SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ME AND MY PAL, INC.,

Plaintiff,

-against-

BRYAN C. BUMPAS, D.D.S., P.C. and
BRYAN BUMPAS,

Defendants.

Index: 614479/2024

MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S SUMMARY JUDGMENT APPLICATION
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR DISMISSAL

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TABLE OF CONTENTS

STATEMENT OF FACTS 1

STANDARD 1

ARGUMENT 2

I. SUMMARY JUDGMENT SHOULD BE DENIED, BECAUSE THE PLAINTIFF LACKS STANDING TO SUE ON THE CONTRACT. 2

II. SUMMARY JUDGMENT SHOULD BE DENIED, BECAUSE THE DEFENSE OF FRAUD IN THE INDUCEMENT PRESENTS A QUESTION OF FACT FOR WHICH DISCOVERY IS WARRANTED. 3

III. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE REMAINS A BONA FIDE DEFENSE OF SETOFF AGAINST THE SOUGHT MONEY JUDGMENT. 5

CROSS-MOTION 7

THE COURT SHOULD DISMISS THE ACTION, AS PLAINTIFF LACKS STANDING TO RECOVER UNDER THE CONTRACT. 7

CONCLUSION 8

STATEMENT OF FACTS

The relevant facts are set forth in the enclosed affirmation of Bryan Bumpas ("Bumpas Aff."), a named defendant and the owner of the corporate defendant listed in this action.

STANDARD

Under CPLR 3213, if "an action is based upon an instrument for the payment of money only ..., the plaintiff may serve ... a ... motion for summary judgment ... in lieu of a complaint." This accelerated mechanism affords "a speedy and efficient remedy to secure a judgment in certain cases where service of formal pleadings would be unnecessary for the expeditious resolution of the dispute between the parties." *Maglich v. Saxe, Bacon & Bolan, P.C.*, 97 A.D.2d 19, 20 (1st Dept. 1983).

"This accelerated procedure, however, only applies to an action based upon ... an instrument for the payment of money only." *Id.* "Where proof outside the instrument is necessary to establish the underlying obligation, the CPLR 3213 procedure does not apply." *Id.* at 21. *See also Council Commerce Corp. v. Paschalides*, 92 A.D.2d 579, 579 (2d Dept. 1983).

With these mechanics in the background, 3213 relief is unavailable in cases where the very existence of the obligation is in dispute, raises questions of fact, or requires information beyond the four corners of the financial instrument. Where no "prima facie case would be made out by the instrument [alone]," or where "evidentiary proof sufficient to raise an issue as to ... defenses" is in play, *Interman Indus. Prod., Ltd. v. RSM Electron Power, Inc.*, 37 N.Y.2d 151, 155-56 (1975), a Plaintiff's request for hyper-accelerated relief under CPLR 3213 must be denied.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE DENIED, BECAUSE THE PLAINTIFF LACKS STANDING TO SUE ON THE CONTRACT.

"Under New York law, contracts are freely assignable absent language which expressly prohibits assignment." *In re Stralem*, 303 A.D.2d 120, 122 (2d Dept. 2003). "[N]o particular words are necessary to effect [one]," and when an assignment is made the assignor is divested of rights under the assigned property—for the "assignee steps into the assignor's shoes and acquires whatever rights the latter had." *Id. See also Lancer Ins. v. Saravia*, 40 Misc.3d 171, 177 (Sup. Ct., Kings Co. 2013) ("Where there is a valid assignment of a claim, the assignor is divested of all control and right to the cause of action").

These principles form an immediate bar to the Plaintiff's request for accelerated summary judgment, because while it brings suit upon an "Equipment Finance Agreement" numbered "202205.4880," it assigned away "all … right, title and interest (including the right to receive payments or hereafter owing) in and to th[at] Contract and the subject Equipment thereunder" back in May 2022. *See* Exhibit A (reproducing Ex. D to NYSCEF Doc. No. 5). To avoid doubt about this fact, Plaintiff acknowledged this assignment in a letter it sent the same month—conceding that the assigned "Contract" in issue was the same one they are suing upon now: "Contract No.202205.4880." *See* Exhibit B (reproducing Ex. D to NYSCEF Doc. No. 5).

Having been "divested of all control and right to the cause of action," *Lancer Ins.*, 40 Misc.3d at 177, Plaintiff clearly lacks standing to prosecute this case or to obtain summary judgment upon it. And at the very least, the Plaintiff's assignment of the contract at issue creates "evidentiary proof sufficient to raise an issue as to … defenses," precluding the availability of

accelerated summary judgment. *Interman Indus. Prod., Ltd. v. RSM Electron Power, Inc.*, 37 N.Y.2d 151, 155-56 (1975).

II. SUMMARY JUDGMENT SHOULD BE DENIED, BECAUSE THE DEFENSE OF FRAUD IN THE INDUCEMENT PRESENTS A QUESTION OF FACT FOR WHICH DISCOVERY IS WARRANTED.

Accelerated summary judgment relief is not available when the "opposition papers adequately allege[] a defense of fraud in the inducement." *Gray v. Ratzker*, 150 A.D.2d 343 (2d Dept. 1989). That is because fraudulent inducement is a complete defense to a breach of contract claim, for, if proven, it "renders the contract voidable." *Mix v. Neff*, 99 A.D.2d 180, 182-83 (3d Dept. 1984). *See also Faller Group Inc. v. Jaffe*, 564 F. Supp. 1177, 1182 (S.D.N.Y. 1983) ("under New York law fraudulent inducement is a complete defense to a claim brought under a contract"). In turn, a fraud in the inducement defense arises in the face of a "knowing misrepresentation of material present fact, which [was] intended to deceive another party and induce that party to act on it, resulting in injury." *Gosmile Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dept. 2010).

The Plaintiff, Me and My Pal, Inc., is no stranger to claims of fraudulent inducement, as this allegation was sustained over its dismissal-request in a lengthy decision just two years from an action arising from a substantially similar background. *See St. Francis Holdings LLC v. MMP Capital, Inc.*, 2022 WL 991980 (E.D.N.Y. 2022) (permitting rescission of contract). Having financed the purchase of deeply troubled and defective equipment, Me and My Pal was accused of engaging in a scheme in which the equipment failed to operate as advertised and where the seller, as here, "failed to send a representative to train … on their use." *Id*. at 4. *See also* Bumpas Aff. at ¶12. *See also id*. at ¶14 (the transaction was a "scam").

As here, Me and My Pal came forward in *St. Francis* with a contract claiming a variety of disclaimers, warranties, and attempted shelters, including a provision claiming to distance itself

from the equipment seller. *St. Francis*, at 3. *See also* Exhibit C (reproduction of contract) at "Disclaimer of Warranties and Claims." Yet the United States District Court cogently explained that the fraudulent inducement claim was not susceptible to such a shelter. *Id*. at 10 ("Defendant's agency disclaimer provision is not controlling"; instead, notwithstanding "contractual agency disclaimers … a court may look to the facts and circumstances of the parties' relationship to determine whether an agent-principal relationship existed"). And given the circumstances in which the equipment was purchased and financed in *St. Francis*, the facts gave rise to a colorable claim of (a) an agency relationship between the equipment seller and the Me and My Pal financing company, and (b) a fraudulent inducement executed upon the buyer-borrower based upon misrepresentations in the sale of the equipment. *Id*. at 9-14.

Me and My Pal's litigation in the *St. Francis* litigation is persuasive as to the merits of the fraudulent inducement defense here. As Dr. Bumpas sets forth in his detailed and attached affirmation, and echoing the experience of the *St. Francis* victim, he was led into this transaction through highly aggressive sales tactics with false promises of suitability for his business as well as "all-in-one" marketing and training—none of which turned out to be true, and which instead left him with a defective product and highly inadequate training on how to use it. *See* Bumpas Aff. at ¶¶8-12 ("the mechanics of the deal were especially safe, [the representative] explained, because the sales team would remain hands on in training us to use the equipment and marketing it to customers"; [a]fter receiving the product, the seller offered no training … other than a single day," the "products also appeared to not work as advertised," and "no insurance company would provide coverage for use of the products").

As in *St. Francis*, moreover, there was a clear agency relationship between the seller Alma Lasers and the financier-plaintiff. *See St. Francis*, at *11. Agency relationships can be established

through "actual or apparent authority," such that the principal must answer for the torts of the actual or apparent agent. *Id*. As in *St. Francis*, despite plaintiff's attempt to evade these rules with clever contract language, its "agency disclaimer is not controlling." *Id*. at 9. And the misrepresentations of Alma Lasers were clearly done with—at minimum, and as in *St. Francis*—apparent authority to act on plaintiff's behalf, as these entire deals, including the financings, were negotiated in person at Alma Laser events and by Alma Laser representatives—including at an Alma Laser seminar and Alma Laser retreat. *See* Bumpas at ¶¶7-10. Just as the equipment seller "Huston" was deemed the plaintiff's apparent agent in *St. Francis*, Alma Laser was its apparent agent here. *St. Francis*, at 11.

In the end, the fraud through which Dr. Bumpas was induced to purchase the equipment in this case forms a complete defense to the claimed breach of contract, and discovery is appropriate to allow the defense to investigate that defense. In the face of this evidentiary issue, pre-complaint summary judgment is not appropriate. *See Interman Indus.*, 37 N.Y.2d at 155-56 (precluding summary judgment in the face of "evidentiary proof sufficient to raise an issue as to … defenses"). The motion for accelerated summary judgment should be denied.

III. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE REMAINS A BONA FIDE DEFENSE OF SETOFF AGAINST THE SOUGHT MONEY JUDGMENT.

Plaintiff seeks an accelerated money judgment in the amount of "$199,010.19." *See* NYSCEF Entry No. 3, at ¶25. This, the Plaintiff claims, reflects the amount of unpaid monies that were due and owing under the Equipment Finance Agreement. *Id*. at ¶14. However, the Plaintiff does not acknowledge a basic defense to this money judgment: it has already recovered assets that secured the contract obligations—the equipment itself (Exhibit D)—which of course would reduce the amount of any outstanding debt on the contract.

Where "there is a factual question as to … whether or not [a] setoff contained in [a] note was to be applied, summary judgment [is] inappropriate…." *Gusmano v. Four Seasons Messenger Servs. Inc.*, 209 A.D.2d 379, 380 (2d Dept. 1994) (denying motion for summary judgment in lieu of a complaint). Thus in *Bragarnik v. Zodiac on Brighton Café Inc.*, 189 A.D.2d 744, 745 (2d Dept. 1993), these mechanics—illustrative for the present case—unfolded to bar summary judgment relief: a seller sued a buyer for failing to keep up with loan payments relating to the purchase of a restaurant, but there was a potential setoff against that debt to account for insurance monies the seller received from a restaurant-fire. Summary judgment was inappropriate, the Appellate Division held, because documentary evidence demonstrated that the defense "had the right to claim, as a set-off or as an accord and satisfaction to the amount due under the notes, the amount of insurance proceeds … received and retained by the plaintiffs." *Id. See also Hack v. Stang*, 2015 WL 5139128, at *4 (S.D.N.Y. 2015) (summarizing same mechanics).

The same mechanics apply here. Even if Plaintiff had standing to sue under the contract, and even if they were *prima facie* entitled to contract damages, factual questions beyond the four corners of the contract would remain firmly in place to identify the extent of any setoff arising from the Plaintiff's recovery of the pledged equipment-collateral. As Plaintiff itself made clear, the recovery of this collateral would narrow the recovery-picture to the "outstanding amount *following a sale or other disposition of the Collateral*." *See* Exhibit D (emphasis added). With no evidence yet about the price fetched for the collateral, and with the very existence of this collateral-recovery arising beyond the four corners of the contract, accelerated summary judgment under CPLR 3213 is not available.

CROSS-MOTION

THE COURT SHOULD DISMISS THE ACTION, AS PLAINTIFF LACKS STANDING TO RECOVER UNDER THE CONTRACT.

For the reasons identified in opposition to Plaintiff's motion for summary judgment, *supra* Section I, the Court should find that the Plaintiff lacks standing to sue under the contract, and should dismiss the action.[1]

[please turn to next page.]

[1] See Exhibit E (summons).

CONCLUSION

For these reasons, Defendants respectfully request that Plaintiff's motion for summary judgment in lieu of a complaint be DENIED, and that Plaintiff's cross-motion for dismissal be GRANTED.

Dated: Garden City, New York
October 7, 2024

Respectfully,

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/s/ *Alexander Klein*

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