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| <b>Tekovery. Inc. v Salesforce, GSD Co.</b>                                                                                                                                                                                    |
| 2018 NY Slip Op 32526(U)                                                                                                                                                                                                       |
| October 4, 2018                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 650643/2018                                                                                                                                                                                                     |
| Judge: Gerald Lebovits                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

**PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM**

*Justice*

-----X INDEX NO. 650643/2018

TEKOVERY, INC.,

MOTION SEQ. NO. 001 & 002

Plaintiff,

- v -

SALESFORCE, GSD COMPANY

**DECISION AND ORDER**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 31, 32, 33, 40

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 46

were read on this motion to/for

DISMISSAL

For convenience, the following motions are consolidated for disposition. Defendant GSD Company (GSD) moves for dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (a) (7) (mot. seq. no. 001). Defendant Salesforce moves for dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (a) (7) (mot. seq. no. 002).

**SUMMARY OF THE FACTS**

The complaint alleges as follows: Plaintiff is a corporation involved in electronics. In December 2016, plaintiff spoke to a Salesforce account representative about a product that would act as inventory management software for plaintiff's operations. The Salesforce representative told plaintiff that Salesforce worked with a preferred vendor, GSD, which was a certified Salesforce partner. In a three-way call, the Salesforce representative introduced plaintiff to Mikael Peterson, an GSD account executive. Plaintiff subsequently contracted with GSD, with the goal of GSD to create a system that would enable plaintiff to run its accounting and other operations by streamlining many aspects of its business. Plaintiff claims that it was oversold by GSD and that GSD failed to timely deliver the system plaintiff expected. Plaintiff also claims that GSD's work product and mismanagement of the project caused plaintiff to manage its operations ineffectively. Plaintiff attempted to be relieved from the additional contractors that resulted from this project with GSD, but to date has only received a response from one vendor.

The complaint includes four causes of action: the first — breach of contract, brought against GSD, alleges that GSD breached its contract with plaintiff by failing to timely devise the system anticipated by plaintiff; the second — breach of the implied covenant of good faith and fair dealing, is brought against GSD and Salesforce; the third — violation of section 349 of the New York General Business Law (GBL), brought against GSD and Salesforce, alleges that defendants were involved in deceptive and unlawful conduct; and fourth — fraudulent inducement, brought against GSD and Salesforce, alleges that defendants induced plaintiff into entering the contract with GSD with misrepresentations and a failure to disclose facts.

### GSD'S MOTION TO DISMISS

GSD moves for dismissal of the complaint, based on documentary evidence and on a failure to state a cause of action. Regarding the first cause of action, GSD contends that the contract executed by GSD and plaintiff (contract) contains both a Limitation of Liability and a Limitation of Damages clause, and said clauses prohibit the claims and damages sought by plaintiff. GSD argues that courts usually uphold agreements which limit liability or damages as long as parties consent to them, in an effort to allocate the degree of risk involved in certain transactions. Their contract provides that the exclusive remedy for any claim against GSD with respect to the quality of work product is GSD's remedying or re-performing its work such that the work product is free from any material defects or deficiencies. According to GSD, the contract limits the liability of GSD in these situations to the fees paid by plaintiff, which, based on GSD's calculations, amounts to \$7,000 to date. GSD also argues that the contract precludes plaintiff from holding it liable for loss of profit or revenue, or for any other special exemplary, punitive, consequential, incidental or indirect damages.

Regarding the second cause of action, GSD is silent on the implied covenant of good faith and fair dealing claim.

Regarding the third cause of action, violation of section 349 of the GBL, GSD argues that the statute does not apply to this situation. According to GSD, section 349 is directed at consumers, and the subject transaction does not involve consumers, but business entities in a commercial project. GSD asserts that to state a cause of action under section 349, plaintiff would have to allege a deceptive consumer-oriented act or practice which is misleading in a material respect, and injury resulting from such conduct. GSD argues that plaintiff has failed to make out a cause of action, due to the nature of this enterprise.

Regarding the fourth cause of action, fraudulent inducement, GSD contends that plaintiff has failed to allege the fraud with adequate specificity, particularly a misrepresentation of a material fact or a justifiable reliance. GSD argues that the fraud allegations are too conclusory to constitute a valid claim.

In its opposition to GSD's motion, plaintiff argues that due to GSD's reckless, intentional and fraudulent conduct, plaintiff should not be bound by the terms of the contract, as plaintiff alleges severe damages directly related to GSD's failure to carry out its contractual duties. Plaintiff argues that courts will disregard limitation clauses in a contract if the terms are impractical, or the conduct of a contracting party is unconscionable, as plaintiff contends.

On the second cause of action, plaintiff states that GSD is liable for bad faith in its contracting with plaintiff, which stands out separately from a breach of contract.

Plaintiff argues that section 349 of the GBL can be applicable to this matter if it impacts consumers, even potentially or indirectly, as plaintiff contends it does.

Plaintiff spells out the fraud in its fourth cause of action: the defendants' failure to disclose the "kickback" when the parties negotiated the contract between plaintiff and GSD. Plaintiff argues that GSD was a disreputable vendor, and this information was not disclosed by Salesforce or GSD at the time of the negotiations. The complaint alleges that GSD had sold a business entity to Salesforce before their meeting. Plaintiff also alleges that, upon information and belief, GSD failed to disclose that it had not been vetted for competency, and that its sole purpose for the referral of eight licensing contracts to Salesforce was to maintain an ongoing relationship. Plaintiff argues that its lack of knowledge of these transactions resulted in its contracting with an entity that injured it financially through a poor performance and bad licensing.

In reply, GSD argues that plaintiff has failed to demonstrate reckless or intentional wrongdoing on GSD's part, and insists that the subject terms of the contract be upheld in court. GSD contends that there is no distinction between the conduct alleged in the breach of contract claim and the implied covenant claim, which requires the dismissal of the latter on the ground of redundancy.

GSD argues that section 349 of the GBL is not applicable here because the impact on consumers by this case is simply too remote. GSD contends that plaintiff's allegation of fraudulent inducement is not sufficient, and the alleged undisclosed facts raised by plaintiff are not clear or distinctly fraudulent.

GSD is moving for dismissal of the complaint on two separate grounds. The first ground is documentary evidence. Dismissal is warranted if the documentary evidence utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). When presented with a motion to dismiss based on failure to state a cause of action, the complaint must be construed liberally, the facts alleged therein accepted as true, and plaintiff accorded the benefit of every possible favorable inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

GSD refers to its contract with plaintiff in dismissing the first cause of action, breach of contract. GSD also argues that plaintiff has not made a valid cause of action in the complaint. Elements of a breach of contract claim "include the existence of a contract, plaintiff's performance thereunder, defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). To state a claim of breach of contract, plaintiff must identify which provision of the contract was breached (*see New York City Educational Constr. Fund v Verizon New York Inc.*, 114 AD3d 529, 531 [1st Dept 2014]).

Plaintiff alleges that the contract provides a Timeline for the project which is approximately four to six weeks. According to plaintiff, the work remained incomplete after a year from its inception. GSD, in its motion papers, addresses the Limitation of Liability clause (section 9), which provides as follows:

"In no event shall Company (GSD) or Client (plaintiff) be liable for any loss of profit or revenue, or for any other special exemplary, punitive, consequential, incidental, or indirect damages of any kind or nature arising out of or in connection with this Agreement, whether in an action based on contract, tort, or otherwise, even if a party has been advised of the possibility of such loss or damages; and the total losses of each party will be of no consequence for all claims of any kind arising as a result of or related to this Agreement (including, without limitation, lost business, lost records or data, or security breach, whether or not the possibility of such damages was disclosed or is reasonably foreseeable by such party.)"

GSD also addresses the Limitation of Damages clause (section 12), which provides as follows:

"Client's sole and exclusive remedy for any claim against Company with respect to the quality of the Work Product shall be addressed by Company's remedying or reperformance such that the Work Product is free from any defects or deficiencies therein. In the absence of any such notice by Client within 30 days of Company's delivery of the Work Product, the Work Product shall be deemed satisfactory to and accepted by Client. Client is responsible for all data backups until we complete the project. THE PARTIES AGREE THAT THE AGGREGATE LIABILITY OF COMPANY AND ITS AFFILIATES, AGENTS AND LICENSORS FOR ANY REASON WHATSOEVER RELATED TO THE WORK PRODUCT SHALL NOT EXCEED THE AGGREGATE OF THE FEES PAID BY CLIENT HEREUNDER, AND CLIENT AGREES NOT TO SUE FOR A GREATER AMOUNT. CLIENT RELEASES AND DISCHARGES SUCH PARTIES FROM ALL LIABILITY IN EXCESS OF SUCH AMOUNT, INCLUDING LIABILITY FOR ITS OR THEIR NEGLIGENCE."

GSD asserts that this court must enforce this contract according to its terms and honor those provisions that limit liability and damages. In the event that this court does not dismiss this cause of action, GSD requests that any claim for damages or costs in excess of the \$7,000 paid to GSD by plaintiff be dismissed.

The court finds that the subject clauses in the contract to be clear and unambiguous. In its opposition papers, plaintiff contends that these clauses should not be enforced because GSD's actions have been unconscionable, fraudulent and in bad faith. Plaintiff's strongest assertion of bad conduct is that GSD acted fraudulently in its dealings with plaintiff. It is this fraudulent behavior which forms the basis of this lawsuit against GSD.

The second cause of action, the breach of the implied covenant of good faith and fair dealing, is essentially a contract claim and may not be used as a substitute for a non-viable contract cause of action (*see Austin v Gould*, 137 AD3d 495, 496 [1st Dept 2016]). It cannot be intrinsically tied to the damages allegedly resulting from a breach of contract (*see Canstar v J. A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]).

Plaintiff is essentially alleging that the implied covenant was breached due to GDS's fraudulent actions, which is independent of its contractual actions. The third cause of action, violation of section 349, also involves allegations of fraud on GDS's part. "In order to make out a valid section 349 claim, a plaintiff must allege both a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff [citations omitted]" (*Blue Cross & Blue Shield of N. J. Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205-206 [2004]). The court shall dismiss this cause of action on the ground that the transactions alleged in the complaint are not consumer-oriented and are related to a commercial-management project. The last cause of action is fraudulent inducement, another claim based on GDS's allegedly fraudulent conduct, and the fraud is based on fraudulent nondisclosure.

Fraudulent nondisclosure is somewhat different from other fraudulent actions. The elements of a fraudulent nondisclosure claim are concealment of material fact which the defendant was duty-bound to disclose, scienter, justifiable reliance, and injury (*see Mitschle v Schultz*, 36 AD3d 249, 254-255 [1st Dept 2006]). Absent a fiduciary relationship between the parties, a duty to disclose arises only under the special facts doctrine when one party's superior knowledge of essential facts renders a transaction without the disclosure inherently unfair (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005]). As with all allegations of fraud, this claim should be dismissed as insufficient where it is unsupported by specific and detailed allegations of fact in the pleadings (*see Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

Plaintiff alleges that during its communications with defendants, GDS failed to disclose a "kickback" between GDS and Salesforce, consisting of an unnamed business entity sold by GDS to Salesforce. Also, plaintiff makes a vague allegation involving GDS's relationship with several licensing companies, also unnamed, with which plaintiff subsequently contracted for the project. Plaintiff does not allege any fiduciary relationship with GDS.

The court finds that plaintiff's allegations of fraudulent nondisclosure are inadequately pleaded and too conclusory. Plaintiff would have to plead additional and more specific allegations about why such transactions constituted a "kickback."

The court dismisses the second and fourth causes of action on the ground of failure to state a cause of action. Plaintiff has alleged GDS's failure to timely complete its performance.

The court does not dismiss the first cause of action, breach of contract. But, pursuant to the limitation clauses in the contract, plaintiff's damages are limited to \$7,000, the fees already paid to GDS.

### SALESFORCE'S MOTION TO DISMISS

Salesforce moves separately for dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Salesforce argues that any claims against it should be dismissed because of the forum selection clause in its Master Subscription Agreement (Agreement) with plaintiff. The Agreement provides that San Francisco, California is the exclusive forum for any disputes arising out of the Agreement. Salesforce contends that plaintiff signed the Agreement and cannot attempt to circumvent the forum selection clause. Salesforce also contends that because plaintiff has not alleged fraud or overreaching in the procurement of this clause, or established that enforcement of the clause would be unreasonable, plaintiff must withdraw any claims brought against Salesforce in this complaint.

Salesforce alternatively argues that all of the claims brought against it in the complaint must be dismissed because plaintiff has failed to state any cause of action. According to Salesforce, the second cause of action, breach of the implied covenant of good faith and fair dealing, must be dismissed because it duplicates the breach of contract cause of action. Salesforce states that it is not a party to the contract between plaintiff and GSD, which plaintiff alleges has been breached. Salesforce argues that, as a nonparty, it cannot be subject to this cause of action.

Salesforce contends that the third cause of action, violation of section 349 of the GBL, is not applicable to the business transactions here, as they are not consumer-oriented. As for the fourth cause of action, Salesforce argues that plaintiff has failed to specify any elements of fraudulent inducement regarding its conduct.

In opposition to the motion, plaintiff argues that it did not execute the Agreement with Salesforce, and that the Agreement is not relevant to the complaint, which refers to acts collateral to the Agreement. With respect to the arguments that plaintiff failed to make out causes of action, plaintiff uses similar arguments that it used in opposition to GSD's motion to dismiss.

With respect to the forum issue, the court agrees with plaintiff. Section 13.1 of the Agreement indicates the choice of San Francisco as a forum for lawsuits arising out of or in connection with said Agreement. Here, all the claims in the complaint are independent of any matters pertaining to the Agreement. Thus, the Agreement is not applicable to this action.

Regarding dismissal based on failure to state a cause of action, Salesforce is entitled to dismissal on all causes of action brought against it. The second cause of action, breach of the implied covenant of good faith and fair dealing, is derived from the contract between plaintiff and GSD, of which Salesforce is neither a party nor a third-party beneficiary. This claim is not pertinent to it. The third and fourth causes of action, violation of section 349 and fraudulent inducement, is dismissed for the same reason they were dismissed against GSD, mainly, the

subject transactions were not consumer-oriented, and the fraud is inadequately and insufficiently pleaded.

In dismissing these causes of action, the court has dismissed Salesforce as a defendant in this suit. Plaintiff is confined to suing GSD on its breach of contract cause of action, subject to the limitations provided in their contract.

Accordingly, it is

ORDERED that defendant GSD Company's motion to dismiss (mot. seq. no. 001) is granted with respect to the second, third, and fourth causes of action, and is otherwise denied; and it is further

ORDERED that defendant GSD Company is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that defendant Salesforce's motion to dismiss (mot. seq. no. 002) is granted and the complaint is dismissed in its entirety as against said defendant as taxed by the Clerk of the Court, and defendant must serve a copy of this decision and order on the County Clerk's Office which is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the remaining parties appear for a preliminary conference on January 9, 2019, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

10/4/2018

DATE

CHECK ONE:

☐ CASE DISPOSED

☐ GRANTED

☐ SETTLE ORDER

☐ INCLUDES TRANSFER/REASSIGN

☐ DENIED

☒ NON-FINAL DISPOSITION

☒ GRANTED IN PART

☐ SUBMIT ORDER

☐ FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE



GERALD LEBOVITS, J.S.C.