SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [redacted] Justice PART 45

Index Number : 652445/2011
NORTHERN STAMPING, INC.
vs.
MONOMOY CAPITAL PARTNERS,
SEQUENCE NUMBER : 001
DISMISS DEFENSE

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~~ by defendants to dismiss the first, third, fourth, fifth and sixth causes of action is GRANTED, and the motion is otherwise DENIED, per the attached Decision and Order.

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

Dated: June 1, 2012

[redacted] 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: IAS PART 45

NORTHERN STAMPING, INC.,	:	
Plaintiff,	:	Index No. 652445/11
-against-	:	DECISION & ORDER
MONOMOY CAPITAL PARTNERS, L.P., MONOMOY CAPITAL MANAGEMENT, L.L.C., and MONOMOY CAPITAL PARTNERS I,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this breach of contract action, defendants Monomoy Capital Partners, L.P., Monomoy Capital Management, L.L.C., and Monomoy Capital Partners I (collectively, Monomoy or Defendants) move, pursuant to CPLR 3211 (a) to dismiss the first, third, fourth, fifth and sixth causes of action in the complaint.

Complaint

The complaint alleges that, in July 2010, plaintiff Northern Stamping, Inc. (Northern or Plaintiff), a designer and manufacturer of complex structural components for the automotive industry, was interested in purchasing Steel Parts Manufacturing, Inc. (Steel), a business that manufactures and supplies stamped and formed metal components for the auto industry. Steel's owner, Resilience Capital Partners (Resilience) engaged Quarton Partners (Quarton) as agent and broker to assist in the sale of Steel and Northern hired XMS Capital Partners (XMS) as its agent and broker to assist in the purchase (Robles Aff., Ex. A [hereinafter "Cmplnt"], ¶¶ 1, 5-8).

In late July 2010, Northern entered into a confidentiality agreement (Confidentiality Agreement), with Quarton which states, in pertinent part, that Quarton will provide Northern

with certain Evaluation Material concerning Steel and that Northern agrees that it will not disclose that Evaluation Material to anyone other than, inter alia, a potential financing source for the purpose of evaluating the purchase. The Confidentiality Agreement requires Northern to obtain a Non-Disclosure Agreement (NDA) from any third party recipient of the Evaluation Material (Cmplnt, ¶¶ 9-13).

In January 2011, Northern contacted Monomoy, a private investment fund, as a potential source for funding to finance the purchase of Steel and, in accordance with the Confidentiality Agreement, Monomoy and Northern entered into an NDA which provides that Monomoy will not do anything that would cause Northern to be in breach of its Confidentiality Agreement with Quarton and that all of Northern's analyses and studies regarding the purchase of Steel and all of Northern's internal, nonpublic information will remain confidential (Cmplnt, ¶¶ 16, 18-20). The NDA also provides that "you will not use the Confidential Information for any purpose other than in respect of your defined role in the transaction;" (Cmplnt, Ex. 2, [2][c]).

Thereafter, Northern regularly provided Monomoy with confidential information concerning both Steel and Northern in order to assist Monomoy in evaluating whether they wished to participate, as a funding source, in the transaction (Cmplnt, ¶¶ 26, 27).

At the end of January 2011, Monomoy suggested that they would be interested in providing funding for the purchase of Steel in a transaction that would require Northern to contribute all of its assets and ordinary course liabilities to a new company (NewCo). In exchange, Northern would acquire a percentage interest in NewCo and Monomoy would provide new capital to acquire Steel. Northern and Monomoy entered into a letter agreement that broadly

outlined some of the terms and conditions under which Monomoy would proceed with the transaction (Cmplnt, ¶ 31, and Ex. 3).

In a February 3, 2011 letter to Northern, Monomoy stated, in pertinent part:

> On the basis of our partnership, this letter outlines our interest in acquiring the operations of Steel Parts Manufacturing, Inc., . . . through a newly-formed entity (NewCo) owned by Monomoy Capital Partners, L.P. . . and the owners of Northern Stamping, Inc. . . . This letter is provided as an indication of interest and it not a binding offer or agreement

(Cmplnt, Ex. 4).

That letter also stated that Monomoy's proposal was "subject to satisfaction of business, legal and environmental due diligence, and definitive documentation that includes customary representations, warranties, covenants, indemnities and conditions for transactions of this sort" (Cmplnt, Ex. A).

Thereafter, in mid-February, Quarton agreed to explore a transaction whereby Northern and Monomoy would purchase Steel for $25,000,000 (Cmplnt, ¶40). According to Plaintiff, Monomoy represented that it would agree to a transaction for the joint acquisition of Steel for $25,000,000 and, on February 21, 2011, Northern allegedly provided Monomoy with a proposed agreement whereby Northern, with Monomoy as financing partner, would be the exclusive prospective buyer for Steel (Cmplnt, ¶ 41).

However, several days later, Steel expressed its desire to meet privately with Monomoy regarding the transaction. According to the complaint, Plaintiff was concerned about this private meeting, but Monomoy represented to Northern that no agreement would be reached between Steel and the Defendants without Northern, that Northern would be part of any purchase

agreement and, in any event, Northern would have to review and sign any agreement that was reached (Cmplnt, ¶ 42). On February 21, 2011, the Defendants met with Resilience, Steel's owner, and on February 22, 2011, Monomoy informed Plaintiff that they would pursue the deal with Resilience for the purchase of Steel without Plaintiffs (Cmplnt, ¶¶ 43, 44). On February 23, 2011, the Defendants entered into an agreement with Resilience for the purchase of Steel. Plaintiffs are not a party to that transaction (Cmplnt, ¶¶ 45, 46).

In September 2011, Plaintiffs commenced this lawsuit against Monomoy alleging: 1) breach of fiduciary duty; 2) breach of contract; 3) tortious interference with prospective economic advantage; 4) unjust enrichment; 5) negligent misrepresentation; 6) fraud/fraudulent inducement.

Contentions

In support of the motion to dismiss the first, third, fourth, fifth and sixth causes of action in the complaint, the Defendants argue that the cause of action alleging breach of fiduciary duty must be dismissed because the parties did not share a relationship of trust and confidence and that the fiduciary duty claim is redundant of the contract claim. As to the tortious interference claim, Defendants contend that Plaintiff has failed to allege that Defendants' alleged actions were solely malicious or that Defendants' alleged actions amounted to a crime or an independent tort. It is Defendants' position that the unjust enrichment claim must be dismissed because there is a valid contract between the parties and that the negligent misrepresentation and fraud claims should be dismissed because Plaintiff has not alleged any of the elements necessary to sustain these causes of action.

In opposition to dismissal, Plaintiff argues that it shared a relationship akin to a partnership/joint venture with the Defendants, which gave rise to fiduciary responsibilities and that it may plead and seek recovery for both breach of fiduciary duty and breach of contract; that the tortious interference claim should be sustained because its allegation of fraud and breach of fiduciary duty sufficiently allege "wrongful means"; that it may plead unjust enrichment in the alternative and that it has pled all the elements of fraud and negligent misrepresentation with particularity.

Discussion

It is well settled that on a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002] [internal quotations and citations omitted]).

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, where dismissal is pressed on the basis of documentary evidence, "dismissal . . . is warranted '. . . if the documentary evidence submitted *conclusively establishes a defense to the asserted claims*

as a matter of law'." (*Richbell Info. Servs. v Jupiter Partners,* 309 AD2d 288, 289 [1st Dept 2003][citations omitted][emphasis in the original]).

A. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant and (3) damages arising directly therefrom (*Fitzpatrick House III, LLC v Neighborhood Youth and Family Servs.*, 55 AD3d 664, 664 [2d Dept 2008]). A detailed factual pleading establishing the breach of fiduciary duty cause of action is necessary to survive a motion to dismiss (*see* CPLR 3016 (b); *Gail v Summit, Rovins and Feldesman,* 222 AD2d 225, 226 [1st Dept 1995]).

Here, plaintiff has failed to establish that a fiduciary relationship existed between the parties. In the complaint, plaintiff alleges that the parties had formed a partnership for the purpose of purchasing Steel and that the fiduciary relationship arose from that partnership. Plaintiff also alleges that a fiduciary relationship arose from Northern's sharing of confidential information with the defendants which put the "Defendants in a superior position in the parties' relationship such that [Northern] was required to repose trust and confidence in to [sic] the Defendants" (Cmplnt ¶ 55). According to plaintiff, the sharing of the confidential information created a higher level of trust than would be present in the usual arm's length contractual relationship and that once the Defendants received the confidential information they had a duty not to exclude Northern from the purchase of Steel and that the Defendants breached their fiduciary duty by negotiating directly with Resilience for the purchase of Steel.

However, a review of the documentary evidence attached to the complaint, in particular the letters attached as exhibits 3 and 4, establishes that, when the Defendants entered into the

purchase agreement with Resilience on February 28, 2011, Northern and the Defendants had not established a partnership[1] or any other business relationship and that they had not reached an agreement on the terms and conditions under which NewCo would be formed and would thereafter purchase Steel.

The party pleading the existence of a partnership must plead facts that support each of the required elements of a partnership: 1) the sharing of the profits and losses of the enterprise; 2) joint control and management of the business; 3) the contribution by each party of property, financial resources, effort, skill and knowledge; and 4) the intention of the parties to be partners (*Rosenshein v Rose*, 20 Misc3d1115 [A], *4,2008 NY Slip Op 51360 [U][Sup Ct, NY County 2008]). "The parties agreement to share in the profits and losses is an 'indispensable essential of a contract of partnership or joint venture'" (*id.* quoting *Matter of Steinbeck v Gerosa,* 4 NY2d 302, 317 [1958]).

Here, the complaint is devoid of facts that support Northern's allegation that a partnership (or joint venture)[2] existed. Rather, the January 28, 2011 letter attached to the complaint states, in paragraph 13 that it contains statements of present intention adopted to ease the negotiation of final agreements and that such statements of present intention, "do not constitute a contract or agreement and are not enforceable." That letter also states that Monomoy's interest in concluding the deal was contingent upon the results of its due diligence. The February 3, 2011

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[1] The use of the word partnership in a nonbinding letter of intent (Exhibit 3) is without any legal effect (*see Kyle v Ford,* 184 AD2d 1036, 1037 [4th Dept 1992] citing *Brodsky v Stadlen,* 138 AD2d 662, 663 [2d Dept 1988]["calling an organization a partnership does not make it one"]; *see also Shine & Co. LLP v Natoli*, 89 AD3d 523, 523 [1st Dept 2011][calling defendant an equity partner didn't make him one where the letter of intent did not provide for him to share in the profits or the losses]).

[2] Northern's allegations of a joint venture are stated for the first time in its Memorandum of Law in Opposition to the Motion to Dismiss. Northern does not allege joint venture in the complaint.

letter to Northern, which uses the term partnership, also states in the first paragraph, "[t]his letter is provided as an indication of interest and is not a binding offer or agreement" regarding Monomoy's interest in acquiring Steel through a newly formed company, NewCo. Indeed, in the February 3, 2011 letter, Monomoy merely sets forth its proposal regarding funding. It does not discuss any of the essential elements required to establish a partnership.

Northern's reliance on *Richbell Info. Servs. v Jupiter Partners,* (309 AD2d 288 [1st Dept 2003]) for the proposition that the parties' intent to form a joint venture can be implied is inapposite. In that case, unlike here, the First Department found that, despite the lack of a formal written agreement, the parties had entered into an implied joint venture agreement because the plaintiff had established that each of the litigants in that case was given ownership or control over the company's stock and that the parties had reached an understanding of how the profits and losses would be distributed (*id.* at 298).

In the case at bar, Monomoy and Northern had not reached any definitive agreement regarding Newco and/or how each parties' contribution to Newco would be evaluated. Indeed, Monomoy's January 28, 2011 to Northern clearly stated that any offer to participate in the acquisition of Steel was contingent upon the "satisfactory outcome of confirmatory due diligence" and, for the most part, the letter contained nonbinding "statements of present intention adopted to facilitate the negotiation of definitive agreements. . ." (Cmplnt, Ex. 3). In *Teachers Ins. and Annuity Assn. of Am. v Tribune Co.* (670 F Supp 491, 499 [SD NY 1987]), a case relied upon in *Richbell*, the Court stated, "[t]here is a strong presumption against finding binding obligations in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents." In that case, the Court stated

that, "[t]he Court of Appeals' first and most important factor looks to the language of the preliminary agreement for indication whether the parties considered it binding or whether they intended not to be bound until the conclusion of final formalities" (*id.* at 500; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce,* 70 AD3d 423, 427 [1st Dept 2010][in determining whether a document is an enforceable contract or an agreement to agree, the important factor is whether the agreement contemplated the negotiation of later agreements and whether those later agreements were a precondition to performance]). In the case before the court, this factor strongly supports Monomoy because the letter agreements contemplated further negotiations and consummation of later agreements. In addition, in this case, the letter agreements contain so many open material terms that they could not be deemed a binding contract (*see Joseph Martin, Jr., Delicatessen, Inc. v Schumacher,* 52 NY2d 105, 109-110 [1981]).

The fact that Northern provided Monomoy with confidential information so that Monomoy could evaluate the proposed transaction did not create a fiduciary duty. The communication of confidential information does not by itself create a fiduciary relationship (*Walton v Morgan Stanley & Co. Inc.,* 623 F2d 796, 799 [2d Cir 1980]). Indeed, "'it makes great sense not to impose fiduciary duties concomitantly with confidentiality agreements. The existence of a detailed confidentiality agreement suggests arm's-length dealings between co-equals'" (*Nolan Bros. of Texas, Inc. v Whiteraven, L.L.C.,* 2004 WL 376265, *1 [SD NY 2004] quoting *City Solutions, Inc. v Clear Channel Communications, Inc.,* 201 F Supp 2d 1048, 1049 [ND Cal 2002])

In addition, the breach of fiduciary duty claim is redundant of the of the breach of contract claim, since they arise from the same allegations and seek the same relief (*Sun Graphics Corp. v Levy, Davis & Maher, LLP,* 94 AD3d 669, 2012 WL 1432061,*1 [1st Dept 2012]).

B. Tortious Interference with Prospective Economic Advantage

To state a claim for tortious interference with prospective economic advantage, plaintiff must plead: "1) that it had a business relationship with a third party; 2) that the defendants knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or an independent tort; and 4) that the defendants interference caused injury to the relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]).

In the complaint, Northern alleges that it had a business relationship with Steel's owner, Resilience, for the purchase of Steel with financing from the Defendants; that the Defendants intentionally interfered with its relationship with Resilience by using Northern's due diligence and confidential information about the contemplated transaction, to enter into an agreement with Resilience to purchase Steel which agreement excluded Northern; that absent such interference Northern would have been a party to the deal for the purchase of Steel; and that it has been damaged thereby.

As stated, the cause of action for tortious interference with prospective economic advantage fails to allege that Monomoy used wrongful means that amounted to a crime or an independent tort[3] to interfere with its business relationship with Resilience. Because the court

[3] "'Wrongful means' include physical violence, fraud, misrepresentation, civil suits and criminal prosecutions and some degrees of economic pressure; . . . " (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]).

has dismissed Northern's fiduciary duty claim, the alleged breach of fiduciary duty cannot support a claim of wrongful means and plaintiff has not alleged, as it does in the fraud cause of action, that Monomoy's fraudulent representations interfered with the proposed transaction. Rather, this cause of action is duplicative of the breach of contract cause of action because the only wrong alleged is Monomoy's use of Northern's confidential information. Accordingly, the cause of action alleging tortious interference with prospective economic advantage must be dismissed (*see Boscorale Operating v Nautica Apparel*, 298 AD2d 330, 332 [1st Dept 2002]).

C. Unjust Enrichment

That branch of the motion that seeks to dismiss the unjust enrichment claim is granted. It is well settled that a claim of unjust enrichment must be dismissed where there is no dispute that a written contract exists covering the subject matter of the action (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.,* 70 NY2d 382, 388 [1987]). Thus, it is only in cases where there is a bona fide dispute as to the existence of a contract that a plaintiff may plead alternative theories of recovery (*see Foster v Kovner,* 44 AD3d 23, 29 [1st Dept 2007]).

In this case, Defendants do not dispute that the parties entered into the NDA, attached to the complaint as Exhibit 2, which was signed by both parties, which governs the Defendants' use of Steel and Northern's confidential information and that it is the Defendants' alleged misuse of such confidential information that forms the basis of the unjust enrichment claim.

The cases cited by Northern in support of its argument that it can plead unjust enrichment in the alternative are inapposite. In *Farash v Sykes Datatronics* (59 NY2d 500, 504 [1983]) the Court allowed plaintiff to plead a quasi-contract claim in the alternative because there was a bona fide question about whether the contract was barred by the statute of frauds. In *Joseph*

Sternberg, Inc. v Walber 36th St. Assoc. (187 AD2d 225, 228 [1st Dept 1993]) the Court permitted alternative pleading because the written contract was silent regarding the subject of the dispute between the parties. Accordingly, because there is no dispute that, in this case, there is a contract which covers the subject matter of plaintiff's unjust enrichment claim, that claim must be dismissed (*see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc,* 85 AD3d 680, 682 [1st Dept 2011], *affd* 17 NY3d 930 [2011]).

D. Negligent Misrepresentation

"The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011][citations and internal quotation marks omitted]).

A special relationship exists when (1) the parties are in a relationship of trust and confidence or (2) one of the parties has superior knowledge (*see Kimmell v Schaefer,* 89 NY2d 257, 263-264 [1996]). Generally, the requisite special relationship does not exist between entities that enter into an agreement through an arm's length business transaction (*see Parisi v Metroflag Polo, LLC,* 51 AD3d 424 [1st Dept 2008]. In *Kimmell*, the Court of Appeals recognized that a duty to speak with care may be imposed in a commercial transaction, but only "on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d at 263).

Here, the parties were engaged in an arm's length business transaction and plaintiff has failed to plead that Monomoy had superior knowledge or expertise as it pertained to the purchase of Steel. In addition, the court has determined that the parties did not share a fiduciary relationship. Accordingly, because there was no privity-like relationship between the parties, the negligent misrepresentation claim must be dismissed.

E. Fraud

Plaintiff has, however, properly stated all of the elements to sustain a cause of action for fraud/fraudulent inducement.

"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" (*Nissan Motor Acceptance Corp. v Scialpi,* 94 AD3d 1067, 1067 [2d Dept 2012]).

Here, the complaint alleges that on February 20, 2011, in order to procure Northern's consent to speak directly with Resilience regarding the purchase of Steel, Monomoy's representatives, Justin Hillenbrand and Nathan Bard, told Northern that it "had nothing to worry about, that its position with respect to the transaction to purchase Steel . . . was safe and secure", that Monomoy wouldn't reach any agreement with Resilience without Northern Stamping's approval, that Northern wouldn't be cut out of any agreement to purchase Steel and that Northern would be able to review and sign any agreement that would be reached (Cmplnt ¶¶ 92, 93).

Northern alleges that Monomoy's statements were false, that Monomoy knew, when they made the statements, that they were going to pursue the purchase of Steel on their own and that

the statements were made simply to induce Northern to consent to their private meeting with resilience and that Northern justifiably relied on these assurances when it gave its consent to the meeting. According to Northern it has been damaged, in an amount not less than $13,000,000, by being cut out of the transaction to purchase Steel.

In essence, Northern has alleged that it was induced to provide its consent to a private meeting based on Monomoy's material misrepresentations of its present intention to exclude Northern from the transaction to purchase Steel and that its reliance on the statements by Monomoy's representatives was justified and that it was damaged thereby. The question of the reasonableness of Plaintiff's reliance on the allegedly fraudulent representations implicates factual issues whose resolution is inappropriate on a motion to dismiss (*Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]).

Here, contrary to Monomoy's contentions, Northern has not alleged promissory statements regarding future acts. Rather, the pleading alleges "misrepresentations that are misstatements of material fact with a present, but undisclosed intent not to perform" (*see Channel Master Corp. v Aluminum Ltd. Sales,* 4 NY2d 403, 408 [1958]["It is not a case of prophecy and prediction of something which is merely hoped or expected . . . but a specific affirmation of an arrangement under which something is to occur, when the party making the affirmation knows . . . no such thing is to occur."]) which are sufficient to sustain the cause of action sounding in fraud.

Accordingly, it is

ORDERED that defendants Monomoy Capital Partners, L.P., Monomoy Capital Management, L.L.C. and Monomoy Capital Partners I's motion to dismiss the first, third, fourth,

fifth and sixth cause of action is granted to the extent that the first, third, fourth and fifth causes of action are dismissed and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 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 on July 13, 2012 at 10:30 p.m. at 26 Broadway, 10th Floor.

Dated: June 1, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.