SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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LANTAU HOLDINGS, LTD.,

Plaintiff,

-against-

ORIENT EQUAL INTERNATIONAL GROUP, *et al.*,

Defendants.

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DECISION AND ORDER

Index No. 653920/2016

Mot. Seq. 005

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract, fraudulent misrepresentation, and negligent misrepresentation, Lantau Holdings, Ltd. ("Lantau" or "plaintiff") moves for a judgment of no less than $20,000,000 against each of Orient Equal International Group Limited ("OEI"), Weibin Huang ("Weibin"), Huang Dongpo ("Dongpo" and together with OEI and Weibin, "Borrower-Defendants"), James Wang ("Wang"), Haitong International Securities Company Limited ("Haitong") and Li Wen Hao ("Hao" and together with Borrower-Defendants, Wang and Haitong, "Defendants").

Haitong moves for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) based upon documentary evidence and failure to state a claim, CPLR 3211(a)(8) for lack of personal jurisdiction, and CPLR 327(a) under the doctrine of forum non-conveniens. (Mot. Seq. 005). Haitong also

requests sanctions to be imposed upon plaintiff pursuant to 22 NYCRR §130-1.1. Plaintiff opposes.

Facts

Lantau is a company that engages in securities repurchase lending, also known as 'repo lending', which involves lending cash to borrowers in return for the delivery to and use by Lantau of shares as collateral during the term of the loan. Amended Complaint ("FAC") ¶29. These repo loans generally grant the lender the status of beneficial owner which allows the lender to engage in transactions involving the collateral with the borrower repurchasing the securities at the end of the specified term. Id. ¶30.

Rex Global Entertainment Holdings Limited ("REX"), a Bermuda LLC trading on the Hong Kong Stock Exchange, issued a public announcement in March of 2015, stating that Haitong would act as its placing agent concerning 25 billion newly issued REX shares. See Affirmation of Alan Howard, dated Dec. 9, 2016 ("Howard Aff."). This same announcement also stated that all of these shares would be subject to a temporary restriction preventing sale, also known as a "lock-up period" of 24 months. Id.

On or about April 27, 2016, Wang introduced Lantau to OEI and Dongpo, in order to discuss entering into a lending arrangement. See FAC ¶¶39-42. After some

negotiations, Lantau and the Borrower Defendants entered into a Collateralized Limited Recourse Loans agreement dated May 6, 2016 (the "Loan Agreement"). Among other things, the agreement required Lantau to provide a limited recourse loan in exchange for suitable shares of REX stock pledged as collateral that was freely tradeable and clear in the account. Id. ¶44. The Loan Agreement contains a choice of venue provision, which states that each party "consents to the exclusive jurisdiction of the courts sitting in New York." FAC, Ex. D at ¶10.15.

Subsequent to this agreement, Lantau learned that Haitong was acting as REX's agent for its share placement but insists that the public announcements by REX failed to identify any of the subscribers of the placement. Id. ¶45. Accordingly, Lantau requested from the Borrower Defendants copies of account statements evidencing their ownership of the shares of REX that would be delivered and pledged as collateral for the repo loans. Id. ¶46. Haitong allegedly provided this information to the Borrower Defendants, which did not indicate that any shares of REX owned by Borrower Defendants were subject to any restrictions. Id. Upon this information, OEI pledged 417,000,000 shares of REX to Lantau and Dongpo pledged 500,000,000 shares of REX to Lantau (collectively, the "Collateral") in order to secure the obligation to repay the sums to be advanced by Lantau to Borrower Defendants. Id. ¶49.

Following execution of the Loan Agreement, Lantau learned that Borrower Defendants owed substantial sums of money to their broker, Haitong, which resulted in a floating lien over the shares of REX held in OEI and Dongpo's securities accounts with Haitong and comprised the Collateral. Id. ¶53. Haitong refused to transfer the Collateral without receiving payments in satisfaction of the lien. Borrower Defendants, Haitong and Lantau agreed that Lantau would execute two Delivery-Versus-Payment ("DVP") transactions in which Lantau would pay Haitong the balance of the lien and Haitong would release the corresponding REX shares. Id. ¶56. Lantau believed that this transaction confirmed that beneficial ownership of and control over the Collateral now rested solely with Lantau during the term of the Loan Agreement. Id. ¶57, 67

To further the DVP transaction, Haitong allegedly sent and exchanged numerous communications via telephone and email to Lantau's principals in New York with information necessary for Lantau to initiate wire transfers to Haitong. Id. ¶62. Throughout this time, Haitong remained silent about its knowledge that the Collateral was subject to the lock-up period. Id. Upon payment, Haitong delivered a portion of the shares of REX into an omnibus account with Merrill Lynch Far East Limited and HSBC. Id. ¶70.

Based on what it thought was beneficial ownership of the shares of REX, Lantau entered into a series of transactions to sell its shares of REX. Id. ¶¶71-73.

REX obtained an injunction order from The High Court of the Hong Kong Special Administrative Region, Court of First Instance (the "Injunction Order"). Id. ¶77. The Injunction Order prohibited OEI, Dongpo and Hong Kong Zhong Qing Development Co. Limited from "selling, mortgaging, charging, pledging, hypothecating, lending, granting or selling any option, warrant, contract or right to purchase, transferring, disposing of, creating any right over, or agreeing or offering to do anything…" in relation to the shares of REX. See Injunction Order, p. 2. The Injunction Order concerned all of the shares in both the HSBC and Merrill Lynch Far East accounts, which contained the Collateral at issue and was granted due to OEI and Dongpo's breach of Clause 2 of the Lock-up Undertaking. Id. pp. 2-3.

It was at this time that Lantau allegedly learned of the lock-up period, which restricted the sale of REX shares for a period of 24 months. Id. ¶78. As a result, Lantau was forced to execute "buy-in" trades in order to cover sales Lantau had made as part of its hedging strategy with respect to the Collateral. Id. ¶83. Plaintiff alleges that it was injured as a result.

As it relates to Haitong, plaintiff alleges that as Haitong participated in the DVP transaction, transfer of the Collateral pursuant to the Loan Agreement, and payments made in connection with these transfers, Haitong knew or should have known of the forum-selection provision of the Loan Agreement and reasonably should have expected to be subject to these provisions. Id. ¶85. Additionally, as

Haitong was involved in these agreements, plaintiff alleges that they had a duty to inform Lantau of the lock-up restrictions. Id. ¶¶59-60.

Analysis

Legal Standard

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 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 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines

only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Whether this Court has Personal Jurisdiction over Haitong

Whether this Court has Personal Jurisdiction under CPLR 301

Plaintiff has not established that it has personal jurisdiction over Haitong under CPLR 301. CPLR 301 provides that "a court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." The recent seminal case of Daimler AG v. Bauman, 134 S. Ct. 746 (S.Ct 2014) is relevant precedent to the application of general jurisdiction. In Daimler, the Supreme Court held that the only type of local activity by a corporation that will ordinarily qualify for general jurisdiction is incorporation in the state or maintenance of its principal place of business in the state.

The New York courts, including the First Department, have followed Daimler. In Magdalena v. Lins, 123 A.D. 3d 600, 601 (1st Dept 2014), the First Department held that "there is no basis for general jurisdiction pursuant to CPLR 301, since [defendant] is not incorporated in New York and does not have its principal place of business in New York." See also, D & R Glob. Selections, S.L. v. Pineiro, 128 A.D.3d 486, 487 (1st Dept 2015). Therefore, "as a matter of due process, general jurisdiction exists only if the corporation is essentially at home in the forum State...typified by the place of incorporation and principal place of business." Motorola Credit Corp. v. Standard Chartered Bank, 24 N.Y.3d 149 (2014); see also Norex Petroleum Ltd. v. Blavatnik, 2015 WL 5057693 (Sup. Ct. N.Y. Cnty. Aug. 25, 2015) ("the only kind of corporate activity that ordinarily will satisfy the general jurisdiction test is incorporation in the state or maintenance of a corporation's principal place of business in the state."); Serov ex rel. Serova v. Kerzner Intern. Resorts, Inc., 2016 WL 4083725 (Sup. Ct. N.Y. Cnty. Jul. 26, 2016).

Plaintiff alleges that a basis for jurisdiction exists because Haitong allegedly maintains substantial full-time personnel and conducts substantial business in New York under a wholly-owned subsidiary Haitong International Securities Group (USA) Inc. ("Haitong USA"). See FAC ¶¶17-18. Plaintiff alleges that Haitong caused at least three of its controlling officers to be appointed to the board of Haitong USA and controls the marketing of Haitong USA in order to hold out Haitong USA

as Haitong itself. Id. Therefore, according to plaintiff, Haitong USA acts as an alter-ego of Haitong. Id.

However, the documentary evidence utterly refutes plaintiff's factual allegations and conclusively establishes a defense as a matter of law. See Goshen, 98 N.Y.2d at 326; Fountanetta, 73 A.D.3d at 78; Ozdemir, 285 A.D.2d at 963. It is clear that Haitong USA is not a subsidiary of defendant Haitong International Securities Company limited, but is instead a subsidiary of non-party Haitong International Securities Group Limited ("Non-Party Haitong"). In Haitong USA's February 2016 filing with the U.S. Securities and Exchange Commission, it indicates that Haitong USA is a subsidiary of Non-Party Haitong. See Howard Aff., Ex. 1. Similarly, the "BrokerCheck Reports" published by the Financial Industry Regulatory Authority ("FINRA") indicates that Non-Party Haitong has an ownership interest in Haitong USA but defendant Haitong does not. Id., Ex. 2. Additionally, Non-Party Haitong issued a public announcement that its wholly owned subsidiary, Haitong International (BVI) had acquired Japaninvest, Inc., which was subsequently renamed Haitong USA. See Howard Aff., Exs. 2-4. Finally, a search of New York State's Department of State Division of Corporations also reveals that Haitong is not incorporated within the state.

Therefore, this court does not have personal jurisdiction over Haitong under CPLR 301.

Whether this Court has Personal Jurisdiction under CPLR 302(a)(2)

CPLR 302(a) (2) provides that a court may exercise the long-arm statute against a "non-domiciliary...who in person or through an agent...commits a tortious act within the state."

The courts in New York hold that the tortious act must have occurred in New York. Small v. Lorillard Tobacco Co., Inc., 252 A.D.2d 1 (1st Dept 1998). The emphasis should be the locus of the tort. Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc. 2d 182, 188 (Sup. Ct. N.Y. Cnty. Mar. 14, 1996) aff'd sub nom. Banco Nacional Ultramarino, S.A. v. Moneycenter Trust Co., 240 A.D.2d 253 (1st Dept 1997). Once the court finds that the tort occurred *within* the state, it should look at the totality of the circumstances, to determine if jurisdiction should be exercised under CPLR 302(a) (2). Id. The burden of proving jurisdiction is upon the party who asserts it. Lamarr v. Klein, 35 A.D.2d 248, 250 (1st Dept 1970).

Plaintiff alleges that Lantau was authorized to do business in New York and Haitong knowingly and intentionally sent emails and telephone calls to Lantau in New York in order to make arrangements in New York for the payment of funds to Haitong. See Pl's Memo in Opp., p. 15. According to plaintiff, this directly resulted in the transferring of funds out of New York. Id. at pp. 16, 17. CPLR 302(a) (2) has been narrowly construed to apply only when the *defendant's* wrongful conduct is

performed in New York. The defining case is Feathers v. McLucas, 15 N.Y. 2d 443, 448 (1965).

In Feathers, the defendant manufactured a steel tank in Kansas and sold it to a Missouri company with knowledge that the tank would be mounted on a wheelbase and resold to a Pennsylvania company for the interstate transportation of propane gas. The tank exploded on a New York highway, injuring the plaintiffs. The Court of Appeals rejected the applicability of CPLR 302(a) (2) because the tortious act--defendant's negligent manufacturing of the tank--occurred in Kansas, not New York. Applying a plain language analysis, the Court held that "tortious act within the state" refers to the defendant's conduct, not its injurious consequences. Without denying the constitutionality of asserting jurisdiction on the given facts, the operative phrase of CPLR 302(a) (2) was simply not "synonymous with 'commits a tortious act without the state which causes injury within the state.' See also, Kramer v. Vogl, 17 N.Y.2d 27 (1966) (where defendant made misrepresentations to plaintiff in Paris and confirmed those misrepresentations by letter mailed into New York, defendant did not commit tortious act in New York); Platt Corp. v. Platt, 17 N.Y.2d 234 (1966). Here, plaintiff has not claimed that the defendants were in New York when the tort was committed.

Plaintiff claims that the tortious statements were made to New York by Haitong's emails and calls to them. Most of the New York courts have refused to

apply CPLR 302(a) (2) to claims based on tortious statements that made their way to New York only by mail or telephone. For example, in Bauer Industries, Inc. v. Shannon Luminous Materials Co., 52 A.D.2d 897 (2d Dept 1976), the court held that a California corporation and its principals were not subject to personal jurisdiction in New York in connection with a fraud action by a New York corporation which was distributing fluorescent pens manufactured by the defendants, where the defendants were not doing business or transacting business within New York State, despite the contention that the alleged false representation, mailed to plaintiff in New York, constituted the commission of a tortious act within New York. See also, Findlay v. Duthuit, 86 A.D.2d 789 (1st Dept 1982) (where defendant, in France, committed tort in the course of a phone call placed from New York to defendant, defendant did not commit a tortious act within the state); Young v. Mallet, 49 A.D.2d 528 (1st Dept 1975); Stein v. Annenberg Research Institute, 1991 WL 143400, at *3 (S.D.N.Y. 1991) (One single telephone call made to New York State is insufficient contact to support a suit initiated in that forum against an out-of-state resident under either the contract or tort provisions of CPLR 302); CRT Invs., Ltd v. BDO Seidman, LLP, 85 A.D.3d 470, 471 (1st Dept 2011) (the sending of a limited number of emails and engagement letters into New York does not establish a defendant's presence in New York.).

Moreover, in Waggaman v. Arauzo, 117 A.D.3d 724, 726 (2d Dept 2014), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) continued, "due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the "random, fortuitous or attenuated" contacts he makes by interacting with other persons affiliated with the State." Here, Haitong does not have its own affiliation with New York outside of the alleged emails and phone calls made to Lantau. Accordingly, "it would offend "minimum contacts" due process principles to force defendants to litigate this claim in a New York forum on the basis of telephone calls or virtual emails." McCracken v. Adams, 2016 WL 1117161 (Sup. Ct. N.Y. Cnty. Mar. 22, 2016).

Therefore, plaintiffs fail to set forth a prima facie basis for jurisdiction over defendants under CPLR 302(a) (2).

Whether this Court has Personal Jurisdiction under CPLR 302(a)(3)

Plaintiff alleges that there is personal jurisdiction under CPLR 302(a)(3)[1] which requires that

> (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New

[1] As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent - commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

> York; and (5) the defendant derived substantial revenue from interstate or international commerce.

Penguin Grp. (USA) Inc. v. Am. Buddha, 16 N.Y.3d 295, 302 (2011).

CPLR 302(a)(3) specifically requires that the plaintiff prove that defendant (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. As plaintiff has not adequately pledged that Haitong committed a tortious act without the state, this court does not have jurisdiction under CPLR 302(a)(3). See *infra*.

As a result of the foregoing, Haitong's motion to dismiss plaintiff's claims for lack of personal jurisdiction is granted.

Whether the Forum Selection Provisions of the Loan Documents Should be Enforced Against Haitong

The loan documents cannot be enforced against Haitong, as it is a non-signatory to the underlying documents. Plaintiff contends that Haitong is bound by section 10.15 of the loan documents executed by and among Lantau and Borrower Defendants. FAC ¶21. Specifically, the provision states,

> *Consent to Jurisdiction, Venue, Jury Trial Waiver*. Each of the parties hereto hereby consents to the exclusive jurisdiction of the courts sitting in New York, New York…for the purpose of any suit, action or other proceeding by any party to this Loan Agreement, the Note, the Pledge Agreement or any related document.

See FAC, Ex. D at ¶10.15.

Neither party denies that Haitong is not a signatory to this agreement. Generally, only parties in privity of contract may enforce terms of the contract such as a forum selection clause within an agreement. See ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 A.D.2d 272 (1st Dept 2003). There are three circumstances in which a non-signatory may invoke a forum selection clause.

First, an entity or individual that is a third-party beneficiary of the agreement may enforce a forum selection clause found within the agreement. Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 39 (1st Dept 2008); ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 A.D.2d 272 (1st Dept 2003). Second, parties to a global transaction who are not "signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose." Freeford, 53 A.D.3d 32, 39. Third, a non-signatory that is closely related to one of the signatories can enforce a forum selection clause. Id.

A non-signatory is considered closely related to one of the signatories and can enforce a forum selection clause when the enforcement of the clause is "foreseeable by virtue of the relationship between them." Id. The non-signatory defendant must have a "sufficiently close relationship with the signatory and the dispute to which the forum selection clause applied." Tate & Lyle Ingredients Americas, Inc. v.

Whitefox Tech. USA, Inc., 98 A.D.3d 401, 402 (1st Dept 2012); Dogmoch Intl. Corp. v. Dresdner Bank, 304 A.D.2d 396, 397 (1st Dept 2003).

The determination as to whether Haitong is closely related to the Borrower Defendants and the dispute is a factually intensive analysis. See Out Publishing, Inc. v. Lipo Liquidating Corp., 2013 WL 3661886 *3 (Sup. Ct. N.Y. Cnty. Jul. 1, 2013); L-3 Commc'n Corp. v. Channel Tech., Inc., 291 A.D.2d 276 (1st Dept 2002) ("we note the absence of any factual predicate for plaintiff's contention that [defendants] bear so close a relation [that they would] have been foreseeably bound by [the forum selection clause]"). When a non-signatory has no relationship to the underlying transaction, they cannot be held to be 'closely related' nor subjected to the forum selection clause. See Out Publishing, 2013 WL 3661886 *3. (finding that where the defendant had no personal involvement in the transaction, they are not 'closely related' for purposes of the forum selection clause.)

Plaintiff alleges that Haitong was so closely related to the Borrower Defendants so as to foreseeably anticipate enforcement of the forum selection clause. See FAC ¶22. Specifically, plaintiff alleges that Haitong maintained control and dominion over the collateral and by way of its relationship with the Borrower Defendants, the true beneficial owner of the collateral. Id. ¶25, 69. Allegedly, this is because the Borrower Defendants had no rights to effect any action concerning the collateral without the knowledge, authorization and participation of Haitong. Id. ¶55.

Lantau has failed to allege any conduct by Haitong that would indicate that they foresaw enforcement of the forum selection clause. Haitong acted as the securities brokerage firm acting as the placing agent for REX shares. The Borrower Defendants initially purchased the REX shares on margin, in which Haitong maintained a floating lien in the shares. Therefore, the Borrower Defendants could not transfer the shares until their balances were paid off. FAC ¶53. In order to facilitate the transfer of shares, Lantau agreed that a portion of the money being loaned to the Borrower Defendants would be used to pay off their balance with Haitong. Id. ¶¶53, 56. Therefore, Lantau transferred this portion of the loan funds to Merrill Lynch Far East Limited and HSBC, which then transferred these funds to Haitong on behalf of the Borrower Defendants. Id. ¶¶64, 70. After the balances were paid, Haitong initiated the transfer of the REX shares to the Borrower Defendants designated accounts at their respective financial institutions. Id. ¶70.

Plaintiff has failed to allege any actions by Haitong that would indicate that they were so closely related to Borrower Defendants that the forum selection clause in the Loan Agreement would apply to them. Plaintiff does not allege that Haitong owns any of the Borrower Defendants or that the Borrower Defendants act as directors of Haitong. See Deutsche Bank AG v. Vik, 2015 WL 458284; In re Commodity Exch., Inc., 2016 WL 5794776, at *33. Plaintiff also does not allege that Haitong was actively engaged in the negotiation or preparation of the Loan

Agreement or any other document related to this deal. See Power UP Lending Group, Ltd. v. Murphy, 2016 WL 6088332 (E.D.N.Y. Oct. 18, 2016) (finding that not only were the defendants principals of the signatory corporation, but were also actively engaged in the negotiation and preparation of the operative documents.).

Alternatively, Lantau alleges alter ego liability. "An alter ego theory may not be used to impose liability on persons who are not 'owners' of the entity defendant." 28 N.Y. Pract., Contract Law §18:6; see also Deutsche Bank AG v. Vik, 2015 WL 458284 (Sup. Ct. N.Y. Cnty. Jan. 30, 2015) (finding jurisdictional basis for alter ego liability where corporation allegedly owned and controlled the corporation); In re Commodity Exch., Inc., 2016 WL 5794776, at *33 (S.D.N.Y. Oct. 3, 2016) (finding that "the Fixing Banks are the only owners and directors of LGMP…LGMF has no real corporate headquarters or separate mailing address."). Here it is undisputed that Haitong is not the owner of the Defendant Borrowers who signed the loan documents. Therefore, plaintiff has not adequately pled a jurisdictional basis for alter ego liability.

Therefore, Haitong is not subject to the forum selection clause contained in the loan documents.

Whether Plaintiff is Entitled to Jurisdictional Discovery

Plaintiff's request for further discovery on the issue of personal jurisdiction is denied. Where a court does not find that it has personal jurisdiction over a defendant,

a plaintiff may show that it has made a 'sufficient start' in establishing jurisdiction so as to warrant jurisdictional discovery. See Peterson v. Spartan Indus., 33 N.Y.2d 463 (1974); Edelman v. Tattinger, S.A., 298 A.D.2d 301 (1st Dept 2002); Am. BankNote Corp. v. Daniele, 45 A.D.3d 338, 340 (1st Dept 2007). To that end, "plaintiffs must demonstrate the possible existence of essential jurisdictional facts that are not yet known." Copp v. Ramirez, 62 A.D.3d 23, 31 (1st Dept 2009).

In Edelman, the court held that jurisdictional discovery was appropriate where the plaintiff had been wronged by a complex web of corporate entities, but the court affirmed the trial court's denial of discovery "in the absence of any basis for claiming that discovery would yield facts relating to [the non-moving parties] doing business in New York." 298 A.D.2d at 302. Here, plaintiff's amended complaint and subsequent motion papers fail to allege any basis that additional discovery would yield material and previously unavailable evidence. Absent this showing, plaintiff's request for jurisdictional discovery is denied.[2]

Plaintiff's Claims for Fraud

Even if there were a basis to sustain jurisdiction, Haitong's motion to dismiss pursuant to CPLR 3211(a)(7) is granted. In any claim for fraud, New York law requires that "the circumstances constituting the wrong shall be stated in detail."

[2] Haitong has also moved to dismiss the Complaint on the grounds of forum non conveniens. Since the court has determined that the action is not jurisdictionally sound, these issues are moot.

CPLR 3016(b). Under this heightened pleading standard, a claim of fraud must be supported by factual allegations that sufficiently detail the allegedly fraudulent conduct and give rise to a reasonable inference of the alleged fraud. Pludeman v. Northern Leasing Systems, Inc., 10 N.Y.3d 486, 492 (2008).

Haitong's Motion to Dismiss Plaintiff's Claim for Negligent Misrepresentation

Haitong's motion to dismiss plaintiff's claim for negligent misrepresentation is granted. A claim of negligent misrepresentation requires that "a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by 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." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 179 (2011); see also J.P. Morgan Securities Inc. v. Ader, 127 A.D.3d 506 (1st Dept 2015); J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144, 148 (2007).

"Liability for negligent misrepresentation has been imposed 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 N.Y.2d 257, 263 (1996). "In order to impose tort liability in a commercial case, there must be some identifiable source of a special duty of care." Ader, 127 A.D.3d at 507 (internal citations omitted) see also Mandarin, 16 N.Y.3d at 180 (A claim for negligent misrepresentation

requires "special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff."); North Star Contr. Corp. v. MTA Capital Constr. Co., 120 A.D.3d 1066 (1st Dept 2014) (A special duty will be found "if the record supports a relationship so close as to approach that of privity.").

Plaintiff alleges that the special relationship requirement is met here where Haitong's communications and demands caused Lantau to "resuscitate a dead deal" upon Haitong's alleged promises that it would deliver the collateral upon payment of the margin debts. See Memo. in Opp., p. 23. As Haitong was the placement agent for REX, plaintiff argues that it was reasonable for them to believe that Haitong would only deliver the collateral if it was not subject to any restrictions. Id.; see also id., p. 24 ("Lantau reasonably relied on Haitong's silence as to other restrictions in the face of Haitong's request to resuscitate and modify the deal to resolve two liens on the Collateral as a representation by Haitong that upon payment of the liens the Collateral would be freely tradeable and free from restrictions.").

However, an arm's-length business transaction between sophisticated parties does not constitute a confidential or fiduciary relationship for purposes of negligent misrepresentation. See Greentech Research LLC v. Wissman, 104 A.D.3d 540 (1st Dept 2013); Ader, 127 A.D.3d at 507; Silvers v. State, 68 A.D.3d 668 (1st Dept 2009); Dobroshi v. Bank of America, N.A., 65 A.D.3d 882 (1st Dept 2009). Taking the facts in the complaint as true, the relationship between Haitong and plaintiff was

that of a business transaction between sophisticated parties who were both involved in the buying and selling of collateral. See *supra*, pp. 3-5.

Nor has plaintiff adequately pled that Haitong "possessed unique or specialized expertise." See Kimmell, 89 N.Y.2d at 263. In Greentech, the First Department held that two defendants who raised capital from investors did not possess unique or specialized expertise where the plaintiff was an experienced financial analyst and money manager. 104 A.D.3d at 540-41. The court went on to hold that superior knowledge of the wrongdoing itself does not satisfy the unique or specialized expertise for negligent misrepresentation. Id. Similarly, in Ader, the First Department found that even where the plaintiff had superior knowledge of the business at issue and its past dealings with the defendant, this still did not rise to a special relationship for purposes of a negligent misrepresentation claim. 127 A.D.3d at 507. Plaintiff cannot allege that Haitong had superior knowledge. In the account statements provided by Haitong, who were acting as the share placement agent for REX shares, Haitong states that the shares were not sellable. See FAC, Ex. J. Specifically, the account summary states that none of the shares are of "sellable quantity" and that there was no last transferred price, indicating that these were restricted shares. Id.

Even if this court were not to find the relationship to be that of a business transaction, plaintiff has not pled a special relationship as required in Ader and

Greentech. Plaintiff's reliance on Ossining Union Free School District v. Anderson LaRocca Anderson, 73 N.Y.2d 417 (1989), is misplaced. The court found that a special relationship existed between the school district and the engineers. Id. at 424-25 (finding a special relationship where reliance was "the end and aim of the transaction.") However, the court found a special relationship only where the engineers undertook their work in the knowledge that the work was for the school district alone, that the school district would rely upon those findings and the retention of the engineers specifically authorized by the school board. Id. at 425-26. Here, plaintiff's do not allege that Haitong worked for the plaintiff's, nor had any duty to report directly to plaintiff. Simply put, the relationship between Haitong and plaintiff was that of a business relationship, which has consistently been held not to constitute a special relationship. See Ader, 127 A.D.3d at 507; Greentech, 104 A.D.3d at 540-41.

Therefore, Haitong's motion to dismiss plaintiff's claim for negligent misrepresentation is granted.

Haitong's Motion to Dismiss Plaintiff's Claim for Fraudulent Misrepresentation

Haitong's motion to dismiss plaintiff's claim for fraudulent misrepresentation is granted. In New York, to properly plead a cause of action for fraud or fraudulent inducement, a plaintiff must allege that the defendant made a material misrepresentation, with intent to defraud, reasonable reliance, and resulting damage.

Girozentrale v. Tilton, 2017 WL 705562, *6 (1st Dept Feb. 23, 2017); Frank Crystal & Co., Inc. v. Dillmann, 84 A.D.3d 704 (1st Dept 2011); Swersky v. Dreyer and Traub, 219 A.D.2d 321 (1st Dept 1996). The allegations of such claims must also be stated with particularity. See CPLR 3016(b); Foley v. D'Agostino, 21 A.D.2d 60 (1st Dept 1964). Further, claims of fraudulent inducement based upon alleged misrepresentations of future intent are not actionable as a matter of law. Bencivenga & Co. v. Phyfe, 210 A.D.2d 22 (1st Dept 1994).

Where a plaintiff fails to adequately plead that the representations were made with the intent to deceive or to induce plaintiff's reliance, the cause of action is properly dismissed. See Riverbay Corp. v. Thyssenkrupp N. El Corp., 116 A.D.3d 487, 488 (1st Dept 2014); Barbarito v. Zahavi, 107 A.D.3d 416, 419 (1st Dept 2013). Plaintiff has not pled in the amended complaint that Haitong intended to deceive plaintiff. As a result, Haitong's motion to dismiss plaintiff's claim for fraudulent misrepresentation is granted.

Haitong's Motion for Sanctions

Haitong's motion for sanctions is denied. Under 22 NYCRR § 130–1.1, the court has discretion to award sanctions for frivolous conduct. This is defined as 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; or which is undertaken primarily to delay or prolong the resolution of the litigation, or

to harass or maliciously injure another, or which involves the assertion of materially false factual statements.

The authority to impose sanctions and costs is within the court's sound discretion. De Ruzzio v. De Ruzzio, 287 A.D.2d 896 (3d Dept 2001). The court's power to impose sanctions serves the dual purposes of vindicating judicial authority and making the prevailing party whole for expenses caused by his opponent's obstinacy. Gordon v. Marrone, 155 Misc.2d 726, 590 N.Y.S.2d 649 (Sup.Ct. Westchester Cnty 1992), *aff'd* 202 A.D.2d 104, 616 (2d Dept.1994). In assessing whether to award sanctions, the court must consider whether the attorney adhered to the standards of a reasonable attorney. Principe v. Assay Partners, 154 Misc.2d 702, 586 N.Y.S.2d 182 (Sup. Ct N.Y. Cnty. 1992).

At this stage of the litigation, this Court denies Haitong's request for sanctions without leave to replead.

Accordingly, it is hereby

ORDERED that defendant Haitong's motion to dismiss the Complaint for lack of personal jurisdiction is granted; and it is further

ORDERED that plaintiff's request for jurisdictional discovery is denied without leave to replead; and it is further

ORDERED that Haitong's motion for sanctions is denied without leave to replead.

Date: March 6 , 2017
New York, New York

Anil C. Singh