SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

----------X

BULENT OSMAN, J. STREICHER, LLC,

Plaintiff,

- v -

THOMAS BROWN, RICHARD PLUM, JONATHAN FREY, MICHAEL PICKETT, J. STREICHER GROUP LLC,J. STREICHER & CO., LLC,SPIORAD CAPITAL PARTNERS, LLC

Defendant.

----------X

INDEX NO. 155092/2019

MOTION DATE 02/27/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

This action arises out of the alleged breach of a purchase agreement for a business. Pending before the court is Defendants' motion to dismiss.

BACKGROUND

This case arises out of a commercial transaction involving the potential purchase of Defendant J. Streicher & Co., LLC (the "Company")[1]. In order to effectuate the transaction, corporate Plaintiff J. Streicher, LLC (the "Buyer") was formed by Plaintiff Bulent Osman ("Osman"), Defendant J. Streicher Group, LLC (the "Seller") and Defendant Spiorad Capital Partners, LLC ("Spiorad"), with the founders holding 80%, 10%, and 9% of the Buyer's ownership interest, respectively. (NYSCEF Doc No. 20.)

[1] Individual Defendants Thomas Brown, Michael Pickett, Jonathan Frey, and Richard Plum were employed by the Company in the roles of CEO, Manager, Manager, and Member, respectively. (NYSCEF Doc Nos. 3 at 69; 4 at 6; 13 at 3.)

The Buyer and the Seller signed the Purchase Agreement on October 24, 2017, which provided for the completion of the purchase through two closings. (NYSCEF Doc No. 2.)

Plaintiffs allege de facto compliance with all obligations set forth in the Purchase Agreement**;** specifically**,** transferring $200,000 to Defendants on March 11, 2017, a further $850,000 to third-party ALC Manufacturing, and providing assistance to Defendants in connection with a $2,500,000 deal with another third-party. (*Id*. at ¶¶ 15-16.)

Osman alleges that Defendant Thomas Brown stated that a final $150,000 payment would then be sufficient to complete the Second Closing. Plaintiffs allege that they complied, with Osman personally transferring the requested amount to Brown, but that Defendants became "unavailable" after receiving the transfer and failed to deliver the 100% ownership interest in the Company. (*Id*. at ¶ 19.)

Defendants delivered to Osman a notice of termination of the Purchase Agreement on August 29, 2018. (NYSCEF Doc No. 3.) The notice of termination contains numerous exhibits detailing Company meetings, Company emails with FINRA, and a proposed contract delivered by Osman detailing "a new source of recapitalization from a third party" that deviated from the terms of the Purchase Agreement. (*Id*.) Osman was then removed as a member of the Buyer entity by board resolution on December 17, 2018, with Spiorad and the Seller absorbing his ownership interest. (NYSCEF Doc No. 13.)

Plaintiffs filed suit on May 20, 2019, setting forth claims for 1) breach of contract; 2) specific performance; 3) injunctive relief; 4) fraud; 5) negligent misrepresentation; 6) unjust enrichment; 7) breach of contract against Thomas Brown; 8) unjust enrichment against Thomas Brown; 9) civil conspiracy.

Defendants now move to dismiss the complaint on the basis that the action is barred by documentary evidence, Plaintiffs lack standing/capacity to sue, and that Plaintiffs fail to state a claim. The motion has been fully submitted.

DISCUSSION

I. Motion to dismiss claims filed on behalf of J. Streicher, LLC pursuant to CPLR 3211[a][3]

"Pursuant to CPLR § 3211(a)(3) a cause of action may be dismissed where a party lacks legal capacity or standing to sue." (*Kenney v Immelt*, 41 Misc 3d 1225[a], *3 [Sup Ct, NY County 2013], quoting *Raske v Next Mgt., LLC*, 2013 WL 5033149, *5 [Sup Ct, NY County 2013] [internal quotation marks omitted].) "[T]he burden is on the moving defendant to establish, prima facie, the plaintiffs lack of standing [or legal capacity] as a matter of law. . . . the motion will be defeated if the plaintiff's submissions raise a question of fact[.]" (*Evanston Paper Co., Inc. v Haig Press Inc.*, 2017 WL 7788832, *4 [Sup Ct, NY County 2017], citing *U.S. Bank, Nat. Ass'n v Noble*, 144 AD3d 786, 787-88 [2d Dept 2016].)

> The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution (*Community Bd. 7 v Schaffer*, 84 NY2d 148, 154–155 [1994]). The most critical requirement of standing . . . is the presence of "injury in fact—an actual legal stake in the matter being adjudicated" (*Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761 [1991]).
>
> The similar but not identical doctrine of legal capacity, by contrast, concerns a litigant's power to appear and bring its grievance before the court (*Community Bd. 7*, 84 NY2d at 155). Legal capacity to sue, or lack thereof, often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or, as in this case, a business corporation.
>
> (*Security Pacific Nat. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006].)

Business Corporation Law § 626 provides that a derivative action may be brought on behalf of a corporation by a shareholder, but the plaintiff must be a shareholder both "at the time of

bringing the action and . . . at the time of the transaction of which he complains[.]" (BCL § 626 [a], [b].) This is known as the "contemporaneous ownership rule" and is "strictly enforced" (*Honzawa Holding Co. v Hiro Enterprise USA, Inc.*, 291 AD2d 318, 318 [1st Dept 2002]) because "only current shareholders have a continuing interest in the welfare of the company." (*Zentz v Intl. Foreign Exch. Concepts, L.P.*, 33 Misc 3d 1212[A], *8 [Sup Ct, Kings County 2011]; *see also Schorr v Steiner*, 46 AD3d 435, 436 [1st Dept 2007] ["the individual plaintiffs' lack of legal capacity to pursue a derivative action was demonstrated by, inter alia, their failure to adduce any evidence that they were . . . shareholders or "beneficial" owners at the time of the alleged fraud *and* when they commenced this action"] [emphasis in original].)

Here, Defendants submit a document titled "Unanimous Written Consent of the Members of J. Streicher, LLC in Lieu of a Meeting" which demonstrates that Osman was removed as a member of the Buyer entity on December 17, 2018, by written consent of its other members, JSG and Spiorad, resulting in the splitting up of Osman's ownership interest among those remaining members. (NYSCEF Doc No. 13.) Despite his removal, Osman commenced this lawsuit on behalf of both himself and the Buyer entity on May 20, 2019. (NYSCEF Doc No. 1 at 18.) Osman submits no evidence raising a question of fact as to whether he had the legal capacity to bring a derivative lawsuit on behalf of the Buyer entity. Accordingly, Osman lacks the capacity to bring this action on behalf of the Buyer and all derivative claims are hereby dismissed.

II. Motion to dismiss direct claims 1-6 & 9 against individual Defendants Brown, Plum, Frey, and Pickett, and corporate Defendants Spiorad Partners and J. Streicher & Co., LLC (the Company)

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the

benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

Defendants move to dismiss Osman's contract claims alleged against individual Defendants Brown, Plum, Frey, and Pickett, and corporate Defendants Spiorad and the Company (J. Streicher & Co., LLC), on the grounds that the members of a corporation are not individually liable for the corporation's breach of a contract. Defendants also move to dismiss the tort claims on the grounds that the Complaint fails to allege personal and active participation beyond mere executive oversight. (NYSCEF Doc No 11 at 24-27.)

Osman responds that the Complaint sufficiently alleges that the individual Defendants "completely controlled and dominated the companies on both sides of the transaction at issue, and that such domination was used to commit a fraud or wrong against Plaintiffs." (NYSCEF Doc No. 18 at 30.) In support, Osman specifically, and exclusively, cites to the Complaint where he alleges that Brown "quickly withdrew funds Mr. Osman sent to J. Streicher LLC to pay his legal bills totally unrelated to the matters involving the LLC." (*Id.*)

Defendants reply that the allegations in the Complaint fail to meet the "heavy burden" required to pierce the corporate veil. (NYSCEF Doc No. 19 at 16.)

Generally, "[a] director is not personally liable for a corporation's breach of an agreement merely by virtue of his or her decisions or actions that resulted in the corporation's promise being broken." (*Hixon v 12-14 E. 64th Owners Corp.*, 107 AD3d 546, 547 [1st Dept 2013].) "It is

axiomatic that only parties to a contract can be sued for breach." (*Shapiro v Ninah Consulting, Inc.*, 2019 WL 3854919, *2 [Sup Ct, NY County 2019], citing *Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009].)

> In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation *and* "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142, [1993]). Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer . . . personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in "bad faith" while representing the corporation

(*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 776 [2011] [emphasis added].) "Under New York law, the corporate veil can be pierced where there has been, inter alia, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment." (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996].) "Given the courts' reluctance to disregard the corporate form, a plaintiff must allege, with the requisite 'particularized statements detailing fraud or other corporate misconduct,' facts that would warrant piercing the corporate veil." (*State Ins. Fund v Iovine*, 2007 WL 2175523 [Sup Ct, NY County 2007], quoting *Sheridan Broadcasting Corp v Small*, 19 AD3d 331, 332 [1st Dept 2005].)

The Complaint fails to include any specific allegations that these eight Defendants exercised complete domination and/or abused the corporate form to commit wrongdoing. Rather, Plaintiffs merely allege that "Plaintiffs entered into the valid Agreement with *Defendants* under which *Defendants* were obligated to sell the Company to Plaintiffs pursuant to the terms of the Agreement dated October 24, 2017" (NYSCEF Doc No. 1 at ¶ 23 [emphasis added]), despite the

fact that the Purchase Agreement was signed only by the Buyer (J. Streicher, LLC) and Seller (J. Streicher Group, LLC). (NYSCEF Doc No. 14 at 25.)

Because these eight Defendants were not signatories to the Purchase Agreement and Plaintiffs have failed to sufficiently plead facts showing a basis to pierce the corporate veil, claims 1-6 and 9 are hereby dismissed as against Defendants Brown, Plum, Frey, Pickett, Spiorad, and the Company (J. Streicher & Co., LLC).

III. Motion to dismiss claims 7 and 8 against Defendant Brown

Plaintiffs allege claims 7 and 8 against Thomas Brown individually, for breach of contract and unjust enrichment, respectively. These claims involve an alleged meeting between Osman and Brown where Brown asked Osman for a loan of $100,000 to pay off legal bills. Osman alleges that he provided two loans to Brown, both in the amount of $15,000. In support, Osman submits two documents, both titled "Swift Advice for Customer Transfer," that appear to reflect transfers made in the amount of $15,000.

Defendants move to dismiss claim 7 for breach of contract on the grounds that the alleged contract is an oral contract of an infinite duration and is therefore unenforceable pursuant to the Statute of Frauds. Defendants move to dismiss claim 8 for unjust enrichment on the grounds that the claim is not viable because it merely seeks the enforcement of the underlying unenforceable oral contract. (NYSCEF Doc No. 11 at 32-33.) In the alternative, Defendants argue that if the oral contract is valid, then the unjust enrichment claim is duplicative.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) based on the Statute of Frauds, the threshold issue is whether the documents are sufficient on their face to satisfy the Statute of Frauds." (*Boone Associates L.P. v Kidder*, 2009 WL 3344821 [Sup Ct, NY County 2009].) "Under the statute of frauds, an oral agreement that cannot be performed within a year of its

creation is void." (*Cohen v HDS Trading Corp.*, 2014 WL 2195401, at *1 [Sup Ct, NY County 2014], citing General Obligations Law § 5-701.) "Wherever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, this court has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred." (*D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 455 [1984].)

Here, the alleged loan contract could have been completed, i.e. repaid, within one year. As such, the motion to dismiss based on the Statute of Frauds is denied. The motion to dismiss the unjust enrichment claim as duplicative of the oral contract must likewise be denied because questions of fact exist as to whether the oral contract was valid. (*Basu v Alphabet Mgmt. LLC*, 127 AD3d 450, 451 [1st Dept 2015], citing *Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237 [1st Dept 1997].)

IV. Motion to dismiss claims 1-6 & 9 against J. Streicher Group, LLC (the Seller)

1. Breach of contract and unjust enrichment

"To state a claim for breach of contract in New York, plaintiffs must allege (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages." (*Oppman v IRMC Holdings, Inc.*, 14 Misc. 3d 1219[A], *5 [Sup Ct, NY County 2007], citing *Noise In the Attic Productions, Inc. v London Records*, 10 AD3d 303 [1st Dept 2004].)

Plaintiffs have sufficiently alleged a claim for breach of contract. There is no dispute that the Purchase Agreement was signed by both Osman, on behalf of the Buyer, and the Seller. Further, Plaintiffs submit documentation detailing at least an attempted performance of the First Closing obligations. (NYSCEF Doc Nos. 3-8.) Plaintiffs allege that Seller became unavailable and terminated the contract, resulting in damages. Accordingly, the motion to dismiss the breach

of contract claim against J. Streicher Group, LLC is denied. However, the unjust enrichment claim is dismissed as duplicative. (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790-91 [2012] ["An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim."]

2. Specific Performance

"In general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party.'" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001].) Specific performance is proper when "the subject matter of the particular contract is unique and has no established market value." (*Id*., quoting *Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 191-94 [1986].)

Defendants argue that the cause of action seeking specific performance must be dismissed because money damages would be sufficient and Plaintiffs fail to plead that they substantially performed their contractual obligations. (NYSCEF Doc No. 11 at 21.)

Plaintiffs have alleged that there is no adequate remedy at law. Additionally, the Purchase Agreement contains a provision stating that the parties "agree that irreparable damage would occur" if the Purchase Agreement were not performed, that "the parties shall be entitled to specific performance of the terms hereof," and that each party waives "the defense that money damages would be adequate." (NYSCEF Doc No. 2 at 23.) The court must "apply the familiar and eminently sensible proposition of law [ ] that, when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms." (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 112 [1st Dept 2005] [internal quotation marks omitted], quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004].)

Accordingly, the motion to dismiss the cause of action seeking specific performance is denied.

3. Injunctive Relief

"It is well established that preliminary injunctive relief is a drastic remedy which will not be granted without a clear showing by the movant that (1) he is likely to succeed on the merits; (2) he will be irreparably harmed without the issuance of the injunction; and (3) the balance of the equities favors him." (*Mr. Dees Stores, Inc. v A.J. Parker, Inc.*, 159 AD2d 389, 389 [1st Dept 1990].) Plaintiffs seek an injunction permanently restraining Defendants from selling any part of the Company during the pendency of this action. (NYSCEF Doc No. 1 at 9.)

Here, Plaintiffs offer only conclusory statements and allege no specific facts showing a likelihood to succeed on the merits, how irreparable harm will occur without the issuance of the injunction, or how the balance of equities tips in their favor. Accordingly, the motion to dismiss for failure to state a claim is granted as to this cause of action.

4. Fraud

"To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury." (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999].) "Moreover, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail." (*DSM2x, Inc. v GFK Custom Research, LLC*, 38 Misc3d 1227[A], *2 [Sup Ct, NY County 2013].)

"A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999].) "A fraud-based cause of action may lie, however, where the

plaintiff pleads a breach of a duty separate from a breach of the contract." (*Manas v VMS Assocs., LLC*, 53 AD3d 451, 453 [1st Dept 2008].)

Here, the allegations in the Complaint are insufficient to withstand the motion to dismiss. Plaintiffs merely state boilerplate language and fail to identify any specific misrepresentation of a material fact made by Defendants that Plaintiffs relied upon to their detriment. Further, the claim for fraud is duplicative of the claim for breach of contract because Plaintiffs fail to identify a separate breach of duty aside from the Defendants' nonperformance of the Purchase Agreement. Accordingly, this cause of action is dismissed.

5. Negligent Misrepresentation

"It is well established that a cause of action alleging 'negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.'" (*CMMF, LLC v JP Morgan Inv. Management Inc.*, 78 AD3d 562, 565 [1st Dept 2010], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007].)

Similarly to fraud, a claim for negligent misrepresentation must be "separate and apart from [a] claim for breach of contract." (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010] [dismissing claim for negligent misrepresentation as duplicative for being "predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract"].)

The claim for negligent misrepresentation must likewise be dismissed. The allegations in the Complaint fail to allege the existence of a special relationship between the parties or any specific information that was misrepresented. Additionally, the claim is duplicative of the claim

for breach of contract because it is also based on the Defendants' alleged nonperformance of the Purchase Agreement.

6. Civil Conspiracy

"There is no tort of civil conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort." (*Satin v Satin*, 69 AD2d 761, 761 [1st Dept 1979].) Because there is no remaining tort claim, this cause of action must also be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to dismiss all derivative claims brought on behalf of J. Streicher, LLC, is granted in full; and it is further

ORDERED, that the motion to dismiss claims 1, 2, 3, 4, 5, 6, and 9 as alleged against Defendants Thomas Brown, Richard Plum, Jonathan Frey, Michael Pickett, J. Streicher & Co., LLC, and Spiorad Capital Partners, LLC, is granted in full; and it is further

ORDERED, that the motion to dismiss claims 7 and 8 against Thomas Brown is denied; and it is further

ORDERED, that the motion to dismiss claims 1, 2, 3, 4, 5, 6, and 9 as alleged against J. Streicher Group, LLC is granted as to claims 3, 4, 5, 6, and 9 but denied as to claims 1 and 2; and it is further

ORDERED that Plaintiff, within 20 days from service of a copy of this order with notice of entry, shall serve and file an amended complaint setting forth the remaining causes of action, the two remaining causes of action against Thomas Brown and the two remaining causes of action against J. Streicher Group, LLC, consistent with the court's decision herein; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days from service of said pleading.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/17/20
DATE

W. FRANC PERRY, 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