Guzovskiy v Weingarten
2019 NY Slip Op 30656(U)
March 15, 2019
Supreme Court, New York County
Docket Number: 650143/2018
Judge: O. Peter Sherwood

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

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ARKADY GUZOVSKIY, *et al.*,

Plaintiffs,

-against-

VICTOR WEINGARTEN, *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 650143/2018

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

Under motion sequence no. 002, defendants move to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (a)(5), and 3016(b). As this is a motion to dismiss, the facts are taken from the complaint unless noted otherwise.

I. Facts

Plaintiffs Arkady ("AG") and Maksim Guzovskiy ("MG") are Russian businesspeople primarily involved in the Russian medical equipment industry (amended complaint ¶¶ 20, 21). They also own minority interests in non-party JMW 75 LLC (*id.* ¶¶ 9,11). AG speaks English, but does business in Russian (*id.* ¶ 21). Plaintiff Guzovskiy Family Irrevocable Trust (the "Trust") is a Florida trust (*id.* ¶ 10). Plaintiff AG has a residence in Florida, and plaintiffs N.Y.A.G Investments LLC ("NYAG") and MLG Invest LLC ("MLG") are Florida companies (*id.* ¶¶ 9, 12-13). Defendant Victor Weingarten ("Weingarten") is a New York resident and businessperson who has invested in both the taxi industry and real estate (*id.* ¶¶ 2, 19). Weingarten is the managing member of defendant entity Joseph Wolf Group, LLC ("Wolf Group" or "JWG")), which is the managing member of defendant entities 12 Wolf 88 LLC ("Wolf 88") and 166 Wolf 75 LLC ("Wolf 75") (*id.* ¶ 14). Weingarten, via Wolf 88, owns 59% of non-party East 88 Group LLC (*id.* ¶ 16). Via Wolf 75, Weingarten owns 96% of non-party JMW 75 LLC (*id.* ¶ 17).

Having no prior experience in the New York real estate market, AG, and later MG, went into business with Weingarten on two projects, (1) a rental to condominium conversion of a building located at 12 East 88th Street, and (2) building improvements and subsequent conversion of rent stabilized units to market-rate units of the building located at 166 West 75th Street (*id.* ¶¶ 22-26

28). JMW 75 LLC, controlled by Wolf 75, is the investment vehicle behind the latter project (*id.* ¶¶ 26-27, 29).

In March 2016, Weingarten issued a capital call to the members of East 88 Project, and because he could not meet the capital call himself, sought to borrow money from AG and MG (*id.* at ¶¶ 2[illegible], 30). AG and Weingarten discussed the terms of the proposed loans in Russian, and Weingarten orally agreed that he, or one of his companies would pay back each of the loans within one year (*id.* ¶¶ 31-34).

Beginning in April 2016, plaintiffs orally agreed to loan to Weingarten $24,487,500 through five different loans (*id.* ¶ 36). The first loan has been repaid (*id.* ¶ 37). The remaining unpaid loans are as follows:

- April 25, 2016: $4,387,500 loaned by AG at an interest rate of 5% (Ex.1)
- May 26, 2016: $3,600,000 loaned by Trust at an interest rate of 7% (Ex. 2)
- July 18, 2016: $4,500,000 loaned by MG at an interest rate of 6% (Ex. 3)
- September 12, 2016: $5,000,000 loaned by MG at an interest rate of 10% (Ex. 9)

(*id.* ¶¶ 39-54). In the case of each of these loans, one year has passed, the plaintiffs have demanded repayment, and Weingarten has refused to pay (*id.*).

Despite representing to plaintiffs that the subsequent written promissory notes (the "Notes") would "contain similar language, and accurately reflect their oral agreement that the amounts would be repaid within a year", Weingarten directed his attorney, Eric Twiste, to do otherwise (*id.* ¶¶ 65, 67). Only the documentation with respect to the first loan contains the requirement that the loan be repaid within one year (*id.* ¶¶ 57, 62, 64, 67). Only defendants Wolf 88 and Wolf 75, and not Weingarten individually, were made parties to the agreements, despite having no assets other than their respective interests in the real estate projects (*id.* ¶ 63). AG did not read or have an attorney review the Notes (*id.* ¶¶ 68, 70). MG did not read or have counsel review the Notes, but did have a Russian attorney review them "for the limited purpose of facilitating the funds that [MG] loaned from Russia" (*id.* ¶ 71).

In April 2017, Weingarten refinanced both real estate projects in order to avoid defaulting on a loan from Goldman Sachs for the East 88 Project (*id.* ¶¶ 72-73, 75, 78). Goldman Sachs invested an additional $8 million in East 88 Project in exchange for a commensurate interest in

West 75 Project, thereby subordinating plaintiffs' interests in West 75 Project, and violating the terms of JMW 75's LLC Agreement (*id.* ¶¶ 75-77).

Plaintiff brings the following causes of action: (i – iii) breach of contract against Weingarten and Wolf 88; (iv) breach of contract against Weingarten and Wolf 75; (v) fraudulent inducement against Weingarten, Wolf 88, and Wolf 75; (vi) reformation based on fraudulently induced unilateral mistake against Weingarten, Wolf 88, and Wolf 75; (vii) damages upon reformation against Weingarten, Wolf 88, and Wolf 75; (viii - ix) breaches of fiduciary duty against Weingarten and Wolf Group; (x) individual liability for the debts of the corporate defendants against Weingarten.

II. Standard

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*, 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 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]). "However, factual allegations that do not state a viable cause of action that consist of bare legal conclusion or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to consideration" (*Skillgames, LLC v Brody* 1 AD 2d 247, 250 [1st Dept 2003] [internal citation omitted]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a

defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 988 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

III. Arguments & Discussion

A. Breach of the Notes Against Weingarten, Wolf 88, and Wolf 75

1. Arguments

Defendants first argue that the Notes, on their face, warrant dismissal because they plainly do not contain the requirement that they be repaid in one year (mem at 13). Rather, the plain language of the Notes states that the principal balance is due when certain distributions are received from the real estate projects (*id.*). These distributions have not occurred, so the balances are not due (*id.*). Any reliance on the provision stating that payments should be made "at a place and manner to be agreed to by the parties" is misplaced because this provision refers to *how* payments are made rather than *when* (*id.* at 14). Even if the court were to find the Notes to be ambiguous and look outside their plain language, external evidence further shows that there was no one-year window for repayment (*id.*). For example, documentary evidence shows that plaintiffs' lawyer, in fact, reviewed the Notes and proposed changes to the timing of the interest payment, but not to the principal payment (*id.*). If the parties had intended to include an essential provision, the Notes would reflect it (*id.* at 15, citing *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470,

475 [2004] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). That a one-year repayment was provided for in the note for the first loan, but not the subsequent others, strongly indicates that the parties "knew how to provide for a one-year repayment obligation where they intended to" (*id.*, citing Weingarten aff ¶¶ 45-46, exhibit 13 [NYSCEF Doc No. 44]).

Defendants next argue that even if the facts alleged are taken as true, the Notes contain broad integration clauses that bar reliance on prior or subsequent oral agreements. The clauses state as follows:

> "This note sets forth the entire understanding of the parties and supersedes all other agreements, written or oral, between the parties relating to the subject matter of this Note. Neither party has relied upon any statement or representation by the other party, or by any other person, except as shall be specifically mentioned in this Note. No amendment, modification, or waiver of any provision of this Note shall be effective unless by written agreement signed by Borrower and Lender"

(*id.* at 16, citing Weingarten aff, exhibit 1 [NYSCEF Doc No. 32]). The integration clause defeats any claim of an oral agreement (*id.*, citing *Gebbia v Toronto-Dominion Bank*, 306 AD2d 37, 38 [1st Dept 2003]; *Bostwick v Christhian Oth, Inc.*, 91 Ad3d 463, 464 [1st Dept 2012]. In any event, plaintiffs' argument makes no sense – the various loan agreements were entered into over time pursuant to the capital needs of the projects; defendants would not have agreed in April 2016 to make future, need-based loans in the amount of $24, 487,500 (*id.* at 17). Defendants also note that plaintiffs, in their original complaint, omitted the existence of the first loan containing the one-year repayment provision and now attempt to "invent" a new story (*id.* at 17-18; *compare* complaint ¶ 40 *with* amended complaint ¶ 36).

Finally, defendants argue that the claims against Weingarten individually should be dismissed because he was not a party to the Notes (*id.* at 18). Plaintiffs cannot rely on any purported oral agreement because it is barred by the integration clauses in the Notes, and "[i]f the parties intended Weingarten to be personally liable on the notes they would have made that clear in the written agreements (*id.*, citing *EB Ink Tech., LLC v Lamocu Holdings, LLC*, 2016 N.Y. Misc. LEXIS 4413, at *19-20, 2016 Slip. Op. 32339[U], at *11-12 [Sup Ct NY County, Nov. 28, 2016]

Moreover, the Statute of Frauds requires that guarantees "to answer for the debt, default or miscarriage of another person" must be in writing (*id.* at 19, citing N.Y. Gen. Oblig. L. § 5-701[2]).

In opposition, plaintiffs contend that the documentary evidence, in fact, supports their position. "The Notes... contain a provision which provides for the separate oral agreement reached here concerning the manner of repayment" (opp at 14). The provision providing for the "remaining principal balance" to be paid 15 days after receipt of "sufficient distributions" refers to principal still owed after the time specified for repayment in the separate oral agreement (*id.* at 14-15).

Plaintiffs also contend that defendants are wrong about the Statute of Frauds. "Under New York law, an oral promise made by one party to pay for benefits provided to a third party is not a promise to pay the debts of that third party and does not fall within the statute of frauds provision of the New York General Obligations Law" (*id.* at 15, citing *Nakamura v Fuji*, 677 NYS2d 113, 115 [1st Dept 1998]). There is no violation of the Statute of Frauds because the alleged agreement is a direct contract, not a guarantee (*id.* at 16, citing *Goldstein v CIBC World Mkts. Corp.*, 603903/02, 2003 WL 25780816 [Sup. Ct. N.Y. County, Oct. 19, 2003]). The Statute of Frauds would not apply to an oral contract to repay within one year. But even so, plaintiffs "alleged the requisite elements to estop defendants' evocation of the statute of frauds defense" (*id.*). The cases cited by defendants are distinguishable because unlike here, there was no evidence of an oral promise (*id.* at 17, citing *e.g. Lichtman v Grossbard*, 129 AD2d 437, 438 [1st Dept 1987]).

In reply, defendants point out that plaintiffs' assertion that the Notes "contain a provision which provides for the separate oral agreement reached here concerning the manner of repayment" is inconsistent with plaintiffs' fraud claims in that while plaintiffs are now arguing that the Notes contain a provision reflecting the parties' intention to work out the timing of payment through a separate oral agreement, the fraud claim accuses Weingarten of a "bait and switch" resulting in Notes that do not reflect the parties' agreement (reply at 3). In any event, the "place and manner" provision does not refer to timing and that argument is inconsistent with the normal use and definition of the word "manner", which refers to "a way of doing" something (*id.* at 4). Because the oral agreement allegedly occurred before the Notes were executed, the timing of payment cannot be a term "to be agreed to" in the future (r *id.*). The "remaining principal balance" cannot mean what is left after repayment in one year because if that requirement existed, there would be no "remaining principal balance" to be repaid after distributions from the project (*id.* at 4-5).

Defendants also argue that plaintiffs attempt to circumvent the integration clause by arguing that "Weingarten's agreement to repay within one year is not an 'amendment, modification, or waiver' of any provision of the Notes" (*id.* at 5, citing opp at 9). However, the integration clause is not so limited and also includes prior agreements, statements, or representations (*id.*).

With respect to the claims against Weingarten individually, defendants note that plaintiffs fail to address the effect of the integration clause. Plaintiffs' contention that the alleged agreement was a direct contract rather than a guarantee for purposes of the Statute of Frauds fails because the actual borrowers under the Notes are Wolf 75 and Wolf 88. As a third party, Weingarten could at most be a guarantor (*id.* at 6). *Nakamura* and *Goldstein* are distinguishable because they do not represent situations where the plaintiffs are attempting to hold a third party liable (*id.*).

2. Discussion

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The complaint alleges four agreements, each consisting of a written promissory note with the entity borrower, and a separate oral agreement with Weingarten that he, personally, would be responsible for paying the balance of the Notes within one year. Plaintiffs allege that they performed by providing the money pursuant to the terms of the Notes. The breach alleged consists of defendants' failure to repay the loans within on year but each of the four unpaid Notes provides that "[t]he remaining principal balance shall be repaid by Borrower to Lender within fifteen (15)

days following receipt by East 88 Group LLC ("East 88") of sufficient distributions from JMW 88 LLC" (Weingarten Affd Ex 1, 2, 3 and 9). Moreover, the written Notes came later in time than the alleged oral agreement, and contain an integration clause. The claims were brought against the entity borrowers, as well as Weingarten himself, who was not a party to the Notes, but who did allegedly make the oral promise.

If the integration clause bars reliance on prior oral agreements, there could not have been a breach even giving plaintiff the benefit of every inference, and the documentary evidence would defeat the claims for breach of contract. The integration clause in each Note states that the Note "supersedes all other agreements, written or oral… Neither party has relied upon any statement or representation by the other party, or by any other person, except as shall be specifically mentioned in this Note" (Weingarten aff, exhibit 1 ¶ 5 [NYSCEF Doc No. 32]). The clause is clear. (*see Bostwick*, 91 AD3d at 464).

As to the claim that "Weingarten's agreement to repay within one year is not a 'amendment, modification, or waiver' of any provision of the Notes" (opp at 9), this assertion selectively cites the clause and ignores the rest of the paragraph referring to prior agreements. Plaintiffs' arguments that the portion of the Notes containing language referring to repayment "at a place and manner to be agreed to by the parties" actually provide for repayment to be determined by a side agreement, ignores the plain text of the sentence in which it appears. The sentence refers to monthly or quarterly "interest only" payments (*see* Weingarten Affd Ex 1, 2, 3 and 9). Plaintiff also ignores the very next sentence which sets forth when principal will become payable (*see id.*). The first through fourth cause of action shall be dismissed.

B. Fraudulent Inducement Against Weingarten, Wolf 88, and Wolf 75

1. Arguments

Defendants first argue that plaintiffs' reasonable reliance argument is contradicted by the written documents (mem at 20, citing *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] ["This Court has repeatedly held that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of the contract executed by the allegedly defrauded party."]; *Daily News, L.P. v Rockwell Int'l Corp.*, 256 AD2d 13, 14 [1st Dept 1998]). Defendants also argue

that plaintiffs' fraud allegation lack the necessary particularity. For example, they fail to address "how Weingarten could have intended to deceive them into thinking the notes had a one-year repayment obligation by providing them... written agreements with no such obligation" (*id.*). Finally, defendants note that the argument that a promise was made without the intent to perform is insufficient to support a fraud claim (*id.* at 20-21 citing *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008] ["general allegations that defendants entered into a contract while lacking the intent to perform it... are insufficient to support the fraud-based claims"]). Plaintiffs cannot rely on the excuse that they did not read the documents because "[p]arties to a contract, particularly sophisticated parties, have an obligation to exercise ordinary diligence in ascertaining the terms of the contracts they sign" (*id.* at 21, quoting *VFS Fin. Inc. v Ins. Servs. Corp.*, 2012 N.Y. Misc. LEXIS 6915 at *12-13, 2012 NY Slip Op. 33934[U] at *9 [Oct. 5, 2012]).

In opposition, plaintiffs contend that they have alleged fraud with the requisite particularity, which plaintiff characterizes as "sufficient detail to clearly inform defendants of the substance of the claims against them" (opp at 19-20, citing *Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1st Dept 1997]). In response to defendants' argument regarding plaintiffs' failure to explain how Weingarten could have intended to deceive when he provided documents containing no one-year repayment obligation, plaintiffs aver that "an inference of fraudulent intent may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness" (*id.* at 20 n 3, citing *Navigant Consulting, Inc. v Kostakis*, No. CV-07-2302[CPS][JMA], 2007 WL 2907330 [ED NY Oct. 4, 2007]; *Bradbury v PTN Publ'g Co.*, No. 93-CV-5521[FB], 1998 WL 3866485, at *7 [ED NY July8, 1998]). The allegations from which it can be inferred that Weingarten did not intend to keep his promise when made, meet this criteria (*id.* at 21).

Plaintiffs also contend that the complaint alleges the required "rational basis" for inferring that plaintiffs' reliance was reasonable – that they lacked experience in the real estate business – and thus, whether plaintiffs reasonably relied is a question of fact (*id.* at 23, quoting *Regency Found. v Robson*, 14 Misc. 3d 1209[A], 836 NYS2d 489 [Sup. Ct. NY County 2006]). Defendants never advised plaintiffs to consult an American lawyer (*id.* at 24). Because the complaint alleges that the Notes state that "[t]he amount owed...shall be repaid... at a place and manner to be agreed

to by the parties", the written documents do not conflict with the oral agreement (*id.*, citing amended complaint ¶¶ 85-86). The cases cited by defendants, *e.g. Perotti*, are distinguishable because none of those cases involve circumstances in which a defendant reached an oral agreement in one language and attempted to manipulate the agreement by having it translated differently into a second language (*id.*; 82 AD3d at 495). Without explaining further, plaintiffs also argue that because this is not a mere lack of intent to perform, but a "misrepresentation of existing fact", the fraud claim is not barred on those grounds (*id.* at 24-25).

In reply, defendants argue that "reasonable reliance is negated as a matter of law where an oral representation conflicts with a written agreement" (reply at 6). Plaintiffs needed only to read, or have someone else read, the Notes to learn that they did not obligate Weingarten personally, in one year or otherwise (*id.* at 7). *Perotti* is instructive because it involves a contract between plaintiff and a company, as well as an alleged oral agreement with two individuals. The First Department held that plaintiff could not have reasonably relied on the individuals' oral promise when the written agreement provided for the means of payment (*id.* at 7-8; 82 AD3d at 495). Plaintiffs' citation to *Hay* is irrelevant because it involved the *renewal* of an existing insurance policy, and the court held that a renewal policy "implies that the terms of the existing policy are to be continued" (*id.* at 8; 77 NY at 235). There is no such renewal here.

Defendants also reiterate their arguments regarding plaintiffs' failure to plead fraud with particularity and note that plaintiffs resort to misrepresenting the alleged "first loan" to Weingarten. That loan was not, in fact, to Weingarten, but to the Wolf Group. It was the Wolf Group who paid the note, not Weingarten (*id.* at 9, citing Weingarten aff, exhibit 13 [NYSCEF Doc No. 44]). Defendants also note plaintiffs' failure to address their arguments regarding the insufficiency of the claim that Weingarten never intended to perform (*id.*).

2. Discussion

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of

then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[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"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

CPLR 3016 (b) also provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail".

Plaintiffs allege in the complaint that before the parties entered into the Notes, "Weingarten agreed that he, personally or through his companies, would repay each of the loans within one year" (complaint ¶ 34). However, a promise to pay is not a statement of present fact but a statement of future intent (*see J.M. Builders & Assocs., Inc. v. Lindner*, 67 AD3d 738, 742 [2009]). Plaintiffs have failed to adequately allege a misrepresentation. Even if plaintiffs had adequately alleged a misrepresentation, "the general merger clause in the Note would exclude parol evidence of it, and the contradictory provisions in the Note would negate justifiable reliance" (*VFS Fin., Inc. v Insurance Servs. Corp.*, 2012 N.Y. Misc. LEXIS 6915, *12-13, citing *Marine Midland Bank N.A. v Walsh*, 260 AD2d 990, 689 [3d Dept 1999]; *AFG Industries, Inc. v Empire Glass Co.*, 226 AD2d 487 [2d Dept 1996]; *Perrotti*, 82 AD3d at 498-99).

While it is true that on a motion to dismiss for failure to state a cause of action, "a plaintiff need only plead that he relied on misrepresentations made by the defendant since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Regency Found.*, 836 NYS2d at 489), conflict between the alleged oral statement and written agreement may preclude a finding of reasonable reliance as a matter of law (*Perrotti*, 82 AD3d at 498 ["This Court has repeatedly held that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party."];

see also Skillgames LLC, 1 AD 3d at 250 ["factual allegations that . . . are clearly contradicted by documentary evidence are not entitled to consideration]). In *Perotti*, the plaintiff, a sophisticated investor, sued for fraudulent inducement based on allegations that two of the parties to the agreement individually agreed to pay him a different price for certain shares of stock than was indicated in the written agreement. The court found that "under any interpretation of the proposed pleading, it is impossible to conclude that plaintiff, a sophisticated investor, reasonably relied on [defendants'] alleged representations... plaintiff fails to explain how he acted reasonably when he executed a writing which, on its face, contradicted those representations and was *highly* prejudicial to him" (*Perrotti*, 82 AD3d at 498).

Here, plaintiffs, sophisticated businessmen (*see* amended complaint ¶ 20), attempt to explain that they acted reasonably because they trusted Weingarten and did not know what the contents of the signed written agreement were, since they did not read it and could not read it because their native language is Russian and the agreements were in English. Assuming these facts alleged to be true, it is still not reasonable to infer that a sophisticated businessperson's failure to ascertain the contents of the documents he was signing would be justifiable (because "a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" *Bishop v Maurer*, 33 AD 3d 497, 500 [1st Dept 2006], affd 9 NY 3d 910 [2007] [Plaintiffs are "responsible for their signature[s] and [are] bound to read and know what [they] signed," *id.* at 499]; [*see also VFS Fin. Inc.*, 2012 N.Y. Misc. LEXIS 6915 at *12-13]).

While scienter does not need to be alleged with particularity, plaintiff must allege a strong inference of present intent to deceive. Here, plaintiff alleges that Weingarten "was unhappy" with the written terms of the first loan, subsequently directed his attorney to draft documents that did not reflect the oral agreement, and then failed to bring this fact to plaintiffs' attention (amended complaint ¶¶ 65-67). While an inference of intent may be drawn from the facts alleged, they do not *strongly* suggest motive, conscious misbehavior, or recklessness (*Navigant Consulting, Inc.*, 2007 WL 2907330).

Because plaintiffs have failed to adequately allege the elements of fraudulent inducement, the fifth claim may be dismissed.

C. Claims for Reformation Based on Fraud Against Weingarten, Wolf 88, Wolf 75

1. Arguments

Defendants argue that the claim for reformation should be dismissed because, as discussed above, the fraud claims fail, but even if they did not, plaintiffs have not shown "in no uncertain terms... exactly what was really agreed upon between the parties" (mem at 22, quoting *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 29 [1st Dept 1992]). Plaintiffs' reckless failure to review the documents does not entitle them to reformation.

Plaintiffs contend that, as discussed above, they have sufficiently pled fraud. In response to defendants' attack on the reasonableness of plaintiffs' reliance, plaintiffs argue that omission to read a document does not bar relief (opp at 26, citing *Albany City Sav. Inst. V Burdick*, 87 NY 40 [1881]). The question of reliance should be left to a finder of fact (*id.* at 27).

In reply, defendants reiterate their position regarding the insufficiency of the fraud claims, and that plaintiffs were not mistaken but merely neglectful in understanding a contract before signing it (reply at 9).

2. Discussion

A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake (*Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). As discussed above, plaintiffs failed to adequately plead fraudulent inducement, so the claim for reformation based on fraud (sixth and seventh causes of action) may also be dismissed.

D. Breach of Fiduciary Duty Against Weingarten and Wolf Group

1. Argument

Defendants argue that there was no fiduciary relationship between plaintiffs and Weingarten or the Wolf Group in connection with the West 75 Project – they were not even parties to the agreements. NYAG and MLG were parties to the agreements, but with Wolf 75, Weingarten or the Wolf Group (mem at 23). The agreements created economic interests in Wolf 75, but not a fiduciary relationship with Weingarten or the Wolf Group (*id.*, citing *Andejo Corp. v South St. Seaport Ltd. P'ship*, 40 AD3d 407, 407 [1st Dept 2007]). Plaintiffs do not allege a "relationship of higher trust" beyond making conclusory statements about how they "reposed complete trust and confidence in" Weingarten (*id.* at 24).

Defendants also argue that their actions in connection with the mezzanine loan would not amount to a breach of fiduciary duty even if such a duty existed. Plaintiffs do not allege facts showing actual misconduct (*id.*). The documentary evidence shows that defendants consented to and actually took part in arranging the mezzanine loan (*id.*, citing Weingarten aff ¶¶ 25-27, exhibit 11 [NYSCEF Doc No. 42]). The allegation that "[AG] objected" does not specify the time, place, manner, or what exactly he objected to (*id.* at 25, citing amended complaint ¶ 75). Although plaintiffs allege that "Weingarten has not shared with [AG] or [MG] the complete documentation concerning the mezzanine loan", they do not allege that they requested that information and were denied. In fact, they had full access to information from the manager-developer of the project (*id.*, citing amended complaint ¶ 77; Weingarten aff ¶ 34, exhibit 11 [NYSCEF Doc No. 42]). Plaintiffs also allege that the mezzanine loan was in violation of the JMW 75 LLC operating agreement without further detail, but no plaintiff is a party to that agreement, and in any event, plaintiffs do not assert a breach of contract claim with respect to this agreement (*id.*, citing amended complaint ¶ 76; Weingarten aff ¶ 19). The breach of fiduciary duty claim must be dismissed if it is also a breach of contract (*id.*, citing *Celle v Barclays Bank PLC*, 48 AD3d 301, 302 [1st Dept 2006] [dismissing cause of action for breach of fiduciary duty where it was based on same facts as breach of contract claim]). Finally, if Weingarten had not taken on the loan, the project, which plaintiffs had invested in, would have completely gone under. There has been no misconduct alleged. Damages are premature and speculative because the projects are still ongoing (*id.* at 26).

In opposition, plaintiffs contend that a fiduciary relationship exists because AG and MG, foreigners unsophisticated in the New York real estate business, relied on Weingarten, a "prominent New York real estate investor... to properly document the agreement that they had reached in Russian" (opp at 18, citing amended complaint ¶¶ 1, 19-21, 25, 28). Furthermore, "Weingarten, through Wolf 75, controls JMW 75 LLC, which is the entity behind the West 75 Project. Wolf Group, as managing member of Wolf 88 and Wolf 75, owes fiduciary duties" (*id.*, citing amended complaint ¶¶ 14, 17, 26, 137-39, 146-48; *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Plaintiffs also contend that the complaint alleges a breach by pointing to the allegations concerning Weingarten's improper direction to his attorney to prepare documents in contravention of what the parties agreed to orally, that Weingarten misled plaintiffs as to the contents of the written documents, and that "against objection, Weingarten encumbered the West 75 project with a massive loan" without revealing the loan's specific terms to plaintiffs (*id.* at 19,

citing amended complaint ¶¶ 5, 6, 32, 60-61, 63, 65, 68-69, 70-72, 75, 77). As for damages, plaintiffs contend that AG has been damaged in the amount of $1 million and MG in the amount of $400,000 by the subordination of their shares (*id.*).

In reply, defendants reiterate that plaintiffs have failed to allege any facts supporting the assertion that defendants owed a fiduciary duty, or that they engaged in any misconduct constituting a breach. Plaintiffs do not even make clear which defendant owes fiduciary duties to which plaintiff (reply at 10). Plaintiffs allege that JWG, "as managing member of Wolf 88 and Wolf 75, owes fiduciary duties", but none of the plaintiffs are partners or members of those entities (*id.*). Plaintiff has not shown any legal relationship to Weingarten, individually, (*id.*). In *Pokoik* and *Out of the Box Promotions, LLC v Kosschitski* (55 AD3d 575 [2d Dept 2008]), the parties were partners in the same company, unlike here (*id.*).

2. Discussion

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik*, 115 AD 3 at 429). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is "necessarily fact-specific" and looks to whether the relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" *Oddo Asset Mgt.*, 19 NY3d at 593 [internal quotation marks and citation omitted]). A fiduciary relationship may be found where a party "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," or "when confidence is reposed on one side and there is resulting superiority and influence on the other" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Although "a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the

higher realm of relationship and fashion the stricter duty for them'" (*Oddo Asset Mgt.*, 19 NY3d at 593, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

The threshold issue is whether Weingarten and Wolf Group owed fiduciary duties to plaintiffs in their capacities as managing members of Wolf 75 (amended complaint ¶¶ 139, 148). Managing members of limited liability companies owe fiduciary duties to non-managing members (*Pokoik*, 115 AD3d at 429). Plaintiffs allege in the complaint that Weingarten is the managing member of Wolf Group, and that Wolf Group is the managing member of Wolf 75 (amended complaint ¶¶ 137, 146). It appears from the allegations in the complaint that plaintiffs AG and MG claim to have an interest in both Wolf 75 and JMW 75, the entity behind the West 75 Project (*id.* [alleging that plaintiffs AG and NYAG, as well as plaintiffs MG and MLG are "minority participants" in Wolf 75, with "no management or decision-making role... and incomplete access to company records"]; *id.* ¶ 17 ["Weingarten, through Wolf 75, owns 96.2% of JMW 75 LLC, except for small percentages of that interest which Weingarten conveyed to Arkady and Maksim."]).

Defendants offer the West 75 Project agreements (Weingarten aff, exhibits 7, 8 [NYSCEF Doc Nos. 38, 39]) in support of their argument that neither AG and NYAG, nor MG and MLG, can allege that they were partners with Weingarten or Wolf Group in the West 75 Project (mem at 23). The documents irrefutably indicate that the parties to those agreements are NYAG, MLG, and Wolf 75. Neither Weingarten, nor Wolf Group, the named defendants to the causes of action for breach of fiduciary duty, are parties to the agreements. The only other basis alleged in support of a fiduciary relationship is perhaps the degree of trust that AG and MG placed in Weingarten given their purported lack of sophistication. But this alone is insufficient to establish a fiduciary relationship, especially given plaintiffs' failure to refute the statements as to AG and MG's level of sophistication and language abilities in the Weingarten aff (*see* NYSCEF Doc No. 31 ¶¶ 4, 5). Nor do plaintiffs rebut the documentary evidence showing that no fiduciary duties would have been owed by the named defendants. Therefore, the eight and ninth causes of action for breach of fiduciary duty shall be dismissed on the documentary evidence.

E. Piercing the Corporate Veil

1. Arguments

Defendants argue that plaintiffs must pierce the veils of Wolf 75, Wolf 88, and then JWG in order to reach Weingarten (mem at 28). The allegations that Weingarten "dominates and controls" the corporate defendants, as well as that "the domination was used to commit wrongdoing against Plaintiffs" are conclusory (*id.* at 28-29, citing amended complaint 157-58, 161). Defendants compare the allegations made to those made in *Board of Mgrs. of the Gansevoort Condominium v 325 West 13th, LLC*, 121 AD3d 554, 554 (1st Dept 2014) and *Albstein v Elany Contr. Corp.*, 30 AD3d 210 (1st Dept 2006), and contend that the allegations in the complaint in this case are weaker even than those dismissed in the aforementioned cases.

In opposition, plaintiffs contend that they have sufficiently pled a veil piercing claim, and compare this case to *Grammas v Lockwood Assoc., LLC* (95 AD3d 1073, 1075 [2d Dept 2012]) and *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC* (125 AD3d 548, 549 [1st Dept 2015]). In *Grammas*, the court found that the complaint adequately alleged a cause of action by averring that the managing member had "engaged in acts amounting to an abuse or perversion of the LLC form to perpetrate a wrong or injustice against plaintiffs" (95 AD3d at 1075). In *Rosetti*, the court similarly found that the plaintiff stated a claim where the complaint alleged that defendants "misused corporate funds and used their domination and control of the corporate defendant to commit a fraud or wrong against plaintiffs" (125 AD3d at 549).

In reply, defendants note that plaintiffs have completely failed to allege facts showing that the corporate form itself was used to commit a fraud (reply at 13). The allegations made by plaintiffs do not rise to the level of what occurred in the cases cites by plaintiffs, i.e. deliberate use of dummy corporations to prevent plaintiff from collecting obligations owed, and misrepresentations made regarding the company's solvency in order to induce the plaintiff to enter into contract (*id.* at 14). Other cases involved true alter-egos, unlike here. In any event, entering into the mezzanine loan "was not Weingarten's doing, was consented to by Plaintiffs, benefitted Plaintiffs more than it benefitted Weingarten, and has not caused Plaintiffs any damage at this point" (*id.* at 15).

2. Discussion

A claim based on piercing the corporate veil is not a separate claim as the "attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against

the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). New York law disfavors disregard of the corporate form. "Generally, . . . piercing the corporate veil requires a showing 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.*). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts also 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]).

Plaintiffs' veil piercing claim consists merely of allegations that Weingarten used shell entities as signatories to the loan agreements to shield himself personally from liability (amended complaint 158). This allegation does not sound in the use of one's domination over a corporate entity in order to wrong another, especially given the discussion of the fraudulent inducement claim above. The claim must therefore be dismissed.

F. Leave to Amend

Defendants object to any request on the part of plaintiffs to further amend the complaint because amendment would be futile and lead to unnecessary litigation (mem at 30). Plaintiffs have already amended their claims once, to no avail, and no additional allegations will change the plain language of the documents or create a fiduciary duty between the parties (*id.*). Plaintiffs merely request to replead in the alternative (opp at 30). In reply, defendants point out that plaintiffs have not even submitted a proposed second amended complaint, and their request should therefore be denied (reply at 15).

Plaintiffs have not shown any new allegations in a third complaint that is likely to withstand the clear documentary evidence in the record. Moreover, plaintiffs have not complied with the requirements of CPLR 3025 (b) in seeking leave to amend. The request shall be denied.

It is hereby

ORDERED that the motion of defendants to dismiss the amended complaint (motion sequence number 002) is GRANTED and the amended complaint is hereby DISMISSED in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

DATED: March 15, 2019

ENTER,

O. PETER SHERWOOD J.S.C.