

**Argo Partners II LLC v Learning Box LLC**

2015 NY Slip Op 30308(U)

March 2, 2015

Supreme Court, New York County

Docket Number: 653919/2013

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : COMMERCIAL DIVISION PART 49**

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**ARGO PARTNERS II LLC,**

**Plaintiff,**

**DECISION AND ORDER**

**-against-**

**Index No.: 653919/2013  
Mot. Seq. Nos.: 002 and 003**

**THE LEARNING BOX LLC, DON MOODY, and  
GARY B. FRIEDMAN,**

**Defendants.**

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**O. PETER SHERWOOD, J.:**

Motion sequence numbers 002 and 003 are consolidated for purposes of disposition. In motion sequence number 002, defendants The Learning Box LLC (“TLB”), Don Moody (“Moody”) and Gary B. Friedman (“Friedman”) move, pursuant to CPLR 3212, for summary judgment dismissing count 1 of the complaint (fraud); and, pursuant to CPLR 3211 (a) (7), dismissing counts 1 (fraud), 2 (breach of contract), 3 (breach of warranty), and 4 (to pierce the corporate veil). In motion sequence number 003, plaintiff Argo Partners II LLC (“Argo”), moves pursuant to CPLR 3212, for summary judgment as to all causes of action. For the following reasons, the defendants’ motion is GRANTED to the extent it seeks dismissal of counts 1 and 4 and otherwise is DENIED. The plaintiff’s motion is DENIED in its entirety.

***Background***<sup>1</sup>

This action arises out of a May 2011 transaction whereby Argo, a bankruptcy claims trader, purchased a claim (“Claim 29”) held by TLB against non-party Word World LLC (“Word World”), a debtor in bankruptcy. Argo contends that it purchased Claim 29 in reliance on defendants’ misrepresentations regarding its validity and value. Claim 29 arose out of a September 2009 loan transaction between TLB and Word World whereby Word World issued a note in favor of TLB in exchange for TLB’s interest in certain grant funds provided by the United States Department of Education.

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<sup>1</sup>The facts are derived from the parties’ Rule 19-a Statements of Undisputed Facts or, where indicated, as alleged, in the complaint.

## I. The TLB-Word World Transaction

In 2009, Word World and TLB entered into a development and loan agreement (the “Loan Agreement”) whereby TLB, *inter alia*, assigned to Word World its right to \$1.5 million in federal funds awarded to TLB by the U.S. Department of Education (“USDOE”) for the development of a children’s literacy program, referred to as “Duck’s Alphabet” (*see* NYSCEF Doc. No. 47). In return, Word World issued a convertible promissory note (“Note”) in favor of TLB in the principal amount of approximately \$1.5 million, with interest accruing at a rate of 8% per annum (*see* NYSCEF Doc. No 32, § 3). According to Joseph Caligaro, the former USDOE program officer responsible for administrating the award, the loan transaction was part of a larger transaction approved by USDOE (*see* NYSCEF Doc. No. 97) pursuant to which Word World assumed the responsibility of TLB for certain deliverables owed to USDOE (*see* NYSCEF Doc. No. 96, ¶ 6). The Note expressly prohibited oral modifications, and provided that it could be amended or modified only by a writing signed by both Word World and the holder (*see* NYSCEF Doc. No. 32 § 12 [a] [“Neither this Note nor any term of this Note may be waived, changed, discharged or terminated orally, but may only be amended or modified by an instrument in writing signed by the Company and the Holder”]). Argo alleges that defendants Moody and Friedman, each of whom held an interest in TLB and Word World<sup>2</sup>, caused the two companies to enter into the Loan Agreement, and structured the transaction in such a way that they would benefit each personally.

In its unverified complaint, Argo alleges that the loaned funds were a portion of a \$2.62 million grant awarded in 2008 to TLB by USDOE for the development of Duck’s Alphabet. Argo interprets the Loan Agreement as describing Word World’s agreement to utilize the federal funds to develop Duck’s Alphabet, and providing that \$1.5 million of the funds would be deemed borrowed from TLB, even though the USDOE funds were paid directly to Word World and not deposited in any TLB account (*see* NYSCEF Doc. No. 84 ¶¶ 5-6).

According to Argo, subsequently, certain of Word World’s creditors objected to the Loan

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<sup>2</sup> Moody holds a majority membership interest in TLB, and was Word World’s chief executive officer, principal, manager, and largest shareholder at all relevant times. Friedman was the manager of, and holds a membership interest in, TLB. He was also one of Word World’s five largest shareholders at all relevant times (*see* NYSCEF Doc. Nos. 1 and 24, ¶¶ 3-4).

Agreement and Note because the added debt would cause Word World to exceed existing debt limit covenants. Additionally, TLB's accountant identified negative tax implications stemming from the loan. Argo alleges that, in response, Word World and TLB voided the loan transaction. Specifically, Argo alleges that Word World's board of directors ("Board") authorized Word World to enter into a development agreement ("Draft Subsequent Agreement")<sup>3</sup> with TLB canceling the Loan Agreement and the Note (*see id.*, ¶ 26). The Draft Subsequent Agreement allegedly transformed the Loan Agreement from a traditional loan to an equity earnout whereby TLB would receive shares of Word World in lieu of repayment of the loan plus interest.<sup>4</sup> This structure allegedly avoided the negative tax implications identified by TLB's accountants, and did not violate Word World's existing debt covenants. Moody and Friedman, then both of Word World Board members, voted in favor of the earnout structure. The Draft Subsequent Agreement provided that it superseded any prior agreements, whether oral or written, between the parties (*see* NYSCEF Doc. No., 49 § VII). All of these alleged matters transpired prior to Argo's involvement with TLB, Moody and Friedman.

Although not disputing that the Word World Board voted on August 5, 2010 to approve the earnout arrangement (*see* NYSCEF Doc. No. 31, ¶ 6), defendants contend that the Draft Subsequent Agreement was never executed (*see* NYSCEF Doc. No. 95, ¶¶ 15-16). In his affidavit submitted with defendants motion, Friedman explained that after the vote, TLB decided not to proceed with the transaction evidenced by the Draft Subsequent Agreement because by late August 2010, it came to believe that a Word World bankruptcy filing was likely and that to proceed would subordinate TLB's interests to those of other noteholders. Plaintiff acknowledges that it has not found an executed copy of the Subsequent Agreement<sup>5</sup> (*see* NYSCEF Doc. No. 31, ¶¶ 7-8).

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<sup>3</sup>The document submitted by plaintiffs as the purported Draft Superceding Agreement appears as an attachment to an email dated September 5, 2012 from Alex Kay, a former Word World employee. It is an unsigned draft of the Development Agreement edited to reflect an "earnout" (*see* NYSCEF Doc. No. 49).

<sup>4</sup> The Draft Subsequent Agreement subjected the equity earnout to additional conditions precedent (*see* § II, III), that indisputably did not come to pass.

<sup>5</sup>Argo also states that Moody and Friedman caused TLB not to execute the Draft Subsequent Agreement (Pl. Br., NYSCEF Doc. No. 85, p.18).

Argo argues that regardless of whether or not a written agreement was ever signed, the parties completed and implemented an equity earnout (*see* Plaintiff's Memo of Law in Support of its Motion for Summary Judgment, NYSCEF Doc. No. 85, p. 1). Specifically, Argo contends that in April 2010, Word World modified its audited internal financial records and statements to reflect that TLB would receive compensation in the form of an equity earnout (*see* NYSCEF Doc. No. 84, ¶ 13). Argo admits that TLB never received any equity earnout (*id.*, ¶15). On August 12, 2010, Moody (on behalf of World Word) certified the truthfulness and completeness of Word World's 2009 internal financial statements, including a reference to the equity earnout (*id.*, ¶ 23). Argo's submission to the Court in opposition to defendants' motion to dismiss, also reveals that in May 10, 2015, Alex Kay, Executive Vice President of Word World advised one of its lenders that Word World had restructured the TLB loan as an earnout (*see id.* ¶19; Salsbury aff, Ex. 10). The lender responded requesting a copy of both the original loan agreement and the revised agreement (*see id.*). Kay provided a draft of the revised agreement and stated that it had not been executed (*id.*, ¶22; Salsbury aff, Ex. 14). In July 2010, the lender inquired of Kay "[w]here is the executed copy of the amendment to the development agreement?" (*id.* ¶ 27; Salsbury aff, Ex. 20). There is no evidence that Word World ever provided it or even asserted that it existed.

## **II. Word World's Bankruptcy and Argo's Purchase of Claim 29**

On February 10, 2011, Word World filed a voluntary bankruptcy petition under chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (*see In re WULWUL, LLC, f/k/a Word World, LLC*, [U.S. Bankr Ct, SD NY, case No. 11-10543]) (the "Bankruptcy Action"). Argo alleges that, despite knowing that the Loan Agreement and Note had been voided, Word World listed TLB on schedule F to its bankruptcy petition as a creditor holding an unsecured nonpriority claim based on the Note.

Argo, a bankruptcy claims trader, became interested in purchasing several claims which the defendants planned to file in the Word World bankruptcy. To that end, Argo alleges that it began discussing with Friedman a potential purchase of several claims expected to be listed on schedule F, including Claim 29. Argo contends that on May 17, 2011, Friedman sent an email to Scott Krochek, Argo's senior vice president, offering to sell Claim 29, but did not mention that the loan had been voided in favor of an equity earnout (*see* Krochek Aff., Ex. A NYSCEF Doc. No. 87).

Friedman attached a spreadsheet showing the loan claim in the face amount of \$1,626,200, and offered by "The Learning Box LLC c/o FLG [Friedman Law Group]" for the purchase price of \$203,275 (*id.*). Later that day, Krochek sent unexecuted draft assignments to Friedman for several of the prospective bankruptcy claims, including Claim 29 (*id.*, Ex. B NYSCEF Doc. No. 88).

Six days later, on May 23, 2011, Friedman completed, and executed, a bankruptcy proof of claim form for Claim 29, and emailed a copy of the proof of claim to Krochek (*see id.*, Ex. C NYSCEF Doc. No. 89). Argo alleges that, in the proof of claim, Friedman fraudulently asserted that Claim 29 was valid and enforceable in the amount of \$1,626,200 and was based on the Note. On that date, Friedman also sent Argo an executed assignment for the claim that TLB intended to file in the Bankruptcy Action (*see id.*, Ex. D NYSCEF Doc. No. 90).

On June 1, 2011, Friedman, on behalf of TLB, filed Claim 29 in the Bankruptcy Action asserting that Word World owed TLB the sum of \$1,626,200, consisting of principal and interest pursuant to the Note. As noted above, the debt was listed by Word World in its bankruptcy filing. The claim was consistent with the representation TLB made to Argo in the assignment. Argo now alleges that Claim 29 was fraudulent because the Loan Agreement and Note was voided by the agreement evidenced by the Draft Superceding Agreement. Argo maintains that in reliance on misrepresentations by TLB and Friedman regarding the value and validity of Claim 29, on June 6, 2011, it executed the Assignment of Claim 29 ("Assignment Agreement"), pursuant to which Word World assigned Claim 29 to Argo. In consideration for the assignment, Argo paid TLB the sum of \$203,150 (*see id.*, Ex. NYSCEF Doc. No. 91). Argo contends that Moody and Friedman acted in concert for their individual personal benefit. Argo also alleges that, once the proceeds of the sale of Claim 29 were received by TLB, TLB distributed the funds to Friedman and Moody.

In the Assignment Agreement, TLB represented and warranted to Argo that: (a) the amount of Claim 29 is not less than \$1,625,200; (b) Claim 29 is valid and enforceable against Word World; (c) no objection to Claim 29 exists; (d) TLB has not engaged in any acts, conduct, or omission that might result in Argo receiving proportionately less payments or distributions or less favorable treatment per dollar of the claim than other unsecured creditors; and (e) the claim is not subject to any offset, defenses, or subordination that has been, or may be, asserted by, or on behalf of, Word World, or any other party, to reduce the amount of Claim 29 or to impair its value (*see* Assignment

Agr. at 1 NYSCEF Doc. No. 90). The Assignment Agreement further provided that TLB "irrevocably appoint[ed] Argo [Partners] as its true and lawful attorney and authorize[d] [Argo] to act in [TLB's] stead, to demand, sue for, compromise and recover all such amounts as now are, or may hereafter become, due and payable for or on account of the claim assigned" (*id.* at 2). Lastly, the Assignment Agreement contains a proportional restitution provision that requires TLB to reimburse Argo in certain circumstances (*id.*).

On July 6, 2012, the Bankruptcy Action estate representative, nonparty Challenge Advisors, LLC (the "Estate Representative"), filed an objection to Claim 29. The objection did not include an assertion that the Loan Agreement had been revised or that the Note had been canceled. After an unsuccessful mediation, Argo, as attorney-in-fact for TLB, negotiated a settlement of Claim 29 with the Estate Representative, agreeing to reduce the amount the claim by 75% (from \$1,625,200 to \$406,300) (*see* Scott Krochek aff, ¶¶ 14-16 NYSCEF Doc. No. 86). Argo contends that it did so in part because it learned from Friedman that TLB had no funds with which to repay Argo its purchase price should the Estate Representative succeed in its challenge to the claim. The bankruptcy court subsequently approved the Claim 29 settlement. Ultimately, Argo received approximately ten percent (10%) of the compromised claim.

### **III. Procedural History**

After compromising Claim 29, Argo demanded that TLB, Moody, and Friedman repay Argo contract damages that it had incurred, including 75% of the purchase price that it paid TLB, or, \$152,362.50, together with interest, and costs of collection, as provided for in the Assignment Agreement. In April, 2013, defendants rejected Argo's demand for payment. Accordingly, on November 11, 2013, Argo commenced this action against defendants. The action rests on allegations that TLB assigned Claim 29 to Argo based on false representations that the Note underlying it was valid and enforceable, even though, at all relevant times, defendants knew, but failed to disclose to Argo, that the Note had been canceled.

The complaint asserts claims for fraud against all defendants, breach of express warranty and breach of contract against TLB. It seeks to pierce the corporate veil in order to hold Moody and Friedman personally liable. Argo demands \$152,363 plus interest in damages on the breach of warranty/contract claims. Alternatively, it seeks, rescission of the Assignment Agreement, repayment of the full \$203,150 paid for Claim 29, reimbursement of its out-of-pocket expenses

(including attorneys' fees and costs), and punitive damages. Defendants deny all material allegations and assert 10 affirmative defenses, including defenses for failure to state a cause of action upon which relief can be granted, failure to plead fraud with requisite particularity, estoppel, doctrine of election of remedies, accord and satisfaction, the merger doctrine, the parol evidence rule, the doctrine of mistake, and lack of standing.

Defendants now move for summary judgment dismissing the first claim for fraud on the ground that the undisputed record conclusively demonstrates that the Draft Subsequent Agreement was never executed, and, therefore, the Note was never canceled. Defendants also move to dismiss the remaining counts of the complaint. Argo in turn moves for summary judgment on all counts in the complaint. As to count 1 (fraud) it seeks \$162,622 derived as follows: \$203,150 (paid at the time of the assignment) less \$42,528 (received in the bankruptcy proceeding). As to counts 2 and 3, it seeks damages in the amount of \$152,362.50 which is seventy-five percent of the amount it paid for Claim 29. It also states that it would prefer to recover on breach of warranty/contract grounds but realizes that any such recovery would be illusory unless the court also grants summary judgment on its piercing the corporate veil theory.

### *Discussion*

#### **I. Legal Standards**

##### **A. Summary Judgment Pursuant to CPLR 3212**

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez*, 68 NY2d 329; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible

form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “a shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman*, 49 NY2d 557; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

#### **B. Standard for Motions to Dismiss Under CPLR 3211(a)(7)**

On a motion to dismiss a plaintiff’s claim pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The Court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 “unless they establish conclusively that [plaintiff] has no . . . cause of action” (*Lawrence v Groubard Miller*, 11 NY 3d 588, 595 [2008]),

[citing *Rovello*, 40 NY2d at 636]). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

## II. Count 1 - Fraud

The misrepresentations specified in the complaint track the warranties set forth in the Assignment Agreement (*see* NYSCEF Doc. No. 34, ¶ 48). According to the complaint, Argo “reasonably and justifiably relied on defendants’ false statements” (*id.*, ¶ 53). Where the complaint alleges breach of an express warranty and reliance thereon, the cause of action for the breach is grounded essentially in contract, not tort (*see CBS, Inc. v Ziff-Davis Publications Co.*, 75 NY 2d 496, 453 [1990]). For this reason, Count 1 must be dismissed. Even if the representations made in the Assignment Agreement are accepted as a basis for a fraud claim, Count 1 must be dismissed. Argo’s fraud claim rests upon the assertion that the Loan Agreement was superceded and the Note canceled thereby rendering the warranties false. The record shows that the Note was never canceled.

“The elements of fraudulent misrepresentation are (1) the defendant made a material false representation, (2) the defendant intended to defraud the Plaintiffs thereby, (3) the Plaintiffs reasonably relied upon the representation, and (4) the Plaintiffs suffered damage as a result of their reliance” (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 [1st Dept 2005]).<sup>6</sup> There are no genuine triable issues of fact regarding whether the Note was canceled and superceded prior to Argo’s purchase of Claim 29. The record contains substantial evidence that Word World negotiated with TLB to cancel the Loan and to replace it with an equity earnout arrangement for reasons entirely unrelated to the transaction between Argo and TLB. That evidence includes an unexecuted draft of a Subsequent Agreement, Word World Board approval of the transaction in August 2010 (*see* NYSCEF Doc. No. 31 ¶ 6) and various internal communications by, and between, Word World employees, its auditor, and its creditors include discussions regarding cancellation of the Note. For

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<sup>6</sup> A claim of fraudulent concealment or omission must be predicated on an act of concealment of a material fact not readily available to the plaintiff and which the defendant was duty-bound to disclose, based upon a confidential, special, or fiduciary relationship (*Kaufman v Cohen*, 307 AD2d 113, 119-120 [1st Dept 2003]; *Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199 [3d Dept 1989]). In this case there can be no viable claim of fraudulent concealment because no fiduciary relationship exists between Argo and defendants.

example, in an April 15, 2010 email, Word World's controller, Martha Harrison, advised Minal Patel an employee of nonparty, Cintrin Cooperman (accounts for Word World and TLB), that "the TLB convertible note has been officially reclassified as revenue for 2009," and that the Word World financials will contain a footnote to explain a possible future payment by Word World to TLB for the Duck's Alphabet property. Harrison also attached a proposed Word World journal entry showing \$855,582.68 in payments received in 2009 from the Department of Education grant. It appears that, Word World's financial and tax statements indicate that the Note was reclassified as an equity earnout (*see* Word World 2009 financial statements and tax return; Word World 2010 first quarter financial statement; Word World second quarter financial statement). Notably, none of these documents evidence any action by TLB to cancel the Note, or to execute the Draft Subsequent Agreement. Argo's reference to the fact that "Moody and Friedman, the only individuals who could act for Learning Box, both approved the Development Agreement in writing" (Pl. Opp. Br., p. 15) is disingenuous. The "writing" referred to is an action taken by them as directors of Word World (*see* Salsbury aff, Ex. 18). The assertion that the writings signed by Moody and/or Friedman on behalf of Word World are sufficient to satisfy the statute of frauds as to TLB is rejected.

In addition, there is no evidence in the record that Word World and TLB ever concluded the transaction. Nor is there any evidence of implementation by TLB of the purported earnout arrangement. Rather, the record shows that by late August 2010, Friedman and Moody became concerned about the financial viability of Word World. Consistent with the absence of documentary evidence of cancellation of the Note, Word World acknowledged existence of the debt when it listed the Note as such in its bankruptcy filing. It is undisputed that Argo purchased Claim 29 in reliance on representations that the Note was a valid existing obligation of Word World. Word World swore to the existence of that obligation in its bankruptcy petition and the Estate Representative in the bankruptcy proceeding never asserted otherwise.

The Note unambiguously states that all modifications be in writing. No such writing has been presented in this case. Argo seeks to avoid the conclusive effect of the writing requirement by asserting that there are genuine triable issues of fact regarding whether Word World partially performed the terms of the Draft Superseding Agreement sufficient to permit parol evidence of a Note modification. Argo maintains that partial performance by one party to an agreement may be

sufficient to demonstrate an enforceable oral modification to that agreement, even where, as here, the agreement contains an express prohibition against such modification. Argo cites *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 (1977) and *Concordia Gen. Contr. v Peltz*, 11 AD 3d 502, 503 (2nd Dept 2004) as support for its claim. Neither case supports the result Argo seeks. *Concordia* involved a contract that did not contain a no-oral-modification clause. *Rose* simply “held that if a party can show that they have been induced into substantial reliance on an oral modification, and conduct has shown such reliance, the other party will be estopped from invoking the statute. Fundamental to this proposition is a showing of reliance” (*Cliffs Mgmt. Corp. v Great Eastern Mgmt. Corp.*, 85 AD 2d 584, 585 [1st Dept 1981], citing *Rose*). Here, Argo does not argue that it was induced to rely on any alleged oral agreement voiding the debt owed by Word World to TLB. It claims that exact opposite, namely that defendants told Argo that the TLB Note was valid.

Argo's additional contention that the Note was never supported by an actual loan of funds to Word World by TLB is also unavailing. TLB assigned to Word World its rights to collect certain federal funds (*see* NYSCEF Doc. No. 47 §§ II, III). Even accepting Argo's theory, whether the funds were legally controlled by the federal government or by TLB is of no moment. In consideration for TLB assigning to Word World its right to collect the funds, Word World agreed to pay TLB up to \$1,500,000 (*see id.*). All that was required of TLB under the Loan Agreement was that it assign to Word World its right to collect the federal funds. There is no dispute that TLB did so. Argo does not argue that the federal government failed to advance any funds to Word World. Word World received the grant money (regardless of who legally controlled it), and was obligated to repay TLB on the Note.

The request to dismiss the fraud claim shall be GRANTED and Argo's motion for summary judgment as to count 1 is DENIED.<sup>7</sup>

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<sup>7</sup> As a last resort, Argo argues that there has been only limited disclosure in this action. Pursuant to CPLR 3212(f), it seeks a continuance of the defendants' motion (but not its own) in order to permit further disclosure aimed at locating a fully executed version of the Draft Subsequent Agreement (*see* Pl. Opp. Br., NYSCEF Doc. No. 45, pp. 16-19). It is well settled that “mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis ... for postponing a decision on a summary judgment motion” (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005] [citations and quotations omitted]; *see also Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 102-03 [1st Dept 2006]; *Zinter Handling, Inc.*

### III. Counts 2 and 3 - Breach of Contract and Breach of Warranty

#### A. Defendants' Motion to Dismiss

The defendants also move to dismiss counts 2 (breach of contract) and 3 (breach of warranty) of the complaint for failure to state a cause of action. Rather than argue that Argo has failed to plead each element of these claims, the defendants assert that the breach claims are barred (1) by the doctrine of election of remedies; (2) rest upon an untenable reading of the Assignment Agreement; and (3) if applied as alleged would render the contract illusory and sanction a forfeiture of TLB's interests. Because counts 2 and 3 cannot be dismissed on the grounds asserted, this branch of the motion must be denied.

"[F]or an election of remedies to bar the pursuit of alternative relief, legal and equitable, a party must have chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must also have gained an advantage, or the opposing party must have suffered some detriment" (*331 E. 14<sup>th</sup> St. v 331 E. Corp.*, 293 AD2d 361, 361 [1<sup>st</sup> Dept 2002] [internal quotation marks and citation omitted]). The doctrine is harsh, and is generally disfavored by the courts (*see Stoetzel v Wappingers Cent. Sch. Dist.*, 118 AD2d 636, 636 [2d Dept 1986]).

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*v Britton*, 46 AD3d 998, 1001 [3d Dept 2007]). Here, Argo received, pursuant to a subpoena served on General Word LLC, the company that purchased all of Word World's assets, access to the entire contents of the Word World computer servers. Nowhere in any of the scores of documents produced is there any suggestion that the Draft Subsequent Agreement was executed. In an effort to fill the gap, Argo points to a communication from Word World Executive Vice President Alex Kay to investors and accountants indicating that the Loan Agreement would be converted to an equity earn-out (*see Salsbury aff*, Ex. 10, 14, NYSCEF Doc. Nos. 56, 60). However, in that very communication, Mr. Kay expressly advises that "we haven't executed the revised agreement yet" (*see id.*, Ex. 14). Indeed, in support of its desire to cast a wider discovery net over Word World's accountants and financial advisors, Argo contends that emails from Mr. Kay's from the period of February 15 to July 21, 2010 to such entities "were apparently deleted" (*see Pl. Opp. Br.* NYSCEF Doc. No. 45, p. 8 fn. 8). However, even if this unsupported allegation was true, the complaint alleges that the Draft Subsequent Agreement was executed sometime after August 5, 2010. Emails dated months prior to the alleged date execution of the agreement cannot evince an executed version of the agreement.

Accordingly, all of the arguments in support of further discovery do nothing more than suggest a "mere hope" that evidence in support of its claim exists, especially in light of the fact that defendants have submitted sworn affidavits from Moody and Friedman that the Draft Subsequent Agreement was never executed (*see Moody aff*, ¶ 4; *Friedman aff*, ¶¶ 7-8). Argo's argument is insufficient to forestall summary judgment in favor of the defendants (*see Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [1st Dept 2005]).

Defendants argue that Argo's election to settle Claim 29 with the bankruptcy estate representative is wholly inconsistent with its subsequent demand that defendants repay a proportionate share of the purchase price of Claim 29. However, in the Assignment Agreement, TLB expressly and irrevocably appointed Argo as its attorney-in-fact and authorized Argo to act for TLB in pursuing, and settling the assigned claim (*see* Assignment Agr. at 2, NYSCEF Doc. No. 68). Argo's settlement resulted in the impairment of Claim 29, which, in turn, triggered the separate proportional restitution provision of the Assignment Agreement. The proportional restitution provision provides that:

"Assignor agrees to make to Assignee immediate proportional restitution and repayment of the . . . Purchase Price, together with interest at the rate of ten percent (10%) per annum on the amount repaid for the period from the date of this Assignment through the date such repayment is made, to the extent that the Claim is disallowed, subordinated, objected to or otherwise impaired for any reason whatsoever in whole or in part or if the Claim is not listed on the Schedule, or listed on the Schedule as unliquidated, contingent or disputed, or listed on the Schedule in a lesser amount than the Claim Amount. Assignor further agrees to reimburse Assignee for all costs, and expenses, including reasonable legal fees and costs, incurred by Assignee as a result of such disallowance"

(*id.* at 1). Because the claim was settled for 25% of its stated value, Argo seeks to recover \$152,363 from defendants. The two provisions are not wholly inconsistent when viewed in isolation. They express the contracting parties' agreement authorizing Argo to compromise Claim 29 and also to seek proportional restitution from TLB to the extent the claim is "disallowed, subordinated, objected to or otherwise impaired for any reason" (*id.*). Applying the standards applicable to a motion to dismiss pursuant to CPLR 3211(a)(7), the second and third causes of action, cannot be dismissed on election of remedies grounds.

Argo's interpretation of the Assignment Agreement does not necessarily render the assignment illusory. The well-established law of contract interpretation provides that:

[i]n interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.

Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

(*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1<sup>st</sup> Dept 1990] [internal citations omitted]; see CPLR 3212). “Whether or not a writing is ambiguous is a question of law to be resolved by the courts” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

The Assignment Agreement permits Argo to compromise Claim 29 in TLB's stead. Thus, defendants cannot dispute that TLB voluntarily ceded to Argo any right that defendants may have had to defend Claim 29 against objection in the Bankruptcy Action. The Assignment Agreement also permits Argo to seek restitution and repayment of the amount it paid for the claim in proportion to the percentage by which the claim was disallowed. If Argo recovered a portion of the amount claimed, then TLB would be entitled to retain a portion of the amount paid it by Argo.

“[W]here the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length . . . courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing”

(*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal citations and punctuation omitted]).

The Assignment Agreement provides for proportional restitution in the event that Claim 29 is objected to, whether successfully or unsuccessfully, and for reimbursement of expenses only in the event that the claim is disallowed in the Bankruptcy Action. In consideration for the purchase price of Claim 29, Argo received certain rights and remedies which included both the ability to compromise the claim, and to seek proportional restitution, should the claim draw an objection or impairment. This interpretation of the parties contract does not sanction a forfeiture. As discussed above, TLB voluntarily ceded its right to defend or compromise the Claim as against an objection in the Bankruptcy Action. Therefore, the proportional restitution provision does not necessarily result in a forfeiture. That portion of the motion seeking dismissal of counts 2 and 3 is denied.

### **B. Argo's Motion for Summary Judgment**

Argo argues that TLB breached several warranties including (1) that the amount of Claim 29 is not less than \$1,625,200; (2) that Claim 29 is valid and enforceable against Word World; (3) that no objection to Claim 29 exists; (4) that The Learning Box has no engaged in any acts, conduct or omissions that might result in Argo receiving proportionately less payments or distributions or less favorable treatment per dollar of claim than other unsecured creditors; and (5) that the claim is not subject to any offset, defenses or subordination that has been or may be asserted by or on behalf of Word World or any other party to reduce the amount of Claim 29 or impair its value (Friedman Aff. Ex. 5, Assignment ¶ 3). Argo's motion for summary judgment as to the breach of contract claims rests on the assertion that a breach of the warranties also constitutes a breach of contract (*see Pl. Br.*, p. 14).

Argo has not established that any of the listed warranties was breached. In this Decision and Order the court has held that the Loan Agreement and Note were valid and enforceable against Word World as of the time the Assignment Agreement was executed. It is undisputed that Word World acknowledged the loan in an amount consistent with the amount warranted. There is no evidence of any action taken by TLB to impair in any way the value of Claim 29. The bankruptcy Estate Representative's objection to Claim 29 was made after the Assignment Agreement was signed and the objection did not relate to any of the listed warranties. Rather, the objection concerned an alleged failure of TLB to disclose to the Federal Government that it had assigned its entitlement to grant funds to Word World. In any event, the objection was refuted in the affidavit of Mr. Coligaro submitted in the bankruptcy proceeding (NYSCEF Doc. No. 97, ¶¶ 10-11). There is no contrary evidence in the record. For these reasons the motion of Argo for summary judgment as to the breach of warranty and breach of contract claims, shall be denied.

Even if the court were to find that the mere assertion of an objection, however baseless, by the bankruptcy Estate Representative was sufficient to trigger a breach of warranty and breach of contract under the terms of the Assignment Agreement, Argo would not be entitled to a grant of its motion for summary judgment for proportional restitution because, the Assignment Agreement does not unambiguously provide for restitution where the reduced payment received was the result of Argo's decision to compromise the claim in its own self-interest and to the detriment of TLB.

#### IV. Count 4 - Piercing the Corporate Veil

The fourth cause of action seeks solely to pierce the corporate veil in order to make Moody and Friedman personally liable to Argo. Moody and Friedman seek dismissal of this cause of action pursuant to CPLR 3211 (a) (7). Argo asserts that it is entitled to summary judgment. The claim is fatally defective, as a matter of law and must be dismissed.

"New York does not recognize a separate cause of action to pierce the corporate veil" (*Hart v Jassem*, 43 AD3d 997, 998 [2d Dept 2007] [internal quotation marks and citation omitted]). Instead, piercing the corporate veil is a theory of liability meant to hold the shareholders of a corporation responsible for the acts of the corporation under very specific circumstances. Moreover, disregard of the corporate form will be granted only in the narrowest of circumstances.

"The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners"

(*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). In order to pierce the corporate veil, generally, the plaintiff must demonstrate that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.* at 141). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKL Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts reject veil-piercing allegations that are "unaccompanied by allegations of consequent wrongs" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]).

In its complaint, Argo alleges that Moody and Friedman own a majority interest in TLB and managed its affairs. In that sense they exercised dominion and control over TLB. The complaint then alleges that (1) TLB never loaned any funds to Word World but nevertheless caused TLB to enter into the Loan Agreement and Note "evidencing a fabricated loan relationship (Compl. ¶ 70); (2) Moody and Friedman caused TLB "to file a fraudulent claim (Claim 29)" (*see id.* ¶ 71); (3) TLB falsely warranted the validity and value of Claim 29 (*see id.*, ¶ 72); (4) Moody and Friedman ignored

TLB's separate corporate identity and operated TLB as their alter ego "to perpetuate a fraud . . . against Argo" (*id* ¶ 74); and (5) Moody and Friedman "orchestrated the sale to Argo of Claim 29 for the purpose of defrauding Argo" (*id* ¶ 75). These allegations are largely conclusory and to the extent not, are refuted by documentary evidence in the record. For example, the undisputed record shows that TLB loaned funds to Word World, that the Loan Agreement and Note were not "terminated" (*id*, ¶ 71), and that no one in the bankruptcy proceeding asserted that Claim 29 was "fraudulent" (*id*, ¶ 72). Moreover, the court has rejected Argo's fraud and breach of warranty claims.

In its motion for summary judgment, Argo largely abandons the allegations set forth in the Count 4 of the complaint. Instead, it argues that Moody and Friedman caused non-party Word World to execute the Development Agreement, "a deal that no rational business person would enter into but that could (and did) provide significant financial benefit to Moody and Friedman" (*Argo Memo of Law*, p 18). How this purportedly non-rational business decision (which resulted in receipt of over \$1.5 million by Word World) represented a fraud committed against Argo which had no involvement whatsoever in the transaction, Argo does not say. Argo also asserts that Word World approved replacement of the loan structure with an equity earnout structure but that Moody and Friedman caused TLB, not to execute the Word World/TLB earnout agreement. How the decision of Moody and Friedman as officers of TLB electing not to proceed with the earnout structure amounted to a fraud on Argo remains unexplained. Argo was not a unit holder of TLB and the officers of TLB owed it no duty. Having conceded that TLB did not execute the earnout agreement and thereby acknowledging that the Note was not abandoned, Argo states to the contrary that Moody and Friedman knew that no loan existed and that they perpetuated a fraud upon Argo by telling Argo that the TLB Note constituted a valid claim against Word World (*see id*). The court has already held that TLB did not abandon the loan in favor of an earnout structure.

Argo has not demonstrated that either Moody or Friedman used their majority unit holder status in TLB to commit any fraud or malfeasance against Argo. In addition, Argo has not alleged any concrete facts demonstrating that either Moody or Friedman "failed to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 A.D.3d 6, 24 [2d Dept 2008]). The request to pierce the corporate veil is denied.

Accordingly, it is hereby

**ORDERED** that the motion of defendants (motion sequence number 002) is GRANTED in part and counts one and four of the complaint are DISMISSED; and it is further

**ORDERED** that the motion of plaintiff for summary judgment (motion sequence number 003) is DENIED; and it is further

**ORDERED** that the complaint is DISMISSED in its entirety as against Don Moody and Gary B. Friedman with costs and disbursements to said defendants as taxed by the Clerk of the court and the Clerk is directed to enter judgment accordingly in favor of Moody and Friedman and against Argo Partners II, LLC; and it is further

**ORDERED** that the action is severed and continued against The Learning Box; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

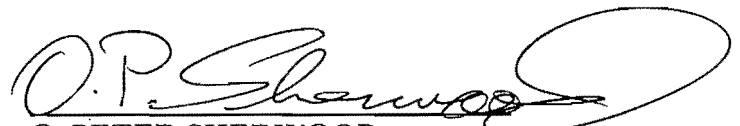
**ORDERED** that within 10 days of the date of this Decision and Order counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

**ORDERED** that counsel for the parties shall appear at a status conference on April 7, 2015 at 9:30 AM in Part 49, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

**DATED: March 2, 2015**

**ENTER,**

  
**O. PETER SHERWOOD**  
**J.S.C.**