

**Adoni v Affordable Luxury Group Inc.**

2024 NY Slip Op 32070(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 652638/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

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JACOB ADONI,

Plaintiff,

- v -

AFFORDABLE LUXURY GROUP INC., AIMEE  
KESTENBERG, SEAN ELAN, and ADAM PROTASS,

Defendants.

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**INDEX NO.** 652638/2021

**MOTION DATE** 06/14/2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 18, 19, 20, 21, 22, 23, 25, 29, 30, 31, 32, 33, 34, and 35

were read on this motion to DISMISS.

LOUIS L. NOCK, J.S.C.

This action arises out of a settlement agreement that ended a prior litigation between the parties. That agreement was amended, and defendants ultimately paid a lower settlement amount to satisfy their obligations. Plaintiff commenced this action claiming fraudulent inducement, civil conspiracy, breach of contract, and breach of the duty of good faith and fair dealing. Plaintiff alleges that defendants, through their counsel, misled plaintiff as to the impact of the COVID-19 pandemic upon their business in order to induce plaintiff to agree to amend the settlement agreement. Before the court is defendants’ motion to dismiss the complaint, and for summary judgment on their counterclaim for breach of the agreement. Upon the foregoing documents, the motion is granted to the extent of dismissing the complaint, and otherwise denied, based on the following memorandum decision.

“On 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]). “[The court] accept[s] the facts as

alleged in the [pleading] as true, accord[ing the nonmovant] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in the nonmovant’s favor (*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]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

The first cause of action for fraud is insufficiently pled. “Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Allegations of fraud must include who spoke, what they said, and the date on which they said it (*E1 Entertainment U.S. LP v. Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]).

Here, plaintiff alleges that on March 25, 2020, defendants, through their counsel, made a number of specific statements to plaintiff’s counsel regarding the health of their business as impacted by the COVID-19 pandemic, all in an effort to induce plaintiff to agree to amend the settlement agreement to reduce defendants’ obligations (complaint, NYSCEF Doc. No. 1, ¶ 25). In order to plead falsity, however a plaintiff must “allege facts from which it is possible to infer

defendants' knowledge of the falsity of their statements when they were made” (*MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 292 [1st Dept 2016] [internal quotation marks and citations omitted]). As amplified by his affidavit, plaintiff alleges that defendants’ counsel’s statements were false based on a press release issued prior to the alleged false representations, and based on statements in a magazine released in August 2020, five months thereafter, which ranked defendant Affordable Luxury Group Inc. as one of the magazine’s “Fastest Growing Companies” (Adoni aff., NYSCEF Doc. No. 31, ¶¶ 13-14). Neither the press release nor the magazine allow an inference that the alleged misrepresentations of defendants’ business performance were false when such allegations were made when considered against the backdrop of the pandemic and its attendant limitations.<sup>1</sup> Further, the press release was publicly available, and thus unavailable as proof of justifiable reliance (*HSH Nordbank v UBS AG*, 95 AD3d 185, 193-194 [1st Dept 2012]; *Rodas v Manitaris*, 159 AD2d 341, 343 [1st Dept 1990] (“Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament”). *White v Davidson* (150 AD3d 610, 611 [1st Dept 2017]), cited by plaintiff, is distinguishable, as the defendants there made specific representations about actions they would take and their prior experience in promoting artists such as the plaintiff, which were not independently verifiable. Further, because the fraud claim is insufficient, the civil conspiracy claim must be dismissed as well (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]).

The contract claims are similarly deficient. Plaintiff alleges that defendants breached the original settlement agreement by failing to pay the original settlement amount. Plaintiff does not, however, seek to rescind the amendment to the settlement agreement, and therefore the

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<sup>1</sup> The court may take judicial notice of the change in conditions caused by the pandemic (*People ex rel. Kaufmann on Behalf of Marongiu v Brann*, 69 Misc 3d 506, 529 [Sup Ct 2020]).

amendment remains in effect. Plaintiff admits in his affidavit that defendants paid him the amount due under the amendment (Adoni aff., NYSCEF Doc. No. 31, ¶¶ 8-11). Thus, plaintiff cannot allege a breach, which requires allegations of, among other things, defendants' default under the amended agreement (*Harris v Seward Park Housing*, 79 AD3d 425 [1st Dept 2010]). The breach of the covenant of good faith and fair dealing claim fails because plaintiff admits he received the benefit of his bargain under the amended agreement (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 13-14 [1st Dept 2011] ["The claim for breach of the covenant of good faith and fair dealing is not viable because defendant did not deprive plaintiff of the benefits of any contract to which plaintiff was a party"]).

Finally, so much of the motion as seeks summary judgment on the counterclaim for breach is denied. A motion for summary judgment may be made "after issue has been joined" (CPLR 3212[a]). A motion made prior to joinder of issue by filing of an answer is premature, and must be denied (*Enriquez v Home Lawn Care and Landscaping, Inc.*, 49 AD3d 496, 497 [2d Dept 2008]). The joinder requirement for summary judgment motions must be strictly adhered to (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Defendants sought summary judgment prior to plaintiff joining issue by replying to the counterclaim, and therefore this branch of the motion must be denied.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent of dismissing the complaint, and otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint; and it is further

ORDERED that the action is severed and continued as to defendants' counterclaim; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on July 10, 2024 at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at [https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary\\_conf\\_forms.shtml](https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml), to the Principal Court Attorney of this Part (Part 38) at [ssyaggy@nycourts.gov](mailto:ssyaggy@nycourts.gov).

This constitutes the decision and order of the court.

ENTER:



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| <u>6/11/2024</u><br>DATE |  | <u>LOUIS L. NOCK, J.S.C.</u>   |
| CHECK ONE:               | <input type="checkbox"/> CASE DISPOSED                           | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION                          |
|                          | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION:             | <input type="checkbox"/> SETTLE ORDER                            | <input type="checkbox"/> SUBMIT ORDER  |
| CHECK IF APPROPRIATE:    | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN              | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE  |