[*1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 106158/2009

JDA CAPTIAL PARTNERS LP

VS.

BNP PARIBAS PRIME BROKERAGE

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED SEP 10 2009 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant BNP Paribas Prime Brokerage, Inc. for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff JDA Capital Partners, L.P. is granted as to the first cause of action, gross negligence, and the first cause of action is hereby dismissed; and it is further

ORDERED that defendant's motion, pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiff's Complaint with respect to the second cause of action, breach of contract, is denied; and it is further

ORDERED that plaintiff's request for leave to amend its Complaint is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendant appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 13, 2009 at 2:15 p.m.; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/8/09

HON. CAROL EDMEAD

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JDA CAPITAL PARTNERS, L.P.,

Index No. 106158/09

Plaintiff,

-against-

DECISION/ORDER

BNP PARIBAS PRIME BROKERAGE, INC.,

Defendant.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff JDA Capital Partners, L.P. ("plaintiff") seeks to recover against defendant BNP Paribas Prime Brokerage, Inc. ("defendant") for gross negligence and breach of contract arising from plaintiff's participation in a tender offer.

Defendant now moves for an order, pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiff's Complaint on the grounds that the Complaint fails to state a cause of action and a defense is founded upon documentary evidence.

Background[1]

Plaintiff, a hedge fund, and defendant, a prime broker, were parties to a Prime Brokerage Agreement dated August 19, 2004 (the "Agreement"). Under the Agreement, defendant was the custodian of plaintiff's securities and was to perform certain services relating thereto for plaintiff. Defendant would receive direct communications from the issuers of such securities, some of which required corporate action to be taken by defendant on plaintiff's behalf. Defendant also would request from plaintiff instructions for corporate action that were to be

[1] Information is taken from plaintiff's Complaint.

followed and acted upon by defendant for plaintiff's benefit. As the customer under the Agreement, plaintiff would issue instructions for corporate action to be followed and acted upon by defendant for plaintiff's benefit.

As specifically relevant herein, plaintiff instructed defendant to vote plaintiff's Hyde Park Corp. ("Hyde Park") securities against the proposed merger between Hyde Park and Essex Rental Corp. ("Essex") and to perfect the exchange of plaintiff's Hyde Park securities for cash (the "Transaction").

On October 22, 2008, Roy Micheli ("Mr. Micheli"), an employee of defendant, e-mailed Chris Dudko ("Mr. Dudko"), a senior analyst for plaintiff, regarding defendant's voting plaintiff's Hyde Park securities in the Transaction (see the "Oct. 22 E-mail"). At the time, plaintiff owned 100,000 Hyde Park units, which were held in custody by defendant in plaintiff's Customer Account, pursuant to the Agreement. The Oct. 22 E-mail informed plaintiff that the Transaction would close on October 31, 2008, and that, in connection with the Transaction, Hyde Park unit holders, including plaintiff, were given the choice to vote to either approve the Transaction, thus converting their Hyde Park units into Essex shares ("Option 0"), or reject the Transaction, thus splitting the Hyde Park units into Hyde Park shares and converting the Hyde Park shares into cash ("Option 1"). The cut-off date set by defendant for plaintiff's response was October 28, 2008 (the "Cut-Off Date").

On, the following day, October 23, 2008 (five days before the Cut-Off Date), Mr. Dudko sent an e-mail to Bolivar Ojeda ("Mr. Ojeda"), vice president of defendant, informing defendant that plaintiff "would like to select Option 1 for all of our 100,000 units (vote against, split units and convert to cash)" (the "Oct. 23 E-mail."). Minutes later, Mr. Ojeda forwarded plaintiff's

request to Kate Yasinskaya ("Ms. Yasinskaya") in defendant's Corporate Actions department, asking her to confirm plaintiff's instructions[2]. On the same day, Ms. Yasinskaya e-mailed Mr. Ojeda back stating:

> confirmed
> Option 1 Cash: Split Units/Convert to Cash (Voted
> Against Acquisition)
> Account: [redacted]
> Position: 100,000 Units

Mr. Ojeda then forwarded Ms. Yasinskaya's e-mail confirmation to Mr. Dudko. Shortly thereafter, Mr. Dudko replied to Mr. Ojeda's e-mail confirmation, acknowledging receipt.

On October 30, 2008, Mr. Dudko telephoned defendant to inquire about the possibility of changing its vote. During the telephone conversation, Mr. Micheli informed Mr. Dudko that the Cut-Off Date was arbitrarily set by defendant, that defendant had already followed and acted upon plaintiff's instruction to perfect Option 1, and that if plaintiff wanted to change its directions and elect Option 0, instructions for such a change would need to be given to defendant immediately.

Later on October 30, 2008, after the phone conversion with Mr. Micheli, Mr. Dudko emailed Mr. Micheli and reaffirmed plaintiff's earlier instruction that plaintiff was "leaving our vote the same . . . voting AGAINST and receiving cash" (emphasis in original). Shortly thereafter that same day, Mr. Micheli replied "OK" via e-mail.

On November 7, 2008, after the Transaction closed, plaintiff learned for the first time that its instructions were not followed or acted upon. Plaintiff was recorded by Hyde Park as having

---

[2]Plaintiff alleges that since 2004 and on many occasions thereafter under the Agreement, Ms. Yasinskaya had received instructions from plaintiff with regard to proposed corporate actions, and defendant's practice under the Agreement would be to follow and act upon plaintiff's instructions and to confirm to plaintiff that its instructions had been followed and acted upon.

voted *for* the proposed Transaction, resulting in plaintiff's receiving shares of Essex under Option 0 rather than cash under Option 1.

In its Complaint, plaintiff alleges that defendant committed gross negligence and breach of contract for failing to follow and act upon plaintiff's instructions and for falsely confirming to plaintiff that defendant had followed and acted upon plaintiff's instructions, resulting in substantial pecuniary losses to the plaintiff.

Defendant's Motion

Defendant argues that plaintiff's claims for gross negligence and breach of contract are defective and must be dismissed. The gross negligence claim fails because it is duplicative of the breach of contract claim. Defendant contends that the Agreement is the sole source of defendant's obligations to plaintiff, and a party may not assert a tort claim based on a breach of a contractual duty.

The claim for breach of the Agreement also fails. The Agreement provides that defendant may not be held liable for any failure to act with regard to plaintiff's account except for defendant's own gross negligence. The facts as alleged in the Complaint, and as they appear in the documents referenced therein, do not amount to "willful indifference that smacks of intentional wrongdoing," so as to constitute gross negligence on defendant's part. The facts surrounding defendant's alleged failure to vote the shares demonstrate that (1) the tender offer notice states that plaintiff, not defendant, must vote the shares, (2) none of the e-mails between the parties indicates that defendant is voting the shares, (3) defendant at all times responded to plaintiff, and the broker in charge worked diligently to effectuate its instructions to apply for the cash option, and (4) plaintiff confused the matter by calling at the eleventh hour and asking

defendant whether it could belatedly change its election to stock payment instead of cash payment. At most, plaintiff's allegations reveal an apparent misunderstanding between plaintiff and defendant in connection with a single purported failure to follow instructions, and under caselaw, such a single instance of inaction cannot constitute gross negligence.

Finally, both claims must be dismissed because plaintiff failed to plead any cognizable damages.

Plaintiff's Opposition

Plaintiff alleges that after receiving plaintiff's instructions to act on its behalf, defendant "confirmed" those instructions and gave plaintiff no indication that anything more was required either by plaintiff or defendant. As a result, plaintiff was left holding shares of Essex, a thinly traded public company that plaintiff expressly did not want, instead of $785,000 in cash that plaintiff expressly wanted. Those Essex shares suffered a precipitous decline in value immediately after plaintiff received them; thus plaintiff has been damaged by an amount approaching three-quarters of a million dollars, plaintiff contends. Thus, plaintiff argues, its gross negligence claim is not duplicative of its breach of contract claim.

Plaintiff contends that under New York law, a contracting party may be charged with a separate tort in connection with a duty separate from, albeit connected to, the contract. Such a duty arises when a broker accepts instructions, similar to plaintiff's instructions to defendant in connection with the Transaction, to execute the purchase or sale of securities from a customer. Throughout the course of the relationship of the parties, defendant has regularly solicited and accepted instructions to take corporate action, including voting, on plaintiff's behalf. Defendant's duty to plaintiff arose when it solicited and accepted plaintiff's "unambiguous

instructions to vote against a reverse merger and effectuate a cash exchange in lieu of Essex shares," plaintiff contends. Instead of cash, plaintiff received Essex shares as a direct and proximate result of defendant's gross negligence or willful misconduct.

Plaintiff adds a footnote citing caselaw and stating: "Should the Court determine that Plaintiffs Complaint does not adequately satisfy the pleading standards of the CPLR in any respect, Plaintiff hereby requests leave to amend the Complaint to remedy any shortcoming identified by the Court" (opp., p. 7, note 6).

Plaintiff further argues that it has stated a claim for breach of contract. Plaintiff identified several provisions in the Agreement that defendant breached by failing to attend to all matters related to the custody of plaintiff's securities. Furthermore, defendant's act or omission constitutes gross negligence and/or willful misconduct and amounts to a breach of contract. Acts amounting to gross negligence and/or willful misconduct are inherently questions of fact, plaintiff contends. Under New York law, a defendant has committed gross negligence when a plaintiff relies on the defendant to protect its property interests, it is foreseeable to the defendant that failing to act may result in significant losses, and the defendant's failure to act causes injury to the plaintiff. Here, plaintiff relied on defendant to protect its right to receive cash, defendant foresaw the significant losses that would result from failing to follow or, in the alternative, to warn that it would not follow plaintiff's unambiguous instructions to vote against the Transaction, thus splitting the Hyde Park units into Hyde Park shares and converting the Hyde Park shares into $785,000 in cash.

Finally, plaintiff argues that it has alleged damages in the Complaint, and whether plaintiff suffered damages raises an issue of fact is not capable of resolution on a motion to

dismiss.

Defendant's Reply

Defendant argues that documentary evidence, *i.e.* the terms of the Agreement and the e-mails, "conclusively establish a defense to the claims asserted" by plaintiff.

Defendant further argues that plaintiff's opposition rests almost entirely on assertions either without citation to authority or contradicted by the very cases upon which plaintiff attempts to rely. For instance, plaintiff posits the existence of an independent duty to support its parallel tort claim upon e-mail instructions sent to defendant. However, plaintiff never explains how the alleged unilateral demand that defendant vote the shares can overrule the express terms of the written agreement between these sophisticated parties. Further, plaintiff cites cases for the proposition that certain relationships or injuries may give rise to independent tort claims. However, plaintiff never alleges (nor could it) that either its relationship with defendant or the injury it supposedly sustained fit within those narrow categories.

Defendant further argues that plaintiff's attempt to state a claim for breach of contract is also flawed. While plaintiff alleges that all of its supposed injury stems from defendant's failure to vote the Hyde Park shares, plaintiff cannot point to a single provision of the Agreement that imposes a duty on defendant to vote or accept instructions to vote the shares. Further, plaintiff refers to the provisions in the Agreement as bestowing a "right" on defendant, not imposing any obligation or duty.

Defendant further argues that plaintiff has failed to establish gross negligence either in tort or contract. Although plaintiff concedes that it must show multiple errors by defendant to establish gross negligence, plaintiff alleges only the single failure to vote the shares, which

defendant was not obliged to vote under the Agreement. In addition, plaintiff asserts no caselaw holding that defendant's subsequent failure to report this single error can constitute gross negligence. Thus, plaintiff cannot plead a tort claim, and it can find no obligation in the Agreement for defendant to vote the shares; nor can it show any grossly negligent conduct.

Finally, plaintiff's claim for damages is premature until it liquidates its shares of Essex stock. Only then can plaintiff show that it has any damages at all, defendant argues. Thus, plaintiff's failure to liquidate its Essex shares requires dismissal of the action without prejudice.

Analysis

Motion to Dismiss

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank* at 228). However, where the bare legal conclusions and factual allegations are "flatly

contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Here, while plaintiff has sufficiently pleaded a cause of action for breach of contract, its gross negligence claim is duplicative.

Breach of Contract

To state a cause of action for breach of an agreement, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497 [U] [NY Sup 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc., citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006], *citing Chrysler Capital Corp.*

v Hilltop Egg Farms, Inc., 129 AD2d 927, 928 [3d Dept 1987], *accord Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [4d Dept 1987]).

Here, plaintiff has sufficiently alleged a claim for breach of contract.

In its Complaint, plaintiff alleges – and it is undisputed – that the Agreement dated August 19, 2004 governed the relationship between the parties[3] and that defendant held all securities for plaintiff in a customer account governed by the Agreement (Complaint, ¶¶ 51-52). Among those services to be performed by defendant were those set forth in paragraphs 5(b), 5(f) and 6 of the Agreement (Complaint, ¶ 52). Further, the Agreement is attached to the Complaint. Plaintiff goes on to allege that it timely instructed defendant to (1) elect Option 1, (2) vote plaintiff's Hyde Park securities against the proposed merger and, (3) take all steps necessary for plaintiff to receive cash under Option 1 (Complaint, ¶ 54). On October 23, 2008 and October 30, 2008, defendant confirmed in writing to plaintiff that it had followed and acted upon plaintiff's instructions to elect Option 1 (Complaint, ¶ 55). Notwithstanding defendant's confirmations, defendant failed to vote plaintiff's Hyde Park securities against the Transaction, as instructed, and failed to take all steps necessary to permit plaintiff to receive the cash benefits under Option 1 (Complaint, ¶ 56). Plaintiff alleges that defendant's conduct was wrongful and constituted a breach of paragraphs 5(b), 5(f) and 6 of the Agreement (Complaint, ¶ 58). Finally plaintiff alleges that, as a result of defendant's wrongful breach of the Agreement, it has suffered

---

[3]The Agreement originally was executed by plaintiff and Bank of America Securities, LLC ("BofA"). On or around June 27, 2008, BofA announced defendant's pending acquisition of BofA's prime brokerage business. In connection with this announcement, BofA sent plaintiff a Prime Brokerage Documentation Novation agreement (the "Novation") to effectuate the transfer of plaintiff's account from BofA to defendant. The Novation provided that defendant would become plaintiff's prime broker in the place and stead of BofA under the Agreement. Pursuant to Paragraph 4(c) of the Novation, the terms and conditions of the Agreement would remain the same. On or around September 30, 2008, defendant acquired BofA's prime brokerage and thus under the terms of the Novation became plaintiff's prime broker.

damages, since it received illiquid Essex shares in connection with the Transaction under Option 0 instead of receiving cash as instructed under Option 1.

Contrary to defendants' argument, the Agreement does not conclusively establish defendant's defense to plaintiff's breach of contract claim. The Agreement contains an exculpatory clause that makes clear that defendant is liable for gross negligence or willful misconduct. The exculpatory clause provides the following:

> Moreover, none of [defendant's] Entities that are parties to this Agreement, nor any of their respective officers, directors, employees, agents or counsel, shall be liable, *except for their own gross negligence or willful misconduct*, and no such party shall be liable for any error of judgment made by it in good faith for any action taken or omitted to be taken by any of them hereunder or in connection herewith, including, but not limited to the following:
> I. the execution, clearing, custodying, subcustodying, handling, purchasing or selling of cash, securities, commodities or other property, including Collateral, or other similar action taken by [defendant's] Entities; and
> ii. any arrangement pursuant to which certain of [plaintiff's] securities are held by subcustodians, agent banks, agent financial institutions and depositories inside or outside the United States provided that the subcustodians have been selected by [defendant's] Entities with reasonable care in light of the relevant jurisdiction.
> (Agreement, ¶ 10[e]) (*emphasis added*)

It is well settled that gross negligence "when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must 'smack of intentional wrongdoing' . . . . It is conduct that evinces a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992], quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]; see also, Restatement [Second] of Contracts §195 [1] [intentional or reckless conduct vitiates contractual term limiting liability]).

In this regard, *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.* (261 AD2d 117 [1st Dept 1999]) is particularly instructive. In *Nederlanden*, as here, one of the defendants, Bankers Trust Company ("Bankers Trust"), was the broker and holder of securities

belonging to plaintiff "ING" pursuant to a written agreement, which contained an exculpatory clause. Pursuant to the clause, plaintiff "promised to 'indemnify you and hold you harmless from any and all loss, liability (*excluding any liability occasioned by the gross negligence or willful misconduct of your employees* . . .), claims, damages or expenses . . . arising from your performance of your services as Custodian, hereunder' (*emphasis added*)" (*id.* at 120). ING made certain elections on ballots it submitted to Bankers Trust; however, the elections were not properly tabulated, ultimately resulting in an alleged loss of $5 million. The "essence of the complaint" was that the "defendants were negligent in completing and recording [ING's] master ballots, such that [ING] received a less valuable type of distribution than what they had selected" (*id.* at 118). When the defendants sought dismissal of the complaint under CPLR §3211, ING requested leave to replead, in the event that dismissal was granted. The Supreme Court granted dismissal of the gross negligence and breach of fiduciary duty claims against Bankers Trust, on the ground that ING did not allege any separate tortious breach of duty independent of a breach of the agreement.

On appeal, the First Department noted:

> The motion court erred in granting defendants' motions, since plaintiffs' complaint contains factual allegations sufficient to support claims against Bankers Trust Company . . . . Having determined that [ING's] *tort claims against Bankers Trust Company were actually breach of contract claims*, the court should have granted [ING's] request for leave to replead.
> (*Id.* at 121) (*emphasis added*)

The First Department then confirmed that the "motion court properly deemed plaintiffs' cause of action against Bankers Trust Company to sound in contract, not tort . . ." since the duty to follow ING's instruction with respect to the disposition of the U-4 Notes arose out of the Custodian Account Agreement (*id.* at 122).

The First Department then explained, however, that the Supreme Court did not address "whether the alleged errors by Bankers Trust Company in filling out and sending the Master Ballot could constitute gross negligence" presumably, under the Custodian Account Agreement's exculpatory clause. The Court continued:

> Though some of the errors seem to concern mere formalistic details, this was an election in which minor errors of form could have drastic consequences . . . . Bankers Trust Company was well aware that millions of dollars were at stake. Failure to keep accurate records has been considered evidence of gross negligence where the plaintiff relied on the defendant to protect its property interests and the defendant was aware that significant losses could result from inaccurate records . . . . ING's loss occurred because Bankers Trust Company failed to follow the instructions for completing the Master Ballot and then either failed to send it to [co-defendant], or sent it too late for the fatal mistakes to be corrected . . . . Although the Master Ballot was never sent, or was too error-ridden to be counted . . ., Bankers Trust Company reassured ING that everything was in order, until it was too late for ING to do anything about it. Certainly the failure to send the Master Ballot at all, if proven, could be gross negligence. The essence of the agreement between ING and Bankers Trust Company was that ING relied on Bankers Trust Company to stand in ING's stead with respect to the U-4 Notes and to protect ING's rights, all of which Bankers Trust Company allegedly failed to do.
> (*Id.* at 122-123)[4]

The First Department concluded by reversing the Supreme Court's order "to permit [ING] to file an amended complaint asserting a breach of contract claim against Bankers Trust Company."

According to the First Department, several acts of negligence with a foreseeably severe cumulative effect can constitute gross negligence (*id.* at 122). Here, in accepting plaintiff's

---

[4]The Court went on to make the following observation: "At this early stage, where no discovery has been conducted, we cannot say as a matter of law that Bankers Trust Company fulfilled its obligations under the Custodian Account Agreement. 'Where the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different [from ordinary negligence], but the question nevertheless remains a matter for jury determination'" (*Nederlanden* at 123, quoting *Food Pageant, Inc. v Consolidated Edison Co., Inc.*, 54 NY2d 167, 172 -173 [1981]).

allegations as true and giving plaintiff the benefit of every possible favorable inference, plaintiff has alleged sufficient facts to support its claim that defendants committed gross negligence in violation of the Agreement. As in *Nederlanden*, plaintiff here alleges several acts of negligence that in the aggregate could conceivably constitute gross negligence: (1) defendant failed to follow plaintiff's instructions to act on its behalf; (2) defendant led plaintiff to believe that defendant had carried out plaintiff's instructions, via several e-mail communications with plaintiff; and (3) defendant never informed plaintiff that it had failed to carry out its instructions (Complaint, ¶¶ 23-43). Plaintiff further alleges that it only learned of defendant's failure to follow and act upon plaintiff's instructions on November 7, 2008, when it was too late to cure.

Defendant's reliance on *Dimsey v Bank of New York* (14 Misc 3d 1205, 831 NYS2d 359 [Sup Ct New York County 2006]) for the proposition that its conduct did not constitute gross negligence lacks merit, at this juncture. In *Dimsey*, the plaintiff opened a discretionary brokerage account with the defendant and directed the defendant to sell the shares at a target price within a specific time frame. The defendant failed to follow the agreement, resulting in the plaintiff's financial detriment, and the plaintiff sued defendant for breach of contract, breach of fiduciary duty, negligence and gross negligence. The defendant moved to dismiss only the breach of fiduciary duty, negligence and gross negligence claims. The *Dimsey* Court concluded that the defendant's conduct did not rise to the level of gross negligence. However, the Court first pointed out that the First Department had found that "financial planners are not professionals for the purpose of professional malpractice." The Court then stated that, to the extent plaintiff alleged a claim for "simple" negligence, the economic loss rule barred such claim. Consequently, the Court concluded that "[h]aving established that [the defendant] is not a

professional for the purpose of professional malpractice and not liable for negligence, it logically follows that a gross negligence cause of action cannot survive. *Further, [the plaintiff] fails to state specific facts to support his gross negligence claim*" (*id.*) (*emphasis added*).

Dimsey is distinguishable from the instant case. First, the veracity of the plaintiff's breach of contract claim was not before the *Dimsey* Court, and, as noted by the Court therein, plaintiff "couche[d] his negligence claim in professional malpractice." The plaintiff in *Dimsey* also merely alleged that the defendant owed the plaintiff a duty to manage the account with reasonable care, and failed to monitor the price movements of stock and sell such stock at appropriate times, resulting in the sale of stock at levels substantially lower than that which would have been available but for the defendant's breach. The Court reasoned that since financial planners are not professionals for purpose of professional malpractice, the defendant could not be found liable for a breach of a duty that did not exist.

Here, plaintiff's gross negligence claim is in no manner couched as a professional negligence claim; nor is simple negligence a claim at issue. More importantly, plaintiff's claims are not merely claims of a failure to monitor stock prices. Unlike the plaintiff in *Dimsey*, plaintiff here states specific, cumulative facts, which, if deemed as true, are sufficient to support its gross negligence claim.

Further, defendant's argument that plaintiff failed to allege damages lacks merit. Plaintiff clearly states that it expected $785,000 in cash for its Hyde Park shares, and instead it received what it did not want: worthless Essex shares (Complaint, ¶¶ 26-27). As plaintiff points out in its opposition: "Essex shares can fluctuate in value and its value is dependent on what counterparties are willing to pay for those shares. Indeed, Essex shares . . . declined markedly and immediately

after the close of the Transaction. However, the value of cash is fixed" (opp., pp. 13-14). Also lacking in merit is defendant's argument that plaintiff "must first exhaust its efforts to sell the Essex shares before it can be allowed to seek damages" (motion, p. 10). Plaintiff is not required to prove its damages at this juncture, only to plead damages.

Accordingly, defendant's motion to dismiss plaintiff's second cause of action for breach of contract is denied.

Gross Negligence

It is well established that in some cases tort liability may arise from a breach of a duty *independent of* a breach of contract (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 -390 [1987] [holding that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract"]). The Court of Appeals in *Sommer v Federal Signal Corp.* 79 NY2d 540 [1992], *supra*) explains:

> A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties . . . . In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care (see, Prosser, Torts, at 613 [4th ed]).
> (*id.* at 551-552)

Here, as plaintiff failed to sufficiently allege that defendant violated a legal duty independent of the Agreement, its gross negligence cause of action is duplicative of its breach of contract claim.

First, plaintiff alleges that defendant, as a prime broker owed plaintiff a duty "under the Agreement" to act with reasonable care and diligence with regard to all matters with respect to

the securities held by defendant for the account of plaintiff (Complaint, ¶ 45). Further, plaintiff alleges that defendant, having requested and received instructions from plaintiff to take all required steps under Option 1, including voting on plaintiff's behalf against the proposed transaction, and having confirmed that defendant had fully followed and acted upon plaintiff's instructions, had a duty to either act in accordance with plaintiff's instructions or to inform plaintiff in a timely fashion that it did not or would not follow or act upon such instructions (Complaint, ¶ 46). Second, plaintiff alleges that defendant breached its duty: That having confirmed in its response to plaintiff that it had followed and acted upon plaintiff's instructions, defendant's failure to inform plaintiff in a timely fashion that it did not or would not follow and act upon plaintiff's instructions violated defendant's duty to act with reasonable care and diligence owed to plaintiff "under the Agreement" (Complaint, ¶ 47). Had defendant informed plaintiff in a timely fashion that it did not or would not follow and act upon plaintiff's instructions with regard to the Transaction, plaintiff would have taken appropriate action in a timely manner on its own behalf to perfect its right to receive the cash benefit under Option 1 (Complaint, ¶ 48). Based on defendant's false confirmations to plaintiff that it had taken all necessary steps to perfect Option 1 and defendant's failure to inform plaintiff in a timely fashion that it did not or would not follow and act upon plaintiff's instructions, defendant's conduct was reckless, constituted an extreme departure of reasonable care and diligence, exhibited a conscious indifference to the consequences of its actions and thus, was wrongful and amounted to gross negligence (Complaint, ¶ 49). Finally, plaintiff alleges that it has been injured as a direct and proximate result of defendant's gross negligence in that plaintiff did not receive cash in the Transaction under Option 1, but instead received illiquid Essex shares under Option 0 that were

worth far less (Complaint, ¶ 49).

Here, it cannot be said that plaintiff's gross negligence claim stems from circumstances extraneous to and not constituting elements of the contract claim. Indeed, as in *Nederlanden,* the Complaint herein sounds in contract, not tort. Plaintiff repeatedly refers to defendant's duty arising *under the Agreement*, and the allegations in support of the gross negligence cause of action are those very same actions that support plaintiff's claim for breach of the Agreement. Plaintiff failed to allege any facts giving rise to a separate tortious breach of duty independent of a breach of the Agreement. Accordingly, plaintiff's first cause of action for gross negligence is dismissed.

Dismissal Pursuant to CPLR §3211(a)(1)

Under CPLR §3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence (*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]). The term "documentary evidence" referred to in CPLR 3211(a)(1) "typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes '[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based'" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 (NY Ct Cl), 2003 NY Slip Op 50590[U], *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20 and 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06).

As discussed above, contrary to defendants' argument, the Agreement does not

conclusively establish defendant's defense to plaintiff's breach of contract claim. Further, also contrary to defendant's argument, the e-mails also do not conclusively establish such a defense. While defendant argues that the e-mails are "ambiguous" as to exactly who was to vote plaintiff's shares (opp., pp. 4-5), defendant's argument does not speak to the material issue of whether defendant's overall conduct – *i.e.* defendant's failure to vote the shares and subsequent failure to inform plaintiff that it did not vote the shares – constituted gross negligence in breach of the Agreement. As such, the branch of defendant's motion to dismiss plaintiff's Complaint on the ground of documentary evidence is denied.

Leave to Amend Complaint

It is well settled that leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]). Further, leave to amend "may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required

procedure to permit the court to pass upon the merits of the leave for amendment" (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984], *citing East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept 1970]).

Here, in a footnote, plaintiff seeks leave to amend the Complaint "to remedy any shortcoming identified by the Court" (opp., p. 7, note 6). However, plaintiff has failed to cross move for leave to amend, pursuant to CPLR §3025(b), and it has not provided the Court with a proposed Amended Complaint, pursuant to CPLR §3211[e] (*see Hickey v National League of Professional Baseball Clubs*, 565 NYS2d 65, 66 [1st Dept 1991]), *citing Walter & Rosen, Inc., v. Pollack*, 101 AD2d 734, 735 [1st Dept 1984] [" Plaintiff's application for leave to amend, contained in a single sentence without even the most conclusory indication of what the new pleadings would be, was properly denied. This Court has construed CPLR 3211(e) to require that the proposed new pleadings be supported by evidence as on a motion for summary judgment"]; *Abbott v Herzfeld & Rubin, P.C.*, 202 AD2d 351, 352 [1st Dept 1994] [holding that leave to replead was properly denied because the plaintiffs did not provide "proposed new pleadings supported by evidence as on motion for summary judgment"]).

Nevertheless, plaintiff fails to make any evidentiary showing that would justify the Court's granting it leave to amend its Answer. As discussed above, plaintiff's claim for gross negligence lacks merit, because it is duplicative of plaintiff's breach of contract claim (*see Baker v 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 121, 2003 NY Slip Op 19017 [1st Dept 2003] [holding that "inasmuch as plaintiffs' claim for gross negligence arises from defendant's alleged failure to make repairs required by a proprietary lease, it is duplicative of and thus barred by their claim for breach of the lease"]; *East Meadow Driving School, Inc. v Bell Atlantic Yellow Pages*

Co., 273 AD2d 270, 271 [2d Dept 2000] [holding that the Supreme Court erred in granting the plaintiffs' cross-motion to amend its complaint to add a cause of action to recover damages for gross negligence because no duty existing independent of the alleged contract was pleaded]). Accordingly, plaintiff's request is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant BNP Paribas Prime Brokerage, Inc. for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff JDA Capital Partners, L.P. is granted as to the first cause of action, gross negligence, and the first cause of action is hereby dismissed; and it is further

ORDERED that defendant's motion, pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiff's Complaint with respect to the second cause of action, breach of contract, is denied; and it is further

ORDERED that plaintiff's request for leave to amend its Complaint is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendant appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 13, 2009 at 2:15 p.m.; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 8, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD