SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

OPERA SOLUTIONS, LLC

-v-

IQOR US, INC.

INDEX NO. 650869/12

MOTION DATE

MOTION SEQ. NO. 003

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 defendant to dismiss the complaint is DENIED in part and GRANTED in part for the attached Decision and Order.

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

Dated: October 12, 2012

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 45

OPERA SOLUTIONS, LLC	:	
Plaintiff,	:	Index No. 650869/12
-against-	:	DECISION AND ORDER
IQOR US, INC.	:	Motion Sequence No. 003
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Preliminary Statement

Opera Solutions, LLC (Opera) brings this action against iQor US, Inc. (iQor), alleging breach of contract, breach of implied covenant of good faith and fair dealing, fraudulent inducement, and numerous semi-contractual claims. iQor moves to dismiss Opera's complaint, pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and pursuant to CPLR 3211 (a) (1) on the ground that iQor's defenses are founded upon documentary evidence.

Standard of Review

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPRL 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPRL 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Background

The following facts are taken from the Opera's complaint. Opera, a New York based limited liability company, is a center of predictive analytics and machine learning science that delivers services designed to result in rapid profit improvement for its clients. iQor, a New York based corporation, is a technology and services company that provides call center and other outsourcing services to its clients.

2010 Statement of Work

On February 15, 2010, iQor retained Opera to support the implementation of Qorus (Qorus), a suit of applications developed by iQor. A month later, on March 16, 2010, iQor and Opera signed a written statement of work (2010 SOW) that set forth the terms of their agreement. The 2010 SOW was retroactive to February 15, 2010, the date Opera commenced work on the project.

The complaint alleges that under the 2010 SOW iQor was to pay Opera a monthly base fee of $95,000 for support in implementation of Qorus. If, as a result of implementation of the

application, iQor's earnings before interest, taxes, depreciation and amortization (EBITDA) reached a target of $66 million, Opera was to receive a bonus fee of $2 million, plus 50% of any such earnings above $66 million. The 2010 SOW also provided for a discretionary award of a $2 million bonus fee in the event the EBIDTA target was not achieved. If EBITDA was close to the target, iQor's management had sole discretion to award the discretionary bonus to Opera.

The complaint alleges that under the 2010 SOW iQor was to provide timely and effective cooperation in connection with Opera's services as well as reasonable and timely access to data required for the Qorus rollout. Opera asserts that it was understood by the parties that if both Opera and iQor performed as required under the 2010 SOW, the 2010 target EBITDA would be achieved. Opera further alleges that the agreement was entered into based on a mutual understanding that the Qorus application was currently being implemented across iQor's collector base. Opera asserts that it later discovered that this was not the case. Opera also alleges that iQor did not perform its obligations with respect to data access under the agreement

Finally, the complaint alleges that in addition to the services performed under the 2010 SOW, Opera performed other, unrelated services requested by iQor. At the time of the request iQor knowingly and falsely represented to Opera that it would pay for the unrelated services provided. It never did.

2011 Statement of Work and 2011 Amended Statement of Work

On February 21, 2011, iQor retained Opera to provide an analysis of performance data of iQor's portfolios, and to develop a blueprint (Blueprint) for methods to improve the profit margins of those portfolios. As in case of the 2010 SOW, the actual written statement of work (2011 SOW) was signed later, on March 14, 2011. The 2011 SOW was retroactive to February 21, 2011, the date when Opera commenced the work.

Due to iQor's failure to make timely payments under the 2011 SOW, iQor requested an amendment be made to the 2011 SOW. On May 19, 2011, an amended statement of work (2011 ASOW), which was retroactive to February 21, 2011, was signed.

Under the 2011 ASOW, Opera was to work on two separate projects, referred to as Phase I High Balance portfolio and Phase II Commercial Third Party portfolio, and was to develop the Blueprint for profit maximization of those portfolios. The Phase II project was to commence only upon the mutual agreement of the parties.

Opera was to receive a base fee of $500,000 for its work on the two projects, and a base fee of $500,000 for its work on the Blueprint. Also, Opera was entitled to an additional $500,000 for Phase I work if the margin improvement target (MIT) of $2 million was achieved for the High Balance portfolio. Opera was also entitled to an additional $1,500,000 for Phase II work if a similar milestone for the Commercial Third Party portfolio was met. The 2011 ASOW provided that if the Phase I MITs were not achieved but only substantially met, Opera was eligible for an additional $500,000 at iQor's discretion.

The complaint alleges that under the 2011 ASOW iQor was obliged to provide timely and effective cooperation in connection with Opera's services as well as timely review of Opera's ongoing work. In particular, iQor's CEO, Mr. Kapoor, was required to provide regular feedback and direction on the development of the Blueprint. The 2011 ASOW also included a "Change of Control" provision. It provided that any financial transaction resulting in a change of control of iQor during 2011 would remove the MIT requirement for the payment of the additional $500,000 on Phase I and the additional $1,500,000 on Phase II, making the payments subject only to completion of the Blueprint.

2011 Modified Amended Statement of Work

According to the complaint, the parties agreed to proceed with Phase II of the 2011 ASOW in June 2011, and began to negotiate the terms of the modified amended statement of work (2011 Modified ASOW) in late June or early July 2011. Opera started its work on Phase II before the agreement was executed. Opera asserts that the parties agreed that Opera would commence work during the negotiations, and that the 2011 Modified ASOW would be retroactive to July 1, 2011, as was the parties' custom.

The negotiations resulted in three distinct adjustments to the 2011 ASOW. Opera's base fee was increased to $150,000 per month starting January 1, 2012. The base fee for the work on the Blueprint was increased to $1 million, and was due in January 2012. Opera was to receive 25% of the amount of any margin increase above the threshold increase of $3 million. No modifications were made to the remaining terms of the 2011 ASOW.

Despite iQor's explicit promises to "expeditiously" execute the agreement, the 2011 Modified ASOW was never signed. Opera asserts that it provided iQor with multiple notices that Opera would not be able to continue performance without an executed 2011 Modified ASOW and without payment of outstanding invoices. iQor did not respond to those notices. In November 2011, Opera withdrew its team from iQor and ceased all work on the project.

The complaint also alleges that shortly after Opera ceased operations, iQor's CEO, Mr. Kapoor, stepped down as a result of a financial transaction. The event allegedly triggered the "Change of Control" provision of the 2011 ASOW, replicated in the 2011 Modified SOW, resulting in Opera being entitled to the payment of an additional $500,000 for Phase I work.

Discussion

Breach of Contract

Opera's first, fourth and sixth causes of action allege breaches of the contractual agreements made between the parties. To adequately allege the essential elements of a breach of contract claim, plaintiff's complaint must plead the existence of a contract between the parties; plaintiff's performance under the contract; defendant's breach of the contract; and plaintiff's resulting damages. *JPMorgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 (2d Dept 2010).

First Claim: breach of 2010 SOW

Opera's complaint asserts that although it fully performed all of its obligations under the 2010 SOW, iQor failed to provide the required access to data. Thus, as a result of this breach, Opera was prevented from the full benefit of its bargain, including, but not limited to, the $2 million bonus fee. The compliant pleads sufficient facts so as to adequately allege a breach of contract claim.

iQuor presents two arguments in response. First, it argues that the EBITDA target of $66 million was never achieved. Thus, iQor's obligation to pay Opera the bonus fee of $2 million was never triggered. Second, it argues that the 2011 SOW extinguished the parties' obligations under the 2010 SOW. These positions are not dispositive at this stage. They neither address the sufficiency of iQuor's first claim, nor do they provide a complete defense based on documentary evidence. CPLR 3211 (a) (7); CPRL 3211 (a) (1). Accordingly, iQuor's motion to dismiss the first cause of action is denied.

Fourth Claim: breach of 2011 ASOW

Opera's complaint makes five distinct allegations of breach under its fourth cause of action. First, the complaint alleges that iQor failed to pay Opera $500,000 upon the change of control. Second, the complaint alleges that iQor failed to pay Opera for the achievement of the Phase I High Balance portfolio MIT. Third, the complaint alleges that iQor failed to pay Opera for the achievement of the Phase II Commercial Third Party portfolio MIT. Fourth, the complaint alleges that iQor failed to pay Opera for work and deliverables under the Phase II project. Fifth, the complaint alleges that iQor failed to pay Opera's reasonable expenses incurred under the 2011 ASOW.

Defendant contends that allegations with respect to the "Change of Control" provision and Opera's reasonable expenses must be dismissed, as plaintiff fails to plead certain conditions precedent. Defendant asserts that plaintiff must allege that the change of control occurred in 2011, and that the expenses were approved in advance. Under New York law, the burden to plead that any condition precedent has not occurred rests on the party resisting enforcement of the contract. *1199 Housing Corp. v International Fidelity Ins. Co.*, 14 AD3d 383 (1st Dept 2005). Opera is not resisting enforcement of the contract. Rather, it is trying to recover on the contract. Hence, Opera does not have to allege the satisfaction of conditions precedent to satisfy its pleading standard.

iQuor further contends that allegations with respect to the "Change of Control" provision and the Phase I MIT achievement fee must be dismissed based on the documentary evidence submitted. iQor claims that the margin report (stating that the actual margin for the Phase I High Balance portfolio was $2.56 million below the $2 million MIT) and heavily redacted Separation Agreement between iQor and Mr. Kapoor (stating that Mr. Kapoor remained as CEO at iQor until January 13, 2012) amount to documentary evidence that establish iQor's complete defense

as a matter of law, pursuant to CPRL 3211 (a) (1). In New York, in order to be considered documentary, the evidence must be unambiguous, authentic and undeniable. *Fontanetta*, 73 AD3d 78 (holding that corporate documents and redacted reports are not documentary evidence for purposes of CPRL 3211 (a) (1)); *Webster v State of New York*, NY Slip Op 50590 (2003) (holding that documents which represent information compiled into a summary form are not essentially undeniable).

iQor's margin report was prepared by iQor and provides summary information on iQor's financial performance. It is not documentary evidence under New York law. The Separation Agreement was prepared exclusively by iQor and its agents and more than 90% of its content was redacted upon submission. A document so heavily redacted does not constitute unambiguous and undeniable evidence. It does not establish a defense as a matter of law, pursuant to CPRL 3211 (a) (1).

iQuor states that Opera's allegations with respect to Phase II MIT and Phase II work and deliverables must be dismissed because Phase II was not within the scope of the 2011 ASOW. iQor contends that since there was never a written agreement to proceed with Phase II, iQor does not have any obligations in relation to that project. Its arguments raise substantial issues of fact, but they do not detract from the sufficiency of plaintiff's breach of contract claim. Since it is not the court's task to make factual determinations on a motion to dismiss, *T. Lemme Machanical, Inc. v Schalmont Cent. School Dist.*, 52 AD3d 1006 (3d Dept 2008), and since the facts as alleged by Opera fit within a cognizable legal theory, *Sitar v Sitar*, 50 AD3d 667 (2d Dept 2008), iQor's motion to dismiss the fourth cause of action is denied.

Sixth Claim: breach of 2011 Modified ASOW

Opera alleges that in June 2011 iQor and Opera made an oral agreement to proceed with Phase II of the project. Opera's complaint alleges that iQor made a specific request that Opera begin work before the 2011 Modified ASOW was finalized. The complaint alleges that Opera fully performed its obligations under the 2011 Modified ASOW, while iQor failed to provide timely access to data and failed to pay Opera its fees.

iQuor argues that the "no oral modification clause" of the 2011 ASOW bars any claims under the orally negotiated 2011 Modified ASOW. iQuor asserts that under the 2011 ASOW, the agreement to proceed with Phase II needed to be included in an addendum to the 2011 ASOW prior to the start of work. iQuor ignores the fact that under New York law a contractual provision against oral modification may be constructively waived by the parties' partial performance in accordance with the oral modification. *Rose v Spa Reality Assoc's,* 42 NY2d 338 (1977). Whether the actions of the parties amount to a waiver of the "no oral modification clause" is an issue of fact to be resolved at the later stages of this litigation.

Since Opera pleaded sufficient facts to state a breach of the 2011 Modified ASOW, and since iQor failed to provide any documentary evidence that would establish a complete defense as a matter of law, iQor's motion to dismiss the sixth cause of action is denied.

Breach of Implied Covenant of Good Faith and Fair Dealing

Opera's second and fifth causes of action allege breach of an implied covenant of good faith and fair dealing with respect to the 2010 SOW and 2011 ASOW discretionary bonus fee provisions. The complaint alleges that iQor decided, without good cause, not to award Opera the discretionary bonus fees during 2010 and 2011. Opera asserts iQor exercised its discretion in

bad faith. The complaint also states that iQor refused, without good cause, to finalize the 2011 Modified ASOW. Opera asserts iQor exercised its contractual 'veto power' in bad faith.

In New York, in order to state a claim for breach of an implied covenant of good faith and fair dealing, a compliant must plead facts indicating an arbitrary or irrational exercise of discretion. *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A.*, 41 AD3d 269 (1st Dept 2007) (allegations of extortive extra-contractual payments raised a triable issue of fact whether defendant's discretion under the contract was exercised in bad faith). Allegations of illegitimate purpose and bad faith must be made. *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288 (1st Dept 2003) (allegations that defendant's discretionary actions were a part of a purposeful scheme designed to deprive plaintiff of the benefit of the agreement were sufficient for the claim to survive the motion to dismiss). Opera alleges that iQor made its discretionary decisions "without good reason." Lack of good reason falls short of the 'arbitrary or irrational exercise of discretion' and the 'illegitimate purpose' pleading standard. Thus, Opera fails to plead successfully the second and the fifth causes of action and iQor's motion to dismiss the second and the fifth causes of action is granted.

Fraudulent Inducement

Opera's third and seventh causes of action allege fraudulent inducement under the contractual agreements between the parties. In order to plead fraudulent inducement, Opera's complaint must allege a material representation by iQor, known by iQor to be false, made by iQor with an intention of inducing Opera's reliance, which was relied upon by Opera, and Opera's resulting damages. *Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704 (1st Dept 2011). Material representations of future intent, however, are not actionable. *Sanyo Elec., Inc. v Pinros & Gar Corp.*, 174 AD2d 452 (1st Dept 1992) (holding that the representation

that plaintiff "would be defendant's primary distributor" and that "the agreement would remain in effect so long as the parties continued business operations" were non-actionable statements of future intent). The cause of action must allege a representation of present fact, not a future intent. *Sandra Green Real Estate, Inc. v Johansen Org.*, 182 AD2d 468 (1st Dept 1992).

Opera's third count states that iQor promised Opera that it *would pay* for the additional unrelated services provided that the Qorus rollout *would lead* to significant increases in productivity and would translate into EBITDA of at least $66 million and that iQor *would pay* Opera the $2 million bonus fee under the "exercise of discretion" clause, regardless of whether the 2010 EBITDA goal of $66 million was met. Opera's seventh count states that iQor misrepresented to Opera that the Phase I and the Phase II MITs *would be achieved*, that iQor *would exercise* its discretion to pay Opera the MIT achievement fees, regardless of whether the MITs were achieved, and that iQor *would pay* Opera for any services provided during the negotiations of the 2011 Modified ASOW. All of the allegations made under the third and seventh causes of action are non-actionable statements of future intent. The third and the seventh causes of action are dismissed for failure to state a cause of action.

Account Stated

Under the eighth cause of action, Opera alleges that it delivered invoices to iQor totaling approximately $2.3 million for services rendered, and that iQor failed to pay the invoices – allegations almost identical to those made under plaintiff's breach of contract claims. Under New York law, a cause of action alleging an account stated cannot be utilized as another means to collect under a disputed contract, and must be dismissed as duplicative, where such is the case. *Grinell v Ultimate Reality, LLC*, 38 AD3d 600 (2d Dept 2007); *Martin H. Bauman Assoc.*,

Inc. v H&M Int'l Transport, Inc., 171 AD2d 479 (1st Dept 1991). Plaintiff's eighth cause of action is dismissed.

Quasi-Contractual Claims

Opera's ninth, tenth and eleventh causes of action state quasi-contractual claims of unjust enrichment, promissory estoppel and quantum meruit. Opera alleges that it is entitled to equitable recovery under the contractual agreements made between the parties, as well to equitable recovery for damages resulting from the performance of additional unrelated services, not covered by any of the contractual agreements.

It is well settled that the existence of a contract precludes recovery in quasi contract for events arising out of the same subject matter. *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 (1987). Opera's quasi-contractual claims relating to the agreements discussed above are dismissed. The rule, however, does not apply to the quasi-contractual claims with respect to the unrelated services performed by Opera, since the unrelated services were not governed by any of such agreements. The ninth, tenth, and eleventh causes of action with respect to the unrelated services are not dismissed.

Conclusion

Opera's complaint contains sufficient allegations to sustain the first, fourth and sixth causes of action, and the ninth, tenth and eleventh causes of action with respect to unrelated services. Opera's complaint does not plead sufficient facts to sustain the second, third, fifth, seventh and eighth causes of action, and the ninth, tenth and eleventh causes of action with respect to all matters relating to the agreements discussed above.

ORDERED that iQor's motion to dismiss the first, fourth and sixth causes of action is denied; and it is further

ORDERED that iQor's motion to dismiss the second, third, fifth, seventh and eighth causes of action is granted; and it is further

ORDERED that iQor's motion to dismiss the ninth, tenth and eleventh causes of action with respect to unrelated services is denied, and iQor's motion to dismiss the ninth, tenth and eleventh causes of action with respect to all matters relating to the agreements discussed in the Decision is granted.

Dated: October 12, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.