SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 650565/2011
MOUNTAIN CREEK ACQUISITION LLC
vs.
INTRAWEST U.S. HOLDINGS, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650565/11
MOTION DATE 10/25/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12-13-11

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
---X

MOUNTAIN CREEK ACQUISITION LLC,

Plaintiff,

Index No. 650565/2011
Motion Date: 10/25/11
Motion Seq. No.: 001

-against-

INTRAWEST U.S. HOLDINGS, INC.,

Defendant.

---X

BRANSTEN, J.:

Defendant Intrawest U.S. Holdings, Inc. ("Intrawest") seeks dismissal of Mountain Creek Acquisition LLC's ("MCA") complaint pursuant to CPLR 3211 (a) (1), (5) and (7), and for an order, pursuant to 22 NYCRR 130-1.1, for an award of sanctions against Plaintiff.

BACKGROUND

Plaintiff MCA is a Delaware limited liability company.

Defendant Intrawest is a Delaware corporation. Intrawest is a wholly owned subsidiary of Intrawest ULC. Compl., ¶ 1.

In May of 2010, Intrawest sold all of the common stock of Mountain Creek Resort, Inc. ("Mountain Creek"), a destination resort located in New Jersey, to MCA pursuant to a stock purchase agreement (the "SPA"). *Id.*; Compl., Ex. A. ("SPA"), p. 1.

The parties negotiated a specific method to determine the final purchase price for Mountain Creek. The SPA provided that the purchase price set forth in the SPA was to be adjusted by Mountain Creek's Interim Net Revenue. The Interim Net Revenue was to be calculated over a specified period prior to the closing date of the Mountain Creek stock sale. Under the SPA, Intrawest was required to provide MCA with its initial Estimated Amount of Interim Net Revenue calculation two days prior to the closing date. MCA then had forty-five days after the closing date to present to Intrawest what MCA thought was the correct calculation of the Interim Net Revenue. *Id.* at ¶ 13. Under the SPA, the purchase price paid was to be "adjusted by an amount equal to the Estimated Amount of Interim Net Revenue." SPA § 2.5(A).

Intrawest provided MCA with its Estimated Statement of Interim Net Revenue at least two days prior to the closing date, in accordance with the SPA. The parties closed the transaction on May 26, 2010. Compl., ¶ 12.

On or about July 28, 2010, MCA provided Intrawest with its final calculation of Interim Net Revenue, together with a schedule setting out its calculation of the Final Amount of Interim Net Revenue. *Id.* at ¶ 16. MCA's final amount of Interim Net Revenue was $970,779 more than Intrawest's Estimated Statement of Interim Net Revenue. Pursuant to the SPA:

> [I]n the event the Final Amount of Interim Net Revenue is greater than the Estimated Amount of Interim Net Revenue, then Seller shall promptly pay to Purchaser the amount of such excess by wire transfer in immediately available funds....
> SPA § 2.6(2)(i).

The SPA further provides that Intrawest "shall have forty-five (45) days from receipt of the Final Statement of Interim Net Revenue within which to review the Final Statement of Interim Net Revenue." SPA § 2.5(C). Intrawest may dispute "any items in the Final Statement of Interim Net Revenue by written notice (an 'Objection Notice') to Purchaser within the same forty-five (45) days." *Id.*

On September 9, 2010, Intrawest provided MCA with an Objection Notice. Intrawest alleged that MCA owed it approximately $87,000, as opposed to Intrawest owing MCA $970,779. Compl., at ¶ 20. Intrawest alleged that MCA failed to provide it with the schedules and work papers underlying MCA's Final Statement of Net Revenue calculation. *Id.* at ¶ 19. Intrawest alleges that MCA then told it that MCA's Final Statement of Net Revenue calculation was based on Mountain Creek's financial statements and other information provided by Intrawest to MCA and that Intrawest already had all the information underlying MCA's Final Statement of Net Revenue. *Id.*

Pursuant to the SPA, if "Seller delivers an Objection Notice...Seller and Purchaser shall attempt to resolve all of the items in dispute within fifteen days of receipt of the Objection Notice." SPA § 2.5(C). Intrawest alleges that MCA refused to provide the schedules and work papers required by the SPA. Memorandum of Law In Support Of Defendant's Motion To Dismiss, ("Defendant's Memo"), p. 7. MCA alleges that on September 14, 2010, it advised Intrawest in writing that it was "prepared to commence the process of attempting to reach resolution [of the Interim Net Revenue Dispute] immediately." Compl., ¶ 22. MCA alleges that Intrawest did not respond to its attempt to resolve the Interim Net Revenue dispute consensually within fifteen days of receipt of the Objection Notice. *Id.* at ¶ 23. Pursuant to the SPA, if the parties are unable to resolve the Interim Net Revenue dispute within fifteen days after receipt of an Objection Notice:

> [T]he Parties shall involve the Independent Accountant, which shall be a Person that is unrelated to and at arm's length from each Party, to resolve the remaining items in dispute....

SPA § 2.5(C). Intrawest alleges that by failing to provide its schedules and work papers, MCA failed to comply with a prerequisite of Section 2.5. Defendant's Memo, pp. 7-8.

On September 30, 2010, MCA provided Intrawest with three candidates for appointment as an Independent Accountant to resolve the dispute. Compl., ¶ 26. On October 6, 2010, Intrawest advised MCA that it would not agree to the appointment of an Independent Accountant. *Id.* at ¶ 27. On October 7, 2010, MCA advised Intrawest that its refusal to submit the Interim Net Revenue Dispute to an Independent Accountant constituted a material breach of the SPA. *Id.* at ¶ 28.

MCA commenced this action on or about March 2, 2011. MCA asserts six causes of action against Intrawest. The first and second causes of action allege breach of contract, with specific reference to the Interim Net Revenue Dispute. The third cause of action seeks a declaratory judgment that the Interim Net Revenue Dispute shall be submitted to an Independent Accountant. The fourth cause of action alleges breach of contract based on representations and warranties Intrawest made in the SPA. The fifth cause of action alleges fraudulent representations. The sixth cause of action alleges breach of contract regarding tax practices.

ANALYSIS

I. CPLR 3211 Motion to Dismiss

Defendant moves to dismiss Plaintiff's complaint in its entirety pursuant to CPLR 3211(a)(1), (5) and (7). However, Defendant makes no argument in its papers for dismissal under CPLR 3211(a)(5).

A. Standard of Law

> "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.:

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (internal quotations and citations omitted); *see also Goshen v. Mutual Life Ins. Co. of New York,* 98 N.Y.2d 314, 326 (2002).

"It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency. *O'Donnell, Fox & Gartner v. R-*

2000 Corp., 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *Zanett Lombardier, Ltd. v. Maslow,* 29 A.D.3d 495, 496 (1st Dep't 2006) citing *Robinson v. Robinson,* 303 A.D.2d 235, 235 (1st Dep't 2003).

B. First and Second Causes of Action for Breach of Contract

Plaintiff alleges that defendant, by refusing to submit the Interim Net Revenue Dispute to an Independent Accountant, has violated Section 2.5(C) of the SPA and is therefore in breach of contract. Plaintiff seeks an order finding that plaintiff's Final Amount of Interim Net Revenue is final and directing defendant to pay plaintiff $970,779. In the alternative, plaintiff seeks an order directing defendant to submit the Interim Net Revenue Dispute to an Independent Accountant. Plaintiff also seeks damages in an amount to be determined at trial.

Defendant moves to dismiss Plaintiff's first and second causes of action on the ground that plaintiff cannot enforce the contract. Defendant alleges that plaintiff did not comply with the requirements of Section 2.5 of the SPA to provide to it the schedules and work papers used in calculating the Final Calculation of Interim Net Revenue.

In order to plead a claim for breach of contract, the plaintiff must allege: (1) the making of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages. *J&L American Enterprises, Ltd. v. DSA Direct, LLC,* 10

Misc. 3d 1076(A), *5 (Sup. Ct., N.Y. County 2006) (citations omitted). In addition, the pleading must also "set forth the terms of the agreement upon which [the breach] is predicated, either by express reference or by attaching a copy of the contract." *Id.* citing *Chrysler Capital Corp. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928 (3rd Dep't 1987).

Plaintiff has alleged that, pursuant to the SPA, it offered to resolve the Interim Net Revenue Dispute consensually with defendant, but defendant refused. Comp., ¶ 52. If the parties were unable to resolve the Interim Net Revenue Dispute consensually, the SPA mandates that they must submit the dispute to an Independent Accountant. SPA § 2.5(C). Plaintiff states that after defendant rejected its offer to resolve the Interim Net Revenue Dispute consensually, it submitted the names of three choices for the Independent Accountant as required by the SPA. *Id.* at ¶ 54. Plaintiff contends that Defendant's refusal to submit the Interim Net Revenue Dispute to an Independent Accountant constitutes a breach of contract. Plaintiff states that it has been damaged as a result.

Plaintiff has sufficiently pleaded a breach of the SPA to withstand a motion to dismiss. Defendant's motion to dismiss plaintiff's first and second causes of action for breach of contract is denied.

C. Third Cause of Action for Declaratory Judgment

Plaintiff's third cause of action seeks a declaratory order that defendant owes it $970,779, or, alternatively, a declaratory order that the Interim Net Revenue Dispute must be submitted to an Independent Accountant.

"A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Gross v. Empire Healthchoice Assur., Inc.*, 847 N.Y.S.2d 896, 7 (2007) citing *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988).

Plaintiff has an adequate, alternative remedy to obtain its sought relief in its cause of action for breach of contract. Plaintiff's cause of action for declaratory judgment seeks the same damages and is based upon the same premise as Plaintiff's cause of action for breach of contract. Plaintiff's third cause of action is therefore duplicative. Thus, Defendant's motion to dismiss Plaintiff's third cause of action for declaratory judgment is granted.

D. <u>Fourth Cause of Action for Breach of Contract</u>

Plaintiff alleges that Defendant breached the SPA by misrepresenting Mountain Creek's financial condition, liabilities and results of operations for the 2009 fiscal year. Compl., ¶ 78. Plaintiff states that in Section 5.2(T) of the SPA, Defendant represented that Mountain Creek's fiscal year 2009 financial statements and its March 31, 2010 Interim Financial Statements "were prepared using GAAP consistently applied throughout the periods indicated and consistently applied from one year to year, and fairly, completely and accurately present in all material respects, the assets, liabilities and financial condition ... and the results of operations" of Mountain Creek. Compl., ¶ 74.

Plaintiff alleges that, contrary to Defendant's representation, Mountain Creek's fiscal year 2009 financial statements did not accurately present Mountain Creek's results of operations for fiscal year 2009. Plaintiff argues that Defendant made a material understatement of insurance expense and overstated earnings during that period. *Id.* at 76.

Defendant argues that Plaintiff's claim is not actionable because Plaintiff ignored the provisions of Article 8 of the SPA. Defendant's Memo, p. 22. Defendant states that a direct claim for indemnification requires proper notice and a 90-day period allowed for response. Defendant's Memo, p. 15. Defendant alleges that Plaintiff neither provided notice nor an opportunity to respond. *Id.*

Plaintiff has alleged that the financial statements for the fiscal year 2009 stated that Mountain Creek's insurance expense was $190,000. Plaintiff alleges that, after closing, it learned that Mountain Creek's actual expense for fiscal year 2009 was approximately $1,600,000. Plaintiff further alleges that other components of insurance expense were not reflected in other line items in the financial statements. Memorandum of Law In Opposition to Defendant's Motion to Dismiss, ("Plaintiff's Memo"), p. 7.

Although Plaintiff may have a difficult time proving this claim, Plaintiff has pleaded a breach of the SPA. Plaintiff has thus stated a claim sufficiently to defeat a motion to dismiss. Defendant's motion to dismiss Plaintiff's fourth cause of action for breach of contract is denied.

E. <u>Fifth Cause of Action for Fraud</u>

Plaintiff alleges that, prior to closing, Defendant made false and fraudulent misstatements and omissions of material fact concerning material items of Mountain Creek's expenses. Plaintiff asserts that these misrepresentations caused Mountain Creek's reported earnings before income, taxes, depreciation and amortization ("EBITDA") to be materially misstated. Compl., ¶ 5. Plaintiff alleges that, as a result, the purchase price it agreed to pay was excessive. *Id.*

Defendant argues that the SPA expressly precludes Plaintiff's fraud claim. First, Defendant argues that Section 5.6 provides that "[e]xcept as set forth in Sections 5.1 and 5.2 hereof, Purchaser acknowledges that, neither Seller nor any other Person makes any other representations or warranties whatsoever, express or implied, relating to the Purchased Stock, the Assets or the business of the Corporation.... All such other representations and warranties are hereby expressly disclaimed by Seller." SPA, § 5.6; Defendant's Memo, p. 14. Second, Defendant argues that Plaintiff did not comply with the provisions of Article 8 of the SPA. Defendant contends that Plaintiff did not provide it with notice of the alleged fraud or an opportunity to respond. SPA, § 8; Defendant's Memo, p. 15. Third, Defendant argues that Section 9.6 of the SPA is a merger clause specifying that the SPA and other written agreements executed by the parties constitute the "entire agreement... and supersede all prior correspondence, agreements, negotiations, discussions and understandings, written or oral, between the Parties." SPA,

§ 9.6; Defendant's Memo, p. 16. Lastly, Defendant argues that even if the fraud claim was not precluded by the SPA, the claim is not plead with particularity. Defendant's Memo, p. 18.

Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings. *Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993). A cause of action for fraud must assert "that a representation of a material fact was made; that such representation was false, and known to be false by the party making it, or was recklessly made; that such representation was made to deceive and to induce the other party to act upon it; and that the party to whom the representation was made relied upon it to its injury or damage." *Zaref v. Berk & Michaels,* 192 A.D.2d 346, 348 (1st Dep't 1993) citing *Orbit Holding Corp. v. Anthony Hotel Corporation*, 121 A.D.2d 311, 314 (1st Dep't 1986).

Plaintiff alleges that Defendant made material misrepresentations when it stated that Mountain Creek's insurance expenses were fully recorded in its 2009 fiscal statements. Compl., ¶ 86. Plaintiff alleges that Defendant misrepresented that Mountain Creek's financial statements included costs for insurance in excess of the $190,000 represented to be the total costs of insurance incurred in fiscal year 2009. *Id.* at ¶ 87. Plaintiff alleges that Mountain Creek's financial statements did not contain additional amounts for insurance costs in addition to the amount recorded on the line item for insurance on the financial statements. *Id.*.

Plaintiff further alleges that Kathy Lawrence and Paul Jorgenson, individuals employed by Defendant or its wholly owned subsidiary and acting on behalf of and under the direction of the Defendant during negotiation of the SPA and its execution, made the material misrepresentations to Joseph Bellatoni, Plaintiff's Chief Financial Officer. Compl., ¶ 84. Plaintiff alleges that Lawrence and Jorgenson knowingly made the misrepresentations, at Defendant's direction, to facilitate Defendant's sale of Mountain Creek. *Id.* ¶ 86. Alternatively, Plaintiff argues that Defendant recklessly made the misrepresentations because Defendant knew or should have known that Mountain Creek's financial statements, which were prepared by or under the direction and control of Defendant, did not contain additional amounts for insurance costs. *Id.* ¶ 87.

Plaintiff alleges that Defendant knew and intended that Plaintiff would rely on its representations in determining the earning power of Mountain Creek, and that Defendant knew Mountain Creek's earning power was material to Plaintiff's decision to enter into the SPA. *Id.* ¶ 85. Plaintiff alleges that it relied on Defendant's misrepresentations when it entered into the SPA. *Id.* ¶ 89. Plaintiff alleges that as a result of the misrepresentations it agreed to pay far more than it would have agreed to pay if Mountain Creek's EBITDA for 2009 was accurately represented. Plaintiff alleges that it suffered damages of approximately $7,000,000. *Id.* ¶ 93. Plaintiff has set forth specific and detailed allegations of fact to state a claim for fraud.

Plaintiff alleges that Defendant's failure to respond to the statutory request from Vernon Township constituted either a change in Mountain Creek's tax practices, a position or election in respect of a 2009 Tax Return that was materially inconsistent with prior years' positions, and/or a material election to forego the right to appeal the taxes assessed in the year to which the unanswered request related, and is therefore a breach of the representations and warranties contained in the SPA. Compl. ¶ 36. Plaintiff alleges that, as a result, it had to withdraw its 2010 tax appeal and has suffered damages in an amount to be determined at trial. *Id.* ¶ 101.

Defendant argues that Plaintiff's claim is not actionable because Plaintiff did not follow the provisions of Article 8 of the SPA which requires proper notice and a 90-day period for response . Defendant also argues that Plaintiff failed to allege a breach of the SPA because a decision made with respect to a single request for information from a single tax authority does not constitute a change in tax practices, a material election or the taking of a position regarding taxes as contemplated in the SPA. Defendant's Memo, p. 23.

Although Plaintiff may here have a difficult time proving this claim, Plaintiff has sufficiently pleaded its cause of action defeat a motion to dismiss. Defendant's motion to dismiss Plaintiff's sixth cause of action for breach of contract is denied.

A general merger clause in a contract is ineffective to bar a claim of fraud in the inducement of a contract. *Carlinger v. Carlinger,* 21 A.D.2d 656, 656 (1st Dep't 1964). Where the complaint states a cause of action for fraud, the parole evidence rule is not a bar to showing the fraud – either in the inducement or in the execution – despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made. *Danann Realty Corp. v. Harris,* 5 N.Y.2d 317, 601-602 (1959).

Plaintiff's cause of action for fraud is not barred by the SPA's general merger clause. Therefore, Defendant's motion to dismiss Plaintiff's fifth cause of action for fraud is denied.

F. <u>Sixth Cause of Action for Breach of Contract</u>

Plaintiff alleges that Defendant made various representations in the SPA regarding its tax practices after June 30, 2009 with respect to Mountain Creek, including, without limitation, that it had not made any changes in its tax practices that were not disclosed in the SPA. Compl., ¶ 96. Plaintiff alleges that, contrary to Defendant's representations, Defendant had made a material change in its tax practices after June 30, 2009 by failing to respond to a request for information on Mountain Creek's property taxes from the Township of Vernon, New Jersey. Plaintiff asserts that Defendant was required to respond under New Jersey law and by failing to do so Defendant materially changed its tax practices. *Id.* ¶ 97.

II. 22 NYCRR 130-1.1 Sanctions

A. Standard of Law

Courts may impose reasonable costs or sanctions for frivolous conduct, namely conduct which "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." *Citibank (South Dakota) v. Alotta,* 277 A.D.2d 547, 548-549 (3rd Dep't 2000). Frivolous conduct warranting imposition of sanctions against a party to litigation can be defined in any of three manners: conduct is without legal merit; is undertaken primarily to delay or prolong litigation or to harass or maliciously injure another; or asserts material factual statements that are false. N.Y. Ct. Rules, § 130-1.1(c). In considering whether specific conduct of a party or an attorney is frivolous, a court is required to examine, *inter alia,* "whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent." *Citibank (South Dakota) v. Alotta,* 277 A.D.2d 547, 548-549 (3rd Dep't 2000).

B. Request for Sanctions

Defendant alleges that Plaintiff has taken a simple disagreement over post-closing price adjustments and grafted onto it unwarranted allegations of fraud and breach of representation that are precluded by the contract at issue. Defendant alleges that the purpose of bringing such patently unsustainable causes of action is to harass Defendant and pressure it to reach a settlement of the true dispute. Defendant's Memo, pp. 24-25.

Defendant has not alleged conduct by Plaintiff that constitutes frivolous conduct. While Plaintiff's arguments may be, at times, difficult to prove at this early junction, Plaintiff has properly pleaded the majority of its claims. Therefore, Defendant's request for sanctions is denied.

ORDER

Accordingly, it is:

ORDERED that Defendant's motion to dismiss is granted as to Plaintiff's third cause of action for declaratory judgment, and that cause of action is dismissed; and it is further

ORDERED that Defendant's motion to dismiss is otherwise denied; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within thirty days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442 at 60 Centre Street on February 21, 2012 at 10:00 a.m.

Dated: New York, New York
December 13, 2011

ENTER:

Hon. Eileen Bransten, J.S.C.