

**Ascendus Inc. v Foley**

2025 NY Slip Op 33748(U)

October 2, 2025

Supreme Court, New York County

Docket Number: Index No. 654829/2023

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12M

Justice

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INDEX NO. 654829/2023

ASCENDUS INC. P/K/A ACCION EAST INC.,

MOTION DATE 06/06/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOSEPH WILLIAM FOLEY, NADA FOLEY, RHYTHM RYDE HOLDINGS LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

DISMISSAL

FACTUAL BACKGROUND

This action arises out of a business loan made by Plaintiff, a credit union authorized to do business in New York, to Defendant Rhythm Ryde Holdings LLC ("RRH"). On December 5, 2022, the parties executed a Promissory Note in the principal sum of \$19,210.00. (NYSCEF Doc No. 18). The Note identifies RRH as Borrower, Defendant Nada Foley as Co-Borrower, and Defendant Joseph Foley as Cosigner. The loan was to be repaid in fifty-nine consecutive monthly installments of \$408.37, beginning January 2023.

Plaintiff alleges that Defendants made only the first six payments (January through June 2023), then defaulted, leaving an outstanding balance of \$19,500.45. Plaintiff further alleges that monthly account statements were sent to Defendants, which were retained without objection, resulting in an account stated.

The Verified Complaint asserts two causes of action: (1) breach of promissory note; and (2) account stated, against all Defendants, including Joseph Foley and Nada Foley individually.

Defendants now move to dismiss the Complaint as to Joseph Foley and Nada Foley pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7). In the alternative, they seek severance of the individual claims under CPLR 603. Their principal argument is that the Note lacks a “personal guarantee” section or waiver of LLC liability, and that they signed only in a representative capacity.

Plaintiff opposes the motion and cross-moves pursuant to CPLR 3025(b) for leave to amend the Complaint to add factual detail and assert additional claims for fraud and piercing the corporate veil, alleging that the individual Defendants have misused the corporate form to perpetrate creditor fraud in multiple similar matters pending in this Court.

### LEGAL STANDARD

#### *Motion to Dismiss*

Pursuant to CPLR 3211 (a)(1) “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Pursuant to CPLR 3211 (a)(3) “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has not legal capacity to sue.” “In general a party's competence to commence an action is presumed” and, thus, a party seeking to dismiss a complaint pursuant to CPLR 3211 (a)(3) bears “the burden of demonstrating that the plaintiff was not competent” (*Vasilatos v. Dzamaba*, 148 AD3d 1275, 1276 [3d Dept 2017]).

Pursuant to CPLR 3211 (a)(7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion, the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal

theory. (See CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980)). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. (See *Leon v Martinez*, 84 NY2d 83, 87 (1994)).

#### *Severance*

Pursuant to CPLR 603, “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of others.”

#### *Amend Pleadings*

Pursuant to CPLR 3025(b), “A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just.” “In general, motions for leave to amend a pleading should be granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise” (*Corwise v. Lefrak Org.*, 93 A.D.3d 754 [2<sup>nd</sup> Dept 2012]).

In *MBIA Ins. Corp v. Greystone & Co.*, the Court held that “on a motion for leave to amend, [a party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499 [1<sup>st</sup> Dept 2010]; see also *Cruz v. Brown*, 129 A.D.3d 455 [1<sup>st</sup> Dept 2015]). The Court specifically ruled that there was “a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony” (*Id.*).

## DISCUSSION

### Defendants' Motion to Dismiss

#### *CPLR 3211(a)(1) – Documentary Evidence*

Defendants rely on the Promissory Note itself in support of their motion to dismiss based on, asserting that the note (1) lacks a section titled “Personal Guarantee”; (2) contains no waiver of limited liability protections; and (3) contains no language showing intent to bind the individuals personally.

These assertions are contradicted by the Note’s actual language. Paragraph 2 expressly provides:

“FOR VALUE RECEIVED, each of Rhythm Ryde Holdings LLC (“Borrower”) and Joseph William Folley (“Cosigner”) promises to pay to the order of Lender in United States dollars and in immediately payable funds, the Loan Amount, together with interest on the unpaid principal balance from December 5, 2022, and all applicable fees until paid in full under the terms of this Note.” (NYSCEF Doc No. 18 ¶ 2).

Additionally, the signature block shows Joseph Foley signed twice, once on behalf of the LLC and once in his individual capacity as Cosigner without any corporate designation for his Cosigner signature. Nada Foley signed as Co-Borrower in her individual capacity. These features, on their face, create at least an arguable basis for personal liability, and do not “utterly refute” Plaintiff’s claims. Accordingly, dismissal under CPLR 3211(a)(1) is inappropriate.

#### *CPLR 3211(a)(3) – Capacity to Sue*

Plaintiff is the named lender on the Note and alleges it is the holder for value of the instrument. Defendants offer only the conclusory assertion that Plaintiff cannot sue them individually. This falls far short of the prima facie showing required. As lender under the Note, Plaintiff plainly has standing to enforce its terms against those parties identified as obligors. As

such, Defendants have failed to demonstrate that they lack capacity under this agreement, and as such the branch of Defendants' motion pursuant to CPLR 3211(a)(3) is denied.

*CPLR 3211(a)(7) – Failure to State a Cause of Action*

The elements of any breach of contract claim “include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The Verified Complaint alleges the following: (1) execution of the Note by RRH, Joseph Foley as Cosigner, and Nada Foley as Co-Borrower, demonstrating existence of a contract (2) Plaintiff's performance by advancing funds, allegations sufficient to demonstrate performance (3) Defendants' payment default, an unpaid balance of \$19,500.45 and retention of funds without objection of account statements sufficiently alleging breach of contract and damages under the agreement. Whether Plaintiff can ultimately prove these claims is a matter for summary judgment or trial, not for dismissal at the pleading stage. Accordingly, the Court does not find that Plaintiff's complaint fails to state a cause of action, and as such dismissal pursuant to CPLR 3211(a)(7) is unwarranted. As such, Defendant's motion to dismiss is denied in its entirety.

*CPLR 603 – Severance*

Defendants seek to sever the claims against them individually from those against the LLC. All claims arise from the December 5, 2022 Note and involve overlapping facts and witnesses, and as such are part of the same transaction or occurrence. Severance would duplicate proceedings and risk inconsistent results. Judicial economy favors trying these claims together; and as such the branch of Defendants' motion seeking severance is denied.

**Plaintiff's Cross-Motion to Amend**

Plaintiff seeks to amend the Verified Complaint to (1) Add factual detail regarding the execution of the December 5, 2022 Promissory Note, including explicit references to the capacity in which each Defendant signed, (2) expand allegations concerning Defendants' post-execution conduct, including the default and subsequent account statements (3) include a new cause of action for fraud, alleging that Defendants misrepresented their intentions to repay and misused the corporate form to obtain funds from multiple creditors without repayment, and (4) add a veil-piercing cause of action, alleging that the LLC was used as an instrumentality for personal benefit and creditor avoidance.

The proposed amendments arise from the same loan transaction and Defendants' alleged default and supplement the theory of liability rather than altering it wholesale. The fraud and veil-piercing claims are pled in the alternative to the contract-based claims. These amendments arise from the same transaction and do not alter the underlying theory of liability in a way that would prejudice Defendants, particularly since the litigation remains in its early stages. The proposed amendments are not palpably insufficient or devoid of merit and therefore Plaintiff's cross-motion seeking leave to amend is granted.

The court has considered the remaining arguments of the parties and finds such unavailing.

Accordingly; it is hereby

ORDERED that Defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that Plaintiff's cross-motion seeking leave to file and serve an Amended Complaint is granted; and it is further

ORDERED that the Amended Complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this Order with notice of entry thereof.

The foregoing constitutes the decision and order of the Court.

10/2/2025  
DATE



HON. LESLIE A. STROTH  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE