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Judge: Calendar, Y

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IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

30 DEGREE DESIGN, LLC an Illinois Limited Liability Company, BRAD BEHMER, an individual, and KENNETH MAYLE, an individual,	)	
Plaintiffs/Counter-Defendants,	)	**No. 22 L 10246**
v.	)	**Judge Catherine Schneider**
GP OPPORTUNITY FUND, LLC, an Illinois Limited Liability Company.	)	**Calendar Y**
Defendants/Counter-Plaintiffs.	)	

PLAINTIFFS'/COUNTER-DEFENDANTS' MOTION TO DISMISS
DEFENDANT/COUNTER-PLAINTIFFS' COUNTERCLAIM

NOW COME Plaintiffs'/Counter-Defendants', 30 DEGREE DESIGN, LLC, BRAD BEHMER, and KENNETH MAYLE, by and through their attorneys, WEISS ORTIZ P.C., and pursuant to 735 ILCS 5/2-615, moves this Honorable Court to dismiss Defendant/Counter-Plaintiff GP OPPORTUNITY FUND, LLC's, an Illinois Limited Liability Company, Counterclaim. In support thereof, Plaintiffs'/Counter-Defendants' respectfully state as follows:

STANDARD

A motion to strike brought pursuant to section 2-615 of the Code of Civil Procedure "challenges the legal sufficiency of a pleading by alleging defects on the face of the pleading." *Dep't of Healthcare & Family Servs. ex rel. Daniels v. Beamon*, 2012 IL App (1st) 110541, ¶15; *Fabricare Equip. Credit Corp. v. Bell, Boyd and Lloyd*, 328 Ill. App. 3d 784, 788 (1st Dist. 2002). 735 ILCS 5/2-615(a) specifically states that a motion to strike:

> shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or *portion thereof be stricken because substantially insufficient in law*, or that the action be dismissed, or

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> that a pleading be made more definite and certain in a specified particular, *or that designated immaterial matter be stricken out . . .*

735 ILCS 5/2-615(a). Emphasis added.

"The issue is whether the allegations in the complaint, viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Dvorkin v. Soderquist*, 2022 Ill. App. 1st 201368, ¶75 (1st Dist. 2022). "[A]n exhibit attached to a complaint is incorporated into the complaint, and the exhibit controls if an exhibit and allegation in the complaint contradict." *Id.* A motion attacking a defect in the pleadings as substantially insufficient in law attacks the legal sufficiency of the complaint and is solely based on defects appearing on the face of the complaint. *IL Labor Relations Bd. v. CTA*, 341 Ill. App. 3d 751, 754 (1st Dist. 2003). When attacking a pleading as "substantially insufficient in law," a motion must specify wherein the pleading is sufficient. *Danville Producers Dairy v. Preferred Risk Mut. Ins. Co.*, 33 Ill. App. 3d 359, 362 (1st Dist. 1961).

The motion to dismiss should be granted if, after disregarding the legal and factual conclusions, the complaint is factually insufficient to state a cause of action. *Barille v. Sears Roebuck and Co.*, 289 Ill. App. 3d 171, 174 (1st Dist. 1997). Failing to adequately plead any elements of a claim is *fatal* for the claim. See *Benge v. State Farm Mut. Auto. Ins. Co.*, 297 Ill. App. 3d 1062, 1066 (1st Dist. 1998) ("*A complaint which fails to state essential allegations is deficient and may not be remedied by liberal construction*."). Emphasis added.

Moreover, in Illinois, *plaintiffs must plead fraud with specificity and particularity.* This means that in addition to pleading the elements of fraud (material misrepresentation, scienter, reliance, and damages), the plaintiff must allege specific facts from which fraud is the necessary or probable inference, including what representations were made, when they were made, which party made them, and to which party they were made. *Connick v. Suzuki Motor Co. Ltd.*, 174 Ill.

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2d 482, 496-97; *See also First Mercury Insurance Company v. Ciolino*, 2018 IL App (1st) 171532, PP 39-40. Emphasis added.

ARGUMENT

I. COUNTER-PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS BECAUSE IT IS INSUFFICIENT IN LAW AND FACT

To state a cause of action for breach of contract, a party must establish: (1) an offer and acceptance; (2) consideration; (3) definite and certain terms of the contract; (4) plaintiffs' performance of all required contractual conditions; (5) defendants' breach of the terms of the contract; and (6) damage resulting from the breach. *Barille v. Sears Roebuck & Co.,* 289 Ill. App. 3d 171, 175, 224 Ill. Dec. 557, 682 N.E.2d 118 (1997). *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1082, 702 N.E.2d 265, 270 (1st Dist. 1998).

Counter-Plaintiff fails to sufficiently plead a claim of breach of contract, and merely attempts to assert broad stroke allegations in an effort to allege the prima facie elements. The Counterclaim is attached hereto as **Exhibit A.** Namely, Paragraph 42 in which Counter-Plaintiff claims that all of its obligations under the lease were fulfilled is inaccurate. As noted on Counter Plaintiff's exhibit, there existed city code violations associated with the property when Counter-Defendants commenced the lease, to such an extent that they were unable to obtain renter's insurance. Counter Plaintiff improperly asserts that they have satisfied all obligations under the lease, in that these code violations existed prior to Counter Defendant's occupancy. Here, **Exhibit H** to the Counterclaim controls, and not the allegation by Counter Plaintiff that it has satisfied all obligations under the lease.

While not necessary to address, but since Counter Plaintiff has alleged same, due to the numerous safety and health issues present on the property prior to Counter-Defendant's occupation

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of the property, Counter-Defendants were not able to obtain renters insurance. This put Counter-Defendant's in the vulnerable position of being liable for any damage incurred on the property due to Counter-Plaintiff's negligence. Instead, the lease should be considered void as a result of the material misrepresentations by the landlord regarding the property. "A case of a mutual mistake of fact as to a material matter affecting the substance of a transaction affords grounds for an application by either party for a rescission. It may, therefore, be well to consider whether the lessors could have had a rescission had they so applied." *Barker v. Fitzgerald*, 105 Ill. App. 536, 543 (1903).

II. COUNTER-PLAINTIFF'S CAUSE OF ACTION FOR FRAUD FAILS BECAUSE IT IS NOT PLEAD WITH SPECIFICITY AND PARTICULARITY

"A successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Company, Ltd.*, 174 Ill. 2d 482, 496-97, 675 N.E.2d 584, 221 Ill. Dec. 389 (1996). To state a claim for fraudulent misrepresentation under Illinois law, a complaint must set forth specific facts establishing each of the following elements: (1) a false statement of material fact, (2) defendant's knowledge that the statement was false, (3) defendant's intent that the statement induced plaintiff to act, (4) plaintiff's reliance on the truth of the statement, and (5) damages resulting from plaintiffs' reliance. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496 (1996).

"To support an action for fraud, the alleged misrepresentation must be one of fact and not an expression of opinion. Statements regarding future events are considered opinions, not statements of fact. [T]he general rule denies recovery for fraud based [upon] a false representation

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of intention or future conduct. Even a false promise of future conduct with no current intent to fulfil that promise will not constitute fraud. An exception to the general rule exists whereby a false promise as to future circumstances may be actionable if the false statements were part of a fraudulent scheme." *Prime Leasing v. Kendig*, 332 Ill. App. 3d 300, 309, 773 N.E.2d 84, 92 (2002).

Here, in addition to the haphazard manner in which Counter Plaintiff asserts the allegations constituting misrepresentation, it has failed to allege the essential elements of its fraudulent misrepresentation claims against Counter Defendants. Namely, again, in support of its fraudulent misrepresentation claim, Counter Plaintiff makes general, broad stroke allegations about alleged representations, but fails to state when they were made, what were the representations, by whom and to whom stated, and the like:

> 63. During the course of preliminary discussions GP, Counter-Defendants represented that the use of the commercial space would be for a workshop. .
>
> 64. Counter-Defendants made such statements with the intent of inducing Counter-Plaintiff to lease the space to them.
>
> 65. Counter-Plaintiff GP reasonably relied on the statements made by Counter-Defendants that the space would be used for commercial purposes and that Counter-Defendants had obtained requisite insurance.

See **Exhibit A** at p. 9.

Moreover, the Counterclaim is devoid of any allegation that any alleged representations were knowingly false. Moreover, any allegation of an intended use or prospective use is a statement of future intent and therefore not actionable as fraud. *Vill. of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 453 (2d Dist. 2009); *People ex rel. Peters v. Murphy-Knight*, 248 Ill. App. 3d 382, 387 (1st Dist. 1993). ("[s]tatements regarding future events are considered opinions, not statements of fact," and therefore cannot be fraudulent). Even a false promise of

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future conduct with no current intent to fulfill that promise will not constitute fraud. *Gold v. Vasileff,* 160 Ill.App.3d 125 (representation by defendant's attorney that his clients would comply with contract although defendant knew that they would not, not actionable as fraud since it was a representation of events to occur in the future and not one of present fact).

Additionally, the Counterclaim states "During the course of preliminary discussions GP, Counter-defendants, represented that the use of the commercial space would be for a workshop; and misrepresented how they intended to use the space located at 4714A W. Lake Street. There is, however, evidence to substantiate that the commercial space in question was in fact used as a workshop, as alleged. *See* **Exhibit B**, attached hereto. Counter-Plaintiffs also fail to state specifically how the representations that were made regarding the *use of the space* were false, in light of the **Exhibit B** depicting the use of the commercial space utilized in a manner that is in keeping with the representations that Counter-Defendants made to Counter-Defendants.

Applying *Prime Leasing v. Kendig*, 332 Ill. App. 3d 300, to the case at bar, alleging that Counter-Defendants falsely claimed to be using their space as an artist's workshop is not only untrue, but it also does not constitute fraud. *Prime Leasing* teaches that a promise to act in a certain way in the future, such as stating how one will use a leased property and then failing to live up to that promise does not constitute fraud. The only exception to this rule would be if the same purportedly false statements were part of a fraudulent scheme, the elements of which would need to be stated with particularity. Such is not the case here. Not only did Counter-Plaintiffs fail to state a claim of fraud upon which relief should be granted, their allegations have been contradicted.

"To state a cause of action for fraudulent concealment, also a form of common law fraud, plaintiffs [***21] must allege that defendants concealed a material fact when they were under a duty to disclose that fact to plaintiffs. *Connick,* 174 Ill. 2d at 490-500. Mere silence in a transaction

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does not amount to fraud." *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1086-87, 702 N.E.2d 265, 273 (1st Dist. 1998) citing *Russow v. Bobola*, 2 Ill. App. 3d 837, 841, 277 N.E. 2d 769 (1972).

Further, paragraphs 64 and 66 regarding the fact that Counter-Plaintiffs relied on Counter-Defendant's representations regarding their intended use of the property indicate that Counter-Defendant's devised a rouse to secure a lease on the property in question. However, the allegations are meritless in that there is no specific allegation to show that Counter-Defendant's fabricated their intent to use the property in question as a workshop, as noted in paragraph 64. Rather, there is evidence to the contrary in the form of pictures of the commercial space being used as an artist's workshop.

Paragraph 66 on the Counterclaim continues with the same empty claim that Counter-Plaintiff's relied upon Counter-Defendant's use of the commercial space as workshop when they entered into the lease agreement, again insinuating that this was not the case without making a specific claim. In *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1086-87, 702 N.E.2d 265, 273 (1st Dist. 1998) the court reasoned:

> "…the most fatal error in pleading this claim [*1087] is the lack of specificity. The complaint fails to allege what material facts were concealed by defendants. We conclude that the complaint fails to sufficiently state a cause of action for fraudulent misrepresentation or concealment. Because the count makes only a general averment that defendants acted fraudulently when they made [***22] the disclosures regarding the property and does not point to specific false representations so as to fairly apprise defendants of what they would be called upon to answer, we affirm the dismissal of this claim." *Id.*

Likewise, here, the fraudulent misrepresentation claim is also devoid of factual allegations as to how the alleged misrepresentations resulted in Counter Plaintiff's claimed damages. Because Counter Plaintiff has failed to sufficiently allege any knowingly false, actionable statements by

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Counter Defendants, failed to plead same with particularity and specificity its fraud claim must be dismissed pursuant to Section 2-615.

CONCLUSION

WHEREFORE, PLAINTIFFS/COUNTER DEFENDANTS, 30 DEGREE DESIGN, LLC, BRAD BEHMER, and KENNETH MAYLE, respectfully request that this Court grant their Section 2-615 Motion to Strike Counts I and II of DEFENDANT'S/ COUNTER PLAINTIFF'S COUNTERCLAIM and for any other relief this Court deems just and proper.

Date: October 24, 2023

Respectfully submitted,

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