Interweb Print., Inc. v Blue Horizon Media, Inc.
2018 NY Slip Op 30621(U)
April 6, 2018
Supreme Court, New York County
Docket Number: 650317/12
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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INTERWEB PRINTING, INC., D/B/A
TRANSCONTINENTAL PRINTING/INTERWEB
PRINTING, INC.,

Plaintiffs,

-against-

Index No. 650317/12
Motion Seq. Nos. 005, 006

BLUE HORIZON MEDIA, INC. and CARL
RUDERMAN,

Defendants.

---X

BRANSTEN, J.:

In this action plaintiff Interweb Printing, Inc. d/b/a Transcontinental Printing/Interweb Printing, Inc. (Transcontinental), which provides printing services to commercial clients, asserts that defendant Carl Ruderman, the chairman of Blue Horizon Media, Inc. (Blue Horizon), a publisher of adult entertainment magazines, committed fraud by inducing plaintiff to enter into a letter agreement, the terms of which were agreed to by the parties to resolve an outstanding balance of more than $639,000 for printing services. Plaintiff also asserts causes of action for aiding and abetting fraud, breach of fiduciary duty, and violation of the Debtor and Creditor Law (DCL).

Motion sequence nos. 005 and 006 are consolidated for disposition. In motion sequence no. 005, Ruderman moves, pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint as against him.

In motion sequence no. 006, plaintiff cross-moves for summary judgment on the Amended Complaint.

For the reasons set forth below, defendant's motion for summary judgment is granted, plaintiff's cross motion is denied, and the Amended Complaint is dismissed.

I. BACKGROUND

The following facts are taken from Transcontinental's Rule 19-A statement of material facts (Plaintiff's SOF), Ruderman's Rule 19-A statement of material facts (Defendant's SOF), and the affidavits and depositions of Ruderman, Carl Gibson (Gibson), Blue Horizon's former vice president of sales and marketing and director of finance, and Kevin Troiano (Troiano), Blue Horizon's former chief financial officer.

A. The Parties

Transcontinental is a Canadian company which provides printing and related services to commercial clients, including publishers like Blue Horizon (Defendant's SOF, ¶ 7).

Blue Horizon was in the business of publishing adult entertainment magazines, such as Playgirl, Cheri and High Society (Plaintiff's SOF ¶ 1, 7; Defendant's SOF, ¶ 1). It acted as a form of holding company, overseeing the operations of each magazine, and managing their finances. Thus, although certain assets of some of those magazines were owned by entities separate and apart from Blue Horizon, Blue Horizon served as "paymaster" for each company and/or magazine. (Defendant's SOF, ¶ 4) For instance, Playgirl magazine was owned by Playgirl, Inc., and Playgirl, Inc. was owned by Blue Horizon, which was the paymaster for Playgirl, Inc. Similarly, Cheri magazine was owned by Cheri Magazine, Inc., and that entity was

owned and controlled by Blue Horizon (*see* Gibson Dep at 12-13 [Affirm. of Gerard Schiano-Strain, Exhibit D]; Troiano Dep at 9-10 [Schiano-Strain Affirm, Exhibit C]; Gibson Affid., ¶ 11).

Each of the affiliated entities, such as Playgirl and Cheri, maintained their own books and records, separate and apart from Blue Horizon (Troiano Dep at 26-27). As paymaster, Blue Horizon would pay the debts of the affiliated entities and those debts would be recorded on Blue Horizon's General Ledger (*see* Schiano-Strain Affirm, Exhibit F). During the course of 20 years, the affiliated entities, such as Cheri, Inc., had accumulated balances into the millions of dollars (*id.*; Troiano Dep at 117).

The General Ledger reflects all of the funds either received by Blue Horizon, paid by Blue Horizon, used for payroll, or transferred to another company, as well as contains journal entries for 2011, the last year Blue Horizon was in operation (*see* General Ledger; *see also* Ruderman Dep at 192-198).

For 40 years, Ruderman was the chairman of the board, chief executive officer and shareholder of Blue Horizon (Plaintiff's SOF, ¶2, 4; Defendant's SOF, ¶ 2). However, Ruderman did not manage the day-to-day operations of Blue Horizon, nor did he make any business decisions, such as entering into agreements with printers like plaintiff (Ruderman Dep at 14-15). Rather, Steve Loschiavo, the publisher of all the magazines, made all the business decisions (*see* Troiano Dep at 11, 21, 33 [Loschiavo "was the publisher. He was the one doing all the day-to-day stuff. Mr. Ruderman owned the companies"]).

As a result of the growing popularity of the Internet, Blue Horizon's business as a publisher of adult magazines began to falter (Defendant's SOF, ¶11). In March 2011, pursuant to

an asset sale agreement (*see* Schiano-Stein Affirm, Exhibit E), Blue Horizon sold certain of its assets for $300,000 to GN Media Corp (Plaintiff's SOF, ¶32; Ruderman Dep at 37-38 [Schiano-Strain Affirm, Exhibit B]; *see* General Ledger at 11, entry dated 3/25/11). Ruderman did not receive any of these sales proceeds (*see* Ruderman Dep at 93; Troiano Dep at 202; Ruderman Affid., ¶ 5; Gibson Affid., ¶ 4). Blue Horizon ultimately collapsed in late 2011 (*see* Troiano Dep at 189; Gibson Dep at 18).

B. Relationship Between the Parties

In January 2001, Transcontinental and Blue Horizon entered into a long-term Master Printing Agreement (the Master Agreement), pursuant to which Blue Horizon engaged Transcontinental to print several of Blue Horizon's magazines for a period of ten years, based upon an agreed pricing schedule (Defendant's SOF, ¶ 8). In October 2003, Transcontinental and Blue Horizon entered into an Amended and Restated Master Printing Agreement (the Printing Agreement), which amended the Master Agreement (Plaintiff's SOF, ¶21; Defendant's SOF, ¶ 9). Under the Printing Agreement, Blue Horizon engaged Transcontinental to print certain of Blue Horizon's magazines pursuant to an agreed-upon pricing schedule (Plaintiff's SOF, ¶ 22; Defendant's SOF, ¶ 10).

Between 2001 and 2011, plaintiff enjoyed a lucrative business relationship with Blue Horizon. However, by April 2011, Blue Horizon had fallen into arrears in its payment obligations to plaintiff under the Printing Agreement (Defendant's SOF, ¶ 12). Blue Horizon

failed to pay the then-due amount of $639,075.12 to plaintiff, and was in breach of the Printing Agreement (Plaintiff's SOF, ¶ 24; Defendant's SOF, ¶ 14).

Because of the outstanding debt owed to Transcontinental, it requested a meeting with Blue Horizon to discuss a possible resolution of the amounts overdue (Plaintiff's SOF., ¶ 26). On April 6, 2011, employees of Transcontinental met with representatives of Blue Horizon, including Troiano and Ruderman, at Blue Horizon's offices to discuss Blue Horizon's failure to pay Transcontinental (*id.* ¶ 27; *see also* Troiano Dep at 70-72; Ruderman Affid., ¶ 6).

Plaintiff alleges that, to induce Transcontinental to continue printing Blue Horizon's magazines, Ruderman assured Transcontinental during this meeting that: (1) Blue Horizon intended to repay the amount owed to Transcontinental; (2) it was extremely important to Blue Horizon to continue doing business with Transcontinental; (3) Blue Horizon was able to commence making monthly payments to pay off the amount owed to Transcontinental; (4) Blue Horizon was more than capable of paying the amount owed to Transcontinental; (5) Blue Horizon would earn revenue and pay Transcontinental; and (6) if Transcontinental agreed to provide additional printing services, Blue Horizon would pay up front for the new work (Plaintiff's SOF, ¶ 29).

Plaintiff further alleges that Ruderman also assured Transcontinental that (1) Ruderman and Blue Horizon had ample resources from which to fund payments due to Transcontinental; (2) Blue Horizon would be receiving revenue from a variety of sources, including revenue from magazines already sent to distributors, from the upcoming sale of Blue Horizon's assets which

Ruderman said would result in proceeds in excess of the amount owed to Transcontinental; and (3) he would personally guarantee the payments (*id.*, ¶ 29-31).

Plaintiff alleges that these representations were false, and that Ruderman only made them to induce Transcontinental to agree to a monthly payment schedule and to continue providing printing services to Blue Horizon (*id.*, ¶ 32).

Ruderman denies making these representations (*see* Ruderman Dep at 110-114), and asserts that during this meeting, he did not act in his individual capacity, but solely in his representative capacity to assist negotiating a resolution to Blue Horizon's outstanding debt (Ruderman Affid., ¶ 7). Ruderman further asserts that he never agreed to personally incur or pay the debt which Blue Horizon owed to plaintiff, and never acted as anything other than an agent and the chairman of Blue Horizon (*id.*, ¶ 9).

C. *The Letter Agreement*

Following the meeting, Transcontinental agreed to provide additional printing services to Blue Horizon, and to enter into a letter agreement (the Letter Agreement) with Blue Horizon regarding the debt owed by Blue Horizon (Plaintiff's SOF, ¶ 35). Pursuant to the Letter Agreement, dated April 12, 2011, Blue Horizon agreed to settle the outstanding balance of $639,075.12 by making minimum monthly payments of $15,000 starting in April 2011, with full payment to be made no later than April 2013 (*id.*, ¶ 36). The Letter Agreement was not signed by Ruderman; rather, it was signed by David Bernstein, Blue's Horizon's senior vice-president of finance (Defendant's SOF, ¶ 16).

Blue Horizon made the first two payments under the Letter Agreement, and continued to pay plaintiff for contemporaneous work, as required under the Letter Agreement, in the amount of $112,000 (*see* General Ledger at 13, 14, 17 for following entries: 4/20/11 [$15,000 payment]; 4/22/11 [$45,000 payment]; 5/2/11 [$17,000 payment]; 6/2/11 [$20,000 payment]). Plaintiff admits that Blue Horizon made the first two payments of $15,000 each under the Letter Agreement (Plaintiff's SOF, ¶37).

However, during the latter part of 2011, Blue Horizon suffered financial setbacks, and was unable to pay the remainder of the debts that it owed to plaintiff, and a number of other creditors (*id*, ¶¶ 37, 39; Ruderman Dep at 112-113; Troiano Dep at 77, 83, 202; Gibson Dep at 183-184, 186). In fact, not even Ruderman was paid any amount from Blue Horizon after it sold its assets in 2011 (Ruderman Dep at 179-181; Gibson Dep at 183; Gibson Affid., ¶¶ 8-9; *see* General Ledger; Blue Horizon's 2011 tax return [Schiano-Strain Affirm, Exhibit H]).

Blue Horizon ceased operations in the latter part of 2011 (Defendant's SOF, ¶ 22). As a result, plaintiff is still owed $609,075.12 from Blue Horizon (Plaintiff's SOF, ¶ 37; Defendant's SOF, ¶ 23).

D. Litigation

Plaintiff originally brought an action in 2011 solely against Blue Horizon, entitled *Interweb Printing, Inc. v Blue Horizon Media, Inc.* (Index No. 652138/11 [Kornreich, J.]), in order to recover the $609,075.12 owed to it. Plaintiff neither named Ruderman in this action, nor made any mention of alleged fraud committed by Ruderman. In that action, Leo Centorami,

plaintiff's sales director, submitted an affidavit in support of plaintiff's motion for judgment in lieu of complaint in which he asserts that plaintiff entered into the Letter Agreement to resolve "the matter of th[e] delinquent sum without the need for litigation." Counsel for plaintiff filed two affirmations and a Statement of Undisputed Facts pursuant to Rule 19-a of the Commercial Division of the Supreme Court, affirming that plaintiff entered into the Letter Agreement "[t]o avoid litigation." Nowhere in any of the pleadings or sworn statements made in that action did plaintiff claim that it entered into the Letter Agreement based upon any fraudulent representation by Ruderman.

On December 6, 2013, plaintiff obtained a default judgment against Blue Horizon, in the amount of the outstanding balance, together with costs and disbursements, for a total of judgment of $609,305.11 (Defendant's SOF, ¶ 41).

In the present action, plaintiff initially named both Blue Horizon and Ruderman as defendants in its original complaint, and asserted claims for breach of contract against Blue Horizon, fraud against Blue Horizon and Ruderman, aiding and betting fraud against Ruderman and breach of fiduciary duty against Ruderman.

Ruderman moved for summary judgment to dismiss the claims against him based, in part, on the ground that plaintiff's fraud claim duplicated its breach of contract claim. After taking Ruderman's deposition, and after obtaining the default judgment against Blue Horizon in the 2011 action, plaintiff amended its complaint to drop its claims against Blue Horizon.

II. DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). If it is determined that the opposing party has failed to establish a genuine issue of fact, summary judgment must be granted (*see Cawein v Flintkote* Co., 203 AD2d 105, 106 [1st Dept 1994]).

As more fully set forth below, Ruderman has offered substantial evidence to demonstrate that there are no material issues to refute the fact that he acted consistently in his capacity as Chairman of Blue Horizon, and not in his individual capacity. In addition, plaintiff has failed to submit any evidence that Ruderman committed fraud, that a fiduciary relationship existed between plaintiff and Ruderman, or that Ruderman violated the DCL by receiving any benefit

from the proceeds of the sale of Blue Horizon's assets, or by otherwise making fraudulent conveyances to himself or to any entity which he owns.

A. Fraud (First Cause of Action)

In its first cause of action for fraud as against Ruderman, plaintiff alleges that, on April 6, 2011, the parties met for the purpose of resolving the debt due by Blue Horizon, and that Ruderman and Blue Horizon represented that Blue Horizon intended to pay the debt in full and that Blue Horizon would and could immediately commence making monthly payments on the overdue debt (Amended Complaint, ¶ 36).

It is well established that a cause of action sounding in fraud is not stated when the only fraud charge relates to the breach of a warranty or representation made in a contract (*see Orix Credit Alliance, Inc. v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998] ["(a) fraud claim that only restates a breach of contract claim may not be maintained"]; *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994] ["(i)t is well settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation"]; *see also Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept 2006] ["'A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract'"] [citation omitted]; *Martian Entertainment, LLC v Harris*, 12 Misc 3d 1190[A], 2006 NY Slip Op 51517[U], *5 [Sup Ct, NY County 2006] ["A claim for fraud that merely states a breach of contract claim may not be maintained"]).

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In *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 (1st Dept 2012), the First Department stated that "[a] claim for fraudulent inducement of contract can be predicated upon a insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." Under New York law, in order for a claim of fraud to qualify as collateral, and not be deemed duplicative of a claim for breach of contract, "'a plaintiff must either: (a) demonstrate a legal duty separate from the duty to perform under the contract; (b) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (c) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages'" (*Waite v Schoenbach*, 2010 WL 4456955, * 5[SDNY 2010]).

Here, plaintiff claims that after Blue Horizon fell behind in payments under the Printing Agreement, Ruderman assured plaintiff during an April 2011 meeting that "Blue Horizon ***intended*** to repay the debt owed to Transcontinental . . . [and] Blue Horizon was more than capable of paying the amount owed to Transcontinental" (Amended Complaint, ¶¶ 15 [i], [iv]; 36[i]); "Blue Horizon would pay up front for the new work" (*id.*, ¶ 15 [vi]); Blue Horizon ***would*** earn revenue and pay Transcontinental (*id.*, ¶¶ 16, 37]; and "Ruderman . . . represented that Blue Horizon ***would*** earn revenue from magazines that had already been shipped to distributors . . . and that Blue Horizon ***would*** shortly be sold for an amount greater than the Debt, and that Blue Horizon could easily pay Transcontinental from the anticipated proceeds" (*id.*, ¶ 38 [emphasis added]).

These representations are insufficient to support a claim of fraud against Ruderman as a matter of law because they are all promissory in nature, and relate directly to performance or payment under the Printing Agreement and/or Letter Agreement. Plaintiff does not "allege any sort of special relationship among the parties or other situation that would give rise to a legal duty apart from the . . . contractual relationship" between plaintiff and Blue Horizon (*Waite*, 2010 WL 4456955 at *5 [internal quotation marks and citation omitted]). Ruderman's alleged misrepresentation that plaintiff "would be timely paid . . . as provided for under the contract was neither collateral nor extraneous to the agreements; rather it was related and intrinsic to [the agreements]" (*id.* [internal quotation marks and citation omitted]). The payment obligation constitutes the very core of the contract, and therefore, representations about payment are neither extraneous nor collateral to the agreement. Plaintiff also fails to allege any special damages.

In addition, the allegations in the complaint all refer to representations allegedly made by Ruderman which all concern a future promise to perform. Such statements are nothing more than "representations of future intent" and therefore "nonactionable since there is no allegation that would support an inference that the representations were made with a present intention that they would not be carried out" (*Papp v Debbane*, 16 AD3d 128, 128 [1st Dept 2005]; *see also HSH Nordbank AG*, 95 AD3d at 206 [representations about future performance of a contract do not create a duty outside of the agreement]; *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2d Dept 2008] ["'(a) present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud'"] [citation omitted]). Specifically, the allegations in the complaint all refer to future promises allegedly made by

Ruderman that Blue Horizon would perform and make payment under the Letter Agreement. Such representations are classic cases of an "insincere promise of future performance" that New York courts reject as supporting a fraud claim.

Although plaintiff conclusorily contends, in opposition to the motion, that the alleged misrepresentations can be characterized as those of present fact and collateral to the contract, the court rejects this argument. All of the allegations in the Amended Complaint refer to representations allegedly made by Ruderman which all concern a future promise to perform under the Letter Agreement. Moreover, despite plaintiff's contention that Ruderman's allegations were false because Blue Horizon never intended to perform its obligations under the contract, plaintiff admits that Blue Horizon made two payments under the Letter Agreement. This admission negates any claim that Ruderman, and/or Blue Horizon, lacked the intention to perform under the contract. Plaintiff has not provided any evidence that contradicts the testimony of Ruderman, Troiano and Gibson that Blue Horizon always intended to pay all of its debts, including the amounts owed to plaintiff (*see* Ruderman Dep at 112-113; Troiano Dep at 77-83; Gibson Dep at 183-184).

The court also rejects plaintiff's argument that Ruderman lacks standing to challenge the fraud claim as duplicative because Ruderman is not a party the Letter Agreement. Both of the cases that plaintiff cites in support of this proposition are completely inapposite, as, unlike here, they involved misrepresentations of present facts collateral to the contract, and the plaintiff sought compensatory damages that were different from the breach of contract damages (*see LIUS*

Group Intl. Endwell, LLC v HFS Intl., Inc., 92 AD3d 918, 920 [2d Dept 2012]; *Selinger Enterp., Inc.*, 50 AD3d at 768).

Accordingly, plaintiff's claim for fraud against Ruderman is duplicative of its claim for breach of contract, and must be dismissed in its entirety.

Furthermore, plaintiff has not provided any evidence that it reasonably relied upon the alleged representations set forth in the complaint. A plaintiff cannot plead justifiable reliance where he has "'the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means'" (*Arfa v Zamir*, 76 AD3d 56, 59 [1st Dept 2010], *affd* 17 NY3d 737 [2011] [citation omitted]; *see also Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310, 320 [1st Dept 2010], *affd* 17 NY3d 269 [2011]).

Assuming, arguendo, that Ruderman made the representations alleged, plaintiff, as a sophisticated commercial entity (*see* Amended Complaint, ¶ 4), cannot establish that it justifiably relied on any of the alleged representations from Ruderman when it willing entered into the Letter Agreement with Blue Horizon at a time when it knew that Blue Horizon was suffering financial difficulties and owed plaintiff more than $639,000 (*see id.*, ¶ 13). Despite this debt, plaintiff continued to provide printing services to Blue Horizon without performing any rudimentary due diligence, such as asking to verify any of Ruderman's alleged statements about Blue Horizon's capitalization, financial health or receivables. As such, plaintiff could not have justifiably relied on his representations (*see e.g. HSH Nordbank AG*, 95 AD3d at 194-195 [internal quotation marks and citation omitted] ["(a)s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged

misrepresentations if that plaintiff failed to make use of the means of verification that were available to it"]; *Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580, 582-583 [1st Dept 1995] [dismissing fraud claim where "plaintiff failed to undertake an independent appraisal of the risk" of loss that a proper investigation would have been likely to disclose]).

Although plaintiff also alleges that Ruderman represented that he would "personally guarantee" that Blue Horizon would "pay up front for new work" (Amended Complaint, ¶ 16), plaintiff presents no evidence to support this allegation. Ruderman asserts that he never made any representation that he would personally assume the debt Blue Horizon owed to plaintiff, nor did he contract with plaintiff in his personal capacity (*see* Ruderman Dep at 110-114). Indeed, plaintiff never obtained a guarantee, or otherwise conducted any due diligence into Blue Horizon's financial conditions.

Plaintiff has failed to provide any evidence that Ruderman ever made such representations to plaintiff. Indeed, plaintiff has represented to this court in numerous sworn affidavits, counsel's affirmations and statements of material facts that it entered into the Letter Agreement "[t]o avoid litigation," and not in reliance on any representation made by Ruderman at the April 2011 meeting (*see* Schiano-Strain Affirm, Exhibits J-M). Specifically, the record is devoid of any evidence that (1) during the April 2011 meeting, Ruderman made any of the alleged representations referred to in the Amended Complaint; (2) Ruderman acted in any manner other than as chairman of Blue Horizon; and (3) Ruderman agreed to be personally responsible for the debt owed by Blue Horizon.

CPLR 3212 (b) requires that an affidavit "by a person with knowledge of the facts" be submitted in order to show that a "defense has no merit." It is well established that a complaint verified by counsel, who lacks personal knowledge of the facts, is without evidentiary value and does not "supply the evidentiary showing necessary to successfully resist the motion" (*see Roche v Hearst Corp.*, 53 NY2d 767, 769 [1981]; *see also Landau v Salzman*, 129 AD2d 774 [2d Dept 1987] ["(w)e also note that plaintiff's opposition to the motion for partial summary judgment was insufficient as there was no affidavit by a person with knowledge of the facts, merely the plaintiff's attorneys' affirmation"]).

Here, plaintiff failed to submit an affidavit from a person with knowledge of the facts to recount the alleged representations and how plaintiff relied upon them, and what due diligence it took to safeguard its rights. As such, there is no record evidence to establish that Ruderman ever made representations which were collateral to Blue Horizon's performance of the Letter Agreement or, even if such statements were made, that plaintiff justifiably relied on them. Plaintiff's failure to submit an affidavit from someone with knowledge of the facts is fatal to its fraud claim (*see id.*).

Plaintiff attempts to cure this fatal defect by submitting an affirmation from Leo Centorami in reply to Ruderman's opposition to plaintiff's motion for summary judgment. However, this reply is improper as matter of law, and will not be considered by this court. Evidence cannot be submitted for the first time on reply in order to make out a prima facie case for summary judgment (*L'Aquila Realty LLC v Jalyng Food Corp.*, 103 AD3d 692, 692 [2d Dept 2013]; *see also Rengifo v City of New York*, 7 AD3d 773, 773 [2d Dept 2004]). The court also

notes that, in his first affidavit, submitted in the prior litigation, Mr. Centorami made no mention of any misrepresentations made by Ruderman, and specifically stated that the reason plaintiff entered into the Letter Agreement was to avoid litigation.

Plaintiff also contends that the court's decision in *American Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477 [1st Dept 2016]), a case involving another of Ruderman's companies, compels the denial of Ruderman's motion for summary judgment. In that case, the First Department found that a misrepresentation of fact, including Ruderman's representation that Bainbridge & Knight would pay American Media with funds it intended to collect from its existing customers, was collateral to the contract, and supported a separate fraud claim against Ruderman.

However, plaintiff's repeated reliance on that case is misplaced, as it dealt with a motion to dismiss, involving a completely different and far more relaxed standard than that on a motion for summary judgment. Moreover, in that case, the First Department determined that the plaintiff was entitled to discovery. In contrast, in the instant action, despite taking ample discovery, plaintiff is still unable to offer any evidence of fraud by Ruderman.

Accordingly, the first cause of action for fraud must be dismissed.

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B. Aiding and Abetting Fraud (Second Cause of Action)

In its second cause of action for aiding and abetting fraud as against Ruderman, plaintiff alleges that "the aforesaid fraudulent conduct of Blue Horizon could not have occurred but for Ruderman directing and/or permitting such fraudulent conduct to occur" (Amended Complaint, ¶ 50).

A claim for aiding and abetting fraud must allege the existence of the underlying fraud, actual knowledge, and substantial assistance (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Although plaintiff seems to base its cause of action for aiding and abetting fraud on an underlying fraud committed by Blue Horizon, there are no allegations in the Amended Complaint with respect to any fraud committed by Blue Horizon. Because plaintiff cannot demonstrate the existence of an underlying fraud, plaintiffs cannot plead the first element required to state a cause of action for aiding and abetting fraud (*see id.*). Accordingly, the second cause of action against Ruderman for "aiding and abetting fraudulent conduct" must be dismissed.

C. Breach of Fiduciary Duty and the Trust Fund Doctrine (Third Cause of Action)

In the third cause of action, plaintiff alleges that, as a consequence of Ruderman's position as an officer, director and majority shareholder of Blue Horizon, he owed a fiduciary duty to the creditors of Blue Horizon, including plaintiff (Amended Complaint, ¶ 55). Plaintiff further alleges that Ruderman breached his fiduciary duty by causing plaintiff to enter into the Letter Agreement, and to provide new and additional work to Blue Horizon, while knowing that Blue Horizon was unable to satisfy its obligations under the Letter Agreement (*id.*, ¶ 58). Plaintiff asserts that the trust fund doctrine requires that Ruderman, as an officer and director of

an insolvent corporation, hold the remaining corporate assets in trust for the benefit of its general creditors, including plaintiff (*id.*, ¶ 59).

The "trust fund doctrine" is a creature of common law by which "the officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its general creditors" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000]). "The application of the trust fund doctrine in New York customarily has been for the purpose of imposing liability on corporate directors or transferees for wrongful dissipation of assets of an insolvent corporation, in actions later brought by court-appointed receivers, trustees in bankruptcy or judgment creditors" (*id.* at 550).

Here, plaintiff alleges that Ruderman owed a fiduciary duty to plaintiff as a creditor of Blue Horizon. However, as a matter of law, an officer or director of a solvent company is not a fiduciary to the creditors of that company (*see Semi-Tech Litig., L.L.C. v Ting*, 13 AD3d 185, 188 [1st Dept 2004]). The record evidence reveals that, at the time plaintiff entered into the Letter Agreement with Blue Horizon, Blue Horizon was still solvent, as evidenced by the fact that it actually made the first two payments of $15,000 each under the Letter Agreement, and paid plaintiff tens of thousands of dollars more for contemporaneous work (*see* General Ledger at 13; Troiano Dep at 71-720).

Because Ruderman was not a fiduciary to plaintiff at the time plaintiff entered into the Letter Agreement with Blue Horizon, and the company was solvent at the time of the Letter Agreement, plaintiff's claim for breach of fiduciary duty must be dismissed.

Plaintiff's claim for breach of the trust fund doctrine is also insufficient on the ground that "a simple contract creditor may not invoke the doctrine to reach transferred assets before exhausting legal remedies by obtaining judgment on the debt and having execution returned unsatisfied" (*Credit Agricole Indozuez*, 94 NY2d at 550; *see also Aldoro, Inc. v Gold Force Intl. Ltd.*, 52 AD3d 223, 224 [1st Dept 2008] [citation omitted] [trust fund doctrine "cannot be invoked by a 'simple contract creditor' like plaintiff, who has not yet obtained a judgment on the debt and had execution returned unsatisfied"].

Plaintiff did not become a judgment creditor until December 2013, when it obtained a default judgment against Blue Horizon, nearly two years after Blue Horizon became insolvent (Ruderman Affid., ¶ 14). As such, plaintiff was not a judgment creditor of Blue Horizon at the time of the company's insolvency, and there was no fiduciary duty and/or trust fund existing which could inure to the benefit of plaintiff.

Accordingly, as a matter of law, plaintiff's claim for breach of fiduciary duty under the trust fund doctrine must be dismissed as against Ruderman.

D. DCL Claims (Fourth Through Seventh Causes of Action)

In its fourth through seventh causes of action, plaintiff alleges that Ruderman violated Debtor Creditor Laws (DCL) §§ 273, 274, 276 and 280 because, in December 2011, when plaintiff "was a creditor of Blue Horizon and when Blue Horizon was insolvent, millions of dollars were transferred between Blue Horizon and its Affiliated Entities" (Amended Complaint, ¶¶ 31, 65, 74, 83, 95). In paragraph 32 of the Amended Complaint, plaintiff references various

entries on the General Ledger that, it contends, sets forth "some of these inter-company transactions."

These causes of action must also be dismissed. After full and complete discovery, there is overwhelming evidence, including the General Ledger, Blue Horizon's final tax return, the depositions of Ruderman, Troiano, and Gibson, and their three affidavits, which all establish that no monies were ever transferred to Ruderman or any Ruderman-owned entity, and that all of the monies that Blue Horizon possessed were used to pay creditors, including plaintiff. Moreover, no evidence has emerged to show that Ruderman received any funds from Blue Horizon, or that any monies paid to creditors by Blue Horizon were not for fair consideration.

More specifically, the General Ledger does not reflect any payment and/or transfer of funds to Ruderman or to any other Ruderman controlled entity. Troiano and Gibson testified that no monies were ever transferred from Blue Horizon to Ruderman in December 2011, and that the "transfers" to which plaintiff refers in paragraph 32 of the Amended Complaint are listed as either a "write-off" or "JENTRY," terms which signify that no funds were actually transferred (Troiano Dep at 193-194, Gibson Dep at 180-184; Gibson Affid., ¶ 15; Troiano Affid., ¶¶ 4-6). They further testified that the purpose of the journal entries or "write-offs" was to zero out the accounts for the filing of Blue Horizon's final tax return because it ceased operations in 2011 (Troiano Dep at 102-4, 109, 111, 114-116, 194-195; Gibson Dep at 30-36, 117-118). Ruderman, Troiano and Gibson all testified that only where the letters "CH," "CK#," or "Vch" appear in the ledger does it signify that funds were actually transferred via check, or that there were accounts payable for which a voucher was issued for payment (Ruderman Dep at 192-199; Troiano Dep at

92-96; 193-194). Notably, none of the entries to which plaintiff's counsel refers include any notation of monies actually being transferred (Gibson Affid., ¶ 15).

Troiano testified that various entries in the General Ledger to which plaintiff refers all indicate that Blue Horizon served as paymaster for the affiliated entities, and that no monies were transferred to any affiliated entity or to Ruderman in December 2011 (Troiano Dep at 9-10; 197-198). Gibson confirmed that all of the entries referred to by plaintiff as 'transfers" of millions of dollars are nothing but "journal entries" and that no monies were actually transferred (Gibson Dep at 180-184). For example, on December 1, 2011, the amount of $7,623,806.78 was not transferred from Blue Horizon to Cheri Magazine Inc, as the transaction is listed as a journal entry, not as a check that was paid or a wire transfer (*see* General Ledger at 33). The journal entry notation applies to all of the transactions listed in paragraph 32 of the Amended Complaint (*see* Ruderman Dep at 192-199; Troiano Dep at 193-194; Gibson Dep at 141, 180-184; Gibson Affid., ¶ 15; Troiano Affid., ¶¶ 4-6).

The General Ledger itself does not provide any evidence that monies were transferred from Blue Horizon to Ruderman, or that Blue Horizon and/or Ruderman violated the DCL. In fact, the General Ledger establishes the opposite -- that Blue Horizon used its remaining funds to pay its creditors, including plaintiff (*see* General Ledger at 13).

Indeed, the evidence reveals that, in 2011, Blue Horizon did not have millions of dollars to transfer (Troiano Affid., ¶ 6). None of the Blue Horizon affiliated entities earned any net profits in 2009, 2010 or 2011, and, as a result, there were no profits earned by the affiliates that would "flow through" to Ruderman. In fact, Troiano specifically testified that Ruderman did not

receive any compensation from Blue Horizon or any of its affiliates in 2009, 2010 or 2011 (Troiano Dep at 13-14, 15).

In support of its motion for summary judgment, plaintiff argues that the element of insolvency under § 273 of the DCL was met, as Ruderman, Gibson and Troiano all testified that Blue Horizon did not fulfill its obligations under the Letter Agreement because the company was insolvent (plaintiff's memorandum at 20). However, insolvency alone is not sufficient to establish a violation of the DCL -- there must also be a "conveyance made" which "thereby rendered [the company] insolvent" (*see* DCL § 273). Plaintiff has not identified a single "conveyance" that was made without fair consideration that rendered Blue Horizon insolvent, such that it could not pay its creditors.

While plaintiff argues that the "conveyance" at issue was Blue Horizon's forgiveness of "loans" to the affiliated entities, plaintiff completely misstates the facts. As the record evidence reveals, the "millions of dollars" to which plaintiff refers were not loans -- they were a tally of the amount that Blue Horizon, as paymaster for the affiliates, paid to creditors, including plaintiff, throughout the nearly 40 years of the companies' existence. As Troiano repeatedly testified, there was never a "write-off" or forgiveness of any loan, and the General Ledger entries were reconciled for the purpose of filing Blue Horizon's final tax return (Troiano Dep at 114-115, 194-194; *see also* Gibson Dep at 30-36).

Significantly, plaintiff has not provided any evidence that the payments which Blue Horizon made on behalf of any affiliate were not for good consideration, that Blue Horizon was left insolvent as a result of any alleged conveyance, that any monies were transferred to

Ruderman or that he benefitted in any way as a result of such conveyance. Instead, plaintiff relies on self-serving conclusory assertions without the support of evidence. For instance, plaintiff asserts that "Blue Horizon paid millions of dollars to the shareholders of the Affiliates (i.e. Ruderman)" (plaintiff's memorandum at 19), but completely fails to cite to any evidence in the record to support this claim. Conclusory assertions, without more, are legally insufficient on a summary judgment motion (*see Grullon v City of New York*, 297 AD2d 261, 264-265 [1st Dept 2002] ["'(m)ere conclusory assertions, devoid of evidentiary facts, are insufficient'" to obtain summary judgment, "'as is reliance on surmise, conjecture or speculation'"] [citation omitted]).

Finally, although plaintiff argues this court may pierce the corporate veil in order to hold Ruderman personally liable under the DCL, this argument completely lacks merit.

A party seeking to pierce the corporate veil must establish 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" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). The requirements of *Morris* are not easy to meet: "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *see also Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]). Thus, mere conclusory alter ego allegations are insufficient to survive a motion to dismiss (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007] [conclusory

statements of domination and control and failure to allege particularized facts were insufficient to impose alter ego liability]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002] [same]).

Moreover, even in the presence of domination and control, the corporate form cannot be disregarded without a showing of fraud or that the misuse of the corporate form led to avoidance of obligations:

> Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance ... [P]laintiffs have failed to show that, even if MKI dominated Batchnotice, that control resulted in some fraud or wrong mandating disregard of the corporate form ... An inference of abuse does not arise from this record where a corporation was formed for legal purposes or is engaged in legitimate business. There is no showing that through its domination MKI misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations.
>
> * * *
>
> Under these circumstances, it cannot be said that MKI has perverted "the privilege [of doing] business in a corporate form"

(*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d at 339-340 [citation omitted]).

Plaintiff cannot meet any of these requirements. Although plaintiff conclusorily states that "Ruderman, Blue Horizon and the Affiliates were a 'single entity'" (plaintiff's memorandum at 24), it fails to submit any evidence demonstrating that Ruderman disregarded corporate formalities by commingling company assets with personal assets, or using company funds for personal expenses. Moreover, plaintiff has not produced any evidence that "the corporate form was used to perpetrate a wrong against" plaintiff (*Ciavarella v Zagalia*, 2013 WL 6192191, * 4

[Sup Ct, NY County 2013], *affd* 132 AD3d 608 [1st Dept 2015]). Because plaintiff has failed to carry its burden, its cross-motion for summary judgment must be denied (*see e.g. Roth Law Firm, PLLC v Sands*, 2010 W: 3800683, 2010 NY Slip Op 32633[U] [Sup Ct, NY County 2010] [rejecting alter ego claims where plaintiff failed to show the corporate form was used to commit a fraud or wrong against the plaintiff]; *see also Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008] ["The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"]).

Accordingly, the DCL claims set forth in the fourth through seventh causes of action must be dismissed.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of defendant Carl Ruderman for summary judgment dismissing the Amended Complaint as against him (Motion Sequence No. 005) is granted, and the Amended Complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment on the Amended Complaint (Motion Sequence No. 006) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 6, 2018

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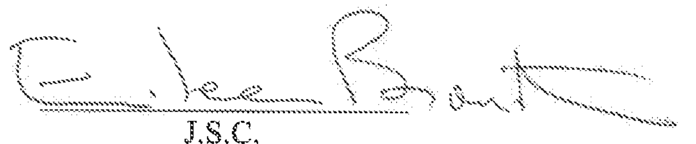

J.S.C.

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