# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

***Justice***

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STEVEN J. FRISCH,

Plaintiff,

- v -

LIKEOPEDIA, LLC, OMAR RIVERO, FG LIKEOPEDIA LLC, FG INVESTMENTS, LLC, and CHRISTOPHER FINDLATER,

Defendants.

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**INDEX NO.** 651876/2021

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for **DISMISS**.

Plaintiff commenced this action against defendants alleging nonpayment under a consulting agreement for work done as a consultant in assisting with developing defendants' product and obtaining third-party funding. The complaint sets forth that Omar Rivero ("Rivero") is a majority member and manager of defendant Likeopedia, LLC ("Liker"), and that defendant Christopher Findlater ("Findlater") is an indirect investor in Liker, through defendant FG Likeopedia LLC, an "Investor Member" in Liker and defendant FG Investments, LLC which is the managing member of FG Likeopedia LLC. Findlater is the manager of FG Investments, LLC. (NYSCEF Doc. No. 31, *Ex. A. to Bornick Aff.*, ¶ 6-13). Plaintiff alleges that Rivero negotiated and signed the consulting agreement on Liker's behalf, and Findlater was party to the electronic correspondences about the negotiations. (*Id.* at ¶ 27, 29 37.) Plaintiff further alleges that he performed the work requested but was not compensated as promised under the consulting agreement. Consequently, the complaint sets forth claims that Liker breached the contract (first cause of action); breached the implied duty of good faith and fair dealing against plaintiff (second cause of action), and that Liker was unjustly enriched (third cause of action). Additionally, plaintiff alleges that Rivero and Findlater committed fraud in the inducement of contract (fourth cause of action), that all defendants committed securities violations (fifth, sixth and seventh causes of action, respectively), and that Liker and Rivero violated the Freelance Isn't Free Act ("FIFA") (eighth cause of action).

In the instant pre-answer motion, defendants seek dismissal of the third, fourth, fifth, sixth, seventh, and eighth causes of action asserted against them. The parties do not contest the existence of the consulting agreement. Defendants argue that the unjust enrichment claim (third cause of action) should be dismissed as duplicative of the breach of contract claim (first cause of action); that the fraud in the inducement claim (fourth cause of action) should be dismissed as a matter of law; that the fifth, sixth and seventh causes of action must be dismissed for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(2) because they allege violations of the Securities Exchange Act of 1934; and that the FIFA claim (eighth cause of action) should be

dismissed because plaintiff's work had no impact on New York City as FIFA requires. (NYSCEF Doc. No. 32, *memo of law in support of motion, pg* 7, 8, 13, 14).

On December 15, 2021, plaintiff attempted to stipulate with defendants to discontinue this action without prejudice to move the entire action to federal court to obviate the need to bifurcate the causes of action between federal court and this court, but said request was refused. (NYSCEF Doc. No. 36, *request to discontinue*). Thus, plaintiff cross-moves for permission to discontinue this action in its entirety, pursuant to CPLR 3217(b), without prejudice to plaintiff filing all claims in a single action in federal court. Plaintiff maintains that federal courts have exclusive subject matter jurisdiction over the fifth, sixth and seventh causes of action, which allege various securities violations. (NYSCEF Doc. No. 37, *memo of law in opposition, pg*. 7-8). Plaintiff argues that the unjust enrichment claim should not be dismissed because the CPLR allows litigants to plead alternative, inconsistent theories of recovery. (*Id.* at 8.) Finally, plaintiff maintains that the fraud in the inducement and FIFA claims are properly pleaded and should survive defendant's pre-answer motion to dismiss. (*Id.*).

In reply to plaintiff's contention that the causes of action have been properly pleaded, defendants reiterate arguments proffered in their initial moving papers. Furthermore, in opposition to plaintiff's cross-motion to discontinue this action in its entirety without prejudice, defendants maintain that granting the discontinuance without prejudice would wrongly reward plaintiff's improper filing and violate defendants' forum rights because plaintiff should have removed and filed the case in federal court from the onset but failed to do so. As such, defendants oppose this case being removed to federal court. (NYSCEF Doc. No. 41, *defendants' reply*.)

This court notes that plaintiff proffered a reply memorandum of law in further support of the cross-motion to discontinue the action without prejudice. However, defendants' sur-reply shall not be considered in deciding the instant motion as it is not provided for in the CPLR as of right. (see *584 Broadway, LLC v Untitled World, LLC*, 2022 NY Slip Op 34123[U], **3 [Sup Ct, NY County 2022].)

When considering defendants' motion to dismiss, pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (See *Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "The key to determining whether a claim is duplicative... is discerning the essence of each claim" (Cortlandt *St. Recovery Corp. v Bonderman*, 31 NY3d 30, 50 [2018], quoting *Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 [1st Dept 2015]).

Plaintiff fails to state a claim for unjust enrichment because it well-settled that an unjust enrichment claim is ordinarily precluded where, as here, a valid contract governs the subject matter in dispute. (see *First Sterling Corp. v Union Sq. Retail Trust*, 102 AD3d 490, 490 [1st Dept 2013], citing *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, [2009]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].) Hence, the third cause of action is dismissed as duplicative of the first cause of action.

This court denies that branch of defendants' motion seeking dismissal of plaintiff's fraud in the inducement claim. A party alleging fraud in the inducement must allege facts to support the claim that it justifiably relied on the alleged misrepresentations. It is well-established that

> "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015], quoting *Schumaker v Mather*, 133 NY 590, 596 [1892]).

Here, plaintiff alleges sufficient facts to sustain a fraud in the inducement claim insofar as he has adequately pleaded that Rivero and Findlater misrepresented that Liker would unconditionally issue membership interests to plaintiff, which they knew was untrue when that misrepresentation was made, and that plaintiff justifiably relied on that misrepresentation to his detriment. Plaintiff makes a colorable claim that when the parties were negotiating the consulting agreement, Rivero and Findlater represented to plaintiff that they were authorized to promise that Liker would unconditionally issue membership interests to plaintiff. This representation was allegedly false insofar as both Rivero and Findlater retained the unilateral ability to prevent Liker from fulfilling that contractual promise pursuant to the terms of an undisclosed operating agreement. Plaintiff alleges that the omissions were material to him entering into the consulting agreement and that, had he known that River and Findlater retained the unilateral ability to withhold his promised equity in Liker, he would not have entered into the consulting agreement and would not have performed consulting services for Liker. Given that "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss," and with all possible inference resolved to the benefit of plaintiff, the court finds that plaintiff has sufficiently alleged justifiable reliance and hence, fraud in the inducement claim. (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043 at 1045).

Additionally, the merger clause in the consulting agreement does not preclude the fraudulent inducement claim. Contrary to defendants' contention that by including a merger clause in the consulting agreement, plaintiff contracted away his right to bring any fraud in the inducement cause of action, it has been ably concluded that "[w]here a merger clause is 'general and vague,' i.e., merely 'an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made,' the merger does not preclude parol evidence establishing fraudulent inducement to enter into the contract" (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015], citing *LibertyPointe Bank v 75 E. 125th St., LLC*, 95 AD3d 706, 706 [1st Dept 2012].) The merger clause in the consulting agreement in this case states "[t]his agreement represents the entirety of the agreement between Liker and Frisch, and this agreement supersedes any and all prior agreements." (NYSCEF Doc. No. 2, *consulting agreement*). It is well-settled that a general merger clause does not operate to bar parol evidence of fraud in the inducement and that "only where the parties expressly disclaim reliance on the particular misrepresentation is extrinsic evidence barred" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 9, [1st Dept 2012]). Here, insofar as the merger clause does not

indicate that no representations were made and lacks language disclaiming reliance on misrepresentation, plaintiff's fraud in the inducement claim is not barred by the merger clause. Therefore, that branch of the motion seeking dismissal of the fraudulent inducement claim is not subject to dismissal under CPLR 3211(a)(7).

Next, considering that part of the motion seeking dismissal of plaintiff's Freelance Isn't Free Act ("FIFA"), NYC Admin. Code § 20-929 claim, plaintiff has sufficiently pleaded that he worked as a freelancer and is therefore entitled to protection under FIFA. FIFA defines a freelance worker as "any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation" (FIFA § 20-927). A review of the consulting agreement reveals that this was an agreement where plaintiff would provide his expertise to defendant in exchange for compensation (NYSCEF Doc. No. 2, *consulting agreement*). Clearly, plaintiff qualifies as an independent contractor based on this agreement and falls within FIFA's definition of a freelance worker. The court in *Turner* applied an "impact standard" approach requiring that those seeking the protection of FIFA demonstrate that their work had an "impact within the city." (see *Turner v Sheppard Grain Enters.*, 68 Misc 3d 385 [Sup Ct, NY County 2020], citing (*Hoffman v Parade Publs.*, 15 NY3d 285, 290 [2010]). Here, plaintiff alleged that he resided in New York City when he provided services to defendants and that the services were performed, in whole or in part, in New York City. (NYSCEF Doc. No. 31, *Ex. A. to Bornick Aff., ¶ 8, 14*). Therefore, plaintiff has stated a viable claim under FIFA, and dismissal of this claim under CPLR 3211(a)(7) is denied.

The court grants that portion of defendants motion seeking to dismiss plaintiff's fifth, sixth and seventh causes of action. Plaintiff alleges in the fifth and sixth causes of action that defendants violated Section 10 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Rule 10b-5 promulgated thereunder, and further alleges in the seventh cause of action that Liker, FG Likeopedia LLC, and FG Investments violated Section 20(a) of the Exchange Act. This court lacks subject matter jurisdiction over these claims pursuant to CPLR 3211(a)(2). It is well-settled that "Section 27 of the Securities Exchange Act provides that '[t]he district courts of the United States . . . shall have *exclusive jurisdiction* of violations of [the Securities Exchange Act] or the rules and regulations thereunder…'" (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008]). Thus, this court does not possess the power to adjudicate said claims pursuant to CPLR 3211(a)(2) and they are hereby dismissed.

Finally, considering plaintiff's cross-motion for leave to discontinue the entire action without prejudice, pursuant to CPLR 3217(b), "a voluntary discontinuance, of course, should not be unconditionally allowed if frivolously sought to delay the litigation or harass or cause the opposition unnecessary expense" (*Eugenia VI Venture Holdings, Ltd. v MapleWood Equity Partners, L.P.*, 38 AD3d 264, 265 [1st Dept 2007] citing (cf. 22 NYCRR 130-1.1 [c]).) Here, while the court notes that plaintiff filed his second amended complaint, plaintiff's request to voluntarily discontinue is not the latest instance of a pattern of discontinuing and re-commencing complaints to increase defendants' expenses in defending this action as argued. The available record indicates that, to conserve judicial and party resources and avoid bifurcation of litigation (after defendants filed their motion to dismiss), plaintiff's attorney prepared a stipulation to discontinue this action in its entirety without prejudice and requested that defendants' attorney

execute same but said request was rejected. (NYSCEF Doc. No. 36, *request to discontinue*). The determination to grant or deny such an application is generally within the discretion of the court (see *Tucker v Tucker*, 55 NY2d 378, 383 [1982]; see also *New York Downtown Hosp. v Terry*, 80 AD3d 493, 494 [1st Dept 2011]), but absent special circumstances such as prejudice to adverse parties, a discontinuance should be granted. (see *Burnham Serv. Corp. v Nat'l Council on Comp. Ins., Inc.*, 288 AD2d 31, 32 [1st Dept 2001]). No special circumstances have been shown here, as defendants have not made a successful showing that granting the discontinuance without prejudice will prejudice them, except to argue unconvincingly that plaintiff could have filed this action from the outset in federal court or could have filed the second amended complaint there once the federal claims were asserted. (NYSCEF Doc. No. 41, *defendants' opposition to plaintiff's cross-motion*, pg. 6). Federal courts have jurisdiction over this action because the parties meet the complete diversity of citizenship and amount in controversy requirement under 28 USC §1332(a)(1) insofar as plaintiff is a citizen of New Jersey; Liker, Rivero, and Findlater are citizens of Florida; and FG Likeopedia LLC and FG Investments are citizens of Delaware; and the amount is controversy is at least $352,500.00. (see *Dart Cherokee Basin Operating Co., LLC v Owens,* 574 US 81, 83 [2014]). Accordingly, it is hereby

**ORDERED** that the motion by defendants to dismiss plaintiff's third cause of action (unjust enrichment) is granted; and it is further

**ORDERED** that defendants' motion to dismiss plaintiff's fourth cause of action is denied; and it is further

**ORDERED** that defendants' motion to dismiss plaintiff's fifth, sixth, seventh causes of action, pursuant to CPLR 3211(a)(2), is granted; and it is further

**ORDERED** that defendants' motion to dismiss plaintiff's eighth cause of action pursuant to CPLR 3211(a)(7) is denied; and it is further

**ORDERED** plaintiff's cross-motion to discontinue this action without prejudice to plaintiff filing claims in a single action in federal court pursuant to CPLR 3217(b) is granted; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant.

This constitutes the decision and order of this court.

**May 8, 2023**

**HON. VERNA L. SAUNDERS, JSC**

| CHECK ONE: | | | | | | | |
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| | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [ ] DENIED | [X] | GRANTED IN PART | [ ] | OTHER |