SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Index Number : 650008/2012
DSM2X, INC.
vs
KNOWLEDGE NETWORKS, INC.
Sequence Number : 002
DISMISS

INDEX NO. 650008/12
MOTION DATE 1/2/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 16
Answering Affidavits — Exhibits _____ **No(s).** 22
Replying Affidavits _____ **No(s).** 23

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S): _____

Dated: 2/22/13

SHIRLEY WERNER KORNREICH
J.S.C.

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

DSM2X, INC.,

Plaintiff,

-against-

GFK CUSTOM RESEARCH, LLC, KNOWLEDGE NETWORKS, INC., KN DIMESTORE MEDIA, LLC, and SIMON KOOYMAN,

Defendants.

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Index No.: 650008/2012

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendant Simon Kooyman moves to dismiss the fifth cause of action of the Second Amended Complaint pursuant to CPLR 3211. Defendant's motion is granted for the reasons that follow.

I. Factual Background & Procedural History

On January 3, 2012, plaintiff, DSM2x, Inc. (DSM2x), commenced this action against defendants Knowledge Networks, Inc. (KN), KN Dimestore Media, LLC (KNDM), and Kooyman in which DSM2x asserted, *inter alia*, breach of contract and fraud claims related to an Asset Purchase Agreement. In an Order dated May 22, 2012, this court dismissed the cause of action for fraud against Kooyman, with leave to replead. On June 1, 2012, DSM2x filed an Amended Complaint (the AC) in which it repled that fraud claim. Pursuant to a stipulation "So Ordered" by this court on October 23, 2012, DSM2x filed a Second Amended Complaint (the SAC) in which it asserted claims against an additional defendant, GfK Custom Research, LLC

(GfK).[1] The stipulation provided that (1) the claims against Kooyman would be pled in the SAC exactly as they were pled in the AC; and (2) the instant motion to dismiss (which was originally filed as to the AC) would apply to the SAC. As this decision involves a motion to dismiss, the facts recited are taken from the SAC.

In 2009, DSM2x, which was known at the time as Dimestore Media, Inc. (DM), was "engaged in the business of providing advertisers with targeted engagement and transactional data to enhance video and other types of advertising" (the Business). SAC ¶ 1. On September 29, 2009, DM, KN, and KNDM entered in an Asset Purchase Agreement (the APA), which provided that KNDM (under the management of KN) would operate and have the option to purchase the Business. *Id.* The APA required KN and KNDM to use commercially reasonable efforts to maximize the value of the Business. ¶ 2. The purchase price would be determined by the value of the business as calculated in the Valuation Matrix in the APA. *Id.* In order to oversee the transition and ensure transparency of the ultimate valuation of the Business, the parties executed an Advisory Agreement which established a Non-Executive Advisory Board (the Board) comprised of two KN officers and three DM officers. ¶ 3. Pursuant to the Advisory Agreement, the Board was to meet quarterly to discuss the status of the Business and KNDM was to provide each Board member with the Business's financial information. *Id.* On October 31, 2011, KN and KNDM notified DSM2x that it was exercising its option to purchase the business.[2]

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[1] KN and KNDM merged into GfK on January 3, 2012.

[2] As the instant motion is limited to the fraud claim against Kooyman, the Court omits facts from the SAC that are superfluous to the decision, such as the alleged facts regarding how DSM2x was paid.

The SAC contains five causes of action, the first four of which are for breach of contract and indemnification against GfK, KN and KNDM (collectively, the Corporate Defendants). These claims relate to alleged actions taken by the Corporate Defendants to devalue the Business in order to decrease the purchase price. The instant motion only concerns the fifth cause of action, which is a claim of fraud against Kooyman. Kooyman signed the APA on behalf of KN and was KN's CEO during the time period that the underlying events occurred. ¶ 14. The claim against Kooyman is that he made two sets of fraudulent representations in connection with the execution and implementation of the APA: "(1) that the Business would engage in 'virtual factoring,' whereby KN and KNDM would credit the amounts due under certain of the Business' receivables to revenue (minus a discount) for purposes of calculating the Purchase Price; and (2) that there was no uncollectible debt when in fact there was over $28,400 in uncollectible debt." ¶ 92.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty* Corp., 60 NY3d 491 (2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citing *McGill v Parker*, 179 AD2d 98, 105 (1992)); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.* (citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual

allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250 (citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

To properly plead a cause of action for fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). Moreover, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

A. Factual Detail

At the outset, the court notes that the pleading standard for an allegation of fraud relating to future performance under a contract is the source of much confusion. Contrary to the arguments commonly set forth in a defendant's motion to dismiss, one may assert a claim for fraud "based upon a representation of future conduct." *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995). However, to survive a motion to dismiss, the plaintiff must plead "facts giving rise to an inference that the defendant, at the time the promissory representations were made, never intended to honor or act upon his statements." *Id.* Nonetheless, fraud "which relates solely to the underlying breach of contract[] does not give rise to a separate cause of action for fraud." *Id.*

"'The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the representation, and damages.'" *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 (2d Dept 2011)(citations omitted). The Court of Appeals and the First Department have ruled that "financial projections of a company's future performance that are alleged to be false, unreasonable and not based on the company's actual financial condition can constitute the basis of a claim for fraud." *Id.* (citing *CPC Int'l Inc. v McKesson Corp.*, 70 NY2d 268 (1987); *East 32nd St. Assocs. v Jones Lang Wooten USA*, 191 AD2d 68 (1st Dept 2003)). While this rule permits a fraud claim to be based on a defendant's expression of opinion regarding a corporate financial projection, there must still be a nexus between the opinion and an untrue fact. The reason the opinion is actionable is because it is irreconcilable with some objective fact (i.e., optimistic corporate projections that cannot be justified by a company's actual financial situation). *See, e.g., Leung v Lotus Ride, Inc.*, 198 AD2d 155, 156 (1st Dept 1993) (fraud claim "not viable absent a showing that such statements were made with the knowledge that they were false and unreasonable"); *Abu Dhabi Commercial Bank v Morgan Stanley & Co. Inc.*, 651 FSupp2d 155, 176 (SDNY 2009) quoting *In re IBM Corp. Sec. Litg.*, 163 F3d 102, 109 (2d Cir 1998) (expression of opinion can be actionable as fraud if "the speaker does not genuinely and reasonably believe it or if it is without a basis in fact").

Hence, the relevant inquiry on a motion to dismiss is whether plaintiff has indentified (1) a fact (2) known to defendant at the time of defendant's representation (3) such that the representation is incompatible with that fact. Here, as in the original complaint, DSM2x has not alleged a single fact that is incompatible with Kooyman's promises relating to virtual factoring.

The portions of the SAC cited by DSM2x all refer to Kooyman's intentions without identifying a conflicting fact. *See* Plaint. Mem., p.5-6 (citing SAC ¶¶ 48-56). These mere allegations of false intentions cannot support a fraud claim. In contrast, Kooyman's representations about the Business's uncollectable debt might give rise to a fraud claim because DSM2x alleges that Kooyman was aware of facts (the company's financial data and the existence and collectability of the debt) that are incompatible with his representations. Nevertheless, for the reasons explained *infra*, part II.B, DSM2x may not maintain its fraud claims against Kooyman because they are improperly duplicative of its breach of contract claims.

B. Duplicative Claim

All of Kooyman's representation were made within the scope of his employment with KN and specifically relate to KN's obligations under the APA and Advisory Agreement. "It is well settled that when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of the contract, unless there is clear and explicit evidence of the agent's intention to be bound." *Mastropieri v Solmar Const. Co.*, 159 AD2d 698, 699 (2d Dept 1990).

Kooyman's promises that "the Business would engage in 'virtual factoring'" cannot be the basis for DSM2x's fraud claim. In the context alleged by DSM2x, such virtual factoring was a way that KM and KNDM would increase the value of the Business. The failure to do so, along with a plethora of other actions and omissions alleged by DSM2x, are the precise grounds for its breach of contract claims against the Corporate Defendants. Likewise, Kooyman's representations about the company's debt were made pursuant to KN's financial disclosure obligations under the APA and Advisory Agreement. If Kooyman's disclosures were not

truthful, a breach of contract was committed. Indeed, if Kooyman's representations were grounds for a fraud claim, every employee of every company who makes a statement about the company's performance under a contract might be subject to personal liability for the company's breach of contract. This is not the law, and for good reason, as such a law would have a chilling effect on commerce.

That being said, "[a] cause of action sounding in fraud is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who were not parties to the contract, and seeks compensatory damages which are not recoverable for breach of contract." *Introna v Huntington Learning Centers, Inc.*, 78 AD3d 896, 898-99 (2d Dept 2010). However, "[a]lthough an agent for a disclosed principal may be held liable to a third party where the agent has committed fraud ... a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract." *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 (2d Dept 2009); *see also Weinstein v Natalie Weinstein Design Assocs., Inc.*, 86 AD3d 641, 642-43 (1st Dept 2011) (same). A plaintiff cannot transform a mere breach of contract into fraud unless "the alleged misrepresentation [is a fact] extraneous to the contract and involve[s] a duty separate from or in addition to that imposed by the contract." *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004) (citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 (1986)). Here, DSM2x has not alleged a single representation that was either unrelated to the Corporate Defendants' contractual obligations or beyond the scope of Kooyman's employment authority.

Additionally, aside from the duplicity of the duties underlying contract and fraud claims, the Appellate Division, First Department has explained that the rule prohibiting duplicative contract and fraud claims exists for a second, independent reason – the difference in damages:

> Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant "to place the nonbreaching party in as good a position as it would have been had the contract been performed"; the damages recoverable for being fraudulently induced to enter a contract are meant to "indemnify for the loss suffered through that inducement", e.g., damages for foregone opportunities.

Manas v VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008) (internal citations omitted).

In this case, the gravamen of DSM2x's claims is that the amount it received for the sale of the Business was far less than it was entitled to because defendants' wrongful actions led to a lower purchase price (as calculated by the Valuation Matrix). Thus, its damages are the difference between the amount it would have received if the purchase price were properly calculated minus the amount actually received. This computation "place[s] [DSM2x] in as good a position as it would have been had the contract been performed." *Id.* This is a contract remedy. The fact that Kooyman's actions may have contributed to the lower purchase price does not change the nature of DSM2x's damages.

In sum, the fraud claims against Kooyman are dismissed because (1) Kooyman's actions did not breach any duty separate from the duties delineated in the APA and Advisory Agreement; and (2) Kooyman's actions did not cause damages independent from the contract damages. *See Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 (1st Dept 2009) (fraud claim dismissed as duplicative of breach of contract claim because "plaintiff sought no damages that were not also recoverable under its breach of contract theory"). Accordingly, it is

ORDERED that the motion to dismiss by defendant Simon Kooyman against plaintiff DSM2x, Inc. is granted, and the Clerk is directed to enter judgment dismissing the Second Amended Complaint against said defendant with prejudice.

Dated: February 22, 2013

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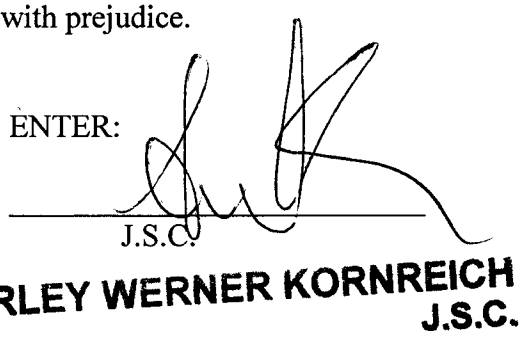

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.