

Unlimited Charles Realty Corp. v AM Online Co.

2017 NY Slip Op 32909(U)

February 8, 2017

Supreme Court, Nassau County

Docket Number: 000255-16

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
UNLIMITED CHARLES REALTY CORP.,

Plaintiff,

-against-

AM ONLINE CO., INC., RAYMOND SROUR,
Individually, RAYMOND SROUR d/b/a AM
ONLINE CO., INC., and UNITED BROKERAGE
SERVICES INTERNATIONAL, INC.,

Defendants.

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 000255-16
Motion Seq. No. 2
Submission Date: 12/22/16

-----X
Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X
- Memorandum of Law in Support.....X
- Legum Affirmation in Opposition and Exhibit.....X
- Plaintiff's Memorandum of Law in Opposition.....X
- Gennaro Affirmation in Opposition and Exhibit.....X
- United Brokerage Services' Memorandum of Law in Opposition.....X
- Reply Affirmation in Support and Exhibit.....X
- Reply Memorandum of Law.....X

This matter is before the court on 1) the motion filed by Defendants AM Online Co., Inc., Raymond Srour, and Raymond Srour d/b/a AM Online Co., Inc. ("Movants") on November 3, 2016 and submitted on December 22, 2016, following oral argument before the Court. For the reasons set forth below, the Court 1) dismisses the Amended Verified Complaint but grants Plaintiff permission to file and serve a second amended complaint, in which Plaintiff may assert claims against any individual and/or entity named in the caption and/or mentioned in the body of the Verified Complaint and/or Amended Verified Complaint; and 2) dismisses any and all cross claims asserted by Defendant United Brokerage Services International, Inc. against Defendant Raymond Srour. The Court directs Plaintiff to file and serve its second amended complaint on or

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before March 24, 2017 and further directs that the defendants named in the second amended complaint shall answer or move with respect to the second amended complaint on or before May 5, 2017. **The conference scheduled on March 13, 2017 is hereby adjourned to May 23, 2017 at 9:30 a.m.**

BACKGROUND

A. Relief Sought

Movants move for an Order 1) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the First, Second and Third causes of action in the Amended Verified Complaint (“Amended Complaint”); 2) striking or, alternatively, dismissing the Third, Fourth and Fifth causes of action in the Amended Complaint on the grounds that Plaintiff was not granted leave, pursuant to CPLR § 3025, to amend the Verified Complaint (“Initial Complaint”) to include these additional claims; 3) pursuant to CPLR § 3217, denying Plaintiff Unlimited Charles Realty Corp. (“Plaintiff” or “Unlimited Charles”) the right to discontinue this action against Defendant AM Online Co., Inc. (“AM Online”) because a discontinuance will result in prejudice to that Defendant as a necessary party; and 4) dismissing any and all cross claims asserted by Defendant United Brokerage Services International, Inc. (“UBS”) against Defendant Raymond Srour.

Plaintiff and Defendant UBS oppose the motion.

B. The Parties’ History

The Initial Complaint (Ex. C to Brofman Aff. in Supp.), dated January 12, 2016, and captioned *Unlimited Charles Realty Corp. v. AM Online Co., Inc., Raymond Srour, Individually, Raymond Srour d/b/a AM Online Co., Inc., and United Brokerage Services International, Inc.*, alleges as follows:¹

Raymond Srour (“Srour”) was and still is a principal officer and agent of Defendant AM Online. Plaintiff was the owner of the premises and appurtenances located at 8501 New Utrecht Avenue, Brooklyn, New York (“Premises”). On or about July 27, 2015, Plaintiff and Defendant

¹ Although the instant motion seeks to dismiss causes of action in the Amended Complaint, the caption of the motion contains the caption of the Initial Complaint, not the caption of the Amended Complaint which is *Unlimited Charles Realty Corp. v. Raymond Srour and United Brokerage Services International, Inc.*

AM Online entered into a ten (10) year lease agreement ("Lease") with a "Good Guy Guaranty" (Init. Comp. at ¶ 10) ("Guaranty"), both executed by Defendant Srour, for the Premises.

Plaintiff alleges that, at all relevant times, Defendant Raymond Srour d/b/a AM Online CO., Inc. ("Srour d/b/a AM Online") was, and still is, Srour, the individual, who has held himself out to the public, including Plaintiff, as an agent and principal of an entity doing business with the public, and identifying itself as AM Online Co., Inc. Plaintiff alleges that AM Online Co., Inc. was created and controlled by Srour, and that Srour held himself out to the public and represented that he was doing business as AM Online Co., Inc. Defendant UBS is a licensed and authorized insurance brokerage that sells insurance coverage and is authorized to procure insurance coverage for its customers, including Plaintiff. Defendant UBS employed a broker named Donald J. Franchilli ("Franchilli") who was an agent of UBS and, at all relevant times, was working within the scope of his employment with UBS. At all relevant times, Franchilli was the Chief Executive Officer of UBS.

On or about December 6, 2015, the Premises suffered a loss and was significantly damaged by fire. The loss would have been a covered loss and an insurable event if the required insurance policies had been procured by any of the Defendants. The Lease and Guaranty were in full force and effect on December 6, 2015. Plaintiff alleges that Defendants are jointly and severally liable to Plaintiff. Plaintiff also alleges that the Lease entitles Plaintiff/Landlord to all costs and expenses, including attorney's fees, incurred with this claim.

The Initial Complaint contained eight (8) causes of action: 1) against Defendant AM Online for negligence based on the allegation that AM Online hired a worker to perform renovations at the Premises, under AM Online's direction, and that the fire, damages and loss were caused by the negligent acts and omissions of AM Online and its servants/agents/employees performing work at the Premises, 2) against Srour for negligence based on the allegation that Srour, who managed and controlled the Premises, hired a worker to perform renovations at the Premises, under Srour's direction, and that the fire, damages and loss were caused by the negligent acts and omissions of Srour and his servants/agents/employees performing work at the Premises, 3) against Srour d/b/a AM Online for negligence based on the allegation that Srour d/b/a AM Online, who managed and controlled the Premises, hired a worker to perform renovations at the Premises, under Srour's direction, and that the fire, damages and loss were

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caused by the negligent acts and omissions of Srour d/b/a AM Online and his servants/agents/employees performing work at the Premises, 4) against Defendant UBS for negligence based on the allegation that UBS, through its agent Franchilli, negligently failed to procure and/or renew the requested insurance coverage for the Premises, 5) against Defendant AM Online for breach of the Lease by failing to procure the required insurance coverage, failing to perform its obligations regarding "tenant's work" (Initial Comp. at ¶ 126) at the Premises and failing to perform its obligations regarding hazardous substances, 6) against Srour, individually, for breach of the Lease by failing to procure the required insurance coverage, failing to perform its obligations regarding tenant's work at the Premises and failing to perform its obligations regarding hazardous substances, 7) against Srour d/b/a AM Online for breach of the Lease by failing to procure the required insurance coverage, failing to perform its obligations regarding tenant's work at the Premises and failing to perform its obligations regarding hazardous substances, and 8) against Srour for breach of the Guaranty.

In support of the motion, counsel for Movants ("Movants' Counsel") affirms that on or about February 25, 2016, UBS appeared in this action by the service of a Verified Answer (Ex. D to Brofman Aff. in Supp.). In its Answer, UBS *inter alia* asserted a cross-claim for contribution against Defendants AM Online, Srour Individually and Srour d/b/a AM Online. On March 25, 2016, Defendant Srour served a pre-answer motion to dismiss the Initial Complaint ("Prior Motion"). On March 31, 2016, Defendant AM Online appeared in this action by the service of a Verified Answer and Counterclaim (Ex. E to Brofman Aff. in Supp.). In that Answer, AM Online *inter alia* 1) asserted a cross claim against UBS based on the theory of contribution; and 2) asserted a counterclaim against Plaintiff for anticipatory breach of the Lease based on the allegation that Plaintiff, notwithstanding its failure to properly terminate the Lease, advertised the Premises "For Lease" (AM Online Answer at ¶¶ 44 and 45). On or about July 8, 2016, Plaintiff and UBS each filed opposition to the Prior Motion ("Opposition"). Movants' Counsel affirms that the Opposition, *inter alia*, alleged that Srour failed to abide by the corporate formalities necessary to shield Srour from liability for the purported acts of AM Online and, therefore, a piercing of the corporate veil was justified. The Initial Complaint, however, did not include a cause of action seeking to pierce the corporate veil. Movants' Counsel affirms that during oral argument of the Prior Motion on August 19, 2016 (transcript at Ex. F to Brofman Aff. in Supp.),

