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

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OMNIVERE, LLC,

Plaintiff,

- v -

SAUL FRIEDMAN, SAUL N. FRIEDMAN & CO., SIMEON FRIEDMAN, BEN FRIEDMAN, INTELLIGENT DISCOVERY MANAGEMENT, LLC, BALINT BROWN & BASRI, LLC,

Defendant.

INDEX NO. 154544/2016

MOTION DATE

MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 155, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 195 DISMISSAL

HON. JENNIFER G. SCHECTER:

Pursuant to CPLR 3211(a)(1) and (7), plaintiff and counterclaim defendant OmniVere LLC and third-party defendants Omnivere Holding Company LLC and Eric S. Post (collectively Omnivere) move for dismissal of the counterclaim and third-party complaint. Defendants and counterclaim/third-party plaintiffs Intelligent Discovery Management (IDM) and Balint Brown & Basri, LLC (B3) (collectively IDMB) oppose the motion.

Background

IDM was a provider of litigation support and e-discovery services (Affidavit is Support [Sup], Ex 1 Counterclaim and Third Party Complaint [Complaint] at Counterclaim at ¶ 2). B3 was a provider of temporary legal staffing to law firms and corporations (*id.*). IDMB along with Kopy International, LLC (Kopy) operated under common ownership as part of a litigation support and e-discovery business known as Superior Discovery (*id.* at ¶

8). These entities were owned by Simeon and Eva Friedman (Friedmans) and the CEO of the entities was Gadi Rosenfeld (Rosenfeld) (*id.* at ¶¶ 8, 14).

Omnivere, LLC is a wholly-owned subsidiary of Omnivere Holding, LLC (Complaint at Counterclaim at ¶ 5). Omnivere's CEO is Erik S. Post who also founded the companies (*id.* at ¶ 6).

In 2014, Omnivere began negotiating for and purchasing a number of e-discovery vendors and similar providers (Complaint at Counterclaim at ¶ 10). Medley Capital Corp. (Medley) provided Omnivere with financing (*id.* at ¶ 11). IDMB alleges that as a condition for financing, Medley insisted that Omnivere's transactions meet certain benchmarks (*id.* at ¶ 12).

In February 2014, IDMB and Omnivere commenced negotiations. IDMB contends that Omnivere retained attorneys and accountants to conduct due diligence and determined that, despite interest in purchasing IDMB, it did not want to purchase Kopy, in part, because Kopy was unprofitable and it would have made it more difficult to obtain financing from Medley (Complaint at Counterclaim ¶¶ 15-16). IDMB further urges that the parties analyzed Kopy and decided "which items were made part of IDM, such that it would be included or excluded from the deal, as the case may be" (*id.* at ¶¶ 17, 38).

"After weeks of due diligence and negotiations, the parties [IDM, B3 and Omnivere, LLC] signed an Asset Purchase Agreement [APA]" (Complaint at Counterclaim at ¶ 19). Omnivere, LLC acquired substantially all of IDMB's assets pursuant to the APA for $9.9 million in cash and $2 million in preferred equity in Omnivere Holding, LLC in the form of 1,153,846 Class B Units (Units) pursuant to a simultaneously-executed Operating

Agreement [OA] of Omnivere Holding, LLC (*id.* at ¶ 20; Sup, Ex 2 [APA] at § 2.4). The OA governed the Units (*id.*).

The OA

Among other things, the OA provided for distributions and allocations of profit and loss with respect to the Units (Sup, Ex 4 [OA] at § 5). Distributions, however, were subject to any applicable agreement to which Omnivere was indebted for "borrowed money and to the retention and establishment of reserves or payment to third-parties" such as the Term Loan Agreement (TLA) with Medley (*id.*). The TLA was defined as a Credit Agreement dated May 5, 2014, between Omnivere, LLC and Medley (OA at p. 8). One year after the issuance of the Units, IDMB could convert any portion of the Units to Class BB Units (OA at § 11.10). In addition, IDMB had the right to seek up to $2 million in payment for the Units at any time following the third anniversary of the date of issuance and only once there had been payment in full of all obligations outstanding under the TLA and other Term Loan Documents (OA at § 11.8).

Significantly, Section 5.1(f) of the OA provides:

> "Except to the extent set forth in the immediately following sentence, each Unit Holder agrees that it will not ask for, demand, sue for (including, without limitation, commencing, prosecuting or participating in any administrative, legal or equitable action . . . against [OmniVere Holding, LLC] or with respect to the Units it holds), receive or exercise any remedy with respect to, and [OmniVere Holding, LLC] will not make any payment or distribution . . . . with respect to any Units until payment in full . . . of all obligations outstanding under the [TLA], after the termination of all commitments thereunder and the other Term Loan Documents"

(OA at § 5.1[f]).

Pledge Agreement

Pursuant to the APA, moreover, IDMB's Units were pledged to Omnivere, LLC as collateral to secure certain indemnification obligations (Sup, Exs 2 [APA] at 3.2[a][xi], 3 [Pledge Agreement]; Memorandum in Support [Sup Memo] at 7). IDMB agreed to indemnify Omnivere, LLC and assigned Omnivere, LLC all of its "right, title and interest in and to the Units on the terms and subject to the conditions contained in [the Pledge] Agreement" (Pledge Agreement at "Background"). Under the terms of the Pledge Agreement, unless and until an Event of Default was declared, IDMB was entitled to receive and retain any and all distributions paid with respect to the Units (Pledge Agreement at ¶ 4).

Misrepresentations of Units' Value

IDMB asserts that according to the APA, the Units were worth $2 million and that the number of shares and their value were based on Post's written and oral representations that "upon closing, Omnivere's annualized forecasted revenue immediately would be '$40 million in sales and $10 million in EBITDA[Earnings Before Interest Taxes Depreciation and Amortization]'" (Complaint at Counterclaim at ¶¶ 25-26; NYSCEF Doc No 195 [Transcript (Tr)] at 8-11). IDMB contends that such representations were false as Omnivere's internal projections of annualized revenue were $33 million and that the figure included increased revenue predictions of acquisitions (*id.* at ¶¶ 28-29). IDMB contends that that the $40 million figure was "a complete fabrication by Post in an effort to convince [IDMB] to accept the [Units]" (*id.* at ¶ 30).

Misrepresentations and Breaches of the TLA, OA and APA

IDMB claims that it relied on written and oral representations of Omnivere and specifically Post as it was not shown important documents related to the transaction (Complaint at Counterclaim at ¶ 24; Tr at 8-12). IDMB contends that it was never shown the TLA, on which its rights were contingent, and that Omnivere made misrepresentations about its relationship with Medley and the TLA (*id.* at ¶ 32). IDMB further alleges that documents that were part of the APA and OA and were referred to as exhibits were not actually shown to IDMB because Omnivere claimed that the documents were confidential due to simultaneous acquisitions and discussions with Medley (Complaint at Counterclaim at ¶ 21).

IDMB also asserts that Post misrepresented that: (1) Omnivere had a war chest for additional acquisitions, (2) Omnivere had secured a $3 million revolving line of credit that would assist financing business operations after the acquisition of IDMB and (3) that Omnivere had a new lender that would allow for refinancing of the Medley loans within weeks (Complaint at Counterclaim at ¶¶ 33-35).

IDMB further urges that Omnivere knew that Kopy had liens, and that in order to make the acquisition appealing to Medley, the parties purposefully officially excluded Kopy from the transaction; yet, they transferred certain Kopy assets to IDMB and excluded liabilities (Complaint at Counterclaim at ¶¶ 37-40). After the acquisition took place and after conducting due diligence, Omnivere claimed that it was the victim of IDMB fraud disclaiming knowledge about Kopy's liabilities or that Kopy assets were even part of the transaction to Medley (*id.* at ¶ 41). IDMB claims that such pretext indicates that Omnivere

never intended to honor the agreements particularly with respect to the Units (*id.* at ¶¶ 42, 45-46).

IDMB maintains that Omnivere ignored inquiries regarding the status of the Units and would not provide tax documents for the Units to be reviewed as required by the OA (Complaint at Counterclaim at ¶¶ 49-50). In addition, pursuant to the OA, IDMB was entitled to convert the Units to Class BB Units (*id.* at ¶ 52). When IDMB issued a notice of conversion in February 2016, for 50,000 Units, it alleges that Omnivere "wrongfully" refused to honor the conversion claiming that the Units were transferred to Omnivere pursuant to the Pledge Agreement (*id.* at ¶ 53).

IDMB also contends that it is entitled to the escrow funds. Pursuant to the APA, a portion of the purchase price included the net receivables price. The numbers were expected to be adjusted after the closing and after the parties had reviewed the numbers as of the closing date (Complaint at Counterclaim at ¶ 56). Therefore, $345,000 of the purchase price was placed in escrow in the event that there were adjustments to the net receivables (*id*). Omnivere submitted its post-closing proposed adjustments but later withdrew it. Omnivere and IDMB did not meet thereafter to resolve their proposed adjustments (*id.* at ¶ 57).

IDMB alleges that Omnivere's misrepresentations and omissions were made to induce it to invest in the Units and enter into the APA and that such misrepresentations and omissions were knowingly made, or at least recklessly made, and were relied upon causing damages (Complaint at Counterclaim at ¶¶ 59-64).

IDMB asserts causes of action for (1) fraud, (2) negligent misrepresentation, (3) breach of the Omnivere Holding Company, LLC's Operating Agreement with respect to the Units (against Omnivere LLC and Omnivere Holding, LLC only), (4) breach of the APA and (5) tortious interference with the OA and APA.

Analysis

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded liberal construction and the facts as alleged are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiffs are afforded the benefit of every possible inference and the court only determines whether the facts as alleged fit within any cognizable legal theory (*id.*). A CPLR 3211(a)(1) dismissal is only warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88 citing *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In assessing a motion under CPLR 3211(a)(7), the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*).

Fraud

A cause of action for fraud must be pleaded with particularity and requires (1) a material misrepresentation or omission of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Omnivere contends that the allegation that it issued worthless preferred stock as part of a fraudulent scheme to induce IDMB to enter into the APA is not economically plausible

because (1) Omnivere paid IDMB $9.9 million cash and (2) the Units were pledged to Omnivere at closing to protect Omnivere from the risk of IDMB fraud (Sup Memo at 2). Additionally, Omnivere urges that IDMB did not allege any misrepresentation that was material.

Only two misrepresentations are alleged. The first was Post allegedly telling IDMB that Omnivere expected that by the closing Omnivere would have a combined $40 million in annual sales and earnings of at least $10 million a year. IDMB claims that this was a misrepresentation because actual annual sales at the time of closing were only projected to be $33 million.

IDMB, however, does not explain how these projections were calculated or where the numbers came from, other than in informal emails. At oral argument IDMB stated that it obtained the information from discovery that was provided in a different litigation, however, it still did not explain how the projections were reached and admitted that it conducted no projections of its own (Tr at 5, 12, 19-20). Rather, IDMB merely asserts that the APA valued the Units at $2 million and that the number of shares and their value were based on Post's written and oral representations that "upon closing, Omnivere's annualized forecasted revenue immediately would be '$40 million in sales and $10 million in EBITDA'" (Complaint at Counterclaim at ¶¶ 25-26). IDMB contends that such representations were sufficient to be relied upon and that they were false (*id.* at ¶¶ 28-29).

Significantly, "where a party has the means to discover the true nature of the transaction by the exercise of ordinary diligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations (*Stuart Silver Assocs.*

Inc. v Baco Development Corp., 245 AD2d 96, 98-99 [1st Dept 1997]). IDMB does not demonstrate how its reliance on any representation could be reasonable when it could have obtained background information about the anticipated state of Omnivere on its own through legal and financial advisors. Moreover, the APA only provided for minimal warranties by Omnivere (APA at § 5[as relevant, section 5.6 merely warranties that Omnivere will have sufficient funds to consummate the transaction and make the cash payment]; APA ¶ 9.1 [each of (Omnivere's) representations and warranties must have been accurate in all material respects]; *NM IQ LLC v OMNISKY Corp.*, 31 AD3d 315 [1st Dept 2006][fraud cause of action dismissed when buyer allegedly misrepresented its financial condition and subscriber projections]; *Stuart Silver Assocs. Inc. v Baco Development Corp.*, 245 AD2d 96 [1st Dept 1997][even if statements regarding expected return were fraudulent, plaintiff could not establish that reliance on such statements was reasonable]). And, Section 14.4 of the APA makes clear that a party may not rely on another party's representations unless they were specifically set forth in the APA itself (APA at § 14.4). None of the alleged misrepresentations are covered under the APA.

Additionally, IDMB does not demonstrate how a difference of $7 million in projected annual sales was material to the transaction especially in light of the decision to invest and to accept $2 million in preferred equity, which was pledged back to Omnivere (Sup Memo at 3). The preferred equity, moreover, did not offer any redemption rights for three years, and then only if certain senior creditors had been repaid (*id.*).

The second alleged misrepresentation, not listed in any agreement, was that Omnivere had a $10 million war chest to make additional acquisitions and had secured a

$3 million revolving line of credit. IDMB again does not reveal any efforts on its part to confirm this information. More importantly, IDMB does not disclose how this information was material to its decision to go forward with the transaction in light of the fact that, even if Medley was paid back in full by a refinancing (1) the Units were transferred to Omnivere as security, (2) conversion rights only kicked in one year after issuance (OA at § 11.10) and (3) IDMB could only demand that the Units be purchased 3 years after their issuance (OA at § 11.8; Sup Memo at 4; *see 88 Blue Corp. v Staten Island Builders Co.*, 176 AD2dd 536. 538 [1st Dept 1991][alleged misrepresentations as to availability of financing are non-actionable expressions of future expectations, not statements concerning an existing fact]).

To the extent that IDMB alleges that document omissions were fraudulent, the argument is without merit. IDMB had an opportunity to do its own due diligence. To rely on representations without seeing documents, which it claims are material, and enter into a multi-million-dollar sale of assets cannot be justifiable. IDMB never insisted on any documentation to back up the alleged misrepresentations by Post and it even signed the APA without insisting on access to documents such as the omitted exhibits to the agreement (Complaint at Counterclaim at ¶ 32).

Because IDMB has not alleged how Post's misstatements of fact or omission of documents were material or could be justifiably relied upon, the fraud cause of action is dismissed.

Negligent Misrepresentation

IDMB alleges that Omnivere made negligent misrepresentations because "certain documents were redacted from the APA and [OA] and/or were not shown to [IDMB]" and

that Omnivere had a "special duty to [IDMB] to make truthful and accurate statements regarding the nature and context of those documents" (Counterclaim at ¶ 72). At oral argument the court found that there was no special duty and dismissed the negligent misrepresentation cause of action as a matter of law (Tr at 37-38; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]).

Breach of the OA and APA

To state a claim for breach of contract, IDMB must allege (1) the existence of a contract, (2) its performance thereunder, (3) Omnivere's breach and (4) damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

IDMB alleges that Omnivere, misrepresented the value of shares, failed to provide documents (i.e tax documents) relating to the Units and that it refused to release a portion of the escrow funds (Counterclaims at ¶ 85). IDMB further alleges that Omnivere failed to make distributions and refused to allow it to convert its preferred equity to a different class or otherwise acknowledge IDMB's ownership of the Units (Sup Memo at 4).

IDMB's claim for breach of the OA fails, however, because pursuant to Section 5.1(f) of the OA, holders of preferred equity may not sue for any rights arising out of the preferred equity Units, unless and until Medley had been paid in full. It is undisputed that Medley has not been paid in full (Tr at 37). In addition, as previously explained, IDMB pledged the Units to Omnivere and had restricted rights.

IDMB's claims also fail with respect to the APA. First, the Units are governed by the OA which prohibits any litigation regarding the Units at this juncture (OA at Section 5.1[f]). With respect to the release of escrow funds, IDMB does not point to a provision

in the APA dealing with release of the funds under the circumstances presented here, rather it alleges that the "parties expected the final numbers to be adjusted based on post-closing review by both parties of the accounts receivable and accounts payable as of the date of closing" (Counterclaims at ¶ 55). The parties began attempting to update adjustments, however, they have not agreed on a final number (Counterclaims at ¶ 57). IDMB asserts that it is "entitled to receive the funds in the escrow account" (Counterclaims at ¶ 58).

The APA merely states that a certain percentage of account receivables would be placed in an escrow account "which funds shall be held in escrow pursuant to an Escrow Agreement" as a reserve for any uncollected amounts (APA at §§ 2.4[c][ii]; 2.5). "If the sum of the Uncollected Amount [Purchaser shall remit to Seller an accounting of uncollected Accounts Receivable] is equal to or exceeds the Escrow Amount, the entire Escrow Amount shall be promptly returned to the Purchaser. If the sum of the Uncollected Amount is less than the Escrow Amount, the amount by which the Escrow Amount exceeds the Uncollected Amount shall be promptly remitted to [IDMB] . . ." (APA at § 2.5). Significantly, Section 2.6 of the APA provides that if the parties are "unable to reach an agreement . . . all unresolved disputed items shall be promptly referred to . . . (the Independent Accountant)" who would provide a written report on the unresolved disputed items and whose decision shall be "final and binding" (APA at § 2.6[b]). Here, IDMB does not allege whether the accounts receivable during the collection period met the threshold amounts provided for in the APA so that it would be entitled to the full return of the Escrow Amount. In addition, it does not allege that it submitted the dispute to the Independent Accountant as provided for in the agreement. Because the APA states the

terms of the release of escrow funds and provides that if a dispute arises it should go to the Independent Accountant and because the conditions of the APA have not yet been met, the claim for breach of the APA is dismissed.

In all other respects, IDMB's claim is too speculative and conclusory since it has failed to state which APA clauses were breached and how they were breached.

Tortious Interference With Contract

IDMB claims that Omnivere, LLC interfered with the OA and that Omnivere Holding, LLC interfered with the APA (Complaint at Counterclaim at ¶¶ 89-95).

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

Significantly, IDMB's cause of action for breach of contract is being dismissed. In addition, IDMB's allegations are meager. To the extent that IDMB alleges that Omnivere, LLC and Post induced Omnivere Holding, LLC to breach the OA, it fails to allege a duty owed to it as a preferred equity holder, especially in light of the fact that (1) it transferred its rights in the Units to Omnivere, (2) Medley had not been paid, (3) the required time to pass for any action had not passed and (4) Section 5(f) of the OA prohibits suit under these circumstances. To the extent that IDMB alleges that Omnivere Holding, LLC and Post induced Omnivere, LLC to breach the APA, there are no allegations of what provision of the APA was allegedly breached or even how such a breach was procured by Omnivere

Holding, LLC or Post (see *Eric Vaughn Flam, P.C. v FTF Crawlspace Specialists Inc.*, 2002 NY Slip Op 50509[U][Sup Ct, New York County 2002]).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the counterclaim and third-party complaint are dismissed with costs and disbursements to the moving parties as taxed by the Clerk upon the submission of an appropriate bill of costs;* and it is further

ORDERED that the remainder of the action is hereby severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

*The negligent misrepresentation counterclaim was dismissed at oral argument (Tr at 37-38).

12/6 /2018
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE			X	NON-FINAL	
	X	GRANTED		DENIED		GRANTED IN	OTHER
APPLICATION:		SETTLE				SUBMIT	
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