SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

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OA HOLDING COMPANY LLC,

Plaintiff,

- v -

WELD NORTH VENTURES LLC,

Defendant.

INDEX NO. 652169/2016

MOTION DATE 3/7/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

In this action for breach of contract and fraud, defendant Weld North Ventures, LLC ("Weld") moves, pursuant to CPLR 3211(a) (1) and CPLR 3211(a) (7), to dismiss the complaint.

On June 25, 2015, plaintiff OA Holding Company LLC ("OA Holding") entered into a Unit Purchase agreement ("UPA") with Weld and various other sellers to purchase 100% of the membership interests in Organic Avenue, LLC ("Organic"), an organic juice business. At the time of purchase, Weld was the majority member of Organic.

Prior to the consummation of the sale of Organic, Weld provided OA Holding with Organic's Fourth Amended and Restated Limited Liability Company Operating Agreement (the "Fourth Agreement") which was dated December 31, 2012. Section 19 of the Fourth Agreement stated that:

> (a) In the event that Weld Members (the "Dragging Members") propose a Sale of the Company in a bona fide transaction to any Person that is not an Affiliate of any of the Dragging Members, the Dragging Members shall be entitled to deliver notice to the Company that the Dragging Members desire the Company and/or the Members to enter into agreements with one or more Persons that would result in a Sale of the Company (an "Approved Sale"), whereupon all Members and the Company shall consent to and raise no objections against the Approved Sale, and if the Approved Sale is structured as… (ii) a sale of Units, each Member shall, and hereby agrees to, agree to sell their Units on the same terms and conditions approved by such Dragging Members.

To complete the sale quickly, Weld relied on section 19's drag-along provision, which obligated all of Organic's members to consent to the sale.

The Fourth Agreement included a redemption obligation in Section 8(a) which stated:

> The Weld Members hereby agree that, on or prior to December 31, 2013 the Weld members shall, or shall cause the Company [Organic] to, offer to purchase all or any portion of the Units… then held by all Members…"

David Schwinger ("Schwinger"), vice president of OAM Manager Inc., the manager of OA Holding, alleges that prior to the execution of the UPA, he was concerned that not all the members had executed the Fourth Agreement. Schwinger asserts that OA Holding contemplated doing an equity offering or financing after acquiring Organic and did not want there to be a "cloud" on the title of the membership interests. OA Holding and Weld modified the UPA to address the issue of the failure of

all members to execute the Fourth Agreement and the UPA, and the effectiveness of the drag-along. The modification, embodied in Section 3.5 (a) of the UPA, stated:

> Upon consummation of the transactions contemplated by this Agreement... the **Purchaser** [OA Holding] **will have acquired good and marketable title** in and to **one hundred percent (100%)** of the issued and outstanding membership interests in the Company [Organic], **free and clear of all Encumbrances**. (emphasis in original)

The UPA also contained a representation and warranty from Weld, which stated that Organic did not have "any obligation . . . to purchase, redeem, or acquire any equity securities or interest" in Organic. In addition, the UPA contained an indemnification provision, which stated, "[s]ubject to the limitations set forth herein, [Weld] shall indemnify, defend and hold [OA Holding] . . . harmless against all liability, loss, and damage . . .relating to or arising from the untruth, inaccuracy or breach of any of the representations, warranties, covenants or agreements of [Weld] contained herein..."

On the closing date, the UPA was executed by Steven Berger, Vice Chairman, on Weld's behalf. Several, but not all, of Organic's members executed the UPA after the Closing Date.

On August 20, 2015, OA Holding engaged a placement agent (the "Offering Agent") to raise funds for the continuing operations of Organic (the "Offering"). According to the amended complaint, the Offering would raise two million dollars by issuing senior-secured convertible notes. The Offering Agent conducted due diligence on OA Holding and Organic and, on September 21, 2015, notified the former that the Offering was approved by the Offering Agent's investment committee.

On September 11, 2015, John Edelman ("Edelman"), one of the other sellers under the UPA, brought an action against Weld and Organic, but not OA Holding (the "Edelman Action").[1] Edelman is a signatory of the UPA, and one of the named sellers of units in Organic to OA Holding. In the Edelman Action Edelman alleged that Weld was required to, but did not, make a purchase offer by mail for Edelman's Organic shares in 2013. Weld made a purchase offer to Edelman on November 5, 2013, but Edelman declined it, alleging that it was invalid because it was made by email, and because he had not been provided with Organic's amended operating agreements. Edelman sought the $135,000 that he would have received, had he accepted, rather than rejected, the purchase offer from Weld in 2013.

