| **Buchsbaum v Geller** |
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| 2014 NY Slip Op 30191(U) |
| January 21, 2014 |
| Sup Ct, New York County |
| Docket Number: 651206/2013 |
| Judge: Saliann Scarpulla |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
*Justice*

PART 19

Index Number : 651206/2013
BUCHSBAUM, IRVING
vs.
GELLER, MARSHALL
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 1/21/14
which disposes of motion sequence(s) no. 001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/21/14

_____, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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IRVING BUCHSBAUM and RELATED BUILDING SERVICES, LLC,

Plaintiffs,

Index No.: 651206/2013
Submission Date: 9/19/13

-against-

**DECISION AND ORDER**

MARSHALL GELLER, BRIAN GELLER, and B. GELLER RESTORATION, INC.

Defendants.

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For Plaintiffs:
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For Defendants:
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Papers considered in review of this motion to dismiss (motion seq. no. 001):

Notice of Motion/Affirm. Of Counsel/Exhibits . . . . . .1
Affirm. in Opposition/Affidavit/Exhibits . . . . . 2
Reply Affirm./Affidavits . . . . . .3

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**HON. SALIANN SCARPULLA, J.:**

In this action, defendants Brian Geller, Marshall Geller, and B. Geller Restoration, Inc. (collectively, "Defendants") move to dismiss plaintiffs Irving Buchsbaum and Related Building Services, LLC's (collectively, "Plaintiffs") complaint pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7).

Plaintiff Irving Buchsbaum ("Buchsbaum") is an individual and sole employee of Related Building Services, LLC ("Related"), a company that procures business for renovation contractors. Defendants Brian Geller and Marshall Geller are principals of B.

Geller Restoration, Inc. ("B. Geller Restoration"), a corporation that specializes in historic preservation, decorative stone work, roofing, and other restoration projects.

On April 4, 2013, Plaintiffs commenced this action to recover for services they provided to the Defendants. In the complaint, Plaintiffs allege that Buchsbaum entered into a contract with Marshall Geller and Brian Geller, in which Buchsbaum agreed to procure clients for the Defendants' restoration business in exchange for a certain percentage of the sales price and other monetary compensation ("the contract").

Plaintiffs assert three causes of action against the Defendants for: (1) breach of contract; (2) account stated; and (3) fraudulent inducement.[1] In the first cause of action, Plaintiffs claim that the Defendants breached the contract by failing to pay for services rendered. In the second cause of action, Plaintiffs claim that the Defendants failed to pay their invoices, and that the Defendants never objected to the invoices from Plaintiffs.

Plaintiffs annex a copy of the contract to the complaint. The contract states "[t]his agreement is made between Irving Buchsbaum and B. Geller Restoration." The contract further states that Buchsbaum will "[p]romote and solicit sales for B. Geller Restoration" in exchange for "5% of sales price if gross profit margin in 30.0% or greater," $500 per

[1] On June 27, 2013, Plaintiffs withdrew the third cause of action for fraudulent inducement through their supplemental verified complaint. Plaintiffs also amended their damages claim from $60,718.60 to $107,584.54. Defendant argues that Plaintiffs' supplemental verified complaint has not been properly e-filed. Plaintiffs are directed to file their supplemental verified complaint to the extent that it has not already been done.

week, and reimbursement for miscellaneous expenses. The contract is signed by Irving Buchsbaum, Marshall Geller, and Brian Geller.

**1. Breach of Contract**

In the current motion, the Defendants argue that the breach of contract claim should be dismissed because: (1) Marshall Geller and Brian Geller are not parties to the contract; (2) Plaintiffs failed to allege that B. Geller Restoration is a party to the contract; and (3) Plaintiffs failed to allege a sufficient damages claim. According to the Defendants, the parties to the contract are Buchsbaum and B. Geller Restoration. The Defendants contend that Marshall Geller and Brian Geller signed the contract on behalf of B. Geller Restoration, not in their individual capacity. The Defendants further argue that Related's breach of contract claim should be dismissed because Related is not a party to the contract.

In opposition, Plaintiffs argue that their breach of contract claim should not be dismissed because: (1) Brian Geller and Marshall Geller signed the contract as individuals; (2) Plaintiffs properly pleaded that B. Geller is a party to the contract; and (3) Plaintiffs allege a sufficient damages claim.

Plaintiffs claim that Brian Geller and Marshall Geller signed the contract as individuals, even though the contract states that the agreement is between Buchsbaum and B. Geller Restoration. Buchsbaum states in his affidavit that "[b]ecause I did not trust B. Geller to pay me in a timely manner (if at all) and I was concerned for its viability

because of the way it was being run, I insisted that Marshall Geller and Brian Geller, individually and personally sign the agreement and commit to themselves to my being paid."

Plaintiffs further contend that, even though Related is not a party to the contract, Related can maintain a breach of contract claim against the Defendants because Buchsbaum rendered services to them through the entity, Related.

In reply, the Defendants argue that the contract clearly states that the parties to the agreement are Buchsbaum and B. Geller Restoration, not Brian Geller or Marshall Geller. The Defendants argue, therefore, that the Court should not consider Plaintiff's affidavit because it is parol evidence that cannot be used to create an ambiguity in the contract where none exists.

**2. Account Stated**

The Defendants argue the account stated claim should be dismissed because Plaintiffs failed to attach any invoices to the complaint, and they failed to specify how and to whom the invoices were delivered.

In opposition, Plaintiffs argue that they submitted invoices to the Defendants, and that the Defendants never contested any of the invoices. In his affidavit, Buchsbaum states "I have always invoiced B. Geller regularly either as an individual or through RBS [Related]." Buchsbaum further states that "[n]ever have any of the Defendants or anyone on their behalf ever contested a single invoice or any statement of account." Buchsbaum

also submits a copy of an account statement that allegedly shows that the Defendants owe $114,584.52 to Plaintiffs.[2]

**Discussion**

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Under CPLR § 3211(a)(7), a defendant may move for judgment dismissing the complaint on the grounds that "the pleading fails to state a cause of action." In determining whether to grant a motion to dismiss based on a failure to state a cause of action, the "court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002).

Under CPLR § 3211(a)(1), a defendant may move for judgment dismissing the complaint on the grounds that "a defense is founded upon documentary evidence." Dismissal 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 N.Y.2d at 88.

[2] In fact, the statement appears to be Related's account summary of open balances, which suggests that B. Geller Restoration owes $107,584.54 to Related.

**1. Breach of Contract**

To state a cause of action for breach of contract, the plaintiff must allege: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) the defendant's breach; and (4) damages. *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

The New York courts have long adhered to the "sound rule in the construction of contracts, that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." *R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 771 N.E.2d 240 (2002) (quoting *Springsteen v. Samson*, 32 N.Y. 703, 706 (1865)). When the parties "set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Whether a contract is ambiguous is a question of law to be determined by looking "within the four corners of the document." *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998). When "the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations." *Del Vecchio v. Cohen*, 288 A.D.2d 426, 427 (2d Dep't 2002); *Triax Capital Advisors, LLC v. Rutter*, 83 A.D.3d 490, 492-93 (1st Dep't 2011).

Based on the plain language of the contract, it is clear and unambiguous that the parties to the contract are Buchsbaum and B. Geller Restoration. The contract expressly states at the outset that the "agreement is made between Irving Buchsbaum and B. Geller Restoration." The contract also provides that Buchsbaum will "[p]romote and solicit sales for B. Geller Restoration" in exchange for a percentage of the sales price and other monetary compensation. It is clear from the contractual language that Buchsbaum and B. Geller Restoration are the only parties that undertook obligations under the contract.

Plaintiffs argue that Brian Geller and Marshall Geller signed the contract as individuals, and are therefore personally liable under the contract. However, it is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually. *Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011). Under New York law, an agent for a disclosed principal will not be personally bound "unless there is clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of the principal." *Performance Comercial Importadora E Exportadora Ltda v. Sewa Int'l Fashions Pvt. Ltd.*, 79 A.D.3d 673, 915 N.Y.S.2d 44 (1st Dep't 2010).

Upon reviewing the terms of the contract, I find no evidence that the parties intended for Brian Geller or Marshall Geller to be personally liable under the contract. The contract does not contain any provision stating that Brian Geller or Marshall Geller assume personal liability under the contract, and the appearance of the Gellers' signatures

on the contract is insufficient to hold them personally liable as a matter of law. *Georgia Malone & Co.,* Inc., 86 A.D.3d at 408; *American Media Concepts, Inc. v. Atkins Pictures, Inc.*, 179 A.D.2d 446, 447-448 (1st Dep't 1992). "In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice -- once as an officer and again as an individual." *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 67 (1961); *American Media Concepts*, 179 A.D.2d at 448.

As the contract is clear and unambiguous, Plaintiff's affidavit is inadmissible to raise an issue of fact as to whether Brian Geller and Marshall Geller signed the contract as individuals. Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face. *R/S Assoc.*, 98 N.Y.2d at 33.

For the above stated reasons, I grant the Defendants' motion to dismiss the breach of contract cause of action against Brian Geller and Marshall Geller.

The Defendants also argue that the breach of contract claim should be dismissed against B. Geller Restoration. While the complaint was poorly drafted, I find that Buchsbaum sufficiently alleges a breach of contract claim against B. Geller Restoration through his affidavit and the contract annexed to the complaint. "In assessing a motion

under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon*, 84 N.Y.2d at 88. However, I find that Related fails to allege a breach of contract claim against B. Geller Restoration. Plaintiffs admit that Related is not a party to the contract, and therefore Related cannot assert a breach of contract claim against B. Geller Restoration.

Accordingly, I grant Defendants' motion to dismiss the breach of contract cause of action as to Brian Geller and Marshall Geller, and as to Related's breach of contract cause of action against B. Geller Restoration, and this part of the motion is otherwise denied.

**2. Account Stated**

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. *Ryan Graphics, Inc. v. Bailin*, 39 A.D.3d 249, 251 (1st Dep't 2007). The agreement may be implied by the receipt and retention of an account statement for an unreasonable period of time without objection. *Shea & Gould v. Burr*, 194 A.D.2d 369, 370 (1st Dep't 1993).

Here, I find that Plaintiffs sufficiently allege an account stated cause of action against B. Geller Restoration. In his affidavit, Buchsbaum stated that he regularly invoiced B. Geller as individual or through Related, and that B. Geller Restoration never objected to the invoices. Buchsbaum also submitted an account statement, which appears to show a list of monthly invoices issued by Related to B. Geller Restoration.

However, Plaintiffs fail to allege an account stated cause of action against Brian Geller and Marshall Geller. Buchsbaum does not allege that he sent invoices to Brian Geller or Marshall Geller as individuals, and neither of them are listed on the account statement submitted by Buchsbaum. Therefore, I grant Defendants' motion to dismiss the account stated cause of action against Brian Geller and Marshall Geller, and I otherwise deny the motion as to B. Geller Restoration.[3]

In accordance with the foregoing, it is

ORDERED that defendants Brian Geller, Marshall Geller, and B. Geller Restoration, Inc.'s motion to dismiss plaintiffs Irving Buchsbaum and Related Building Services, LLC's complaint pursuant to CPLR § 3211(a)(1), (a)(3), and (a)(7) is granted to the extent that: (a) the breach of contract cause of action against Brian Geller and Marshall Geller is dismissed; (b) Related Building Services, LLC's breach of contract cause of action against B. Geller Restoration, Inc. is dismissed; (c) Irving Buchsbaum and Related Building Services, LLC's account stated cause of action against Brian Geller and Marshall Geller is dismissed; and (4) the fraudulent inducement cause of action is withdrawn by Plaintiffs; and the motion is otherwise denied; and it is further

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[3] Defendants also request sanctions against Plaintiffs in their reply papers. Defendants did not move for sanctions in their original motion papers. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments or grounds for the motion. *Schultz v. 400 Co-op. Corp.*, 292 A.D.2d 16, 21 (1st Dep't 2002). I therefore deny Defendants' request for sanctions.

ORDERED that plaintiff Irving Buchsbaum's breach of contract cause of action against B. Geller Restoration, Inc., and Irving Buchsbaum and Related Building Services, LLC's account stated cause of action against B. Geller Restoration, Inc. are severed and shall continue.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 21, 2014

ENTER:

Saliann Scarpulla, J.S.C.