

Did-It.Com LLC v Halo Group, Inc.
2018 NY Slip Op 33643(U)
December 11, 2018
Supreme Court, Nassau County
Docket Number: 606044-17
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X **TRIAL/IAS PART: 12**

DID-IT.COM LLC,

Plaintiff,

Index No: 606044-17

Motion Seq. No. 2

-against-

Submission Date: 11/3/17

THE HALO GROUP, INC. and LINDA PASSANTE,

Defendants.

-----X

The following papers have been read on this motion:

- Notice of Motion.....X**
- Affirmation in Support and Exhibit.....X**
- Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Memorandum of Law in Opposition.....X**
- Reply in Further Support.....X**

This matter is before the court on the motion filed by Defendants The Halo Group, Inc. (“Halo”) and Linda Passante (“Passante”) (“Defendants”) on September 12, 2017 and submitted on November 3, 2017, following oral argument before the Court. For the reasons set forth below, the Court grants the motion to the extent that the Court dismisses the first cause of action, and dismisses the second cause of action to the extent that it seeks specific performance with respect to the apartment referred to in the Amended Complaint. The Court otherwise denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing Plaintiff’s claims with prejudice. In their Memorandum of Law in Support, Defendants submit that the Court should dismiss the Amended Complaint’s first, third and fourth causes of action in their entirety, and the second cause of action as to the Apartment and computer equipment (Ds’

Memo. of Law in Supp. at pp. 22-23), and at oral argument before the Court, counsel for Defendants confirmed that these are the causes of action to which Defendants' motion is addressed.

Plaintiff Did-It.Com LLC ("Didit" or "Plaintiff") opposes the motion.

B. The Parties' Background

The Verified Amended Complaint ("Amended Complaint") (Ex. 1 to Gong Aff. in Supp.) alleges as follows:

Didit is a fully integrated marketing and communications firm that offers a range of marketing, public relations and digital services. Halo is a branding and marketing communications agency. This action arises from Defendants' fraudulent and material misrepresentations as to the value of Halo's assets, which Defendants used to induce Plaintiff to purchase all of Halo's assets at a substantially inflated price, and to hire Passante as an employee of Didit.

Didit and Defendants executed an Asset Purchase Agreement dated May 3, 2017 ("APA"), pursuant to which Didit agreed to purchase all of Halo's assets. Didit also contemporaneously entered into an employment agreement dated May 3, 2017 with Passante, the owner of Halo ("Employment Agreement"). The APA contained material terms, including the following: 1) the 2016 financial statements that Halo provided to Didit were accurate and complete; and 2) there were no adverse changes or events subsequent to the preparation of Halo's 2016 financials that would result in, *inter alia*, a loss of customers or a reduction in revenues. These, and other representations, induced Didit to pay \$1.5 million to purchase Halo's assets and to hire Passante as an employee and officer of Didit at a generous salary.

Following the closing ("Closing") under the APA in May 2017, however, Didit learned that the assets ("Assets") that it purchased from Halo are worth significantly less than what was bargained for and agreed upon. The client accounts purchased from Halo generated approximately \$5,000 in revenues for Didit during the first month after the Closing, although Halo's 2016 financials reflected average monthly revenues in excess of \$300,000. Didit also learned after the Closing that all but one of Halo's customers listed in Defendants' disclosures had ceased doing business with the company. Defendants also failed to turn over all of the Assets to Didit as required under the APA. Defendants failed and/or refused to turn over a number of computers and the deed to an apartment ("Apartment"), believed to be located at 45

East 25th Street, Apartment 30C, New York, New York, despite the fact that Defendants had listed those items as Assets. As a result of these breaches and misrepresentations, as well as other misconduct, Didit terminated Passante's employment for cause.

The Amended Complaint sets forth relevant provisions of the APA,¹ including:

Section 2.01 which set forth the Assets being purchased by Didit which included "all of the Seller's property, plant and equipment, supplies, furniture, fixtures, computers, computer files, books and records and other items of personal property used in connection with the Business;"

Section 3.05 which contained material representations and warranties including that "The Seller has delivered to the Purchaser true, correct and complete copies of Seller's unaudited balance sheet as of December 31, 2016 and the related statements of operations and cash flows for the fiscal year ended December 31, 2016..;"

Section 3.06 which contained material representations and warranties concerning the "Absence of Certain Changes or Events," including that "[s]ince December 31, 2016, there has been (i) no material change in the Assets or Liabilities, or in the business, condition (financial or otherwise), results of operations or prospects, of the Seller and the Business...;"

Section 5.02 which provides that Defendants, jointly and severally, shall indemnify and reimburse Didit for any losses, including reasonable attorney's and consultant fees, incurred as a result of, or in connection with, the inaccuracy of any representations and warranties made by Defendants in the APA; and

Section 5.03 which provides that all of the representations and warranties contained in the APA shall survive the Closing and continue in full force and effect for a period of three (3) years thereafter.

¹ The APA defines "Purchaser" as Didit and "Seller" as Halo. It also defines "Business" as "Seller's Business consisting of advertising and marketing agency" (Am. Comp. at ¶ 36).

The Amended Complaint also sets forth relevant provisions of the Employment Agreement,² including:

Section 4.5 which provided for termination for cause, which included Passante's material breach of the Employment Agreement, breach of her duty of loyalty to the Company, or breach or misrepresentation of any provisions of the APA;

Section 7.0 which contained non-competition and non-solicitation covenants; and

Section 9 pursuant to which Passante agreed that, both during and after her employment with Didit, she would not publish or communicate any disparaging remarks regarding Didit or its officers or employees.

Plaintiff alleges numerous false representations and warranties by Defendants, including the following:

1) Halo's income statement reflected that Halo's total billings for 2016 totaled \$4,008,008, which was comprised of 11 different customer accounts, but Didit learned after the Closing that only one 1 of the 11 purported customers, a company called Its Learning, actually still maintained business with Halo;

2) in the first month of business with Didit, the client accounts purchased from Halo generated only approximately \$5,000 in revenues for Didit and, at that rate, it would take 800 months, more than 66 years, for Didit to realize the \$4 million of annual billings that Halo represented in its financials, supporting Plaintiff's allegation that the material information contained in Halo's financial statements was willfully or recklessly exaggerated, false, and/or misleading; and

3) following the Closing, Passante failed and/or refused to provide information to Didit relating to the client accounts purchased from Halo, despite multiple requests, in an attempt to further conceal the problems with the business, in violation of her Employment Agreement and her duty of loyalty to Didit.

Plaintiff also alleges that Defendants, in violation of the APA, failed to provide Didit with all of the Assets, including the deed to the Apartment as well as an account with Salesforce.com which contains information relating to customer accounts and potential leads. In addition, Plaintiff alleges, Passante reacted to her termination by attempting to harm Didit by,

² The Employment Agreement defines the "Company" as Didit and "Employee" as Passante (Am. Comp. at ¶ 46).

inter alia, making false statements to 888Casino, a potential Didit customer, in an effort to dissuade 888Casino from doing business with Didit which included advising 888Casino representatives that Didit was under federal investigation; staying in contact with Its Learning and attempting to obtain business for herself from that company; retaining access to databases and websites belonging to Didit, accessing and/or attempting to access those databases and websites subsequent to her termination from Didit, and attempting to prevent Didit from accessing those databases and/or websites.

The Amended Complaint contains six (6) causes of action:

1) fraudulent inducement/rescission of the APA based on the allegations that Defendants knowingly made false representations of fact to Didit to induce Didit to enter into the APA, Defendants knew that these representations were false when the parties entered into the APA, Defendants intended to induce Didit to rely on such false representations, and Didit justifiably relied on Defendants' false representations. Didit seeks a judgment: rescinding the APA; directing Defendants to reimburse Didit the consideration it paid, specifically the Closing payment of \$500,000 that Didit made to Halo's lender, plus interest from the date that Didit made that payment; declaring that Defendants are not entitled to any further payments or consideration from Didit under the APA or otherwise; and awarding Didit all other losses sustained by Didit as a result of Defendants' fraud, together with interest, counsel fees, costs, disbursements and expenses as provided for in the APA. Plaintiff also alleges that Defendants' conduct was willful and malicious, warranting an award of punitive damages.

2) alternative claim for specific performance of the APA based on Plaintiff's assertion that, if the APA is not rescinded then, in the alternative, Didit is entitled to full enforcement of the APA and specific performance under its terms. Plaintiff alleges that Defendants' failure to deliver the deed to the Apartment, computers owned by Halo and the Salesforce account, as well as Passante's wrongful diversion from Didit of the remaining Assets, constitutes a violation of the APA. Plaintiff further alleges that Defendants, by virtue of that conduct and the statements made by Defendants' counsel, have confirmed that they do not intend to honor the terms of the APA, which constitutes an anticipatory breach of the APA. Plaintiff seeks a judgment: directing Defendants to specifically perform their obligations under the APA; enjoining Defendants from accessing and/or using for any purpose customer information including the information and data contained in the Salesforce database, and from soliciting customers and potential customers of Didit in violation of the terms of the APA; engaging in competition with Didit in violation of the

APA for the period of time prescribed in the APA, and attempting to interfere with and/or disrupt Didit's relationships with customers and potential customers in violation of the APA or, alternatively, enforcing the applicable provisions of the APA to the maximum duration, scope and geographic area deemed reasonable under the circumstances; and awarding Plaintiff all damages incidental to such relief.

3) alternative claim for breach of the APA (damages) based on the allegation that, if the APA is not rescinded, Didit is entitled to an award of damages stemming from Defendants' breaches of the representations and warranties made;

4) a request for a declaratory judgment stating that Didit properly terminated Passante's employment for cause pursuant to the Employment Agreement, without further liability or obligation to Passante for any future salary or benefits;

5) tortious interference with prospective economic relations based on the allegations that Passante was aware of Didit's prospective contracts, as well as business relationships with Didit's existing and/or prospective customers, including 888Casino, and maliciously frustrated Didit's efforts to obtain business from current and prospective clients by using dishonest, unfair and improper means, including making false statements to 888Casino representatives in a successful attempt to dissuade 888Casino from hiring Didit.

6) breach of restrictive covenants in Employment Agreement.

In support of the motion, Passante affirms that she is the co-founder and Chief Executive Officer of Halo. Passante provides copies of the APA (Ex. A to Passante Aff. in Supp.); Employment Agreement (Ex. B); Halo's unaudited balance sheet for the twelve-month period ending December 31, 2016, which was provided to Didit prior to the sale of the Assets to Didit (Ex. C); and an unaudited statement of Halo's operations and cash flows for the fiscal year ending on December 31, 2016, which was provided to Didit prior to the sale of the Assets to Didit (Ex. D).

C. The Parties' Positions

Defendants submit that dismissal of the Amended Complaint is warranted because 1) Didit states no facts to support its allegation that Halo misrepresented the finances of the company, and Didit's assertion that "clearly" (Am. Comp. at ¶ 68) either the financial statements were false and exaggerated or a material adverse change occurred that Halo failed to disclose, is conclusory and contradicted by the facts alleged and the express terms of the APA in light of the fact that a) Didit fails to identify any item on the 2016 financial statements that is false or

misleading; b) Didit does not, and cannot, allege that Halo made any representations in the APA with respect to the status of any of the eleven customers listed on the 2016 Income Statement and, to the contrary, Halo could have made such a representation but did not do so, as evidenced by the fact that Halo could have, but did not, include an existing disclosure schedule as provided for in Section 3.14 of the APA; c) Plaintiff's allegation that the client accounts purchased from Halo generated approximately \$5,000 in revenues for Didit during the first month after closing, although Halo's 2016 financials reflected average monthly revenues in excess of \$300,000 (Am. Comp. at ¶ 12) is misleading and contradicted by the evidence because Halo's only representation was that the 2016 Income Statement, which reported annual billings in the amount of \$4,008,008, was accurate, and Plaintiff does not allege that Halo made any representations about when those billings were earned or accounted for, or represented that its 2016 billings were realized evenly over the prior 12 months; d) Didit speculates that, if the 2016 Income Statement was accurate, then there must have been a material adverse change in Halo's business between December 31, 2016 and the signing of the APA, but Didit does not, and cannot, allege facts demonstrating that a material adverse change to Halo's business occurred when only a single month elapsed after the Closing and before Didit filed this lawsuit; and e) the essence of Didit's fraud claim appears to be that Didit relied on Halo's 2016 Income Statement as a projection of what Halo's revenues would be in 2017, and that projection turned out to be false, but these allegations do not support a fraud claim because representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain a fraud claim; 2) Didit does not, and cannot, allege that its reliance was reasonable or justifiable in light of the fact that a) Didit, a sophisticated company represented by counsel, was provided with the 2016 Income Statement that included a list of customers from whom Halo had reported billings in 2016; b) Plaintiff fails to allege that it sought to verify the accuracy of that information or sought clarification as to the status of any of those accounts; and c) Plaintiff does not, and cannot, allege that Halo prevented Didit from conducting due diligence prior to the acquisition; 3) with respect to Plaintiff's allegation that Passante "concealed" the fact that Halo had only one "remaining, potentially viable customer" (Am. Comp. at ¶¶ 64 and 65), Plaintiff fails to state a claim for fraud by concealment because, absent a fiduciary relationship, which does not exist in this action which involves an arm's-length business transaction, a party has no duty to disclose material information; 4) Didit's fraud claim is duplicative of its breach of contract claim as evidenced by the fact that it is based on the representations that a) the 2016 financial statements

provided to Didit were accurate and complete; and b) there were no adverse changes or events subsequent to preparation of Halo's 2016 financials that would result in, *inter alia*, a loss of customers or a reduction of revenues, and both of those representations are "material terms of the APA" (Am. Comp. at ¶ 10); thus, the only false statements that the Amended Complaint alleges were fraudulent are "entirely duplicative of express representations made in the APA" (Ds' Memo. of Law in Supp. at p. 15), and are not collateral or extraneous to the parties' agreement; 5) as Didit has failed to state a claim for fraud, its rescission claim, which is derivative of its fraud claim, also fails; 6) the second cause of action, to the extent that it seeks specific performance as to the Apartment is barred by the statute of frauds because, even assuming that the 2016 Balance Sheet was incorporated by reference into the APA and is not precluded by the parol evidence rule, the Balance Sheet's mere listing of an "Apartment" without an address or any other description, other than its reported value, does not describe the real property with the required degree of certainty, and Didit cannot overcome the statute of frauds by attempting to identify the address of the Apartment upon information and belief (*see* Am. Comp. at ¶ 28); 7) the second cause of action, to the extent that it seeks specific performance as to the computer equipment, fails because, given the absence of allegations that the computer equipment has a unique or special character, Plaintiff has an adequate remedy at law in the form of money damages; 8) the third cause of action fails because the Amended Complaint does not adequately allege that Halo breached any provision of the APA because it is based on the allegation that Halo's 2016 Income Statement reported a certain volume of business 2016 and the revenue from Halo's accounts in the first month following the acquisition was inconsistent with what Didit expected to achieve in light of the 2016 numbers, but Halo made no representation or warranty as to the amount of revenue that Didit would achieve from Halo's accounts after the acquisition; and 9) the fourth cause of action, for a declaratory judgment fails because Didit did not have cause to terminate Passante's employment in light of the fact that there is no allegation that Passante breached her duty of loyalty by misusing her employer's resources to compete with her employer.

Plaintiff opposes the motion submitting *inter alia* that 1) Plaintiff has stated a viable claim for fraudulent inducement by alleging that Defendants made misrepresentations pursuant to the APA by providing 2016 financials that reflected a healthy business, providing a warranty that these financials were correct and not misleading, and providing a warranty that no adverse changes had occurred since the financials were prepared; 2) with respect to the first cause of

action, Didit's failure to identify a single item in the 2016 Financial Statements that it alleges is false or misleading is not grounds for dismissal because the information that will demonstrate that Halo's 2016 financials were false and misleading is exclusively within Defendants' possession; 3) Plaintiff's claims are not based on projections by Defendants about future business; rather, Didit alleges that Defendants made misrepresentations of present facts, specifically the health of the business as it existed in 2016; 4) Defendants are incorrect in asserting that Plaintiff's fraud claim fails because Halo's 2016 financials were stated in annual terms and not allocated on a month-to-month basis, in part because this is a factual issue not properly addressed on a motion to dismiss; 5) the Amended Complaint alleges justifiable reliance in light of the fact that Defendants' misrepresentations are contained within the APA itself, Didit did not disclaim reliance on those representations, and Section 5.03 of the APA expressly states that the representations survive closing for a period of 3 years, regardless of any investigation conducted by the parties; 6) Plaintiff's fraud claim does not depend upon a showing of fraudulent concealment, although the Amended Complaint states such a claim, because Plaintiff has alleged that Defendants made affirmative misrepresentations about Halo's business and financials; 7) the fraud claim is not duplicative of the breach of contract claim because allegations of fraudulent inducement based on false representations and warranties of present facts state a claim for fraud as well as a claim for breach of contract; 8) in light of the viability of the fraud claim, the rescission claim is also proper; 9) Didit's claim for the Apartment is not barred by the statute of frauds because a) where, as here, an agreement states that all of a seller's property is being conveyed, the statute of frauds is satisfied; and b) in light of the APA's reference to the transfer of all of Seller's property used in connection with Halo's business, and the fact that Defendants listed the Apartment as an asset of Halo on disclosures made for this transaction (*see* Exs. C and D to Passante Aff. in Supp.), the writings, taken together, satisfy the statute of frauds; 10) Plaintiff is entitled to specific performance with respect to Halo's computer equipment in light of Plaintiff's allegation that the computer is unique because it contains Halo's "proprietary business information including, without limitation, information regarding potential leads" (Am. Comp. at ¶¶ 79, 125); 11) if Didit is unable to obtain specific performance of the APA with respect to the Apartment and computer equipment, then Didit would be entitled to a reduction in the purchase price under the APA to account for Halo's failure to deliver those assets to Didit; 12) Plaintiff has stated a claim for breach of the APA and attendant damages in light of Didit's specific allegations as to how the

representations and warranties made by Defendants were false; and 13) Plaintiff has stated a claim for a declaratory judgment, as set forth in its fourth cause of action, because the Amended alleges significant factual misrepresentations in the APA that provided cause to terminate Passante's employment under the Employment Agreement, and Didit is not alleging a cause of action for breach of the duty of loyalty and, therefore, Defendants' reliance on cases discussing the standards for such a claim is misplaced.

In reply, Defendants submit *inter alia* that 1) Plaintiff has failed to specify any actual misrepresentation by Halo or Passante and, even accepting as true Didit's claim that only one of 11 Halo customers listed on the 2016 Income Statement generated business for Didit in the first month following the acquisition, this allegation does not support a reasonable inference of fraud; 2) while the issue of justifiable reliance often implicates factual questions that cannot be resolved at the pleadings state, dismissal in this action is appropriate because Didit does not deny that it neglected to inquire about Halo's customer account, and Didit never secured a disclosure schedule that would have identified the customers with which Halo expected to do more than \$100,000 (*see* APA at § 3.14); 3) neither Halo nor Passante had an affirmative duty to disclose the status of its customers accounts because, given the absence of a fiduciary duty, nondisclosure is inadequate to state a claim for fraud; 4) the fraud claim is duplicative of the breach of contract claim because the alleged misrepresentations that form the basis for Didit's fraud claims are representations in the APA on which Didit had an express contractual right to rely; 5) Didit's claim for the unidentified "Apartment" is barred by the statute of frauds because a) unlike the cases on which Plaintiff relies, clear identification of the Apartment is not a simple proposition; b) the APA lacks essential terms required to create an enforceable contract for the sale of real estate; and c) Didit's contention that an Apartment with a reported value of \$1.4 million was intended to be conveyed as part of the APA, when the aggregate purchase price for all of Halo's assets was \$1.5 million, is "inherently incredible" (Ds' Reply Memo. of Law at p. 11); and 6) Didit's allegations that Halo's 2016 Income Statement reported a certain volume of business in 2016, and that the revenue from Halo's accounts in the first month following the acquisition was inconsistent with what Didit expected to achieve in light of the 2016 figure, do not support Didit's claim that Halo breached a representation or warranty in the APA because Halo made no representation or warranty as to the amount of revenue that Didit would achieve from Halo's accounts after the acquisition.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), 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 within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013). To state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached. *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 (2d Dept. 2011) citing, *inter alia*, *Peters v. Accurate Bldg. Inspectors Div. of Ubell Enters., Inc.*, 29 A.D.3d 972 (2d Dept. 2006).

C. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

A cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract. *Gorman v. Fowkes*, 97 A.D.3d 726, 727 (2d Dept. 2012), citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d 766, 768 (2d Dept. 2008); *Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1076-1077 (2d Dept. 2007). A mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud. *Gorman v. Fowkes*, 97 A.D.3d at 727, citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d at 768; *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528 (2d Dept. 2001). Conversely, a misrepresentation of material fact that is collateral to the contract and serves as an inducement for the contract is sufficient to sustain a cause of action alleging fraud. *Gorman v. Fowkes*, 97 A.D.3d at 727, citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d at 768, quoting *WIT Holding Corp. v. Klein*, 282 A.D.2d at 528.

Where the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. *1810 E & J Restaurant Corp.*, 150 A.D.3d 648 (2d Dept. 2017), quoting *Schumaker v. Mather*, 133 N.Y. 590, 596 (1892) and citing, *inter alia*, *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278 (2011).

The issue of justifiable reliance is generally one of fact. *Braddock v. Braddock*, 60 A.D.3d 84, 88 (1st Dept. 2009). A sophisticated investor who acquires a business is, however, under an affirmative duty to protect himself from misrepresentations by the seller by investigating the business he is acquiring and the details of the transaction. *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 100 (1st Dept. 2006), *lv. den.*, 8 N.Y.3d 804 (2007).

The mere nondisclosure of a material fact, unaccompanied by some deceptive act, does not constitute fraud absent a confidential or fiduciary relationship. *Scott v. Fields*, 85 A.D.3d 756, 758 (2d Dept. 2011), quoting *First Keystone Consultants, Inc. v. DDR Constr. Servs.*, 74 A.D.3d 1135, 1138 (2d Dept. 2010).

Representations that are mere expressions of opinion of present or future expectations are not to be considered promises when examining the issue of fraud in the inducement. *Goldman v. Strough Real Estate, Inc.*, 2 A.D.3d 677, 678 (2d Dept. 2003), quoting *Crossland Sav. v. SOI Dev. Corp.*, 166 A.D.2d 495 (2d Dept. 1990). Fraud is not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future. *Goldman v. Strough*

Real Estate, Inc., 2 A.D.3d at 678, quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 408 (1958).

D. Rescission

To justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract, failure of consideration, an inability to perform the contract after it is made, or a breach in the contract which substantially defeats the purpose thereof. *Babylon Assoc. v. County of Suffolk*, 101 A.D.2d 207, 215 (2d Dept. 1984). If rescission is based on a breach of the contract, the breach must be material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract. *Id.*, quoting *Callanan v. Keeseville, Ausable Chasm & Lake Champlin R. R. Co.*, 199 N.Y. 268, 284 (1910).

E. Specific Performance

The decision whether or not to award specific performance is one that rests in the sound discretion of the trial court. *Cho v. 401-403 57th Street Realty Corp.*, 300 A.D.2d 174, 175 (1st Dept. 2002), quoting *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001). In determining whether to grant specific performance, the trial court must determine, in the first instance, whether money damages would be an adequate remedy by considering, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award. *Cho v. 401-403 57th Street Realty Corp.*, 300 A.D.2d at 175, quoting *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d at 415. Specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action. *Cho v. 401-403 57th Street Realty Corp.*, 300 A.D.2d at 175.

F. Relevant Statute of Frauds Principles

The Statute of Frauds prohibits the conveyance of real property without a written contract. *Pinkava v. Yurkiw*, 64 A.D.3d 690, 692 (2d Dept. 2009), citing GOL § 5-703(a). While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance, the claimed partial performance must be unequivocally referable to the agreement. *Pinkava v. Yurkiw*, 64 A.D.3d at 692, citing GOL § 5-703(4) and quoting *Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group*, 93 N.Y.2d 229, 235 (1999). It is not sufficient that the oral agreement gives significance to the plaintiff's actions. The actions alone must be unintelligible or at least extraordinary, and explainable only with reference to the oral agreement. *Pinkava v. Yurkiw*, 64 A.D.3d at 692, citing *Anostario v.*

Vicinanzo, 59 N.Y.2d 662, 664 (1983), quoting *Burns v. McCormick*, 233 N.Y. 230, 232 (1922). The doctrine of part performance is based on principles of equity, in particular, recognition of the fact that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield. *Pinkava v. Yurkiw*, 64 A.D.3d at 692, quoting *Nicolaidis v. Nicolaidis*, 173 A.D.2d 448, 449-450 (2d Dept. 1991).

The description in a contract of sale need not be as detailed and exact as the description in a deed. *Elias v. Serota*, 103 A.D.2d 410, 416 (2d Dept. 1984) citing, *inter alia*, *Boyajian v. Casey*, 52 A.D.2d 1014 (3d Dept. 1976). Descriptions of “all my property” or “all my lands wherever situated” have been upheld under the statute of frauds. *Elias v. Serota*, 103 A.D.2d at 416 citing, *inter alia*, *Miller v. Tuck*, 95 App. Div. 134 (2d Dept. 1904). The same is true for descriptions of all assets of a partnership. *Elias v. Serota*, 103 A.D.2d at 416 (citations omitted). The Second Department, in *Elias v. Serota*, noted that clear identification of the properties at issue was a “relatively simple proposition” and that “no one contends that the parties had any difficulty in identifying the subject matter of the transaction.” 103 A.D.2d at 416.

To satisfy the statute of frauds, an agreement need not be contained in one single document, but rather may be furnished by piecing together other, related writings. *Agosta v. Fast Systems Corp.*, 136 A.D.3d 694, 695 (2d Dept. 2016), quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 477 (2013) (internal quotation marks omitted). Further, all of the terms of the contract must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged. *Agosta v. Fast Systems Corp.*, 136 A.D.3d at 695, quoting *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 55-56 (1953).

G. Application of these Principles to the Instant Action

The Court dismisses the first cause of action, dismisses the second cause of action to the extent that it seeks specific performance with respect to the Apartment and otherwise denies the motion. The Court so rules based on its conclusion that 1) Didit’s fraud claim, set forth in its first cause of action, is duplicative of its breach of contract claim because it is based on the representations that the 2016 financial statements provided to Didit were accurate and complete and that there were no adverse changes or events subsequent to the preparation of Halo’s 2016 financials, and both of those representations are material terms of the APA and the only false statements that the Amended Complaint alleges were fraudulent are duplicative of express

representations made in the APA; 2) in light of the dismissal of the fraud claim, the related rescission claim is also not viable; 3) the claim for specific performance with respect to the Apartment, set forth in the second cause of action, violates the statute of frauds because there is no description of that real property in the APA, clear identification of the Apartment is not a simple proposition and the APA lacks essential terms required to create an enforceable contract for the sale of real estate; 4) the claim for specific performance with respect to the computer, set forth in the second cause of action, is legally sufficient because Plaintiff has alleged that the computer is unique because it contains Halo's proprietary business information, including information regarding potential leads and, therefore, money damages may not be sufficient; 5) the breach of contract claim, the third cause of action, is sufficient because Plaintiff has stated a claim for breach of the APA and attendant damages by making specific allegations as to how the representations and warranties made by Defendants were false; and 6) Plaintiff has stated a claim for a declaratory judgment, as set forth in its fourth cause of action, because the Amended Complaint alleges significant factual misrepresentations in the APA that would have provided cause to terminate Passante's employment under the Employment Agreement, and also alleges that Passante engaged in conduct, including failing or refusing to provide information relating to the Halo client accounts and failing and/or refusing to provide access to computer programs and/or data relating to former Halo accounts, that constituted a breach of her duty of loyalty to Didit, and also would have permitted Didit to terminate Passante for cause.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on January 26, 2018 at 9:30 a.m.

DATED: Mineola, NY

December 11, 2018

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

DEC 22 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE