

Cablelot Sys., Inc. v GE Med. Sys. Info. Tech., Inc.

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Supreme Court, SuffolkCounty

Docket Number: 4437/2012

Judge: Thomas F. Whelan

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The plaintiffs, Cablelot Systems Inc. and Clinical Response Solutions, Inc., commenced this action to recover damages allegedly sustained by reason of the defendant's conduct in terminating a business relationship between them that began in 2010. At that time, the first named plaintiff, Cablelot Systems Inc. ["hereinafter Cablelot"], was engaged in the business of distributing, installing, programing and servicing health care communication devices at hospitals and other health care venues in downstate New York. The defendant was then, and remains now, a developer, manufacturer, and seller of such health care communication systems and devices.

In or about the spring of 2010, Cablelot and the defendant began negotiations aimed at the defendant's contractual retention of Cablelot as a "Strategic Partner" dedicated to the sale, distribution, installation and servicing of certain of the defendant's communication products. In connection therewith, Cablelot, allegedly at the behest of the defendant, incorporated a separate company named Cablelot Clinical Communications Solutions Inc. [hereinafter "Clinical #1"]. The focus of Clinical #1 was to secure the Strategic Partner business relationship with the defendant and to assure the ready performance of Clinical #1 under the terms of any such relationship.

On July 5, 2010, correspondence issued out of the Baltimore regional office of the defendant's Healthcare Communications Group announcing that Clinical #1 had become an authorized Strategic Partner of the plaintiff with respect to the defendant's healthcare communications product line in the Long Island/New York City area of downstate New York (*see* Exhibit B attached to the complaint). Fifteen days later, a second letter of similar import issued out of the defendant's Nurse Call sales office in Utah (*see* Exhibit C attached to the complaint). Strategic Partners are highly favored product distributors who, upon designation, are authorized to purchase the defendant's systems and equipment and to re-sell them directly to users. In exchange, the Strategic partner must actively promote the subject product line and user acceptance and they must contractually commit to the purchase of a quantified amount of such products on an annual dollar amount basis.

On August 24, 2010, the defendant forwarded to plaintiff, Cablelot, a proposed GE Health Care Authorized Distributor Agreement contract titled "Channel Partner Agreement" (*see* Exhibit D attached to plaintiff's complaint). Under its first paragraph, which is captioned "Appointment", the defendant appointed plaintiff, Cablelot System Inc., as a non-exclusive, GE Monitoring Solutions Channel Partner for the product line designated in Annex A, namely Telligence™, ProCare 6000™, ProCare™, StaffCallPro™ - Telergy™, ProCare Connect and ARMSip Software. The appointment type, namely Strategic Partner was also listed in Annex A along with the term of the agreement defined as 08/01/10 through 12/31/11. The product purchase price commitment of Cablelot was fixed at \$250,000.00, but only for the year 2010. Acceptance by Cablelot of such appointment was expressly conditioned upon the terms and conditions set forth in said agreement (*see* ¶ 1(b) of Channel Partner Agreement attached as Exhibit D to complaint). After making two changes to the account exclusions provisions set forth in the Primary Marketing Area section of Annex A, plaintiff, Cablelot, by its president, executed the Channel Partner Agreement on August 26, 2010 and returned it, as modified, to the defendant. The plaintiffs were allegedly advised by agents of the defendants that the revisions made by Cablelot's president posed "no problem with accepting the contract", and that the modified contract had been sent to the defendant's legal office for review. No contract executed by the defendant, with or without Cablelot's modifications, was ever received by the plaintiffs.

Following Cablelot's execution of the contract and continuing through October of 2010, Clinical #1 began to promote the defendants' products directly or on a "referred call" basis from its customers and it allegedly brokered the sale of a large system to a city hospital and other sales in the downstate

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area. Clinical #1 also participated in trade shows and webinars at which it promoted defendant's product lines. Clinical #1 also purchased the defendant's electrical equipment including speakers, cords, cables wires, lights, switches and the like for use in the servicing and maintenance of the NurseCall system. On October 20, 2010, Clinical #1 "incorporated as Clinical Response Solutions, Inc., [hereinafter Clinical #2], but it transacted its business solely under the corporate name of Clinical #1 (*see* ¶ 30 of the plaintiff's complaint).

On October 27, 2010, the defendant denied a request by Clinical #2, d/b/a/ Clinical #1, for a sales presentation product demo kit because there was no distributor agreement between Clinical #1 and the defendant. Thereafter, the defendant refused to indorse or otherwise recognize any relationship between it and Clinical #1 or #2, as there were no distributor contracts between these entities and the defendant and said entities were not named as the Channel Partner designee under the proposed "Channel Partner Agreement" that was executed by Cablelot in August of 2010. In November of 2012, the defendant filled the plaintiffs' order to purchase products within the contemplation of the agreement and it shipped them to the plaintiff notwithstanding that the none of the plaintiff were authorized to sell such products (*see* ¶ 34 of the plaintiff's complaint). The plaintiffs claim to have lost millions in unrealized revenues and that they incurred out of pocket damages in excess of \$500,000.00 by virtue of the defendant's failure to honor its purported promises to retain Clinical #1 as a Strategic Partner.

Cablelot and Clinical #2 commenced this action in February of 2012 seeking damages from the defendant under one or more of the six causes of action advanced in their joint complaint. Each plaintiff is described as a separate corporate entity who conducted business as "Cablelot Clinical Communications Solutions, Inc. (*see* ¶ 3 of the complaint). The causes of action set forth in the complaint are denominated as follows: FIRST: Breach of Contract-Express or Implied; SECOND: Unjust Enrichment; THIRD: Promissory Estoppel; FOURTH: Fraudulent Inducement; FIFTH: Common Law Fraud; and SIXTH: Accounting. The plaintiffs demand \$7,584,000.00 on their FIRST cause of action, sounding in breach of contract, and/or \$548,000.00 on each of the remaining causes of action. Attached to the complaint is GE Health Care Authorized Distributor Agreement contract entitled "Channel Partner Agreement" with the modifications thereto made by Cablelot's president as described above and other of the documents referenced above.

By the instant motion, the defendant moves to dismiss the plaintiffs' complaint for legal insufficiency pursuant to CPLR 3211(a)(7). For the reasons stated below, the motion is granted to the extent stated.

The standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. That standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Marist College v Chazen Env'tl. Serv.*, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting *Sokol v Leader*, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; *Reiver v Burkhardt, Wexler & Hirschberg, LLP*, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]).

In making its determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by

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applicable statutes or rules (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *Haberman v Zoning Bd. of Appeals of City of Long Beach*, 94 AD3d 997, 942 NYS2d 571 [2d Dept 2012]). If it appears, after application of all of the foregoing rules, that the plaintiff is entitled to relief on any view of the duly considered facts alleged, the court’s inquiry is complete and the complaint must be declared legally sufficient (*see Symbol Tech. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]).

While facts alleged in the complaint are presumed to be true, bare legal conclusions and factual allegations which are flatly contradicted by the record are not (*see Daub v Future Tech Enter., Inc.*, 65 AD3d 1004, 885 NYS2d 115 [2d Dept 2009]). “If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

CPLR 3211 allows a plaintiff to submit affidavits and other evidentiary submissions but it does not oblige him or her to do so on penalty of dismissal (*see Rovello v Orofino Realty, Co.*, 40 NY2d 633, 389 NYS2d 814 [1976]). While such submissions may not serve for purposes of determining whether there is evidentiary support for the pleadings, they may be considered for the limited purpose of remedying defects in the complaint (*id.*, at 40 NY2d 636; *see Way v City of Beacon* 96 AD3d 829, 947 NYS2d 531 [2d Dept. 2012]; *Quinones v Schaap*, 91 AD3d 739, 937 NYS2d 262 [2d Dept 2012]). Upon such consideration, the facts alleged therein, like those set forth in the complaint, must also be assumed to be true (*see Harris v Barbara*, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 921 NYS2d 108 [2d Dept 2011]).

Breach of Contract:

It is well established that the essential elements of a cause of action to recover damages for breach of contract are as follows: the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages (*see Elisa Dreier Reporting Corp. v Global NAPs Networks*, 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; *Palmetto Partners, L.P. v AJW Qualified Partners*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). To satisfy the damages element of a cause of action for breach of contract, the pleadings must allege that the breach directly and proximately caused the plaintiff’s injury (*see Weiss v TD Waterhouse*, 45 AD3d 763, 847 NYS2d 94 [2d Dept 2007]; *Jorgensen v Century 21 Real Estate Corp.*, 217 AD2d 533, 629 NYS2d 268 [2d Dept 1995]). The mere fact that defendant breached the contract is insufficient to sustain a complaint (*see Lexington 360 Associates v First Union Nat. Bank of North Carolina*, 234 AD2d 187, 651 NYS2d 490 [1st Dept 1996]).

Without assailing the existence and/or validity of the purported Channel Partner Agreement upon which the plaintiffs’ breach of contract claims are premised, the defendant asserts that the very terms of that agreement render all such breach of contract claims non-actionable and thus legally insufficient. The defendant notes that the plaintiffs allege that the defendant’s “breach caused Cablelot Clinical to lose all of the contracts for service and sales of Nurse Call systems and resulting revenues therefrom” which “are believed to be in excess of Seven Million Dollars” (*see Part I, pp. 4-5 of the*

defendant's memorandum of law). The defendant argues, however, that under Paragraph 6 of the Channel Partner Agreement, it has no entitlement to "termination or severance compensation or to payment in respect of any good will or loss of prospective profits or on account of any expenditure incurred by the Channel Partner except as specifically provided by this Agreement or authorized in writing by GE" (see ¶ 6[iii] on page 2 of the Channel Partner Agreement attached as Exhibit E of the complaint). The defendant contends that because the existence of recoverable damages is an element of a breach of contract claim and the recovery of such damages were waived by the plaintiffs under these provisions of the agreement, their FIRST cause of action sounding in breach of contract is subject to dismissal due to legal insufficiency.

In opposition, the plaintiffs claim that the Channel Partner Agreement it executed is one for the sale of goods and is thus governed by the Article 2 of the Uniform Commercial Code [UCC] and that the absence of the defendant's execution thereof is of no consequence under the terms of § 2-207(2) of the UCC. The defendant's reliance upon the provisions of subparagraph (iii) of ¶ 6 of the Channel Partner Agreement, entitled "Rights and Obligations on Termination of this Agreement", is misplaced as the waiver of damages provisions set forth therein relate to damages arising from the termination of the contract not to breaches thereof. Since the contract was not terminated, but instead, breached by the defendant, ¶ 6(iii), the defendant's claim that the plaintiffs' FIRST cause of action is legally insufficient is without merit.

In reply, the defendant raises an entirely different contractual provision than that advanced in its moving papers, namely, that subparagraph B of ¶ 8 entitled " Limited Warranty: Limitations of Liability", which purports to exempt the defendant from liability in tort, contract, indemnity or warranty, also render the plaintiffs' breach of contract claims legally insufficient. However, these arguments are not properly before the court since they were raised for the first time in the defendant's reply brief (see *Wright v City of New York*, ___ AD3d ___, 2012 WL 4513105 [2d Dept 2012]; *Ramsarup v Rutgers Cas. Ins. Co.*, 98 AD3d 494, 949 NYS2d 436 [2d Dept 2012]). The inability of the plaintiff to respond to these new arguments warrants their rejection by this court. The defendant's demands for dismissal of the plaintiffs' FIRST cause of action sounding in breach of the Channel Partner agreement are thus denied.

Unjust Enrichment:

Claims for unjust enrichment are predicated upon a quasi-contract theory of recovery which results in an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned. The elements are that 1) the other party was enriched; 2) at that party's expense; and 3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (see *Zamor v L&L Assoc. Holding Corp.*, 85 AD3d 1154, 926 NYS2d 625 [2d Dept 2011]). The existence of a valid written contract generally precludes proceeding on grounds of unjust enrichment (see *IDT Corp v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 879 NYS2d 355, [2009]), unless there is a bona fide dispute over the existence of the contract or the contract does not cover the dispute in question (see *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 762 NYS2d 621, 622 [2d Dept 2003]).

Review of the plaintiffs' complaint reveals that its claims for unjust enrichment rest upon allegations that defendant was unjustly enriched by the plaintiffs' expenditure of \$584,000.00 for the purchase of defendant's equipment and other expenses incurred in reliance upon the defendant's promises to name Clinical #1 as a Strategic Partner. The defendant contends that where, as here, the

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plaintiff's efforts result in a benefit to itself or where demands for recovery of the costs of a failed negotiation are advanced, a claim for unjust enrichment does not lie (*see Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 741 NYS2d 100 [2d Dept.,2002]; *Chatterjee Fund Mgt., L.P. v Dimensional*, 260 AD2d 159, 687 NYS2d 364 [1st Dept 1999]; *Songbird Jet Ltd., Inc. v Amax, Inc.*, 581 F.Supp. 912 [DC NY 1984]).

Upon a liberal view of the allegations in the complaint, the court finds that the same sufficiently state claims for unjust enrichment. Controlling case authorities have held that "recovery is available not only where there has been an actual benefit to the other party but, in the instance of a wrongdoing defendant, to restore the plaintiff's former status, including compensation for expenditures made in reliance upon defendant's representations" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484, 567 NYS2d 404 [1st Dept 1991], citing *Farash v Sykes Datatronics*, 59 NY2d 500, 505, 465 NYS2d 917 [1983]). While not every expenditure made by the plaintiffs in pursuit of the "partnership" may be the subject of a recovery under theories of unjust enrichment, at this stage of the proceeding, it does not appear that all are precluded by legal insufficiency (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 672 NYS2d 8 [1st Dept 1998]). The court thus rejects the defendant's application to dismiss the plaintiffs' SECOND cause of action sounding in enrichment. Since, however, the remedies afforded upon the successful claim may be, in whole or in part, inconsistent with the breach of contract claim set forth in the plaintiff's FIRST action, the plaintiff may be required to elect between these remedies at some future stage in this litigation.

Promissory Estoppel:

"The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771, 895 NYS2d 432 [2d Dept 2010]). The requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties (*see Southern Fed. Sav. and Loan Assn. of Georgia v 21-26 E. 105th St. Assoc.*, 145 B.R. 375, 383 [S.D.NY1991], *aff'd*, 978 F.2d 706 [2d Cir. 1992]). The defendant claims that the plaintiff cannot establish the reasonable reliance element because reliance is unreasonable where an agreement between the parties exists that contradicts it (*see* Part III pp. 8-10 of the defendant's memorandum of law in support of its motion). In this regard, the defendant points to the provisions of the Strategic Partner Agreement which expressly state that the designation of the defendant is a non-exclusive, GE Monitoring Solutions Channel Partner (*see* ¶ 1 of Channel Partner Agreement attached as Exhibit D to complaint). The plaintiffs counter with allegations that the exclusive nature of the Channel Partnership relationship may be derived from the defendant's conduct in announcing such relationship and from other provisions of the contract. The court, however, rejects these contentions of the plaintiffs as the court cannot discern any clear and unambiguous promise upon which the plaintiffs could have reasonably relied to sustain a cause of action for breach of contract on a theory of promissory estoppel (*see Rogowsky v McGarry*, 55 AD3d 815, 865 NYS2d 670 [2d Dept 2008]). The plaintiffs' THIRD cause of action is thus dismissed due to legal insufficiency.

Fraud in the Inducement and Common Law Fraud:

To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance (*see Eurycleia*

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Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 883 NYS2d 147 [2009]; *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 932 NYS2d 100 [2d Dept 2011]; *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 920 NYS2d 128 [2d Dept 2011]). Claims of constructive fraud or negligent misrepresentation require the establishment of the same elements as actual fraud “except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties” (*Brown v Lockwood*, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]; *Refreshment Management Services, Corp. v Complete Office Supply Warehouse Corp.*, 89 AD3d 913, 933 NYS2d 312 [2d Dept 2011]); Such a relationship requires demonstrating a high degree of dominance and reliance, and where parties have an arm's length business relationship, a plaintiff's subjective claims of reliance on defendant[s] expertise are insufficient (*see SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 777 NYS2d 62 [1st Dept 2004]).

A cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR 3016(b). “[T]he purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, *supra* at 559). General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318, 639 NYS2d 283 [1995]; *Dune Deck Owners Corp. v Liggett*, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). This result is derived from the general rule that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct (*see Cerabono v Price*, 7 AD3d 479, 775 N.Y.S.2d 585 [2d Dept 2004]; *Brown v Lockwood*, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]).

A cause of action to recover damages for fraud may not be maintained where the only fraud alleged relates to a breach of contract (*see Refreshment Mgt. Serv., Corp. v Complete*, 89 AD3d 913, 933 NYS2d 312, [2d Dept 2011]). “[A] cause of action will be found to sound in tort rather than in contract *only* when the legal relations binding the parties are created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of contractual relations between the parties” (*Lee v Matarrese*, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005], *quoting Hoydal v City of New York*, 154 AD2d 345, 346, 545 NYS2d 823 [2d Dept 1989]).

Nevertheless, not all fraud claims are duplicative of claims for breach of contract (*see J & D Evans Constr. Corp. v Iannucci*, 84 AD3d 1171, 923 NYS2d 864 [2d Dept 2011]). A fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim (*see Gorman v Fowkes*, 97 AD3d 726, 949 NYS2d 96 [2d Dept 2012]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 928 NYS2d 229 [1st Dept 2011]; *Introna v Huntington Learning Ctrs. Inc.*, 78 AD3d 896, 911 NYS2d 442 [2d Dept. 2010]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291–292, 690 NYS2d 17 [1999]). “Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty” (*id.* at 292, 690 NYS2d 17; *see also Deerfield Communications Corp. v Chesebrough–Ponds, Inc.*, 68 NY2d 954, 956, 510 NYS2d 88 [1986]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81, 915 NYS2d 521 [2010]). Where, as here, a party asserts a fraud cause of action based upon a claim that it was fraudulently induced to enter into a contract “the misrepresentations alleged in the pleadings must be more than merely promissory statements about what is to be done in the future; they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them” (*McGovern v T.J. Best Bldg. and Remodeling Inc.*, 245 AD2d 925, 666 NYS2d 854 [3d Dept 1997], *quoting Laing Logging, Inc. v International Paper Co.*, 228 AD2d 843, 644 NYS2d 91 [3d Dept 1996]).

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Here, the plaintiffs allege, in both their FOURTH and FIFTH causes of action that the defendant “misrepresented material facts, specifically that Cablelot Clinical was to become the exclusive service provider in the New York Metropolitan area and that such representations were made knowing them to be false” (see ¶¶ 51-52 and 56-57 of the plaintiffs’ complaint). The plaintiffs further allege that “in reliance thereon, Plaintiffs expended large amounts of money purchasing equipment, hiring employees, marketing defendant’s products” in order “to become the defendant’s exclusive service provider” (see ¶¶ 53 and 58 of the plaintiffs’ complaint). These claims are legally insufficient in as much as they do not allege an intentional misrepresentation of any material existing fact was made to the plaintiffs nor any specific allegations of a present intent to deceive the plaintiffs with respect to material facts independent and collateral to those encompassed by the Channel Partner Agreement. In addition, there are no allegations of justifiable reliance by any of the plaintiffs on any of the purported material misrepresentations (see *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 912 NYS2d 178 [1st Dept 2010]). Nor are there any allegations as to the existence of a fiduciary or confidential relationship between the parties of the type necessary to sustain negligent misrepresentation or constructive fraud claims (see *WIT Holding Corp. v Klein*, 282 AD2d 527, 724 NYS2d 66[2d Dept 2001]). For these reasons, the court dismisses the plaintiff’s FOURTH and FIFTH causes of action which sound in fraud.

Accounting:

The complaint is also legally insufficient with respect to the plaintiffs’ pleaded demands for an accounting. It is axiomatic that an equitable action for an accounting will not lie in the absence of a fiduciary or confidential relationship between the parties (see *Bradkin v Leverton*, 26 NY2d 192, 309 NYS2d 192 [1970]; *Gersten-Hillman Agency v Heyman*, 68 AD3d 1284, 892 NYS2d 209 [3d Dept 2009]; *Waldman v Englishtown Sportswear*, 92 AD2d 833, 460 NYS2d 552 [1st Dept 1983]).

As indicated above, there are no allegations regarding the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (see *Weinstein v Natalie Weinstein Design Assoc.*, 86 AD3d 641, 928 NYS2d 305 [2d Dept 2011]; *Palazzo v Palazzo*, 121 AD2d 261, 265, 503 NYS2d 381 [1st Dept 1986]). Indeed, the Channel Partner Agreement expressly provides that the plaintiffs’ relationship was that of an independent contractor. Such “a conventional business relationship, without more, is insufficient to create a fiduciary relationship” (*AHA Sales v Creative Bath Prods.*, 58 AD3d 6, 21, 867 NYS2d 169 [2d Dept 2008]). The plaintiffs’ SIXTH cause of action is thus dismissed as legally insufficient.

In view of the foregoing, this motion by the defendant for an order dismissing the plaintiffs’ complaint pursuant to CPLR 3211 is granted to the extent that the THIRD, FOURTH, FIFTH and SIXTH causes of action set forth therein are dismissed for legal insufficiency pursuant to CPLR 3211(a)(1). The motion is denied with respect to the FIRST and SECOND causes of action set forth in the complaint, which are hereby severed and continued herein. A preliminary conference shall be held as scheduled above with respect to such FIRST and SECOND causes of action.

DATED: 11/7/12


THOMAS F. WHELAN, J.S.C.