

<b>Kalembe v Oanda Corp.</b>
2018 NY Slip Op 31420(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 656647/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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 MUKENGESHAYI KALEMBA,

Plaintiff,

- v -

OANDA CORPORATION,

Defendant.

INDEX NO. 656647/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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 The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17  
 were read on this application to/for Dismiss.

HON. SALIANN SCARPULLA:

In this action for, *inter alia*, breach of contract and fraud, defendant Oanda Corporation (“Oanda”) moves, pursuant to CPLR 3211, to dismiss the putative class action complaint of plaintiff Mukengeshayi Kalemba’s (“Kalemba”).

**Background**<sup>1</sup>

Oanda operates one of the country’s largest online platform for transactions in foreign currency exchange (“Forex”), which is called the FXTrade System. Oanda has

<sup>1</sup> Unless otherwise specified, all facts are taken from the complaint and the exhibits annexed to the complaint and are accepted as true only for purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). See CPLR 3014 (“A copy of any writing which is attached to a pleading is a part thereof for all purposes.”); *Wernham v Moore*, 77 AD2d 262, 263 (1st Dept 1980).

purportedly continuously represented on its website and in its sales and marketing materials that it offers low and competitive exchange rates, does not charge commissions or account maintenance fees, offers transparent pricing, and will make historical pricing data available to its customers

In quoting rates to its clients, Oanda represented that the quoted rates were an accurate reflection of the average market rates; Oanda further represented that the only differences between the quoted rates and the average market rates were that the quoted rates had a markup above the average market rate when buying currency and a markdown below the average market rate when selling currency. The difference between these buy and sell quoted rates is referred to as the “spread,”<sup>2</sup> which Oanda advertises as the only fee charged to clients.

Oanda’s marketing frequently touted that it had “consistently competitive spreads” compared to the rest of the Forex market, with “no commissions or account fees.” Kalembe alleges that, based on these representations, he and the members of the putative class created Oanda trading accounts through which they placed buy and sell Forex transactions, and Oanda charged a spread as well as additional fees on these transactions.

Before creating a trading account with Oanda, Kalembe entered into Oanda’s form FXTrade Customer Agreement, which was in effect from approximately July 2005 until March 2016 (“2005 Agreement”). In or around March 2016, Kalembe entered into another FXTrade Customer Agreement, which is currently in effect (“2016 Agreement”)

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<sup>2</sup> The spread is represented in basis points or pips, each corresponding to \$0.0001 for currencies quoted in U.S. dollars, which averages between 0.6 and 1.2 basis points.

(the 2005 Agreement and 2016 Agreement are collectively referred to as the “Agreements”).

The 2005 Agreement provides that Oanda accounts accrue interest on the account balance and accrue or are charged interest on any Open Positions<sup>3</sup> of the account holder; “[a]ll interest shall be calculated at such rates, and paid or charged, as the case may be in such a manner as OANDA shall publish from time to time on OANDA’s Web site at [fxtrade.oanda.com/fxtrade/interest\\_calculate.shtml](http://fxtrade.oanda.com/fxtrade/interest_calculate.shtml).” 2005 Agreement ¶ 4. The 2016 Agreement uses the terms “Financing Charge” and “Financing Credit”<sup>4</sup> instead of the term “Interest,” and provides that the

[r]ates used for calculating Financing Charges and Financing Credits are variable and are set by OANDA in its sole discretion. All such Financing Charges and Financing Credits shall be calculated at such rates, and credited or charged, as the case may be, in such a manner as OANDA shall publish from time to time on OANDA’s Web site at <http://fxtrade.oanda.com/help/policies/interest-rate-calculation>.

2016 Agreement ¶ 4.

The Agreements ¶9(a), provide that

Oanda will make available to o you, via the FXTrade System, the Exchange Rates at which Oanda is offering to enter into Trades with you. Each Exchange Rate is valid only on the exact date and at the exact time that such Exchange Rate is presented to you. You acknowledge that in a rapidly changing market the Exchange Rate presented to you on the FXTrade System may no longer remain in effect at the time your Order is executed at Oanda’s

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<sup>3</sup> An “Open Position” is defined as “the sum of all open Trades for a given currency pair.” 2005 Agreement ¶ 1(bb).

<sup>4</sup> “Financing Charge” is defined as “a charge to [customer’s] Account, calculated in accordance with Section 4.” 2016 Agreement ¶ 1(h). “Financing Credit is defined as “a credit to [customer’s] Account, calculated in accordance with Section 4.” 2016 Agreement ¶ 1(i).

FXTrade server, and you agree that any Trade resulting from the execution of such Order shall be at the Exchange Rate in effect at the time such Order is executed at Oanda's FXTrade server. Oanda makes no warranty, express or implied, that the Exchange Rates represent exchange rates available elsewhere in the market.

Agreements ¶9(b) also provide that "Oanda will use reasonable commercial efforts to execute any Order you submit to OANDA through the fxTrade System, in accordance with its terms, and at the prevailing Exchange Rate at the time such Order is received at OANDA's fxTrade server." The Agreements define "Exchange Rate" as the rate set by Oanda for each trade. 2005 Agreement ¶ 1(o); 2016 Agreement ¶ 1(g).

Moreover, the 2016 Agreement provides that the spread between buy and sell prices "may widen or narrow at any time at Oanda's discretion" and that Oanda's customers must acknowledge that "markets are not static and changes in such markets, news announcements, political events, and periods of low liquidity, may result in widened [s]preads," which "may widen at any time and there is no limit to how wide the [s]pread may be." 2016 Agreement ¶ 9(d).

Beyond the specific provisions governing the mechanics of buy and sell orders, Oanda's customers, including Kalemba, made and agreed to several more general representations in the Agreements. Kalemba represented that he had read the "Risk Disclosure Statement" regarding the risks of Forex trading and accepted those risks, Agreements ¶ 13(d), including that Forex trading "is one of the riskiest forms of investment available," Agreements ¶ 14(a), and that he was not "relying on any communication of Oanda, written or oral, as investment advice, or as a recommendation to enter into any Transaction or to engage the services of any third-party account

manager.” Agreements ¶ 13(j). Kalemba further acknowledged that “[n]o communication, written or oral, made by or received from Oanda [would] be deemed to be an assurance or guarantee as to the expected results of any Transaction,” and that “Oanda [was] not acting as [Kalemba’s] fiduciary or advisor in respect of any Transaction.” 2005 Agreement ¶¶ 32(a)&(d); 2016 Agreement ¶¶ 30(a)&(d).

After becoming a customer of Oanda, Kalemba alleges that he discovered that many of what he believed to be Oanda’s representations in its advertising materials are false or misleading in two ways. First, despite Oanda’s claim that it offered low and “consistently competitive spreads,” Oanda’s spreads are purportedly excessive, not competitive, and some of the highest among Forex brokers. Second, Oanda effectively charges commissions on trades under the pretense of charging interest on each trade. In March 2017, Oanda changed its pricing model to include the spread itself and a fixed commission per trade.

On October 31, 2017, Kalemba commenced this action by filing a verified class action complaint. In the complaint, Kalemba asserts causes of action for: violation of the Martin Act (General Business Law §§ 349, 350); breach of contract; fraud; negligent misrepresentation; equitable accounting; and unjust enrichment.<sup>5</sup> Oanda now moves to dismiss the complaint.

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<sup>5</sup> At oral arguments, I dismissed the causes of action for violation of the Martin Act, negligent misrepresentation, equitable accounting, and unjust enrichment. NYSCEF Doc. No. 28, court tr dated 4/4/18 at 2:16-3:17.

## **Discussion**

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon*, 84 NY2d at 87. “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory.” *Id.* at 87-88. “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration.” *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). *See Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dept 2001) (“the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint”) (internal citations omitted).

### **1. Breach of Contract**

A claim for breach of contract requires proof of “the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where, as here, “a written agreement . . . is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.” *Beinstein v Navani*, 131 AD3d 401, 405 (1st Dept 2015) (internal citation and quotation marks omitted).

In support of the claim for breach of contract, Kalemba alleges that Oanda's advertisements regarding “low” and “competitive” rates created an implied contract,

under which Oanda agreed that it would provide such spreads, not charge commissions, and provide transparent pricing, all obligations which Oanda has breached.

Kalembe also alleges that Oanda breached the Agreements by manipulating its spread pricing so that it could charge higher rates that were not competitive in the market. Specifically, Kalembe claims that Oanda: (1) failed to offer low and competitive exchange rates that were only subject to certain market factors in violation of ¶ 9(a) of the Agreements; (2) failed to use commercially reasonable efforts to execute trades at prevailing exchange rates in violation of ¶ 9(b) of the Agreements; and (3) improperly widened spreads to increase profits in violation of ¶ 9(d) of the 2016 Agreement.

As an initial matter, to the extent that Kalembe's breach of contract claim is based upon an implied contract, it must be dismissed. Where, as here, "there is an express contract no recovery can be had on a theory of implied contract." *SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 (1st Dept 2001) (internal quotation marks and citation omitted). Kalembe's claims are specifically governed by the Agreements, thus precluding any claim based on an implied contract.

Additionally, Kalembe's claim for breach of contract based on violations of the Agreements is precluded by the express language of the Agreements.<sup>6</sup> The Agreements provide that Oanda offers Exchange Rates that it sets, 2005 Agreement ¶ 1(o); 2016 Agreement ¶ 1(g), that it makes no warranty that such rates are equal to those available on the market, Agreements ¶ 9(a), that it has discretion to adjust those rates, 2016

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<sup>6</sup> While the record is unclear as to when Kalembe traded on Oanda's platform, he does not contest that he is bound by the Agreements.



Agreement ¶ 9(d), and that it will use reasonable commercial efforts to execute trades at the rates that it offers at the time that a customer seeks to trade. Agreements ¶ 9(b). These terms are unambiguous, and must be interpreted to avoid rendering any of them meaningless. *See, e.g. Warner v Kaplan*, 71 AD3d 1, 5 (1st Dept 2009).

Kalemba's contrary reading of the Agreements' terms is meritless. Provisions in a contract are not ambiguous merely because the parties interpret them differently. *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 (1996). Indeed, Kalemba's proposed interpretation of the Agreements to require Oanda to charge rates equal to those offered by its competitors in the Forex market, or which are otherwise "low" and "competitive," would render meaningless the Agreement's definition of "Exchange Rate," the warranty regarding Oanda's exchange rates, and Oanda's discretion to adjust its spreads.

Further, Kalemba's argument that Oanda is improperly charging what amounts to commissions on trades is unsupported by the Agreements, as the Agreements expressly provide for Oanda to charge interest or financing charges on trades, and makes no mention of any commissions. Agreements ¶ 4.<sup>7</sup> Finally, the complaint does not set forth any facts to support Kalemba's claim that Oanda failed to use reasonable commercial efforts to execute trades at the exchange rates set by Oanda.

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<sup>7</sup> When Kalemba signed the Agreements, he acknowledged that he was not relying on Oanda's written or oral communications as a guarantee of trading outcomes. 2005 Agreement ¶¶ 13(j), 32(a); 2016 Agreement ¶¶ 13(j), 30(a).

Although the complaint does allege that Oanda's pricing was not transparent, the complaint does not allege that Oanda's lack of transparency constitutes a breach of the Agreements. However, at oral arguments, Kalemba's counsel clarified that it was not possible for Kalemba to determine the rate at which he was charged interest on trades, in violation of Oanda's duty under the contract to make such a rate and calculation available on its website. Agreements ¶ 4; NYSCEF Doc No. 28, court tr dated 4/4/18 at 14:25-16:8. While this allegation may support a cause of action for breach of contract, it is not sufficiently set forth in the complaint. Accordingly, while that branch of Oanda's motion to dismiss the second cause of action for breach of contract is granted, I grant Kalemba leave to replead the breach of contract cause of action for the reasons stated on the record at oral argument, court tr dated 4/4/18 at 27:10-28:4, 29:21-30:7.

## 2. Fraud

Oanda moves to dismiss Kalemba's fraud claim because it is duplicative of the breach of contract claim, not plead with particularity, based on unactionable puffery, and barred by the Agreements' reliance disclaimers that state that Kalemba was not relying on written or oral communications from Oanda to enter the Agreements, make transactions, or guarantee outcomes.

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011). All elements must be

plead with particularity. CPLR 3016(b). At minimum, a plaintiff must allege who spoke, what they said, and the date on which they said it. *E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 (1st Dept 2011). Further, the plaintiff must specifically allege how he relied on the misrepresentation, *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 (1st Dept 201), and how the alleged misrepresentation caused damages. *1711 LLC v 231 W. 54th Corp.*, 7 AD3d 261, 262 (1st Dept 2004).

“General allegations that [a party] entered into a contract while lacking the intent to perform it are insufficient to support [a fraud] claim.” *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995). A fraud claim is duplicative of a contract claim where it is based on the same underlying facts, *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 (1st Dept 2003), or where “it allege[s] no factual basis for recovery other than defendants' failure to keep promises; no damages [are] sought thereunder that would not be recoverable under a contract measure of damages.” *Stewart v Maitland*, 39 AD3d 319, 319 (1st Dept 2007).

Here, Kalemba’s fraud claim is fundamentally flawed in several respects. First, the allegations supporting the fraud claim are duplicative of Kalemba’s breach of contract allegations. Compare complaint ¶¶ 55-60 with *id.* ¶¶ 63-73. Kalemba alleges that Oanda defrauded him by failing to offer low and competitive spreads, transparent pricing, and commission free trading, despite Oanda’s advertising materials representing that it would do so. These allegations are almost identical to those supporting Kalemba’s breach of contract claim. Additionally, because the complaint alleges the same measure of damages

for both claims,<sup>8</sup> Kalemba can recover all damages under a contract measure of damages, which renders his fraud claim duplicative of the breach of contract claim. *Stewart*, 39 AD3d at 319.

To the extent that Kalemba claims that Oanda's advertising materials were collateral to the contract or misrepresentations of present facts regarding Oanda's practices, Kalemba fails to plead this claim with the requisite particularity. Other than identifying a single press release dated January 8, 2008, complaint ¶ 18, Kalemba makes only vague and conclusory allegations regarding Oanda's advertising materials. The complaint is devoid of allegations regarding when Kalemba received or viewed Oanda's advertising materials, when these misrepresentations were made, and who made any such misrepresentation, and is thus insufficient. *E1 Entertainment U.S. LP*, 85 AD3d at 562.

Moreover, Kalemba does not sufficiently plead reliance. Both Agreements specifically provide that Kalemba acknowledged and warranted that he was not relying on Oanda's written or oral communications as investment advice, as a recommendation to make particular trades, or as a guarantee of particular results. 2005 Agreement ¶¶ 13(j), 32(a); 2016 Agreement, ¶¶ 13(j), 30(a). Kalemba's disclaimer of reliance thus bars any claim for fraud regarding the substance of his transactions. *Richbell Info. Servs.*, 309 AD2d at 305 (affirming motion court's dismissal of fraud claim because "the

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<sup>8</sup> Compare *id.*, ¶ 61 ("Oanda is liable for all consequential and resulting damages.") with *id.*, ¶ 74 ("By reason of the foregoing fraudulent conduct, Plaintiff and Class members are entitled to recover all of their damages.").

representation was inconsistent with specific recitals in the stockholder agreement, and there was a merger clause disclaiming reliance on extrinsic representations”).

Accordingly, that branch of Oanda’s motion to dismiss the third cause of action for fraud is granted. The court has considered the remaining arguments of the parties and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that defendant Oanda Corporation’s motion to dismiss the complaint against it is granted; and it is further

ORDERED that plaintiff Mukengeshayi Kalemba is granted leave to serve and file an amended complaint so as to replead the second cause of action for breach of contract within twenty (20) days after service on plaintiff’s attorney of a copy of this order with notice of entry; and it is further


ORDERED that, in the event that Kalemba fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by Oanda’s counsel attesting to such non-compliance, is directed to enter judgment dismissing the entire action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

*Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

5/26/18  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
DO NOT POST

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE