

**Wal-Mart Stores, Inc. v Visa U.S.A. Inc.**

2017 NY Slip Op 30367(U)

February 27, 2017

Supreme Court, New York County

Docket Number: 652530/2016

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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WAL-MART STORES, INC.; SAM'S EAST,  
INC.; SAM'S WEST, DELAWARE INC.; VUDU,  
INC.; WAL-MART STORES EAST, LP; WAL-  
MART STORES ARKANSAS, LLC; WAL-MART  
LOUISIANA, LLC; WAL-MART STORES  
TEXAS, LLC; WAL-MART PUERTO RICO,  
INC.; WAL-MART.COM USA, LLC,

Plaintiff,

-against-

VISA U.S.A. INC.,

Defendant.  
-----X

**DECISION AND  
ORDER**

Index No.  
652530/2016  
Mot. Seq. 007

**HON. ANIL C. SINGH:**

In this action, Wal-Mart Stores, Inc. ("Wal-Mart" or the "plaintiff") seeks to dismiss Visa U.S.A. Inc.'s ("Visa" or the "defendant") third counterclaim for fraudulent inducement, pursuant to CPLR 3211(a)(7). Visa opposes.

The contract at the center of the parties' dispute is an Acceptance Agreement executed by the parties on November 13, 2015 ("the Agreement"). The Agreement is allegedly a product of nearly two years of negotiations between the parties. It lays out the terms under which Wal-Mart would accept Visa credit and debit cards at its stores across the United States as well as in online and phone sales.

In November 2015, Wal-Mart began transitioning its payment card terminals to require cardholders with the new generation of debit cards with embedded computer chips to insert the card into the point-of-sale terminals and then to enter their PIN verification instead of signature verification. This is more commonly known as the chip-and-PIN protocol. Wal-Mart alleges that under the Agreement and federal law it has the right to direct the routing transactions over networks of Wal-Mart's choosing. Wal-Mart alleges that the PIN verification protocol protects against fraud and saves money as PIN verification networks are usually cheaper than signature debt networks.

In its Answer, Visa alleges that Wal-Mart's actions breached the Agreement's core terms which required that Wal-Mart provide Visa debit cardholders the option to verify debit transactions by providing signatures instead of entering PINs.

In particular, Visa cites to Section 2(a)(i) of the Agreement which provides that Wal-Mart must continue to accept Visa-branded debit cards "in a manner and form no less than the manner and form in which Visa Cards" were accepted at Wal-Mart on the Agreement's Effective Date. Visa alleges that prior to entering into the Agreement, Wal-Mart had always permitted Visa debit cardholders to complete their transactions via signature rather than PIN entry if they chose to do so, and in Section 2(a)(i) it promised to continue following that protocol.

Visa further alleges that Wal-Mart's promise is memorialized in Section 2(b)(i)(A), which provides that Wal-Mart "shall comply with all [Visa] Rules" and that "Visa does not and shall not waive any Rule which would prohibit Wal-Mart . . . [from] limiting the cardholder verification method available to a cardholder on any Visa Card." Visa maintains that Section 2(b)(i)(A) requires Wal-Mart to comply with Visa's Honor All Cards Rule and its Consumer Choice Rule, which prohibits Wal-Mart from limiting verification methods on debit card transactions to PINs. Visa alleges that it has not waived those rules and Wal-Mart must follow them. See, Answer with Counterclaims, ¶ 20-28. Visa contends that Wal-Mart's PIN verification protocol has caused customers to complain, resulting in lost revenues and damage to its reputation and brand.

Three months after the parties executed the Agreement, Wal-Mart allegedly started requiring Visa debit cardholders to enter their PINs. In February 2016, Visa threatened to terminate the Agreement with Wal-Mart claiming that using the chip-and-PIN protocol for customers' debit card transactions was a "material breach" of provisions of the Agreement. Wal-Mart agreed to stop using this PIN protocol.

On May 10, 2016 Wal-Mart sued Visa seeking a declaratory judgment that Wal-Mart's chip-and-PIN protocol is permissible under the parties' Agreement. Visa answered, and asserted three counterclaims. The first two counterclaims are for

breach of the Agreement and breach of the implied duty of good faith and fair dealing.

The third counterclaim which is the subject of this motion is for fraudulent inducement. Visa alleges that Wal-Mart falsely represented in Section 2(a)(i) and 2(b)(i)(a) that it would give cardholders the option of signature verification and not require PINs. At the time Wal-Mart made this representation it did not intend to perform its obligations under the Agreement.

### **Discussion**

It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) “must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). The pleading is to be liberally construed. Id. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendant, “the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory.” Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” Id. at 88.

### ***Fraudulent Inducement***

To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury.” Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dept 2010). Moreover, “to recover damages for a tort, such as fraud, in a contract action, plaintiff needs to plead and prove a breach of duty distinct from, or in addition to, the breach of contract.” Id. (internal quotation marks omitted).

It is well-settled that “[a] claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract.” HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 206 (1st Dept 2012) (emphasis added). The First Department has held “collateral” means not “directly related to a specific provision of the contract.” Orix Credit Alliance, Inc. v. Hable Co., 256 A.D.2d 114, 115 (1st Dept 1998) (holding that the fraud claim was duplicative of the contract claim as “the only misrepresentation identified by defendants was Orix's alleged present intention, at the time of contracting, to charge more than it promised in the contract” and the purported misrepresentation was “directly related to a specific provision of the contract”). See also, Wyle Inc. v. ITT Corp., 130 A.D.3d 438, 441 (1st Dept

2015) (where the court held that misrepresentation of future intent to perform the contract is duplicative of contract claims); Gordon v. Dino de Laurentiis Corp., 141 A.D. 2d 435, 436 (1st Dept 1988) (fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it); Comtomark, Inc. v. Satellite Communications Network, Inc., 116 A.D.2d 499, 500–01 (1st Dept 1986) (The trial court “erred as a matter of law when it charged that Rabin's liability for fraud could be established by proof showing simply that he did not intend to keep the promise made to plaintiff”); Schanier v. Azroomanian, 2014 WL 3107911 (Sup. Ct. N.Y. Cnty July 3, 2014) (Singh. J) (“The alleged promise cannot be that the promisor falsely promised to perform the contract itself; such a representation is not collateral to the contract”).

