

**Penske v National Holding Corp.**

2025 NY Slip Op 30777(U)

March 6, 2025

Supreme Court, New York County

Docket Number: Index No. 655002/2022

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MARK PENSKE and UNITED ATLANTIC CAPITAL, LLC,  
Plaintiffs,

INDEX NO. 655002/2022

- v -

MOTION DATE \_\_\_\_\_

NATIONAL HOLDING CORP. and B. RILEY WEALTH  
MANAGEMENT HOLDINGS, INC.,

MOTION SEQ. NO. 005

Defendants.

**DECISION + ORDER ON  
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 248, 473

were read on this motion to/for LEAVE TO FILE.

Defendants National Holding Corp. and B. Riley Wealth Management move pursuant to CPLR Rule 3025(b) to file an amended answer to the plaintiffs' amended complaint. Specifically, defendants seek to add counterclaims for (1) fraudulent inducement when the Stock Purchase Agreement (SPA) was executed on February 7, 2020 and seek rescission; (2) fraudulent inducement when the parties executed the Bolanis accounts side letter and seek rescission; (3) fraud on the court; (4) breach of contracts; (5) breach of representations and warranties and the implied covenant of good faith and fair dealing; and (6) legal fees.<sup>1</sup>

As stated on the record on February 26, 2025, defendants' motion to amend its answer to add counterclaims is granted.

<sup>1</sup> The court has also reviewed the motion papers on the motions for summary judgment. (Defendants' motion 009 and plaintiff's motion 010.)

In this 2022 action, plaintiffs allege “breach of contract ... arising out of [defendants’] purchase of all outstanding equity in three UAC-affiliated entities: Financial Services International Corp. (FSIC), United Advisors Services LLC (UAS), and United Advisors LLC (UA)<sup>2</sup>.” (NYSCEF Doc No. [NYSCEF] 34, Amended Complaint [AC] ¶1.)

On the eve of closing, the parties executed a side letter pursuant to which UAC would remove the Bolanis accounts from UA’s books prior to closing and transfer them to UAADC.<sup>3</sup> (NYSCEF 314, SPA, including September 20, 2020 Side Letter at 74<sup>4</sup>.) The parties agreed that defendants would not purchase the Bolanis accounts, but would continue to service the Bolanis accounts, on a subcontractor basis, for fifteen years and they would share the proceeds, the fees, generated by that book of business 50/50. (*Id.*) In exchange for removing the Bolanis accounts from this deal, plaintiffs reduced the purchase price by \$2.9 million (original purchase price: \$10.4 million to \$7.5 million for removing Bolanis accounts.) (NYSCEF 34, AC ¶ 42.) One reason given for this structure was that the parties had informed FINRA that they’re coming over. (NYSCEF 473, Oral argument tr at 30:10-14.)

At the closing, as proof that plaintiffs complied with the side letter, plaintiffs provided defendants on September 11, 2020, with “an Adjusted Gross Margin,” which plaintiffs claimed represented, “the removal of the Bolanis Accounts from the transaction, resulting in a reduction of the Purchase Price.” (NYSCEF 174, Proposed Amended Answer [PAA] ¶ 54.) Defendants also accepted plaintiffs’ representation that

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<sup>2</sup> “UA was majority owned by UAC, and minority-owned by Penske and Pope.” (NYSCEF 34, AC ¶ 4.)

<sup>3</sup> UAADC is “a wholly-owned subsidiary of UA.” (*Id.* ¶ 33.)

<sup>4</sup> NYSCEF pagination.

plaintiffs had transferred the Bolanis Accounts to UAADC, which plaintiffs represented was a subsidiary of UAC. (*Id.* ¶ 56.)

“On the evening of September 11, 2020, after the Closing had taken place, Sandler<sup>5</sup> sent to National’s lawyer the Bolanis Asset Purchase Agreement and three Allonges, but withheld the correspondence and documents exchanged with Bolanis following the execution of the SPA, including Bolanis’s complaints filed with the securities authorities of the State of New Jersey and State of Washington and Bolanis’s threat of litigation.” (*Id.* ¶57; NYSCEF 228, September 11, 2020 email from Sandler at 8:46 pm.)

The issue at the closing, and now on this motion to amend, is plaintiffs’ “2006 acquisition of the Bolanis accounts through a wholly-owned subsidiary of UA – UAADC” (NYSCEF 34, AC ¶ 33) pursuant to an asset purchase agreement (APA).<sup>6</sup> The APA requires prior written approval from Bolanis for UAADC to sell more than 5% of the assets or acquired cash flow of the clients/client accounts. (NYSCEF 201, Asset Purchase Agreement [APA] § VII.) Any sale or transfer of the Bolanis accounts is prohibited until plaintiffs have fully performed under the APA –paid Bolanis \$1.19 million. (*Id.* § X.) The APA states that the sale or transfer of the Bolanis accounts shall constitute default. (*Id.* § XVI(A)(3).) Penske executed a Promissory Note for \$401,300, on behalf of UAADC, which gives Bolanis a security interest in the accounts that plaintiffs acquired. (*Id.* at 18 [§IV of Addendum A to the Asset Purchase Agreement ].) Finally, Penske executed, on behalf of UAADC, a security agreement giving Bolanis a

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<sup>5</sup> Jaclyn Sandler is plaintiffs’ COO. (NYSCEF 177, tr at 11:6-7 [Sandler’s depo].)

<sup>6</sup> Under the APA, the sellers were Chuck Bolanis, Phillip Selden and Bolanis Financial Planning Group (collectively, Bolanis). (NYSCEF 201, APA at 6, 18.)

security interest in the assets sold including the “accounts, client accounts, and client lists.” (*Id.* at 19 [security agreement].) Defendants serviced that debt since 2006 and continued to do so after the September 2020 closing. (NYSCEF 422, Plaintiffs’ MOL in Opposition to Defendants’ Motion for summary Judgment at 14.) While defendants were aware of the Bolanis accounts, they were not aware that UAADC, the owner of the Bolanis accounts, was liable to Bolanis under the APA and was a subsidiary of UA, which defendants purchased from plaintiffs.

In the SPA’s representations and warranties, plaintiffs pledged that “UA has no subsidiaries.” (NYSCEF 35, Stock Purchase Agreement [SPA] § 3.03[d].) Plaintiffs also represented that UA shares are not encumbered (*id.* § 3.03[a]), that, there are no undisclosed liabilities (*id.* § 3.07), that, there is no need for any third party to consent to this transaction (*id.* § 3.04), that, there are no material contracts that have not been disclosed (*id.*), and that that there are not going to be either assigned to the defendants or canceled before the transaction (*id.* § 3.18.)

Defendants allege that soon after the SPA was signed, plaintiffs scrambled to try to get Bolanis to give up his right to have to consent to the transaction and to substitute Penke’s assets for the original collateral consisting of the Bolanis accounts. (NYSCEF 219, Negotiation email changing collateral [“[P]enske” advised me that his former wife has agreed to allow his home to serve as collateral for the personal guarantee he intends to issue that will serve as a substitute for the current collateral, FSIC Corp., UAS, LLC and UA, LLC that are the subject of this acquisition.”]; NYSCEF 220, Negotiation email lifting encumbrances [“This would be adjusting the agreement I

prepared to amend the note lifting encumbrances on FSIC, UA, UAC and using as collateral, [Penske's] home in CT with the personal guarantee.".)

Plaintiffs attack defendants' counterclaims as without merit. "[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal as a *matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], \*3-4 [Sup Ct, NY County 2021].) "When the non-moving party opposes amendment on the ground of futility, the moving party should be prepared in its reply brief to defend the proposed pleading as if it were opposing a motion to dismiss." (*Id.* at 4.)

Plaintiffs argue defendants' fraud claims are "nonsensical" because if true then defendants own the Bolanis accounts even though there was a \$2.9 million reduction in price to carve out the Bolanis accounts from the sale to defendants. The court rejects this argument because plaintiffs misstate defendants' concern. Defendants object to the Bolanis liability on defendants' UA books. The court also rejects plaintiffs' argument that defendants' asserted breaches of the SPA as affirmative defenses are a bar to defendants' counterclaims. Parties can have both. Further, defendants' new allegations support their fraud counterclaims which satisfies CPLR 3016 [b]. Indeed, having earlier asserted such a breach as an affirmative defense precludes a prejudice argument; discovery on this issue should have been completed. In any case, discovery arising from such an amendment is not prejudice. (*Shareholder Representative Servs. LLC v NASDAQ OMX Group, Inc.*, 176 AD3d 632, 633 [1st Dept 2019] [holding that plaintiff's is not prejudiced by defendant's new amendment because "plaintiff failed to

identify any prejudice beyond the purported need for additional discovery, which is insufficient.”].)

Defendants’ fraud claims are not duplicative of their contract claims. “Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty.” (*First Bank of the Ams v Motor Car Funding, Inc.*, 257 AD2d 287, 292 [1st Dept 1999].) Therefore, defendants state a claim for fraud in the inducement.

The court strikes defendants’ fraud on the court claim because defendants failed to defend it. Moreover, “fraud upon the court requires a showing that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.” (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 321 [2014] [internal quotations omitted].) Under defendants’ theory where one party asserts that the opposing allegations are untrue, every case filed in any court with an opponent would be a fraud on the court.

Plaintiffs object to defendants’ counterclaim IV and V for breach of contract because it is already pled as an affirmative defense. In the absence of law, the court rejects plaintiffs’ objection, again.

Plaintiffs also challenge defendants’ contract damages or the lack thereof. Dismissal on this ground is not warranted. There is a difference between injury and damages and to establish liability for breach of contract there must be an injury to the

complaining party regardless of whether that party suffered actual damages as a result of such injury. In *Kronos, Inc. v AVX Corp.*, the Court of Appeals determined that when a claim for tortious interference of contract accrues, the statute of limitations does not start to run until plaintiff sustains an injury. (81 NY2d 90 [1993].), In its analysis, the Court detailed the differences between tort and contract principles, stating

“Nominal damages are always available in breach of contract actions, but they are allowed in tort only when needed to protect an ‘important technical right.’ For example, nominal damages have been recognized in tort to protect a landowner’s right to be free of trespass, but that exception from the established rule that actual injury must be shown is warranted because a continuing trespass may ripen into a prescriptive right and deprive a property owner of title to his or her land. There is no similarly compelling reason for departing from the actual injury rule when the trespass alleged is not to real property but to a chattel or, as in the present case, to an intangible property right arising under contract. In such cases, actual loss must be demonstrated. ...

Fundamentally different functions are served by an action in tort on the one hand, and an action in contract on the other, and an understanding of that functional difference is critical to understanding why nominal damages are appropriate in one and not in the other. Contract liability is ‘imposed by the law for the protection of a single, limited interest, that of having the promises of others performed ... The law of torts ... is concerned with the allocation of losses arising out of human activities.’ In other words, a party’s rights in contract arise from the parties’ promises and exist independent of any breach. Nominal damages allow vindication of those rights. In tort, however, there is no enforceable right until there is loss. It is the incurring of damage that engenders a legally cognizable right. To recognize nominal damages element of tort claims would be to wrest the cause of action from its traditional purposes--the compensation of losses-- and to use it to vindicate nonexistent or amorphous inchoate rights when unlike in trespass to property, there is no compelling reason to do so.” (*Id.* at 95-97 [internal citations omitted].)

The Court’s determination that nominal damages are always available for claims of breach of contract implies that the breach of the contract in and of itself is the injury to which plaintiff would be entitled to nominal damages at the least if it could not show actual damages. The Appellate Division, First Department has also sustained breach of contract claims in the absence of actual damages on the ground that nominal damages

are available for those claims. (See *NGM Mgt. Group, LLC v Bareburger Group, LLC*, 224 AD3d 600, 602 [1st Dept 2024] [declining to dismiss breach of contract claim, even though defendant attempted to demonstrate no damages were suffered, on the ground that nominal damages are available]; *Gordon v Schaeffer*, 176 AD3d 431, 431 [1st Dept 2019] [holding that “plaintiff’s motion as to liability need not be denied because he failed to demonstrate damages as a result of the breach”]; *Matter of Schleifer v Yellen*, 158 AD3d 512, 513 [1st Dept 2018] [sustaining breach of contract claim even though respondents argued “that petitioners were not injured by the delay in providing the financial statement, [because] ‘[n]ominal damages are always available in breach of contract action’” (internal citation omitted)].<sup>7</sup> In any case, defendants deny they owe plaintiffs 50% of the revenue from the Bolanis accounts under the side letter which would constitute damages. Further, owing the Bolanis debt would constitute damages, particularly if plaintiffs stripped the accounts from UA.

Accordingly, it is

ORDERED that the defendants’ motion for leave to amend the answer is granted, and the amended answer in the proposed form annexed to the moving papers

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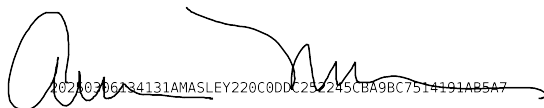
<sup>7</sup> However, in some cases, the First Department has found that where a party cannot demonstrate that it suffered damages, the claim must be dismissed. (See *Tillage Commodities Fund L.P., v SS&C Tech., Inc.*, 151 AD3d 607, 608 [1st Dept 2017] [dismissing breach of contract where plaintiff “cannot demonstrate that it suffered any damages from defendant’s failure to turn over” books and records, a right guaranteed by contract on a CPLR 3211 motion]; *Milan Music Inc. v Emmel Communications Booking Inc.*, 37 AD3d 206, 206 [1st Dept 2007] [finding that “plaintiffs’ alleged damages amount to nothing more than conjecture as to what could have been earned,” and thus “[w]ithout a clear demonstration of damages, there can be no claim for breach of contract”]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988] [“In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based ( internal citations omitted)].)

shall be deemed served upon service of a copy of this order with notice of entry thereof;  
and it is further

ORDERED that defendants shall file the amended answer in NYSCEF labeled as  
“Answer (Amended)”; and it is further

ORDERED that the plaintiffs shall serve a response to the amended answer  
within 20 days from the date of this order; and it is further

ORDERED that the parties shall submit an expedited discovery schedule by  
March 26, 2025.



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3/6/2025  
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: