SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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TRUCKLEY RESIDENTIAL LLC,

Plaintiff,

- v -

LINDSAY TAYLOR, NICOLE TAYLOR, HOLLAND & KNIGHT LLP, JAMES SPITZER

Defendant.

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INDEX NO. 651323/2024

MOTION DATE 10/08/2024

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, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants' motion to dismiss is granted in part and denied in part.

Background

In March of 2021, Truckley Residential LLC ("Plaintiff") bought a Manhattan apartment from Lindsay Taylor and Nicole Taylor (collectively, the "Taylor Defendants"). Plaintiff was represented in the transaction by James Spitzer, Esq., of Holland and Knight LLP (collectively, the "Attorney Defendants"). The Taylor Defendants are both residents of Australia, so the sale of the apartment was subject to the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"), which would levy a tax against the purchaser. They believed, however, that they were eligible for a waiver under FIRPTA and so the Taylor Defendants applied for the exemption with the IRS. A FIRPTA withholding provision was included in the sales contract, stating that after certain preconditions were met, Plaintiff was to put 15% of the purchase price in escrow that would be paid to the IRS if the exemption was denied. The withholding provision

also required the Taylor Defendants to notify Plaintiff when receiving IRS notifications concerning the exemption application.

The IRS denied the Taylor Defendants' first FIRPTA exemption application. Plaintiff alleges that the Taylor Defendants never told them or their attorneys about the denial. Plaintiff also alleges that the Attorney Defendants failed to release the escrow funds to the IRS, and that as a result Plaintiff owes the IRS penalties and interest fees on the penalties. As a result, Plaintiff brought the underlying proceeding seeking to recover damages from the Taylor Defendants and the Attorney Defendants. Ultimately, the Taylor Defendants pursued an amended filing with the IRS and were able to secure the exemption as well as a refund on a portion of the FIRPTA tax already paid. The Taylor Defendants bring the present pre-answer motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017). CPLR § 3211(a)(3) states that a motion to dismiss can be brought when "the party asserting the cause of action has not legal capacity to sue."

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether

the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

The Taylor Defendants move to dismiss the complaint in its entirety under CPLR § 3211(a)(3), on the grounds that the Plaintiff lacks the capacity to commence and maintain this action. They also move to dismiss the first and second causes of action under CPLR § 3211(a)(7). Plaintiff opposes the motion. For the reasons that follow, the motion is granted as to the request for punitive damages and denied as to the rest.

Plaintiff Does Not Lack Capacity to Sue

The Taylor Defendants argue that Plaintiff lacks the capacity to sue, because Plaintiff has not complied with certain requirements in New York's limited liability company law. Specifically, it is alleged that Plaintiff failed to file proof of the publication of its formation as required by NY LLC Law § 206 and failed to allege that it was duly authorized by its membership to commence and prosecute the underlying proceeding. Plaintiff argues that "even if this is true, in an abundance of caution" Plaintiff is currently curing the alleged publication defect, and they have attached evidence to that effect. The First Department has held that Section 260 precludes an LLC from maintaining an action in New York courts "unless and until it complies with that requirement." *Barklee Realty Co. LLC v. Pataki*, 309 A.D.2d 310, 311 (1st Dept. 2003). As Plaintiff has cured the defect, and in the interests of hearing cases on the merits, the complaint will not be dismissed for this reason.

The Taylor Defendants' second argument for why Plaintiff lacks the capacity to sue is that they have failed to plead that it was authorized by its members to bring the suit. In support of this argument, the Taylor Defendants cite to a series of trial-level decisions. *See, e.g., Alternative Global Six, LLC v. Durham Homes LLC,* 2024 WL 1623311, **6 (Sup. Ct. NY. Cty. April 12, 2024). Plaintiff is a limited liability company run by Caroline Born Gleser and Zachary Gleser, a married couple who are also the only members of the business entity. Plaintiff has submitted an affidavit by Caroline Born Gleser and a copy of the operating agreement, which states that the company is run by the members jointly. It also does not require any specific formalities to bring a suit. As the operating managers, the Glesers would have the ability to bring lawsuits on behalf of the company. The Taylor Defendants have not established that they have the standing to challenge the decisions made on behalf of the LLC, nor that the Glesers have violated Plaintiff's operating agreement. Here they have not met their burden of showing that Plaintiff lacks the capacity to sue.

Plaintiff Has Sufficiently Pled Damages

The Taylor Defendants allege that the first and second causes of action, for breach of contract and (in the alternative) breach of the implied covenant of good faith and fair dealing fail to adequately plead damages. Essentially, the Taylor Defendants argue that the penalties and fees the IRS has assessed against Plaintiff are speculative future damages. In response, Plaintiff alleges that they have made interest payments totaling $265,273.99 on the fees and that they have suffered negative tax consequences as a result of the FIRPTA tax levied against them. Damages that "are too speculative" cannot support a claim. *Lloyd v. Wheatfield,* 67 N.Y.2d 809, 810 (1986). But when damages are "proximate in effect, neither speculative nor uncertain in character and were reasonably foreseen as a consequence of the wrong", then they can be

recovered. *Id.* The Taylor Defendants argue that Plaintiff's damages are wholly speculative because "there is a possibility that Plaintiff could successfully argue to the IRS that the penalties and fees purportedly assessed should be reversed."

But this argument fails to show that the damages alleged by Plaintiff, the payment of interest and the negative tax implications of the penalties assessed, is speculative. Rather, (and certainly under the favorable inference standard of a motion to dismiss), it is speculative that the alleged damages will be remedied by the IRS reversing their stance. Furthermore, while the Taylor Defendants argue that Plaintiff has failed to adequately prove that they have paid interest on the IRS fees, under a notice pleading standard damages have been sufficiently alleged and Plaintiff does not bear the burden of proving those damages on this motion to dismiss. It is the Taylor Defendants who have failed to meet their burden of showing that the first two causes of action should be dismissed for failure to plead damages.

Plaintiff's Second Cause of Action is Not Duplicative

The Taylor Defendants argue that the claim for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim and therefore should be dismissed. Generally, if a good faith claim "arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." *Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 104 (1st Dept. 2014). But the complaint clearly states that the good faith claim is pled in the alternative. CPLR § 3014 permits for claims to be "stated alternatively or hypothetically." Claims pled in the alternative to a breach of contract claim should not be dismissed prematurely. *Audthan LLC v. Nick & Duke, LLC*, 42 N.Y.3d 292, 304 (2024); *see also Citi Mgt. Group, Ltd. v. Highbridge House Ogden, LLC*, 45 A.D.3d 487, 487 (1st Dept. 2007). At this time, dismissal of the second cause of action would be premature.

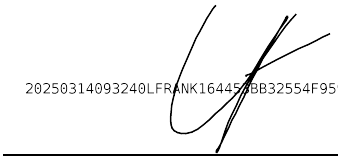
Punitive Damages Are Inappropriate Here

The Taylor Defendants argue that the first two causes of action should be dismissed to the extent that they seek punitive damages because the alleged wrongdoing has not reached the level of outrage required under New York law. The general rule in New York is that punitive damages is only awarded for "outrageous or oppressive intentional misconduct" with recklessness that is "close to criminality." *Camillo v. Geer*, 185 A.D.2d 192, 194 (1st Dept. 1992). Ordinary claims for breach of contract do not allow for the recovery of punitive damages, but only when the "breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations." *Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 613 (1994). Furthermore, in a breach of contract action punitive damages are not recoverable when "no public rights are alleged to be involved." *2470 Cadillac Resources, Inc. v. DHL Express (USA), Inc.*, 84 A.D.3d 697, 699 (1st Dept. 2011). Here, even taking all facts alleged by Plaintiff as true and giving them every favorable inference, there is no behavior alleged that meets this standard. Therefore, dismissal of the first two causes of action to the extent that they seek punitive damages is proper. Accordingly, it is hereby

ADJUDGED that the defendants' motion to dismiss the first two causes of action is granted to the extent that they seek punitive damages; and it is further

ADJUDGED that the rest of defendants' motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.



3/13/2025
DATE

LYLE E. FRANK, 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**