SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

TRANSCAN SYSTEMS, INC.,

Plaintiff, Decision and order

- against - Index No. 512741/19

ms # 1

SELDAT DISTRIBUTION INC., SELDAT, INC., (DELAWARE), SELDAT INC., (ONTARIO) & DANIEL DADOUN

Defendants, January 21, 2020

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff alleges it was a startup company formed in 2015 to provide integrated solutions including software products for port participants such as shippers, carriers, port operators and customs agencies. TranScan sought financial and strategic partners and eventually entered into an agreement with Seldat Distribution. Thus, on June 1, 2016 the parties entered into a stock subscription agreement whereby the defendant Seldat Distribution agreed to pay $2 million in exchange for preferred shares of plaintiff corporation. In a prior lawsuit the defendant sued the plaintiff alleging the plaintiff TranScan never filed an amendment to its Certificate of Incorporation authorizing the shares to which defendant was entitled. The

court dismissed the lawsuit on the grounds the allegation was moot since the authorization of the shares was fulfilled and the shares were ultimately delivered. The plaintiff has now instituted this lawsuit against the defendants alleging the defendants breached the subscription agreement, breached the strategic partnership agreement, committed fraud and negligent misrepresentation. Specifically, the Verified Complaint alleges Seldat failed to provide necessary data required under the agreement and admitted it never had the data to provide to TranScan. Further, the Verified Complaint alleges Seldat failed to provide $500,000 that it contracted to invest.

The defendants have now moved seeking to dismiss the complaint. First, the defendants allege the lawsuit against all the defendants except Seldat Distribution must be dismissed because the court lacks jurisdiction over those defendants since they were not a party to any agreement. Further and in any event the complaint should be dismissed against all the defendants for the failure to state any cause of action. The plaintiff counters the complaint has alleged viable claims and the parties should proceed with discovery.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as

true, whether the party can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

Preliminarily, all service of process on all the defendants was proper. Turning to the general jurisdiction issues, a non-domiciliary may be subject to the jurisdiction of New York courts where that entity "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR §302(a)(1)). "Although it is impossible to precisely fix those acts that constitute a transaction of business" case law has established that "it is the quality of the defendants' New York contacts that is the primary consideration" (see, Fischbarg v. Doucet, 9 NY3d 375, 849 NYS2d 501 [2007]). Thus, it is generally true that electronic mail or telephone communications, are insufficient to constitute 'transacting business' sufficient to confer jurisdiction (Dukes Bridge LLC v. Security Life of Denver Insurance Company, 2016 WL 1700383 [E.D.N.Y. 2016]). Thus, the plaintiff must demonstrate the out of state party "engaged in some purposeful activity within the State and that there was a substantial relationship between that activity and the plaintiff's cause of action" (Bill-Jay Machine Tool Corp. v.

Koster Industries, 29 AD3d 504, 506, 816 NYS2d 115 [2nd Dept., 2006], see, also Armouth International Inc. v. Haband Co., 277 AD2d 189, 190, 715 NYS2d 438 [2nd Dept., 2000]).

For example, in Uribe v. Merchants Bank of New York, 266 AD2d 21, 697 NYS2d 279 [1st Dept., 1999] the court held that the foreign corporation was not 'doing business' in New York where there was no evidence that the foreign corporation maintained any business office, maintained a business telephone number, owned real estate and had any employees in the state. The court found that the activities of the foreign corporation consisted of "solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" and the court concluded that was insufficient to demonstrate the foreign corporation was 'doing business' in New York. Moreover, without evidence of doing business there is a presumption that the corporation then does business in its area of incorporation (Household Bank (SB), NA v. Mitchell, 12 AD3d 568, 785 NYS2d 116 [2d Dept., 2004]). To rebut that presumption the party seeking to prevent the foreign business from maintaining jurisdiction has the burden of demonstrating the business activities of the foreign corporation were systematic and regular as to manifest continuity of activity within New York (Gemstar Canada Inc., v. George A. Fuller Co., Inc., 127 AD3d 689, 6 NYS3d 552 [2d Dept., 2015]).

There is no dispute the defendant's entities of Delaware and Ontario are foreign corporations. The plaintiff asserts both entities conducted business in New York because defendant Dadoun presented a business card to the plaintiff that stated he was the CEO of Seldat Inc., and was the owner of all Seldat entities and the e-mail address and website included a reference to Seldat Inc. However, that does not demonstrate any activity that could possibly constitute 'doing business' in New York. The mere fact Dadoun was the owner of the entities does not establish those entities conducted any business in New York. Consequently, Dadoun's New York office cannot be considered the office of foreign corporations, for jurisdiction purposes, when there has been no evidence presented any business was conducted. The mere fact Dadoun's business card might have referenced other entities is an insufficient basis to confer jurisdiction. Therefore, the motion seeking to dismiss the Delaware and Ontario entities is granted.

Concerning the substantive motion seeking to dismiss the complaint, the defendants argue the plaintiff materially breached the agreements by failing to deliver the shares in a timely manner and that such breach relieved them of providing any further funding. Therefore, they argue the first cause of action for breach of contract must be dismissed. The plaintiff asserts the defendants waived any claims regarding the failure to deliver

the shares by continuing to participate in the plaintiff's activities and that in any event the cause of action should not be dismissed. There can be little dispute the plaintiff was required to timely deliver the shares to the defendants and that they failed to do so. Further, the only reason the court dismissed the complaint in the prior action was because Seldat could not allege any damages since the shares, albeit worthless, were ultimately transferred to them by TranScan. Indeed, the court did not hold no breach occurred by the failure to deliver the stock certificates. Rather, the court noted that "even if true that not providing the stock certificates constituted a breach the plaintiff must allege damages" (see, Decision dated April 1, 2019 in *Seldat Distribution Inc., v. TranScan Systems Inc., and Joseph Frasko*, Index No. 520228/18). TranScan argues Seldat now maintains a position that is inconsistent with the position it held in the prior action when it asserted the agreement had not been terminated thereby undermining the potency of its arguments here. However, no such inconsistency exists. TranScan did not deliver the shares in a timely manner pursuant to an agreement wherein such shares were to be timely delivered. As Seldat argued in the prior action such agreement was binding and a breach therefore occurred. While a breach did occur, as noted, no cause of action was possible for technical pleading reasons concerning damages. Thus, TranScan now makes the

implausible argument that it indeed breached the agreement by not delivering the shares in a timely manner, however, Seldat is really at fault for not paying the fourth installment anyway because it once argued the agreement had been valid.

Further, TranScan does not dispute that it may have breached the agreement, rather it argues Seldat waived such breach. The basis for such an argument is the allegation Seldat "continued to perform by making payments, and to accept performance by attending shareholder presentations, requesting financial and product development information and accepting its stock certificates in 2018, thereby waiving its ability to terminate for these breaches" (Memorandum of Law in Opposition, pages 12, 13). First, it is unclear which payments TranScan is referring to since the basis for the cause of action is the failure to make payments. More importantly, Seldat counters those activities do not evince a waiver of plaintiff's breach since they occurred prior to the due date of the fourth payment and prior to any possibility of any waiver. Further, Seldat did not 'accept' the stock certificates in 2018 which demonstrated a waiver, rather the certificates were delivered to Seldat at a time when they no longer had any value and in breach of the agreement. Thus, no waiver took place. Consequently, there can be no cause of action for breaching the agreement and consequently the motion seeking to dismiss the first cause of action is granted.

Turning to the third cause of action, the defendants seek to dismiss the action on the grounds the oral strategic agreement is barred by the merger clause of the subscription agreement.

It is well settled that a merger clause which states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). In this case the subscription agreement in Paragraph 5(d) states that "this subscription agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and may be amended or waived only by a written instrument signed by all parties" (id). The plaintiff argues the strategic agreement does not violate the subscription agreement because none of its terms contradict the subscription agreement. However, contradiction is not the governing test whether such oral agreements can change any of the terms of the written agreement. Rather, parole evidence cannot be used to modify or vary the terms of a written agreement that contains a merger clause (HSBC Bank USA N.A. v. Strong Steel Door, 36 Misc3d 1207(A), 954 NYS2d 759 [Supreme Court Kings County 2012]).

Therefore, the motion seeking to dismiss the third count is granted.

Turning to the cause of action of negligent misrepresentation, it is well settled that the plaintiff must demonstrate the existence of a special relationship imposing a duty upon the defendant to impart correct information, that the information was incorrect and there was reasonable reliance upon the information (Ginsburg Development Companies LLC v. Carbone, 134 AD3d 890, 22 NYS3d 485 [2d Dept., 2015]). A special relationship either means a fiduciary relationship between the parties, a privity-like relationship or a relationship where the plaintiff "emphatically alleges" the defendant had unique or special expertise (see, Alley Sports Bar, LLC v. SimplexGrinnell LP, 58 F.Supp3d 280 [W.D.N.Y. 2014]). Likewise, concerning the cause of action alleging fraud it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]).

Both claims are based upon the same allegation, namely that Seldat promised to provide shipping data vital to the plaintiff

and misrepresented its ability to do so upon which the plaintiff relied. However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]). Thus, there can be no cause of action for fraud where the only fraud relates to a breach of contract (WIT Holding Corp., v. Klein, 282 AD2d 527, 724 NYS2d 66 [2d Dept., 2001]). The allegations of the complaint assert Seldat misrepresented its knowledge of the shipping industry pursuant to the subscription agreement. It is true the court has already dismissed the existence of any strategic agreement, however, any obligations or duties on the part of Seldat are all contained within the subscription agreement. Therefore, any misrepresentation that flowed from that agreement is nothing more than a breach of contract which cannot sustain any cause of action for fraud or negligent misrepresentation. The plaintiff opposes that contention arguing the breach of contract claim is not duplicative of the fraud claim because the representation concerning the shipping data was not specifically within the contract.

It is true that a misrepresentation of a material fact that

is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the

contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case Exhibit F of the subscription agreement states that Seldat was offered its investment "at a lower valuation because Company [TranScan] values Subscriber's [Seldat] technical experience, market expertise and market access, and Subscriber has indicated that it will use these in support of the Company" (see, Exhibit F third paragraph). The plaintiff argues that "at the time they made these representations, the Defendants did not have the data that they claimed to have, nor was it stored in a manner that could readily be transferred to TranScan. These factual representations induced TranScan to enter into both the Subscription Agreement and Strategic partnership Agreements and to expend substantial funds developing their products and seeking pilot projects. As the factual misrepresentations are collateral to the contracts, the misrepresentation claims are properly pled" (see, Memorandum in Opposition, page 19). However, these promises were included within the agreement itself and cannot be classified as collateral. The agreement clearly stated that Seldat's valuation was lowered in exchange for promises made by Seldat in furtherance of TranScan's product. The failure to adhere to those promises or the misrepresentation of those promises are nothing more than breaches of contract. Therefore, there can be no separate causes of action for fraud or negligent misrepresentation. Consequently, those causes of action are dismissed. Indeed, the defendant's motion seeking to dismiss the

complaint is granted in full.

So ordered.

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DATED: January 21, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC