SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ Justice

PART 45

SAMSON LIFT TECHNOLOGIES

-v-

JERR-DAN COPORATION

INDEX NO. 653586/11

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 To reargue and amend the complaint made by plaintiff are GRANTED for the attached Decision and Order.

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

Dated: March 19, 2013

MELVIN L. SCHWEITZER 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

SAMSON LIFT TECHNOLOGIES, LLC, Plaintiff, -against- JERR-DAN CORPORATION A/K/A JERRDAN CORPORATION and OSHKOSH CORPORATION Defendants.	Index No. 653586/11 DECISION AND ORDER Motion Sequence No. 023

MELVIN L. SCHWEITZER, J.:

This case involves a dispute arising out of a license agreement (the License Agreement) under which plaintiff Samson Lift Technologies, LLC (Samson) licensed Patent No. 5,915,912 (the Patent) to defendant Jerr-Dan Corporation (Jerr-Dan) to develop side-loading tow trucks.

Samson argues that the court improperly dismissed its fraud claim against defendant Oshkosh Corporation (Oshkosh), the parent of Jerr-Dan, for being duplicative of its contract claim, when in fact Oshkosh was not party to the Licensing Agreement. Samson also moves to amend its complaint to allege promissory estoppel against Oshkosh.

For the reasons that follow, plaintiff's motions to reargue and to amend the complaint are granted.

Background

An initial licensing agreement (the Initial License Agreement) was entered into on June 16, 2004. It granted Jerr-Dan exclusive use of the Patent. The Patent concerned tow truck technology and was licensed to Jerr-Dan to develop a side-loading vehicle retriever.

Less than a month after the execution of the Initial License Agreement, Oshkosh acquired Jerr-Dan and requested amendments to its terms. Samson alleges that based on Oshkosh's

misrepresentations, it was induced to cede certain rights to Jerr-Dan, regarding improvements to the Patent, that it held under the Initial License Agreement. Samson alleges that Article 5.1 of the Initial License Agreement "was changed significantly to restrict Samson's rights as to the Patent." The License Agreement, as amended, was executed on July 22, 2004.

Samson alleges that defendants falsely represented that: (1) Oshkosh would actively cross-market the Samson product through Oshkosh's other divisions; (2) Oshkosh would use its economies of scale and purchasing power to lower costs; and (3) Oshkosh would use its distribution networks, brand presence, and technology to increase sales. Samson alleges that these misrepresentations induced it to agree to amend the Initial License Agreement to its detriment. The complaint alleges that Jerr-Dan and Oshkosh deliberately destroyed the market potential of Samson's technology and acted in bad faith in failing to manufacture, market, and sell Samson's tow truck product. Samson alleges that defendants planned to use the proprietary information that Samson gave them to create their own tow truck product, and that defendants lured potential customers away from Samson's product.

On a prior motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, this court dismissed Samson's claims of fraud against Oshkosh and Jerr-Dan. Samson now moves for reargument of dismissal of the fraud claim against Oshkosh and seeks to amend its amended complaint to assert a claim of promissory estoppel against Oshkosh.

Discussion

The Fraud Claim

A motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221 [d]).

The court dismissed Samson's claim of fraud against Oshkosh as duplicative of its contract claim. *See HSH Nordbank AG v UBS AG*, 95 AD3d 185, 186 (1st Dept 2012). The court also found that Samson's alleged misrepresentations were not collateral to the License Agreement because they concerned how the defendants intended to execute the License Agreement in the future. The court found the complaint lacking in specificity because it alleged "nothing more than defendants' entry into a contract they purportedly did not intend to honor." *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 (1st Dept 2004). The court found that the fraud claims were based on defendants' alleged omissions and dismissed them because neither defendant had a duty to disclose the information at issue. *See Kaufman v Cohen*, 307 AD2d 113, 119-20 (1st Dept 2003).

Samson correctly asserts that the court dismissed the fraud claim against Oshkosh based on reasoning that applied only to the fraud claim against Jerr-Dan. Jerr-Dan and Samson were the only parties to the License Agreement. There was no privity of contract between Oshkosh and Samson. As a result of this lack of privity, Samson argues, the fraud claim could be neither duplicative nor mere intent not to perform. In addition, Samson asserts that it alleged affirmative misrepresentations by Oshkosh, preventing the fraud claim from being dismissed on the ground that there was no duty to disclose. Oshkosh maintains that the court properly applied the law as to the fraud claim against Oshkosh.

A cause of action for "fraud is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who were not parties to the contract." *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898–899 (2d Dept 2010). Oshkosh is not a party to any contract with Samson, and the assertion of duplicativeness fails.

As to the fraud claim failing because the representations were not collateral to the License Agreement, but were merely promises of future performance, the court did not take into account that the party (Oshkosh) alleged to have made the misrepresentations was not a party to the contract, and that the representations dealt with Oshkosh's conduct outside the parameters of the contract. The representations were clearly collateral to the contract.

Furthermore, the rule of law with respect to promises of future performance was recently dealt with on the appeal of a case before the court in which plaintiff alleged a fraud claim with respect to his entering into a contract based upon defendant's representation that she would manage his financial and legal affairs in the future. It was alleged defendant had an undisclosed intention not to perform the future promises to manage. The Appellate Division upheld the pleading of a fraud claim based on the promises made with an undisclosed intention not to perform. *Robinson v Day*, 2013 NY App Div LEXIS 1252 (1st Dept 2013). In *Deerfield Communications Corp. v Chesebrough-Ponds Inc.*, 68 NY2d 954, 956 [1986], the court said, "[a]s we stated in *Sabo v Delman*, 3 NY2d 155, 160 [1957], 'a promise . . . made with a preconceived and undisclosed intention of not performing it . . . constitutes a misrepresentation.'"

Samson's position is far stronger than those of the plaintiff's in *Chesebrough-Ponds* and *Robinson*, as here the representations are not made by a party to the contract. "[A] misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud." *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898–899 (2d Dept 2010); *see LIUS Grp. Int'l Endwell, LLC v HFS Int'l, Inc.*, 92 AD3d 918 (2d Dept 2012).

As Oshkosh correctly asserts, Samson must plead damages independent from contract damages. *See Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 (1st Dept 2009); *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898–899 (2d Dept 2010). Oshkosh contends Samson's claim is based on the License Agreement and Samson seeks damages based on a breach of that Agreement. Such an argument misapprehends Samson's claim. Samson seeks damages for the loss of patent rights resulting from its amending the Initial License Agreement, as Oshkosh allegedly requested, and entering into the final License Agreement. Such alleged loss of rights is not the equivalent of pleading damages for breach of contract.

Lastly, Samson did allege that Oshkosh made affirmative misrepresentations, not omissions, about how it would use its resources to ensure the success of Samson's tow truck, including using Oshkosh's cross-marketing, economies of scale, and distribution network. These are not omissions and therefore the cause of action should not have been dismissed on the ground that Oshkosh had no duty to disclose.

Motion to Amend the Amended Complaint

Samson moves to amend the amended complaint, dated February 9, 2012, to assert a claim of promissory estoppel against Oshkosh. Pursuant to CPLR 3025 (b), leave to amend shall be "freely given upon such terms as may be just." Oshkosh's contention of prejudice at this point in discovery is not persuasive. Samson's claims of promissory estoppel rest largely on the same alleged facts as the now reinstated claim of fraud.

Oshkosh's contention that Samson's claim of promissory estoppel is demonstrably without merit is unpersuasive. The elements of a claim for promissory estoppel are "a clear and unambiguous promise, a reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained by the party asserting the estoppel by reason of his reliance."

Rippel's of Clearview, Inc. v Le Havre Assocs., 88 AD2d 120 (2d Dept 1982); *see Isler v Sutter*, 198 AD2d 68 (1st Dept 1993). Samson claims that Oshkosh made promises to help promote the Samson tow truck product, that Samson relied on that promise when agreeing to amend the Initial License Agreement, and that Samson, by reason of that reliance, lost certain ownership rights to improvements to the Samson product. Leave to amend is therefore granted.

Accordingly, it is

ORDERED that plaintiff's motion to reargue is granted.

Dated: March 19, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER