EB Ink Tech., LLC v Lamocu Holdings, LLC
2016 NY Slip Op 32339(U)
November 28, 2016
Supreme Court, New York County
Docket Number: 650078/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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EB INK TECHNOLOGIES, LLC,

Index No.: 650078/2016

Plaintiff,

DECISION & ORDER

-against-

LAMOCU HOLDINGS, LLC, JOHN GENTILE, ANTHONY GENTILE, ANDREW FERBER, and T-INK, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants John Gentile, Anthony Gentile, Andrew Ferber (collectively, the Individual Defendants), Lamocu Holdings, LLC (Lamocu), and T-Ink, Inc. (T-Ink) move, pursuant to CPLR 3211, for dismissal of all the causes of action in the complaint except for the second cause of action for breach of contract asserted against Lamocu. Plaintiff EB Ink Technologies, LLC (EB Ink) opposes the motion. Defendants' motion is granted for the reasons that follow.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.

This case concerns EB Ink's option to acquire 20% of the fully diluted stock of T-Ink, which is secured by shares of T-Ink held in escrow. The number of shares in escrow is subject to increase (e.g., by virtue of further dilution) and, therefore, the escrow was supposed to be "topped up" to reflect the full 20% of T-Ink's stock. It is undisputed that this "top up" obligation is a contractual obligation on the part of Lamocu and that no written agreement exists obligating the Individual Defendants (T-Ink's founders) to personally top up the escrow with their own shares. EB Ink, however, seeks to hold the Individual Defendants liable by seeking to pierce

Lamocu's corporate veil, asserting a claim for fraudulent inducement, and claiming that the Individual Defendants orally admitted that they are personally responsible for Lamocu's "top up" obligations. Lamocu, at this juncture, does not own the shares required to top up the escrow. As explained herein, since Lamocu is a Delaware LLC, Delaware's veil piercing standard applies (notwithstanding the parties' reliance on New York law in their papers). As further explained herein, under Delaware law, the allegations pleaded in the complaint fail to state a claim to pierce Lamocu's corporate veil. EB Ink's other attempts to hold the Individual Defendants liable are similarly unavailing.

To begin, the subject top up obligation is the result of numerous transactions,[1] all of which are governed by robust written agreements drafted by sophisticated counsel. According to the complaint, between December 2007 and May 2008, EB Ink and T-Ink entered into a number of agreements, pursuant to which EB Ink (1) purchased approximately 3.1% of T-Ink's common stock;[2] (2) loaned $22 million to T-Ink with the right to convert the loan into approximately 17.1% of T-Ink's common stock; and (3) obtained a warrant to purchase 22% of T-Ink's common stock on a fully diluted basis. *See* Complaint ¶ 9. In addition, EB Ink was involved in other unrelated transactions with the Individual Defendants.

In October 2009, the Individual Defendants formed Lamocu, a Delaware LLC, as special purpose vehicle (SPV) in order to execute seven contracts with EB Ink on October 31, 2009. The complaint only concerns one of those contracts: the Option Agreement. *See* Dkt. 16 at 81. The Option Agreement is governed by New York law, contains a merger clause, disclaims the

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[1] Many of which are unrelated to this case and, therefore, will not be discussed.

[2] This stock purchase was made with non-party Emigrant Capital Corporation. It should be noted that EB Ink is a Delaware LLC that is managed by Emigrant Bank. *See* Dkt. 16 at 148. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

existence of any prior oral and written agreements, and prohibits oral modifications. *See id.* at 86-87. It provides EB Ink with the right to purchase 20% of T-Ink's common stock on a fully diluted basis for $5 million. *See id.* at 82. EB Ink's option expires on October 31, 2019. *See id.* Sections 2.2 and 2.3 of the Option Agreement memorialize the fact that Lamocu and EB Ink separately entered into an Escrow Agreement pursuant to which Lamocu delivered 20% of T-Ink's shares to an Escrow Agent (JPMorgan Chase Bank), which would be delivered to EB Ink upon the exercise of its option. *See id.* To address the fact that the nominal number of shares amounting to 20% of T-Ink's stock could change over time, section 3 of the Option Agreement requires Lamocu to deposit additional shares with the Escrow Agent (i.e., to "top up" the escrow) to ensure that the amount of shares being held in escrow equals the amount that EB Ink is entitled to upon exercising its option. *See id.* at 83. Section 3 sets forth the circumstances under which Lamocu must top up the escrow (the specifics of which are not pertinent to this motion). *See id.* at 83-84.

According to the complaint, at the time the Option Agreement was executed, Lamocu did not own any shares of T-Ink other than those it deposited with the Escrow Agent. However, notwithstanding section 6.9 of the Option Agreement expressly disclaiming and superseding any prior agreements regarding its subject matter (i.e., EB Ink's option) (*see* Dkt. 16 at 87), EB Ink alleges that "[i]t was understood and agreed among the [Individual Defendants] and EB Ink that the [Individual Defendants] would at all times provide Lamocu with sufficient shares to satisfy its obligations under the Option Agreement." *See* Compliant ¶ 14. This alleged oral agreement is not contained or referenced in any of the parties' contracts.[3]

[3] It bears mentioning that the contracts entered into by EB Ink and T-Ink on October 31, 2009 reference each other and the context of the transactions they govern. No mention of personal liability on the part of the Individual Defendants can be found in those contracts.

In a letter agreement dated March 5, 2013 (the Letter Agreement), the parties agreed to an amendment of the Option Agreement that would fix the amount of shares due upon EB Ink's exercising of its option. *See* Dkt. 16 at 91.[4] This would eliminate the perpetual possibility of the escrow needing to be topped off until the option's expiration in 2019. Simply put, subject to certain conditions precedent, the amount of shares would be fixed upon T-Ink closing on an agreement with a third-party financier for at least $3 million. *See id.* at 91-92.

On October 8, 2013, John Gentile, one of the Individual Defendants, informed EB Ink that non-party Pacific Capital Group (PCG) and another investor (not named in the complaint) were prepared to invest more than $3 million in T-Ink. According to the complaint, however, that investment had already closed. *See* Complaint ¶ 20. Gentile requested that EB Ink exercise its amended option rights under the Letter Agreement.[5] EB Ink refused, contending that the conditions of the Letter Agreement had not been satisfied. The parties' dispute, as alleged in the complaint and reflected in their emails, was over the use of the financing proceeds. *See* Complaint ¶ 22; Dkt. 16 at 138-41. EB Ink alleges that it eventually came to believe Gentile's representations regarding the proceeds and, therefore, EB Ink was "under the misimpression that the threshold required for it to execute [the amended option under the Letter Agreement] had been met" on November 13, 2013. *See* Complaint ¶ 23. Consequently, according to EB Ink, between November 13 and December 6, 2013, Gentile and EB Ink negotiated the number of additional shares that would be needed to top up the escrow at the time the amended option was

[4] A principal concern of the Individual Defendants appears to have been the dilution of *their* equity position in T-Ink, the company they founded. Dilution had the possibility of nearly or entirely wiping out the value of the compensation they received for forming and developing T-Ink's business.

[5] An Amended and Restated Option Agreement was drafted for this purpose, but was never executed. *See* Dkt. 16 at 95.

executed. But, no agreement was ever reached. EB Ink claims that it learned that the proceeds from PCG were being used for a purpose prohibited by the Letter Agreement, namely, an acquisition of a German technology company (which also, allegedly, was done by T-Ink acquiring a further $3 million payment obligation).[6] Shortly thereafter, according to EB Ink, it discovered other improper uses of the proceeds. For these reasons, EB Ink contends it never exercised its amended option under the Letter Agreement, nor did it exercise its original option under the Option Agreement, which it claims is still effective (and which, as noted, does not expire until October 31, 2019).

According to the complaint, in January 2014, Gentile orally conceded that the conditions under the Letter Agreement were not satisfied. Gentile also allegedly admitted that the Option Agreement was not disclosed to PCG because PCG would not have provided T-Ink with financing had it known about EB Ink's option. It was at that time, allegedly, that the Individual Defendants orally "conceded"[7] their personal liability to top up the escrow under the Option Agreement. *See* Complaint ¶ 27. The parties then attempted to negotiate another proposed amendment to EB Ink's option rights, but no such agreement was reached. By letter dated

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[6] EB Ink has not asserted any derivative causes of action for breach of fiduciary duty (which, it bears mentioning, would be governed by Delaware law because T-Ink is a Delaware corporation). Relatedly, the fraudulent inducement claim asserted by EB Ink does not relate to the Letter Agreement or the Amended and Restated Option Agreement (which EB Ink claims are not in effect), but only to representations made prior to entering into the original Option Agreement. *See* Complaint ¶ 65. Hence, misrepresentations alleged in the complaint which post-date the Option Agreement's execution, such as those related to the PCG proceeds, are not relevant to EB Ink's claim for fraudulent inducement.

[7] They also allegedly did so after T-Ink subsequently purchased PCG's interest in T-Ink. *See* Complaint ¶¶ 28-29. It should be noted that EB Ink does not claim an oral amendment of the Option Agreement (which the Option Agreement prohibits), only that alleged oral admissions regarding the contract were made. An estoppel theory would be unavailing here since reliance by a sophisticated party on a counterparty's erroneous statement about the parties' contractual rights cannot be deemed reasonable.

October 14, 2015, EB Ink demanded that Lamocu top up the escrow as required by the Option Agreement. *See* Dkt. 16 at 145. Lamocu refused to do so, and EB Ink terminated the Letter Agreement. *See id.* at 146.

EB Ink commenced this action on January 7, 2016 by filing a complaint with seven causes of action, numbered here as in the complaint: (1) a declaratory judgment that Lamocu and the Individual Defendants have the obligation to top up the escrow under the Option Agreement; (2) specific performance of the top up obligation, asserted against Lamocu;[8] (3) specific performance of the top up obligation, asserted against the Individual Defendants; (4) piercing Lamocu's corporate veil to hold the Individual Defendants liable for Lamocu's top up obligations; (5) fraudulent inducement of the Option Agreement, asserted against Lamocu, the Individual Defendants, and T-Ink; (6) injunctive relief prohibiting the Individual Defendants from selling their T-Ink shares and T-Ink from repurchasing its shares from the Individual Defendants; and (7) anticipatory breach of the escrow top up obligation, asserted against Lamocu and the Individual Defendants. On April 29, 2016, defendants filed the instant motion to dismiss,[9] which seeks dismissal of all claims except the breach of contract claim asserted against

[8] This cause of action, liberally construed, also appears to allege that Lamocu breached section 4.1(a) of the Option Agreement, in which Lamocu warranted that it had the "power and authority" to satisfy its top up obligations. *See* Dkt. 16 at 84. The court will not substantively address this claim since EB Ink does not move to dismiss it, nor does this claim affect the Individual Defendants' liability since this warranty was made only by Lamocu, and not the Individual Defendants. Had EB Ink wanted the Individual Defendants to also make representations and warranties, they could have so negotiated and contracted. Contrary to the suggestion in EB Ink's brief [*see* Dkt. 23 at 28], they did not. That being said, the complaint makes clear that this warranty cannot support a fraud claim since EB Ink's understanding that Lamocu lacked sufficient shares would preclude a claim of reasonable reliance.

[9] Defendants filed the instant motion prior to this action being assigned to the Commercial Division by order of the Administrative Judge dated May 17, 2016. *See* Dkt. 22. The court, therefore, excuses their failure to comply with this part's e-filing rules (e.g., Dkt. 16 improperly

Lamocu (the second cause of action). The court reserved on the motion after oral argument. *See* Dkt. 31 (9/22/16 Tr.)

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

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containing all of the exhibits for the moving papers and the documents not being text searchable).

The core issue in this case is whether the Individual Defendants may be held liable for Lamocu's top up obligations. As noted above, EB Ink principally relies on claims of veil piercing and alleged oral admissions by the Individual Defendants.

As an initial matter, the court disregards the parties' reliance on New York's veil piercing standard[10] because Lamocu is a Delaware LLC. It is well settled that "[t]he question of whether defendants' corporate veils should be pierced will be determined by the laws of each defendant's state of incorporation." *Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013). New York courts, therefore, apply Delaware law when the plaintiff seeks to pierce the corporate veil of a Delaware LLC. *See MMA Meadows at Green Tree, LLC v Millrun Apts. LLC*, 130 AD3d 529, 530 (1st Dept 2015), citing *Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 (1st Dept 2008).[11]

As this court has explained:

> "To state a 'veil-piercing claim' [under Delaware law], the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created **a sham entity designed to defraud investors and creditors**." *Crosse v BCBSD, Inc.*, 836 A2d 492, 497 (Del 2003). "Delaware takes corporate formalities seriously." *Base Optics Inc. v Liu*, 2015 WL 3491495, at *23 (Del Ch

[10] *See generally Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993).

[11] That being said, the result in this case might not be different if New York law were applied. *See Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 2016 NY Slip Op 06903, 2016 WL 6106652, at *7 (1st Dept Oct. 20, 2016) ("Far from alleging that FCRC used B2 Owner to perpetrate a fraud, plaintiff, a sophisticated party, **admits that it knowingly entered into the CM Agreement with B2 Owner, an entity formed to construct the project**. Nowhere in the complaint does plaintiff allege that it believed it was contracting with or had rights vis-à-vis FCRC or any entity other than B2 Owner. Indeed, plaintiff could have negotiated for such rights. **Having failed to do so, plaintiff cannot now claim that it was tricked into contracting with B2 owner only and thus should be allowed to assert claims against FCRC**") (emphasis added). It also should be noted that EB Ink's contention that the First Department permits veil piercing to be maintained as an independent cause of action (as opposed to a basis for liability) [*see* Dkt. 23 at 16] is simply wrong. *See PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436 (1st Dept 2016) ("piercing the corporate veil is not a cause of action independent of a cause of action against the corporation").

2015), citing *Wallace v Wood*, 752 A2d 1175, 1183 (Del Ch 1999). "[P]ersuading a Delaware court to pierce the corporate veil is a difficult task. Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes, such as limited liability, of a corporation." *Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 (Del Ch 2003) (quotation marks omitted). Delaware "courts have only been persuaded to pierce the corporate veil after substantial consideration of the shareholder-owner's disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity." *Crosse*, 836 A2d at 497. "Determining whether to [pierce the corporate veil] requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder." *Winner Acceptance Corp. v Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del Ch 2008).

...

[Moreover], Delaware law ... permits LLC members to maintain the benefits of the corporate form without strictly adhering to a governance, cross-ownership, and control structure that would otherwise be problematic outside of the alterative entity context, such as with a corporation. *See generally Capone v Castleton Commodities Int'l LLC*, 2016 WL 1222163, at *7 (Sup Ct, NY County 2016), citing *In re Opus E., LLC*, 528 BR 30, 57-66 (Bankr D Del 2015) (collecting cases). Hence, **allegations regarding [defendants'] domination and control of their companies is insufficient to maintain a veil piercing claim**. *See In re Opus*, 528 BR at 64-65 ("Merely presenting evidence of dominion or control ... without evidence of fraud or similar injustice [] will not support alter ego liability.") (citations omitted).

[Consequently, a valid veil piercing claim requires the plaintiff to plead that the company] controlled by defendants [is a] **sham entit[y] designed to defraud investors and creditors** ... *See EBG Holdings LLC v Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *12 (Del Ch 2008) ("the requisite element of fraud under the alter ego theory must come from **an inequitable use of the corporate form itself as a sham, and not from the underlying claim**"); *Medi-Tec of Egypt Corp. v Bausch & Lomb Surgical*, 2004 WL 415251, at *4 (Del Ch 2004) ("[plaintiff's] alter ego argument also fails because it has not alleged that the **corporate form in and of itself operates to serve some fraud or injustice, distinct from the alleged wrongs of [defendant]**").

PMC Aviation 2012-1 LLC v Jet Midwest Group LLC, 2016 WL 3017763, at *10-11 (Sup Ct, NY County 2016) (emphasis added).[12]

The complaint fails to properly plead a veil piercing claim because the requisite fraud allegations are not alleged. The allegations in the complaint regarding domination, control, and inadequate capitalization, as set forth above, are insufficient to pierce the corporate veil of a closely held Delaware LLC.[13] The only bad act alleged, Lamocu's breach of its contractual obligations, cannot be used to satisfy the fraud prong.[14]

On an even more fundamental level, the claim that the Individual Defendants were intended to be held liable for Lamocu's top up obligations is based on the entirely foreseeable

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[12] The First Department also recognizes and enforces the strict manner in which Delaware courts apply the Delaware veil piercing standard. *See Walnut Hous. Assocs. 2003 L.P. v MCAP Walnut Hous. LLC*, 136 AD3d 403, 404 (1st Dept 2016) ("The Delaware courts apply the alter ego theory rather strictly and, in determining the sufficiency of the claim, will often consider a combination of factors including whether a company was adequately capitalized or solvent, whether corporate formalities were observed, whether the dominant shareholder siphoned company funds and whether, in general the company simply functioned as a facade for the dominant shareholder"), accord *Midland Interiors,* 2006 WL 4782237, at *3 ("persuading a Delaware court to pierce the corporate veil is a difficult task" and will not be done "[a]bsent compelling cause.").

[13] While domination and control, without more, are always insufficient to justify veil piercing, allegations of domination and control over an SPV are particularly uncompelling since, by definition, all SPVs are dominated and controlled by their principals. Contracting through an SPV is an ordinary and legitimate way to do business. A sophisticated party, such as EB Ink, is, or should be, aware of the counterparty credit risk of contracting with an SPV.

[14] Since the court is dismissing the veil piercing claim for pleading deficiencies, the dismissal is without prejudice. If EB Ink is capable of properly pleading a veil piercing claim under Delaware law, it may move for leave to amend. It also should be noted that, as discussed at oral argument [*see* Dkt. 31 (9/22/16 Tr. at 5-6)], the record indicates that the Individual Defendants caused Lamocu to forgive its principal asset (a $22 million loan owed by T-Ink), but this is not pleaded in the complaint as a basis for veil piercing (that revenue, perhaps, could have been used to satisfy a judgment since Lamocu could have used that revenue to purchase more T-Ink shares), nor is it pleaded as an alleged fraudulent transfer (nor will the court opine on whether a canceled debt of T-Ink might, on balance, benefit EB Ink since EB Ink is a shareholder of T-Ink). Simply put, the court will not rely on possible arguments justifying veil piercing not contained in EB Ink's brief.

assumption that Lamocu, an SPV, would not have the ability to top up the escrow because it did not own the shares needed to do so. Even if the court found EB Ink's position to be sympathetic, equity is not a concern the court may consider when interpreting a contract or assessing the legitimacy of a Delaware corporation. *See Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity."); *Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506, 507 (1st Dept 2007) ("Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities"); *see also Nemec v Shrader*, 991 A2d 1120, 1126 (Del 2010) ("we must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. **Parties have a right to enter into good and bad contracts, the law enforces both**") (emphasis added).

The parties here are sophisticated and, therefore, the court must enforce their agreement, even if the court or one of the parties believes the agreement to be unwise. EB Ink admits that it knew that Lamocu did not own shares of T-Ink that could be used to top up the escrow. Obviously, entering into a contract with a judgment proof SPV that obligates the SPV to deliver shares, which it does not own nor has the means to acquire,[15] is an extremely perilous risk. It is hard to imagine a more extreme undertaking of counterparty credit risk. Had the parties intended to obligate the Individual Defendants, instead of just Lamocu, to top up the escrow, they could have (and would have) expressly done so in one of their many agreements. They did not. The court cannot rewrite the parties' contract to give EB Ink a better bargain than it negotiated.

[15] The caveat to this is the forgiven $22 million loan, but the court will not speculate about whether that loan matters to the veil piercing inquiry since it is not actually alleged that this loan was capable of being repaid by T-Ink. As noted, to the extent EB Ink seeks to rely on this loan or any other basis for veil piercing, it must seek leave to amend.

Rather, the court must give effect to the parties' decision to not contract for the Individual Defendants to have the personal obligation to top up the escrow.

To the extent EB Ink alleges the Individual Defendants orally agreed to do so, that allegation is barred by the Option Agreement's merger clause, which disclaims such an alleged collateral agreement. "The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing. The merger clause accomplishes this purpose by evincing the parties' intent that the agreement 'is to be considered a completely integrated writing.'" *Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 (2001), quoting *Primex Int'l Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 599-600 (1997). EB Ink's allegation of an oral agreement with the Individual Defendants, therefore, is unavailing. *See Denenberg v Schaeffer*, 137 AD3d 1197, 1198 (2d Dept 2016) ("The defendant produced a written share subscription agreement covering the subject matter of this action, which established that the plaintiff is precluded, by a merger clause contained in that writing, from presenting evidence of an alleged prior oral agreement between the parties regarding the same subject matter"); *In re E. 51st St. Crane Collapse Lit.*, 100 AD3d 503, 503-04 (1st Dept 2012) ("the motion court correctly concluded that ... the parties' 2008 construction management agreement contained a broad merger clause, and thus, extrinsic evidence, such as the oral agreements alleged by RCG, should not be considered to alter, vary or contradict the written agreement").[16]

EB Ink also has failed to state a claim for being fraudulently induced to enter into the Option Agreement. "The elements of a cause of action for fraud [are] a material

[16] As an alternative argument, which the court need not reach, the Individual Defendants contend that the allegation that they orally agreed to guarantee Lamocu's top up obligation is barred by the statute of frauds. *See* General Obligations Law § 5-701(2).

misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). A plaintiff who does not plead a statement of present fact, and instead only pleads a future promise or expression of intent, fails to state a claim for fraudulent inducement. *See Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 (1st Dept 2015) ("In the context of a contract case, **the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract**, in order to present a viable claim that is not duplicative of a breach of contract claim. Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract.") (emphasis added; citations and quotation marks omitted).

EB Ink does not allege any allegedly fraudulent misrepresentation other than the Individual Defendants' alleged statements that they would provide Lamocu with the means to top up the escrow. This sort of promise, moreover, cannot support a claim of fraud if the complaint fails to allege that it was made with the requisite scienter. In other words, if, as here, EB Ink fails to plead that the promise by the Individual Defendants was made with the intent to deceive – that is, there is no allegation that, at the time, the Individual Defendants did not intend to fulfill that promise – the fraud claim is not properly pleaded. The allegations of scienter in the complaint are entirely conclusory. *See Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 (1st Dept 2015) ("Allegations regarding an act of deceit or intent to deceive must be stated with particularity; the claim will be dismissed if the allegations as to scienter are conclusory and

factually insufficient") (citation omitted), accord *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 554 (1985).[17] The fraud claim, therefore, is dismissed.

Finally, the declaratory judgment and anticipatory breach claims asserted against Lamocu are dismissed as duplicative of the breach of contract claim asserted against it.[18] *See Cherry Hill Market Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 515 (1st Dept 2014), citing *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract."); *Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 206 (1st Dept 2003) (anticipatory breach claim duplicative of validly pleaded breach of contract claim). The relief sought on the breach of contract claim against Lamocu is sufficient to provide EB Ink with the relief it seeks under the Option Agreement. Accordingly, it is

ORDERED that defendants' motion to dismiss all of the causes of action in the complaint, except for the second cause of action for breach of contract against Lamocu, is granted, and said causes of action are hereby dismissed; and it is further

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[17] While the element of scienter may be pleaded based on allegations that give rise "a rational inference of actual knowledge" [*IKB Int'l S.A. v Morgan Stanley*, 142 AD3d 447, 450 (1st Dept 2016)], no such allegations are pleaded in the complaint. Indeed, the only reasonable inference that may be drawn is that these sophisticated parties agreed that only Lamocu would be liable. Presumably, EB Ink's counsel would have advised it that the Individual Defendants could only be held liable if they were made parties to the contract.

[18] Such claims asserted against the Individual Defendants are infirm by virtue of the fact that the breach of contract claims asserted against them are being dismissed.

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on December 8, 2016, at 11:30 in the forenoon.

Dated: November 28, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C