A.D.E. Sys., Inc. v Energy Labs, Inc.
2017 NY Slip Op 33220(U)
June 21, 2017
Supreme Court, Nassau County
Docket Number: 604036-15
Judge: Vito M. DeStefano
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

INDEX NO. 604036/2015
RECEIVED NYSCEF: 06/23/2017

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

A.D.E SYSTEMS, INC.,

Decision and Order

Plaintiff,

MOTION SEQUENCE:08, 09
INDEX NO.:604036-15

-against-

ENERGY LABS, INC.,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support of Motion	2
Notice of Cross Motion	3
Memorandum of Law in Opposition to Motion and in Support of Cross Motion	4
Reply Affirmation	5
Reply Memorandum of Law in Opposition to Cross Motion and in Further Support of Motion	6
Supplemental Affirmation	7
Memorandum in Opposition to Motion and in Support of Cross Motion	8
Memorandum of Law in Further Support of Motion	9
Letter dated March 7, 2017	10
Letter dated March 8, 2017	11
Letter date March 10, 2017	12
Letter dated March 10, 2017	13

The Defendant moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the amended verified complaint and the Plaintiff cross-moves for an order pursuant to CPLR 3025(b) for leave to amend its pleading in the event that the motion is granted.

On April 1, 2015, the Plaintiff, A.D.E. Systems, Inc. and Defendant Energy Labs, Inc. entered into a Manufacturers Representative Agreement ("Agreement") whereby Plaintiff was to become a manufacturers' representative for Defendant's products. The Agreement contained the following relevant provisions:

> 10.1 Term: The term of the agreement shall commence as of the date hereof ('effective date') and shall continue in full force and effect for an initial term of one (1) year thereafter. Subject to this Section 10, this agreement shall be automatically renewed for additional successive renewal periods of one (1) year each unless written notice of an intended change or intent not to renew is delivered by either of the parties at least thirty (30) days prior to the expiration of the preceding period.
>
> 10.2 Cancellation: Subject to the other provisions of this Section 10, either party may terminate its obligations under this Agreement or any actual or proposed extension of the initial term hereof for any reason by giving the other party at least thirty (30) days prior written notice of such cancellation.

Following the parties' entry into the Agreement, Plaintiff "publicly identified itself as a representative of" the Defendant, began marketing and promoting the Defendant's products, and expanded its employee base (Amended Complaint at ¶¶ 14-16).

Seven weeks later, by letter dated May 21, 2015, the Defendant terminated the Agreement with the Plaintiff.

On June 22, 2015, the Plaintiff commenced the instant action. In its amended verified complaint, the Plaintiff asserts four causes of action: breach of contract; anticipatory breach of contract; breach of the implied covenant of good faith and fair dealing; and fraud in the

inducement.[1]

The instant motion to dismiss the complaint and cross motion to amend the complaint followed.

For the reasons that follow, the motion is granted in part and denied in part and the cross motion is denied.

The Court's Determination

Initially, the court notes the governing law provision set forth in section 14.1 of the Agreement, to wit, "[t]his Agreement shall be construed and enforced in accordance with the internal laws of the State of California without regards to its conflicts law." Accordingly, inasmuch as the first, second and third causes of action in the amended complaint are claims related to the Agreement, they are, and as conceded by the parties, to be decided under California law.

Breach of Contract (First Cause of Action)

In the first cause of action alleging breach of contract, the Plaintiff asserts that the Defendant wrongfully terminated the Agreement by cancelling it within the first year. Specifically, according to the Plaintiff, the Agreement does not allow for termination during the initial one year term. Rather, the Agreement provides that: "either party can cancel, on 30 days' notice, only for any given year of the Agreement *subsequent* to the initial year term of the Agreement" (Amended Complaint at ¶ 20).

---

[1] Punitive damages are sought in connection with the fraud claim.

Defendant argues that the breach of contract claim must be dismissed because the language of § 10.2 of the Agreement expressly permitted termination of the Agreement during the initial one year term for any reason.

In view of the apparently conflicting contractual language, the court, in an order dated February 8, 2017, directed the parties to submit additional memoranda referencing California law concerning the interpretation of conflicting contractual provisions and particularly "putative conflicts between contracts of fixed duration and contracts that provide for termination at will."

Based upon its review of the relevant contractual provisions and all submissions of the parties, the court concludes that the Agreement is internally inconsistent and conflicting.

Under California law, a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful (Civil Code § 1636). Thus, California courts have held that the "fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties" at the time the contract is formed (*Wolf v Walt Disney Pictures & Television,* 114 CalApp4th 1343 [Cal App Ct 2004]; *AIU Insurance Co. v FMC Corporation*, 51 Cal3d 807, 821 [1990]; *Bluehawk v Continental Insurance Co.*, 50 CalApp4th 1126 [Cal App Ct 1997] [paramount rule in interpreting a contract is that the parties' mutual intent be given effect as it exists at the time of contracting]).

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity (Civil Code § 1638). The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other (Civil Code § 1641). A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties (Civil Code § 1643). "In interpreting a contract, the objective intent, as evidenced by the words of the contract, is controlling . . .

focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made" (*Lloyd's Underwriters v Craig & Rush, Inc.*, 26 CalApp4th 1194 [Cal App Ct 1994]).

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates (Civil Code § 1647). Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract (Civil Code § 1652). Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected (Civil Code § 1653). "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible (*Southern Pacific Land Co. v. Westlake Farms, Inc.*, 188 CalApp3d 807 [citations omitted]; *cf. Argonaut Ins. Co. v. Transp. Indem. Co.*, 6 Cal3d 496 [1972] [where no extrinsic evidence is introduced at trial to aid in the construction of a contract, such construction presents a question of law]).

Consistent with the foregoing, section 314 of the California civil jury instructions states the following:

Interpretation–Disputed Term

Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (City of Hope National Medical Center v. Genentech, Inc. (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181

P.3d 142], footnote and internal citations omitted.)

In cases of uncertainty not removed by the aforementioned rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist (Civil Code § 1654; *AIU Insurance Co. v FMC Corporation*, 51 Cal3d at 822, *supra* [ambiguity interpreted against drafter]; *Wolf v Superior Court*, 114 CalApp4th at 1351, *supra*).

At bar, section 10.1 of the Agreement establishes a one-year initial term, which is automatically renewed for additional one-year terms unless "notice of an intended change or intent not to renew" is delivered by either party within 30 days of the end of the preceding period. Yet, section 10.2 gives either party the right to terminate "this Agreement or any actual or proposed extension of the initial term," "[s]ubject to the other provisions of this Section 10", "by giving the other party at least thirty (30) days prior written notice of such cancellation."

The effect of linking "[t]his Agreement" with the disjunctive "or" to "actual or proposed extension of the initial term," is to require that "this Agreement" be read as "this Agreement *during the initial term*" otherwise the words "this Agreement" and "or" would be devoid of any meaning. Inasmuch as the same section permits termination "for any reason" on 30 days notice, it appears to make the Agreement terminable at will at any time, provided the requisite notice is given. However, in consideration of the fixed term contained in section 10.1 and by making section 10.2 "subject to" it, the Agreement is rendered inconsistent and contradictory. In short, it is impossible to give effect to all the terms of the Agreement inasmuch as the Agreement cannot have a fixed term of one year and at the same time be terminable during that year "for any reason."

Given the limited function of the court on this dismissal application, which itself is akin

to the common law demurrer,[2] the branch of the motion to dismiss the breach of contract cause of action must be denied. The court also notes that the e-mail correspondence annexed to the supplemental submission constitutes extrinsic evidence concerning the interpretation of the Agreement, which supports the plaintiff's interpretation thereof.[3]

Interestingly, the unpublished case cited by defendant as dispositive herein, and about which the parties have submitted additional arguments via letter, likewise supports the court's conclusion, although its use and citation are prohibited (Cal. Rules of Court, rule 8.1115[a]).

The case, *Purcell-Murray Co. v Wolf Range Co.* (2002 Cal. App. Unpub. LEXIS 811 [Ct. App First Appellate Dist. 2002]), involved the termination of a contract with language that is similar to the language at issue herein. In *Purcell-Murray Co. v Wolf Range Co.* (*supra*), defendant was a manufacturer of kitchen stoves and appliances. In 1990, plaintiff became a wholesale distributor of the defendant under an oral distributorship agreement. In 1998, defendant decided that all distributorship agreements should be reduced to formal contracts; defendant forwarded a draft contract to the plaintiff, which was made effective on February 1, 1999, and was renewable annually.

---

[2]"In ruling on a demurrer, the court must assume the truth of the factual allegations of the complaint (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 517 [150 Cal.Rptr. 1, 585 P.2d 851].) The function of a demurrer is to test the legal sufficiency of the challenged pleading by raising questions of law (*Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 702 [141 Cal.Rptr. 189]) * * * [T]here is no waiver by failure to plead what extrinsic evidence will be offered. Where an ambiguous contract is attached and incorporated into the complaint, the party pleading is only required to allege in a complaint the meaning which the party ascribes to that contract" (*Southern Pacific Land Co. v. Westlake Farms, Inc.*, 188 CalApp3d, *supra* at 817).

[3]That the plaintiff submitted this e-mail with the supplemental memorandum, thus going beyond what the court directed, is of no moment considering the court's function on a motion to dismiss for failure to state a cause of action.

The contract contained the following provisions:

> Paragraph 8 of section III of the distribution agreement contains various provisions for termination of the contract. The introductory sentence provides for termination by either party "at any time, with or without cause[,] by giving not less than thirty (30) days['] notice in writing to the other party." Paragraph 8.A. provides for immediate termination of the contract by Wolf upon certain failings by Purcell-Murray, such as the sale of competitive products or nonpayment for goods shipped. Paragraph 8.B. provides for termination by written agreement of the parties, and paragraph 8.C. provides for termination "at the end of the term stated herein unless extended as provided herein."
>
> Paragraph 17, entitled "Term," contains an automatic renewal provision: "This Agreement shall become effective February 1, 1999, and automatically renew for one (1) year increments unless terminated in writing thirty (30) days prior to the end of the term or any extension thereof." (Italics in original.)

In January 2000, defendant's parent corporation sold its residential product line to a competitor; as a result, on January 25, 2000, defendant notified plaintiff that it was terminating the distributorship agreement effective February 29, 2000. Plaintiff brought suit against the defendant asserting, *inter alia*, breach of contract based on what it believed was an early and improper termination of the agreement. According to the plaintiff, the contract was automatically renewed on February 1, 2000, and could not be terminated until the end of the renewal term (January 31, 2001) unless notice had been given at least 30 days in advance of February 1, 2000. Because notice was given on January 25, the defendant could not terminate the contract. The defendant, citing language in the agreement which permitted termination by either party at any time by giving 30 days notice, moved for summary judgment, which was granted. The appellate court affirmed based on the following:

> "When the parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous, i.e., [whether] it is 'reasonably susceptible' to either of the meanings urged by the parties.

[Citation.] In making this determination, the court is not limited to the contract language itself but provisionally receives, without actually admitting, any extrinsic evidence offered by a party which is relevant to show the contract could or could not have a particular meaning. [Citation.] If, in light of the language of the contract and the extrinsic evidence as to its meaning, the trial court determines the language is 'reasonably susceptible' to either of the meanings urged by the parties the court moves on to the second step which is to determine just what the parties intended the contract term to mean. [Citation.] [P] The trial court's ruling on the first step, the threshold question of ambiguity, is a question of law subject to our independent review. [Citation.] [P] The trial court's ruling on the second step, the construction to be given to an ambiguous contract term, is a question of law subject to our independent review if no extrinsic evidence was introduced as to the meaning of the contract or, if extrinsic evidence was introduced, the evidence was not in conflict. [Resolution of the ambiguity is a question of fact] only when conflicting evidence was introduced as to the meaning of the contract term." (Curry v. Moody (1995) 40 Cal.App.4th 1547, 1552-1553; see also Badie v. Bank of America (1998) 67 Cal.App.4th 779, 798-799.)

On the threshold question, we independently conclude that the contract is ambiguous and uncertain. Paragraph 8 provides for termination at any time by either party upon 30 days' notice, while paragraph 17 provides for termination at the end of the renewal term upon 30 days' notice. Each party relying on a different paragraph has presented a plausible interpretation. We agree with Purcell-Murray that the two provisions are contradictory and confusing. We therefore proceed to the second step to determine the ultimate construction to be placed on the disputed language. Because the only extrinsic evidence introduced on the meaning of the contract language was undisputed, we make our determination as a matter of law.

* * *

Our task when faced with such contradictory and inconsistent provisions of a contract is to reconcile them, if possible, in such a way that gives effect to the main purpose of the contract and avoids rendering some parts of the contract inoperative or meaningless. (Civ. Code, §§ 1641, 1652, 1653; Code Civ. Proc., § 1858; City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 473.) Only when the uncertainty cannot be removed by applying these standard rules of contract interpretation do we construe the language against the drafter. (Civ. Code, § 1654.)

> In that light, we interpret paragraph 17 of the distribution agreement as pertaining to the duration of the contract, while paragraph 8 pertains to termination. We construe the 30-day notice provision within paragraph 17 as allowing either party to change the contract from one of indefinite duration to one that expires at the end of the term. We construe paragraph 8, on the other hand, as governing termination of the contract during the contract's (renewable) 12-month term and allowing termination at any time upon 30 days' notice. That is, unless one party decides otherwise 30 days before the end of each 12-month term, the contract continues on with all of its provisions intact, including the provisions of paragraph 8 regarding termination.
>
> We believe our construction preserves the main purpose of the contract, which was to provide an arrangement for distribution of Wolf's products so long as Wolf was in the business of selling those products. The contract expressly contemplates in paragraph 4 that Wolf may discontinue "any or all" of its products. While the provisions of paragraph 17 regarding annual renewal allow the distribution relationship to continue indefinitely without the need for renegotiation of terms, paragraph 8 gives the parties the option of cutting the long-term arrangement short.
>
> Our construction also gives some meaning and effect to both paragraphs.

Significantly, *Purcell-Murray Co. v Wolf Range Co.* (*supra*) determined a summary judgment motion whereas the instant motion is pursuant to CPLR 3211(1) and (7). Thus, the appellate court in *Purcell-Murray*, noted its obligation to first determine whether the contract was ambiguous and then to resort to extrinsic evidence. Inasmuch as the extrinsic evidence was undisputed, the court could decide the issue as a matter of law. Here, as noted, the function of the court is different than on a summary judgment motion and the only extrinsic evidence is the

e-mail correspondence proffered by plaintiff, which supports its interpretation of the Agreement. [4]

Accordingly, the branch of Defendant's motion to dismiss the Plaintiff's first cause of action is denied.

Anticipatory Breach of Contract (Second Cause of Action)

In the second cause of action, the Plaintiff alleges that the Defendant "wrongfully repudiated the parties' Agreement which has the effect of preventing Plaintiff A.D.E. from receiving the benefits under their Agreement with Defendant Energy Labs, to wit, term renewals of the Agreement subsequent to the initial one year period" (Amended Complaint at ¶ 29).

The Plaintiff has alleged that it performed all of the conditions up to the time of the repudiation and were ready, able and willing to complete performance pursuant to the

---

[4]The court notes the paucity of case law on point. In New York, for example, the nearest applicable case uncovered after extensive research is *Daniel v Manhattan Life Ins. Co.* (126 AD 780 [2d Dept 1907], *affd without opinion* 191 NY 541 [1908]. In *Daniel v Manhattan Life Ins. Co.* (*supra*), the Second Department held that a contractual extension for a fixed term was inconsistent with a provision making the contract terminable at will: "The duration of the plaintiff's employment was fixed by a clause in the original agreement that either party might terminate the agreement by a notice of 30 days. * * * [T]hat agreement as theretofore amended was in terms 'extended' from the first day of March in one year to the same day in the following year, the final agreement of extension being dated February 24th, 1900, and providing that the said agreement as amended (all of the amendments being enumerated) 'is hereby extended * * * for one year after March 1st, 1900.' The duration thus fixed was different to that first fixed; it is inconsistent with it; both cannot exist together. If the contract was to continue to be terminable by either side at will on a notice of 30 days, what was the meaning of extending it for a year? If the contract could still be terminated at will -- if that was the intention -- the words of extension for a fixed period were used to mean nothing. The contract was extended a year from March 1st, 1900, and the defendant is liable for damages for discharging the plaintiff before the year was up."

In a vigorous dissent in *Daniel v Manhattan Life Ins. Co.* (*supra*), Justice Jenks asserted that "[a] provision that is effective for the prescribed term of a contract does not forbid a provision that makes the contract terminable before the lapse of that term" (Jenks, J.) (Dissenting).

Agreement except for the Defendant's expressed unequivocal repudiation that has not been retracted, and that as a result of that repudiation, the Plaintiff has suffered damages (*see Daum v Yuba Plaza, Inc.*, 228 CapApp2d 283 [Cal App Ct 1964]).

In support of its motion to dismiss, the Defendant argues that the Plaintiff has elected a remedy to sue for breach of contract and, thus, the anticipatory breach of contract claim is duplicative. In its supplemental submission, the defendant asserts that the claim must be dismissed because the damages sought on a contract that may be cancelled at will are not recoverable.

Initially, the court has noted in conference and argument that any claim for damages sought in connection with renewal periods appears speculative. The cases cited by the plaintiff and defendant in support of their positions are not in conflict as they stand for the proposition that damages on renewal contracts are generally speculative, however, such damages may be recoverable if there was an automatic renewal policy in effect (*eg. Citri-Lite Co. v Cott Beverages, Inc.*, 721 Fsupp2d 912 [ED Cal 2010]).

Inasmuch as the instant motion is directed at the sufficiency of the pleading only, it is denied. Nothing contained in this decision and order shall preclude a motion for summary judgment on any issue herein. Moreover, no argument has been raised with respect to whether the cause of action is itself a properly asserted "stand alone" cause of action or whether the damages sought therein are more properly recoverable as part of the breach of contract cause of action. This issue need not be addressed at this time.

Breach of the Implied Covenant of Good Faith (Third Cause of Action)

In its third cause of action, the Plaintiff alleges the following:

That at or near the time of the execution of the Agreement between the parties,

> Defendant Energy Labs made the aforementioned covenants, warranties and representations.
>
> That Defendant Energy Labs specifically understood A.D.E.'s concern that a one year agreement may not be sufficient and having enough time to "see[] results" and not "having the rug pulled out from under" it.
>
> That the Defendant Energy Labs implicitly agreed and represented to the Plaintiff A.D.E. that it would not cancel Plaintiff A.D.E. during the initial term of the Agreement.
>
> That in reliance on the aforementioned covenants, warranties and representations Plaintiff A.D.E. entered into the Agreement and fully performed all of its obligations pursuant to the Agreement.
>
> That by email dated May 14, 2015, Defendant Energy Labs wrongfully purported to "terminate" the parties' Agreement.
>
> That the foregoing conduct of Defendant Energy Labs, as well as other acts to be discovered, had the effect of preventing Plaintiff A.D.E. from receiving the benefits under their Agreement with Defendant Energy Labs.
>
> That the aforementioned acts by the Defendant Energy Labs, as well as other acts to be discovered, constitute a breach of the implied covenant of good faith and fair dealing in connection with the parties' Agreement (Amended Complaint at ¶¶ 33-39).

"The law implies in every contract . . . a covenant of good faith and fair dealing. 'The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits'" (*Alameda County Flood Control v Department of Water Resources*, 213 Cal App 4th 1163, 1203 [Cal App Ct 2013] [internal cations omitted]). But there is no bad faith under California law when a party does that which is explicitly allowed by the agreement (*Id.*).

The Defendant argues that its "implicit agreement" that it would not cancel the Agreement during the initial term directly conflicts with section 10.2 of the Agreement which, according to the Defendant, allows either party "to cancel the Agreement during the initial term or any extension thereof for any reason on 30 days' notice" (Memorandum of Law in Support at

p 11). Inasmuch as the crux of Plaintiff's breach of contract claim is its wrongful termination during the initial one-year term of the Agreement, and this issue remains viable, dismissal of the third cause of action would be premature at this time.

Fraud in the Inducement (Fourth Cause of Action)

Although the Agreement has a governing law provision providing that it "shall be construed and enforced" under California law, the fraud claim sounds in tort, and, thus, the governing law provision is inapplicable to it (*see Knieriemen v Bache Halsey Stuart Shields Inc.*, 74 AD2d 290 [1st Dept 1980]).

Under New York conflict of law principles, fraud claims are governed by the law of the place of injury–usually the place where the plaintiffs are located, which, in the case at bar, is New York (*see Telecom Intl. Amer., Ltd. v AT & T Corp.*, 67 FSupp2d 189 [SDNY 1999]; *see also Odyssey RE (London) Ltd. v Stirling Cooke Brown Holdings Ltd.*, 85 FSupp2d 282, 292 [SDNY 2000]).

In the fourth cause of action, the Plaintiff alleges that "as an inducement" for Plaintiff to enter into the Agreement to become Defendant's representative, Defendant "warranted and represented" to Plaintiff that "the total market potential [as a distributor for Defendant Energy Labs] is easily $15.0+ million annually"; that as "additional inducement" to enter into the Agreement, Defendant "represented that it understood" Plaintiff's concern that a "one year agreement may not be sufficient" to see results and was concerned with "having the rug pulled out from under it," Defendant represented to Plaintiff that "[y]ou [Plaintiff] need to trust that we [Defendant] will treat you fairly and not cancel you for no reason"; and that Defendant "implicitly agreed and represented" to the Plaintiff that "it would not cancel" the Plaintiff "during the initial term of the Agreement" (Amended Complaint at ¶¶ 6-8, 35).

It is axiomatic that in order to state a claim for fraudulent inducement (*Wyle Inc. v ITT Corp.*,

130 AD3d 438, 438-39 [1st Dept 2015]):

> there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury". 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". Therefore, "[a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract (internal citations omitted).

The Plaintiff's fraud in the inducement claim must be dismissed inasmuch as the allegations and representations concern future conduct, not present facts. Moreover, the allegation in the amended complaint as to the $15 million "total market potential" is an expression of "future expectation" and, thus, not to be considered a promise when examining the issue of fraud in the inducement (*Goldman v Strough Real Estate, Inc.*, 2 AD3d 677 [2d Dept 2003]; *Crossland Sav., F.S.B. v SOI Development Corp.*, 166 AD2d 495 [2d Dept 1990]).[5]

The Cross Motion To Amend

The Plaintiff's cross-motion for an order pursuant to CPLR 3025(b) for leave to serve and file a second amended complaint in the event that defendant's motion to dismiss is granted is denied, Plaintiff having failed to annex the proposed amended pleading showing the changes or additions to be made to the amended pleading (CPLR 3025[b]; *Janssen v*

---

[5] With respect to Plaintiff's claim for punitive damages associated with the fraud claim, "[p]unitive damages are intended to punish and deter behavior involving a high degree of moral turpitude which constitutes exceptional misconduct aimed at the public at large" (*Goodale v Central Suffolk Hosp.*, 126 AD3d 671, 673 [2d Dept 2015]) rather than "ordinary allegations of fraud and breach of contract" (*Stangel v Chen*, 74 AD3d 1050 [2d Dept 2010]).

Incorporated Vil. of Rockville Ctr., 59 AD3d 15 [2d Dept 2008]).

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant's motion is granted to the extent that the fourth cause of action is dismissed; and it is further

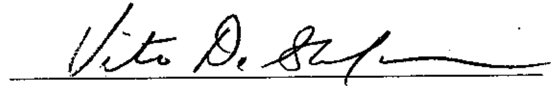
Ordered that the motion is, in all other respects, denied; and it is further

Ordered that the cross motion of the Plaintiff is denied.

This constitutes the decision and order of the court.

DATE: June 21, 2017

ENTERED
JUN 23 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE



Hon. Vito M. DeStefano, J.S.C.