendants had something to do with the attorney advice provided in connection with the lease negotiations, Defendants admit that they retained counsel to review the terms of the lease and accompanied Plaintiffs to the attorneys' offices to review the terms of the lease (Defs' Mem. at 6 and Stmt. of Undisputed Facts at ¶ 36, *citing* Zhu Tr. at 34-37, 41-42). Defendants point out that the lease required a guaranty from Zhu and further included a tenant package that detailed the work to be performed by Plaintiffs (Defs' Mem. at 6, *citing* Siddiqi Aff., Ex. 7 at § 1.22 and Ex. C attached thereto).

With regard to Plaintiffs' failure to notify Defendants of any dissatisfaction of their performance under the Agreement, Defendants rely on the fact that the lease was signed in September 2010, Tanbo took possession of the Premises on or about January 28, 2011, and in May 2011, Plaintiffs advised the landlord they wished to terminate the lease and entered into the settlement with the landlord on October 24, 2011– *i.e.*, a payment of $50,000 in exchange for the lease's termination. However, Plaintiffs did not sue Defendants until February 2012 (Defs' Mem. at 6-7, *citing* Siddiqi Aff., Exs. 7, 8, 11 & 12).

To distance their involvement with the construction process, Defendants argue that, despite their advice to Plaintiffs that they hire a contractor familiar with projects in malls, Plaintiffs and Benny instead agreed that Benny would be responsible for the renovations and Benny selected the contractor that was hired to perform the build-out (Defs' Mem. at 6, *citing* Li Aff. and Zhu Tr. at 13, 44-45). Based on email correspondence attached to counsel's affirmation, Defendants argue that the contractor's failure to build in accordance with the landlord's plans, its failure to build to the city code and town plans, and its failure to use materials approved for restaurant use are what caused a stop work order to be issued in April 2012 (Defs' Mem. at 6, *citing* Siddiqi Aff., Ex. 9). Further, that the general contractor attempted to bribe the mall manager to overlook the code violations (*id., citing* Siddiqi Aff., Ex. 10).

For their legal arguments, Defendants contend that the Complaint must be dismissed because Plaintiffs have failed to establish, *prima facie,* causation between Defendants' alleged conduct and Plaintiffs' damages. Thus, it is Defendants' position that while the gravamen of Plaintiffs' claims is that the landlord would not have entered into the lease with

Plaintiffs had it known Zhu's true financial condition, there is no evidence to support this point. Instead, Zhu has admitted that he was unaware of any minimum financial requirement for the lease and further admitted, contrary to the allegations in the Complaint, that he never told Li that he, Zhu, did not possess the sufficient financial assets to obtain a lease (Defs' Mem. at 10, Zhu Tr. at 23). Further, Defendants argue that, despite having made demands to Plaintiffs for Zhu to produce his financial records so that Defendants could discover Plaintiffs' true financial condition, "Plaintiffs have failed to produce bank and other financial statements contemporaneous to the preparation of the personal financial statement that would allow Defendants to determine Plaintiffs' actual financial state, have also failed to produce financial statements evidencing payments made to the various suppliers, and have failed to produce proof of payment of monies alleged to have been paid to the Landlord as consideration for the settlement and release agreement entered into with the same" (Defs' Mem. at 10). Defendants also contend that Plaintiffs have not obtained any third party discovery from the landlord to substantiate that a minimum level of assets was required and that Plaintiffs did not meet that minimum level such that the landlord would not have extended a lease to them because of their failure to meet that minimum level. Thus, say Defendants, there is no basis for this Court to find that Defendants' purported actions caused Plaintiffs' damages. Alternatively, Defendants argue that the Complaint must be dismissed because there was a superceding intervening cause to Plaintiffs' damages, namely, the inept general contractor for which Defendants had no involvement.

Defendants also claim that there can be no liability because the information provided on the personal financial statement had been provided to Li by Benny – Zhu's authorized agent. Thus, because Defendants acted in accordance with the information and instructions provided by Benny – Plaintiffs' authorized agent – Plaintiffs are bound by Benny's instructions and information and their causes of action cannot stand.

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition, Plaintiffs submit a response to Defendants' Statement of Undisputed Facts, an affidavit from Jian Hui Zhu ("Benny"), an affirmation from Plaintiffs' counsel attaching various exhibits, and a memorandum of law. Noticeably absent from Plaintiffs' opposition is an affidavit from Plaintiff Zhu, although Plaintiffs rely on Zhu's deposition testimony at times in their opposition.

In his affidavit in opposition, Benny avers that he was affiliated with Tanbo and that he and Zhu hired Beacon to find a location for their restaurant (Affidavit of Zhu Jian Hui in Opposition to Defendants' Motion for Summary Judgment, sworn to March 5, 2013 ["Benny Opp. Aff."] at ¶¶ 3,6). He denies providing any information to Li in connection with the preparation of the financial statement; he also claims that he did not give Li permission to sign his name or Zhu's name to the financial statement (Benny Opp. Aff. at ¶¶ 10-12). He further avers that he was unaware that the landlord required such a financial statement (*id.* at ¶ 9). Benny admits that he was responsible for hiring the general contractor, but states that the budget for the construction was under $200,000 and that he advised Li of this budget (*id.* at ¶ 16). Further, says Benny, Defendant Li advised Benny that he had spoken to the landlord and that (1) Plaintiffs did not have to hire union workers, and (2) that the renovations required by

the mall would be completed within the $200,000 budget (*id.* at ¶¶ 18-19). He contends that after the stop work order was issued in April 2011,

> Defendant Li found Tanbo a general contractor that ... Freehold Mall management would approve, defendant Li told us that we should not worry about finding a general contractor because he would find us a new general contractor that would be acceptable to the Mall and would perform the renovations within our budget ... Li then began to ignore us, when we called him to find out how the search was going .... After a while, I found a contractor who was acceptable to the mall, but a $500,000 outlay, just to begin would have been required (Benny Opp. Aff. at ¶¶ 21-23).

Plaintiffs refute Defendants' contentions concerning the corporate existence of the counter-party to the Agreement – Beacon International Inc. – rather than the Beacon Int'l Inc. referenced in the Department of State printout annexed to Defendants' moving papers. Thus, based on the printout on the New York Department of State website concerning Beacon International Inc., it is clear that Beacon was dissolved by proclamation for failure to pay franchise taxes as of December 24, 2002 (Affirmation of Stacey Van Malden, Esq. dated March 6, 2013 ["Malden Opp. Aff."], Ex. E). As such, it is Plaintiffs' position that the Defendants' reliance on Beacon Int'l Inc.'s good standing is misplaced (Pltfs' Response to Defs' Stmt at ¶ 1).

With regard to Defendants' contentions that the financial statement was drafted from information provided to them, Plaintiffs rely on Benny's affidavit denying same as well as the deposition testimony from Zhu in which Zhu attests that the information contained on the statement is wholly false (*i.e.,* Defendants created it out of "whole cloth") because Zhu provided Li with what he had asked for in terms of financial information such as the deed to the house, tax records and information concerning his existing restaurant (Malden Opp. Aff., Ex. F, Zhu Tr. at 22-23, 30-32). To refute Defendants' contention that Defendants were unaware of any requirement that a minimal level of assets were required in order for Plaintiffs to be approved (Defs' Stmt at ¶¶ 21-22), Plaintiffs rely on an a letter from the landlord dated June 4, 2010 in which the landlord advised Defendants that "Tenant will be asked to submit financial statement for the lease entity, along with financial statements of the lease guarantor" (Malden Opp. Aff., Ex. C at 2; Pltfs' Response at ¶7).

Finally, without providing any evidentiary support, Plaintiffs dispute the assertion contained in Defendants' Statement of Undisputed Facts that Plaintiffs never expressed dissatisfaction with Defendants' services until the filing of the Complaint by stating that "Plaintiffs have been expressing dissatisfaction with the Defendant, Defendant's acts, and Defendant's fraudulent ways ever since they discovered them" (Pltfs' Response at ¶ 10). However, because this assertion is devoid of any reference to evidence provided in Plaintiffs' opposition papers as required by Commercial Division Rule 19-a (d), it has been disregarded for purposes of this determination.

In their memorandum of law, Plaintiffs set forth their version of the events that transpired. In essence, Plaintiffs contend (and Li admitted at his deposition) that Defendant Li

is not a licensed real estate broker in either New York or New Jersey (Pltfs' Opp. Mem. at 4, *citing* Li Tr. at 11), yet Beacon International, an inactive domestic business corporation, entered into an agreement with Zhu to provide brokerage services (*i.e.*, to find a suitable place for Plaintiffs to open a restaurant). According to Plaintiffs, after the parties' execution of the Agreement in August and September 2010, Li obtained a proposal to lease space in the Freehold Mall (Malden Opp. Aff., Ex. C), which proposal called for monthly rent in the amount of approximately $75,000[3] and required that Li disclose the guarantor's finances to the landlord. However, because Plaintiffs never communicated directly with landlord, they were unaware of this financial disclosure requirement but did provide Li with truthful financial disclosure. According to Plaintiffs, Benny did not authorize Li to sign a financial statement on Zhu's behalf and further, the information Li submitted in the financial statement did not accurately reflect Zhu's assets. Instead, based on the financial disclosure provided to the landlord in June 2011 as part of Plaintiffs' negotiations with the landlord to terminate the lease, Zhu's actual financial condition was divulged, which was that he had $10,000 cash on hand, $3,000 cash in the banks, a $20,000 car and a 50% ownership in a residence with a market value of $560,000 and a mortgage amount of $340,000[4] (Pltfs' Opp. Mem. at 6, *citing* Malden Opp. Aff., Ex. H).

With regard to the build out, Plaintiffs argue that Li was the one who spoke to the landlord about the requirements for renovation and that "Li was aware that Plaintiffs' budget ... was under $200,000" and Li represented to Benny that not only were union workers not required but that the renovations could be completed within Plaintiffs' $200,000 budget (Pltfs' Opp. Mem. at 5-6). It is further Plaintiffs' position that after the stop work order in April 2011, Li attempted to find a contractor to complete the work in accordance with the landlord's requirements but that contractor required funds of $500,000, which was outside Plaintiff's budget.

As their legal argument, Plaintiffs first start of by requesting that the Court search the record and award them summary judgment (CPLR 3212[b]) since Defendants had no real estate license and, therefore, the Agreement was illegal and Plaintiffs may recover up to four time the amount they paid to Defendants as a civil penalty ($300,000) (Pltfs' Opp. Mem. at 7-

---

[3]As Defendants point out in the reply, based on the provisions of the lease, Plaintiffs have grossly overstated the monthly rent for shock value and this $75,000 figure was actually the annual rent with the monthly rent being $6,242.50 (Defs' Reply at 5, *citing* Lease § 1.8).

[4]As an initial matter, it is unclear why Zhu's interest in the Yonkers restaurant was not divulged in this statement. In addition, this amount of mortgage presumably includes the amount Zhu had to borrow to fund the failed build-out. As such, because it is the mortgage amount at the time of the financial disclosure that is the relevant amount, the Court finds that Plaintiffs' reliance on this financial document to be misplaced. Further, because Plaintiffs failed to rebut Defendants' contention that they utterly failed to produce relevant financial disclosure required for Defendants' defense, if it were not for the fact that the Court was granting Defendants' motion on the merits, it is likely this Court would have granted it based on an adverse inference that the financial data, if produced, would have confirmed that the information provided on the financial statement was accurate as of the date of its making.

8). Here, because the Agreement "was for a specified lease interest, and the fee was due and owing when the Plaintiffs entered into a binding lease agreement" – "Li was acting as an unlicensed real estate broker in association with Defendant Beacon" since he was facilitating the lease for another for a fee (Pltfs' Opp. Mem. at 9). Thus, it is Plaintiffs' contention that they should be awarded summary judgment based on Defendants' violations of New York's Real Property Law ("RPL") § 442-e.

Rebutting Defendants' contention that Plaintiffs have not and cannot create a triable issue of fact that anything Defendants did caused Plaintiffs' damages, Plaintiffs argue that they have submitted evidence sufficient to create triable issues of fact on their fraud claim, and, in particular, that Defendants' acts caused Plaintiffs' damages. First, Plaintiffs have submitted evidence showing that the financial statement submitted by Li reflecting Zhu's assets totaling $1.3 million was a material misrepresentation as Zhu's assets were actually between $250,000 - $300,000 (and Defendants' moving papers have Zhu's assets as somewhere between $650,000 and $750,000).[5] Further, it is Plaintiffs' position that a logical inference from the evidence that the landlord agreed to terminate the lease for much less consideration than what would have been owed based on the true financial statement Plaintiffs provided shows that the landlord "never would have entered the lease if the [landlord] had accurate financial information" (Pltfs' Opp. Mem. at 10).[6] In any event, it was Defendants' lack of a real estate license that "was the proximate and factual cause for all of Plaintiffs' damages" (*id.*).

With regard to Defendants' position that the general contractor's ineptitude is the intervening cause breaking the chain of causation to Defendants' actions, Plaintiffs argue that whether something constitutes an intervening cause is necessarily a question of fact. In any event, Plaintiffs contend that they have presented evidence showing that Defendants were heavily involved in the renovations and helped to see that the renovations stayed within budget and Plaintiffs relied on Defendants' advice in hiring a non-union contractor. Therefore, there are questions of fact over whether Li caused Plaintiffs to hire an incompetent contractor.

---

[5] As noted *supra,* because the evidence upon which Plaintiffs rely for their contention that Zhu's assets were between $250,000 and $300,000 is based on a financial document prepared almost a year after the financial statement at issue *(i.e.,* after Zhu had presumably expended over $160,000 on an inept contractor) the Court finds that this evidence is insufficient to create a triable issue of fact.

[6] As discussed *infra,* the Court does not agree that such an inference may be taken. There are numerous possibilities why the landlord decided to settle with Plaintiffs for $50,000. For example, the landlord was not simply receiving $50,000 since Plaintiffs had expended $160,000 in renovations that, while not at present meeting the rules and regulations, likely improved the premises. In addition, it is entirely possible that the landlord had another tenant waiting in the wings ready and willing to take over the premises for a higher rent. Another possibility is that the landlord did not wish to expend money litigating the matter against a person and entities that could be judgment proof. Thus, the Court does not find that the logical inference in the landlord's release of Plaintiffs based on the financial statement provided was that it would have never rented the premises to Plaintiffs if it had been provided the financial statement Zhu provided almost one year later.

Finally, on the issue of whether or not Benny provided the inaccurate financial information to Li and whether or not he authorized Li to sign the financial statement on Zhu's behalf, Benny's affidavit denying same has created a triable issue of fact. Further, given that Defendant Li was acting illegally as an unlicensed real estate broker, "[i]t is a reasonable inference that he would have filled out any form on behalf of the Plaintiffs in order to collect his fee" (*id.* at 12-13).

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION

In further support of its motion, Defendants submit a reply affidavit from Guang Yang Li and a reply memorandum of law.

In his affidavit in further support of his motion, Li avers that he executed the Agreement in his capacity as an officer of Beacon (Reply Affidavit of Guang Yang Li, acknowledged March 20, 2013 ["Li Reply Aff."] at ¶ 5). It is Li's position that neither he nor Beacon has ever held themselves out as being associated with Beacon International Inc. and the reference to Beacon International Inc. in the Agreement was simply a typographical error (Li Reply Aff. at ¶ 7).

In opposition to Plaintiffs' contention that somehow Defendants acted as a real estate broker, Li asserts that Beacon provided restaurant consulting services (approximately 300 hours) to Tanbo

> that included evaluating market conditions in a number of shopping malls in the New York and New Jersey area to determine trends relating to popular cuisines, originating and proposing to Tanbo the concept of selling Japanese cuisine, creating a proposed menu for Tanbo, obtaining the services of an architect and participating in design decisions relating to layout and decor (*id.* at ¶ 9).

Further that Defendants never held themselves out as brokers and Plaintiffs never referred to Defendants as brokers (*id.* at ¶¶ 12-13).

In their reply memorandum of law, Defendants point out that Plaintiffs have provided no proof that the landlord required certain minimum financial net worth - only that Defendants knew that a financial statement from the tenant and guarantor would be required. This does not create a material issue of fact over whether the landlord would have rented to Plaintiffs had it known Li's true net worth. According to Defendants, Plaintiffs' reliance on the inference that this is the case based on the landlord's agreement to terminate the lease upon a payment of $50,000 after receiving a statement detailing Zhu's actual net worth is mere conjecture and insufficient to raise a triable issue of fact. Thus, Defendants' *prima facie* showing that there were no minimal financial requirements on the part of prospective tenants remains unrebutted (Defs' Reply at 5).

In response to Plaintiffs' contention that Defendants' lack of a real estate license was the proximate cause of their damages, Defendants point out that nowhere do Plaintiffs

assert that if they had known Defendants were not licensed, they would not have dealt with them (*id.*). This coupled with the fact that the issue of the lack of a license is a remote cause and damages do not flow from remote causes, Plaintiffs have failed to raise a triable issue of fact as to causation.

In response to Plaintiffs' contention in their opposition that Defendants somehow caused them to retain the contractor, Defendants point out that this position is directly contradicted by the testimony from Benny, Zhu and Li to the effect that while Li advised Plaintiffs to hire a contractor familiar with mall build-outs, instead, Benny was in charge of hiring the contractor. Further, it is uncontested that the landlord approved the non-union contractor Benny had selected. Thus, all of the assertions concerning Defendants' alleged representations that non-union labor was permitted are simply red herrings. Defendants further point out that nowhere do Plaintiffs allege that they would have chosen a different contractor but for Defendants' intervention. Further, the "evidence" upon which Plaintiffs rely to show that Defendants had some control over the renovation process does not support Plaintiffs' position as that evidence is an email chain concerning Defendants' efforts to help Plaintiffs find a new contractor after the stop work order.

Defendants argue that Plaintiffs are not entitled to summary judgment on their unpleaded "claim" that Defendants violated RPL §442-e because (1) as a general rule, "summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded" (Defs' Reply at 8); and (2) Plaintiffs should not be entitled to assert such a claim now, after the close of discovery, thereby depriving Defendants of the opportunity to conduct discovery on whether Defendants acted as brokers (Defs' Reply at 8-9).

Alternatively, should the Court permit Plaintiffs to assert this unpleaded statutory remedy, Defendants argue that "Plaintiffs' causes of action for breach of contract, breach of fiduciary duty and fraud must be dismissed as a statutory remedy is exclusive of other remedies" (*id.* at 9). Further, that Plaintiffs' motion for summary judgment on this claim must be denied as Zhu's signature on the lease in which he admitted that Plaintiffs used no broker in connection with the lease "conclusively establish[es] that whatever role Defendants had in the transaction it was not in the role of a real estate broker as contemplated by the *RPL*" (*id.* at 10). As their final point on this issue, Defendants argue that because RPL § 442-e provides that it is a crime to fail to have a license, the cases require that the statute be strictly construed and it is not meant to cover every situation in which real estate is an aspect of the transaction. Defendants argue that here, because the real estate activities were incidental to Beacon's consulting activities, and because specifically excluded from the Agreement's coverage was any requirement that Defendants assist in the negotiations over the terms of the lease, there is no basis for the Court to find that Defendants engaged in unlawful real estate broker activities. And Defendants contend that Plaintiffs' reliance on the language of the Agreement as supporting the notion that Defendants acted as real estate brokers is not determinative since "any written agreement, even one which provides that it cannot be modified except by a writing signed by the parties, can effectively be modified by a course of actual performance ... Here, given both Defendants' significant non-real estate efforts and Plaintiffs' admission that they did not retain a broker, it is apparent that the parties modified the project agreement so as to make the real estate portion incidental and thus removed the provision of the *RPL* requiring licensure" (Defs' Reply at 13).

Finally, in support of the dismissal of this action as against Li, Defendants argue that it is clear that Li signed the Agreement in his corporate capacity as an officer of Beacon and Plaintiffs have never alleged that he entered into the Agreement in his personal capacity. Thus, it is Defendants' contention that the substitution of Int'l for International was merely a typographical error and Defendants never held themselves out as Beacon International.[7] Thus, because Plaintiffs have not alleged nor made any showing that would warrant a piercing of the corporate veil, Plaintiffs' claims as against Li must be dismissed (including an claims based on the notion that Beacon contributed to the intervening cause of the selection of the contractor).

LEGAL DISCUSSION

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985];*Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2d Dept 2008]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 [2d Dept 2000]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD 2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]; *Zuckerman, supra; see also Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 514 [2d Dept 1994]).

The court's main function on a motion for summary judgment is issue finding

---

[7]Defendants' argument has support under the law. Thus, "it has been long held that 'a corporation may be known by several names in the transaction of its business, and it may enforce and be bound by contracts entered into in an adopted name other than the regular name under which it was incorporated'" (*Harmon v Ivy Walk*, 48 AD3d 344, 347 [1st Dept 2008], *quoting Mail & Express Co. v Parker Axles*, 204 App Div 327, 329 [1st Dept 1923)]. In short, "[a] contract entered into by a corporation under an assumed name may be enforced by either of the parties. If the entity of the corporation can be ascertained from the instrument itself, the misnomer is held unimportant; but, if not, evidence may be introduced ... to establish what particular corporate entity was intended" (*Mail & Express Co., supra*, 204 App Div at 329). The Court, however, need not decide the issue as the matter can be disposed of on other grounds.

rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the Court is to determine if *bona fide* issues of fact exist, and not to resolve issues of credibility. As the Court stated in *Knepka v Tallman* (278 AD2d 811 [4th Dept 2000]):

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint ... Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial .... (*id.* at 811; *see also Yaziciyan v Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact"]).

On the other hand, a party cannot successfully oppose summary judgment by offering an affidavit which reverses his or her prior deposition testimony for the purpose of avoiding the consequences of that testimony (*Colucci v AFC Constr.*, 54 AD3d 798 [2d Dept 2008]; *Israel v Fairharbor Owners, Inc.*, 20 AD3d 392 [2d Dept 2005]; *Smith v Taylor*, 279 AD2d 566 [2d Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Bloom v La Femme Fatale of Smithtown, Inc.*, 273 AD2d 187 [2d Dept 2000]). But, this rule does not apply where the affidavit is not directly contradictory of the prior deposition testimony (*see O'Leary v Saugerties Cent. School Dist.*, 277 AD2d 662 [3d Dept 2000], amplifies the prior testimony (*Castro v New York City Tr. Auth.*, 52 AD3d 213 [1st Dept 2008], or provides a potentially meritorious explanation for any consistency (*see Mickelson v Babcock*, 190 AD2d 1037 [4th Dept 1993] [plaintiff claimed that she suffered from amnesia at time of deposition but had recovered memory by time of affidavit]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (*Baker v Briarcliff School Dist.*, 205 AD2d 652, 661-662 [2d Dept 1994]).

LEGAL ANALYSIS

The Court concludes that Defendants have established, *prima facie*, that there were no known minimum financial requirements set by the landlord. Further, Defendants have shown *prima facie* that there is no evidence that the landlord would have denied Plaintiffs a lease had the landlord known Plaintiff's true financial condition. Thus, it was incumbent upon Plaintiffs to show that there is evidence to support their theory of causation – *i.e.,* that the inaccuracies in the financial statement caused the landlord to lease the premises to Plaintiffs which it otherwise would not have done but for the inaccurate financial statement thereby causing Plaintiffs to sustain injury. Plaintiffs have not provided any evidence in their opposition papers to show that the landlord leased the Premises to Plaintiffs based on the faulty financial

statement. Further, Plaintiffs have not offered any evidence to show that the landlord would have refused Plaintiffs a lease had the landlord known of Plaintiffs' true financial condition. Hence, the Court concludes that Plaintiffs have not shown the existence of a genuine triable issue of fact with regard to causation.[8]

Moreover, Defendants have established, *prima facie*, that the reason for the failed lease transaction was not because of the inaccurate financial statement but, rather, because of the intervening cause of the inept contractor which failed to construct the build-out in accordance with all relevant rules and regulations. In opposition to this *prima facie* showing, Plaintiffs have not provided evidence genuine triable issue of fact that the actions of the contractor were not the cause of the failed lease transaction.

Accordingly, the Court shall grant Defendants' motion for summary judgment since in opposition to Defendants' *prima facie* showing, Plaintiffs have not provided evidence creating a triable issue of fact on the issue of causation (*Standard Fed. Bank v Healy*, 7 AD3d 610 [2d Dept 2004]; *Laub v Faessel*, 297 AD2d 28 [1st Dept 2002]; *Lexington 360 Assoc. v First Union Natl. Bank of N.C.*, 234 AD2d 187 [1st Dept 1996]; *Pappas v Harrow Stores, Inc.*, 140 AD2d 501 [2d Dept 1988]).

The Court also concludes that there are no triable issues of fact with regard to Plaintiffs' fraud claim, even apart from causation. To establish a fraud cause of action, a plaintiff must show a misrepresentation or omission of a material fact, which defendant knew to be false, which defendant made with the intent of inducing reliance (scienter), plaintiff's reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance (*Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999]). Here, because the alleged misrepresentation contained in the financial statement was not sent to Plaintiffs and Plaintiffs

---

[8] The Court does not believe that it may deny summary judgment based on Plaintiffs' contention that the logical inference from the landlord's decision to enter into a settlement allowing Plaintiffs to terminate the lease based on a financial statement prepared almost a year later to be evidence that Zhu did not meet the landlord's financial requirements. As stated, Plaintiffs have admitted no knowledge of any such financial requirements nor have they provided evidence from the landlord that it was because of this financial statement that the landlord rented the premises to Plaintiffs. There are many reasons why the landlord may have permitted Plaintiffs to terminate the lease, such as the fact that Plaintiffs may have been judgment proof, the landlord may have had another tenant willing to enter into a lease for the premises for a higher monthly rent, or the landlord found value in the renovations that had been performed to date (that the landlord would be entitled to keep at the lease's termination) even though they did not meet with the landlord's and the town's rules and regulations. Further, as noted previously, the financial statement a year after the fact which did not reflect the amount of Zhu's assets at the time Li submitted the financial statement (as admitted by Zhu at his deposition) since the statement included a higher mortgage amount on Zhu's house and no value associated with Zhu's interest in the Yonkers' restaurant, cannot be used to show that the landlord did not view Zhu as having sufficient financial resources as of the time of the parties' entry into the lease.

have not established their reasonable reliance on the financial statement (Zhu having testified that the first time he saw it was in preparation for his deposition), the Court is at a loss to understand how a fraud claim is even established *vis a vis* Plaintiffs. Further, there is no basis for Plaintiffs to claim they justifiably relied on Defendants in this regard since they were in the best position to determine whether or not they were in the financial position to lease the premises and there is no claim that Defendants were somehow more knowledgeable about the financial viability of Plaintiffs' venture. Further, the admissions found in Zhu's deposition testimony and Benny's affidavit make clear that it is undisputed that Benny selected the contractor and whether or not Defendants made representations to Plaintiffs that they could use non-union labor or that the project should come in within the $200,000 budget are insufficient from a legal perspective to create any liability on Defendants' part. Because there was no legal duty for Defendants to be insurers of this project's viability, and because Plaintiffs failed to raise a triable issue of fact that the inaccuracies set forth in the financial statement was a cause of Plaintiffs' damages, there is no basis for Defendants' liability under any of Plaintiffs' **existing** causes of action. The Court next turns to the viability of Plaintiffs' unpleaded cause of action for RPL § 442-e violations.

PLAINTIFFS' UNPLEADED CAUSE OF ACTION FOR VIOLATIONS OF RPL § 442-e

Plaintiffs have asked the Court to search the record and grant them summary judgment on a currently unpleaded claim – *i.e.,* that Defendants violated RPL § 442-e based on their provision of real estate broker services through their facilitation of Plaintiffs' lease of the Premises. It is Plaintiffs' contention that because Defendants are not licensed real estate brokers, they were not entitled to the commission received and Plaintiffs may recover up to four times the amount they paid Defendants (*i.e.,* $300,000). Indeed, if Plaintiffs have a viable claim under RPL §442-e, it appears that the remedy would be exclusive as noted by the court in *Kilpatrick v Rose* (197 Misc 911 [Sup Ct Queens County 1950], *lv dismissed* 96 NYS2d 681 [2d Dept 1950]):

> the remedy provided in [RPL § 442-e (3)] is exclusive and ... the plaintiffs in these various causes of action cannot, in addition to the provisions of this section, sue for the money alleged to have been paid as commission for the procuring of the various mortgage loans ... where a new right is created or a new duty imposed by statute, if a remedy be given by the same statute for its violation or non-performance, the remedy given is exclusive (*id.* at 912).

It is well settled that "Real Property Law § 442-d bars unlicensed persons and corporate entities from recovering fees or commissions for the performance of services facilitating, inter alia, the sale [or rental] of real property" (*Ling's Props., LLC v Bode*, 94 AD3d 951, 952 [2d Dept 2012]). RPL § 440 defines a real estate broker as one "who, for another and for a fee, commission or other valuable consideration, ... sells ...or rents ... an estate of interest in real estate ..." (*id.*). "He is 'an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of' real property" (*Gerstein v 532 Broad Hollow Road Co.*, 75 AD2d 292, 296 [1st Dept 1980], *quoting* 6 N.Y. Jur. Brokers § 1).

Thus, a real estate license is required when real estate is the dominant feature of the transaction (*Ling's Props., LLC, supra*, 94 AD3d at 952). In the event a person has paid a commission to an unlicensed real estate broker, that person may sue to recover the penalty provided under the statute, *i.e.*, a recovery up to four times the amount paid as a commission (RPL § 442-e[3]). However, as noted by Defendants, since an unlicensed broker providing services in violation of the statute may be prosecuted as a crime, the statute is "strictly construed so as not to encompass every situation in which an interest real estate may be part of the transaction" (*Eaton Assoc. v Highland Broadcasting Corp.*, 81 AD2d 603, 604 [2d Dept 1981]; *see also Reiter v Greenberg,* 21 NY2d 388, 391-392 [1968]; *2 Park Ave. Assoc. v Cross & Brown Co.*, 36 NY2d 286, 291 [1975] [statute to be given a narrow construction]).

In *Ling's Props., LLC,* the Appellate Division, Second Department, reversed a denial of summary judgment to plaintiff who had retained Gnosis VII, LLC to perform certain services to enable plaintiff to purchase certain real property. Plaintiff brought a declaratory judgment that Gnosis and its managing member Michael J. Bode (a licensed real estate broker) were not entitled to receive compensation in connection with those services and to collect damages based on their receipt of a commission in violation of RPL § 442-e. The Appellate Division, after noting that it was undisputed that Gnosis was not a licensed real estate broker, found that plaintiff had sustained its *prima facie* burden of establishing "that the acquisition of real property was the dominant feature of the contract at issue and that Gnosis charged a fee for services facilitating the purchase and sale of the property" (*Ling's Props., LLC,* 94 AD3d at 952). The Court further found that in opposition, the defendants did not raise a triable issue of fact since they "did not demonstrate that the acquisition of real property was merely incidental to the underlying transaction or that the services rendered were for any purpose other than facilitating the acquisition of real property" (*id.*).

The Court believes that Plaintiffs have a potentially meritorious claim for a violation of RPL § 442-e, though such a claim is currently unpleaded and, as such, the Court is not going to search the record and grant summary judgment to Plaintiffs on such an unpleaded claim.

"While under certain circumstances, a summary judgment application may be entertained based on a theory of recovery not pleaded, the general rule is that summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded (*see*, Siegel, Practice commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C3212:11, at 319). This requirement 'is intended to show the court precisely what the parties' positions are'" (*Moscato v City of N.Y.,* 183 AD2d 599, 601 [1st Dept 1992]). Thus, while courts may grant summary judgment on an unpleaded cause of action by amending the pleading to conform it to the proof (*Weinstock v Handler,* 254 AD2d 165, 166 [1st Dept 1998]) "if the proof supports such a claim and if the opposing party has not been misled to its prejudice" (*Kramer v Danalis*, 49 AD3d 263, 264 [1st Dept 2008]), the general rule is that summary judgment may not be obtained on an unpleaded claim given the prejudice that results to the opposing party nor may the Court deny summary judgment based on such an unpleaded cause of action (*Mezger v Wyndam Homes, Inc.,* 81 AD3d 795, 796 [2d Dept 2011] [improper to deny a motion for summary judgment based on an unpleaded theory raised for the first time in opposition papers]; *see also Silber v New York Life Ins. Co.,* 92 AD3d 436 [1st Dept 2012]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.,* 15 AD3d 523 [2d Dept 2005]; *Medina*

v Sears, Roebuck and Co., 41 AD3d 798 [2d Dept 2007]; *Galatti v Alliance Funding Co., Inc.*, 228 AD2d 550 [2d Dept 1996]).

Whether Plaintiffs should be entitled to amend their Complaint at this late date to assert this cause of action and what remedies, if any, the Court would invoke to ameliorate the prejudice (if any) that could result from a grant of such a motion need not be decided at present.[9] It bears mentioning that if such a claim is allowed to be pleaded, it would be irrelevant whether or not the inaccuracies in the financial statement or Defendants' lack of a license caused Plaintiffs' damages (*e.g.*, contrary to Defendants' position, whether or not Plaintiffs would not have retained Defendants if they had known Defendants were unlicensed and the representation in the lease that Plaintiffs had no brokers in connection with the lease would be wholly irrelevant).[10]

Based on the foregoing, the Court shall grant Defendants' motion for summary judgment, without prejudice and with leave to Plaintiffs to file a motion to amend their Complaint (CPLR 3025[b][11]) to assert this new cause of action, within 30 days of the date of

---

[9]Whether or not Defendants were prejudiced cannot be determined on the present record. In this regard, the Court simply notes that although the Complaint does not allege a violation of RPL § 442-e, it appears that Defendants' counsel had at least an inkling that Plaintiffs would be relying on Defendants' status as unlicensed real estate brokers based on the joint one page statement of the facts and the parties' contentions Plaintiffs' and Defendants' counsel collaborated on in connection with the PC. In that statement, Plaintiffs asserted that the grounds for Defendants' liability, which included that Defendants acted as real estate brokers but neither was a licensed real estate broker.

[10]"Article 12-A ... is a regulatory statute setting up a comprehensive pan to assure, by means of licensing, that standards of competency, honesty and professionalism are observed by real estate brokers and salesmen" (*2 Park Ave. Assoc., supra*, 26 NY2d at 289). Thus as a statute designed to ensure the public's safety, a finding that the Agreement fell within the statute's reach and that Beacon was unlicensed would render at least Beacon strictly liable.

[11]CPLR 3025 (b) provides, in pertinent part, that "[a] party may amend his pleading ... at any time by leave of court or by stipulation of the parties." It is well settled law that leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law (*Leszcynski v Kelly & McGlynn*, 281 AD2d 519, 520 [2d Dept 2001]; *see also Thone v Crown Equip. Corp.*, 27 AD3d 723 [2d Dept 2006]) or unless prejudice and surprise directly result from the delay in seeking the amendment (*McCaskey, Davies & Assoc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558 [2d Dept 2007]; *Emilio v Robison Oil Corp.*, 28 AD3d 417 [2d Dept 2006]; *Bolanowski vTrustees of Columbia Univ. in City of N.Y.*, 21 AD3d 340 [2d Dept 2005]; *Luberda v Spameni,* 303 AD2d 384 [2d Dept 2003]; *Adams v Jamaica Hosp.* 258 AD2d 604, 605 [2d Dept 1999]; *Nissenbaum v Ferazzoli*, 171 AD2d 654, 655 [2d Dept 1991]; *Haven Associates v Donro Realty Corp.*, 96 AD2d 526 [2d Dept 1983]; *Mosely v Baker*, 59 AD2d 936 [2d Dept 1977]).

this Decision and Order.[12] Defendants are, of course, free to oppose the application for leave to amend. The parties are invited to address whether additional discovery is required with respect to the license issue.

CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Notice of Motion for Summary Judgment dated January 30, 2013; dated January 16, 2013; Affirmation of Humayun Z. Siddiqi, Esq. in Support of Motion for Summary Judgment, together with the exhibits annexed thereto; Affidavit of Guang Yang Li in Support of Defendants' Motion for Summary Judgment, acknowledged January 29, 2013;

2) Memorandum of Law in Support of Defendants' Motion for Summary Judgment;

3) Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment dated January 30, 2013;

4) Affidavit of Zhu Jian Hui in Opposition to Defendants' Motion for Summary Judgment, sworn to March 5, 2013;

5) Response to Statement of Alleged Undisputed Facts dated March 6, 2013 together with the exhibits annexed thereto;

6) Affirmation of Stacey Van Malden, Esq. in Opposition to Motion for Summary Judgment dated March 6, 2013, together with the exhibits annexed thereto;

7) Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment dated March 6, 2013;

8) Reply Affidavit of Guang Yang Li, acknowledged March 20, 2013; Reply Affirmation of Humayun A. Siddiqi, Esq. in Further Support of Defendants' Motion for Summary Judgment, together with the exhibit annexed thereto;

---

[12]When and if such a motion is filed and when and if it is ultimately determined that Plaintiffs are permitted to amend, the Court shall address the viability of such a claim as against Li as opposed to only Beacon, either since Li acted as a real estate broker in this transaction or because he should be held liable as Beacon International Inc. was a corporation that had been dissolved by proclamation for failure to pay franchise taxes in 2004, prior to the parties' entry into the Agreement. Until such time, however, the Court shall not render an advisory opinion as to whether or not a claim for a violation of RPL § 442-e as against Li, a nonparty to the Agreement, is viable (*see, e.g., Rodolitz Organization v Secondary Mtge. Resources, Inc.*, 175 AD2d 277 [2d Dept 1991]).

and

9) Reply Memorandum of Law in Further Support of Defendants Motion for Summary Judgment.

Based on the foregoing, it is hereby

ORDERED that the motion by Defendants Beacon International, Inc. (a/k/a Beacon Int'l Inc.) and Guang Yang Li (a/k/a Andy Li) for summary judgment dismissing the Complaint of Plaintiffs You Jie Zhu and Tanbo Restaurant, Inc., is granted, without prejudice and with leave to Plaintiffs to file a motion to amend their Complaint to assert a cause of action for a violation of New York's Real Property Law § 442-e within 30 days of the date of this Decision and Order, if Plaintiffs be so advised; and it is further

ORDERED that the parties shall appear for a conference on August 12, 2013, at 9:30 a.m. which conference shall not be adjourned without the prior written permission of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 3, 2013

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

APPEARANCES:

Stacey Van Malden, Esq.
Attorney for Plaintiffs
6629 Broadway, 7H
Bronx, New York 10471

LAW OFFICES OF ZAFAR SIDDIQI
By: Humayun Siddiqi, Esq.
Attorneys for Defendants
11 Broadway, Suite 853
New York, New York 10004