Visa argues that the Court should follow a second line of cases that stand for the proposition that “if a promise was made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of ‘material existing fact’.” Sabo v. Delman, 3 N.Y. 2d 155 (1957); Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403 (1958); Deerfield Commc'ns Corp. v. Chesebrough-Ponds, Inc., 68 N.Y. 2d 954 (1986). Visa also relies on Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112 (1995), where the Court of Appeals permitted plaintiff law firm to proceed simultaneously with a contract and fraud claim against a former partner who allegedly solicited firm clients despite earlier

assurances that he would encourage those clients to remain with the firm. The former partner made representations in a retirement agreement that he would not “impair the firm’s relationship with existing clients and business” and would “integrate, to the extent possible, relationships between the firm’s clients and other partners.”

However, Sabo and its progeny only permit a fraud claim where there is a misrepresentation of present material fact that is collateral to the contract.<sup>1</sup> For example, in Sabo, the plaintiff alleged that he was fraudulently induced into assigning an invention to his employer by oral misrepresentations that the employer “‘would finance [or would undertake to finance] the manufacture of the patented machine’ and ‘would use his best efforts to promote the sale or lease of the machine to other manufacturers.’” However, the contract itself contained neither promise.

Similarly, in Channel Master, an aluminum supplier allegedly made the false statement that “its available and uncommitted supplies and productive capacity of

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<sup>1</sup> The cases cited by the lower courts are consistent with the rule that a claim for fraudulent inducement can be predicted on an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed. In Calenda v. Walker, 2013 WL 875777, at \*1 (N.Y. Ctny Mar 7, 2013), the court noted at the outset of the decision that plaintiff agreed to withdraw the breach of contract claim and instead relied on the fraud claim. In Shopmylabel LLC v. LBI New York, LLC, 2012 WL 11668102, at \*3, the defendant’s representations were made before a contract, including claims about its abilities to handle the project. In 438 West 20 Street, LLC v. Bares, 2016 WL 4076550 the plaintiff alleged that the defendant, during negotiations *prior* to the sale of a home, had misrepresented that a home’s structural elements had “been completely gut renovated with top-of the line workmanship,” which induced the plaintiff to purchase the home.

aluminum ingot, then existing, were such as rendered it then capable of selling to the plaintiff the amount it needed 'and that it had entered into no binding commitments with other customers which could in the future reduce such available and uncommitted supplies and productive capacity." These representations were not made in any contract but rather prior to contracting and as an inducement to enter into a supply agreement.

In Deerfield Commc'ns Corp., the claim was premised on allegedly false oral representations that the defendant would abide by certain geographic restrictions that were not contained in the contract itself.

Graubard also falls within the collateral promise rule as the allegation of fraud and misrepresentation was extraneous to the retirement agreement. See, Big Apple Car, Inc. v. City of New York, 234 A.D.2d 136, 138 (1st Dept 1996); Coppola v. Applied Electric Corp., 288 A.D.2d 41, 42 (1st Dept 2001); GoSmile, 81 A.D.3d at 81. See also, International CableTel Inc. v. Le Groupe Videotron Ltee, 978 F. Supp. 483, 487 (S.D.N.Y.1997) (Sotomayor, J) (where the court held that "[a]ny apparent tension between the two aforementioned principles of New York law has been reconciled through a rule, widely adopted by the state and federal courts, pursuant to which a false promise can support a claim of fraud only where that promise was "collateral or extraneous" to the terms an enforceable agreement in place between the parties."); New York University v. Continental Ins. Co., 87 N.Y.2d 308, 315-16

(1995) (Court of Appeals case that was decided after Graubard with a similar holding as International Cable).

***Visa Fails To Identify Any False Statement As To Collateral Matters***

Here, the gravamen of Visa's allegations is that Wal-Mart did not intend to honor the Honor All Cards Rule and its Consumer Choice Rule despite its promises in Section 2(a)(i) and 2(b)(i)(A) to do so and despite inducing Visa to give it lower acceptance fees in exchange. Wal-Mart's promise to abide by the Honor All Cards Rule and its Consumer Choice Rule and the lower acceptance fees were memorialized in the Agreement. See, Answer with Counterclaims ¶ 31. Visa argues that this constitutes actionable fraud and is not collateral to the Agreement.

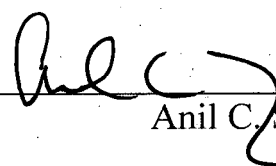
This Court disagrees. Visa's fraudulent inducement claim is directly related to specific provisions of the Agreement and is not a collateral misrepresentation of present material fact. Rather it is an alleged misrepresentation of its future intent not to perform and is duplicative of Visa's contract counterclaim.<sup>2</sup>

**ORDERED** that Wal-Mart's motion to dismiss Visa's third counterclaim for fraudulent inducement should be granted without leave to replead.

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<sup>2</sup> Visa claims that it offered lower fees in exchange for promises memorialized in the Agreement and that Wal-Mart began requiring PIN verification after the Agreement became effective, sound in breach of contract and breach of the implied duty of good faith and fair dealing.

Date: February 27, 2017  
New York, New York

  
Anil C. Singh