SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 39EFM

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BARRY MCGOWAN

Plaintiff,

- v -

CLARION PARTNERS, LLC,

Defendant.

INDEX NO. 650710/2015

MOTION DATE 01/10/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 181, 182, 183, 191, 192

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this breach of contract action defendant Clarion Partners, LLC ("Clarion") moves summary judgment dismissing the complaint.

In his complaint, plaintiff Barry McGowan ("McGowan") contends that a term sheet agreed to by the parties constituted a binding contract to establish a new real estate investment management business in Germany with McGowan and two of his former colleagues. McGowen claims that Clarion breached the "contract" by renegotiating certain terms set forth in the term sheet, and then refusing to go forward with it. On this summary judgment motion, Clarion argues that the undisputed facts show that the term sheet was only a preliminary outline, and not final and binding. It further argues that no

other company offered to go into business with McGowan, and thus, he was not damaged by any purported reliance on Clarion's "promises."

Background

McGowan is a sophisticated real estate investment executive. Clarion is a real estate investment management company, and, during the relevant time period, was majority owned by the private equity firm Lightyear Capital ("Lightyear"), Clarion's financial partner.

Prior to contacting Clarion, McGowan worked for ten years in Munich, Germany for GLL, a Munich-based real estate fund. He left GLL in November 2011, to try to start his own real estate investment business in Germany. McGowen was planning to have two GLL employees, Florian Winkle ("Winkle"), a fund manager, and Oliver Kachele ("Kachele"), GLL's Chief Financial Officer, join him in managing the new business. McGowen, Winkle and Kachele created a business plan and marketing materials, and sought a large, institutional equity partner to provide capital and credibility to get the business going.

In late January 2012, McGowan contacted Clarion, as well as other potential target companies, seeking investors for the new business.[1] On February 21-23, 2012, McGowan met with Steve Furnary ("Furnary"), the Chief Executive Officer of Clarion, and discussed the business plan and projections. McGowan also met other Clarion executives, including Dave Gilbert ("Gilbert"), the Chief Investment Officer, and Patrick

[1] At that time, Clarion had no office, operations or investments in Europe.

Tully ("Tully"), the Chief Financial Officer. McGowen told Furnary that he wanted to bring in Winkle and Kachele as his management team.

On March 8 and 9, 2012, McGowan, Winkle and Kachele met with Clarion at its offices in New York. Furnary and Tully were present for most of the meetings with other Clarion executives coming in at times. On March 9, the parties prepared a one-and-one-quarter page term sheet (the "Term Sheet") discussing the creation of Clarion Partners–Europe ("CPE") (Marooney affirm, exhibit 20).

The Term Sheet contains seven numbered paragraphs. In the first paragraph, the parties state that employment offers will be made to the "management team comprised of Barry McGowan, Oliver Kachele and Florian Winkle." It then refers to the term "management team," "management group," or "management" (not simply McGowen) twelve times, in nearly every paragraph.

The Term Sheet provides, in paragraphs 2 and 3, that the gross salary of the management team would be €1 million (one million euros), without indication of the breakdown of that pay between McGowen, Winkle and Kachele, and it also provides for potential bonuses. Paragraph 4 of the Term Sheet provides that Clarion would commit €3.2 million of capital to fund the projected operating losses. The Term Sheet further states, in relevant part:

> "[t]he management team will fund $1.0 million to Clarion Partners to purchase an economic interest in Clarion Partners . . . The structure of this economic interest is to be determined, and likely be provided in the form of equity or income units and performance units"

(*id.*, ¶ 4 at 1). It specifies that CPE will be initially capitalized by funds from both Clarion and the management team, and that Clarion Partners would own 70% of CPE's equity and the management team would own 30%. It further indicates that the management team would have vesting and repurchase options but does not indicate what those options are or how they work.

At the end of the Term Sheet, the parties wrote: "[a]greed amongst the parties but subject to documentations." It was signed by McGowan, Winkle and Furnary on Friday, March 9, 2012 at 6:11 p.m. (*id.* at 2). Furnary then sent an email to Stephen Cordes, Clarion's Chief Operating Officer, Tully, Gilbert, Stephen Hansen, a Clarion Managing Director, and Hugh Macdonnell, also a Clarion Managing Director, with an attachment "Draft Term Sheet for Clarion Partners Europe March 9 2012.docx," stating "[t]his is agreed and signed" (affirmation of David A. Piedra in opposition [Piedra affirm], exhibit 26).

At the time Clarion executed the Term Sheet it had not retained counsel, no lawyers were involved in the preparation of the Term Sheet (Furnary tr[2] at 156), nor had Clarion conducted its own due diligence (Tully tr at 65, 70-71). While Clarion's executive committee members had met with McGowan, Winkle and Kachele on March 8 and 9, the committee had not met or voted on the Term Sheet or on opening a business in Europe prior to its execution.

[2] Tr refers to that person's deposition transcript.

On Saturday March 10, Tully sent an email to Cordes, indicating that "[i]f CPE does not work [McGowan's] put in a nominal investment in CPE at risk and has his hooks in us with [Class] A shares," and that "we should discuss either a way to phase in their equity purchase in based on performance, or shift his investment more to CPE and we can give him B shares, more inc/perf units, etc." (Piedra affirm, exhibit 27). Over the weekend, on March 10 and 11, Furnary and Cordes had discussions with McGowan about employment agreements for the management team, McGowan's separation agreement, and the allocation of salaries. They further negotiated the nature and amount of the management team's potential investment in Clarion, increasing the management teams' investment from $1 million (U.S. dollars) to €1.0 million (euros) which was about a 30% increase (McGowan tr at 229-233). McGowan expressed that he was willing to discuss this and to rearrange things, but he believed this was a "retrade" – Clarion wanted to increase the management team's investment and would make them whole with securities (*id.* at 233).

Clarion sought copies of the existing employment agreements of Winkle and Kachele, because it was concerned about their ability to compete against their current employer GLL (Marooney affirm, exhibit 26). On Sunday March 11, McGowan sent an email to Winkle indicating that he had conversations with Furnary and Cordes and that "there are some issues to discuss regarding the million which is getting complicated. The USD [US dollars] investment into Clarion is difficult" (Marooney affirm, exhibit 26). He

indicated that Clarion was proposing a new structure on the investment with euros rather than dollars, but which would be "drawn down over time that will earn same 7%," that Clarion had "lots of questions" about regulatory licenses, and about the management team's competition clauses in their GLL employment agreements (*id.*). He asked Winkle to send his GLL employment agreement, and to have Kachele send his as well (*id.*).

In fact, Kachele had an employment contract that could not be terminated by either party prior to June 2014 except by mutual agreement (Kachele tr at 76-81). Prior to March 9, Kachele had begun negotiations with GLL, which he believed might relieve him of that commitment early (*id.*). However, once GLL learned, sometime over that weekend, that Kachele and Winkle met with Clarion, it ceased discussions with Kachele about an early exit and locked him into his employment agreement until June 2014 (*id.*). At that time GLL also offered Winkle a raise and significant promotion, which Winkle accepted. (Winkle tr at 44-45).

While the Term Sheet does not explicitly so state, Clarion required approval from Lightyear to proceed with this investment (Furnary tr at 153-155). By email dated Monday March 12, 2012, Furnary circulated to Cordes and Tully a draft email to be sent to Lightyear with the subject as "Clarion Partners Europe," indicating the terms from the Term Sheet, and providing that "[t]o align the interests of CPE to Clarion Partners and to provide additional compensation, the management team will receive equity stock awards in Clarion Partners . . . [w]e propose that this be in the form of Class B units" (Marooney affirm, exhibit 24 at 2). The draft email was never sent to Lightyear.

On Monday, March 12, 2012, Winkle sent an email to Furnary saying: "I want to thank you for the interesting meeting and the opportunity you offered. I'm sorry to give you notice that I reject your offer and do not pursue it" (Marooney affirm, exhibit 27). When asked at his deposition whether at the time he signed the Term Sheet he believed that the Term Sheet or any terms contained in it were binding, Winkle testified, "No" (Winkle tr at 31; *see also id.* at 33). Winkle testified that he walked away from the project because (1) GLL offered him a significant raise and promotion, (2) he was concerned that Clarion would not have given him sufficient time to raise capital at the new venture, and (3) Clarion indicated it would expect the management team to invest one million euros rather than 1 million dollars, which was a 30% increase. (*id.* at 41-45).

In response to Winkle's email, Furnary sent an email to McGowan informing him that "we [Clarion] have stopped the lawyers having received this note" (Marooney affirm, exhibit 28 at 2). McGowan responded by saying that he thought "it's a case of the 'yips,'" and that "we are where we are, and everyone needs to regroup." He further stated that Winkle "went off the reservation. I'm only glad it happened early. I just wanted to give you the post-mort. It was a rush job, with Germans involved. Adapability [sic] is unfortunately not their strong suit. I am really sorry for that. Please accept my apologies" (*id.* at 1). Negotiations basically stopped after Winkle withdrew and Kachele was no longer available.

From that point on, McGowan Repeatedly reached out to Furnary about a European business and capital raising. Thus, By email on March 19, 2012, McGowan

wrote Furnary summarizing why he thought the timing was right to enter the European market, and that he thought they should move forward (Marooney affirm, exhibit 41). By email March 29, 2012, McGowan again reached out to Furnary stating that he could help "push the European initiative forward" (Marooney affirm, exhibit 42). On Friday March 30, Furnary sent an email to Hugh Macdonnell, the Clarion Managing Director in charge of capital raising, stating that McGowan "has the idea he would take on the capital raising role for the U.S. and delay the Europe launch until later," asking Macdonnell to call McGowan and see if this made sense (Marooney affirm, exhibit 43). Macdonnell ultimately did not offer McGowan the role of capital raiser (McGowan tr at 266).

On April 9, 2012, McGowan emailed Furnary, discussing his potential role as a capital raiser, again pushing the European business (Marooney affirm, exhibit 44). On May 2, 2012, McGowan sent Furnary a draft outline for discussion concerning a plan for a Munich business (Marooney affirm, exhibit 45). Furnary then offered McGowan a consulting position, but McGowan rejected the offer (McGowan tr at 273-274).

On May 18, 2012, McGowan's German counsel sent an email with a 17-page draft "articles of association" for a proposed new business in Germany to Clarion's counsel, King and Spaulding, at their Germany office. McGowan's counsel indicated the draft was for discussion purposes, and that they needed to discuss the details, such as tag-along rights and drag-along rights, and that her next step would be to send a draft shareholders' agreement but that they needed to discuss all of this (Marooney affirm, exhibit 47). On May 24, 2012, Furnary sent an email to McGowan confirming that "the earlier outlines of

a transaction are neither agreed nor approved," that "we [Clarion] have no commitment to advance the formation of a business," and there was little support in Clarion Partners to begin an effort in Europe at that time (Marooney affirm, exhibit 49).

Three years later McGowan commenced this action. The amended complaint asserts four claims: breach of contract; breach of the covenant of good faith; detrimental reliance; and promissory estoppel. Clarion answered the amended complaint, denying the material allegations, asserting various affirmative defenses, including that the Term Sheet is not binding. Discovery has been completed.

Now that discovery has been completed Clarion moves for summary judgment, urging that the conditional language of the Term Sheet, confirmed by undisputed evidence, demonstrates that the parties did not intend to be bound. It also argues that there was a lack of certainty regarding at least one material term – the proposed equity investment by the management team. It asserts that there is no basis for a breach of the duty of good faith, because there is no enforceable contract, and the undisputed facts show that it made good faith, reasonable efforts to reach an agreement with McGowan.

Clarion also contends that there is no claim for detrimental reliance, and that the undisputed facts show no reasonable reliance by McGowan on the Term Sheet since that agreement was expressly conditional and subject to documentation. Finally, it contends that McGowan cannot establish an unambiguous promise to enter into the proposed transaction, and again, his reliance was unreasonable.

In opposition, McGowan argues that the Term Sheet contained all material terms, and that whether any of the alleged missing terms can be supplied is a triable issue of fact. He contends that Clarion's actions in negotiating over the weekend contradict its claims that the agreement was non-binding. On the breach of the covenant of good faith claim, McGowan contends that Clarion's actions in retrading on the management team's investment from dollars to euros, and by offering the equity not in Clarion, but in a less valuable entity, was in bad faith. He claims that because the agreement contemplated that Winkle may not join CPE, Clarion's withdrawal based on that also was a breach of good faith.

Finally, McGowen asserts that he detrimentally relied on Clarion's representations by informing Legal & General, another potential investor for creating this business, that he would not pursue a transaction, that during his negotiations with Clarion, he could not pursue other potential options, and then Europe underwent an economic upheaval. He asserts that he expended significant funds traveling back and forth from Germany to New York when they were negotiating the Term Sheet, and that he ended up having to return to the U.S., incurring relocation expenses.

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). The burden then shifts to the opposing party to produce competent evidence sufficient to raise an issue of fact warranting a trial (*id.*). "Summary judgment

permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]).

Breach of Contract Claim

The "burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it" (*Kosson v "Algaze"*, 203 AD2d 112, 112-113 [1st Dept 1994], *affd* 84 NY2d 1019 [1995] [internal quotation marks and citation omitted]). For a contract to be binding, there must be full agreement on all material, essential terms (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999] ["there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms"]; *see Kolchins v Evolution Mkts., Inc.,* 128 AD3d at 61 ["The law is clear that although the parties may intend to enter into a contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result"]; *Mode Contempo, Inc. v Raymours Furniture Co., Inc.*, 80 AD3d 464, 465 [1st Dept 2011]).

Whether a writing constitutes a binding contract, or an unenforceable agreement to agree, turns on "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n 2 [2009]; *Keitel v E*TRADE Fin. Corp.*, 153 AD3d 1181, 1181 [1st Dept 2017]; *Offit v Herman*, 132 AD3d

409, 409-410 [1st Dept 2015]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 427 [1st Dept 2010]). Where an essential term of a contract is left for future negotiation, the agreement is not binding (*Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444 [1st Dept 2014]; *see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Luxor Capital Group, L.P. v Seaport Group LLC,* 148 AD3d 590, 590 [1st Dept 2017].[3]

Essential terms that must be set forth in the written contract are "those terms customarily encountered in a particular transaction" (*Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d at 444 [internal quotation marks and citation omitted]). The issue is not whether the court could determine the omitted terms from an agreement, but, rather, whether the parties had a meeting of the minds in the first place (*id.* at 445).

Here, the Term Sheet itself indicates an intent not to be bound until additional documents are signed and fails to include certain terms material to an agreement for the

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[3] S*ee also Keitel v E*TRADE Fin. Corp.*, 153 AD3d at 1181 [term sheet indicating that that neither party shall be bound until they execute a more formal written agreement, was not an enforceable contract]; *Offit v Herman*, 132 AD3d at 410 [memorandum of understanding that was "subject to documentation acceptable to the parties and court approval" was not an enforceable contract]); *Amcan Holdings, Inc v Canadian Imperial Bank of Commerce*, 70 AD3d at 426-427 [documents signed by the parties and titled "Draft Summary of Terms and Conditions" and "Summary of Terms and Conditions," which "made a number of references to future definitive documentation" were not binding agreements]; *Northern Stamping, Inc. v Monomoy Capital Partners, L.P.*, 129 AD3d 448, 449 [1st Dept 2015] [letter agreement which stated that "[a]ll other terms of this Letter constitute statements of present intention adopted to facilitate the negotiation of definitive agreements, do not constitute a contract or agreement" did not constitute a binding contract].

creation of this business. The Term Sheet states right above the signatures that it was "[a]greed amongst the parties but subject to signed documentations" (Marooney affirm, exhibit 20 at 2). This language shows that the parties reserved the right not to be bound "subject to signed documentations," and that documentation included not only management team employments contracts, but also operating agreements, articles of association, and other governing documents for the not yet established CPE entity. While McGowan argues that these documents were all "pro forma" in Germany, in May 2012, his own counsel sent a 17-page draft of proposed articles of association to Clarion, explaining that it was "for discussion purposes" and that "there were a number of provisions which still need to be included once we have discussed the details" (Marooney affirm, exhibit 47, May 18, 2012 email from Dr. Nina Leonard at 1).

Moreover, McGowan admitted at his deposition that there were a number of additional documents the parties needed to agree on, such as documents required to set up the entity in Germany, operating agreements, employment contracts and governance agreements (McGowan tr at 206-209; *see also* Furnary tr at 154 ["That last sentence was put in there so we all understood this was not a done committed transaction"]). Even McGowan's own proposed management team member, Winkle, who personally signed the Term Sheet, testified at his deposition that the Term Sheet was not binding (Winkle tr at 31).

McGowan's actions right after Winkle rejected the "offer," in stating in an email to Furnary that the negotiations that preceded the Term Sheet were a "rush job," and in

not objecting when Furnary informed him that after Winkle's decision that Clarion "had stopped the lawyers," further show the parties' lack of intent to be bound.

Contrary to McGowan's contention, simply by indicating in an email that the Term Sheet was "agreed and signed," Furnary did not transform this otherwise preliminary agreement into a fully enforceable contract to engage in a venture to create CPE with McGowan, Winkle, and Kachele (*see Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d at 445). Further, this interpretation does not render the language "[a]greed amongst the parties" meaningless. While the parties agreed to the preliminary terms set forth in the Term Sheet, they did not agree to those terms constituting the final, binding agreement to establish the business without the additional "signed documentations."[4]

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[4] McGowan's reliance on *Stonehill Capital Mgt., LLC v Bank of the W.* (28 NY3d 439, 451-455 [2016]) to urge that "subject to" language is insufficient to convey an intent not to be bound is misplaced. *Stonehill* involved distinguishable circumstances. In that case, a party was conducting an auction sale of a loan, and the auction terms provided that the buyer would be required to sign a pre-negotiated asset sale agreement that was provided with the auction memorandum (28 NY3d at 449). The Court found defendant's argument that the auction was not final and binding, was "in direct contravention of the auction sale terms and the usual manner in which reserve auctions proceed" (*id.* at 452). Here, this proposed transaction did not involve a party bidding to purchase something at an auction, and there was no particular form of documentation that the parties were required to sign. Rather, as McGowan himself admitted, it required the negotiation of terms and of a number of different agreements to create a start-up real estate investment management business.

Similarly, *Bed Bath & Beyond Inc. v IBEX Constr., LLC*, (52 AD3d 413, 414 [1st Dept 2008]) is factually distinguishable. In that case, the Court held that a letter of intent in connection with a construction project was binding, because it did "not contain an express reservation by either party of the right not to be bound until a more formal agreement is signed. Here, the Term Sheet does contain an express reservation.

Also, material terms regarding the consideration to be given to the management team were left for future negotiation. The Term Sheet clearly stated that the "*structure of this economic interest is to be determined*, and likely to be provided in the form of equity or income units and performance units" (Term Sheet at 1). The precise form of this economic interest is material and would customarily be included in this type of transaction. Where an agreement fails to indicate the nature of the equity consideration given to one party, it fails for lack of definiteness (*Benham v eCommission Solutions, LLC*, 118 AD3d 605, 606-607 [1st Dept 2014]). In *Benham v eCommission Solutions, LLC*, the First Department granted summary judgment to the defendants, dismissing the breach of contract claim. It found that the record indicated that, at most, the parties had an agreement to agree that the plaintiff would receive some kind of equity stake in one of the defendant entities, with the terms of that stake subject to future negotiation. The Court held that "[t]he failure of the parties to agree on the precise form of the equity stake causes plaintiff's contract claim to fail for lack of definiteness in the material terms of her equity compensation" (*id.* at 607; *see also Doller v Prescott*, 56 Misc 3d 1204[A], 2017 NY Slip Op 50871[U] * 2[Sup Ct, Albany County 2017], *affd* 167 AD3d 1298 [3d Dept 2018] [memorandum of understanding not enforceable where contained language that "the precise manner in which this Equity is offered shall be determined," and left open for future negotiation both the type of equity and the precise manner in which it would be offered]; *Raj Acquisition Corp. v Atamanuk*, 272 AD2d 164 [1st Dept 2000] [letter

agreement was not enforceable where it left a material element of the bargain open for negotiation]).

Here, like in *Benham v eCommission Solutions, LLC* and *Doller v Prescott*, the management team's equity stake is a material element that was left for future negotiation. In addition, the language of the Term Sheet is written in the disjunctive and contemplates that the economic interest could take several forms as either "equity or income units and performance units." Thus, the text of the Term Sheet plainly recognizes the need for subsequent negotiations to determine the structure of the economic interest that was being offered to them (*see Doller v Prescott*, 56 Misc 3d 1204[A], 2017 NY Slip Op 50871[U] at * 5).

Subsequent negotiations between the parties confirm that there was no agreement on this essential term. Where there is evidence the parties engaged in subsequent negotiations to a written memorandum, indicating there was no meeting of the minds on all essential terms, then the memorandum is not a binding contract (*see Luxor Capital Group, L.P. v Seaport Group LLC*, 148 AD3d at 590 [summary judgment to defendant dismissing complaint as the subsequent negotiations show that while the parties agreed to some terms, other material terms remained unresolved]; *Eastern Consol. Props., Inc. v Morrie Golick Living Trust*, 83 AD3d at 534-535 [after executing a deal memorandum, parties engaged in negotiations over additional terms demonstrating there was never a meeting of minds on all essential terms]; *2004 McDonald Ave. Realty, LLC v 2004 McDonald Ave. Corp.*, 50 AD3d 1021, 1022 [2d Dept 2008] [letter of intent which

contained open terms, expressly anticipated preparation and execution of contract documents, and parties' negotiations, established parties' intent not to be bound.

Here, after the completion of discovery Clarion has provided undisputed evidence that almost right after the Term Sheet was signed, on Saturday morning and throughout the weekend, Tully, Cordes, and Furnary were negotiating with McGowan regarding the management team's investment in terms of €1.0 million instead of $1 million, and regarding whether the management team was going to receive Class A shares or B shares of Clarion (Piedra affirm, exhibits 9, 12, 27).

For example, on Sunday March 11, 2012, Cordes indicated to McGowan he was on the phone with Clarion's counsel, and asked for the management team's employment agreements, and asked how they wanted Clarion to allocate the € 1.0 million across the group (Piedra affirm, exhibit 12). On that same date, in an email to Winkle, McGowan recounted a phone conversation with Furnary and Cordes in which he indicated that Clarion was proposing a new structure on the management team's investment, that "there are some issues to discuss regarding the million which is getting complicated. The USD investment into Clarion is difficult," and Clarion was seeking "a million euros rather than USD, but drawn down over time that will earn same 7%," (Marooney affirm, exhibit 26). In fact, McGowan summarized some of these negotiations in an email to Furnary on Tuesday March 13, 2012, stating that when the management team's planned investment was changed to euros, it was perceived as a significant change and he "really wanted to

work through these issues" and that "we are where we are, and everyone needs to regroup" (Marooney affirm, exhibit 28).

McGowan's arguments that the value of Class A shares could be determined objectively so that the agreement is not indefinite, begs the question. The issue they were negotiating, and had not definitively specified in the Term Sheet, was whether the management team would get Class A or Class B shares, and if they would be phased in based on certain performance requirements, not the value of Class A shares.

Finally, the Term Sheet plainly states that the "management team" was McGowan, Winkle and Kachele, and then refers repeatedly to the "management team," or "management group." By identifying these specific parties by name, the Term Sheet clearly indicated that they were essential to the deal. While McGowan now claims that Winkle was "merely a candidate" and superfluous (plaintiff's memorandum in opposition at 13), this is entirely contrary to the fact that both Winkle and Kachele were plainly named as part of the defined management team in the very first paragraph, and then throughout the Term Sheet. In fact, Winkle actually signed the Term Sheet – not the action of a person who is "merely a candidate." Further, once Winkle withdrew from the "offer," the deal fell apart.

Under the totality of these circumstances, the language of the Term Sheet indicating that it was "subject to documentations," the material terms that were left open for negotiation, along with the evidence showing continued negotiation of those terms, and the fact that one of three members of the management team, who signed the Term

Sheet but viewed it as a non-binding offer and then withdrew from it, show that the Term Sheet is not enforceable as a matter of law. And McGowan is unable, after discovery, to raise an issue of fact as to enforceability.[5] Accordingly, the first cause of action for breach of contract is dismissed.

Breach of Covenant of Good Faith

Agreements to agree obligate both parties to negotiate in good faith (*IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 502-503 [2014]). That obligation can end without a breach by either party because "not every good faith negotiation bears fruit" (*id.* at 503). If a party fails to negotiate in good faith the damages recoverable are only the party's out-of-pocket expenses (*180 Water St. Assoc. v Lehman Bros. Holdings*, 7 AD3d 316, 317 [1st Dept 2004]).

Here, the parties' negotiations simply failed, particularly after Winkle withdrew from the transaction and Kachele was unavailable. The Term Sheet left the parties' equity investment for future negotiation, and McGowan's own emails to Winkle and later to Furnary indicate that there was a give-and-take and both sides were seeking a resolution of the issue (*see* Marooney affirm, exhibits 26, 28). Clarion submits evidence

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[5] [5] While on an earlier CPLR 3211 pre-answer motion to dismiss, I was required to accept McGowan's allegations to determine if the complaint sufficiently stated a claim, and held the contract claim sufficient under that standard, the standard is different on summary judgment after discovery has been completed, where the court searches the record assessing the sufficiency of the parties' evidence (*see Davis v Boeheim*, 24 NY3d 262, 268 [2014]; *Pentacon, LLC v 422 Knickerbocker, LLC*, 165 AD3d 829, 830 [2d Dept 2018]). Here, viewing both the Term Sheet and the evidence presented, plaintiff has not raised triable issues of fact regarding this claim.

that immediately after the Term Sheet was signed it began developing a more detailed model for what a potential venture might look like (Marooney affirm, exhibit 25), and requested copies of the management team's employment agreements, and McGowan's separation agreement, with GLL (Marooney affirm, exhibit 26). It further submits evidence that it was drafting an email presenting the terms of the proposed transaction to Lightyear, its equity partner, to obtain its approval which Clarion required to go forward.

Similarly, McGowan fails to raise an issue regarding Clarion's decision to stop work on the proposed transaction once Winkle "reject[ed]" Clarion's "offer." Again, contrary to McGowan's assertions, Winkle was a specific named member of a three-member management team and a signatory to the Term Sheet, and, thus, not merely a candidate. Further, Clarion submits undisputed evidence that it continued months-long discussions with McGowan, trying to find him an alternative spot as a capital raiser or a consultant (McGowan tr at 273-274; Marooney affirm, exhibit 43).

McGowan's contention that Clarion acted in a manner that deprived him of the right to receive the benefits under the Term Sheet lacks evidentiary support (*see Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 213 [1st Dept 2005]). Further, McGowan fails to raise any triable issue that Clarion acted unilaterally to frustrate performance of the agreement. For these reasons, the second cause of action for breach of the covenant of good faith and fair dealing is dismissed.[6]

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[6] I also note that the breach of the covenant of good faith and fair dealing claims is duplicative of the breach of contract claim as both claims arise out of the same facts, and seek the same damages (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d at 426).

Detrimental Reliance

There is no independent cause of action for detrimental reliance. While it may be an element of a claim for equitable or promissory estoppel (*see Adams v Washington Group, LLC*, 11 Misc 3d 1083[A], 2006 NY Slip Op 50672[U] [Sup Ct, Kings County 2006], *affd as mod on other grounds* 42 AD3d 475 [2d Dept 2007]), it does not stand as an independent claim. Here, McGowan makes the identical allegations in his fourth cause of action for promissory estoppel, thus, this claim is dismissed as duplicative.

Promissory Estoppel

McGowan asserts that the Term Sheet and other promises by Clarion's senior management constituted a clear and unambiguous promise to enter into a transaction as outlined in the Term Sheet. He asserts that he reasonably relied and materially changed his position by terminating discussions with potential joint venture partners, including Legal & General, with whom he could have entered into a transaction on similar terms.

To prevail on a theory of promissory estoppel, a party must establish "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*MatlinPatterson A TA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011].

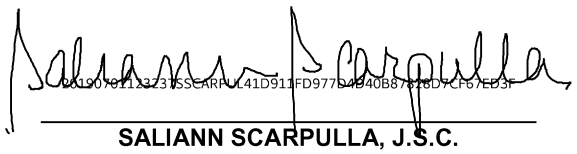
Here, Clarion makes a prima facie showing, and McGowan fails to raise a triable issue of fact, that Clarion did not make a clear, unambiguous promise to enter into the transaction outlined in the Term Sheet (*see Richbell Info. Servs., Inc. v Jupiter Partners,*

L.P., 309 AD2d at 304). Moreover, McGowan could not have reasonably relied upon the Term Sheet once Winkle rejected the offer, and Kachele was locked into his employment agreement with GLL (*see StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012] ["[w]here a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises" to go forward with the transaction without that further agreement]; *511 9th LLC v Credit Suisse USA, Inc.*, 69 AD3d 497, 497 [1st Dept 2010] [term sheet was documentary evidence that conclusively refutes plaintiff's allegations that it reasonably relied on oral assurances by defendants that they intended to close the financing agreement]; *see also Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015] ["a promissory estoppel claim is not viable where the conduct underlying the claim is governed by contract, and where the plaintiff fails to allege a duty independent of the contract"]). Therefore, the fourth cause of action fails as a matter of law.

In accordance with the foregoing, it is

ORDERED that defendant's motion for summary judgment is granted, the amended complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment dismissing the amended complaint.

This constitutes the decision and order of the Court.



7/1/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE