SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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FATHOM DIGITAL MANUFACTURING CORPORATION

Plaintiff,

- v -

CVI INVESTMENTS, INC.,

Defendant.

INDEX NO. 650396/2022

MOTION DATE 06/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISS.

In this action involving a subscription agreement for the purchase of stock, plaintiff Fathom Digital Manufacturing Corporation alleges a single cause of action for breach of contract and seeks specific performance and damages. Defendant CVI Investments, Inc.[1] moves to dismiss plaintiff's First Amended Complaint pursuant to CPLR 3211 (a)(7). Plaintiff opposes the motion.

Background

Unless otherwise indicated, this background is derived from the allegations in plaintiff's amended complaint, which are accepted as true for the purposes of this motion (NYSCEF # 23 – First Amended Complaint).

Plaintiff, under its former name, Altimar Acquisition Corp. II (Altimar), was a Special Purpose Acquisition Company (SPAC) (NYSCEF # 23, ¶ 4). Plaintiff explains that SPACs, "often referred to as 'blank-check' companies," raise money through an initial public offering (IPO), identify a business to acquire, "and then do a so-called 'de-SPAC' transaction whereby the target business is merged into the SPAC and becomes a new public operating company" (*id.*, ¶ 5). Plaintiff further explains that SPACs typically raise money from outside investors known as "subscribers" through a private placement. Such investors enter "subscription agreements" with the SPAC "pursuant to which the subscribers agree to invest funds in the SPAC by a date and time certain – ordinarily right before the closing of

[1] The First Amended Complaint refers to defendant CVI Investments, Inc. as Heights.

the 'de-SPAC' transaction – that the SPAC uses to fund the acquisition of the target business and the target's business plan" (*id.*, ¶ 6).

Plaintiff completed its IPO on February 9, 2021, generating proceeds of $345 million, after which it searched for a prospective business combination target (*id.*, ¶ 20). Plaintiff agreed to combine with Fathom Holdco, which arrangement was memorialized on July 15, 2021 (*id.*, ¶'s 21-22). Also on July 15, 2021, defendant entered into the Subscription Agreement with Altimar and Fathom Holdco, LLC (Fathom Holdco), agreeing to purchase one million shares of plaintiff's Class A common stock for $10,000,000 (*id.*, ¶ 3; ¶ 30; NYSCEF # 2 – Subscription Agreement; # 3 – Business Combination Agreement). The parties agreed that the purchase would close on, immediately prior to, or substantially concurrently with the date of the consummation of the business combination (NYSCEF # 2, § 2 [a]).

On December 7, 2021, plaintiff sent defendant a closing notice specifying the funding deadline as December 21, 2021, one day in advance of the scheduled business combination closing (NYSCEF # 23, ¶ 37). On December 9, 2021, defendant represented that it was scheduled to make the payment on December 21, 2021. But, on December 16, 2021, defendant indicated that it did not intend to pay the subscription amount as it wished to "get out of the investment" (*id.*, ¶'s 38-39). Despite plaintiff's written demand to defendant for the payment, defendant did not and has not delivered payment (*id.*, ¶'s 41, 43).

Defendant's obligation to complete the stock purchase was subject to the satisfaction of a set of conditions provided in Section 2 (e) of the Subscription Agreement (*id.*, ¶ 32). Plaintiff alleges that all such conditions were satisfied in advance of the anticipated closing (*id.*, ¶'s 33, 37). Plaintiff does note that the Business Combination Agreement was amended on November 16, 2021 to, among other things, reduce the nominal amount of cash required, which plaintiff indicates was solely for the benefit of plaintiff and could be waived in its entirety by plaintiff at its sole and unilateral discretion (*id.*, ¶ 23). Plaintiff alleges that no exception to defendant's payment obligation applies (*id.*, ¶ 45).

In contrast to plaintiff's characterization of the November 16 cash reduction amendment of the Business Combination Agreement, defendant claims that this amendment materially and adversely affected defendant. Given this detriment, defendant claims the Subscription Agreement gave defendant an out of the Business Combination Agreement (NYSCEF # 33 – MOL at 2). Defendant adds that despite plaintiff's threat to commence litigation against defendant in late December 2021, plaintiff did not carry out its threat, and the business combination closed (*id.*). Defendant argues that it need not rely on the out provision in the Subscription Agreement or even evaluate the merits of plaintiff's liability claim to obtain a dismissal of the First Amended Complaint because plaintiff has neither alleged nor can allege "any actual injury or irreparable harm" (*id.* at 1).

Expanding its claim of the absence of "any actual injury or irreparable harm" to plaintiff, defendant explains that the business combination transaction

contemplated the potential acquisition of a large percentage of stock by a private equity firm, CORE Industrial Partners (CORE), which was the majority shareholder of the business combination target Fathom Holdco (*id.*). But Altimar needed to retain enough cash to redeem those shares of its public shareholders who opted to redeem their shares for approximately $10 per share rather than retain and convert those shares to equity of plaintiff following the business combination (*id.* at 1-2). As it turns out, $321.5 million of the $345 million raised by Altimar in its IPO was paid out to shareholders choosing not to receive shares of plaintiff following the combination (*id.* at 7). The "near unanimous redemption by Altimar's shareholders, who rejected the [business combination] transaction . . . dramatically reduced the public float of [plaintiff] to a *de minimis* amount" with the result that CORE retained significantly more equity (*id.* at 10).

Defendant asserts that the cash that defendant committed to invest would have been transferred to CORE so that plaintiff could acquire one million of CORE's shares of Fathom Holdco (*id.* at 11). Defendant concludes that plaintiff has not alleged monetary harm because even if defendant had paid the purchase price, such funds would have been paid out immediately to acquire CORE's equity, so that defendant's $10 million would not have gone to plaintiff and the transaction; it "would have had no impact – literally none – on Plaintiff" but would instead be "an entirely cash-neutral transaction" for plaintiff (*id.* at 3, 14-15). Defendant notes that plaintiff still has the 1 million shares that had been earmarked for defendant, which is equity that plaintiff could have used, and still can use, to raise funds from another investor at any time (*id.* at 15).

Defendant also asserts that because the business combination closed, plaintiff has already proven that, notwithstanding defendant's failure to invest, plaintiff does not need specific performance to avoid irreparable harm (*id.* at 3). Further, defendant argues that because plaintiff never sought preliminary injunctive relief of any type, plaintiff accordingly conceded that there is not now nor has there ever been a threat of irreparable harm (*id.* at 12).

In opposition, plaintiff argues that defendant's express acknowledgment and affirmation in the subscription agreement that a breach of defendant's obligations would cause plaintiff damages is alone dispositive (NYSCEF # 43 – Opp at 9). Plaintiff claims that it is not obliged at this stage to show that it actually sustained damages to maintain its claim (citing *Magliocco v MKB Fam., LLC,* 199 AD3d 576, 577 [1st Dept 2021] ["it is sufficient that the complaint contains allegations from which damages attributable to defendants' breach might be reasonably inferred."]). Plaintiff asserts that the First Amended Complaint "easily meets this low threshold," identifying the allegation that defendant's breach "proximately caused damages to Plaintiff in an amount to be proven at trial" (NYSCEF # 43 at 9). Plaintiff states that it "intended to use the funds from the Subscription Agreement to help 'fund the acquisition of the target business and the target's business plan' " (*id.* at 10, quoting the First Amended Complaint, ¶ 6).

Responding to defendant's argument that defendant's failure to complete the purchase merely meant that plaintiff had one million additional authorized shares it could sell to raise financing, plaintiff notes that the closing price of plaintiff's stock on the last trading day prior to its filing its opposition memorandum was $3.82, significantly below defendant's agreed upon purchase price of $10 per share (*id.* at 11).

As to defendant's argument that its funding would have been "entirely cash-neutral" to plaintiff, plaintiff asserts that defendant's own argument establishes that its breach altered plaintiff's planned post-merger capital structure, which is more than enough for the court to reasonably infer injury (*id.* at 14).

Plaintiff also takes issue with defendant's argument that plaintiff's requested relief is belied by the fact that the business combination closed. Plaintiff notes that if investors such as defendant were free to breach subscription agreements without consequence so long as such intentional failure to perform does not prevent the subject business combination from closing, the SPAC market would be greatly disrupted and the contractual performance of investors such as defendant would be rendered entirely optional (*id.* at 14).

In reply, defendant argues that, where defendant agreed in the subscription agreement that its breach would cause plaintiff "*irreparable* damages," such language does not mean that defendant acknowledged that a breach would cause plaintiff *monetary* damages (NYSCEF # 44 – Reply at 2). Next, disputing that plaintiff's damages can be reasonably inferred from its complaint, defendant asserts that plaintiff "has not identified a single type or category of economic harm purportedly caused by" defendant's refusal to fund (*id.* at 3). Defendant also rejects plaintiff's use of plaintiff's recent stock trading price as a basis for assessing damages, arguing that damages must be measured as of December 2021 (*id.* at 3).

Defendant adds that plaintiff has not, and cannot, refute the $10 million that defendant committed to fund would never have touched plaintiff's accounts, instead flowing to CORE or other legacy shareholders (*id.* at 4). Said differently, defendant posits that its contemplated investment "was merely a pass-through to take down a very small portion of [the] legacy shareholders' equity position" for the benefit of the legacy shareholders, not for plaintiff (*id.* at 5).

Discussion

Motion to Dismiss Standard

On a motion to dismiss, 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Whether a plaintiff "can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713

[2009]). CPLR 3211 (a) (7) limits the court "to an examination of the pleadings to determine whether they state a cause of action. . . . Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether" one has been properly stated (*Lee v Dow Jones & Co.*, 121 AD3d 548, 549 [1st Dept 2014] [citations and quotation marks omitted]).

Specific Performance Standard

The "question of whether specific performance should be awarded to a party is ordinarily committed to the sound discretion of the trial court and should not be determined on a motion to dismiss" (*Stellar Sutton LLC v Dushey*, 82 AD3d 485, 486 [1st Dept 2011]). "In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate or inequitable burden on the breaching party" (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002] [quotation marks and citations omitted]). In determining whether money damages would be an adequate remedy, the trial court considers, among other factors, "the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award" (*id.*).

Breach of Contract Standard

"To plead a breach of contract, the proponent must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Second Source Funding, LLC v Yellowstone Cap., LLC*, 144 AD3d 445, 445–46 [1st Dept 2016]). In a breach of contract action, a plaintiff is not obliged to show that damages have actually been sustained; "it is sufficient that the complaint contains allegations from which damages attributable to defendants' breach might be reasonably inferred" (*Magliocco v MKB Fam., LLC*, 199 AD3d 576, 577 [1st Dept 2021]).

Analysis

Defendant bases its motion to dismiss on its contention that plaintiff has not pled injury resulting from defendant's purported breach; defendant does not base its motion to dismiss on the other elements of a cause of action for breach of contract, which elements are deemed met for present purposes.

Defendant's motion to dismiss is denied. Plaintiff has adequately pled damages, including by identifying that defendant contractually committed to pay $10,000,000, which defendant admits it did not pay and which is sufficient to reasonably infer damages attributable to defendants' breach at this stage (*Magliocco*, 199 AD3d at 577).

Defendant's argument that its payment would have been an entirely cash-neutral transaction to plaintiff is unavailing. Even accepting for argument's sake that defendant correctly describes the extrinsic documents defendant files as exhibits to its affidavit in support of its motion (NYSCEF # 34 – Aff of Dielai Yang), nonetheless plaintiff is correct in arguing that on a motion to dismiss under CPLR

3211 (a) (7), a court must accord plaintiffs the benefit of every possible favorable inference rather than draw inferences from extrinsic documents that differ from plaintiff's complaint (*see Dow Jones & Co.*, 121 AD3d at 549; *see also GEM Holdco, LLC v Changing World Techs., L.P.*, 127 AD3d 598, 599 [1st Dept 2015] [denying motion to dismiss breach of contract cause of action where "defendants' argument depends on affidavits and documents that are not properly considered on a motion to dismiss pursuant to CPLR 3211(a)(7)"]).

Defendant's assertion that plaintiff still has the one million shares that had been earmarked for defendant and which plaintiff can use to raise funds from another investor is insufficient; even accepting the truth of that statement for argument's sake, it still does not establish that plaintiff did not suffer damages at the time of defendant's breach (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 12 [1st Dept 2008] ["The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach"]; *see also Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60 AD3d 497 [1st Dept 2009] [in breach of contract action involving defendant's failure to fund participation agreement obligation, that "the amount of damages, if any, is not yet known . . . does not preclude the assertion of plaintiff's contract claim against" defendant]).

Defendant's argument that plaintiff's demand for specific performance should be dismissed is rejected at this stage (*see e.g. Stellar Sutton*, 82 AD3d at 486 [noting that specific performance, as an equitable remedy for a breach of contract, should be determined on a fuller record, not a motion to dismiss]; *Cho*, 300 AD2d at 175 [same]).[2]

As defendant's basis for arguing that plaintiff has not suffered damages has been rejected as discussed above, and as defendant has not otherwise indicated how plaintiff's damages may be measured, accordingly defendant's argument that plaintiff may be adequately compensated by monetary damages is unavailing (*see Cho*, 300 AD2d at 175 [noting that the court considers the difficulty of proving damages with reasonable certainty in evaluating the appropriateness of specific performance]).

Also unavailing are defendant's contentions that specific performance is unavailable because (i) plaintiff did not immediately sue for specific performance following defendant's failure to fund; and (ii) the business combination transaction still closed. Neither fact demonstrates that damages may be proved with reasonable

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[2] Given this principle, the cases that defendant cites involving summary judgment or post-trial decisions are distinguishable on the present motion to dismiss. Defendant's argument that this distinction is "beside the point" and that "this case is an extreme example of one in which the amended complaint fails to plead even a plausible basis for specific performance" is rejected (NYSCEF # 44 at 11). Defendant fails to distinguish the principle expressed by the *Stellar Sutton* court, which applies given the court's finding that the amended complaint adequately pleads damages reasonably inferable to defendant's breach.

certainty. This conclusion is persuaded by defendant's failure to identify any disproportionate or inequitable burden on defendant if specific performance were required (*see id.*) along with defendant's express contractual agreement to specific performance.

Conclusion

In view of the foregoing, it is

ORDERED that defendant CVI Investments, Inc.'s motion to dismiss plaintiff Fathom Digital Manufacturing Corporation's amended complaint is denied; and it is further

ORDERED that within 30 days of the e-filing of this order, defendant shall file an answer to the amended complaint; and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on March 1, 2023 at 10:30 a.m. or at such other time that the parties shall set with the court's law clerk.

1/12/2022
DATE

MARGARET CHAN, J.S.C.

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