[*1]

SCANNED ON 10/1/2009

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

PRESENT: _____ PART _____

Justice

Index Number : 101937/2009

GENERGY POWERBOX, INC.,

vs.

DEFENSE HOLDINGS, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 101937-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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 is decided in accordance with the accompanying memorandum opinion.

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/30/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

----------X

GENERGY POWERBOX, INC.,

Plaintiff,

INDEX NO.
101937/09

-against-

DEFENSE HOLDINGS, INC.,

Defendant.

----------X

WALTER B. TOLUB, J.:

Defendant, Defense Holdings, Inc., moves for an order pursuant to CPLR 3211(a)1 and 7 and CPLR 327 dismissing the complaint on the ground that the parties agreed in writing to litigate their disputes in the Commonwealth of Virginia. In the alternative, defendant seeks an order pursuant to CPLR 3016(b) and CPLR 3211(a)7 dismissing plaintiff's third cause of action for failure to plead fraud in detail and dismissing plaintiff's fourth cause of action for declaratory relief on the ground that no justiciable controversy exists.

The primary issue before the court is whether a forum selection clause in an unsigned contract warrants dismissal of the complaint prior to joinder of issue. Defendant is a Virginia corporation engaged in the business of electrical engineering research and development. Plaintiff, Genergy Powerbox, Inc., is a New York based Delaware corporation engaged in the business of providing energy services. In May 2007 the parties entered into discussions regarding plaintiff's retention of defendant's services to create and design a prototype of an

external power meter called the "PowerBox." On March 19, 2008 defendant sent to plaintiff a Commercial Development Agreement (the "Agreement"), which set forth the costs, schedule, and work involved in developing the PowerBox. The Agreement provides in pertinent part that any dispute arising thereunder "shall be heard and litigated exclusively in a state or federal court located in the county or city of Fairfax or Alexandria, Commonwealth of Virginia" (see defendant's exhibit C, ¶ 16.4).

On June 23, 2008, plaintiff's president, Dario Gristina ("Gristina"), sent an e-mail to defendant's president and CEO, Richard Martin ("Martin"), in which Gristina "apologize[d] for the delay in providing your company with a firm commitment for the development of the PowerBox prototypes" and attached a copy of a $60,000 check dated July 1, 2008 payable to defendant, which Gristina stated was being sent by overnight mail as a down payment on a contract price of $250,000 pursuant to the Agreement "that is to be executed prior to July 1st" (see defendant's exhibit F). Gristina stated further that "[w]hile we still have to execute a contract ... , please consider our good faith in moving forward with the project and work with us through these last steps in finalizing our agreement" (*id.*). By e-mail dated July 16, 2008 Gristina advised Martin that he wished to discuss several items including getting an update on the PowerBox project and execution of the Agreement (see defendant's exhibit H). Martin responded that outstanding issues involving "screen size, patents, and some other thoughts" needed to be addressed before Gristina sent the proposed Agreement to him (*id.*). On July 21, 2008 defendant sent to plaintiff a "Genergy Power Box Risk Assessment" which gave a revised evaluation of cost, schedule, and risks of the PowerBox project (see Martin supporting affidavit, ¶ 21). Plaintiff responded that same day stating that it was imperative that defendant "gets on the

same page" as plaintiff and that "critical issues" raised in defendant's July 21 e-mail needed to be addressed and resolved without further delay (see plaintiff's exhibit I). By e-mail to plaintiff dated July 22, 2008, Martin agreed "that everyone MUST be on the same page (emphasis in original)" and that "critical issues" remained outstanding (see plaintiff's exhibit J). On July 24, 2008 plaintiff requested the return of its $60,000 down payment. Apparently, defendant failed to oblige. On February 11, 2009 plaintiff commenced this action seeking to recover the $60,000.

In support of its motion defendant initially argues that the complaint should be dismissed pursuant to CPLR 3211(a)1 (defense founded on documentary evidence) and CPLR 3211(a)7 (failure to state a cause of action) because the Agreement provides that any dispute arising thereunder shall be litigated in Virginia. Defendant also argues that in the interest of substantial justice the complaint should be dismissed pursuant to CPLR 327 (*forum non conveniens*) because New York is an inconvenient forum. According to defendant, litigating in New York would impose a hardship because defendant does not have any bank accounts, offices, or other real or personal property here and because all the relevant witnesses and documents are in Virginia. Defendant alternatively argues that plaintiff's third cause of action sounding in fraud should be dismissed because it fails to allege fraud in detail and is duplicative of plaintiff's contract claim and that plaintiff's fourth cause of action for declaratory relief must be dismissed for failure to state a cause of action because it is based on a "phantom controversy" regarding intellectual property rights which are covered by Article 18.1 of the Agreement.

For a motion to dismiss based on documentary evidence to succeed, the proffered documentation must definitively dispose of the claim (see *Demas v 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1st Dept 1987]). This is not the situation at bar because the document relied

on by defendant is the Agreement, which was never agreed to. In its July 21, 2008 e-mail to Martin (*supra*) plaintiff stated that "critical issues" needed to be addressed. In his July 22 response (*supra*) Martin agreed that "critical issues" remained outstanding. Two days later, on July 24, plaintiff requested the return of its down payment (see *supra*). The "critical issues" remained outstanding and, as a result, the parties never reached an agreement. Furthermore, the Agreement, which was drafted by defendant (see defendant's exhibit C), states on the signature page that "This document does not become a binding agreement until it has been executed by both parties" (*id.*, p 5). Plaintiff never signed the proposed Agreement. "It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be liable until it has been written out and signed" (*Jordan Panel Systems Corp. v Turner Const.* Co., 45 AD3d 165, 166 [1st Dept 2007], quoting *Scheck v Francis*, 26 NY2d 466, 469-470 [1970]).

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations of the complaint and everything reasonably implied therefrom (see *Khan v Newsweek*, 160 AD2d 425, 426 [1st Dept 1990]). The complaint herein asserts causes of action for money had and received, unjust enrichment, fraud, and declaratory relief. There is nothing in the forum selection clause of the inchoate Agreement that has any bearing on the validity of plaintiff's allegations.

There is little basis for defendant's claim that New York is an inconvenient forum. Defendant's bank accounts, etc. are irrelevant in the context of this litigation. Defendant's principal, Martin, can come to New York as he did during the parties' negotiations (see, *e.g.*, defendant's exhibit E). It appears from the papers before the court that all relevant documents

(the Agreement and the e-mails referred to herein) can easily be carried in his briefcase. While defendant makes reference to its former engineer, Dan Alley ("Alley"), it does not state where Alley resides.

Plaintiff's third cause of action for "fraudulent inducement/fraudulent misrepresentation" is based on the allegation that plaintiff was induced to hire defendant and to send it $60,000 because Martin represented that Alley was the only person with the expertise to see the project through and that Alley "would be in charge of and oversee the PowerBox project" (see complaint, defendant's exhibit A, ¶ 23). According to the complaint: this representation was material and false (*id.*, ¶¶ 24-25); plaintiff relied on this false representation to its detriment (¶ 26); shortly after plaintiff sent the $60,000 to defendant for work to be performed defendant told plaintiff that Alley was no longer employed by defendant and that defendant did not have a qualified engineer to work on the project (¶ 27); and, plaintiff suffered resulting damages of $60,000 (¶ 28).

There is no basis for defendant's contention that plaintiff has failed to allege fraud in detail (see CPLR 3016[b]). The underlying facts are fully set forth in the complaint and Martin, who purportedly made the representations, is in the best position to dispute them. Nor is there any basis for defendant's contention that plaintiff's fraud claim is duplicative of its contract claim. The complaint does not assert any claim for breach of contract. Arguably, plaintiff's fraud claim could be dismissed pursuant to CPLR 3211(a)7. To plead a *prima facie* case of fraud the plaintiff must allege representation of a material existing fact, falsity, scienter, reliance and injury (see *Lanzi v Brooks*, 54 AD2d 1057 [3d Dept 1976], affd 43 NY2d 778 [1977]). Here, plaintiff has failed to explicitly allege that defendant knowingly misrepresented a material

existing fact. However, the complaint is to be liberally construed and plaintiff is entitled to 'the benefit of every possible favorable inference' (see *Khan v Newsweek, supra*, 160 AD2d at 426). It is possible that Martin knew that Alley's days as defendant's employee were numbered when the alleged representations were made. Discovery has yet to take place. At this point, plaintiff's fraud claim will not be dismissed.

Plaintiff's fourth and final cause of action seeks a declaration that, *inter alia*, defendant "has no rights or claims to and/or ownership or interest in the intellectual property, whether statutory or common law, of PowerBox" (see defendant's exhibit A, ¶ 32). Defendant offers no support for its contention that plaintiff's allegations present a "phantom controversy" and, as indicated herein, defendant's reliance on the unsigned Agreement is misplaced.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is denied in its entirety.

Defendant is directed to serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

Counsel for the parties are directed to appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on November 6, 2009.

This constitutes the decision and order of the court.

DATED: Sept 30, 2009

Hon. Walter B. Tolub, J.S.C.