

**Cavalry Fund I LP v Quad M Solutions Inc.**

2023 NY Slip Op 30012(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 656142/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

CAVALRY FUND I LP,

Plaintiff,

- v -

QUAD M SOLUTIONS INC., PAT DILEO, and CARL DORVIL,

Defendants.

-----X

**INDEX NO.** 656142/2020

**MOTION DATE** 03/19/2021

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 24, 25, 26, 27, 28, 29, 31, 32, 33, and 34

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ORDERED that so much of the motion to dismiss for lack of standing pursuant to CPLR 3211(a)(3) is denied, but is otherwise granted as to other grounds asserted, per the following.

Defendant Quad M Solutions Inc. (“Quad M”) and plaintiff Cavalry Fund I LP (“plaintiff”) are parties to a Securities Purchase Agreement (the “SPA”) and Convertible Note (the “Note”) pursuant to which plaintiff invested with Quad M in exchange for a convertible and warrants to purchase common shares of Quad M, later converted by agreement of the parties to shares of convertible preferred stock (amended complaint, NYSCEF Doc. No. 22, ¶¶ 8-9). Quad M and defendants Pat Dileo (“Dileo”) and Carl Dorvil (“Dorvil”), Quad M’s Chief Executive Officer (“CEO”) and one of its directors, respectively, now claim that plaintiff is required to register with the Securities Exchange Commission (“SEC”) as a broker-dealer (15 USC § 78o[a][1]), and in the absence of such registration the entire transaction is void (15 USC § 78cc).

Therefore, defendants argue, plaintiff lacks standing to bring this action. Distinct of that, however, whether the SPA and Note are void impacts whether plaintiff may recover pursuant to those contracts independent of whether plaintiff may assert such claims in the first instance as a matter of standing to sue.

Regarding standing, the Appellate Division, First Department, has recently held that a party “has standing to defend the validity of its own contract” (*FGP 1, LLC v Dubrovsky*, 197 AD3d 441, 442 [1st Dept 2021]). For the same reason, a party cannot be robbed of standing under a facially valid contract to which it is a party by another’s challenge to the validity of the contract. The court further notes that the question of whether plaintiff was required to register with the SEC is, as defendants’ own citations suggest, not appropriate for resolution at the dismissal stage, as it requires a factual inquiry into the nature of plaintiff’s business (*see, S.E.C. v Fierro*, No. 20-2104 [MAS] [DEA], 2020 WL 7481773 at \*3 [DNJ, Dec. 18, 2020] [regarding the determination whether a defendant is a broker-dealer for S.E.C. registration purposes: “whether and which factors are met is necessarily a fact-based inquiry best reserved for summary judgment or trial”] [internal quotation marks and citation omitted]). Therefore, the motion to dismiss on standing grounds is denied.

AND IT IS FURTHER

ORDERED that so much of the motion to dismiss the amended complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), erroneously styled by defendants as pursuant to subdivision (a)(1), is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 25-29, 34), in which the court concurs. As set forth more specifically therein, the claims against Dileo and Dorvil must be dismissed for failure to allege facts justifying piercing the corporate veil. “The party seeking to pierce the corporate veil must

establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]). The amended complaint alleges, in essence, that Dileo and Dorvil were the primary points of contact for plaintiff throughout the process of negotiating and carrying out the SPA and Note, as well as the parties who told plaintiff that Quad M would not convert plaintiff’s shares to common stock, allegedly breaching the contract. While these allegations place Dileo and Dorvil at the center of the parties’ dealings in their corporate capacity, there are no allegations that they abused the corporate form of Quad M, such as by failing to observe corporate formalities, converting corporate funds, or otherwise using Quad M “as a mere device to further their personal rather than the corporate business” (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]).

Further, the second cause of action for conversion, fifth cause of action for unjust enrichment, sixth cause of action for breach of the implied covenant of good faith and fair dealing, seventh cause of action for promissory estoppel, and eighth cause of action for quantum meruit must be dismissed as duplicative of the breach of contract claim. Quasi-contractual claims cannot be maintained where, as here, an enforceable contract governs the parties’ dispute and the allegations in support are the same as those supporting the breach of contract claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *see also Brown v Brown*, 12 AD3d 176, 176-77 [1st Dept 2004] [promissory estoppel]; *Baker v 16 Sutton Place Apartment Corp.*, 2 AD3d 119, 121 [1st Dept 2003] [implied covenant]; *Richbell Information Services, Inc. v Jupiter Partners, LP*, 309 AD2d 288, 306 [1st Dept 2003] [conversion]).

Finally, the third and fourth causes of action for fraud and negligent misrepresentation must also be dismissed. Plaintiff effectively argues that defendants made various representations that Quad M would convert the debenture and warrants and, later, shares of preferred stock, pursuant to the SPA and Note, and that Quad M ultimately did not convert the preferred stock to common stock as required. Such allegations of an intent not to perform an agreement are not actionable as fraud (*e.g.*, *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Moreover, and contrary to plaintiff's argument, no special relationship necessary to support a claim for negligent misrepresentation exists in "an arm's length commercial contract" (*Parisi v Metroflag Polo, LLC*, 51 AD3d 424 [1st Dept 2008]) and, therefore, the claim more appropriately sounds in breach of contract – not in negligent misrepresentation; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants Pat Dileo and Carl Dorvil, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant Quad M Solutions Inc.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that defendant Quad M Solutions Inc. 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 counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on February 8, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:

<u>1/4/2023</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE