SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 108387/2009
DINOSAUR SECURITIES, L.L.C.
vs.
TOWNSEND ANALYTICS, LTD.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

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

is decided in accordance with the annexed decision.

Dated: 7/24/12

_____ **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

DINOSAUR SECURITIES, L.L.C.,

Plaintiff,

-against-

TOWNSEND ANALYTICS, LTD.,

Defendant.

----------x

Index No. 108387/09

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Dinosaur Securities, LLC ("Dinosaur") commenced the instant action against Defendant Townsend Analytics, Ltd. ("Townsend") seeking a rescission of an agreement entered into by the parties and for damages stemming from alleged fraud/fraud in the inducement. Townsend now moves for an Order pursuant to Civil Practice Law and Rules ("CPLR") § 3212 granting it summary judgment dismissing Dinosaur's verified complaint. For the reasons set forth below, Townsend's motion is granted.

The relevant facts are as follows. Dinosaur is a financial services company which provides, among other things, equities trading capabilities for its clients. Townsend is a company that provides, among other things, execution management services for companies like Dinosaur.

On or about February 20, 2008, Dinosaur and Townsend entered into a license agreement related to certain financial trading software and hardware owned by Townsend and licensed to Dinosaur (the "Contract"). Pursuant to the terms of the Contract, Townsend was to provide Dinosaur "Realtick" terminals which provide market analysis and trade management capabilities. In return, Dinosaur paid a set-up fee and a monthly charge for access to the terminals.

The Contract specifically provided for access to U.S.-based markets. However, the Contract did not provide for services related to international markets. In April 2008, Dinosaur inquired about expanding the scope of the Contract to include international markets, such as Brazil, Europe, Canada and other foreign markets. Specifically, Elliot Grossman, Director of Equity Trading for Dinosaur sent an e-mail to Jane Beresford of Townsend stating "[w]ill it be possible for our users to trade Brazil, Europe, Canada and other foreign markets over Realtick? I don't want to alter our work order and set us back further, I just want to know if it will be possible." While discussions regarding trading in international markets ensued, the parties did not formulate any written amendment to the Contract or separate written agreement relating to any services concerning Brazil. However, the parties did agree in October 2008 to certain additional international services related to Canada which were reduced to a formal written contract amendment dated October 9, 2008.

During performance of the Contract, Dinosaur became unhappy with its inability to connect to markets, the way the software performed and the way Townsend supported its product. Thus, beginning in December 2008, Dinosaur stopped paying Townsend under the Contract. As of February 2009, Dinosaur owed Townsend $19,583.50 and on March 1, 2009, Townsend terminated its services to Dinosaur. On April 13, 2009, Glenn Grossman, the

principal owner and managing member of Dinosaur, began negotiations with Townsend to restart the system. Townsend agreed to restart the system upon receipt of payment of $14,000 from Dinosaur. The payment of $14,000 was made by wire transfer from Dinosaur to Townsend on April 14, 2009. On or around April 20, 2009, Townsend commenced an action against Dinosaur in the New York State Supreme Court, Kings County, for all sums due and owing under the caption *Townsend Analytical v. Dinosaur Securities, LLC*, Kings County, Index No. 039462/09 (the "prior action"). However, as Dinosaur had already paid the $14,000 to resume Townsend's services, Townsend withdrew the action and signed a Notice of Discontinuance, with prejudice. Townsend, however, refused to resume services for Dinosaur under the Contract because Dinosaur would not agree to additional terms set forth by Townsend. Those proposed terms were additional payments of (a) $909.97 for outstanding services; (b) $5,850.00 to cover collection agency fees and costs; and (c) a $12,000.00 deposit representing the average of two months invoices. Dinosaur then commenced the instant action against Townsend alleging fraud/fraud in the inducement.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"[T]o prevail on a cause of action for fraud, a plaintiff must prove (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations." *Leno v. DePasquade*, 18 A.D.3d 514, 515 (2d Dept 2005), citing *Guirdanella v. Guirdanella*, 226 A.D.2d 342, 343 (2d Dept 1996); *see also Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 N.Y.2d 644, 646-647 (1989)(a claim for fraud constitutes "misrepresentation of a material fact, falsity, scienter and deception"). A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1st Dept 2008); *see also Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dept 1998), citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4th Dept 1975)("To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.") "A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607 (1st Dept 1985).

In the instant action, Townsend has established its prima facie right to summary judgment dismissing Dinosaur's verified complaint as it has shown that there is no evidence of fraud which is collateral or extraneous to the Contract. A contract claim cannot be converted into a fraud claim merely by the allegation that a contracting party never intended to perform its promise. *See Smart Egg Pictures, S.A. v. New Line Cinema Corp.*, 213 A.D.2d 302 (1st Dept 1995). Dinosaur

alleges that in attempting to induce Dinosaur into entering into the Contract,

> [Townsend] made a series of factual misrepresentations about its ability to make the aforesaid connections and [Townsend] also made factual misrepresentations about its ability to support the product, the number of technical representatives who were available to resolved (sic) technical problems in making the connections and resolving technical problems, and its staff's abilities in resolving technical problems. At the time it made these representations, [Townsend] knew them to be false and untrue, or alternatively recklessly and willfully disregarded the truth of their representations, in a deceitful and dishonest manner, in order to persuade Dinosaur to sign with [Townsend] and not with [Townsend's] competitors, in breach of [Townsend's] duty of good faith and fair dealing with Dinosaur.

However, these allegations fail to raise an issue of fact as Dinosaur has not provided evidence that Townsend had an intention to deceive Dinosaur at the time it signed the Contract. Thus, Dinosaur's claims of fraudulent inducement are entirely conclusory and rebutted by Townsend's averments that it had no such intent. *See Smart Egg Pictures, S.A. v. New Line Cinema Corp.*, 213 A.D.2d 302, 303 (1st Dept 1995).

Moreover, the issue of whether Townsend improperly performed the services it promised to provide in the Contract, such as achieving connectivity and proper symbology, is the crux of a breach of contract claim, not a fraud claim. Dinosaur has not pointed to any fraud collateral or extraneous to the contract and it is clear that the breach of duty plaintiff alleges is that of a breach of contract. As more fully explained above, "[a] failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract." *Tesoro*, 108 A.D.2d at 607. Moreover, the fact that Dinosaur wished to resume Townsend's services in May 2009 after the Contract was terminated is further evidence that Dinosaur felt that Townsend had the ability to perform under the Contract and that it had not been misled.

The First Department shed light on this issue in the case of *Non-Linear Trading Co. v. Braddis Assoc.*, 243 A.D.2d 107 (1st Dept 1998). In that case, the plaintiff made allegations that "defendant promised to 'expend sufficient time and effort, and allocate sufficient staff' to develop the anticipated software. Defendant did not devote adequate resources to the effort as promised and, plaintiff concludes, defendant thereby induced plaintiff to invest in the partnership venture by means of a fraudulent misrepresentation." The First Department found that merely alleging that defendant failed to perform the promise of future acts is insufficient evidence of a tort separate from a breach of contract.

Townsend has also established its prima facie right to summary judgment dismissing Dinosaur's verified complaint as it has shown that it did not make material representations that were false. Elliott Grossman testified that he was the person primarily responsible for the negotiation of the Contract. However, Mr. Grossman was unable to describe any material misrepresentations made by Townsend. Rather, Mr. Grossman testified that the misrepresentations were "implicit in their...work that they do." Further, in explaining why Dinosaur entered into the Contract in the first place, Mr. Grossman testified that it signed the contract "because firms used RealTick to - or Townsend Analytics - they used Townsend Analytics to distribute RealTick terminals to their customers. That is an enormous part of what they do, of what Townsend does and what these, ah, our competitors do." Thus, Mr. Grossman explained that the Contract was executed to remain competitive in the marketplace and not because of any misrepresentations made by Townsend.

Moreover, the Contract provides that any additional representations made outside the Contract are not to be relied upon. Specifically, Paragraph 13 of the Contract states:

[* 8]

13. WARRANTY DISCLAIMER. THE LICENSED PRODUCT, THE TAL DATA AND THE TOWNSEND NETWORK ARE PROVIDED "AS IS" AND WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES AS TO ACCURACY, FUNCTIONALITY, PERFORMANCE OR MERCHANTABILITY. TOWNSEND AND THE SOURCES EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM TRADE USAGE, COURSE OF DEALING OR COURSE OF PERFORMANCE. TOWNSEND AND THE SOURCES MAKE NO REPRESENTATION, WARRANTY OR COVENANT CONCERNING THE ACCURACY, COMPLETENESS, SEQUENCE, TIMELINESS OR AVAILABILITY OF THE LICENSED PRODUCT, THE TOWNSEND NETWORK, THE TAL DATA OR ANY OTHER INFORMATION OR THE LIKELIHOOD OF PROFITABLE TRADING USING THE LICENSED PRODUCT, THE TOWNSEND NETWORK OR TAL DATA. LICENSEE ACCEPTS FULL RESPONSIBILITY FOR ANY INVESTMENT DECISIONS OR STOCK TRANSACTIONS MADE BY LICENSEE OR ITS AUTHORIZED USERS USING THE LICENSED PRODUCT, THE TOWNSEND NETWORK OR TAL DATA. NO SALES PERSONNEL, EMPLOYEES, AGENTS OR REPRESENTATIVES OF TOWNSEND OR ANY THIRD PARTY ARE AUTHORIZED TO MAKE ANY REPRESENTATION, WARRANTY OR COVENANT ON BEHALF OF TOWNSEND. ACCORDINGLY, ADDITIONAL ORAL STATEMENTS DO NOT CONSTITUTE WARRANTIES AND SHOULD NOT BE RELIED UPON AND ARE NOT PART OF THIS AGREEMENT. LICENSEE ACKNOWLEDGES THAT USE OF THE LICENSED PRODUCT, THE TOWNSEND NETWORK AND THE TAL DATA MAY FROM TIME TO TIME BE INTERRUPTED AND MAY NOT BE ERROR-FREE. LICENSEE EXPRESSLY AGREES THAT USE OF THE LICENSED PRODUCT, THE TOWNSEND NETWORK, THE TAL DATA OR ANY OTHER INFORMATION IS AT LICENSEE'S SOLE RISK AND THAT TOWNSEND AND THE SOURCES SHALL NOT BE RESPONSIBLE FOR ANY INTERRUPTION OF SERVICES, DELAYS OR ERRORS CAUSED BY ANY TRANSMISSION OR DELIVERY OF THE LICENSED PRODUCT, THE TOWNSEND NETWORK, TAL DATA OR ANY OTHER INFORMATION OR CAUSED BY ANY

COMMUNICATIONS SERVICE PROVIDERS.

Thus, any representations made about speed or accuracy of Townsend's services outside of the four corners of the Contract cannot be used as a basis for a cause of action sounding in fraud.

While Dinosaur asserts that misrepresentations were made by Townsend about it's "knowledge, skill, acumen and ability to do all that was then necessary to achieve 'connectivity' and proper 'symbology' to Dinosaur's international destinations, the most important of which was Brazil," these assertions fail to raise an issue of fact as Dinosaur provides no evidence supporting such claims. As an initial matter, the Contract does not state that Townsend will provide Dinosaur services for its Brazil market. Rather, Dinosaur approached Townsend about services in Brazil but no agreement was ever formulated regarding such services. As previously explained, Paragraph 13 of the Contract specifically states that "additional oral statements do not constitute warranties and should not be relied upon and are not part of this agreement."

Finally, Dinosaur's reliance on *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 A.D.3d 487 (2d Dept 2004) is misplaced. In that case, the plaintiff purchased computer software and related services from the defendant pursuant to a software license and services agreement. The plaintiff commenced an action against the defendant when the software allegedly failed to perform as promised asserting claims of breach of express warranty, negligent misrepresentation and fraud. The defendant moved pursuant to CPLR § 3211(a)(7) to dismiss the complaint in its entirety. In affirming the decision of the Supreme Court denying the defendant's motion to dismiss, the Second Department held that "the plaintiff adequately pleaded a cause of action based on fraud by alleging that the defendant made false representations regarding the

manufacture of its software and the manner in which the software performed for the defendant's other customers, and that these false representations induced the plaintiff to enter into the contract." *Fresh Direct*, 7 A.D.3d at 489. However, that case is distinguishable from the case at hand. In *Fresh Direct*, the court made its decision based on the standard imposed on a motion to dismiss, which is much broader than the summary judgment standard imposed in the instant case. Further, the software at issue in *Fresh Direct* was unique and manufactured solely for the plaintiff. In the instant case, the software at issue is not a unique service provided only to Dinosaur, but rather, a software that is provided to many companies, including many of Dinosaur's competitors and was not manufactured solely to fit Dinosaur's standards. As Dinosaur has failed to provide evidence of fraud extraneous to the contract, Townsend's motion for summary judgment must be granted.

Accordingly, Townsend's motion for summary judgment is granted and the verified complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Date: 7/24/12

Enter: _____
J.S.C.