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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [redacted] PART 56

Index Number : 108552/2005
GREENMAN-PEDERSEN

-VS-
LEVINE, MICHAEL
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

...wing papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

[redacted]

Dated: 11/3/2005

[redacted] J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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GREENMAN-PEDERSEN, INC.,
Plaintiff,

Index No. 108552/05

- against -

DECISION AND ORDER

MICHAEL LEVINE,
Defendant.

----------x

RICHARD B. LOWE, III, J.:

Defendant Michael Levine (Levine) moves to dismiss, pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), the Complaint in this action for, inter alia, breach of contract, breach of warranty, fraudulent concealment, negligent misrepresentation, and securities fraud.

BACKGROUND

Plaintiff Greenman-Pedersen, Inc. (GPI) brings this action to recover monies for alleged damages for defendant Levine's breach of contractual duties under a Stock Purchase Agreement ("SPA"), dated October 1, 2001, entered into between GPI and Levine, with respect to plaintiff's purchase of the outstanding shares of Atometrics Engineering, P.C. and Atometrics, Inc. (hereinafter "Atometrics").

On or about October 1, 2001, GPI entered into a SPA with Levine where GPI was to purchase from Levine the outstanding shares of Atometrics. Under the SPA, Levine agreed, represented, and warranted that the representations made in connection with the purchase were true and accurate. Representations and warranties concerned accounts receivables, balance sheets, financial statements, and statements of cash flow. Levine represented and warranted that all financial statements were

prepared in accordance with generally accepted accounting principles and were true, correct, and complete in all material aspects.

Levine further represented to the plaintiff in the SPA that there was no pending or threatened litigation against Atometrics, that Atometrics was in compliance with applicable laws, and that Atometrics was in compliance with tax and other liabilities. Levine finally represented that he was obligated to advise GPI of changes to the condition of Atormetrics or of the representations and warranties made. The acquisition of Atometrics by GPI was finalized on October 9, 2001.

Plaintiff alleges that the representations and warranties were in fact untrue, incorrect, and incomplete, arguing that defendant breached the SPA by providing untrue statements of material facts and omitting other necessary material facts. Plaintiff asserts that Levine misstated the value of Atometrics, failed to advise GPI that Atometrics had incurred certain tax liabilities, did not disclose that Atometrics had failed to comply with copyright laws regarding its software licensing, and failed to give information to GPI regarding potential legal claims Atometrics had against it.

Plaintiff commenced this action by filing a Summons and Complaint, dated June 17, 2005. GPI seeks damages from Levine for breach of the SPA (first cause of action); damages from the defendant for breach of warranty under the SPA (second cause of action); damages for fraudulent concealment (third cause of action); damages for negligent misrepresentation (fourth cause of action); and a securities fraud action under Sections 12(2) and 17(a) of the Securities Act of 1933 (fifth cause of action). As well, GPI seeks attorneys fees and other relief.

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211(a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). The court addresses each of the plaintiff's claims in turn.

A. *Breach of Contract*

Defendant Levine argues that the plaintiff is barred from bringing this cause of action because the explicit three-year limitations period contained in the SPA, which was signed in October 2001, has passed. Plaintiff argues that the three-year limitations period does not bar a claim for breach of warranty and contract because, GPI claims, the clause only pertains to claims for indemnification and not for claims of breach of contract or breach of warranty.

When the meaning of a contract is plain and clear, it will be enforced according to its terms (*Loblaw, Inc. v Employers' Liab. Assur. Corp.*, 57 NY2d 872, 877 [1982]). Any ambiguity in the agreement is construed against the drafter (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; *67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249 [1975]). However, the terms of the contract are "not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist" (*Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998]).

Here, the issue is whether the three-year limitations period as contained in the "Indemnification" section of the SPA covers claims for breach of contract or warranty. Section 8.01, the "Survival" clause, under Article 8 "Indemnification" of the SPA states in part:

> Except as otherwise set forth in this Agreement, *the representations and warranties made in or pursuant to this Agreement and the indemnification obligations of the parties with respect thereto shall survive for a period of three years after the Closing regardless of any*

> *investigation made by or on behalf of any party, and shall thereupon expire together with any right to indemnification for breach thereof* (except to the extent a written notice asserting a claim for breach thereof shall have been given prior to such date to the party which made [])....

(Levine Aff., Ex. B [emphasis added]).