the issue of pleading the relevant allegations for piercing the veil was raised and discussed. Movants' Counsel affirms that the Court, with the consent of Defendants, afforded Plaintiff an opportunity to amend the Initial Complaint to plead a cause of action relating to piercing the corporate veil. Movants' Counsel also provides a copy of the Lease (Ex. A to Brofman Aff. in Supp.).

Movants' Counsel affirms that on September 15, 2016, he received a Consent to Change Attorney on behalf of Plaintiff (Ex. G to Brofman Aff. in Supp.). On that same date, Srour Counsel received the Amended Complaint dated September 8, 2016 (Ex. H to Brofman Aff. in Supp.). On or about September 28, 2016, UBS served its Verified Answer to the Amended Complaint (Ex. I to Brofman Aff. in Supp.) which includes a cross-claim for contribution against Srour.

The Amended Complaint, captioned *Unlimited Charles Realty Corp. v. Raymond Srour and United Brokerage Services International, Inc.*, contains 6 causes of action: 1) against Srour for negligence, 2) against Srour for breach of the Lease, 3) against Srour for costs and expenses, including attorney's fees, pursuant to a relevant provision in the Lease, 4) against Srour, pursuant to the Guaranty, for rent and additional rent due Plaintiff under the Lease which includes damage caused by tenant's work and attorney's fees, 5) against Srour for fraud based on the allegation that he produced inaccurate documents and records on which Plaintiff relied in entering into the Lease, and 6) against UBS for breach of its duty to Plaintiff for failing to procure property insurance coverage as requested by Plaintiff.

In opposition to the motion, counsel for Plaintiff ("Plaintiff's Counsel") provides a copy of the sublease between AM Online Co., Inc. and Bensonhurst Boxing LLC, executed by Defendant Srour, as provided by him to Plaintiff-landlord. That sublease, dated October 1, 2015, pertains to the Premises and states that it is between AM Online Co Inc. and Bensonhurst Boxing LLC. The signature page of the sublease reads as follows, and contains the signature of the individuals whose names appear under the signature lines:

UPON WITNESS WHEREOF, the said parties hereunto set their hands and seals this 20th day of October 2015.

CHRIS GANIM
LESSEE

RAYMOND SROUR
LESSOR

DESORY CIRILLO

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In further opposition to the motion, counsel for Defendant UBS ("UBS Counsel") submits that Srour's failure to abide by corporate formalities renders him liable for the alleged acts of AM Online. UBS Counsel submits that the proper corporate entity, as evidenced by the Certificate of Incorporation (Ex. B to Brofman Aff. in Supp.) is AM Online Sales, Inc., but the entity which entered into the Lease with Plaintiff was AM Online Co., Inc., "an apparently non-existent entity" (DiGennaro Aff. in Opp. at ¶ 15).

UBS Counsel submits that the execution of the Lease was not the only occasion on which Srour failed to abide by corporate formalities. UBS Counsel provides a copy of the Certificate of Liability Insurance provided to Plaintiff, which listed the insured as "AM Online Co. Inc." (Ex. A to DiGennaro Aff. in Opp.). In addition, as set forth in the Amended Complaint, the initial payment due under the Lease was not paid by AM Online or a similarly-named entity, but by Srour himself (Am. Comp. at ¶ 8). UBS Counsel submits that this failure to abide by corporate formalities renders Srour liable for any tortious act committed by AM Online, entitling UBS to seek contribution. UBS Counsel contends, further, that Plaintiff's allegation that Srour misrepresented his finances to induce Plaintiff to enter into the Lease provides another basis for tort liability on the part of Srour, which entitles UBS to contribution.

In reply, Movants' Counsel provides a copy of Srour's March 18, 2016 affidavit submitted in support of the Prior Motion (Ex. A to Brofman Reply Aff.). In that affidavit, Srour affirms that he is submitting the affidavit for the sole purpose of explaining the inconsistency in the name of AM Online Sales, Inc. as identified in the Certification of Incorporation from the name of the corporation identified in the Lease. Srour affirms that he executed the Lease in his capacity as President of AM Online Sales, Inc., the tenant under the Lease. It was "simply by an inadvertent error, likely by counsel for the landlord" (Srour Aff. in Supp. at ¶ 4) that the name of his corporation is incorrectly identified on the Lease as AM Online Co., Inc. instead of AM Online Sales, Inc. Srour affirms that he "simply failed to catch the error" when executing the Lease. Srour also affirms that there is no such entity as "Raymond Srour d/b/a AM Online Co., Inc." as identified in the Initial Complaint (Srour Aff. in Supp. at ¶ 5). Srour affirms that the only legal entity in existence involved in this litigation of which he is a principal is AM Online Sales, Inc.

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C. The Parties' Positions

Movants submit that 1) while the Initial Complaint alleged three causes of action against Srour, the Amended Complaint alleges five, none of which relate to piercing the corporate veil, which was the only amendment to the Initial Complaint contemplated or approved of and consented to during the hearing on August 19, 2016; 2) the first and second causes of action asserted against Srour in the Amended Complaint, alleging negligent hiring and supervision of the contractor who performed work at the Premises and breach of contract for failing to procure proper insurance coverage, must fail because AM Online, not Srour, is the tenant under the Lease; 3) the third cause of action against Srour, alleging a claim for payment of attorney's fees in the event of a default under the Lease, is precluded pursuant to CPLR § 3025(b) because no order or consent was given to that amendment; 4) the third cause of action also fails because the tenant under the Lease is AM Online, not Srour, and because Plaintiff fails to allege how and in what manner the tenant defaulted under the Lease; 4) the fourth cause of action against Srour, alleging that Plaintiff is entitled, pursuant to the Guaranty, to a judgment for attorney's fees and damage to the Premises as additional rent, is improperly asserted because it was not pleaded in the Initial Complaint, and because the definition of additional rent in the Lease does not include these items; 5) the fifth cause of action, alleging "wilful and malicious" representations by Srour regarding his financial records (Am. Comp. at ¶ 46), on which Plaintiff relied in entering into the Lease, was not pleaded in the Initial Complaint, and does not assert a viable claim for fraud in the inducement; 6) Plaintiff has "unilaterally removed" AM Online from the caption (Brofman Aff. in Supp. at ¶ 22) and has eliminated all causes of action against AM Online from the Amended Complaint despite the fact that AM Online interposed a counterclaim for anticipatory breach of the Lease and, therefore, a) if Plaintiff is unsuccessful against Srour because the Court determines that AM Online is the tenant, Plaintiff could relitigate the case against AM Online, thereby obtaining a second opportunity for recovery; b) AM Online is a necessary party pursuant to CPLR § 1001 and Plaintiff's attempt to "amend a party out of the case" (Brofman Aff. in Supp. at ¶ 22) raises a procedural question as to the counterclaim asserted by AM Online, to which Plaintiff has not replied, and which is "substantial and continuing" (*id.*); and c) allowing Plaintiff to voluntarily discontinue the action against AM Online without any stipulation or court order violates CPLR § 3217 and will result in substantial prejudice to AM Online because its right to proceed on its counterclaim will be terminated, and it could be subject to later litigation; 7) the first, second and third causes of action, for negligence, breach of contract and payment of attorney's fees in the event of a default, must be dismissed pursuant to CPLR §§ 3211(a)(1) and

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(7) because a) any allegation arising from the Lease can only be asserted against AM Online as the tenant under the Lease, not Srour who signed the Lease in his representative capacity on behalf of AM Online, and Plaintiff has failed to allege that any tort was committed by Srour outside of the contractual obligations of the Lease; and b) when the Lease, along with the limited guaranty of the Lease executed by Srour, is read as a whole, the intended tenant was and is the corporate entity AM Online, not Srour, and the allegations in the Amended Complaint that Srour, not AM Online, is the tenant under the Lease lead to the illogical result that Srour is both the principal obligor under the Lease as well as the secondary obligor under the Guaranty; and 8) UBS' claim for contribution is precluded under CPLR § 1401 and the economic loss doctrine.

Plaintiff opposes the motion submitting that Srour's contention that the first, second and third causes of action of the Amended Complaint must be dismissed because he is not a party to the Lease is an attempt to "pull a fast one" on the Court (P's Memo. of Law in Opp. at p. 4) in light of the fact that the tenant listed on the face of the Lease is AM Online Co., Inc., an entity that does not exist, and because Srour's attempt to persuade the Court that AM Online Co., Inc. and AM Online Sales Co., Inc. are one entity is inconsistent with the facts, and with Srour's prior affidavit. Plaintiff notes that on October 20, 2015, subsequent to the execution of the Lease, AM Online Co., Inc. entered into the sublease, whose signature page does not reflect that Srour was executing the sublease on behalf of any entity. Plaintiff submits that Srour's execution of the sublease in his individual capacity demonstrates that 1) Srour intended to name AM Online Co., Inc. as the tenant on the lease; and 2) he knew at the time that he executed that document that AM Online Co., Inc. was not an existing entity and that Srour, individually, was personally obligated under both the Lease and the sublease.

Plaintiff submits, further, that the first cause of action is properly asserted against Srour because it alleges that Srour, not his corporation, negligently hired the contractor who negligently caused the damage to the Premises. Plaintiff contends that if, as alleged, Srour, individually, engaged the contractor, then it would be Srour, individually, who would be liable to Plaintiff for negligent hiring and negligent supervision of his agents, irrespective of the Lease. Plaintiff also submits that the duties that Srour owed to Plaintiff, and the breach of those duties, are separate and distinct from any contractual obligations.

Plaintiff also disputes Movants' contention that the Court should dismiss the third, fourth and fifth causes of action because Plaintiff is attempting to amend the Initial Complaint in a manner that is different than that authorized by the Court. Plaintiff contends that the transcript of the August 19, 2016 proceedings demonstrates that the Court did not limited Plaintiff's ability to amend the Initial Complaint. Moreover, even if the Amended Complaint exceeded the leave granted by the Court, it did not exceed the mandates of the CPLR because Defendants' time to respond to the Initial Complaint had not yet expired and, therefore, Plaintiff had the right, without leave of court, to amend its Initial Complaint, without restriction.

UBS opposes the motion submitting that it has adequately pleaded a cross-claim for contribution against Srour. UBS notes that the Amended Complaint asserts that Srour and UBS are each liable in tort for the same injury, specifically Plaintiff's losses from the fire at the Premises, and asserts causes of action for negligence and fraud against Srour, and against UBS for negligence for failing to procure required insurance. Thus, as it is alleged that Plaintiff's loss was caused/augmented by the negligence and/or intentional wrongdoing of Srour and the negligence of UBS, contribution may properly be sought as a remedy.

UBS contends, further, that 1) the failure to abide by corporate formalities renders Srour individually liable for AM Online's purported conduct and provides a further basis for UBS' contribution claim; 2) that failure includes the fact that the entity that entered into the Lease with Plaintiff was an apparently non-existent entity, and the fact that the initial payment under the Lease was made by Srour, individually, and not by AM Online; and 3) the evidence that Srour failed to abide by corporate formalities, as well as the fact that Srour guaranteed some of AM Online's obligations under the Lease, supports a finding that Plaintiff and UBS are entitled to pierce the corporate veil and hold Srour individually liable for AM Online's torts or, at a minimum, are entitled to discovery to determine whether the corporate veil should be pierced.

In reply, Movants submit that, in light of Plaintiff's concession that there is an issue regarding the circumstances under which AM Online Co. Inc. was named as a party to the Lease, Plaintiff's dismissal of that party, which filed an answer to the Initial Complaint, by "amending it out of the action" (Movants' Reply Memo. of Law at p. 1) does not that resolve that factual, and now legal, dispute. Movants contend that Plaintiff, by its amendment, has effectively sought to determine that issue as a matter of law, without court intervention. Movants contend that the Court should prohibit Plaintiff's amendment which changes the caption and removes a party to the proceeding, in violation of CPLR § 3217.

Movants submit, further, that Plaintiff is incorrect in asserting that it has a claim, independent of the Lease terms, for negligence against Srour, whether in his position as an officer of AM Online or as the direct tenant under the Lease, for the alleged negligent supervision and hiring of a contractor to perform construction at the Premises. Movants contend that this argument ignores Sections 5.1, 5.2 and 5.6 of the Lease which provide specificity regarding the tenant's obligations for contractors that it may hire. Thus, Movants submit, the duty of the tenant relating to contractors arises specifically from the Lease terms, and it is inappropriate to permit a separate claim of negligent conduct in the performance of the duties set forth in the Lease.

Movants also argue that the contribution claim of UBS against Srour in its Amended Answer and Cross Claim is entirely dependent on Plaintiff's allegations against Srour in the first cause of action that sounds in negligence, and should not survive because the negligence claim is not viable because there is no duty independent of the obligations set forth in the Lease. Movants contend further that the fraud claim, like the negligence claim, also arises from, or is directly related to, the Lease, and, therefore, there is no basis for UBS' contribution claim.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013).

A simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract, *i.e.*, one arising out of circumstances extraneous to, and not constituting elements of the contract itself, has been violated. *Brown v. Brown*, 12 A.D.3d 176, 176-177 (1st Dept. 2004), citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 289 (1987).

C. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007). It is well settled that to recover damages for fraud, the fraud alleged cannot relate to a breach of contract. *Weitz v. Smith*, 231 A.D.2d 518, 518-519 (2d Dept. 1996). To state a cause of action to recover damages for fraud, a plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties. *Id.* at 519.

D. Individual Liability for Corporate Obligations

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), *aff'd* 16 N.Y.3d 775 (2011), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton v. Sandpebble*, 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has “abused the privilege of doing business in the corporate form,” the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton v. Sandpebble*, 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

A corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced. *Sindhwani v. Coe Business Service, Inc.*, 52 A.D.3d 674, 677 (2d Dept. 2008) quoting *American Express Travel Related Servs. Co. v. North Atl. Resources*, 261 A.D.2d 310, 311 (1st Dept. 1991).

An individual who does business as a nonexistent corporation is personally liable in suits brought against the “corporation.” *Animazing Entertainment, Inc. v. Louis Lofredo Associates, Inc.*, 88 F. Supp. 2d 265, 271 (W.D.N.Y. 2000) citing *Poritzky v. Wachtel*, 176 Misc. 633, 634 (Sup. Ct. 1941); *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666 (2d Dept. 1989); *Annicet Associates, Inc. v. Rapid Access Consulting, Inc.*, 171 Misc. 2d 861, 864-65 (Sup. Ct. 1997); *Worldcom, Inc. v. Sandoval*, 182 Misc. 2d 1021 (Sup. Ct. 1999); 2A N.Y. Jur. 2d, Agency § 326. The court in *Animazing Entertainment, Inc. v. Louis Lofredo Associates, Inc.* observed that the cases cited above impose liability on the ground that it would be inequitable to allow individuals who form contracts on behalf of nonexistent corporations to avoid liability because their misrepresentations resulted in a contractual defect. 88 F. Supp. 2d at 271.

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E. Contribution

The rules governing contribution, as set forth in *Dole v. Dow Chem Co.*, 30 N.Y.2d 143, 147-153 (1972) and codified in CPLR Article 14, enable a joint tortfeasor who has paid more than his or her equitable share of damages to a plaintiff to recover the excess from the other tortfeasor. *O'Gara v. Alacci*, 67 A.D.3d 54, 57 (2d Dept. 2009). Ordinarily, the other tortfeasor's liability for contribution flows from a breach of a duty owed to the plaintiff. *Id.*

Purely economic loss resulting from a breach of contract does not constitute injury to property within the meaning of New York's contribution statute. *Schottland v. Brown Harris Stevens Brooklyn, LLC*, 137 A.D.3d 997, 998 (2d Dept. 2016), *lv. app. den.* 28 N.Y.3d 906 (2016), citing *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987), quoting CPLR § 1401. CPLR § 1401 does not apply to a breach of contract cause of action where the only potential liability to the plaintiff is for the contractual benefit of the bargain. *Schottland v. Brown Harris Stevens Brooklyn, LLC*, 137 A.D.3d at 998 citing, *inter alia*, *Sound Refrig. & A.C., Inc. v. All City Testing & Balancing Corp.*, 84 A.D.3d 1349, 1350 (2d Dept. 2011).

F. Discontinuance Pursuant to CPLR § 3217

CPLR § 3217, titled "Voluntary discontinuance," provides, in pertinent part, as follows:

(a) Without an order. Any party asserting a claim may discontinue it without an order

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; or

* * * * *

(b) By order of court. Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR § 3217(b) rests within the sound discretion of the court. *Wells Fargo Bank, N.A. v. Chaplin*, 107 A.D.3d 881, 883 (2d Dept. 2013), citing *Expedite Video Conferencing Servs., Inc. v. Botello*, 67 A.D.3d 961 (2d Dept. 2009). In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted. *Wells Fargo Bank, N.A. v. Chaplin*, 107 A.D.3d at 883, citing *Blackwell v. Mikevin Mgt. III, LLC*, 88 A.D.3d 836, 837 (2d Dept. 2011), quoting *Expedite Video Conferencing Servs., Inc. v. Botello*, 67 A.D.3d at 961.

G. Leave to Amend

Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. *Oh v. Jin*, 124 A.D.3d 639, 640 (2d Dept. 2015) citing, *inter alia*, *Rodgers v. New York City Tr. Auth.*, 109 A.D.3d 535, 537 (2d Dept. 2013).

Leave to amend one of several separate causes of action of a complaint, or one of several separate defenses of an answer, does not confer the right to amend the whole complaint or answer or any part for which leave is not specifically given. *Genung v. Hawkes*, 147 A.D. 380, 381 (3d Dept. 1911).

H. Application of these Principles to the Instant Action

The Court 1) dismisses the Amended Verified Complaint but grants Plaintiff permission to file and serve a second amended complaint, in which Plaintiff may assert claims against any individual and/or entity named in the caption and/or mentioned in the body of the Verified Complaint and/or Amended Verified Complaint; and 2) dismisses any and all cross claims asserted by Defendant United Brokerage Services International, Inc. against Defendant Raymond Srour. The Court directs Plaintiff to file and serve its second amended complaint on or before March 24, 2017 and further directs that the defendants named in the second amended complaint shall answer or move with respect to the second amended complaint on or before May 5, 2017. The Court so rules based on its conclusion that 1) there is no duty independent of the provisions in the Lease related to "Tenant's Work" and, therefore, there is no viable negligence claim; 2) the fraud claim, based on the allegation that Srour provided inaccurate financial statements on which

Plaintiff relied in entering into the lease, arises from the Lease and, therefore, is duplicative of the breach of contract claim; 3) Plaintiff acted improperly in filing the Amended Complaint which removed the defendant corporations from the caption because that amendment effectively discontinued those claims without leave of court; and 4) because there is no duty independent of the Lease, the contribution claim set forth in UBS' cross claim against Srour is not viable because the alleged loss is purely economic loss resulting from a breach of contract. In consideration of the liberal amendment policy, the Court will permit Plaintiff to file and serve a second amended complaint in which it may assert claims against any individual and/or entity named in the caption and/or mentioned in the body of the Verified Complaint and/or Amended Verified Complaint, with the caveat that Plaintiff, in filing a second amended complaint, is bound by the Court's determinations in this decision.

All matters not decided herein are hereby denied.

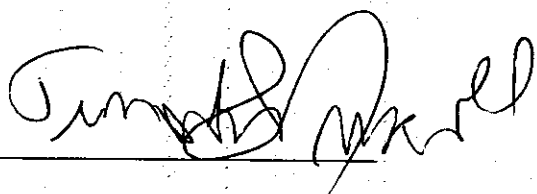
This constitutes the decision and order of the Court.

The conference scheduled on March 13, 2017 is hereby adjourned to May 23, 2017 at 9:30 a.m.

ENTER

DATED: Mineola, NY

February 8, 2017



HON. TIMOTHY S. DRISCOLL

J.S.C.

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