SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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EZRA SILVERMAN,

Plaintiff,

-against-

MINIFY, LLC, BRUCE DUFF, EDWARD CARP, DIGITAL LEGAL DELAWARE, DLS DISCOVERY, LLC, AND DELAWARE DOCUMENT IMAGING dba DIGITAL LEGAL LLC,

Defendants.

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DECISION AND ORDER

Index No.: 157691/2014
Mot. Seq. Nos.: 001 -and- 002

O. PETER SHERWOOD, J.:

In this action, plaintiff alleges claims for breach of contract, breach of fiduciary duty, and fraud stemming from defendants' alleged representation that plaintiff would own a twenty-five percent membership interest in Minify, LLC (**"Minify"**) – an entity which would own the eDiscovery software that plaintiff assisted in developing.[1] Plaintiff asserts that he reasonably relied on defendants' promise and expended "an extraordinary amount of energy attempting to develop the software." Plaintiff, however, never became a member of Minify. When the purported oral agreement (made sometime in 2007) was finally put into writing in 2014, plaintiff was only offered a ten-percent membership interest, which he declined. Defendants also did not transfer ownership of the software to Minify, as defendants allegedly promised. As a result, plaintiff seeks monetary damages, as well as an order: (1) declaring that he owns twenty-five percent of Minify, (2) transferring ownership of certain software technology to Minify, and (3) directing defendants to produce Minify's records and books.

In motion sequence 001, defendants Edward Carp (**"Mr. Carp"**) and DLS Discovery, LLC (**"DLS"**) (collectively, **"Delaware Defendants"**) move to dismiss the Complaint pursuant to CPLR

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[1]On July 17, 2015, plaintiff filed an Amended Complaint (hereinafter, the "Complaint" or "Compl."), adding DLS Discovery, LLC as a party pursuant to the parties' stipulation (*see* So-Ordered Stipulation, June 11, 2015, NYSCEF, Doc. No. 36). On July 20, 2015, Delaware Defendants elected to have their previously filed motion to dismiss apply to the Amended Complaint (*see* Letter from Counsel, July 20, 2015, NYSCEF Doc. No. 44).

3016, 3211(a)(3), (7) and (8). Specifically, Delaware Defendants move to dismiss the Complaint arguing that (1) the complaint fails to state a basis for personal jurisdiction; (2) plaintiff lacks standing to bring his claims because they are derivative in nature; (3) the fraud and breach of fiduciary duty claims are duplicative of the breach of contract claim; and (4) the fraud claim is not plead with particularity.

For the following reasons, the action against Delaware Defendants may be subject to dismissal for lack of personal jurisdiction. However, Plaintiff is entitled to conduct limited discovery addressed to the issue of jurisdiction and will be granted a continuance for this purpose (*see* CPLR 3211[d]). Assuming the Court does have personal jurisdiction, the claims were properly brought as direct claims, however the fraud and breach of fiduciary duty claims are duplicative of the contract claims and fraud is not plead with particularity. Plaintiff's fraud and breach of fiduciary duty claims are therefore dismissed as to Delaware Defendants.

In motion sequence 002, defendant Minify and Bruce Duff (**"Mr. Duff"**) move to dismiss plaintiff Ezra Silverman's complaint pursuant to CPLR 327(a), 3016, 3211(a)(2), (3), (7) and (8). Specifically, Minify and Mr. Duff move to dismiss the Complaint arguing that (1) the Complaint fails to state a basis for personal jurisdiction; (2) the action should be heard in another forum under CPLR 327(a); (3) the Court lacks subject matter jurisdiction under BCL 1314(b); (4) documentary evidence conclusively refutes the claim; (5) plaintiff fails to state a claim; and (6) the fraud claim is not plead with particularity.

For the following reasons, the action against defendant Minify and Mr. Duff may be subject to dismissal for lack of personal jurisdiction. However, Plaintiff is entitled to conduct limited discovery addressed to the issue of jurisdiction and will be granted a continuance for this purpose (*see* CPLR 3211[d]). Assuming the Court does have personal jurisdiction, a New York forum is appropriate under CPLR 327, it is premature to decide whether the Court lacks subject matter jurisdiction under BCL 1314(4), documentary evidence does not conclusively refute plaintiff's claims, plaintiff failed to state a claim for breach of fiduciary duty and fraud, and the fraud claim is not plead with particularity. Plaintiff's fraud and breach of fiduciary duty claims are therefore dismissed as to defendants Minify and Mr. Duff.

BACKGROUND[2]

I. The Parties

Plaintiff Ezra Silverman alleges he is a founding member and twenty-five percent owner of Minify (*see* Compl. ¶ 1). Elsewhere in the Complaint, however, plaintiff alleges that the ownership of Minify was never transferred to him (*see e.g.*, Compl. ¶ 35).

Defendant Minify was incorporated in Delaware as a software company on February 11, 2013 and was authorized to do business in New York State (Compl. ¶ 2). Minify claims that it is actually a dissolved Delaware limited liability company that was never authorized to do business in New York (*see* Minify and Duff Memo., NYSCEF Doc. No. 42, at 9).

Defendants Bruce Duff and Edward Carp are founding members of Minify and exercise control over Minify's corporate affairs (Compl. ¶¶ 3-4).

Digital Legal Delaware is a Delaware corporation wholly owned and controlled by Messrs. Carp and Duff (*id.* ¶ 5). Defendants argue that this is an "unknown" entity.

DLS is a Delaware corporation wholly owned by Messrs. Carp and Duff (*id.* ¶ 6). Defendant Carp alleges he became the sole member of DLS in or about January 2014 (*see* Carp Aff., NYSCEF Doc. No. 25, at ¶ 1). In April 2014, DLS changed its name to Delaware Document Imaging d/b/a/ Digital Legal LLC (**"DDI"**), also a Delaware corporation (*id.* ¶ 7).

II. Plaintiff's Relationship with Defendants

Mr. Silverman alleges that on October 15, 2007, he commenced employment with a company called "Digital Legal Delaware" as a Technology Manager to, *inter alia*, develop certain eDiscovery software (Compl. ¶¶ 11-12). Delaware Defendants assert that between October 2007 and June 2013, plaintiff was actually employed by DDI, a Delaware limited liability company that changed its name to DLS in April 2014 (*see* Delaware Def. Memo., NYSCEF Doc. No. 34, at 3). In any event, plaintiff alleges that Messrs. Carp and Duff, owners of Digital Legal Delaware, represented to Silverman that in exchange for plaintiff's work on the software, they would create a new company, called Minify, and Mr. Silverman would be a twenty-five percent owner of the new company (*id.* ¶ 13). In late 2012, a trademark was filed for the Minify name (*see id.* ¶¶ 14-15).

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[2] Unless otherwise noted, the facts contained herein are taken from the Amended Complaint and assumed to be true for purposes of this motion (*see* Amended Complaint, NYSCEF Doc. No. 43, hereinafter cited to as "Compl.").

In December 2012, Mr. Duff opened an office for non-party Digital Legal New York (*see id.* ¶ 16). Mr. Silverman initially split his work time between Digital Legal Delaware [or DLS] and Digital Legal New York (*id.* ¶ 17).[3] In December 2013, when a founder left Minify, plaintiff became the primary software developer (*see* Compl. ¶ 23). On June 1, 2013, Mr. Silverman moved to New York and commenced work at Digital Legal NY on a full-time basis (*id.* ¶ 18). In April 2014, Ms. Nancy Tassi, Minify's President, emailed plaintiff a draft equity agreement reflecting a ten-percent ownership of Minify (*see* Compl. ¶¶ 26, 30-31; *see also* draft Amended Operating Agreement, Duff. Aff., Ex. A). At some unspecified time, Mr. Duff stated to plaintiff that plaintiff's ownership interest was only ten-percent (*see* Compl. ¶¶ 30-31). Plaintiff refused to execute the draft equity agreement (*see* Compl. ¶¶ 27, 32).

On May 5, 2014, plaintiff advised defendants that until the equity and other issues are resolved, he would no longer develop the software (*see* Compl. ¶ 33). Defendants responded that plaintiff's services were no longer required and to receive the $17,000.00 in wages (presumably owed), he must conform to a list of demands (*see* Compl. ¶ 34). Ultimately, the membership interest was never transferred to plaintiff and ownership of the software was never transferred to Minify (*see* Compl. ¶¶ 35-36).

Accordingly, plaintiff asserts the following: Cause of Action I alleges a claim for breach of contract for failing to pay him approximately $17,000 in wages and failing to honor the twenty five percent equity interest in Minify (*see* Compl. ¶¶ 39-41). Cause of Action II alleges that defendants Duff and Carp, as Minify's majority shareholder, breached their fiduciary duty to plaintiff when they stole his equity interest in Minify (*see* Compl. ¶¶ 42-44). Cause of Action III alleges that defendants intentionally misrepresented to plaintiff that ownership of the software would be transferred to Minify to induce plaintiff to develop the software and accept twenty-five percent ownership of Minify, and as a consequence of defendants' fraudulent conduct, plaintiff has been financially damaged in an amount to be determined at trial (*see* Compl. ¶¶ 45-47).

III. Plaintiff's Opposition Affidavit

In plaintiff's affidavit, he claims that Messrs. Duff and Carp represented to plaintiff that

[3] Delaware Defendants assert that plaintiff actually worked for a non-party entity called Digital Legal-NYC, LLC (**"Digital Legal NY"**), an entity distinct from DLS (*see* Delaware Def. Memo. at 3).

ownership of the software would be transferred to Minify – and they made such representations over the telephone and in person while he was employed and physically located in New York (at 545 Fifth Avenue, Suite 1103, New York, NY 10017) (*see* Silverman Opp. Aff. ¶¶ 4, 5, & 7, NYSCEF Doc No. 56). Plaintiff claims that Messrs. Duff and Carp supervised his work while he was employed in New York (*see id.* ¶ 9). Mr. Carp called plaintiff in New York "1-2 times a week," sent him emails "3-5 times a week," and visited plaintiff in New York "4 times" (*see id.* ¶ 11). Mr. Duff called plaintiff in New York "3-5 times a week," sent him emails "8-10 times a week," and visited him in New York "30-40 times" (*see id.* ¶ 12). The subject matter of the calls included current development and licensing efforts, sales activities, and work direction, including sales efforts under the direct supervision of Messrs. Duff and Carp (*see id.* ¶ 12). Plaintiff alleges that through these acts Mr. Carp "promoted" the business of DLS and both Messrs. Duff and Carp "promoted" the business of Minify in New York (*see id.* ¶¶ 14-15.) Plaintiff was physically located in New York when he received the draft equity agreement and the server containing the Minify software code was located in New York (*see id.* ¶¶ 16-17).

DISCUSSION

I. Motion to Dismiss Standards

Defendants, collectively, move to dismiss the complaint based on five subsections of CPLR 3211. The applicable legal standards governing each are as follows.

A. CPLR 3211(a)(1)

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]).

CPLR 3211(a)(1) does not explicitly define "documentary evidence." As used in this statutory provision, "documentary evidence" is a fuzzy term, and what is documentary evidence for one purpose, might not be documentary evidence for another (*Fontanetta v John Doe 1*, 73

AD3d 78, 84 [2d Dept 2010]). "[T]o be considered documentary, evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:10, at 21–22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are essentially undeniable" (*id.* at 84–85).

B. CPLR 3211(a)(2)

A motion to dismiss pursuant to CPLR 3211(a)(2) rests on the court not having jurisdiction of the subject matter of the cause of action. "Absence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not" (*Lacks v Lacks*, 41 NY2d 71, 75 [1976]) [quotations omitted]).

C. CPLR 3211(a)(3)

Pursuant to CPLR 3211(a)(3) a cause of action may be dismissed where a party lacks legal capacity or standing to sue. The critical issue in determining whether a party has standing to sue is whether the party has suffered an "injury in fact, which is 'an actual legal stake in the matter being adjudicated" and 'ensures that the party seeking review has some concrete interest in prosecuting the action . . ." (*Society of Plastic Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]).

D. CPLR 3211(a)(7)

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]. Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a CPLR 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they establish conclusively that [plaintiff] has no . . . cause of action" (*Lawrence v Groubard Miller*, 11 NY 3d 588, 595 [2008], [citing *Rovello*, 40 NY2d at 636]). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

E. CPLR 3211(a)(8)

CPLR 3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211(a)(8), "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211(d) only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011] [*citing Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]]).

II. Delaware Defendants' Motion to Dismiss (Motion Sequence 001)

A. Personal Jurisdiction

Delaware Defendants argue that the Complaint fails to assert a basis for personal jurisdiction. In New York, there are two types of personal jurisdiction: CPLR 301 (general jurisdiction) and CPLR 302 (specific or long-arm jurisdiction). Plaintiff does not address – and thus does not dispute – the lack of general jurisdiction, but contends that this court has specific

jurisdiction over Mr. Carp and DLS.[4]

1. Specific Jurisdiction under CPLR 301(a)(1): Transaction of Business by DLS

The Court may assert long-arm jurisdiction over a foreign defendant under CPLR 302(a)(1) where plaintiff's cause of action arises from the transaction of business in New York by the defendant either directly or through its agent (*see* CPLR 302(a)(1)). The attachment to New York must be (1) "purposeful"; and (2) "there must be a substantial relationship between the New York transaction of business and the claim asserted" (*see Fischbarg v Doucet,* 9 NY3d 375, 380 [2007]). Purposeful activities are defined as "those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*see C. Mahendra (N.Y.), LLC v Nat'l Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457, 3 NYS3d 27, 30 [1st Dept 2015] [internal quotations and citations omitted]).

Not all "purposeful activity" constitutes a transaction of business within the meaning of CPLR 302(a)(1) (*see Fischbarg v Doucet,* 9 NY3d 375, 380 [2007]). "It is the nature and quality of these contacts that matter" (*id* at 382). Even one instance of purposeful activity directed at New York is sufficient to create jurisdiction, whether or not defendant was physically present in the State, as long as that activity bears a substantial relationship to the cause of action (*Corporate Campaign, Inc. v Local 7837, United Paperworkers Int'l Union*, 265 AD2d 274, 274-75, 697 NYS2d 37, 39 [1999]). Even when physical presence is lacking, jurisdiction may still be proper if the defendant "on his [or her] own initiative . . . project[s] himself [or herself]" into this state to engage in a "sustained and substantial transaction of business" (*see Fischbarg v Doucet,* 9 NY3d 375, 382 [2007]).

Here, from October 2007 to June 2013 (until plaintiff moved to New York), plaintiff was employed by DDI, a Delaware entity that changed its name to DLS in April 2014 (*see* Delaware Def. Memo. at 3). After plaintiff moved to New York, he was employed full-time by non-party Digital Legal NY – an entity separate from DLS (*see id.*). DLS never employed plaintiff in New

[4] Regardless, because DLS is not incorporated and does not maintain its principal place of business in New York, and Mr. Carp does not reside in New York, neither defendant is amenable to general personal jurisdiction (*see Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014] [*citing Daimler AG v Bauman*, —— US——, 134 S Ct 746, 760 [2014]).

York. DLS does not have any office, phone listings, mailing address, bank address, bank account, authorized agent, subsidiary, or employee in New York (*see id.*). Delaware Defendants claim that DLS does not market or transact any business in New York and it does not have any authority to do business in New York. Plaintiff does not dispute any of these facts in his opposition. Instead, he asserts that defendants Carp and Duff "promoted" the business of DLS in New York (*see generally* Pl. Opp., NYSCEF Doc. No. 52; Silverman Opp. Aff. ¶¶ 14-15).

Plaintiff makes many arguments in support of specific jurisdiction. First, plaintiff alleges that Messrs. Duff and Carp represented to him over telephone and in person that ownership of the software would be transferred to Minify, and they made such representations while he was employed and physically located in New York (*see* Silverman Opp. Aff. ¶¶ 4, 5, & 7, NYSCEF Doc No. 56). This argument is simply unavailing. Plaintiff fails to allege any specific information regarding the time and place of the meetings, or otherwise any context, and therefore fails to meet his burden of proof (*see Davis v Scottish Re Group Ltd.*, 46 Misc 3d 1206(A) [Sup Ct 2014]["the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue"], *citing Marist Coll. v. Brady,* 84 AD3d 1322, 1322–1323 [2d Dept 2011]). Additionally, plaintiff has not alleged any facts showing that these non-specific calls or meetings were essential to the formulation or continuation of the 2007 oral agreement giving rise to the twenty-five percent membership interest. "To establish jurisdiction in New York based on a meeting or meetings in that state, the meeting or meetings must be essential to the formulation of a business relationship (*see Greco v Ulmer & Berne L.L.P.*, 23 Misc 3d 875, 889 [Sup Ct 2009], *citing Kahn Lucas Lancaster, Inc. v Lark International Ltd.,* 956 F Supp 1131, 1136 [1997].

Plaintiff makes several other arguments. He alleges that:

- Messrs. Duff and Carp supervised his work while he was employed in New York and made calls and in-person visits (*see id.* ¶ 9).

- Mr. Carp called plaintiff in New York "1-2 times a week," sent him emails "3-5 times a week" and visited plaintiff in New York "4 times" (*see id.* ¶ 11).

- Mr. Duff called plaintiff in New York "3-5 times a week," sent him emails "8-10 times a week," and visited plaintiff in New York "30-40 times" (*see id.* ¶ 12).

- The subject matter of the calls included current development and licensing efforts,

sales activities, and work direction, including sales efforts under the direct supervision of Messrs. Duff and Carp (*see* Silverman Aff. ¶ 12).

- Plaintiff was paid by Digital Legal Delaware while working in New York. Defendants argue that plaintiff was actually paid by DLS after he moved to New York, and Digital Legal NY reimbursed DLS (*see* Delaware Def. Reply at 7, *citing* Duff. Aff., ¶ 23).

Again, plaintiff does not allege any specific details regarding any of these alleged transactions or activities, such as the date in which they took place. Notwithstanding, this activity also does not appear to bear a "substantial relationship" to plaintiff's causes of action. While they may relate to plaintiff's employment, they do not relate to the alleged failure to honor the twenty-five percent membership interest in Minify or the purported failure to transfer the ownership of the software to Minify (*see SPCA of Upstate New York, Inc. v Am. Working Collie Ass'n*, 18 NY3d 400, 404 [2012] ["[T]here must be 'a substantial relationship' between [the purposeful] activities and the transaction out of which the cause of action arose"]). Moreover, the assertion that Mr. Carp "promoted the business" of DLS in New York is conclusory.

A judge of the U.S. District Court for the Southern District of New York rejected the assertion of specific jurisdiction under CPLR 302(a)(1) based on similar facts (*see Phillips v Reed Group, Ltd.*, 955 F Supp 2d 201, 232 [SDNY 2013]. In *Phillips*, a plaintiff asserted claims against a corporation for breach of contract, negligent misrepresentation, and breach of fiduciary duty based on failure to provide equity interest in newly created limited liability company (LLC) for work plaintiff performed in lieu of direct compensation (*see id.*) The court held that allegations that the non-resident corporation's president transacted business in New York, through extensive travel to present sales, attend trade shows, and conduct a seminar to reach a local New York market were insufficient to give rise to specific jurisdiction over president, pursuant to CPLR 302, because plaintiff failed to allege the existence of any nexus between the president's New York-based transactions and the claimed injury (*see id.*).

Finally, plaintiff has not shown that any of these transactions avail "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*see C. Mahendra (N.Y.), LLC v Nat'l Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457, 3 NYS3d 27, 30 [1st Dept 2015]).

Because plaintiff has not pointed to any purposeful activity of DLS with a substantial connection to plaintiff's claims, the Court likely does not have jurisdiction over DLS pursuant to CPLR 302(a)(1). However, Plaintiff is entitled to conduct limited discovery addressed to the issue of personal jurisdiction over DLS pursuant to CPLR 302(a)(1) and will be granted a continuance for this purpose (*see* CPLR 3211[d]).

2. Specific Jurisdiction under CPLR 301(a)(1): Transaction of Business by Mr. Carp

Next, Delaware Defendants argue that the Court lacks jurisdiction over Mr. Carp because his alleged contacts in New York were not made on an individual basis. A corporate director is subject to specific jurisdiction under CPLR 302(a)(1) if he conducts business in New York on an *individual* basis, as distinct from conducting business on behalf of a corporation (*see Laufer v Ostrow*, 55 NY2d 305, 313-14 [1982]; *see also Pramer S.C.A. v Abaplus Int'l Corp.*, 76 AD3d 89 [1st Dept 2010]). However, the New York Court of Appeals has made clear that Section 302 confers jurisdiction over "an individual who was a primary actor in [a] transaction ... in New York," even if that individual was acting as a corporation's agent (*see Phillips v Reed Group, Ltd.*, 955 F Supp 2d 201, 232 [SDNY 2013], *citing Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 470, 527 NYS2d 195, 522 NE2d 40 [1988]). First, personal jurisdiction is appropriate over a corporate officer who "benefit[s] from the [agent-corporation's] course of dealing in New York." (*New York v Mtn. Tobacco Co.*, 12 CV 6276 ADS SIL, 2015 WL 893625, at *3 [EDNY Feb. 26, 2015]). Second, "Being a primary actor ... requires that the officer have knowledge of and consent to the transaction carried out by the agent-corporation and that the officer have exercised control over the corporation in the transaction." (*Hypoxico, Inc. v Colorado Altitude Training LLC*, 02 CIV. 6191 (JGK), 2003 WL 21649437, at *3 [SDNY July 14, 2003]).

There are no allegations in the Complaint that Mr. Carp conducted business on an individual basis in New York. Indeed, plaintiff's affidavit seems to suggests otherwise. After referring to Mr. Carp's alleged New York contacts with plaintiff, plaintiff stated that Mr. Carp "promoted the business" of DLS, as well as his "services businesses in New York which heavily utilized the Minify software" (*see* Silverman Opp. Aff. ¶¶ 14-15). Any business he is alleged to have conducted is thus company business, not individual. However, Plaintiff is entitled to conduct limited discovery addressed to the issue of whether Mr. Carp was a primary actor in the

alleged transaction and will be granted a continuance for this purpose (*see* CPLR 3211[d]).

3. Specific Jurisdiction under CPLR 301(a)(2) and (a)(3): Tortious Conduct

Under CPLR 302(a)(2), "a court may exercise personal jurisdiction over any non-domiciliary" that "commits a tortious act within the state." To assert jurisdiction pursuant to CPLR 302(a)(3), the defendant must commit a tortious act outside New York that "caused an injury to a person or property in New York," provided that he "regularly does or solicits business, or engages in [a] persistent course of conduct, or derives substantial revenue from goods . . . or services rendered, in the state" or "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Here, for the reasons discussed below, plaintiff's fraud and breach of fiduciary duty claims collapse into their contract claims, and thus there is no "tortious act" on which to base jurisdiction under CPLR 302(a)(2) or 302(a)(3) (*see e.g., PI, Inc. v Quality Products, Inc.*, 907 F Supp 752, 760-62 [SDNY 1995] [allegations that the defendant did not intend to perform the contract do not permit recovery for fraud, and thus, does not allege a "tortious act" under CPLR 302(a)(2) or (a)(3)]).

B. Standing

Delaware Defendants argue that plaintiff lacks standing because his claims are derivative in nature (*see* Delaware Def. Memo., NYSCEF Doc. No. 34, at 9-10). Specifically, Delaware Defendants argue that claims based on the allegation that any of the defendants did not transfer ownership of the software to Minify belong to Minify, as it would be the party first harmed (*see id.* at 10, *citing Longo v Butler Equities II, LP*, 278 AD2d 97, 98 [1st Dept 2000]).

Under New York law, "a derivative claim seeks to recover for injury to the business entity," while "a direct claim seeks redress for injury to [a plaintiff] individually" (*see Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]). In *Yudell,* the First Department adopted Delaware's "common sense approach" for deciding whether a claim is derivative or direct (*id.* at 113, *citing Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del 2004]). Under *Tooley,* "a court should consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (*see Yudell,* 99 AD3d at 114 [internal quotations omitted]; *SFR Holdings Ltd. v Rice*, No. 15777, 2015 WL 5794245, at *1 [1st Dept

2015] [*Citing Yudell* and *Tooley*]; *Hansen v Wwebnet, Inc.*, No. 1:14-CV-2263 ALC, 2015 WL 4605670, at *4 [SDNY July 31, 2015] [same]).

Here, (assuming personal jurisdiction exists over Delaware Defendants) plaintiff's claims were properly brought as direct claims, as he individually suffered the alleged harm of not receiving a membership interest in Minify, as well as being induced to invest his labor on the software based on the alleged promise that the software would be transfered to Minify.

C. Duplicative Claims

Delaware Defendants argue that plaintiff's breach of fiduciary duty and fraud claims must be dismissed as duplicative of the breach of contract claim (*see* Delaware Def. Memo. at 11, NYSCEF Doc. No. 34). A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract" (*Krantz v Chateau Stores of Can. Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]). The "fraud" must therefore "allege fraud extraneous and collateral to the contract" (*International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 527 [1st Dept 2009]). A corporate officer does not commit a tort by promising that his corporation will fulfill its express contractual promises (*see PI, Inc. v Quality Products, Inc.*, 907 F Supp. 752, 762 (SDNY 1995), *citing Mills v Polar Molecular Corp.*, 12 F3d 1170, 1177 [2d Cir 1993] ["[e]very party to a contract commits himself to good faith performance. That does not transmute a breach of contract into a tort"]).[5]

As the Court of Appeals and First Department have recognized, "a misrepresentation of ***present facts*** . . . is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010] [emphasis added]; *see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). A cause of action for breach of fiduciary duty is duplicative of a breach of contract claim as it alleges the very same facts as the breach of contract claim (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 [1st Dept 2014]).

Here, plaintiff alleges that Messrs. Carp and Duff stated that in exchange for plaintiff's development of the software they ***would*** separate the software into its own company and he ***would*** be a twenty five percent owner of the new company (*see* Compl. ¶ 23; *see also* Pl. Opp.,

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[5]The First Department has also dismissed fraud claims based on future expectation, where they were based merely on a vague allegation that the defendant never intended to comply with a particular contract (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001]).

NYSCEF Doc. No. 63, p. 13). These alleged misrepresentations are both of defendants' intention to perform in the future under an alleged oral contract, rather than misrepresentations of present fact. Plaintiff's breach of fiduciary duty and fraud charges only relate to his breach of contract claim. Accordingly, the Court dismisses plaintiff's fraud and breach of fiduciary claims.

D. Failure to Plead Fraud with Specificity

Lastly, Delaware Defendants argue that the fraud claim is not pled with the requisite particularity because (1) the Complaint fails to identify specifically who misrepresented plaintiff's membership interest in Minify to induce him to work on the development of the software; and (2) the Complaint fails to allege that plaintiff reasonably relied upon any purported promise as he admits in the Complaint that he worked as a compensated employee for years without seeing any draft equity agreement and after rejecting a draft equity agreement (*see* Delaware Def. Memo., NYSCEF Doc. No. 34, at 11-13). "Where a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong shall be stated in detail" (*see* CPLR 3016).

Here, plaintiff has failed to allege any false representations of fact with the requisite particularity. Plaintiff alleges, for example, that, on an unspecified date, Mr. Duff represented to plaintiff that he believed that plaintiff's ownership interest in Minify was only ten-percent and provided plaintiff with a draft operating agreement reflecting same (*see* Compl. ¶¶ 30-31). However, neither the unsigned agreement nor Mr. Duff's alleged statement contain a specific misrepresentation. Likewise insufficient is plaintiff's allegations that Messrs. Carp and Duff represented that in exchange for plaintiff's development of the software they would separate the software into its own company, and he would be a twenty five percent owner of the new company (*see* Compl. ¶¶ 21, 23). Plaintiff does not plead the time and place that the alleged statement was made and, for certain allegations, even fails to specify the speaker and the specific content of his or her statements. Plaintiff does not even allege that he reasonably relied on any of these allegations. Plaintiff fails to plead fraud with the requisite particularity under CPLR 3016.

III. Defendants Minify and Mr. Duff Motion to Dismiss (Motion Sequence 002)

A. Personal Jurisdiction

Defendants Minify and Duff argue that the Court lacks personal jurisdiction over them.[6] For the reasons stated above, plaintiff fails to state a claim for fraud, and thus there is no "tortious act" to base jurisdiction under CPLR 302(a)(2) or 302(a)(3).

Yet, there may be long-arm jurisdiction over Minify and Mr. Duff under CPLR 302(a)(1). Here, the only alleged Minify transaction arguably connected to plaintiff's claims was an email sent by Nancy Tassi, Minify's President and General Counsel, which attached a draft amended operating agreement (*see* Duff. Aff., Ex. A). However, this email alone does not amount to activity Minify availing "itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*see C. Mahendra (N.Y.), LLC v Nat'l Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457, 3 NYS3d 27, 30 [1st Dept 2015]). Additionally, Mr. Duff argues that his only visits to New York were occasional, and occurred exclusively on behalf of Digital Legal NY (to help set up its office and make sales calls for Digital Legal NY) (*see* Minify and Duff Memo. at 10). Mr. Duff also asserts that he never conducted business in New York in his individual capacity (*see* Duff. Aff. ¶13.) Of note, Mr. Duff had a 49% membership interest in Digital Legal NY (*see id.* ¶ 24).

However, plaintiff is entitled to conduct limited discovery addressed to the issue of (1) specific jurisdiction over Minify under CPLR 302(a)(1); and (2) whether Mr. Duff was a primary actor in the alleged transaction and will be granted a continuance for this purpose (*see* CPLR 3211[d]).

B. Forum Non Conveniens

CPLR 327[a] states, in relevant part:

> (a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The

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[6] Plaintiff does not dispute the lack of general jurisdiction. Regardless, because Minify is not incorporated and does not maintain its principal place of business in New York, and Mr. Carp does not reside in New York, neither Minify nor Mr. Duff is amenable to general personal jurisdiction (*see Magdalena*, 123 AD3d at 601[*citing Daimler AG* 134 S Ct at 760]).

domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Defendants Minify and Duff argue that the following factors weigh against continuing this action in New York: (1) none of the defendants are New York residents; (2) plaintiff was not a resident at the times relevant to the Complaint; (3) there is no indication that the transaction giving rise to the action occurred in New York; rather it arose in Delaware where all the defendants and their businesses are located; (4) Delaware law is applicable to some, or all of plaintiff's claims; and (5) the witnesses would mainly be residents of Delaware (*see* Minify and Duff Memo. at 10-14).

Plaintiff argues that because Mr. Silverman resides in New York, defendants bear a heavy burden of establishing that the State is not an appropriate forum (*see* Pl. Reply at 10-11, *citing*, *inter alia*, *Mionis v Bank Julius Bear & Co*, 9 AD3d 280 [1st Dept 2004]). Further, plaintiff argue that Mr. Silverman worked in New York developing the software, the alleged misrepresentations were made to him while he worked in New York, and the defendants transacted business in New York. In addition, all parties have already retained New York counsel. Based on these facts, defendants have not met their "heavy burden" of establishing the New York is not an appropriate forum (*Yoshida Print. Co., Ltd. v Aiba*, 213 AD2d 275, 275 [1st Dept 1995] [holding that neither the fact that plaintiff is a Japanese corporation, whose witnesses may speak Japanese, nor the potential necessity of applying Japanese law, renders New York an inconvenient forum]).

C. Subject Matter Jurisdiction

Defendants Minify and Duff argue that the Complaint must be dismissed for lack of subject matter jurisdiction under CPLR 3211(a)(2) and Corporation Law 1314(b) (*see* Minify and Duff's Memo. at 14-15). Plaintiff's opposition papers do not specifically address this argument. Because subject matter jurisdiction under Business Corporation Law 1314(b)(4) depends on personal jurisdiction under CPLR 302 (*see D & R Global Selections, S.L. v. Pineiro*, 128 AD3d 486, 487, 9 NYS3d 234, 235 [1st Dept 2015], deciding this issue before the parties have completed limited jurisdictional discovery would be premature.

D. Documentary Evidence 3211(a)(1)

By attaching a draft operating agreement and a client affidavit setting forth that plaintiff

was voluntarily offered a ten percent (10%) membership interest, defendants argue that they present "conclusive evidence" of the "true nature" of the terms under which plaintiff could obtain membership interest in Minify. This argument simply lacks merit. Because plaintiff may have been offered a ten-percent interest does not foreclose the possibility that he was originally offered twenty-five percent (*see McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009] [motion to dismiss pursuant to CPLR § 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"] [citation omitted]).

E. Failure to State a Claim 3211(a)(7)

Defendants Minify and Duff argue that the Complaint fails to state of claim for breach of contract, breach of fiduciary duty and fraud (*see* Minify and Duff Reply at 5-8). On a motion to dismiss pursuant to 3211(a)(7), the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Plaintiff adequately alleges breach of contract because plaintiff has adequately alleged a meeting of the minds regarding his equity share in the LLC. Plaintiff alleges that he and Messrs. Carp and Duff discussed a twenty-five percent equity interest in Minify, LLC. Plaintiff further alleges that, at some time down the road, Minify's president sent plaintiff a proposed operating agreement under which plaintiff would receive a ten percent ownership interest. Plaintiff has thus alleged sufficient facts to support a meeting of the minds regarding his purported equity interest (*see, e.g., Phillips v Reed Grp., Ltd.*, 955 F Supp 2d 201, 240 [SDNY 2013]).

Plaintiff, however, fails to allege a breach of fiduciary duty claim. Plaintiff does not even attempt to show that a fiduciary relationship existed between himself and Duff and/or Minify (*see Pokoik v Pokoik*, 115 AD3d 428, 429, 982 NYS.2d 67, 70 [2014] ["To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct"]). As defendants point out, plaintiff was not a member of Minify, and even if he was a member, plaintiff did not allege that members of Minify owed a fiduciary duty to one another (*see id.*). Accordingly, plaintiff's

breach of fiduciary duty claim fails.

Defendants Minify and Duff argue that plaintiff fails to sufficiently plead fraud. The Court need not address this argument as the fraud claim is duplicative of the contract claim. For the reasons discussed above, the Court must also dismiss plaintiff's fraud claim for failure to plead in particularity pursuant to CPLR 3016.

CONCLUSION

The motions to dismiss the Complaint are granted to the extent of dismissing the fraud and breach of fiduciary duty claims. That branch of defendants' motions seeking dismissal of the breach of contract claim shall be continued to permit discovery on the issue of personal jurisdiction.

It is hereby

ORDERED that the Complaint is DISMISSED as to the Second (breach of fiduciary duty) and Third (fraud) Causes of Action; and it is further

ORDERED that branch of the motions to dismiss the First Cause of Action (breach of contract) is continued pending the outcome of discovery on the issue of jurisdiction which discovery shall commence without delay; and it is further

ORDERED that counsel for the remaining parties shall appear for a preliminary conference on Tuesday, February 23, 2016 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York which preliminary conference may be adjourned upon stipulation of counsel provided there is agreement as to the discovery schedule and court approval by January 22, 2016.

This constitutes the decision and order of the court.

DATED: January 7, 2016

ENTER,

O. PETER SHERWOOD 1/7/16

J.S.C.