Even in construing every possible inference favorable to the plaintiff, the agreement signed by both parties is unambiguous and definitive in its terms, providing that "the representations and warranties made in or pursuant to this Agreement and the indemnification obligations of the parties . . . shall survive for a period of three years after the Closing." The plaintiff argues that the heading of article – "Indemnification" – demonstrates that this section does not cover representations and warranties. However, this argument controverts Section 9.12 of the SPA, the "Headings" clause, which provides that "[t]he *headings* in this [Stock Purchase] Agreement *are solely for convenience of reference and shall be given no effect in the construction or interpretation of this Agreement*" (*id.* [emphasis added]). As such, and contrary to plaintiff's assertion that the limitations period was not "clearly and unequivocally set forth in the agreement itself" *(Nassau Chapter Civil Services Employees Ass'n, Local 830 v County of Nassau*, 154 Misc 2d 545, 550 [Sup Ct 1992]), the clause is indeed "clear and unequivocal" and the court will not subvert the plain meaning of this contractual term where no ambiguity exists.

The plaintiff forcefully argues that this case is similar to *Russell-Stanley Holdings, Inc. v Buonanno* (327 F Supp 2d 252 [SD NY 2002]) and stands for the proposition that the court must interpret the "Indemnification" heading to only include indemnification claims and not breach of contract or warranty claims. This argument is misapplied. In *Russell-Stanley Holdings*, the agreement between the parties specifically provided that defendant Buonanno would

> indemnify, defend, and hold the [plaintiff Russell-Stanley Holdings, Inc.] . . . (including, after the Closing Date, the Company) . . . harmless from and in respect to any and all losses, damages, costs and reasonable expenses (including, without limitation, reasonable fees and expenses of counsel) . . . that they may incur arising (i) out of or due to any inaccuracy of any representation or breach of any warranty, covenant, undertaking or other agreement....

(*Id.* at 255 [edits in the original]). There, any claim*for indemnification* based on the representations and warranties contained in the agreement would only survive two years. Nothing in that clause restrained the parties' right to bring a cause of action for breach of contract or warranty against each other, whether by time limitation or otherwise. In this case, however, the agreement specifically states that "the representations and warranties made in or pursuant to this Agreement and the indemnification obligations *of the parties* with respect thereto shall survive for a period of three years after the Closing" (Levine Aff., Ex. B [emphasis added]). Plaintiff's argument that *Russell-Stanley Holding* is similar to this case is incorrect.

In addition, a similar clause and heading found in *Russell-Stanley Holdings* is also found in Section 8.02 of the SPA:

> [T]he Seller [defendant] shall indemnify the Buyer [plaintiff] and its affiliates . . . and hold each of them harmless from and against, any loss, claim, liability, (including fees and expenses of outside counsel), or damage . . . which is incurred or suffered by any of them by reasons of (i) the breach of any of the representations or warranties made by the Seller herein....

(*See* Levine Aff., Ex. B). If the "Indemnification by the Seller" clause of Section 8.02 was the only provision in the SPA, then GPI would have a sounder argument in equating this litigation to *Russell-Stanley Holdings*. However, that is not the case here, where Section 8.01 of the SPA explicitly

provides for a time limitation on litigation regarding representations and warranties. GPI's arguments to the contrary lack merit.

Furthermore, accepting plaintiff's reading of the contract would "create inconsistencies with other parts of the contract" (*Russell-Stanley Holdings, Inc.*, 327 F Supp 2d at 256), especially here, where Section 9.12 explicitly qualifies and limits the headings' "effect in the construction or interpretation of this Agreement" (Levine Aff., Ex. B). Indeed, GPI reads too much into the headings where there is explicitly no need to do so. Finally, this contract was negotiated by two "sophisticated commercial parties" (*Russell-Stanley Holdings, Inc.*, 327 F Supp 2d at 256). "[C]ourts should interpret [] language to realize the reasonable expectations of the ordinary businessperson" (*id.*, quoting *Bank of New York v Amoco Oil Co.*, 35 F3d 643, 662 [2d Cir 1994]). Here, both parties are sophisticated business people and the clause itself is unambiguous. For the court to interpret the clause in the way plaintiff proposes would disregard the "reasonable expectations of the ordinary businessperson."

Accordingly, in reading the SPA, the three-year limitations period, agreed to by the parties, applies to representations and warranties contained in the agreement, as well as to indemnification claims. Because this cause of action for breach of contract is based on the representations and warranties made by defendant, the limitations period applies. Here, any cause of action for breach of contract or warranty must have been brought within three years of the October 1, 2001 date of the SPA. Since the plaintiff brought this action on June 17, 2005, GPI's cause of action is outside the limitations period stipulated in the SPA and is barred.

Alternatively, GPI argues that it had discussed with and emailed the defendant of his breaches of the representations and warranties and, as such, the limitations period was tolled due to notice (*see*

Greenman Aff. ¶¶ 11-12, Ex. A). The evidence provided and the SPA demonstrate otherwise. The "Survival" clause specifically requires that a "written notice asserting a claim for breach thereof shall have been given prior to such date to the party which made, such representation or warranty" (*see* Levine Aff., Ex. B). However, no written notice asserting any claim was given to Levine. The emails only note that the calculations were incorrect (*see* Greenman Aff. Ex. A); there is no notice of or any assertion of a claim for breach of contract or warranty contained in those emails. Furthermore, under the Section 9.01 "Notices" section of the SPA, "[a]ll notices, requests, instructions and other documents or communications to any party hereunder shall be in writing (including telecopy or similar writing) and delivered at the addresses . . . or mailed by registered or certified mail, return receipt requested, postage prepaid..." (*id.*). There was no actual writing, and there was no delivery. GPI's alternative argument must also fail.

Because GPI bought this action on June 17, 2005, more than a year after the three-year limitations period of the SPA dated October 1, 2001, the plaintiff is barred from bringing this breach of contract action, and the motion to dismiss this cause of action is granted.

B. *Breach of Warranty*

Based on the same reasoning set forth above for granting defendant's motion to dismiss the first cause of action, the second cause of action for breach of warranty must similarly be dismissed due to the agreed-upon limitations period contained in the SPA *(accord John J. Kassner & Co. v New York*, 46 NY2d 544 [1979]).

C. *Fraudulent Concealment*

The defendant moves to dismiss the third cause of action for fraudulent concealment for essentially the same reasons explained above, arguing that the limitations period also covers fraud.

The defendant also makes the alternative argument that GPI has not pled the elements of fraudulent concealment with particularity. Plaintiff argues that it properly pled fraudulent concealment, that the cause of action is within the applicable statute of limitations, and, thus, this cause of action should not be dismissed.

To state a legally cognizable claim of fraudulent concealment, 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]). In addition, in any action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). However, CPLR 3016(b) does not require a plaintiff "to allege details of the asserted fraud that it may not know or that may be peculiarly within the defendant's knowledge at the pleading stage" (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 377 [1st Dept 2003]). CPLR 3016(b) "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks* , 43 NY2d 778, 780, [1977], quoting *Jered Contracting Corp. v New York City Transit Authority*, 22 NY2d 187, 194 [1968]).

On its face, and construing the Complaint as liberally and as favorably for the plaintiff non-movant, GPI has alleged with sufficient particularity the elements for fraudulent concealment. Based upon the alleged concealment of material facts and false representations made by Levine, as well as the plaintiff's reliance upon those misrepresentations, which GPI avers as intentional, the plaintiff has sufficiently complained a cause of action for fraudulent concealment. Accordingly, a cause of action for fraud ought to be based upon the six-year statute of limitations period (CPLR 213[8]), and,

based upon this reasoning, the cause of action would be timely, as six years have not passed since the signing of the SPA in October 1, 2001.

Nonetheless, "courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003][internal quotations omitted]). In other words, where the alleged fraud is merely "the means of accomplishing the breach" of some other duty, whether imposed by contract or law, but adds nothing to the causes of action, the statute of limitations applicable to fraud claims will not control (*Powers Mercantile Corp. v Maurice Feinberg*, 109 AD2d 117, 120 [1st Dept 1985]; *Iandoli v Asiatic Petroleum Corp.*, 57 AD2d 815, 816 [1st Dept], *lv dismissed* 42 NY2d 1011 [1977]). After all, in applying the statute of limitations clause, the court looks for the "reality, and the essence of the action and not its mere name" (*Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937]; *see also Spinale v Tenzer Greenblatt, LLP*, 309 AD2d 632 [1st Dept 2003]).

Based on the reasoning dismissing the first and second causes of action, the motion to dismiss the third cause of action for fraudulent concealment must also be granted, as the alleged fraud is merely "the means of accomplishing the breach" of a duty imposed by contract (*Powers Mercantile Corp.* , 109 AD2d at 120). In looking into the "reality" and "essence of the action" (*Spinale*, 309 AD2d 632), the claim for fraudulent concealment is essentially a method for the plaintiff to get another bite at the proverbial apple in furtherance of plaintiff's breach of contract and warranty claims. For one, plaintiff's fraud claims do nothing more than add conclusory allegations of scienter to the same allegations underlying the breach of contract and warranty theories. In addition, GPI does not present any evidence to show that they have suffered any injury resulting from

Levine's alleged actual or constructive fraud that is different from the injury resulting from its breach of contract and warranty. Because the two causes of action for breach of contract and warranty are themselves "stale" (*Kaufman*, 307 AD2d at 119), the court will also not allow GPI to bring this claim for fraudulent misrepresentation.

Accordingly, defendant's motion to dismiss the third cause of action for fraudulent concealment is granted.

D. *Negligent Misrepresentation*

Based on the same reasoning set forth above for granting defendant's motion to dismiss the third cause of action, the fourth cause of action for negligent misrepresentation must similarly be dismissed *(see Powers Mercantile Corp.*, 109 AD2d at 120).

E. *Securities Fraud*

Levine also moves to dismiss the fifth cause of action for alleged securities fraud in violation of Sections 17(a) and 12(2) of the Securities Act of 1933 (15 USC §§ 77q[a], 77l[2]), arguing that Section 17(a) does not provide a private right of action and because Section 12(2) applies only to securities sold pursuant to a public offering. GPI concedes that Section 17(a) does not provide a private right of action and, accordingly, the motion to dismiss is granted as to plaintiff's fifth cause of action alleging violation of Section 17(a).

Section 12(2) of the Securities Act of 1933 creates a cause of action against one who "offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements." The US Supreme Court in *Gustafson v Alloyd Co.* (513 US 561 [1995])

articulates further, providing that a stock purchase contract is not a prospectus where it "was not required to contain the information contained in a registration statement and . . . no statutory exemption was required to take the document out of § 10's coverage" (*id.* at 569). Furthermore, "a prospectus under § 10 is confined to documents related to public offerings by an issuer or its controlling shareholders" (*id.*).

Even "bearing in mind the remedial purpose of Section 12(2)" (*Fisk v SuperAnnuities*, 927 F Supp 718, 730 [SD NY 1996]), GPI has failed to allege and satisfy each element of a Section 12(2) claim. First, GPI fails to assert that interstate commerce was involved or how interstate commerce was affected. Moreover, GPI does not allege that this contractual agreement was a prospectus for purposes of Section 12(2). Finally, there is nothing to demonstrate that this was a public offering or that there was information in the SPA which would have been contained in a registration statement. Based on these facts, the claim for violation of Section 12(2) of the Securities Act of 1933 must fail, and the motion to dismiss the fifth cause of action is granted.

F. *Attorneys Fees*

Plaintiff argues that attorneys fees are warranted under the SPA. Defendant disagrees and avers that there is no basis to justify an award for attorneys fees, and moves to dismiss the request.

Under Section 8.02, "Indemnification by the Seller," the SPA provides that "regardless of any investigation . . . the Seller [defendant] shall indemnify the Buyer and its affiliates . . . [for] fees and expenses of outside counsel. . . by reason of . . . (iii) failure by the Seller to perform or pay, perform, or discharge his obligations and liabilities..." (*see* Levine Aff., Ex. B). However, this indemnification provision and indemnification for costs is only allowed where claims are brought within the three year limitation period prescribed by the SPA. Assuming arguendo that the court had

accepted GPI's logic above in severing the breach of contract and warranty claims from indemnification, the plaintiff's argument at this juncture would only contradict its prior argument, since any claim for indemnification would have barred by the three-year limitations period.

Given the limitations period in the SPA, the defendant's motion to dismiss the attorneys fees is also granted and plaintiff's request for attorneys fees is denied.

G. *Leave to Amend the Complaint*

Finally, GPI requests leave of the court to amend the Verified Complaint in the event the court finds that GPI has failed to state a claim, arguing that CPLR 3025 allows a party to amend or supplement its pleadings at any time by leave of the court.

While courts freely grant leave to amend in the absence of prejudice to the non-moving party and where the amendment is not plainly lacking in merit (CPLR 3025 [b]; *Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]; *Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]), this is not the case here. The moving party, an individual, would undoubtedly be prejudiced by GPI's amending its Complaint, as Levine would be further subjected to the cost of defending an action which is already "plainly lacking in merit." The SPA is clear and in its applicability and is unequivocal in its effect. Plaintiff GPI should have brought its claims prior to October 1, 2004 and it has failed to do so, and, as such, its claims against Levine based on the SPA are barred. Similarly, any amendment to the Complaint would also be barred by the same contractual limitation.

Accordingly, plaintiff's request for leave to amend the Complaint is denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Michael Levine's Motion to Dismiss is granted and the Complaint is dismissed in its entirety, with costs and disbursements to the defendant as taxed by the Clerk of the court; it is further

ORDERED that plaintiff Greenman-Pedersen, Inc.'s requests for attorneys fees and for leave to amend the Verified Complaint are denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 3, 2005

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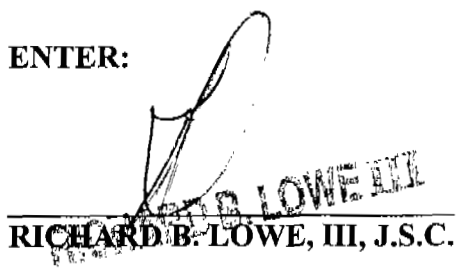

RICHARD B. LOWE, III, J.S.C.