SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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MARCATO DIRECT,

Plaintiff,

- v -

ID BEVERAGE GROUP, LLC and PIETRO ROMANI,

Defendants.

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INDEX NO.	655135/2018
MOTION DATE	11/08/2018
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendants ID Beverage Group, LLC ("ID Beverage") and Pietro Romani ("Romani") to dismiss the complaint (the "Complaint") is granted in part, in accord with the following memorandum decision.

Background

Defendant ID Beverage is a New York limited liability company that is a wine wholesaler and distributor specializing in Italian varieties (Romani Aff. ¶ 2). Romani is the Managing Member of ID Beverage (*id.*). Plaintiff Marcato Direct ("Plaintiff") is the purported assignee of unpaid debts in the amount of $150,621.70 allegedly incurred by ID Beverage when it purchased certain wine products from a number of non-party vendors. On October, 16, 2018, Plaintiff filed the Complaint, asserting two causes of action for breach of contract and fraud/misrepresentation. On November 8, 2018, Defendants appeared in this action by filing this pre-answer motion whereby they move "for summary judgment to dismiss Plaintiff's complaint pursuant to CPLR §§ 3211 (c), CPLR 3211 (a) (3), (5), and (7), and for sanctions pursuant to

Uniform Rule 130-1.1 (a)(1)1(a)(5) [*sic*]" (NYSCEF Doc. No. 2) on the grounds that Plaintiff lacks standing to bring the action; Plaintiff's claims violate prohibitions against champerty; Plaintiff's fraud/misrepresentation claim is duplicative of its breach of contract claim; and the causes of action for fraud/misrepresentation and the individual claims against Romani are inadequately pled. Defendant also moves for sanctions on the grounds that this action is frivolous because Plaintiff has no legal basis or standing for the claims asserted. Plaintiff opposes.

Standard of Review

On this motion, Defendants purport to move "for summary judgment to dismiss Plaintiff's complaint pursuant to CPLR §§ 3211 (c), CPLR 3211 (a) (3), (5), and (7)," and assert that the court should apply a summary judgment standard of review, but a party may not move for summary judgment until after issue has been joined (CPLR § 3212[a]). CPLR § 3211(c) sets forth the exceptions to this rule and provides that the court may convert a motion to dismiss to a motion for summary judgment "[w]hether or not issue has been joined . . . after adequate notice to the parties." Where the court exercises its discretion to convert a motion in this manner, it must provide adequate notice to the parties of its intention to do so (*Pine Street Homeowners Assoc. v. 20 Pine Street LLC*, 109 A.D.3d 733, 735 (1st Dept 2013]) and give the parties an "opportunity to make an appropriate record" (*Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508 [1988]; *see also Nonnon v City of New York*, 9 N.Y.3d 825, 827 [2007] [Conversion was not appropriate where "plaintiffs were not put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered"). There are three exceptions to the notice requirement: (1) where the action in question involves no issue of fact, but only issues of law which are fully acknowledged and argued by the parties; (2) where the parties specifically request the motion be treated as one for summary judgment; and (3) where the

parties deliberately lay bare their proof and make it clear they are charting a summary judgment course (*Wiesen v New York University*, 304 A.D.2d 459, 460 [1st Dept 2003]). CPLR 3211(c) also provides that the court may, "when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

Although Defendants purport to move for summary judgment and indicate that they move pursuant to CPLR § 3211(c), they do not specify whether they seek conversion of the action into a motion for summary judgment or immediate trial on the issues raised in the motion. Whereas the relevant procedural posture is not addressed on the motion, issue has not been joined in this matter, and this pre-answer motion was made mere weeks after commencement of the action where there has been no discovery between the parties, the court declines to convert the motion to dismiss to one for summary judgment or proceed with an immediate trial on the issues raised on the motion, but will consider the merits of the motion to the extent that it seeks dismissal pursuant to CPLR § 3211(a)(3), (5), and (7) as set forth in the notice of motion. To the extent warranted, discovery on any threshold issues may be prioritized.

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the

calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

Discussion

Defendant first moves to dismiss the Complaint on the grounds that Plaintiff lacks standing to maintain the action.[1] To prevail on a pre-answer motion to dismiss for lack of standing, the defendant must establish, *prima facie*, that the plaintiff has no standing to sue (*Credit Suisse Financial Corp. v. Reskakis*, 139 A.D.3d 509, 510 [1st Dept 2016]. Defendants argue that Plaintiff lacks standing because it does not plead the existence of a written assignment of debt, citing to General Obligations Law § 5-1107 to support the contention that a written assignment is required to transfer the debt. Nevertheless, the assignee of a debt for the sale of goods has standing to maintain an action to collect the debt (*Sterling Nat. Bank v. Polyseal Packaging Corp.*, 104 A.D.3d 466, 467 [1st Dept 2013] ["Plaintiff—as the assignee of [seller]—has standing to sue defendant for receiving goods from [seller] but failing to pay for them"]; *see also M.W. Zack Metal Co. v. International Navigation Corp.*, 112 A.D.2d 865, 868 [1st Dept 1985] ["Unless forbidden by law or clearly limited by agreement or waiver, any claim for recovery of damages for other than personal injury may be transferred or assigned"], *affd* 67 NY2d 892, *rearg denied* 68 NY2d 664 [1986]), and such assignment need not be in writing (*id;*

[1] At various points in their submissions, both parties appear to confuse the principles of capacity and standing. Generally, capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Silver v Pataki*, 96 N.Y.2d 532, 537 [2001]) while standing concerns whether a plaintiff has an actual legal stake in the controversy (*id.* at 529). The question of whether Plaintiff is the assignee of a debt is one of standing and is addressed here accordingly.

American Banana Co. v. Venezolana Internacional De Aviacion S.A. [VIASA], 67 A.D.2d 613, 614 [1st Dept 1979], *affd.* 364 49 N.Y.2d 848 [1980]).

GOL § 5-1107 provides that "[a]n assignment shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent." This statute codifies the common law principle that an assignment need not be supported by consideration, but it does not impose an affirmative duty that an assignment be in writing as Defendants assert (*see Stein v. Reisner*, 145 A.D.3d 499 [1st Dept 2016], *lv denied* 29 NY3d 917 [2017]). The Complaint alleges that "[a]ll debts for product ordered by Defendants have been assigned to the Plaintiff" (Compl. ¶ 11). This statement is sufficient to put Defendants on notice of the "transactions, occurrences, or series of transactions or occurrences" that Plaintiff intends to prove—an assignment of debts (CPLR § 3013). No heightened particularly is required. (*id.*). To the extent that the letters annexed to the affirmation of Plaintiff's counsel in opposition to the motion may demonstrate assignment or lack thereof, the court notes that the letters are not supported by an affidavit of a person with personal knowledge and do not unambiguously represent the intent of the involved parties (*see Leon v Martinez*, 84 N.Y.2d 83, 89 [1994] ["No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned"]). On a motion to dismiss where Plaintiff must be afforded every favorable inference, Defendants' unsupported allegations that the debts were not assigned to the Plaintiff are insufficient to establish, *prima facie*, that Plaintiff lacks standing to maintain the action.

Defendants argument that Plaintiff's claims must be dismissed as champerty is similarly unpersuasive. Section 489 (1) of New York's champerty statute prohibits the purchasing or taking assignment of debts "with the intent and for the purpose of bringing an action or proceeding thereon." To constitute the offense of champerty, "the primary purpose of the purchase must be to enable one to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" (*Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd*., 154 A.D.3d 171, 180 [1st Dept 2017], *citing Justinian Capital SPC v WestLB AG, N.Y. Branch*, 28 NY3d 160, 166 [2016]). Under this analysis, there is a distinction "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee, with only the former being champertous" (*id.* [internal citations omitted]). Plaintiff's intent in acquiring the purported debts is a question of fact that cannot be inferred on the basis of speculation on a motion to dismiss (*Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 94 N.Y.2d 726, 739 [2000] ["Indeed, the question of intent and purpose of the purchaser or assignee of a claim is usually a factual one to be decided by the trier of facts"]). Therefore, Defendants do not assert viable grounds for the dismissal of the breach of contract claim for lack of standing or champerty.

Defendants also move to dismiss Plaintiff's claim for fraud/misrepresentation on the grounds that they are inadequately pled and duplicative of the claim for breach of contract. To state a claim for Fraud, a Plaintiff must allege (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, (2) made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation or material omission, and (4) injury to the plaintiff (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827, *rearg denied* 28 NY3d 956 [2016]). Additionally, Fraud is subject

to the heightened pleading requirements of CPLR 3016(b) and "the circumstances constituting the wrong shall be stated in detail" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Plaintiff's allegation that Romani "knowing that the legal entity did not have the ability to pay, fraudulently and with the purpose to induce, represented or provided the impression that defendants could pay for the products it ordered" (Compl ¶ 16) lacks the requisite particularity to sustain a claim for fraud, and is insufficient as a matter of law because it alleges only a mere misrepresentation of future intent to perform under the contract and is, therefore, duplicative of the breach of contract claim (*Wyle Inc. v ITT Corp*, 130 AD3d 438, 439 [1st Dept 2015] ["In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim."]). Dismissal of this claim is, therefore, appropriate.

Defendants also argue that the Complaint fails to state a claim for breach of contract against Romani individually. To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff's performance, the defendant's breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 A.D.3d 605, 606 [1st Dept 2019]). Here, allegations in the Complaint made "upon information and belief" that ID Beverage "and/or" Romani "individually or on behalf of ID Beverage" ordered the wines in question are contradicted by the repeated assertion that ID Beverage was obligated to pay the debt in question, stating that Romani "knew, or should have known, that ID Beverage Group, LLC, did not have the financial means to pay for any of the aforementioned products that were ordered" (Compl. ¶¶ 12, 16). Absent any non-conclusory allegations that Romani incurred the debts in his individual capacity or a viable claim to pierce the corporate veil, the Complaint must

be dismissed against Romani individually. Whereas the court declines to dismiss the cause of action for breach of contract against the corporate defendant, sanctions under 22 NYCRR § 130-1.1 are not warranted.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part; and it is, accordingly,

ORDERED that the cause of action for fraud and misrepresentation is dismissed in its entirety; and it is further

ORDERED that the complaint is dismissed as against the individual defendant Pietro Romani; and it is further

ORDERED that the parties shall immediately commence discovery on the issues of standing and Plaintiff's intent and purpose in taking assignment of the alleged debts and bringing the present action, to be followed by the remainder of discovery; and it is further

ORDERED that the parties will be contacted by the court to arrange a telephonic preliminary conference to be held within 30 days of entry of this order.

ENTER:

4/24/2020

DATE			LOUIS L. NOCK, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[x] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[x] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE