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Zucker v Ron Waldmann, Basel, LLC
2014 NY Slip Op 50914(U)
Decided on June 12, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on June 12, 2014

Supreme Court, Kings County

Daniel Zucker, Plaintiff,

against

Ron Waldmann, Basel, LLC, and the Basel Group, LLC, Defendants.

503467/2013

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Carolyn E. Demarest, J.

In this action by plaintiff Daniel Zucker (plaintiff) for breach of contract, unjust enrichment, and fraud, and seeking to recover $500,000 plus interest from defendants Ron Waldmann (Waldmann),[FN1] Basel, LLC (Basel) and the Basel Group, LLC (the Basel Group), Basel and the Basel Group (collectively, defendants) move, under motion [*2]sequence number 3, for an order, pursuant to CPLR 3211 (a) (5)[FN2] , (7), and (8), dismissing plaintiff's verified complaint as against them, with prejudice, based upon the grounds that: (1) the court lacks personal jurisdiction over Basel, (2) plaintiff's complaint fails to adequately allege a breach of contract claim as against Basel, (3) plaintiff's breach of contract claim as against Basel is time-barred by the applicable Statute of Limitations, (4) plaintiff's complaint fails to state a viable cause of action for unjust enrichment claim as against Basel and the Basel Group, and plaintiff's claim for unjust enrichment is otherwise time-barred by the applicable Statute of Limitations, and (5) plaintiff's complaint fails to allege fraud as against Basel and the Basel Group with the degree of specificity required by

CPLR 3016, and plaintiff's fraud claim is otherwise time-barred by the applicable Statute of Limitations and is impermissibly duplicative of plaintiff's breach of contract cause of action as against Basel.

BACKGROUND

Basel is a limited liability company organized under the laws of the Republic of Georgia, with its sole place of business located in the City of Tbilisi in Georgia. Its only business is the ownership and management of real property in Tbilisi, and it is not authorized to do business in New York. The Basel Group is a limited liability company organized under the laws of the State of Delaware, with a principal place of business at 3475 Mystic Pointe Drive, Apt. 1 in Aventura, Florida. The Basel Group is authorized to do business in the State of New York, with an address for service of process at 35 West 96th Street, in Manhattan. Waldmann is the director of Basel and a member of the Basel Group.

According to plaintiff, beginning on or before late November 2005, while he was in the Republic of Georgia for educational and charitable reasons, he was approached by Waldmann and a colleague of Waldmann, who presented him with a business proposal, whereby he could gain a one percent interest in a business venture involving the development of certain real property on the grounds of the former Presidential Palace in the city of Tbilisi, in the country of Georgia (the property). The property was a 10 hectare (approximately 25 acres) of undeveloped lake land area property, referred to as the "Residences of Krtsanisi," which was part of a 44 hectare area owned by Basel that comprised the former Presidential Palace. Plaintiff claims that defendants represented that if he would contribute $500,000 towards this business venture, he would receive a five percent interest in the property and would receive his proportionate five percent share of any profits derived from the property which were to be generated by the development of the property. He asserts that defendants represented that they would develop the [*3]property by constructing new residential and other structures thereon and otherwise improve the property in order to ensure that this venture would be profitable to him and other investors. Plaintiff toured the grounds of the property, and, after observing the beautiful and secluded nature of this area, decided that he wanted to make this investment and he told this to Waldmann.

Thereafter, Waldmann forwarded a written Investment Agreement, dated November 29, 2005 (the Investment Agreement), to plaintiff in New York by facsimile. The Investment Agreement

provided that it was between Basel and plaintiff, as an investor, and it listed Waldmann as the director of Basel. It stated that plaintiff was investing $500,000 in the asset "Residences at Krtsanisi," a 10 hectares property lake land area, not including any existing structures in Krtsanisi Governmental Residence, in Tbilisi, Georgia. It further stated that the structure of the investment was that plaintiff would receive five percent of "the ownership of the profits" of this asset for his $500,000 investment. With respect to the distribution of profits, the Investment Agreement set forth that investors would "receive 100% of net profits after development costs are covered on Investors investment in equity return of his investment plus 50% of profits thereabove," and that "[t]hereafter all profits based on investors percentage of ownership shall be distributed with 60% of further returns of such ownership going to investor," and that profits would be distributed quarterly. It also set forth that the business plan of this asset was submitted to plaintiff, as an investor, and "include[d] the development of mainly residential and mixed use commercial real estate within the site." It provided that "investors shall receive [a] full accounting on th[is] asset on a quarterly basis," and that the accounting would be performed by Price Waterhouse Cooper or another top accounting firm. Plaintiff immediately signed the Investment Agreement with Basel and forwarded it to Waldmann in Georgia, along with a check for $500,000, dated December 5, 2005, made payable to the Basel Group.

The business plan for the property was disclosed in a Preliminary Information Memorandum for Townhouses & Villas at the Krtsanisi Governmental Residence dated October 2005 (Exhibit 3 to Plaintiff's Opposition Papers) (the Memorandum), which set forth the Residential Development for the townhouses, villas, and apartments at the property. The Memorandum stated that there would be a development of 40 townhouses with development costs for each townhouse of $150,000 on average for a total of $6 million, and that the expected revenue from the sales per townhouse would be $350,000 for a total of $14 million. The Memorandum further stated that there would be a development of 10 large villas, which would range in size, that the development costs totaled $3.8 million, and that the expected revenues totaled $11.75 million. In addition, the Memorandum stated that there would be a development of two apartment buildings with 10 apartments each, that the development costs totaled $1.5 million, and that the expected revenues totaled $5 million based on a sale price of $250,000 per apartment. With respect to the townhouses, villas, and apartments, the Memorandum provided that, [*4]as to financing, pre-sale revenues would fully fund the development, and it specified that, as to timing, "pre-sales [were] to start [the] first quarter [of] 2006." It set forth an Income Statement which projected these revenues and costs for the townhouses, villas, and apartments split equally over two years, which resulted in a projected total net income of $9,725,000 for the first year and another $9,725,000 for the second year, with a total

of $19,450,000 for this two-year period. It also included drawings of the proposed development.However, following plaintiff's execution of the Investment Agreement, no development of the property occurred, and no pre-sales took place in the first quarter of 2006. According to plaintiff, he kept in touch with Waldmann by telephone every six months or so, beginning in 2006 and continuing through at least May 2012. He claims that during these telephone conversations, Waldmann continually blamed the economic crisis and conditions in Georgia, such as the brief military conflict with Russia several years ago, as the reasons why the property could not be sold, and, therefore, why no profits were forthcoming on the property. He asserts that in the summer of 2008, Waldmann reported that instead of developing the property and selling it for a profit, Basel was looking to sell the land in an unimproved condition, but that this would still result in a profit to him and other investors. He claims that throughout the fall of 2008, Waldmann reported that efforts to sell the property to a particular buyer or buyers were continuing, but in early 2009, he reported that a contemplated sale might not occur and that, instead, Basel was going to put the property up for sale through a public auction.

Plaintiff states that Waldmann met with him and another Brooklyn investor in Brooklyn in late 2009/early 2010, and that Waldmann provided him and the other investor with a handwritten purported list of expenses for the project, which was incomplete and insufficient to properly explain the financial status of his investment, and that Waldmann refused to allow him to make a copy of this list. He maintains that following this meeting, Waldmann resumed reporting to him through telephone conversations, still stating that the property had not been developed and that Basel had yet to find a buyer for it, and that these conversations continued through as late as May 2012.

Plaintiff alleges that Basel never provided him with any written accounting of any kind and never provided him with distributions of any profit or monies of any kind as required by the Investment Agreement. He further alleges that although, pursuant to the Investment Agreement, Basel was obligated to develop and improve the property by building residential and other structures thereon in order to provide income to him and other investors from rent and/or sales of all or portions of the property, it failed to develop or improve any portion of the property. Plaintiff asserts that it is his understanding from speaking with another investor, who has been to Georgia recently and viewed the property, that essentially nothing has been done to develop it.

Plaintiff also alleges, upon information and belief, that Basel has sold portions of the property, but has failed to account to him with regard to the disposition of the [*5]proceeds of those sales, and that defendants placed liens and/or security interests on the property that purport to give

Waldmann superior rights to the property over Basel and any of its investors. Specifically, plaintiff asserts that according to information from the internet, Basel has sold portions of the 44 hectare area owned by it that comprised the former Presidential Palace to various embassies, and he annexes agreements with Great Britain and Iraq, and a prospectus which refers to these sales to Great Britain and Iraq, and also refers to a sale to Germany and the development of a sports club and entertainment complex on this 44 hectare area.

On June 24, 2013, plaintiff commenced this action against defendants. Plaintiff's complaint alleges a first cause of action for breach of contract against Basel, a second cause of action for unjust enrichment against all defendants, and a third cause of action for fraud against all defendants. On October 22, 2013, plaintiff moved for an order, pursuant to CPLR 3215, granting him a default judgment as against the Basel Group because its time to answer or otherwise respond to his complaint had expired, and an order, pursuant to CPLR 306-b, extending his time to complete service of process on Basel and Waldmann (who he could not locate). On November 15, 2013, the Basel Group cross-moved, pursuant to CPLR 2004, for a 30-day extension of its time to respond to plaintiff's complaint. By an order dated November 27, 2013, following argument, plaintiff's motion for a default judgment against the Basel Group was denied in light of its cross motion to serve a late response to the complaint, and it was granted to the extent of permitting time for service upon Waldmann and Basel to be extended to March 7, 2014. This order also granted Basel Group's motion to extend its time to file a response to plaintiff's complaint, and the Basel Group was directed to answer plaintiff's complaint or otherwise move on or before December 20, 2013. Service was subsequently effectuated upon Basel, but Waldmann was never served with the summons and complaint. On December 20, 2013, Basel and the Basel Group e-filed their instant motion.

DISCUSSION

Plaintiff's First Cause of Action for Breach of Contract

Plaintiff's first cause of action for breach of contract alleges that Basel has utterly failed to perform its obligations under the Investment Agreement in that it has failed to provide him with any profits from the rent or sales of the property, to develop or improve the property in any manner, and to provide him with quarterly accountings. He seeks damages of $500,000 plus interest thereon as a result of these breaches and a full accounting from Basel.

Waldmann, in response, asserts that he and Basel have never denied plaintiff's entitlement to

the benefit of the Investment Agreement if and when the property is developed and profits are realized. He points out that the Investment Agreement did not guarantee profits, but merely provided that plaintiff would receive five percent of the [*6]profits from the development of the property. Plaintiff concedes that the property has not been developed and that no profits have been generated. Waldmann states that plaintiff, by this action, has unjustly called into question his good faith and commitment in developing the property, and explains that due to the terrible economic conditions in Georgia, Basel has not been able to develop or sell any residential housing on any part of the 44 hectares property that it owns. He and defendants further maintain that plaintiff's breach of contract claim as against Basel is time-barred.

A breach of contract cause of action is governed by a six-year Statute of Limitations (*see* CPLR 213 [2]; *Gibraltar Mgt. Co., Inc. v Grand Entrance Gates, Ltd.*, 46 AD3d 747, 748 [2d Dept 2007]). The Statute of Limitations begins to run when the cause of action accrues (CPLR 203 [a]), and this occurs " when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court'" (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012], quoting *Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]; *see also Sears, Roebuck & Co. v Patchogue Assoc., LLC*, 87 AD3d 629, 630 [2d Dept 2011]; *HP Capital, LLC v Village of Sleepy Hollow*, 68 AD3d 928, 929 [2d Dept 2009]). "[A] breach of contract cause of action accrues at the time of the breach" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Here, it is alleged that defendants breached the contract by failing to develop the property. Defendants assert that this breach accrued when there was no development of the property and no pre-sales occurred in the first quarter of 2006. Plaintiff, on the other hand, asserts that there is no specific time period set forth in the Investment Agreement as to when defendants had to complete the development of the property nor is there a time period set forth as to when profits had to be made. Plaintiff claims that Basel never repudiated the Investment Agreement and that it had a reasonable time to perform its duties under the Investment Agreement before it could have been considered to have materially breached it. He argues that there is an issue of fact as to what was a reasonable time within which Basel should have developed the property, such that the failure to do so was a material breach of the contract that commenced the time running within which he had to bring this action.

Plaintiff's argument must be rejected. As discussed above, the Memorandum specifically stated that the pre-sales would begin in the first quarter of 2006. Plaintiff was aware, in 2006, that no

development of the property had occurred, and, thus, at that time, all of the facts necessary to a breach of contract cause of action had occurred (*see Hahn Automotive Warehouse, Inc.*, 18 NY3d at 770; *Aetna Life & Cas. Co.* 67 NY2d at 175). Consequently, plaintiff's cause of action for breach of contract accrued in 2006.

Plaintiff argues that since the Memorandum projected the total net income of the property over a two-year period, this shows that his cause of action for breach of contract could not have accrued before the second quarter of 2008, which would render this claim timely. This argument is rejected since Basel had already failed to perform under the [*7]Investment Agreement by its lack of any development of the property or pre-sales in 2006. Thus, since plaintiff's breach of contract claim arising out of Basel's failure to develop the property accrued in 2006, such claim was untimely brought by him on June 24, 2013 (*see* CPLR 213 [2]).

Plaintiff also argues that he has a breach of contract claim arising out of Basel's failure to provide quarterly written accountings to him. Plaintiff admits that he waived that requirement and allowed Basel, by Waldmann, to report to him orally via telephone until at least December 2009/early 2010, at which time he met with Waldmann and Waldmann presented him with a handwritten list of expenses, but refused to allow him to copy the list. Plaintiff claims that at that time, he first expressed that this purported accounting was insufficient. Plaintiff contends that his breach of contract claim based upon Basel's breach of its duty to provide quarterly accountings, therefore, did not accrue until December 2009 at the earliest and that it is not time-barred.

This contention is devoid of merit. Plaintiff knew since the first half of 2006 that Basel was not providing him with accountings, and, thus, his claim accrued at that time. Plaintiff concedes that he had waived the requirement of quarterly written accountings by his knowing acceptance of performance differing from that required by the Investment Agreement, and he could not extend the Statute of Limitations by later insisting upon a written accounting in accordance with the Investment Agreement following such a known waiver (*see generally Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977] [contractual term may be orally modified]; *Fantigrossi v Brannon Homes, Inc.*, 77 AD3d 1413, 1414 [4th Dept 2010] [there is a waiver of contractual terms by a knowing acceptance of a deviation]). Plaintiff's claim for an accounting accrued when he possessed the legal right to demand an accounting, which was in 2006, not when he decided, after waiving this right for years, to demand one. Indeed, to hold otherwise would allow potential plaintiffs to extend the Statute of Limitations indefinitely by simply failing to make a demand. In any event, as pointed out by defendants, there were no profits for which to account due to the lack of any development of the

property.

Plaintiff argues that defendants have acknowledged their obligations to him under the Investment Agreement in writing through e-mails. He relies upon General Obligations Law § 17-101, which provides that "[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby" constitutes "competent evidence of a new or continuing contract" which takes an action out of the operation of the provisions of the Statute of Limitations. He contends that the issue of whether various e-mail communications forwarded by Waldmann to him and others fall within the ambit of General Obligations Law § 17-101 is a question of fact that must be determined at trial.

This argument, however, is unavailing since none of these e-mails were signed by Basel or acknowledged that it was obligated to develop the property under the Investment Agreement. Rather, these e-mails pertained to attempts to otherwise sell the property to a [*8]third-party buyer, which was not in accordance with the terms of the Investment Agreement. Thus, plaintiff may not rely upon General Obligations Law § 17-101 as a basis to extend the running of the Statute of Limitations.

Plaintiff further argues that Basel, through Waldmann, continually represented to him that it was working diligently on his behalf to obtain an outcome that would be profitable to him, including making representations to him that profitable sales to third parties were imminent and/or that it was going to sell the property for a profit at a public auction. He asserts that these representations began in 2006 and continued through at least May 2012, and that they caused him to delay taking action. He argues that defendants should, therefore, be equitably estopped from raising the defense of the Statute of Limitations on this basis.

Equitable estoppel, however, is an extraordinary remedy, and a defendant may be equitably estopped to plead the Statute of Limitations only "where [a] plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006], quoting *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). "Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations" and that the plaintiff exercised due diligence in ascertaining the facts (*Zumpano*, 6 NY3d at 674; *see also Simcuski*, 44 NY2d at 449; *Clark v Ravikumar*, 90 AD3d 971, 972-973 [2d Dept 2011]). Here, plaintiff has failed to allege that defendants induced him, by fraud, misrepresentations, or deception, to refrain from filing a timely action (*see Jones v Safi*, 58 AD3d 603, 604 [2d Dept 2010], *lv dismissed* 13 NY3d 901 [2009], *rearg denied* 14 NY3d 794 [2010]; *Bobash, Inc. v Festinger*, 57 AD3d 464. 467

[2d Dept 2008]; *Garcia v Peterson*, 32 AD3d 992, 992 [2d Dept 2006]). Additionally, since plaintiff's complaint itself does not refer to or even raise any facts alleging conduct to which the doctrine of equitable estoppel would be applicable, he cannot raise it in opposition to Basel and Basel Group's motion (*see Reiner v Jaeger*, 50 AD3d 761, 762 [2d Dept 2008]*; Anderson Co. v Devine*, 202 AD2d 382, 382-383 [2d Dept 1994]).

In addition, with respect to plaintiff's breach of contract claim, plaintiff argues that defendants have not shown that the portions of the property that are being sold and/or leased by Basel are not the property in which he has invested. In reply, Waldmann has annexed a marked-up copy of a map prepared by architects in Tbilisi which depicts the property adjacent to the lake, with notations that show that the sold or leased properties are all outside of the 10 hectares that constitute the property. Moreover, plaintiff, in his complaint, is not seeking to recover his share of alleged profits from any development or sales of the property, but, rather, he seeks a return of his $500,000 investment based upon a breach by Basel to develop the property. As noted above, Waldmann does not dispute that plaintiff is entitled to the benefit of the Investment Agreement when profits are realized. Plaintiff, however, cannot now seek a return of his $500,000 investment or claim that he should have received accountings since these claims accrued back in 2006, [*9]when the absence of any development of the property and the non-delivery of accountings were already apparent. Thus, plaintiff's first cause of action for breach of contract must be dismissed, pursuant to CPLR 3211 (a) (5), as time-barred.

Plaintiff's Second Cause of Action for Unjust Enrichment

Plaintiff's second cause of action for unjust enrichment alleges that he provided $500,000 to defendants based upon their representations that this sum would be used toward his obtaining a five percent interest in the proceeds from the rental or sales of the property after payment of reasonable and necessary expenses, and that defendants would develop and improve the property in order that such rental and sales would result in profitable income to him. He further alleges that these monies were also provided in reliance upon defendants' representations that they would keep him fully informed of all financial matters concerning the property, including the business venture, the development of the property, the rental or sale of the property, and the revenue generated and expenses incurred with respect to the property. He asserts that defendants maintain that there have been no profits from the property and they have failed to provide him with any financial statements regarding the revenue and expenses with respect to the property. He claims that defendants have

been unjustly enriched by their receipt of his $500,000 and have failed to provide him with anything in return.

Plaintiff's claim for unjust enrichment is thus based on essentially the same facts as his breach of contract claim. Plaintiff concedes that his unjust enrichment claims arise out of the same facts as his breach of contract claim and that the applicable Statute of Limitations is six years. He asserts that his unjust enrichment claim accrued at the same time that his breach of contract claim accrued, which he contends (as discussed above) was when the wrongful acts by defendants occurred in failing to develop the property within a reasonable time and in failing to provide him with written accountings after he insisted upon them.

Where an unjust enrichment is based upon the same facts as a breach of contract claim, a six-year Statute of Limitations applies (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]; *EMD Constr. Corp. v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 893, 894 [2d Dept 2010]; *37 Park Dr. S., Inc. v Duffy*, 63 AD3d 1040, 1041 [2d Dept 2009]). Thus, plaintiff's second cause of action for unjust enrichment is similarly barred by the Statute of Limitations since plaintiff knew from early 2006 that the development of the property was not proceeding and no profits were being realized and that no written accountings were being provided to him (*see* CPLR 213 [2]). Consequently, plaintiff's second cause of action for unjust enrichment must be dismissed as time-barred (*see* CPLR 3211 [a] [5]).

Moreover, plaintiff's second cause of action for unjust enrichment is precluded by the existence of a valid agreement, i.e., the Investment Agreement, which governs his five percent interest in the profits of the property (*see Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]; *IDT Corp. v Morgan Stanley Dean [*10]Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 289 [1987]). "[U]njust enrichment is not a catchall cause of action to be used when others fail," but, rather, "[i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello*, 18 NY3d at 790). A claim for unjust enrichment cannot be maintained when it is duplicative of a breach of contract claim (*see id.*; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 388-389 [1987]). Thus, dismissal of plaintiff's unjust enrichment claim is also mandated due to its failure to state a viable cause of action (*see* CPLR 3211 [a] [7]).

Plaintiff's Third Cause of Action for Fraud

Plaintiff's third cause of action for fraud alleges that in early December 2005, defendants represented to him that if he would provide them with $500,000 in investment funding, he would receive a percentage of profits from the rental or sale of all or portions of the property and that defendants would develop and improve the property and provide him with a full accounting. He further alleges that these representations were false when made since defendants did not intend to provide him with the promised accounting, nor did they intend to provide him with a percentage of profits from rental or sales of all or portions of the property, nor did they intend to develop or improve the property in accordance with their promises. He asserts that he reasonably relied upon these false representations in providing $500,000, and that he sustained damages because he has received no accountings as to the disposition of his monies and no monies from the renting or sales of all or portions of the property, and the property has not been developed or improved despite his providing $500,000 to defendants.

"The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916 [2d Dept 2009]; *see also Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Spector v Wendy*, 63 AD3d 820, 821 [2d Dept 2009]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; *Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877, 878 [2d Dept 2006]).

"A cause of action alleging fraud must be commenced within six years after the date on which the cause of action accrued or within two years after the time the plaintiff could have discovered the fraud with reasonable diligence" (*Espie v Murphy*, 35 AD3d 346, 347 [2d Dept 2006]; *see also* CPLR 213 [8]; *Sandpebble Bldrs., Inc. v Mansir*, 90 AD3d 888, 889 [2d Dept 2011]; *Prand Corp. v County of Suffolk*, 62 AD3d 681, 682 [2d Dept 2009]). "A plaintiff's ability to discover an alleged fraud depends on whether he or [*11]she possessed knowledge of facts from which the fraud could reasonably have been inferred'" (*Espie*, 35 AD3d at 347, quoting *Northridge Ltd. Partnership v Spence*, 246 AD2d 582, 583 [2d Dept 1998]).

Defendants assert that since plaintiff's third cause of action for fraud alleges that he was

fraudulently induced to execute the Investment Agreement, such claim accrued at the time the Investment Agreement was signed in December 2005, more than six years before this action was commenced, and that it is, therefore, barred by the applicable Statute of Limitations. Plaintiff, in opposition, asserts that his fraud claim accrued either six years from the date that he paid the $500,000 (which was in December 2005) or two years from when he should have discovered the fraud, whichever is longer. While the six-year Statute of Limitations would render plaintiff's fraud claim untimely, plaintiff argues that since defendants continued to assure him that they were working diligently on his behalf to attempt to derive profits for him from the property through at least May 2012, there is a question of fact as to when he should have reasonably realized that he was being defrauded and that his fraud claim should, therefore, not be determined to be time-barred on a motion to dismiss.

Plaintiff's argument is unavailing since, in any event, " "a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract"" (*Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 642-643 [2d Dept 2011], quoting *Yenrab, Inc. v 794 Linden Realty, Inc. LLC*, 68 AD3d 755, 757 [2d Dept 2009], quoting *Mastropieri v Solmar Constr. Co.*, 159 AD2d 698, 700 [2d Dept 1990]). "[A] cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations" (*Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914 [2d Dept 2011]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 389). Here, plaintiff's fraud claim merely alleges that Basel did not intend to perform its obligations under the Investment Agreement when it entered into this agreement. Therefore, the only fraud charged relates to Basel's alleged breach of contract (*see Weinstein*, 86 AD3d at 642-643).

"Furthermore, a fraud claim must be based upon a misrepresentation of an existing fact rather than upon an expression of future expectations" (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916 [2d Dept 2009]; *see also Foot Locker Stores, Inc. v Pyramid Mgt. Group, Inc.*, 45 AD3d 1447, 1448 [4th Dept 2007]; *International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]; *Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155 [4th Dept 2005]; *Naturopathic Labs. Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 [1st Dept 2005]). Thus, "[a] cause of action alleging fraud may not be based on disappointment that a promised future benefit did not materialize" (*Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998]). "The mere fact that the expectations of the parties were frustrated is an insufficient ground upon which to [*12]predicate a claim of fraud" (*Tutak v Tutak*, 123 AD2d 758, 760 [2d Dept 1986]).

Plaintiff argues, however, that his fraud claim should not be dismissed as against the Basel Group since only Basel, and not the Basel Group, was a party to the Investment Agreement. Specifically, plaintiff contends that there are multiple defendants and that if one of the defendants (i.e., the Basel Group since Waldmann has not been served) is found to have not entered into a binding contract, it is possible that such defendant could be liable in fraud. This argument must be rejected since plaintiff's complaint fails to allege any specific fraudulent representations made by the Basel Group (*see* CPLR 3016 [b]), and, in any event, the allegations in plaintiff's complaint, in general, are insufficient to state a fraud or fraudulent inducement cause of action as against it (*see Lama Holding Co.*, 88 NY2d at 421; *Weinstein*, 86 AD3d at 643). Consequently, plaintiff's third cause of action for fraud must be dismissed for failure to state a cause of action (*see* CPLR 3211 [a] [7]).

*Lack of Personal Jurisdiction Over Basel*Additionally, CPLR 3211 (a) (8) provides for dismissal of an action where the court lacks personal jurisdiction over the defendant. Basel argues that the court lacks personal jurisdiction over it since it is a foreign limited liability company which does not do business in New York.

The burden of proof rests upon the party asserting personal jurisdiction (*see Armouth Intl. v Haband Co.*, 277 AD2d 189, 190 [2d Dept 2000]; *Roldan v Dexter Folder Co.*, 178 AD2d 589, 590 [2d Dept 1991]; *Spectra Prods. v Indian Riv. Citrus Specialties*, 144 AD2d 832, 833 [3d Dept 1988]). Where a defendant submits facts that would negate a court's power to obtain jurisdiction over it, the plaintiff is required "to come forward with evidence to support the existence of a basis upon which to predicate the exercise of personal jurisdiction . . . or to at least show that such evidence may exist" (*Roldan*, 178 AD2d at 590; *see also Weiss v Chou*, 234 AD2d 539, 540 [2d Dept 1996]; *Spectra Prods.*, 144 AD2d at 833).

"A foreign [limited liability company] is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of doing business' here that a finding of its presence' in this jurisdiction is warranted" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). "The essential factual inquiry is whether the defendant has a permanent and continuous presence in the State, as opposed to merely occasional or casual contact with the State" (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 [1st Dept 1998]).

As noted above, Basel is a limited liability company organized under the laws of the Republic of Georgia, with its sole place of business in the City of Tbilisi, in Georgia, and Basel's only

business is the ownership and management of real property in Tbilisi. Basel does not maintain offices in New York, does not employ anyone in New York, and does not transact business in New York. Thus, plaintiff has failed to show that Basel has [*13]a permanent and continuous presence in New York so as to be doing business in New York pursuant to CPLR 301.

Plaintiff, however, argues that the court should exercise personal jurisdiction over Basel because Waldmann was a New York City resident at the time of his entry into the Investment Agreement with Basel, and because the Basel Group, to which he paid the $500,000, is authorized to do business in New York. He contends that Waldmann and the Basel Group held themselves out as agents of Basel.

Plaintiff's argument must be rejected. It has not been alleged that the Basel Group and Basel have a parent/subsidiary relationship with each other or that they are alter egos of one another so as to subject Basel to jurisdiction through the Basel Group (*see Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 432 [1972], *rearg denied* 30 NY2d 694 [1972]; *see also Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 537-538 [1967], *cert denied* 389 US 923 [1967]; *Pacamor Bearings v Molon Motors & Coil*, 102 AD2d 355, 356-357 [3d Dept 1984], *appeal withdrawn* 64 NY2d 886 [1985]). Basel cannot be deemed to be present in New York pursuant to CPLR 301 merely based upon the fact that the Basel Group is authorized to do business in New York. In addition, while plaintiff claims that Waldmann (who now purportedly lives in Florida) was, at the time of the contract, a New York resident, all of plaintiff's contacts with Waldmann prior to his entry into the Investment Agreement took place in Tbilisi, and not in New York. Therefore, Basel cannot be said to have been doing business in New York based upon Waldmann's residency in New York. Furthermore, "[u]nless a foreign [limited liability company] is engaged in business within the state, it is not brought within the state by the presence of its agents" (*Tauza v Susquehanna Coal Co.*, 220 NY 259, 268 [1917]; *see also Gertsenstein v Peninsular & Oriental Steam Nav. Co.*, 202 Misc 838, 841 [City Ct, NY County 1952], *affd* 204 Misc 459 [App Term 1953]). Consequently, the court cannot exercise personal jurisdiction over Basel pursuant to CPLR 301.

Under New York's long-arm jurisdiction statute, a court may exercise jurisdiction over a nondomiciliary who, in person or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). Personal jurisdiction can be conferred under CPLR 302 (a) (1) "even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial

relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *see also Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2d Dept 2006], *lv denied* 9 NY3d 803 [2007]). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007], quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]; *Paterno v Laser Spine Inst.*, 112 AD3d 34, 39-40 [2d Dept 2013]).

Here, plaintiff's complaint does not allege that Basel engaged in purposeful business activities or transactions in New York. Rather, plaintiff alleges, in his complaint, that jurisdiction over Basel is proper in New York because the matters complained of arose, in part, out of representations directed to him in New York.It is undisputed, however, that plaintiff toured the property in Tbilisi and that he and Basel reached their agreement in principle in Tbilisi. The only acts that transpired in New York were that plaintiff signed the Investment Agreement in New York, which was sent to him in New York by facsimile from Georgia, and that plaintiff made his investment by sending his check while in New York. The Investment Agreement did not require that any portion of it be performed in New York, the investment was in real property in Tbilisi, and the contract was to be performed in Tbilisi. Thus, Basel has demonstrated that it did not purposefully avail itself of business activities or transactions in New York.

Plaintiff, in opposition, asserts that although the initial meeting with Waldmann occurred in Georgia, Waldmann actively solicited his participation in the venture through his communications to him in New York. Plaintiff, however, does not allege any facts to show any active solicitation by Waldmann or communications made to him while in New York. Rather, plaintiff admitted that the contract was already agreed to in principle in Tbilisi. The other communications referred to by plaintiff occurred subsequent to his execution of the Investment Agreement. Consequently, the court cannot exercise personal jurisdiction over Basel pursuant to CPLR 302 (a) (1) (*see Finesurgic Inc. v Davis*, 148 AD2d 414, 415 [2d Dept 1989], *appeal dismissed in part, denied in part* 74 NY2d 781 [1989]).

Plaintiff also contends that personal jurisdiction can be based upon Basel's alleged committing of tortious conduct under CPLR 302. However, since plaintiff's fraud claim (as discussed above) fails to state a claim, personal jurisdiction cannot be established based upon any tortious conduct, and there is no basis for jurisdiction pursuant to CPLR 302 (a) (2) or (3).

Plaintiff additionally alleges, in his complaint, that personal jurisdiction over Basel in this action may be maintained based upon the ground that the parties agreed that any action concerning this matter could be brought in New York. Plaintiff, in his affidavit, attests that Waldmann, on behalf of Basel, specifically agreed with him that any and all disputes concerning his investment could be taken care of in a court action here in New York. He claims that this agreement as to New York jurisdiction was reached during a telephone call made to him in Brooklyn before he signed the Investment Agreement. He states that he accepted Waldmann's word on this, without insisting that he put it in writing. While conceding that the Investment Agreement does not mention this aspect of their agreement, plaintiff points to the fact that the Investment Agreement does not specifically state that it constitutes the entire agreement between him and Basel. He further states that he relied upon this representation by Waldmann in executing the [*14]Investment Agreement, and claims that since Waldmann was also a New York City resident at that time, he thought that it made sense that they would have access to New York courts in the event of a dispute. He argues that there is an issue of fact as to whether he and Basel agreed that all disputes among them could be litigated in New York.Plaintiff, relying upon *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.* (35 AD3d 222, 222 [1st Dept 2006]), contends that parties to an agreement are free to agree that courts in this State may be utilized for dispute resolution, and where they have done so, this constitutes a basis for the assertion of personal jurisdiction. Plaintiff's reliance upon *Sterling Natl. Bank*, however, is misplaced since that case involved a forum selection clause, and the Appellate Division, First Department, noted that the "very point" of forum selection clauses was "to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute," and that "it is the well-settled policy of the courts of this State to enforce contractual provisions for . . . selection of a forum for litigation'" (*Sterling Natl. Bank*, 35 AD3d at 222, quoting *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]). Here, there is no forum selection clause contained in the InvestmentAgreement. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms," and "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Thus, since the written Investment Agreement between the plaintiff and Basel was unambiguous, parol evidence to add terms to this agreement is inadmissible (*see Emerald Equip. Sys., Inc. v Gearhart Bros. Servs., LLC*, 115 AD3d 1187, 1188 [4th Dept 2014]; *Akasa Holdings, LLC v Sweet*, 115 AD3d 556, 557 [1st Dept 2014]; *Bond Safeguard Ins. Co. v Forkosh*, 107 AD3d 750, 751 [2d Dept 2013]). Consequently, dismissal of plaintiff's complaint as against Basel is also mandated pursuant to CPLR 3211 (a) (8) based upon a lack of personal jurisdiction.

CONCLUSION

Accordingly, Basel and Basel Group's motion to dismiss plaintiff's complaint as against them is granted.

This constitutes the decision and order of the court.ENTER,

J.S.C.

Footnotes

Footnote 1: Waldmann was never served with the summons and complaint, and, therefore, he has not appeared or moved on his own behalf.

Footnote 2: While Basel and the Basel Group's notice of motion cites to CPLR 3211 (a) (1), instead of CPLR 3211 (a) (5), this appears to be an inadvertent error.

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