Edelman also sought money damages against Organic for failure to provide him with a copy of the Fourth Agreement, alleging that he "did not have full and complete information concerning [Organic] to assess the merits of [Weld's] November 5, 2013 offer." The complaint in the Edelman Action did not contest the validity of Edelman's transfer of his interests pursuant to the Fourth Agreement's drag-along provision.

OA Holding alleges that, upon learning of the Edelman Action, it reviewed the executed UPA delivered by Weld's counsel after the closing and discovered that, "Organic Member LLC [a non-voting member of Organic which owned 1.7% of Organic's shares], had still not executed the UPA and Weld failed to deliver clean title to 100% of the membership interests as required by the UPA." OA Holding alleges that it

[1] *Edelman v. Organic Avenue, LLC*, NY Sup. Ct., Index #653091/2015.

was concerned that title to the membership interests was not marketable and this unclean title would prevent OA Holding from completing its equity offering.

On or about September 26, 2015, OA Holding alleges that it notified Weld's counsel of Edelman's complaint, and that Weld's counsel stated in an email, "[a]ssuming the accuracy of the facts you state [that a lawsuit was commenced against Organic] . . . Weld North would be responsible for indemnification obligations in accordance with the [UPA]." Subsequently, however, "Weld repudiated any liability that resulted in anticipatory breach of the UPA" and "as a direct result, the offering agent cancelled the offering, which caused OA Holding to lose the going concern value of [Organic]."

As per the amended complaint, without the funds from the Offering, Organic was unable to continue business and was forced to file for bankruptcy on October 15, 2015.

OA Holding commenced this action on April 22, 2016, asserting claims for breach of contract and fraud against Weld. Weld moves to dismiss the complaint on the grounds that OA Holding's allegations are conclusively disproven by the express terms of the UPA and because OA Holding has failed to state a cause of action for breach of contract and fraud.

Discussion

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established: a court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleader." *Sanders v. Winship*, 57 N.Y.2d 391, 394 (1982). In assessing a complaint, the Court must "determine simply whether the facts alleged fit within any cognizable legal theory."

Morone v. Morone, 50 N.Y.2d 481, 484 (1980). If the facts stated are sufficient to support any cognizable legal theory, the motion to dismiss should be denied. *Campaign for Fiscal Equity v. State of New York,* 86 NY2d 307, 318 (1995).

When a motion to dismiss is based on CPLR 3211 (a) (1), "'dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Morgenthow & Latham v. Bank of New York Co.,* 305 A.D.2d 74, 78 (1st Dept. 2003) (citation omitted).

Breach of Contract

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." *Flomenbaum v. New York Univ.*, 71 A.D.3d 80, 91 (1st Dept. 2009) *aff'd* 14 N.Y.3d 901 (2010). In interpreting a contract, the court must consider the parties' intentions, "[t]he best evidence of [which] . . . is what they say in their writing." *Banco Espírito Santo, S.A. v. Concessionária Do Rodoanel Oeste S.A.*, 100 A.D.3d 100, 106 (1st Dept. 2012) (internal quotation marks and citation omitted). "[T]he 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." *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dept. 2001).

1. Breach of the Warranty that OA Holding Would Receive Good Title

OA Holding maintains that Weld violated section 3.5 (a) of the UPA, which provided that OA Holding would receive good and marketable title to 100% of the

membership interests in Organic. OA Holding contends that, because of the allegations in Edelman's complaint, the Offering Agent determined that OA Holding did not have good and marketable title and was subject to a potential claim by Organic Member LLC ("Organic Member"), an entity which failed to sign either the Fourth Agreement or the UPA.

The documentary evidence submitted by Weld conclusively establishes, however, that Weld did not violate section 3.5 (a) of the UPA as a matter of law. Indeed, the express terms of the UPA are inconsistent with OA Holding's allegations. First, review of the complaint in the Edelman Action shows that Edelman did not even challenge title. In fact, Edelman expressly alleged that he assigned his interest in Organic to OA Holding.

Moreover, Organic Member, a non-voting member, was bound by the Fourth Agreement regardless of whether it signed the agreement. The Third Amended Operating Agreement ("Third Agreement") contained a provision permitting amendment on consent of the "voting Members holding at least sixty-six and two thirds percent (66 2/3%) of the then outstanding voting Units." It is undisputed that voting members holding at least 66 2/3% of the outstanding units of Organic approved the Fourth Agreement. *See* Fourth Agreement, Schedule II. Thus, the relevant documents show that Organic Member was bound by the Fourth Agreement, including the drag-along provision.

The Fourth Agreement's drag-along provision provided that all members, including Edelman and Organic Member, agreed to sell their units in connection with a

sale of Organic approved by Weld. Therefore, the UPA did not have to be signed by Organic Member to effect the conveyance of its membership units.

OA Holding does not allege that Organic Member, Edelman or any other member ever challenged the sale of their units to OA Holding. Considering the documentary evidence, OA Holding's allegation that a potential financing partner was concerned that Organic Member had not signed the Fourth Agreement and/or UPA is an insufficient basis to support OA Holding's claim that it did not receive good and marketable title as required by section 3.5 (a) of the UPA.

OA Holding also argues that the Fourth Agreement could not have been adopted absent Organic Member's signature because the Third Agreement required written approval of the amendment. The Third Agreement, however, required written approval only for a material adverse change that affected a member disproportionately with respect to other members. OA Holding did not allege a disproportionate effect on Organic Member relative to other members.

New York Limited Liability Company Law ("LLC Law") section 417 (b) does not require a different result, as it only states that certain types of amendments cannot be made to an operating agreement without the written consent of adversely affected members, unless the operating agreement provides otherwise. Here, the Third Agreement provides otherwise and its more permissive terms render LLC Law section 417 (b) inapplicable.

Because the documents submitted by Weld conclusively refute OA Holdings claim that Weld violated section 3.5 (a) of the UPA, OA Holdings may not assert a breach of

contract cause of action based upon an alleged violation of section 3.5 of the UPA. *See Morgenthow,* 305 A.D.2d at 78 (2003); *Ark Bryant Park Corp.*, 285 A.D.2d at 150.

2. Breach of the Indemnification Provision

OA Holding also asserts that Weld breached the UPA's indemnification provision by not indemnifying it for the Edelman Action. Weld argues that it had no obligation to indemnify OA Holding under the UPA for the Edelman Action because the Edelman Action was not based on the "untruth, inaccuracy, or breach of any of the representations, warranties, covenants or agreements" in the UPA.

As stated above, the Edelman Action did not name OA Holding as a defendant or challenge OA Holding's title to the Organic units. The Edelman Action was simply not based on the "untruth, inaccuracy, or breach of any of the representations, warranties, covenants or agreements" in the UPA, thus Weld was not required to indemnify OA Holding under the UPA. Contrary to OA Holding's contention, the email from Weld's counsel could not have been an admission of indemnification liability, as counsel stated that he had not received the Edelman Action documentation and was unaware of the specific allegations in the suit.

3. Breach of Warranty that Organic Lacked Any Redemption Obligations

Finally, OA Holding alleges that Weld violated section 3.5 (b) (iii) of the UPA, and bases this allegation on the language in Section 8(a) of the Fourth Agreement and on the allegations and outcome of the Edelman Action. Neither of these bases support OA Holding's claim for breach of 3.5(b)(iii) of the UPA.

Section 8 (a) of the Fourth Agreement states that "on or prior to December 31, 2013 the Weld Members shall, or shall cause the Company [Organic] to, offer to purchase all or any portion of the Units . . . then held by all Members . . ." The Fourth Agreement defines "Weld Members" as "Weld North Ventures LLC and/or any Transferee thereof."

Contrary to OA Holding's interpretation, the language in Section 8 (a) does not obligate Organic to purchase the units, rather it requires Weld to do so. Because the redemption obligation is Weld's, and not Organic's, Weld did not breach 3.5(b)(iii) of the UPA which states that "neither [Organic] nor any of its subsidiaries has any obligation... to purchase, redeem or otherwise acquire any equity securities or any interest therein..." *See Banco Espírito Santo,* 100 A.D.3d at 106 (a clear and unambiguous document on its face "must be enforced according to the plain meaning of its terms") (internal citation omitted).

Further, OA Holding's argument, that the Edelman Action lends support to its breach of warranty claim, is erroneous. In the Edelman Action, the claim for breach of Section 8 (a) of the Fourth Agreement is only brought against Weld and focuses on Weld's alleged failure to comply with the contractual notice requirement.

In sum, Weld submits documentation to conclusively refute all three grounds on which OA Holding bases its breach of contract claim. Accordingly, I grant Weld's motion to dismiss the breach of contract claim.

Fraud

Where a fraud claim is merely duplicative of a breach of contract claim and the alleged breach of duty is one owed based upon alleged contractual obligations, a court will dismiss the fraud claim. *See Rivas v. AmeriMed USA, Inc.*, 34 A.D.3d 250, 250 (1st Dept. 2006); *J.E. Morgan Knitting Mills v. Reeves Bros.*, 243 A.D.2d 422, 423 (1st Dept. 1997) (dismissing fraud claim as duplicative of breach of contract claim because both claims were based on the same facts).

OA Holding's fraud claim is duplicative of its breach of contract claim, as the only alleged misrepresentations supporting the fraud claim are the same as those upon which the breach of contract claim is based.

In accordance with the foregoing, it is

ORDERED that Defendant Weld's motion to dismiss plaintiff OA Holding's complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to Weld as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

3/23/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE