

<b>Frosch Intl. Travel, Inc. v Botbol</b>
2022 NY Slip Op 30216(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 653071/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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FROSCH INTERNATIONAL TRAVEL, INC., N/K/A FROSCH INTERNATIONAL TRAVEL, LLC,  <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- v -</p> MICHEL BOTBOL,  <p style="text-align: center;">Defendant.</p>	<table border="0"> <tr> <td style="padding-right: 10px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">653071/2020</td> </tr> <tr> <td style="padding-right: 10px;">MOTION DATE</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">07/23/2021</td> </tr> <tr> <td style="padding-right: 10px;">MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">001</td> </tr> </table> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>	INDEX NO.	653071/2020	MOTION DATE	07/23/2021	MOTION SEQ. NO.	001
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 12, 13 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence 001, defendant moves, pursuant to CPLR 3211 and CPLR 3016, to dismiss plaintiff's fraud claim.<sup>1</sup>

### Background

Unless indicated otherwise, the following facts are taken from the complaint as they relate to the fraud claim, and for the purposes of this motion are accepted as true.

On July 29, 2019, the parties executed an employment contract, whereby plaintiff hired defendant as President of New York. (NYSCEF Doc. No. [NYSCEF] 2, Complaint

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<sup>1</sup> Defendant's counsel is reminded that "an affirmation may be filed, under penalties of perjury, not in place of a brief but in place of an affidavit, by an attorney admitted to practice in New York. Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law)" (*Tripp & Co., Inc. v Bank of NY (Del), Inc.*, 2010 NY Slip Op 51274[U], \*6 [Sup Ct, NY County 2010] [citation omitted], citing 22 NYCRR § 202.8 [c] [Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law]). A failure to file a memorandum of law in the future will result in denial of the motion.

¶¶ 8, 10; NYSCEF 3, Employment Contract [ex 1 to Complaint].) Plaintiff issued a press release announcing defendant's employment, commending his knowledge of and experience with the New York market, based on defendant's representations. (*Id.* ¶ 11.)

Plaintiff alleges that defendant misrepresented his prior experience and ability to secure new clients. (*Id.* ¶ 12.) Plaintiff claims defendant failed to secure the clients defendant said to have had relationships with. (*Id.*) Moreover, plaintiff alleges that defendant did not secure any new meaningful business. (*Id.* ¶ 13.) Plaintiff contends that defendant committed fraud by making material misrepresentations regarding his forecasts and ability to bring in new clients with whom defendant claimed have existing connections with. (*Id.* ¶¶ 38-39.) Plaintiff alleges that defendant knew his connections were exaggerated and the forecasts were unrealistic. (*Id.* ¶ 40.)

## Discussion

Defendant does not specify which subsection(s) of CPLR 3211 he is moving pursuant to, but the court can glean that he moves pursuant to CPLR 3211(a)(1) and (7), in addition to CPLR 3016 (b), which requires that fraud claims be pled with the requisite specificity.

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].)

On a motion to dismiss 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.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

In the complaint, plaintiff alleges that defendant fraudulently induced plaintiff into entering the employment contract by misrepresenting his “prior experience”, ability to bring new clients to [plaintiff]”, generating “significant new business,” “business acumen” and “business connections.” (NYSCEF 2, Complaint ¶¶ 12, 39, 49, 51.) Plaintiff further alleges that defendant provided it with “financial forecasts” and “financial projections,” showing sales that defendant represented that he could achieve and represented that he had “extensive knowledge and expertise of the New York corporate market.” (*Id.* ¶¶ 5, 11.) Plaintiff alleges that it would never have agreed to pay defendant \$325,000 a year plus a \$50,000 commencement bonus but for these misrepresentations. (*Id.* ¶ 39.)

Defendant argues the fraud claim must be dismissed because defendant’s alleged misrepresentations are nonactionable as opinion, puffery, or an intent to perform under an agreement.

“[S]tatements of opinion as to a party’s qualifications cannot form the basis for a fraudulent inducement claim.” (*JDS Highline LLC v 514 W. 24th St. Partners LLC*, 2021 NY Slip Op 31042[U], \*10-11 [Sup Ct, NY County 2021] [citations omitted].) Plaintiff’s general allegations regarding defendant’s alleged misrepresentations as to his abilities to generate new business, his business skills, experience, and connections, i.e., his

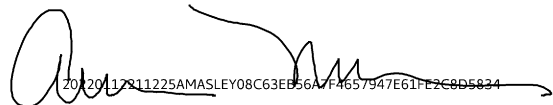
ability to perform and satisfy his obligation to achieve a direct sales target of \$117 under paragraph 1(B) of the employment contract, are not sufficient to state a claim for fraud. These alleged misrepresentations are opinion and not objective facts. (*Yablon v Stern*, 161 AD3d 594, 595 [1st Dept 2018] [citations omitted].) Further, defendant’s “financial forecasts” and “financial projections,” showing sales that defendant represented that he could achieve are nonactionable future promises of conduct and not present fact. (*Id.* [citations omitted].)

Accordingly, all remaining arguments need not be addressed.

ORDERED that the defendant’s motion to dismiss the second cause of action for fraud is granted; and it is further

ORDERED that defendants shall file an answer within 20 days of this decision; and it is further

ORDERED that the parties shall submit a joint preliminary conference order in 30 days, or if the parties cannot agree to a joint PC order, then they may submit competing orders.



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1/12/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE