SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 13

ALLEON CAPITAL PARTNERS, LLC AND ACP ALLFAMILY UNIVERSAL, LLC,

Plaintiffs,

- against -

SHERYAR CHOUDHRY, TANGENT EHR, LLC, AMSAC, INC a/k/a AMSAC HEALTHCARE CONSULTANTS, MANUEL AA FARESCAL, ALL FAMILY MEDICAL, P.C., and UNIVERSAL MEDICAL, P.C.,

Defendants.

Index No.: 610648-18
Motion Date: 6/4/19
Sequence No.: 003 MOD

DECISION AND ORDER

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, and Exhibits.....1
Memorandum of Law in Support.....2
Reply Affirmation.....3

PRELIMINARY STATEMENT

Defendants, Sheryar Choudhry, Tangent EHR, LLC, AMSAC, INC a/k/a AMSAC Health Care Consultants, bring this application for an order; a) pursuant to and in accordance with CPLR§2221(d) granting said defendants leave to reargue defendants' prior CPLR §3211 omnibus motion to dismiss (motion date 12/12/18) based upon the fact that, after the assignment of a judge in this matter, a hard working copy of the Summons and Complaint was attached to Defendants' underlying Reply Papers; b) pursuant to and in accordance with CPLR §2221(e) granting said Defendants leave to renew Defendants' prior CPLR §3211 omnibus motion to

dismiss (motion date 12/12/18) based upon the fact that Defendants have a reasonable justification for not attaching a copy of the Summons and Complaint to the Defendants initial underlying motion papers; c) in the event that such leave pursuant to CPLR §2001 and/or CPLR§ 2221(d) and/or (e) is granted, then, in such event, that such re-argument and/or renewal then and there proceed; and/or and for such other further relief as this Court deems just and proper. Opposition and reply have been submitted. Oral argument was held on September 10, 2019.

BACKGROUND

By motion returnable on December 12, 2018, defendants Sheryar Choudhry, Tangent EHR, LLC, AMSAC, Inc. a/k/a AMSAC Healthcare Consultants, moved pursuant to CPLR § 3211(a)(3) and LLCL § 802(b) to dismiss, in its entirety the Complaint against all defendants, based upon the claim that plaintiffs, as foreign limited liability companies, are not authorized to carry on, conduct, or transact any business in New York, and thus lack the legal capacity to assert any of the Causes of Action set forth in the Complaint in the above captioned action; and/or; b) pursuant to and in accordance with CPLR §3211(a)(1) and CPLR§ 3211(a)(7) to dismiss, in its entirety, the Plaintiff's above captioned action based upon the failure to state a cause of action as against all named defendants as documentary evidence establishes payment of the subject loan in full; and/or ; c) Pursuant to and in accordance with CPLR§ 3211(a)(5) to dismiss, in its entirety, the Plaintiff's above captioned action based upon the Plaintiff's failure to state a cause of action as against all named defendants due to the doctrines of res judicata and/or collateral estoppel; and/or; d) Pursuant to and in accordance with CPLR§ 3211(a) (7) to dismiss, in its entirety, the Plaintiff's above captioned action based upon the Plaintiff's failure to state a cause of action as against all named defendants due to the subject loan being illegal and criminally usurious; and/or e) Pursuant to and in accordance with CPLR§ 3211(2)(1) and CPLR§ 3211 (a) (7), to dismiss, in its entirety, the Plaintiff's First Cause of Action for the breach of the subject 12/22/2010 contract in the above captioned action based upon the Plaintiff's failure to state a cause of action as against the defendants/non-obligors Sheryar Choudhry and Tangent EHR LLC personally for the contractual obligation of the defendants/obligors Manuel A. Farescal, All Family Medical, P.C., and Universal Medical, P.C., and/or; f) Pursuant to and in accordance with CPLR§3211(a)(5) and CPLR§3211 (a)(7), to dismiss, in its entirety, the Plaintiff's Second Cause of Action for

Conversion (although improperly denominated as one for Fraud) in the above captioned action based upon the Plaintiff's failure to state a cause of action as against defendants Sheryar Choudhry, Tangent EHR, LLC and AMSAC Inc. a/k/a AMSAC Healthcare Consultants due to the expiration of the applicable three (3) year statute of limitations for the legal remedy of conversion of the subject loan which matured on 11/23/2013; and/or; g) pursuant to and in accordance with CPLR §3211(a)(5) and CPLR §3211 (a)(7), to dismiss, in its entirety, the Plaintiff's Third Cause of Action for an equitable Accounting in the above captioned action based upon the Plaintiff's failure to state a cause of action as against defendants Sheryar Choudhry, Tangent EHR, LLC and AMSAC Inc a/k/a AMSAC health care consultants due to the expiration of the applicable three (3) year statue of limitations for the legal remedy of conversion; and/or; h) pursuant to and in accordance wit CPLR§ 3211(a)(5) and CPLR§ 3211(a)(7), to dismiss, in its entirety, the Plaintiff's Fourth Cause of Action for Fraud in the above captioned action based upon the Plaintiff's failure to state a cause of action as against defendants Sheryar Choudhry, Tangent EHR LLC and AMSAC INC a/k/a AMSAC Healthcare Consultants due to Plaintiff's fraud claim being duplicative of Plaintiff's contract claim; and/or and for such other further relief as this Court deems just and proper.

By Decision and Order dated February 25, 2019, this Court denied the First motion which did not attach the Complaint to the moving papers. This was an essential document for the court's consideration and for the Plaintiff to respond to in their opposition. Defendants were given 30 days to serve an Answer to the Complaint. Defendants Sheryar Choudhry ("Choudhry"), Tangent EHR, LLC, and AMSAC, Inc., a/k/a AMSAC Healthcare Consultants now seek to renew and reargue that motion, claiming that the Complaint was annexed to reply papers submitted at the time of the May 12, 2018 motion. A reply is not for the purpose of raising new evidence as was previously done. A copy of the Complaint is annexed as 3-G to the new Affirmation in Support of the motion. Consistent with *Bulbin v O'Carroll*, 173 A.D. 3d 825,(2nd Dept. 2019), the Court will now grant permission to reargue.

Plaintiffs oppose the motion to dismiss, and submit a Memorandum of Law (Exh. "A") and an Affidavit of Jason Vanacour, Esq. (Exh. "B") to which is annexed copies of the transcript of the Deposition Testimony of Manuel Farescal of October 28, 2015 in connection with *All*

Medical Family, P.C., Universal Medical, P.C. and Manuel Farescal v. Alleon Capital Partners, LLC v. AMSAC, Inc., a/k/a AMSAC Healthcare Consultants Supreme Court, Queens Co., Index No. 22873/2016; the Deposition Testimony of Sheryar Choudhry of August 10, 2015 and continued on October 29, 2015 (Exh. "B") in connection with the same action; and an email produced by defendant AMSAC, a/k/a AMSAC Healthcare Consultants on January 20, 2015.

Defendants reply that, in response to plaintiffs' contention that they have not sought leave of the court to renew or reargue, this is what the motion is for, and that there is no necessity to distinguish the motion to renew from the motion to reargue, since the original motion was denied on procedural grounds, and they argue that the complaint was attached to their initial reply papers.

The court will consider the omnibus motion *ab initio*, since it never rendered a decision on the merits of the motion.

DISCUSSION

Defendants Choudhry, Tangent, and AMSAC seek dismissal of the Complaint against them. This action arises from a Loan and Security Agreement as of December 22, 2010, between Alleon Capital Partners, LLC ("Alleon"), as Lender, and Universal Medical, P.C. and All Family Medical, P.C., as Borrower, and Alleon as Agent. The loan was for $2,782, 259.27, evidenced by a Promissory Note, and which were collateralized by Borrower's rights to the proceeds of Receivables comprising certain claims that are, or have been, litigated. Manuel A. Farescal is identified as the Individual Guarantor(Exhibit "B").

According to the Complaint in the Queens Action (Exh. "D"), Medical Family, P.C., Universal Medical, P.C., and Manuel A. Farescal alleged that the documents prepared by Alleon reflected a loan of $2,782,259.27, but were accompanied by "excessive fees", including a "loan fee" of $229,048.52. Defendants selected claims in the aggregate of $5,826,578.24 to secure payment of the loan, and an additional pool of claims to replace those found to be flawed.

The Maturity Date of November 22, 2013 had passed by the time of commencement of the action, and plaintiffs allege that defendant has received $3,012,730.85, has retained an escrow of $57,511.35, and has not returned the balance of the escrow. The parties were allegedly negotiating a resolution, when defendant served a Notice of Default. Plaintiff claimed that the

Notice of Default was in error, as it claimed entitlement to the sum of $5,826,578.24, the full collateral, the original loan fee of $229,048.52, the escrow funds retained by defendant, closing costs, and 24% interest from the date of alleged default. Plaintiff asserted that they were being called upon to pay more than $6,000,000.00 on a loan of $2,360,200.72 for a period of three years, and that the loan is usurious, despite defendant's efforts to show that the loan exceeded $2,500,000.00. By Decision and Order of Hon. Marguerite A. Grays, J.S.C., Supreme Court, Queens County, granted plaintiffs' motion to dismiss defendants' Counterclaims and Third-party Complaint against AMSAC and AMSAC Healthcare consultants (Exh. "1-A" to Affidavit of Choudhry in Support of Motion).

The basis for this Decision was that Alleon was the sole defendant, which had assigned its rights under the Loan Agreement and Promissory Note to ACP All Family Universal, LLC, which Alleon formed as a Series B Delaware Limited Liability Company on December 13, 2010. Alleon, therefore, was without standing to assert counterclaims, or commence a third-party action against AMSAC and AMSAC Healthcare Consultants.

Complaint in Alleon Capital Partners and ACP All Family Universal, LLC v. Choudhry, et al. (Exh. "G ")

In the Introduction, plaintiffs summarize the essence of the Complaint. They assert that the action arises from what was "purportedly" a loan secured by medical receivables "which was in fact a scheme devised by a single individual to intentionally and willfully breach contractual obligations and wrongfully profit and keep money rightfully belonging to Plaintiffs through the control and manipulation of multiple individuals and entities." The alleged orchestrator of the scheme is defendant Choudhry, the owner and operator of AMSAC HealthCare Consultants.

Alleon and ACP, collectively referred to as Alleon, loaned $2,782,259.27 to two entities controlled by Manuel A. Farescal ("Farescal"), Universal Medical, P.C. and All Family Medical, P.C., which were secured by the repayment of a group of medical receivables, which Farescal was to collect in the ordinary conduct of business. Plaintiffs allege that the loan for $2,782,259.27 and an expected return of approximately $5 million, which was the approximate value of the Receivables. The loan was allegedly never fully prepaid because of actions taken by Choudhry. AMSAC contracted to serve as a billing agent for the Receivables, and assure that all

amounts collected were directed to plaintiff in accordance with the Loan Documents.

At some point in 2013,Choudry allegedly directed Farescal to stop making payments of all amounts collected on the Receivables to plaintiff, and to improperly divert payments to a new entity controlled by Choudhry, Tangent EHR ("Tangent"). They also allege that defendants misrepresented to them that the efforts by AMSAC at collection of the Receivables were continuing, and that they would honor the agreement. While Receivables were being collected, they were not being forwarded to plaintiff.

Loan and Security Agreement

In the Factual Background of the Complaint, the Documents are summarized. The Loan Agreement was entered into between Alleon as Lender, and All Family Medical, P.C.("All Family"), and Universal Medical, P.C. ("Universal"), and personally guaranteed by Manuel A. Farescal, the owner and operator of the corporate borrowers. The loan was for three years in the Principal Amount of $2,782,259,27. Payment was collateralized by a series of Receivables of All Family and Universal, which plaintiff claims were approximately $5,000,000.00. Repayment terms from collection of Receivables are set forth in the Agreement and the Promissory Note as follows;

> (i) Until such time as the Principal is paid in full, for each and every One dollar ($1.00) collected from [the Receivables], Lender will receive all such funds collected from such [Receivable] . . .
>
> (ii) After the Principal is paid in full, then for each and every One dollar ($1.00) collected from [the receivable] . . . Lender will receive Eighty Six and Eight Tents cents ($0.868 of each such One dollar ($1.00) (the ***"Loan Premium"***).
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> The remaining Thirteen and Two Tents cents ($0.132 of each such One dollar ($1.00) shall be payable to the Borrowers . . .

The Loan Premium

This is provided for in the Loan Agreement at § 1.9, and is "a premium to Lender as consideration for entering into this [Loan] Agreement." It further provides that

> The Loan Premium shall be calculated as follows, as each Clean Claim or Replacement Claim is settled and the proceeds of such settlement are collected:

> (a) [u]ntil such time as the Principal is paid in full, for each and every One dollar ($1.00) collected from a Clean Clam or Replacement Claim is settled and the proceeds of such settlement are collected from each "Clean Claim Receivable or Replacement Claim Receivable (in the aggregate) pledged by Borrowers, Lender will receive all such funds collected from such Clean Clam Receivable or Replacement Claim Receivable.
>
> (b) After the Principal is paid in full then for each and every One dollar ($1.00) collected from a Clean Claim Receivable or Replacement Claim Receivable (in the aggregate) pledged by the Borrowers, Lender will receive Eighty Six and Eight Tenths cents ($0.868) of each such One dollar ($1.00) (the "Loan Premium").
>
> The remaining Thirteen and Two Tents cents ($0.132 of each such One dollar ($1.00) shall be payable to the Borrowers.

Plaintiffs allege that the control and distribution of money from the Receivables was governed by ***The Irrevocable Account Management Agreement*** **("IAMA")**, to which AMSAC is a signator, and identified as the Billing Agent. They claim that the IAMA, the Control Agreement, and the Loan Agreement provides that, to the extent there remains an outstanding balance of the Note, or other Obligations as of the Maturity Date, November 23, 2013, they became due and payable on that date.

With respect to Choudhry, they point to a comment in his deposition in the Queens action, wherein he stated "So I would have taken a very strong position and never would have directed any funds other than what my company was bound to do in the duration of the contract. This was clearly - - a contract that had ended. There was an end date mentioned in the contract, so I felt this was a sufficient direction." The Complaint alleges that Farescal testified that he received approximately $13,500.00 per month from Tangent, Choudhry's company, but the documents show that collections on the Receivables were regularly between $35,000.00 and $50,000.00 a month.

The Complaint then asserts Four Causes of Action as follows:

FIRST: Breach of Contract against all defendants;

SECOND: Fraud against all defendants;

THIRD: Accounting against all defendants;

FOURTH: Fraudulent Concealment against Choudhry, AMSAC, Tangent and Farescal.

Motion by Choudry, Tangent EHR, LLC and AMSAC a/k/a AMSAC Healthcae Consultants

These defendants move for dismissal of the Complaint on eight (8) grounds:

a. Pursuant to CPLR § 3211(a)(3) and LLCL § 802(b), plaintiffs, as foreign limited liability companies, are not authorized to carry on, conduct or transact business in this state, and lack the legal capacity to assert any of the Causes of Action in the Complaint;

b. Pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) based upon failure to state a Cause of Action, and that documentary evidence establishes payment in full;

c. Pursuant to CPLR § 3211(a)(5) for failure to state a cause of action due to the doctrines of res judicata and/or collateral estoppel;

d. Pursuant to CPLR § 3211(a)(7) on the ground that the loan is illegal and criminally usurious;

e. Pursuant to CPLR § 3211(a)(1) for failure of the First Cause of Action against Choudry and Tangent EHR, LLC for the contractual obligations of defendants Farsecal, All Family Medical, and Universal Medical;

f. Pursuant to CPLR §§ 3211(a)5 and 3211(a)(7) as to the Second Cause of Action, improperly denominated as Fraud, but in actuality is for Conversion, which is barred by the three (3) year statute of limitations for the subject loan, which matured on November 23, 2013;

g. Pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) dismissing the Third Cause of Action for Accounting as being barred by a statute of limitations;

h. Pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) to dismiss the Fourth Cause of Action for Fraud as being duplicative of the Breach of Contract Cause of Action;

i. For such other and further relief as the Court deems just, proper and equitable.

CPLR § 3211(a) provides in relevant part as follows:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

> 1. a defense is founded upon documentary evidence; or
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> . . .
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> 3. the party asserting the cause of action has not legal capacity to sue; or
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> . . .
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
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> . . .
>
> 7. the pleading fails to state a cause of action; or
>
> . . .

3211(a)(1)

In order to succeed in a claim based upon documentary evidence, " . . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP,* 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine,* 2010 WL 3583424 (N.Y. .D. 2d Dept., 2010]; *Gould v. Decolator,* 121 A.D.3d 845 [2d Dept. 2014]).

3211(a)(3)

"On a defendant's motion to dismiss a complaint based upon the plaintiff's alleged lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law (*DLJ Mort. Capital, Inc. v. Pittman,* 150 A.D.3d 120 [2d Dept. 2017] quoting *Deutsche Bank Trust Co. Ams. v. Vitellas,* 131 A.D.3d 52, 59 [2d Dept. 2015]).

3211(a)(5)

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*Yang v. Oceanside Union Free School District,* 90 A.D.3d 649 [2d Dept. 2011]).

3211 (a)(7)

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass'n., Inc.* 70 A.D.3d 928 [2d Dept. 2010]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " *(Braddock v. Braddock,* 2009 WL 23307 [N.Y. A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]).

a. Standing of Plaintiffs

Moving defendants' motion to dismiss the Complaint for lack of standing is granted as to Alleon Capital Partners, LLC. As determined by Supreme Court, Queens County, in *All Medical Family, P.C., Universal Medical, P.C. and Manuel A. Farescal v. Alleon Capital Partners, LLC v. AMSAC, Inc., a/k/a AMSAC HealthCare Consultants,* Index No. 22873/2016 (Exh. "A" to Choudhry Affidavit, at p.9), Alleon assigned the Promissory Note to ACP All Family Universal, LLC on December 22, 2010, and was without standing to maintain counterclaims and a third-party action against AMSAC.

Res judicata precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter (*Josey v. Goord,* 9 N.Y.3d 386 [2007]). The court in All Medical Family, P.C. was confronted with a claim by plaintiffs that Alleon was in violation of Limited Liability Company Law § 802, which provides that a limited liability company doing business in New York State must obtain a certificate of authority from the New York Department of State in order to maintain a civil action in New York. In denying plaintiffs' motion on that ground, Justice Grays cited Limited Liability

Company Law §808, which provides that the failure of foreign company doing business in New York to comply with §802 does not impair their ability to defend an action or special proceeding, and that counterclaims and third-party actions are not separate from the underlying action, which they are defending.

But the court concluded, based upon Alleon's pleadings, that they assigned the Promissory Note to another entity, and that they were bringing the counterclaims and third-party action on behalf of the assignee. Alleon never sought to amend its pleadings to include ACP All Family, the assignee, and the court ruled that Alleon was without standing to assert counterclaims and a third-party action. Alleon is not the holder of the Note, and is without standing to commence this action.

ACP All Family is the holder of the Note, and is not precluded from bringing this action on the basis of standing. But defendants claim that they are barred from commencing this action because, as a foreign limited liability company, doing business in New York, they are in violation of § 802 of the Limited Liability Company Law, since they have not obtained a certificate of authority from the Secretary of State. Plaintiffs respond in their Memorandum of Law (Exh. "2") that defendants have failed to meet the burden of establishing that plaintiff is regularly doing business in New York.

The issue presented is whether or not ACP All Family Universal, LLC, is doing business in the State of New York, and is therefore required to obtain a certificate of authority. "The question of whether a foreign corporation is 'doing business' in New York 'must be approached on a case-by-case basis with inquiry made into the type of business being conducted' " (*Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742 [2d Dept. 2008], quoting *Alicanto, S.A. v. Woolverton,* 129 A.D.2d 601, 602 [2d Dept. 1987]).

"In order for a court to find that a foreign corporation is 'doing business' in New York within the meaning of Business Corporation Law §1312(a), 'the corporation must be engaged in a regular and continuous course of conduct in the State' " (*Id.* at 743, quoting *Commodity Ocean Transp. Corp. of N.Y. v. Royce,* 221 A.D.2d 406, 407 [2d Dept. 1995]). "Cases decided pursuant to the Business Corporation Law §1312 have defined the parameters of what constitutes 'doing business' in the State of New York" (*Aries Financial, LLC v. 2729 Clafin Ave., LLC,* 26 Misc.3d

1236(A) [Sup. Ct., Bronx Co. 2010]).

The rights of ACP All Family Limited, LLP are no greater than the rights of its assignor. If either of them is doing business in the State of New York, and have not complied with the requirements of § 802 of the Limited Liability Law, they are precluded from bringing action in the courts of New York. Defendants relying upon § 802 to preclude a plaintiff from bringing an action in New York "bears the burden of proving that the [plaintiff-corporation's] business activities in New York were not a casual or occasional activity, which does not constitute doing business. Rather, a company's activities must be so "systematic and regular" as to manifest continuity of activity within the jurisdiction (*Highfill, Inc. V. Bruce & Iris, Inc.,* 50 A.D.3d 742 [2d Dept. 2008]). In this case, defendants have offered no evidence that either of the plaintiffs were doing business within the State of New York, which is their burden (*Id.*).

Defendants' motion for judgment dismissing the Complaint based on the lack of standing of ACP All Family Universal, LLC is denied.

b. Pursuant to CPLR §§ 2011(a)(1) and 2011(a)(7) that the Complaint fails to state a Cause of Action and that Documentary Evidence shows payment in full

The Complaint must be accepted as true. Plaintiffs allege that defendants failed to make payment of all amounts due under the terms of the Agreement. Defendants contention that the loan was repaid in full is belied by the terms of the Agreement, which call for payment of the principal balance and a Loan Premium of $0.868 of each dollar collected from receivables.

The Agreement provides that if there is a balance on the Note or other obligations on the Maturity Date, all such obligations were found to be due and payable, subject to the occurrence of an Event of Default, which makes such obligations due and payable.

The motion to dismiss the Complaint on these bases is denied.

c. Collateral estoppel and Res Judicata

For the reasons previously stated, the motion to dismiss the Complaint of Alleon Capital Partners, LLC is granted for lack of standing, as determined in the Queens action;

d. Pursuant to CPLR § 3211(a)(7) on the ground that the Loan Agreement is usurious, illegal, and unenforceable

The Affidavit in Support of Sheryar Choudhry reports the gross amount of the loan to be

$2,782,259.27, from which was deducted a "loan fee" of $422,058.52, producing a net sum of loan proceeds to $2,360,200.75. The Receivables which served as collateral for the loan, and from which payments were to be made, amounted to $5,826,378.24. Referring to the Affirmation of Anthony Licatesi, Esq., of Rubin & Licatesi, the collection agent, paid no less than $3,165,040.74, inclusive of $152,309.89 paid into escrow with the Queens County Clerk, in repayment of the loan. When the Maturity Date passed, Alleon filed a Notice of Default, claiming that they were entitled to receive a total of $5,826,578.24, the total amount of the collateral, together with an additional sum of $229,048.52, the original loan fee, as well as the balance of the escrow proceeds.

The Agreement provided for repayment of the principal amount on a dollar for dollar amount of collected receivables, and, after the principal is repaid, Lender was entitled to $0.868 from each dollar recovered. The latter is referred to as the Loan Premium. In the event that certain Receivables were not "clean receivables", they were to be replaced from a pool of additional receivables.

Plaintiff asserts that after defendants repaid the principal balance of $2,782,259.27, they were responsible to pay $0.868 on the balance of receivables, amounting to $2,642,468.87 ($5,826,578.24 - $2,782,259.27 = $3,044,318.97 x .868 = $2,642,468.87). This amounts to an interest rate of 95%, or 31.67% per year over the three year term of the loan. Plaintiffs claim that they anticipated a return in excess of $5,000,000. If this was all plaintiffs received, this would produce an interest rate of 80%, annualized over three years at 26.57%. In either event the amount of interest is in excess of the criminal usury laws in Penal Law §§ 190.40 and 190.42.

In opposing the motion to declare the Agreement void, for violation of the prohibition against usury, plaintiffs cite General Obligations Law § 5-501(6)(b) which provides as follows:

> b. No law regulating the maximum rate of interest which may be charged, taken or received, including section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more. Loans or forbearances aggregating two million five hundred thousand dollars or more which are to be made or advanced to any one borrower in one or more installments pursuant to a written

> agreement by one or more lenders shall be deemed to be a single loan or forbearance for the total amount which the lender or lenders have agreed to advance or make pursuant to such agreement on the terms and conditions provided therein.

In response, defendants claim that the true amount of the loan was less than $2,500,000.00 in that the loan fee of $422,058.27 was deducted from the proceeds of the loan, thus reducing the actual amount of the loan to $2,360,201.00, and thereby avoiding the impact of § 5-501(6)(b). But the Agreement, in multiple locations, defines the Principal as $2,782,259.27, and while the "loan fee" of $422,058.27 may well be exorbitant, the clear language of the Agreement provides that the Principal was in excess of $2,500,000.00, and the exemption from the claim of usury applies to this transaction.

Defendants' CPLR§ 3211(a)(7) motion to dismiss the Complaint as void in violation of the criminal usury laws of §§ 190.40 and 190.42 of the penal law is denied. Corporations may not invoke a defense of civil usury (*72nd Ninth, LLC v. 753 Ninth Ave. Realty, LLC*, 168 A.D.3d 16 [1st Dept., 2019]; citing General Obligations Law § 5-521[1]).

e. Failure of First Cause (against all defendants) to state a claim against Choudry and Tangent EHR, LLC, and AMSAC, Inc. a/k/a AMSAC Healthcare Consultants

The First Cause of Action alleges that Farsecal and the Farsecal Entities, with the assistance and direction of AMSAC, Tangent, and Choudhry, have breached the Loan Documents, including the personal guarantees, and have failed to pay all amounts due and owing under the Loan Documents. Choudhry, AMSAC, and Tangent, are not signatories to the Loan Agreement, and are not liable for the alleged failure of Farsecal and the Farsecal entities to comply with the terms of the Agreement.

The First Cause of Action also refers to the Irrevocable Account Management Agreement (IAMA), to which AMSAC is an alleged signatory, but which cannot be located among the documents submitted in connection with this motion. Plaintiffs allege that AMSAC is identified as the Billing Company, and agreed to abide by the Loan Agreement and "ensure delivery to the Collection Agent the proceeds from the Receivables dollars to be deposited into the attorney escrow account established by the Collection Agent (the Collection Account)".

Plaintiffs allege that Tangent EHR, LLC is the successor in interest to AMSAC, which

was responsible for monitoring the Receivables, ascertaining which Receivables were subject to the Loan Agreement, and to forward the proceeds to the Collection Agent. To the extent that plaintiff alleges that AMSAC and Tangent failed to perform pursuant to the IAMA, they have stated a cause of action against AMSAC and Tangent, its successor.

Plaintiff also seeks to impose liability on Choudhry, as the "alter ego" of AMSAC and Tangent. "On a motion to dismiss a complaint pursuant to CPLR §3211 (a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible . and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v. Olinville Realty, LLC,* 54 A.D.3d 703, 703—704 [2d Dept. 2008]). A motion pursuant to CPLR§ 3211 (a)(7) will fail if, taking all facts alleged as true, and according them every favorable inference, the complaint states in some recognizable form a cause of action known to our law (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 A.D.3d 34, 38 [2d Dept. 2006]).

With respect to a claim under the doctrine of piercing the corporate veil, allegations to hold a principal of a corporation liable, a simple allegation that an individual dominates a corporation is inadequate, since this could be said about virtually any single-person corporation. The party seeking to pierce the corporate veil must also establish "that the owners, through their domination, abused the privilege of doing business in the Corporate form" (*Morris v. New York State Dept. of Taxation & Fin.,* 82 N.Y.2d 135, 142 [1993]). Factors to be considered in determining whether or not there has been such abuse include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v. Loupolver,* 44 A.D.3d 1016, 1016—1017 [2d Dept. 2007]; *see also ABN Amro Bank, N.V. v. MBIA, Inc.,* 17 N.Y.3d 208 [2011]).

In circumstances in which the complaint alleged that the principal of the corporation exercised "bad faith" in negotiating a replacement contract for the supervision of construction work, and that he was the only point of contact with whom the school district negotiated, this was insufficient to justify piercing of the corporate veil. The policy inherent in allowing individuals

to conduct business in the corporate form so as to shield themselves from personal liability would be seriously threatened were we to allow an insufficient cause of action to survive, merely on the plaintiff's hope that something will turn up (*East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 66 A.D. 3d 122 [2d Dept. 2009]).

Plaintiffs have alleged enough, to show that defendant Choudhry has potentially abused the privilege of operating under the corporate or limited liability form, and can therefor potentially be held personally liable under the doctrine of piercing the corporate veil.

The motion to dismiss the First Cause of Action against defendants AMSAC and Tangent is denied. The motion to dismiss Choudhry from the case, for not sufficiently pleading the doctrine of piercing the corporate veil, is denied based on all the allegations in the Complaint, including allegations 36-49 inclusive.

f. That the Second Cause of Action is actually for Conversion, is improperly denominated as Fraud, and is barred by the three year statute of limitations.

In order to sustain a cause of action for actual fraud, plaintiff must prove:

- defendant made a representation , as to a material fact;
- the representation was false;
- the representation was known to be false by defendant;
- it was made to induce the other party to rely upon it;
- the other party rightfully relied upon the representation;
- the party relying upon the representation was ignorant of its falsity;
- the party suffered injury or damage based on its reliance. (*Otto Roth & Co. Inc., v. Gourmet Pasta, Inc.* 277 A.D.2d 293 [2d Dept. 2000]). Liability can also be premised upon representations which are recklessly made (*Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112 [1969]).

Plaintiff's Second Cause of Action does not set forth a misrepresentation of a material fact, only that defendants said that they would comply with their obligations. The remedy for a misrepresentation as to the intention to comply is not fraud, as it is duplicative of the claims for breach of contract (*ID Beauty S.A.S. v. Coty, Inc.*, 164 A.D.3d 1186 [1st Dept. 2018].

Defendants argue that the language of the Second Cause of Action constitutes a claim of

Conversion, which is barred by the three-year statute of limitations pursuant to CPLR § 214. Plaintiff claims that in 2013, defendants began to withhold payment of Receivables to the Collection Agent and, instead, diverted the recovered Receivables to Farescal. This claim is governed by a three-year statute of limitations and is therefor barred.

Moving defendants motion to dismiss the Second Cause of Action against them is granted.

g. Dismissal of the Third Cause of Action for Accounting pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) on the ground that the action is barred by the three-year statute of limitations

Plaintiffs' Third Cause of Action is more of a Demand for Discovery than a separate Cause of Action. But to the extent that it calls for an Accounting, and such allegations claim that the defendants collected income from Receivables, and failed to transfer them to the Collection Agent, a basis has been established for an Accounting. Any such receipts by defendants within the six-years allowed by CPLR §213 (1), are not barred by the Statute of Limitations. The open issues of whether, and to what extent, defendants received payments of Receivables and when the statute of limitations began to run, constitutes factual issues. (See also *Meyer v Meyer 303* A.D. 2d 682[2nd Dep't, 2003].)

To the extent that plaintiffs are seeking production of records referable to the receipt of payment of receivables by defendants, and their distribution, this should be the subject of a discovery motion, to the extent that the information has not already been provided or agreed to or so ordered on September 10, 2019.

h. Pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7) dismissing the Fourth Cause of Action for Fraud, as duplicative of the Cause of Action for Breach of Contract.

In the Fourth Cause of Action plaintiffs allege that AMSAC, and Tangent, as agents for Farescal, and Choudhry, have misrepresented to plaintiffs as to the status of collections, which Receivables have been collected, and the location of the proceeds, in an effort to defraud and mislead plaintiffs. The elements of a claim for Fraud is set forth in "f", and the failure of defendants to perform under a Contract, or misrepresenting their intention to do so, does not constitute fraud. Defendants' motion to dismiss the Fourth Cause of Action is granted.

To the extent that relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 10, 2019

ENTER:

JEROME C. MURPHY, J.S.C.

ENTERED
SEP 16 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE