SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

CHADBOURNE & PARKE LLP,

Plaintiff,

- v -

BENJAMIN C. BOWEN,

Defendant.

Index No.: 115444/05

Motion Date: 06/06/06

Motion Seq. No.: 01

Motion Cal. No.: 04

The following papers, numbered 1 to 3 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The court shall deny the defendant's motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action as to defendant's first cause of action wherein the defendant alleges that the fraud claim presented is duplicative of a breach of contract claim that should be brought against the principal agent. The court shall, however, grant the motion with respect to the second cause of action that alleges negligent misrepresentation.

Plaintiff law firm Chadbourne and Parke LLP (Chadbourne) seeks to recover against Benjamin C. Bowen (Bowen) for fraud and

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

negligent misrepresentations of material facts. The plaintiff alleges that its claims against the defendant arose out of its dealings with William J. Holt (Holt). The plaintiff in the complaint states that Holt contacted Chadbourne in 2002 and requested that Chadbourne represent him in connection with a number of ongoing disputes pending against him and some of his corporate entities. This included a tax dispute, as well as litigation based on Holt's alleged non-payment of legal fees. The plaintiff also alleges that they had previous dealings with Holt between 1980 and 1990.

After agreeing to represent Holt in 2002, the plaintiff alleges that Holt introduced Chadbourne to Bowen, as Holt's business manager. Chadbourne, after being introduced to Bowen, allegedly undertook various projects for Holt. During the period of 2002 to 2005, Chadbourne alleges that it sent Bowen and Holt monthly statements detailing the amount due for the prior month and listing the outstanding payments for the work they had done for Holt. The plaintiff alleges that during this time, it became evident to Chadbourne that Bowen had considerable control over Holt's business and financial dealings. Bowen became Chadbourne's principal point of contact for its dealings with Holt and his companies. According to the complaint, the unpaid amount which allegedly is due to Chadbourne totals $378,677.90. There are no allegations in the complaint that allude to when

this unpaid amount was accrued and whether there had ever been any payments made by either Bowen or Holt.

With regards to the outstanding debt, the plaintiff alleges that Bowen assured Chadbourne that its bills would be paid in full. It is also alleged that Bowen made specific representations to Chadbourne concerning the sources of payment, including (1) that Chadbourne would be paid out of the proceeds from the sale of Holt's historic brownstone, (2) that Chadbourne would be paid out of proceeds from the sale of Holt's estate in Princeton, New Jersey, and (3) that Chadbourne would be paid out of a federal tax refund check that Holt was to receive from the Internal Revenue Service. These representations were allegedly made orally and in writing.

The plaintiff alleges that Bowen had represented orally to Chadbourne the brownstone's worth and the amount that Chadbourne would be paid from the sale of the brownstone. Additionally, the plaintiff alleges that Bowen had responded to an email from Chadbourne about the outstanding balance, in reference to sale of the brownstone, stating that "when finalized as promised the balance of the account will be paid." On April 9, 2004, the Brownstone was allegedly sold with none of the proceeds going to Chadbourne. In another response to an email sent by Chadbourne, the plaintiff alleges that Bowen stated that "which ever comes first, the sale [of the Princeton Estate] or the [tax] refund

we'll be able to settle [Holt's] account with you." Holt's Princeton Estate was allegedly sold on January 15, 2005. Chadbourne did not receive any of the proceeds from the sale of the estate. In 2005, Holt allegedly received a federal income tax check and the proceeds were not paid to Chadbourne.

As a result of the non-payment of its bills, in the fall of 2005 the plaintiff withdrew from its representation of Holt. The plaintiff alleges that Bowen, with regard to the payment of outstanding legal fees owed to Chadbourne from Holt, made false statements, knowing them to be false or made them with reckless disregard for the truth, upon which Chadbourne detrimentally relied.

The standard for a motion to dismiss for failure to state a cause of action is found in CPLR 3211 (a) (7). When considering whether to grant or to deny a motion to dismiss the court must give the plaintiff the benefit of all favorable inferences that may be drawn from the pleadings, and then determine whether a cause of action exists. Rovello v Orfino Realty Co., 40 NY2d 633, 636 (1976). If the plaintiff is entitled to relief on any reasonable view of the facts stated, then the complaint is legally sufficient. Campaign for Fiscal Equity Inc. v State of New York, 86 NY2d 307, 318 (1995).

In order to maintain a cause of action for fraud it must be shown that a defendant misrepresented a material fact, knowing it

to be false, which plaintiff relied upon and suffered injury thereby. Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 122 (1995). The defendant argues that the fraud claim is insufficient because it is duplicative of a claim for breach of contract that should be brought by the plaintiff against Holt. Defendant asserts that much of the debt was incurred prior to time the defendant was involved in the matter.

The Court in First Bank of Americas v Motor Car Funding (257 AD2d 287 [1st Dept 1999]) articulates the standard under which courts determine whether a claim of fraud should be dismissed when it is allegedly duplicative of a breach of contract claim. The Court in First Bank said that when the fraud claim is merely restating a breach of contract claim, the claim should be dismissed. When the only fraud alleged is that the defendant was not sincere in promising to perform a contract, the claim is insufficient. The cause of action for fraud may be maintained "where the plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract." Id. at 291. Where a plaintiff alleges they were induced to enter into a transaction because of material misrepresentations on the part of the defendant a claim for fraud is legally sufficient regardless of whether the allegations also give rise to a breach of contract claim. Id. at 292. The misrepresentation must be a misrepresentation of a present fact rather than of future intent

to perform, as present facts are collateral to the contract and involve a separate breach of duty. Id. citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956 (1986). In Rich v New York Central and Hudson River Railroad Co. (87 NY 382, 390 [1882]), the court stated that "unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be breach of contract, there is no tort, since there is no duty to be violated."

The defendant contends that because he was acting on behalf of the instructions given to him by Mr. Holt, no separate duty can be established as is required for a claim of fraud to be brought. The defendant states that he was an agent of a disclosed principal and as such is not liable for Mr. Holt's alleged breach of contract. Furthermore, the defendant claims that any statements allegedly made were promissory statements for actions that would be done in the future, thus precluding a separate breach of duty as the statements given were not collateral to the contract.

The plaintiff however asserts that the issue of fraud has no relation to breach of contract; that the fraud claim is about the material misrepresentations of fact from Bowen relating to payment from Chadbourne which occurred subsequent to the actual contract between Chadbourne and Holt. Plaintiff further argues

that as a disclosed agent, Bowen is not relieved from any liability that may arise out of fraud or misrepresentation that he made regarding the transaction.

The defendant's contention that a disclosed agent is not individually liable for a contract that is related to the agency is accurate. See e.g. N.Y. Assoc. for Retarded Children, Inc. v Keator, 199 AD2d 921 (3rd Dept 1993). However, where a disclosed agent has made false or fraudulent representation with a fraudulent design, resulting in damage to the defendant, regardless of whether the agent profited, they are not immune from liability. Laska v Harris, 215 NY 554 (1915).

The plaintiff and defendant agree that Bowen was acting as a disclosed agent for Holt. Therefore, the court finds that Bowen is not relieved from liability for any fraudulent misrepresentations that he may have made because a separate duty could be established. In order to support the claim for fraud the plaintiff alleged that Bowen made false statements to Chadbourne, knowing them to be false and/or with reckless disregard for the truth. The plaintiff also alleged that they relied on these representations to its detriment. These allegations are legally sufficiently to maintain the fraud claim at this pleading stage because Bowen's oral and written statements may constitute material facts that were misrepresented upon which the plaintiff relied on to its detriment. Because

Bowen may be liable for fraudulent misrepresentations he made as a disclosed agent and the pleadings adequately allege that Bowen's actions satisfy the elements of fraud claim, as a matter of law the plaintiff's claim for fraud is sufficient. Therefore, defnedant's motion to dismiss the claim of fraud will be denied.

As to the issue of negligent misrepresentation, the New York Court of Appeals has observed that liability for negligent misrepresentation should only be imposed on a person who is in a special position of confidence and trust or who possesses special expertise such that reliance on the misrepresentation is justified. Kimmel v Schaefer, 89 NY2d 257, 263 (1996). In Kimmel, the court explained that when a defendant is in a position of expertise, that places them in a special relationship of trust or confidence. Id. There the defendant was a lawyer, certified public accountant and former chief financial officer. Agents of disclosed principals are also not immune from liability for negligent misrepresentation. See e.g. Mathis v Yondata Corporation, 125 Misc 2d 383 (Sup Ct, Monroe County, 1984) (the court found that regardless of whether the injured party has a contractual relationship with the agent's principal, the agent is not insulated from liability where the agent is guilty of active negligence or malfeasance).

The defendant contends that the complaint fails to allege that a relationship of trust or confidence existed between

Chadbourne and Bowen. Defendant argues that the negligent misrepresentation claim is therefore insufficient because in order to establish a case for negligent misrepresentation, the plaintiff has the burden of demonstrating that the defendant had a duty, based upon a special relationship of trust or confidence. Hausler v Spectra, 188 AD2d 722, 723 (3d Dept 1992). Furthermore, the plaintiff must plead that there is some type of fiduciary or other special relationship "sufficient to sustain [the] cause[] of action for . . . negligent misrepresentation." M. Bailey v Gray Siefert & Co., Inc., 300 AD2d 258 (1st Dept 2002). The court agrees.

The plaintiff's complaint states that as Holt was winding down his business affairs, Chadbourne was introduced to Bowen as Holt's business manager. The complaint goes on to allege that "it became evident to Chadbourne that Bowen had considerable control over Holt's business and financial dealings. Bowen became Chadbourne's principal point of contact for its dealings with Holt and his companies." There is nothing further in the complaint to suggest that there was any special relationship of trust or confidence. The plaintiff suggests that, by inference, because Holt contracted with Chadbourne, and Bowen acted as Holt's disclosed agent, there was a relationship of trust and confidence between Bowen and Chadbourne. However, although the defendant, in acting as a disclosed agent, is not relieved of

liability for any act of negligent misrepresentation, it does not follow from that fact that there is a relationship of trust or confidence. The plaintiff did not allege in the complaint that Bowen was in any way placed in a position of expertise that would cause the plaintiff to rely on his representations. Furthermore, the plaintiff does not even allege that there were any prior dealings where, perhaps, Bowen adequately represented facts, thus showing that Chadbourne was justified in relying on Bowen's representations. There are no facts alleged in the complaint to justify Chadbourne's reliance on Bowen's assertions. Absent any allegations in the complaint that demonstrate a special relationship of trust or confidence, the claim for negligent misrepresentation must be dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss plaintiff's complaint is GRANTED to the extent of dismissing the second cause of action in the complaint and the Clerk is directed to enter judgment DISMISSING the second cause of action; and it is further

ORDERED that the defendant's motion to dismiss is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on November 14, 2006, at 9:30 AM, in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: October 10, 2006 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.