SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

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ALICIA VERGARA,

Plaintiff,

- v -

BIBHU, LLC, BIBHU MOHAPATRA, ROBERT ROANE BEARD

Defendants.

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INDEX NO. 655395/2016

MOTION DATE 06/23/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff Alicia Vergara ("Vergara") commenced this action seeking damages from defendants Bibhu, LLC, Bibhu Mohapatra ("Mohapatra") and Robert Roane Beard ("Beard") for the failure to repay a loan in accordance with the terms of a May 15, 2014, Promissory Note.

Vergara asserts six claims against the three defendants for fraud, breach of contract, account stated, unjust enrichment, conversion, and negligent infliction of emotional distress.

ALLEGED FACTS

Prior to May 2014, Vergara shared a close friendship with Mohapatra and Beard, who were her neighbors. Vergara alleges that she traveled around the world with Mohapatra and Beard, who afforded her access to "the world of high fashion and design" (Amended Verified Complaint at 10, ¶ 51).

According to Vergara, Mohapatra and Beard, who are married, owned a controlling beneficial interest in Bibhu, LLC, Mohapatra's fashion business. Around May 2014, Vergara alleges that Mohapatra and Beard solicited her to loan Bibhu, LLC funds for production costs for the LLC's "Fall Line 2014 orders" (*id.* at 3, ¶ 12(a)). On May 15, 2014, Mohapatra executed a Promissory Note (the "Note") on behalf of Bibhu, LLC, promising that Bibhu, LLC would repay Vergara the principal sum plus interest by November 15, 2014 (Promissory Note, Exhibit A at 1, ¶ 1). Vergara wired $250,000.00 in installments to a bank account entitled "Bibhu Mohapatra/Bibhu LLC" from May 12, 2014, to July 31, 2014 (Amended Verified Complaint at 3, ¶ 11).

Vergara alleges that Mohapatra and Beard used the funds for Mohapatra and Beard's own salaries and consulting fees rather than to produce their fall clothing line as promised (Amended Verified Complaint at 5, ¶ 13).[1]

By November 15, 2014, the loan was not repaid, and on November 4, 2015, Vergara's attorney sent a demand letter to Mohapatra insisting that the loan be repaid within ten business days. Since November 14, 2015, Vergara alleges that the loan has not been fully repaid.

PROCEDURAL HISTORY

On August 10, 2017, the Court granted defendants' motion for a stay on the basis that Bibhu, LLC had filed for chapter 11 bankruptcy.

By April 7, 2025, the Bankruptcy Proceeding had been resolved, the stay had been lifted and the action was restored to this Court's active calendar.

[1] In their Memorandum of Law in Support of the motion to dismiss, Mohapatra and Beard confirm that Beard was a "consultant working with Bibhu, LLC" (Memorandum of Law in Support at 2).

PENDING MOTION

On July 8, 2025, Mohapatra and Beard moved for an order granting their motion to dismiss plaintiff's Amended Complaint pursuant to CPLR § 3211(a)(7).

The motion is granted to the extent set forth below.

DISCUSSION

Standard of Review.

A court may dismiss a cause of action within a party's complaint when "the pleading fails to state a cause of action" (CPLR § 3211(a)(7)). When reviewing a motion to dismiss for failure to state a cause of action, a court must "give the complaint a liberal construction, accept the allegations as true and provide [the plaintiff] with the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017] [internal quotation marks omitted]). In deciding the motion, a court will not weigh "[w]hether a plaintiff can ultimately establish its allegations" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). And while a motion for summary judgment requires that "the court search[] the record and assess[] the sufficiency of the parties' evidence," on a motion to dismiss, the court "merely examines the adequacy of the pleadings" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotations omitted]).

When a cause of action is based on fraud, CPLR § 3016(b) requires a heightened pleading standard, providing that "the circumstances constituting the wrong shall be stated in detail" (CPLR § 3016(b); *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Such circumstances are stated in sufficient detail when "the facts . . . permit a reasonable inference of the alleged conduct" (*Pludeman*, 10 NY3d at 492, citing *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 [2001]). However, when a material fact is "peculiarly within the

knowledge" of the party charged with the fraud, a court should consider on a 3211 motion whether any deficiency in the pleadings might be cured later in the proceeding (*id.*, citing *CPC Intl. v McKeeson Corp.*, 70 NY2d 268, 285–86 [1987]).

Vergara has alleged sufficient facts for the Court to pierce Bibhu, LLC's corporate veil.

Mohapatra and Beard contend that the Court should dismiss Vergara's claims for breach of contract, unjust enrichment, and account stated because they were not parties to the May 15, 2014, Note between Vergara and Bibhu, LLC. However, Vergara has alleged facts permitting a "reasonable inference" that Mohapatra and Beard may have abused Bibhu, LLC's corporate form to perpetuate a fraud or other wrong against her (*Pludeman*, 10 NY3d at 492).

Ordinarily, a corporation is legally construed to exist "independently of its owners . . . limiting the liability of the corporate owners" (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). However, a court may enable a party to impute liability onto the corporate owners for the alleged misconduct of the corporation through the doctrine of piercing the veil (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). For a court to allow a party to pierce the corporate veil, the party bears a "heavy burden" to show that (1) the corporate owners exercised "complete domination" over the corporation with respect to the contested transaction and (2) such domination "was used to commit a fraud or wrong against the plaintiff," resulting in the plaintiff's injury (*Skanska USA Bldg. Inc.*, 146 AD3d at 12, quoting *Matter of Morris*, 82 NY2d at 141). When considering domination for the purpose of veil-piercing, courts weigh several factors:

> "[1] the disregard of corporate formalities; [2] inadequate capitalization; [3] intermingling of funds; [4] overlap in ownership, officers, directors and personnel; [5] common office space or telephone numbers; [6] the degree of discretion demonstrated by the alleged dominated corporation; [7] whether the

> [entities] are treated as independent profit centers; and [8] the payment or guarantee of the corporation's debts by the dominating entity" (*Cortlandt St. Recovery Corp. v Bonderman*, 226 AD3d 103, 105 [1st Dept 2024], quoting *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]).

Because a decision to pierce the corporate veil will "necessarily depend on the attendant facts and equities," there are no conclusive rules that govern the various circumstances when this power may be exercised (*Baby Phat Holding Co.*, 123 AD3d at 407).

Allegations that support Mohapatra and Beard's complete domination of Bibhu, LLC.

Vergara's complaint adequately alleges an overlap in the ownership, officers, directors and personnel of Bibhu, LLC and defendants Mohapatra and Beard. In *MPEG LA, LLC v GXI Intl., LLC*, the First Department held that there were sufficient allegations supporting an improper overlap between a limited liability corporation and its corporate officers because the plaintiff alleged that the sole members and managers of the LLC were husband and wife (126 AD3d 641, 642 [1st Dept 2015]). Vergara's complaint alleges the same relationship: that Mohapatra and Beard, who are married, "co-owned . . . a majority interest [in a] business entity called Fly Art, LLC. which owned a controlling beneficial interest in BIBHU, LLC," that Mohapatra "exercised dominion and control over the finances and business operations of . . . BIBHU, LLC," and that Beard was "Mohapatra's partner in the business endeavors of BIBHU, LLC" (Amended Complaint at 2, ¶¶ 3, 4). Like the allegations in *MPEG LA, LLC*, Vergara's allegations permit the inference that Mohapatra and Beard were the sole members or managers of Bibhu, LLC, which is sufficient to allege an improper overlap among owners, directors, officers or personnel.

Vergara's complaint further provides facts suggesting an intermingling of funds between Mohapatra and Bibhu, LLC. The complaint states, "The Defaulted Loan principal of $250,000.00 was paid by [Vergara] to Mohapatra and BIBHU, LLC. to a bank account entitled

'Bibhu Mohapatra/Bibhu LLC' at JP Morgan Chase Bank" (Amended Complaint at 3, ¶ 11). She also alleges that the funds were "wrongfully taken by [Mohapatra and Beard]" to pay for their own "salaries and 'consulting fees,'" (*see id.* at 5, ¶ 13). Mohapatra and Beard confirm that Beard was "Mohapatra's husband and *a consultant working with Bibhu, LLC*" (Memorandum of Law in Support at 2 [emphasis added]). Thus, the bank account containing Mohapatra's full name and the allegation that the funds were diverted for the defendants' personal benefit permit an inference that Mohapatra and Beard intermingled Bibhu, LLC's funds with their own.

Thus, when reading the allegations in Vergara's complaint with "the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc., Series 2006-FM2*, 30 NY3d at 582), there are sufficient facts showing that Mohapatra and Beard exercised complete domination and control over Bibhu, LLC in the loan transaction between Bibhu, LLC and Vergara.

Allegations that support a claim for fraud in connection with the alleged false promises of Mohapatra and Beard.

"[D]omination, standing alone, is not enough" to pierce the corporate veil (*Matter of Morris*, 82 NY2d at 141). The plaintiff must also demonstrate "some showing of a wrongful or unjust act" (*id.* at 141–42). Vergara has adequately alleged that Mohapatra and Beard may have used Bibhu, LLC to commit a fraud or other wrong against her.

To state a cause of action for fraud, the plaintiff must plead that (1) the defendant made a material misrepresentation of fact, (2) the defendant had knowledge of the misrepresentation's falsity, (3) the defendant intended the plaintiff to rely on the misrepresentation, (4) the plaintiff justifiably relied on the misrepresentation, and (5) the plaintiff suffered pecuniary loss from such reliance (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1, 8 [1st Dept 2019]).

Mohapatra and Beard contend that Vergara failed to plead a material misrepresentation of fact because their allegedly false promises about future action are not actionable as fraud (Memorandum of Law in Support at 7–8). They also assert that Vergara disclaimed reliance on the allegedly false promise when the promissory note contained no promises about how the funds were to be specifically used (*id.* at 8). A promise to do something in the future may constitute a material misrepresentation of fact when the promise "falsely represents the [defendant's] state of mind and the state of [the defendant's] mind is a fact" (*Tribune Printing Co. v 263 Ninth Ave. Realty, Inc.*, 57 NY2d 1038, 1041 [1982], quoting *Deyo v Hudson*, 225 NY 602, 612 [1919]). However, when a promise was made during contract negotiations and the final contract contains a "specific disclaimer . . . that the agreement was executed in reliance upon . . . contrary oral representations," that false promise cannot form the basis of a fraud claim (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320–21 [1959], citing *Cohen v Cohen*, 3 NY2d 813 [1957]). In *Danann Realty Corp. v Harris*, the Court of Appeals held that false statements allegedly made during contract negotiations did not give rise to a fraud claim when the contract expressly provided that "neither party rel[ied] upon any statement or representation, not embodied in this contract, made by the other" (*id.* at 320).

Mohapatra and Beard argue that the Note lacks a provision that the proceeds from the loan be specifically used to fund production costs, as Vergara alleges she was promised (Memorandum of Law in Support at 8; Amended Verified Complaint at 3–4, ¶¶ 12[a]–[b]). As such, they contend that she cannot have justifiably relied on their promise that the funds be used in such a manner. But the case they cite—*Lewin Chevrolet-Geo-Oldsmobile, Inc. v Bender* (225 AD2d 916 [3d Dept 1996])—involved a dispute where the written terms of a contract *expressly* contradicted the allegedly fraudulent statements (*see id.* at 917–18). Here, the Note did not

contain terms that expressly contradicted the alleged purpose of the loan's proceeds (*see* Promissory Note, Exhibit A). The Note also did not contain a merger clause or a "specific disclaimer" providing that Vergara did not rely on the defendants' oral representations (*see Danann Realty Corp.*, 5 NY2d at 320; *see* Promissory Note, Exhibit A). Absent such an express contradiction or a specific disclaimer, the Note's mere lack of a stated purpose for the proceeds of the loan cannot defeat Vergara's fraud claim at this stage of the litigation. And because the allegedly false promise involves a fact "peculiarly within the knowledge of the [defendants]," the Court holds that Vergara has stated facts supporting a material misrepresentation of fact (*Pludeman*, 10 NY3d at 492).

Mohapatra and Beard's argument that Vergara has not adequately pleaded justifiable reliance rests on another basis for her fraud claim: that the defendants misrepresented that her loan would be senior to other liens of Bibhu, LLC (Memorandum of Law in Support at 8–11). The Court need not address this argument because Mohapatra and Beard's allegedly false promises about the purpose of the loan form a valid basis of her fraud claim.

Accordingly, Vergara has adequately alleged a material misrepresentation of fact and her justifiable reliance on such misrepresentation. As Mohapatra and Beard do not contest that Vergara adequately pleaded the other elements of fraud— knowledge of the misrepresentation's falsity, intent to induce reliance, and plaintiff's pecuniary loss—the Court holds that she has stated a viable claim of fraud and denies dismissal of her claim against the defendants.

To summarize, an officer or director of a corporation may be held personally liable for a breach of the corporation's obligations when the officer or director "acts for . . . personal, rather than the corporate interests" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002], citing *Hoag v Chancellor, Inc.*, 246 AD2d 224, 230

[1st Dept 1998]). Giving Vergara "the benefit of every favorable inference," Vergara's complaint alleges that Mohapatra and Beard used Bibhu, LLC for their own personal interests when (1) Mohapatra and Beard exercised complete domination over Bibhu, LLC and (2) the complete domination was used to perpetrate a fraud or other wrong against Vergara, causing her pecuniary loss (*see Nomura Home Equity Loan, Inc., Series 2006*-FM2, 30 NY3d at 582). The Court thus allows Vergara to pierce Bibhu, LLC's corporate veil and denies dismissal of her causes of action against Mohapatra and Beard for fraud, breach of contract, and account stated.

Vergara's claims for conversion and unjust enrichment are duplicative of her breach-of-contract claim.

Conversion.

Conversion occurs when a defendant, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). A cause of action exists for the conversion of money when "there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund" (*id.*, quoting *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1st Dept 1990]). "A conversion claim," however, "cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff" (*Interstate Adjusters, Inc. v First Fid. Bank, NA*, 251 AD2d 232, 234 [1st Dept 1998]; *accord 2497 Realty Corp. v Fuertes*, 232 AD3d 451, 454 [1st Dept 2024]). The conversion claim must contain "independent facts sufficient to give rise to tort liability" (*Fesseha v TD Waterhouse Investor Servs.*, 305 AD2d 268, 269 [1st Dept 2003]).

Vergara's conversion claim against Mohapatra and Beard is wholly predicated on her breach-of-contract claim. Her complaint states only that "Defendants are in possession of property belonging to [Vergara], and despite repeated demands, will not return that property" (Amended Complaint at 9, ¶ 45). The section for breach of contract refers to the same subject matter, alleging that "[Vergara] performed all of her obligations under the [Note]. Defendants intentionally breached the [Note] by not performing their obligations" (*id.* at 8, ¶¶ 31–32). Those obligations involved "Mohapatra . . . to cause his limited liability company BIBHU, LLC. to repay the Defaulted Loan to [Vergara] no later than November 15, 2014" (*id.* at 2, ¶ 9). Because Vergara's breach-of-contract allegations wholly encompass her conversion allegations, the Court dismisses Vergara's claim for conversion against Mohapatra and Beard.

Unjust enrichment.

Unjust enrichment is a claim based in a quasi-contract theory, created by the law "in the absence of any agreement" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005], quoting *State of New York v Barclays Bank of NY*, 76 NY2d 533, 540 [1990]). The existence of a "valid and enforceable written contract governing a particular subject matter" precludes recovery under an unjust enrichment theory when the events "aris[e] out of the same subject matter" (*id.*, quoting *Clark-Fitzpatrick, Inc. v Long Is. RR Co.*, 70 NY2d 382, 388 [1987]). In *Rosetti v Ambulatory Surgery Center of Brooklyn, LLC*, the First Department held that a plaintiff's claim for unjust enrichment was not duplicative of a breach-of-contract claim because the unjust enrichment claim was based on separate allegations that the defendant forged the plaintiff's name on loan documents (125 AD3d 548, 549 [1st Dept 2015]).

Because Vergara has alleged facts sufficient for this Court to permit the imposition of liability on Mohapatra and Beard for Bibhu, LLC's alleged breach of the Note, Vergara's unjust

enrichment claim is duplicative of her breach-of-contract claim against them. Vergara only states that "Defendants have been knowingly benefitted at [Vergara's] expense" and "There is no adequate remedy at law" (Amended Complaint at 9, ¶¶ 40, 41). The improper benefit that Vergara alleges involves the same subject matter as her breach-of-contract claim: that Mohapatra and Beard possessed the proceeds of her loan and failed to repay as stipulated by the Note (*see id.*). Accordingly, the Court dismisses Vergara's unjust enrichment claim against Mohapatra and Beard because there is no independent basis on which to hold them liable.

Vergara's complaint fails to allege the facts required for a claim of negligent infliction of emotional distress.

To be liable for negligent infliction of emotional distress, a defendant must engage in "a breach of a duty of care resulting directly in emotional harm" (*Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 9 [1st Dept 2023]). The breach must unreasonably endanger the plaintiff's physical safety or cause the plaintiff to fear for the plaintiff's own safety (*Winslow v New York-Presby./Weill-Cornell Med. Ctr.*, 203 AD3d 533, 534 [1st Dept 2022]). Further, the emotional harm must present with "residual physical manifestations" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 3 [2008], quoting *Johnson v State of New York*, 37 NY2d 378, 381 [1975]). And the emotional harm must be "a direct, rather than a consequential, result of the breach" that possesses "some guarantee of genuineness" (*id.*, quoting *Ferrara v Galluchio*, 5 NY2d 16, 21 [1958]).

Vergara's claim of negligent infliction of emotional distress is wholly unsupported by the Amended Complaint. First, Vergara alleged that Mohapatra and Beard engaged in intentional, not negligent, misconduct when they failed to repay the loan and misappropriated the proceeds (Amended Complaint at 3–4). Further, the Amended Complaint only states that Vergara suffered "extreme emotional distress," but it does not allege in any specificity the residual physical

manifestations of such distress (*see id.* at 10, ¶¶ 50–52). Finally, Vergara did not plead that Mohapatra and Beard's misconduct caused her to suffer any endangerment to or fear for her physical safety (*see id.*).

Notwithstanding those deficiencies, Vergara contends that Mohapatra and Beard's misconduct involved a breach of "a quasi-fiduciary relationship and responsibility and a duty to . . . not deceive or cheat a good friend" (*id.* ¶ 51). Vergara first does not specify what type of fiduciary relationship existed between Mohapatra, Beard and her (*see id.* at 10–11). Vergara also offers no support for her contention that the breach of a fiduciary duty—rather than "a breach of a duty of care" (*Brown*, 215 AD3d at 9) under a negligence theory—can give rise to a cause of action for negligent infliction of emotional distress (*see* Memorandum of Law in Opposition at 10–11).

As such, the Court dismisses Vergara's claim of negligent infliction of emotional distress against Mohapatra and Beard.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion of defendants Bibhu Mohapatra and Robert R. Beard to dismiss the plaintiff's fourth, fifth, and sixth causes of action for unjust enrichment, conversion, and negligent infliction of emotional distress is granted; and it is further

ORDERED that the balance of relief requested is denied; and it is further

ORDERED that, within twenty (20) days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119, New York, NY 10007); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that defendants Bibhu Mohapatra and Robert R. Beard file an answer to plaintiff Alicia Vergara's Amended Verified Complaint within ten (10) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties appear for a virtual preliminary conference via MS Teams on October 29th, 2025, at 10:00 am.

This constitutes and the decision and order of this Court.

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9/25/2025
DATE

SABRINA KRAUS, 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**