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| **Hunter v Total Mtge. Servs., LLC** |
| 2023 NY Slip Op 35125(U) |
| December 1, 2023 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 801927/2023E |
| Judge: Mary Ann Brigantti |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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KINGSLEY HUNTER and EDITH RIVERA,
Plaintiffs,

DECISION and ORDER
Index No. 801927/2023E

-against-

TOTAL MORTGAGE SERVICES, LLC, MIKE GRIMES, individually, MLB RESIDENTIAL LENDING, LLC, and MARTY BRONFMAN, individually,

Defendants.
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**HON. MARY ANN BRIGANTTI**

Upon the foregoing papers, the defendants MLB Residential Lending, LLC ("MLB") and Marty Bronfman ("Bronfman") (collectively, "Defendants") move for an order dismissing the complaint of the plaintiffs Kingsley Hunter ("Hunter") and Edith Rivera ("Rivera") (collectively, "Plaintiffs"), with prejudice, pursuant to CPLR 3211(a)(1), (3), (7), and (8), or in the alternative, transferring this case to Rockland County pursuant to CPLR 511. Plaintiffs oppose the motion.

I. Background

Plaintiffs' complaint alleges that they are owners of property known as 50 Halley Drive, Pomona, New York 10970 (the "Property"). Plaintiffs obtained the right to purchase the Property after a foreclosure sale pursuant to an assignment dated August 1, 2018. They allege that a closing on the Property was subject to a "time of the essence" deadline of August 10, 2018. Plaintiffs engaged the services of defendant Mike Grimes ("Grimes") of defendant Total Mortgage Services, LLC ("TMS") for the purpose of obtaining financing to complete the purchase on or before August 10. Grimes allegedly made guarantees that he would be able to provide Plaintiffs funding for the loan to purchase the Property. As the deadline approached, Grimes failed to respond to Plaintiffs' inquiries about the status of the loan and he ultimately failed to provide funding. Plaintiffs allege that they obtained a further extension to September 21, 2018. Pursuant to this extension, Grimes referred Plaintiffs to Defendants to secure the funding for the loan.

On or about September 13, 2018[1] MLB through its agents "provided a conditional loan approval." Plaintiffs allege that they "worked tirelessly to timely submit the supporting documentation to clear the conditions and did in fact provide all requested documentation." MLB, however, "failed to provide a clear to close despite their knowledge of Plaintiffs time of the essence deadline." Consequently, Plaintiffs lost their $50,000 deposit[2].

Plaintiffs assert various causes of action against the defendants. Relevant for purposes of this motion, Plaintiffs allege causes of action against Bronfman for fraud, fraudulent inducement/concealment, and injurious falsehood. Plaintiffs allege that MLB is vicariously liable for the unlawful conduct of its employee, Bronfman. Plaintiffs also assert a claim of "prima facie tort" against all defendants.

With respect to the fraud claims against Bronfman, Plaintiffs allege that he "represented that the Plaintiff[s] were guaranteed commitment within the time frame allotted herein…[b]ut [Bronfman] knew that this was a false guarantee when made." Plaintiffs allege that Bronfman knew that time was of the essence, and Plaintiff relied upon Bronfman's representations and trusted he would fulfill his promise to Plaintiffs. "Plaintiffs lost $50,000 in their reliance on Defendant." In Plaintiffs' fraudulent inducement/concealment cause of action, they again assert that Bronfman "represented that the Plaintiffs were 'guaranteed' a loan within the time permitted" and "[t]hat misrepresentation induced Plaintiffs to enter into a contract with Defendants to allow Defendant to fund their loan." Plaintiffs allege that Bronfman "knew such assertions to be patently false and intended to induce Plaintiffs' reliance thereon," and "Plaintiffs justifiably relied on the representation in entering into the Agreement with Defendant and inter alia, gave up its right to outsource which Plaintiff was already limited."

In affidavits submitted in opposition to this motion, Plaintiffs allege in pertinent part, that after their initial time-of-essence deadline passed, the seller bank agreed to extend the time to close to September 21, 2018, with the condition that the failure to close on or before September 21, 2018 would forfeit the $50,000 deposit. They allege, "[a]t all times Defendant Bronfman was aware of this." Plaintiffs allege that they "submitted all documents" but were "advised at the eleventh hour that we did not respond to everything" and they often had to point out that

[1] The complaint sets forth a date of "September 13, 2022," however a review of this motion record makes it clear that this is a scrivener's error, and the correct year is 2018.
[2] According to the opposition papers, Plaintiffs thereafter switched to a new mortgage broker and were able to close on the Property.

documents had been previously submitted. Plaintiffs "impressed upon Bronfman how pressing this was" and they could not get more time. On September 20, 2018, Bronfman told Plaintiffs to get at least a 15-day extension to conclude the loan. By October 5, 2018, the loan was still not approved and consequently, the referee released Plaintiffs' $50,000 deposit. Plaintiffs allege "[w]e lost our deposit because Defendant Bronfman made certain assurances that he would be able to secure us the loan by the deadline in our stipulation. It is a major reason why we moved from Defendant Grimes to Bronfman to begin with." Plaintiffs further allege, "Defendant misrepresented that they would be able to help us" resulting in $50,000.00 in damages including mental and emotional distress.

Defendants now move to dismiss the claims asserted against them on various grounds, or alternatively, to change venue to Rockland County.

## II. Applicable Law and Analysis

(1) Venue

While Defendants' motion seeks a change of venue as alternative relief, this Court must resolve that issue before reaching the merits of the motion to dismiss. If venue is found to be improper, a "[c]ourt should not, in the interest of '(o)rderly procedure and proper regard for comity,' consider the underlying merits of the application" (*Ryback v. Lomenzo*, 38 A.D.2d 915 [1st Dept. 1972], quoting *Rosenblatt v. Sait*, 34 A.D.2d 238, 239 [1st Dept. 1970][ "…once Special Term decided that venue should be changed to a county outside of this Department it should have relegated all motions to the transferee court."]; *see also Burton v. Ontra Inc.*, 167 Misc.2d 977 [Sup. Ct., Queens Cty., March 18, 1996, Goldstein, J.]).

Defendants allege that Bronx County is an improper venue because no party resides in the Bronx, the Property is in Rockland County, and all the allegedly unlawful conduct occurred there. However, a defendant seeking to transfer venue on these grounds is required to serve a demand to change venue with their answer or before an answer is served (CPLR 511[a]), and then move for a change of venue within fifteen days after service of such demand, unless plaintiff consents to the change (CPLR 511[b]). Here, Defendants did not demonstrate that they complied with this procedure. Under these circumstances, the court's discretion to grant the motion is exercised "only in certain limitation situations" (*Banks v. New York State & Local Employees' Retirement Sys.*, 271 A.D.2d 252, 252-53 [1st Dept. 2000]). If the only ground sufficient to support the change of venue is that the action was commenced in an improper county, granting the motion would be an improvident exercise of discretion (*id.* at 253).

Here, the only ground supporting a change of venue is that Plaintiffs commenced the action in an improper county. While the Property is located in Rockland County, this action will not "affect the title to, or the possession, use or employment of" the Property (CPLR 507; *see Fish v. Davis*, 146 A.D.3d 485, 486 [1st Dept. 2017]). Since Defendants failed to follow the statutorily required demand procedure, the motion to change venue must be denied.

(2) Motion to Dismiss – Fraud, Fraudulent Inducement, Fraudulent Concealment

The Court next addresses Defendants' motion to dismiss Plaintiffs' fraud causes of action pursuant to CPLR 3211(a)(1) and (7).

On a motion to dismiss pursuant to this section of the CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 AD2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true] ). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 AD2d 98 [1st Dept. 1992]).

A party moving to dismiss under CPLR 3211(a)(7) may submit documentary evidence, however dismissal would only be appropriate where such evidence "conclusively establishes that plaintiff has no cause of action" (*Basis Yield Alpha Fund [Master]*, 115 A.D.3d at 134, citing *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636 [1976]). It is settled, however, that "affidavits, 'which do no more tha[n] assert the inaccuracy of plaintiffs' allegations" cannot be considered as they do not conclusively establish a defense as a matter of law (*Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 438 [1st Dept. 2014], quoting *Tsimerman v. Janoff*, 40 A.D.3d 242, 242 [1st Dept. 2007]; *see also Bou v. Llamoza*, 173 A.D.3d 575 [1st Dept. 2019]).

Factual allegations normally presumed to be true on a motion pursuant to CPLR 3211 (a)(7) may properly be negated by affidavits and documentary evidence (CPLR 3211 [a][1], *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1st Dept. 2005]). When documentary evidence is submitted by a defendant, "the standard morphs from whether the plaintiff has stated a cause of action to whether it has one" (John R. Higgitt, CPLR 3211 [a][7]: Demurrer or Merits - Testing Device?, 73 Albany Law Review 99, 110 [2009]). Dismissal is appropriate under these circumstances only where the documentary evidence flatly rejects a plaintiffs well-pleaded and cognizable claim, or "conclusively establishes a defense to the asserted claims as a matter of law" (*Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 136 [1st Dept. 2014]). In order for evidence submitted under a CPLR 3211 (a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996-997 [2nd Dept. 2010][internal quotation marks omitted]). Again, factual affidavits, "do not constitute documentary evidence within the meaning of the statute" (*Art & Fashion Group Corp.*, 120 A.D.3d at 438; *see also Bou v. Llamoza*, 173 A.D.3d 575, 576 [1st Dept. 2019]).

To state a claim for fraud, a plaintiff must plead: "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages" (*Nicosia v. Board of Mgrs. of the Weber House Condominium*, 77 A.D.3d 455, 456 [1st Dept. 2010]). A claim for fraudulent concealment must allege the same elements, plus an allegation that the defendant had a duty to disclose material information and that it failed to do so (*High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 957 [2d Dept. 2011]). To state a fraudulent inducement cause of action, the claimant must allege "a knowing misrepresentation of a material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 81 [1st Dept. 2010], *lv. dismissed*, 17 N.Y.3d 782 [2011]). Importantly, where a cause of action is based upon a misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]).

In this case, Plaintiffs failed to plead sufficient facts to state the causes of action sounding in fraud. Plaintiffs do not identify the specific material misrepresentation of a present fact made by Bronfman, when such misrepresentation was made, or the context surrounding it (*see, e.g., Bohn v. 176 W. 87th St. Owners Corp.*, 106 A.D.3d 598, 599 [1st Dept. 2013]; *Barlow v. Skroupa*, ___A.D.3d___ 2023 N.Y. Slip Op. 05786 [1st Dept. Nov. 16, 2023]). Plaintiffs allege generally that Bronfman "guaranteed" or made certain assurances that he would be able to secure the loan before the time-of-essence deadline, but Plaintiffs do not explain how they relied on this representation.

Moreover, to constitute fraud, the defendant must have made a material representation of an existing fact, not a mere expression of opinion or hope for a future result, or prediction of a future event (*Albert Apartment Corp. v. Corbo Co.*, 182 A.D.2d 500 [1st Dept. 1992]; *Zaref v. Berk & Michales, P.C.*, 192 A.D.2d 346 [1st Dept. 1993]; *Natropathic Laboratories Intern, Inc. v. SSL Americas, Inc.*, 18 A.D.3d 404 [1st Dept. 2005]). Plaintiffs' complaint, again, does not state what was said, when it was said, or in what context it was given. Absent such facts, the Court is unable to assess whether the "guarantee" or "assurances" purportedly made by Bronfman were unactionable expressions of hope or expectation of a future result, or whether Plaintiffs were justified in relying on such statements (*see International Finance Corp. v. Carrera Holdings Inc.*, 82 A.D.3d 641, 641-42 [1st Dept. 2011], citing *Elghanian v. Harvey*, 249 A.D.2d 206, 206 [1st Dept. 1998]). Accordingly, Plaintiffs' causes of action asserting fraud, fraudulent inducement, and fraudulent concealment against Bronfman must be dismissed.

(3) Motion to Dismiss- Injurious Falsehood, Prima Facie Tort.

Defendants' moving papers allege that Plaintiffs' causes of action for injuries falsehood and prima facie tort are untimely as the applicable statutes of limitations have expired. Plaintiffs' opposition fails to address this argument, and therefore these causes of action are deemed abandoned (*see e.g., Disla v. Biggs*, 191 A.D.3d 501, 503 [1st Dept. 2021]). In any event, Defendants established that the injurious falsehood claim is untimely because it was commenced more than one year after the allegedly injurious statements were made in 2018 (*Clark v. New York Tel. Co.*, 41 N.Y.2d 1069, 1070 [1977]; CPLR 215[3]). The prima facie tort claim asserting injury to a plaintiff's economic interests is subject to a three-year statute of limitations, which begins to run from the date of the tort (*Stacom v. Wunsch*, 173 A.D.2d 401, 401 [1st Dept. 1991], *leave denied*, 78 N.Y.2d 859 [1991]; *Barrett v. Huff*, 6 A.D.3d 1164, 1166 [4th Dept. 2004]; CPLR 214[4]). Here, the allegedly actionable conduct and resulting damages occurred in October 2018 at the latest. This action was commenced on February 2, 2023, well after the statute of limitations expired, even when taking into account the COVID-19 pandemic-related Executive Order that temporarily tolled the limitations period.

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Since the causes of action against Bronfman are dismissed, the cause of action against his alleged employer MLB, seeking to hold it vicariously liable for Bronfman's actions, must also be dismissed. In light of the foregoing, Defendants' motion to dismiss the claims against them is granted, even assuming that plaintiff Rivera had standing to sue, that Plaintiffs sufficiently alleged that they sustained actual damages, and that defendant Bronfman was property served with process.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss is granted, and Plaintiffs' claims against MLB and Bronfman are dismissed pursuant to CPLR 3211(a)(7), and the Clerk of this Court is hereby directed to enter judgment accordingly.

This constitutes the Decision and Order of this Court.

ENTER

Dated: DECEMBER 1, 2023

Mary Ann Brigantti

Mary Ann Brigantti, J.S.C.