SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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TABOOLA, INC.

Plaintiff,

- v -

DML NEWS & ENTERTAINMENT, INC.,

Defendant.

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INDEX NO. 656393/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

In this breach of contract action, plaintiff Taboola, Inc. (Taboola) moves in motion sequence 001 to dismiss defendant DML News & Entertainment, Inc.'s (DML) counterclaims pursuant to CPLR § 3211(a)(1) and (7), CPLR § 3013, and CPLR § 3016(b). Plaintiff, an online advertising company, contracted with defendant, a news and opinion aggregation website, to deliver and serve advertisements on defendant's website. Plaintiff alleges that defendant breached their exclusivity agreement by removing Taboola's content recommendation platform (also known as the 'widget') and replacing it with Taboola's competitors' platforms to provide the same services.

Defendant denies plaintiff's allegations and makes three counterclaims: (1) plaintiff breach of contract for failure to pay defendant its share of revenue pursuant to the Publisher Agreement; (2) breach of the warranty of merchantability under UCC §2-314 and breach of the warranty of fitness for a particular purpose under UCC §2-315 for glitches related to the Taboola advertising widget; and (3) fraud in the inducement by making material misrepresentations regarding revenue generation and the nature of the exclusivity deal with Taboola. Defendant objects to plaintiff's motion to dismiss these three counterclaims. The decision and order is as follows:

Standard on Motion to Dismiss

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561,

570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

In addition, CPLR § 3013 requires statements in pleading to "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transaction or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3016(b) further adds that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

Breach of Contract Counterclaim

Plaintiff's motion to dismiss as it relates to defendant's breach of contract claim is granted. A counterclaim for breach of contract must be dismissed where the defendant fails "to allege, in nonconclusory language, as required, the essential terms of the parties' purported...contract, including those specific provisions of the contract upon which liability is predicated..." (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 223, 234 [1st Dept 1994]). Defendant's counterclaim is insufficiently particularized as it does not indicate which provision of the contract was breached. Defendant's counterclaim vaguely states that Taboola breached the Publisher Agreement "by refusing to pay [DML] its share of revenue pursuant to the Publisher Agreement" (NYSCEF Doc. No. 9 – Answer With Counterclaims). Vague and conclusory allegations will not suffice and therefore defendant's first counterclaim must be dismissed (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

Warranties of Merchantability and Fitness Counterclaims

Similarly, plaintiff's motion to dismiss as it relates to defendant's breach of the warranties of merchantability and fitness for a particular purpose is granted. The Publisher Agreement that governs the relationship between the parties included an explicit limitation on liability for breach of the warranties of merchantability and fitness (NYSCEF Doc. No. 22 – Publisher Agreement §7(B)). The language is very clear: "The foregoing representations and warranties are the sole and exclusive representations and warranties made by Taboola. Taboola provides the service "as is". Taboola expressly disclaims, to the fullest extent permitted by law, all other representations and warranties, whether express, implied or statutory, including the implied warranties of title, merchantability, fitness for a particular purpose and non-infringement" (*id.*).

"It is settled that a contractual provision which limits damages will be enforced unless a special relationship exists between the parties, or a statute or public policy imposes liability despite the restrictions set forth in the contract" (*Duane Reade v 405 Lexington, LLC*, 22 AD3d 108, 111 [1st Dept 2005]). Defendants do not point to any special relationship or statute that would prevent plaintiff from relying upon the clear liability limitation language included in the Publisher Agreement.

Furthermore, defendant's attempt to utilize the New York UCC warranties here is unavailing. While it is debatable that the Taboola widget and service constitutes "goods" subject to the UCC, even assuming arguendo that the UCC applies, defendant is not able to maintain a cause of action on warranty grounds. The warranties of merchantability (NY UCC § 2-314) and fitness for a particular purpose (NY UCC § 2-315) may be excluded or modified under NY UCC §2-316, so long as the exclusion is conspicuous, in writing, and mentions "merchantability". Further, NY UCC §2-316(3)(a) provides that "all implied warranties are excluded by expressions like 'as is', 'with faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." Where contractual exclusions comply with these requirements they must be enforced according to their terms (*see MG Hotel, LLC v Bovis Lend Lease, LMB, Inc.*, 133 AD3d 519, 520 [1st Dept 2015] [affirming dismissal of warranty of merchantability where "[t]he written warranty that Trane provided to plaintiff expressly...waived the implied warranties of merchantability and fitness for a particular purposes."]).

Defendant's argument that the liability limitation only applies to the "Taboola Service" and that the widget is excluded is similarly rejected. The language in the Publisher Agreement is very clear: "Taboola expressly disclaims, to the fullest extent permitted by law, all other representations and warranties, whether express, implied or statutory, including the implied warranties of title, merchantability, and fitness for a particular purposes" (Publisher Agreement §7(B)). The disclaimer of the warranties of merchantability and fitness must apply to the widget as it is arguably the only 'good' in the contract between Taboola and DML. It would not make sense for the parties to disclaim the UCC warranties for only the 'services' components of the Publisher Agreement as the UCC only applies to goods.

However, the UCC does not even apply here. As the parties have made clear in their submissions, Taboola was providing DML a "service" – advertisement delivery for the DML website. Transaction that are predominantly service oriented, and involve only the incidental transfer of personal property, are considered transactions for the provision of services to which the warranty of merchantability does not apply (*see Milaur Assocs., Inc. v Nort Ave. Dev. Corp.*, 42 NY2d 482. 485-486 [1977]). The widget for delivering the service constitutes such an incidental transfer of personal property that merely facilitates the provision of the Taboola

service. As such, DML's counterclaim regarding the UCC warranties cannot be maintained.

Fraudulent Inducement Counterclaim

Plaintiff's motion to dismiss as it relates to defendant's claim regarding fraudulent inducement is granted. A fraud in the inducement claims requires allegations of "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" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). Defendant alleges that Taboola made numerous representations of material fact, including that (i) Taboola would generate a $4-6 revenue per mille (RPM), which equates to the revenue generated for a website publisher per every thousand page views or impressions; and (ii) that the Taboola agreement would not require exclusivity as to direct ad suppliers, like Lockerdome (NYSCEF Doc. No. 9- Answer with Counterclaims at ¶40). Defendant also avers that Taboola promised that a dedicated support representative would be available to DML to remedy any issues.

Plaintiff strenuously disputes that the representations were ever made, and argues that even if they were, all of the statements cited by defendant constitute non-actionable promissory statements. Allegations of misrepresentations that are promissory in nature do not constitute fraud (*see Hawthorne Group, LLC v RRE Venture*, 77 AD3d 320, 323-24 [1st Dept 2004] ["[i]n a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform"]; *see also Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 221 [1st Dept 1994]).

The claims that Taboola would generate $4-6 RPM and that Taboola could duplicate the results it had with other partners are clearly promissory in nature as they are representations regarding future performance. Likewise, the claims that Taboola would provide dedicated support to DML and that the exclusivity clause would only apply to "Taboola-like" content are also about future performance. Nothing in these statements constitutes a misrepresentation about present fact.

Even if the statements constituted misrepresentations of material present fact, defendant has failed to demonstrate reasonable reliance on the statements and its claim fails on this ground as well. Failure to show reasonable reliance is grounds for dismissal (*see River Glen Assocs., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [1st Dept 2002]). The Publisher Agreement contains a clear merger clause that clarified that "[t]his agreement constitutes the complete and exclusive

understanding and agreement between the parties regarding the subject matter herein and supersedes all prior or contemporaneous agreements or understandings, written or oral, relating to its subject matter" (NYSCEF Doc. No. 22 – Publisher Agreement at §18). Additionally, as it relates to the exclusivity issue at play here, the Publisher Agreement made explicit that DML would not engage any third-party competitors of Taboola (*id.* at §6). Accordingly "[t]he purported misrepresentations relied upon by plaintiffs may not form the basis of a claim for fraudulent... misrepresentation since they... are contradicted by the written agreement between the parties" (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]).

Defendant requests leave to amend its counterclaims in its opposition brief to this motion (NYSCEF Doc. No. 36 – Def's Memo of Law at 13). While leave to amend is freely granted, CPLR § 3025(b) requires that "any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Defendant did not do so here. Defendant failed to submit a proposed amended answer and therefore leave to amend will not be granted. Defendant may file a proper CPLR § 3025 motion if it so chooses.

Accordingly, it is hereby ORDERED that plaintiff Taboola, Inc.'s motion to dismiss is granted and defendant's counterclaims are dismissed, it is further

ORDERED that defendant's request for leave to amend is denied, and it is further

ORDERED that the Clerk of the Court is to enter judgment as written.

This constitutes the decision and order of the court.

12/27/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE