SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M
Justice

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ARGENTO SC BY SICURA INC.

Plaintiff,

- v -

ALLEN HIRSCH,

Defendant.

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INDEX NO. 160504/2021

MOTION DATE 08/12/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

Plaintiff Argento S.C. By Sicura, Inc. (hereinafter "Argento") commenced the instant action against defendant Allen Hirsch (as owner of Handl New York, LLC; "Handl") asserting causes of action for fraudulent inducement and breach of fiduciary duties. In Motion Sequence 001, Hirsch moves pursuant to CPLR 3211 (a) (7) for an order dismissing these causes of action. Argento opposes the motion in its entirety. For the following reasons, Hirsch's motion is granted.

BACKGROUND

After developing a novel smartphone case in 2014, Hirsch—an artist based in New York—obtained three United States patents and several trademark registrations for his designs. In 2018, Hirsch incorporated his company, Handl, in Delaware to design, manufacture, and sell the smartphone cases. In the fall/winter of 2020, Argento—as a self-described industry leader in the design, manufacture, and distribution of a variety of goods, including cellphone and smartphone cases—approached Hirsch and Handl to negotiate a joint venture agreement. During these negotiations, Hirsch allegedly represented to Argento and Jack Scaba, one of its principal agents, that Handl's prior agreement with C2 Wireless and Accessories LLC ("C2") for the manufacturing/sale of these smartphone cases had concluded and that Handl had agreed to pay $50,000 to C2 to resolve a dispute between them.

In December 2020, Argento and Handl executed a joint venture agreement ("the Agreement"). (*See* NYSCEF doc. no. 13, Joint Venture Agreement.) Section 2 of the Agreement provides "each of the two Parties of this Venture shall operate their respective businesses under their current names…This Venture shall not operate as a separate business entity." Section 5, entitled "Management," requires that "the Venture shall be managed jointly by one representative from each of the Parties (each, a 'Manager'). The Managers will meet or confer with each other on a periodic basis in the performance of their responsibilities." (*Id.*) Section 6 then distributes the parties' respective responsibilities: Handl would be responsible for the day-

to-day operations of Handl, including sales, marketing, accounting, and brand development, and ensure, among other things, the smartphone cases' manufacturing quality; Argento would assist Handl with establishing relationships with manufacturers in China and alternative financing sources, and provide engineering/marketing/packaging assistance. (*Id.*) Section 7, entitled "Financing of Inventory and Tooling," extends Argento an option, exercisable at its sole discretion, to finance Handl's manufacturing and tooling costs in return for a greater portion of the joint venture's profits as apportioned in Section 8. As described in the schedule in Section 8, Argento would receive 25% of the net profits on domestic sales if it were to provide the financing versus 15% if it did not exercise the option to finance. (*Id.*) Lastly, the Agreement provides, "This Venture is termed a contractual joint venture and will not constitute a partnership. The parties will provide services to one another on an arms' length basis while remaining independent business entities. Each Party is responsible only for its own actions and No Party is an agent for any other Party." (*Id.* at ¶25, Joint Venture Agreement, Miscellaneous Section.)

In April 2021, Argento extended Handl approximately $1.3 million in funding pursuant to Section 7's option clause. Soon after, Hirsch allegedly terminated a Handl employee who ran the day-to-day operations and shuttered its Boston office. Argento alleges that Handl failed to reimburse it for approximately $1,042, 994 or pay 25% of the profits Handl garnered from the sale of inventory purchased with Argento's funds. In June 2021, Handl filed for Chapter 11 bankruptcy. In that bankruptcy proceeding, Hirsch asserted that it still owed C2 $500,000—not $50,000 as warranted to Argento—and that Handl's smartphone case patents (which Argento sought in negotiations with Hirsch as collateral for nonpayment) were actually already securing the $500,000 in a UCC-1 Financing Statement.

Argento commenced the instant action in November 2021 alleging that Hirsch's misrepresented the value of his company's obligations to C2 and, thereby, fraudulently induced Argento to enter the joint venture agreement. Further, Argento alleges that Hirsch, by virtue of the Agreement, held fiduciary duties to Argento and that he violated those duties by firing the individual specifically responsible for Handl's duties under the Agreement. In the current motion sequence, Hirsch moves for dismissal pursuant to CPLR 3211 (a) (7), arguing that (1) Argento fails to plead it justifiably relied on, or suffered injuries from, his misrepresentations; and (2) the joint venture did not establish fiduciary duties between the parties.

DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) The courts' only function is to determine whether the facts as alleged fit within any cognizable legal theory. (*Id.*) As such, for Argento's fraudulent inducement cause of action, the Court only looks to whether the facts as alleged consist of "(1) a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, (2) made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation, and (4) [plaintiff's] injury." (*See Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016].) And for Argento's breach of fiduciary duties cause

of action, the Court only looks to whether the facts establish the existence of a fiduciary relationship, misconduct by the defendant, and damages caused by the misconduct. (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014], *citing Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007].) The Court finds that Argento has failed to sufficiently plead each cause of action.

Fraudulent-Inducement Cause of Action

Hirsch premises his argument on Argento's failure to cite evidence indicating that it performed due diligence or that the knowledge of Hirsch's resolution with C2 was solely within his possession (NYSCEF doc. no. 15 at 8, Hirsch memo of law.) In his view, since Argento is required to plead facts which would signal that it justifiably relied upon the alleged misrepresentations, and since Argento did not describe any due diligence on its part, Argento's pleadings are fatally deficient and should be dismissed. Though the Court recognizes that pleading justifiable reliance is a "fundamental precept" of a fraud cause of action and that its absence (as the case is here) would ordinarily warrant dismissal (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 579 [2018]), the issue is not dispositive on this motion.

In certain circumstances, where defendants have "essential" facts that are within their sole knowledge and such knowledge renders a transaction without disclosure inherently unfair, they have a duty to disclose the facts as known to them. (*Sports Tech. Applications, Inc. v MLB Advanced Media, L.P.*, 188 AD3d 619, 620 [1st Dept 2020], citing *Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 516 [1st Dept 2015].) To avail oneself of this "special facts" doctrine, a plaintiff must not only plead the above-described elements but also that the "information was not such that could have been discovered through the exercise of ordinary intelligence." (*Shareholder Representative Servs. LLC v Sandoz Inc.*, 2015 Slip Op 50326 [U] at *7 [Sup. Ct. NY County 2015], quoting *Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 2777 [1st Dept 2005].)

Here, Argento contends that, as alleged, the complaint makes out a cause of action for fraudulent inducement under the "special facts" doctrine. It maintains that: (1) the knowledge of the company's liability to C2 were solely within Hirsch's or Handl's possession given that the liability concerned a private contractual dispute and was not part of any public record or the subject of any litigation; (2) such a significant misrepresentation—$50,000 instead of $500,000—affected Argento's evaluation of an essential component of the company and devalued Handl's intellectual property that secured Argento's payments, all of which made the transaction unfair; and (3) the true facts of Handl's liability could not have been discovered through ordinary intelligence. Although Argento has undoubtedly demonstrated that Hirsch and Handl had superior knowledge of the company's liability to C2, the Court finds that Argento's allegations that it could not have discovered the information through the exercise of ordinary intelligence to be deficient. (*See New York City Waterfront Dev. Fund II, LLC v Pier A Battery Park Assocs., LLC*, 206 AD3d 565, 567 [1st Dept 2022].) The pleadings on this point are, at best, conclusory and lack anything that would indicate Argento attempted to verify Hirsch's statements (even as the alleged misrepresentations concerned what Argento considered to be a significant issue in its negotiations). (*See Kim v XP Sec., LLC*, 200 AD3d 420, 421 [1st Dept 2021] [Doctrine does not apply because "plaintiff's pleadings do not demonstrate that he

exercised ordinary diligence in investigating defendant's representations, despite their alleged importance to the employment agreement"].) In *Jana L.*, the First Department wrote that simply using the language "[the information] could not have been obtained through the exercise of ordinary intelligence" is insufficient for pleading the "special facts" doctrine. (22 AD3d at 278.) As this is precisely how Argento has described why it could not have discovered the misrepresentation, the Court is compelled to grant this branch of Hirsch's motion. (*See also New York City Waterfront Dev.*, 206 AD3d at 567 ["special facts" doctrine unavailing because plaintiff's allegations were conclusory].)

Argento's argument that the applicability of the "special facts" doctrine requires a fact-intensive inquiry and therefore the cause of action should not be dismissed before the conclusion of discovery is unpersuasive. As an initial matter, this fact-sensitive argument relies upon the possibility that discovery will uncover information as to whether the "special fact" doctrine applies. But this ignores that at this stage, requiring some factual allegation that indicates ordinary intelligence would not have uncovered the deception is a minimal threshold, often necessitating only allegations of whatever minimal attempts they made at verification—information entirely within the plaintiff's control. (*See Kim v XP Sec., LLC*, 200 AD3d at 421 [requiring pleadings demonstrate plaintiff exercised ordinary diligence in investigating facts for "special facts" doctrine to apply].) Again, this aspect is entirely missing from Argento's complaint. For example, as Hirsch argues, nowhere in the pleading papers does Argento allege that it sought even documentary proof or signed papers regarding Handl's agreement with C2.

Moreover, the cases Argento cites are in one way or another inapposite here. In both *China Dev. Indus. Bank v Morgan Stanley & Co. Inc.* (86 AD3d 435 [1st Dept 2011]) and *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.* (301 AD2d 373 [1st Dept 2003]), the plaintiffs alleged fraudulent inducement on the part of investment banks related to complex and opaque financial instruments—credit default swaps and collateral debt obligations—in the financial service industry. While the First Department in both cases found it improvident to dismiss the complaint, the courts appear to have held so because of the unique circumstances involved in these types of transactions at issue. In regard to *China Dev.* specifically, the First Department affirmed the lower court's judgment that, given the allegations that Morgan Stanley "corrupted the rating agencies," *no amount of due diligence* or analysis could have uncovered the deception and misrepresentations. The Court's only mention of having an obligation to disclose was in the context of fraudulent concealment—not the "special facts" doctrine. By contrast, as described above, the Court has determined that Argento failed to plead any basic actions it took to investigate statements that by its own account were important to it and that were by orders of magnitude less complex than those financial instruments.

Or consider *Swersky v Dreyer & Traub* (219 AD2d 321) and *Harbinger Capital Partners Master Fund I, Ltd. v Wachovia Capital Mkts., LLC* (2010 NY Slip Op 51046 [U] [Sup. Ct. NY County 2010]. Besides involving complex securities and large-scale fraud allegations, both courts found issues of fact as to the level of knowledge of each party and whether the exercise of ordinary intelligence could have independently ascertained the truth of defendants' statements. (*Swersky*, 219 AD2d at 327-328; *Harbinger*, 2010 NY Slip Op 51046[U] at *9.) Put differently, neither court appears to have confronted the type of conclusory allegations that are at issue here:

both of the respective plaintiffs in these cases seemed to have displayed some degree of diligence with regard to defendants' statements.

For the above stated reasons, Argento has not plead a cognizable fraudulent-inducement cause of action.[1]

Breach-of-Fiduciary-Duties Cause of Action

The premise of Argento's cause of action is that the joint venture agreement created fiduciary duties between the managers—Jack Scaba for Argento, Hirsch for Handl—to the joint venture and that Hirsch breached such duties by unilaterally undermining Handl's ability to distribute the smartphone cases. According to Hirsch, however, that the Agreement may have labeled the parties' business arrangement as a joint venture is immaterial to whether the agreement actually establish a joint venture as recognized under New York law. Citing to *Slabakis v Schik* (164 AD3d 454, 454-455 [1st Dept 2018]), *Richbell v Info. Servs. v Jupiter Partners* (309 AD2d 288, 298 [1st Dept 2003]), and *Lebedev v Blavatnik* (193 AD3d 175, 186 [1st Dept 2021]), Hirsch argues that to properly plead the existence of a joint venture Argento must, but cannot, allege that parties included a mutual promise to share in the profits of the business *and* its losses. The Court agrees. Described *supra*, the joint venture agreement contains Sections 7 and 8 that specify what would happen should Argento provide the financing for the manufacturing and tooling of the smartphone cases, but the agreement is silent as to the division of losses. As the First Department recognized in *Slabakis* and *Lebedev*, "an indispensable essential of a contract of contract of partnership or a joint venture…is a mutual promise or undertaking of the parties to share in the profits of the business and *submit to the burden of making good the losses* (quoting *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958])."

Without a division of losses, and therefore, without a joint venture, Argento's cause of action collapses on itself. Instead of a joint venture, the Agreement appears to provide for a lender-borrower relationship between Argento and Handl. Under such a relationship, "there is no special relationship of confidence and trust". (*See Oddo Asset Mgmt. v Barclay's Bank, PLC*, 19 NY3d 584, 593 [2012] ["There is generally 'no fiduciary obligation in a contractual arm's length relationship between a debtor and a note-holding creditor' (citation omitted)]".) The conclusion that the parties did not create an actual joint venture is furthered by looking to Section 25 of the Agreement. That section does three things: first, it disclaims that a partnership exists; second, it describes that the parties will undertake the services to each other "on an arms' length basis;" and third, it denies that either party is an agent for the other. (NYSCEF doc. no. 13 at ¶25.) It is clear that at each level Section 25 rejects the premise that each owe the other "a higher realm of relationship…or stricter duty." (*Oddo Asset Mgmt.*, 19 NY3d at 593 [2012].)

In opposition, Argento principally relies on *Don v Singer* (92 AD3d 576 [1st Dept 2012] and *Richbell Info. Servs.* (309 AD2d 288) for the proposition that issues concerning the existence

[1] Because the Court finds that Argento has not sufficiently plead justifiable reliance or its use of ordinary intelligence, it need not address Hirsch's further contention that Argento failed to plead a causal connection between the alleged misrepresentation and its injury. The Court also does not consider Hirsch's argument, submitted for the first time in reply, that the joint venture agreement contains a merger agreement that precludes any representations made during negotiations from constituting a fraud inducement cause of action.

of a joint venture are not suited for resolution on a motion to dismiss. (NYSCEF doc. no. 17 at 19-20.) Reliance on these cases, however, is mistaken. In *Don v Singer*, the First Department held that issues of fact exist as to "whether [defendant's] conduct manifested an intention to be bound as a joint venturer with plaintiff." The conduct that the First Department alluded to included remaining silent when provided with the agreements or when repeatedly introduced as plaintiff's partner. (*Don*, 92 AD3d at 577.) Here, Argento does not point to similar such conduct on Hirsch's part that might have implicitly manifested the intention to be deemed a joint. *Richbell* is no more helpful: as found by both the motion court and the First Department, the express written agreement that was the basis for the "joint venture" was merely "an agreement to agree" and therefore not binding on the parties. (*Richbell*, 309 AD2d at 297.) It was only in the absence of an express agreement that the First Department found issues of fact as to whether the parties, by their conduct, entered into an implied joint venture agreement.

Lastly, Argento argues that the language of a joint venture agreement does not preclude the Court from inferring a fiduciary duty from the circumstances beyond the contractual nature of the relationship. While an accurate statement, Argento allegations provide no reason to believe that the circumstances outside of the contractual relationship would impose additional duties on the party. As opposed to the circumstances in *Kern v Robert Currie Assocs.*, 220 AD2d 255 [1st Dept 1995], where a plaintiff relied on the defendant's advice after a series of interactions outside the strict confines of the contract, or *Era Capital L.P. v Soleil Chtd. Bank*, 2021 NY Misc. Lexis 2723 at 15-16 (Sup. Ct. NY County 2021), where a years-long customer-bank relationship developed into the financial-advisory relationship, Argento has not alleged any relationship outside the terms of the agreement. Because its cause of action requires it to plead a fiduciary relationship, and because Argento has not, this cause of action is dismissed.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant Allen Hirsch's motion pursuant to CPLR 3211 (a) (7) is granted against plaintiff Argento S.C. By Sicura, Inc and the complaint dismissed; and it further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry; and it further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court

1/12/2023
DATE

DAKOTA D. RAMSEUR, 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:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE