SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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BRIGHTHILL CAPITAL, LLC,

Plaintiff,

- v –

ROBERT S. ABRAMS,

Defendant.

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INDEX NO. 655054/2023

MOTION DATE 05/03/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 27, 29, 30, 31, 32

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action alleging, *inter alia*, breach of contract and account stated, the defendant, Robert S. Abrams, moves to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The plaintiff, Brighthill Capital, LLC's ("Brighthill"), opposes the motion. The motion is granted in part.

II. BACKGROUND

The following facts are drawn from the allegations in the amended complaint and are accepted as true for purposes of the instant motion.

Brighthill is an advisory firm that provides investment services for complex financial structuring transactions. During a meeting between Dr. Jose Maria Barrionuevo, the President and CEO of Brighthill, and Abrams on April 19, 2023, Abrams represented that he was the founder and president of SiO2 Medical Products Inc. ("SiO2"), a manufacturer of components used in the pharmaceutical and biotechnology industries. Abrams further represented, *inter alia*, that he needed to raise money to repay a $400 million loan from nonparty Oaktree Capital Management ("Oaktree"), a debt investor, to SiO2, and that nonparty Thomas Strungmann had also invested in SiO2 and was "trying to steal the company" from Abrams.

The parties executed an Engagement Letter on April 24, 2023, whereby Brighthill agreed to assist Abrams with a transaction to raise approximately $450 million from investors in order to buyout existing SiO2 shareholders and for Abrams to regain full control of SiO2, (the "Transaction"). Brighthill would be exclusively engaged by Abrams to complete the Transaction. Upon the successful completion of the Transaction, Abrams agreed to pay as fees to Brighthill ten percent (10%) of the total funding raised from investors and a five percent (5%) equity interest in SiO2. In the Engagement Letter Abrams again represented that he is the founder and president of SiO2, and further represented that SiO2 owns over 9,000 patents. Abrams agreed that he would provide Brighthill and potential investors with reasonable access to SiO2 company officers and would keep Brighthill fully informed of all material developments involving SiO2. Abrams also agreed to make available non-public information concerning SiO2 to help Brighthill close the Transaction successfully and took sole responsibility for the accuracy of the information so provided.

On April 25, 2023, Brighthill also offered to work exclusively on the Transaction for four weeks in exchange for a fee of $100,000, to which Abrams agreed. Brighthill thereafter worked exclusively on the Transaction and requested payment of the $100,000 fee in writing on May 25, 2023. Abrams paid $35,000 and stated that he would pay the remaining $65,000 two weeks later. Abrams never made the remaining payment.

After the Engagement Letter was signed, Brighthill learned that Abrams had made false representations and material omissions in the Engagement Letter, including, *inter alia*, a failure to disclose that SiO2 had declared bankruptcy, that Abrams himself approached Strungmann to invest in SiO2 in exchange for Abrams handing over control of SiO2 through an irrevocable voting proxy, and that Abrams was no longer CEO, chairman, director, or president of SiO2 at the time the parties entered into the Engagement Letter. Brighthill agreed to help Abrams submit bids in the bankruptcy proceeding to regain control over SiO2 and contacted potential investors to help raise money for Abrams' bid. The deadline for Abrams to place a bid for SiO2 in the bankruptcy proceeding was June 12, 2023, which was later extended to June 22, 2023.

Throughout this time, Abrams failed to provide access to SiO2's directors, officers, and management, and acted in ways that undermined Brighthill's efforts to obtain the financing to close the Transaction. Abrams misrepresented to potential investors that he was still president

and owner of SiO2, exaggerated and falsified the amount of assets held by SiO2 and the products made by the company, made untimely fee payments to two potential investors which allegedly led to a loss of confidence by these potential investors, and misrepresented to Brighthill that he had found "new strategic partners" when no such partners existed. The amended complaint further alleges that, when the deadline for Abrams to place a bid for SiO2 in the bankruptcy proceeding was close, Abrams falsely represented to Brighthill that Oaktree was willing to further extend the deadline to July 15, 2023, and that Oaktree was willing to give Abrams control of SiO2 in exchange for Abrams releasing all his claims against Oaktree, even though an Oaktree representative told Brighthill that this was not the case. Brighthill also learned through Oaktree that Abrams attempted to circumvent the Engagement Letter's exclusivity requirement by approaching a pharmaceutical company to help secure funding. By June 26, 2023, no other qualified bids were received in the bankruptcy proceeding, leaving Oaktree in control of SiO2. On the same day, Oaktree told Brighthill that Oaktree would consider bids to allow Abrams to control SiO2. Brighthill reached out to Abrams, but Abrams refused to communicate with Brighthill any further. On September 25, 2023, the United States Bankruptcy Court for the District of Delaware issued a final decree closing the SiO2 bankruptcy case and approving of the reorganization. The Transaction contemplated by the Engagement Letter was not successfully completed, as the parties failed to raise the funding required for Abrams to regain control of SiO2.

Brighthill initiated this action on October 13, 2023. Abrams moved to dismiss Brighthill's initial complaint (MOT SEQ 002) but withdrew his motion after Brighthill filed its amended complaint on January 29, 2024. Brighthill's amended complaint alleges four causes of action: (i) breach of the Engagement Letter; (ii) breach of the implied covenant of good faith and fair dealing; (iii) fraudulent inducement; and (iv) account stated in the sum of $65,000. Brighthill seeks $67.5 million in compensatory damages for the first three causes of action, as well as punitive damages and attorney's fees. The instant motion ensued.

III. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a pleading adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible

favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory (see Hurrell-Harring v State of New York, 15 NY3d 8 [2010]; Leon v Martinez, 84 NY2d 83 [1994]).

1) Breach of Contract

Brighhill's amended complaint sufficiently alleges (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Brighthill alleges the existence of the Engagement Letter, its performance thereunder, Abrams' breach of the Engagement Letter due to his numerous alleged misrepresentations and actions that undermined Brighthill's efforts to negotiate with potential investors, and resulting damages.

Abrams argues that Brighthill's alleged damages are far too speculative and attenuated to support its breach of contract claim, as Brighthill assumes the Transaction under the Engagement Letter would have been successfully completed had Abrams not breached the Engagement Letter. Abrams specifically focuses on Brighthill's assumptions that, but for his alleged breach, the parties would have successfully attracted investors; said investors would have been willing to contribute $450 million; the money raised would have been sufficient to bring the Transaction to a successful conclusion by allowing Abrams to regain control of SiO2; and the Bankruptcy Court would have approved of such a Transaction. However, Brighthill's amended complaint is to be liberally construed and given every possible favorable inference. See Morris v 702 E. Fifth St. HDFC, 46 AD3d 478, 478-479 (1st Dept. 2007). Abrams' argument that Brighthill's damages calculation is far too attenuated from his alleged breach is more appropriately addressed on a motion for summary judgment and is premature at this juncture. Id. While it may be true that the Transaction contemplated by the Engagement Letter may not have succeeded even without Abrams' alleged breach, that is not dispositive at the pleading stage. See Goodstein Const. Corp. v City of New York, 67 NY2d 990, 991–92 (1986) (denying defendants' motion to dismiss because whether or not a deal would have occurred but for the defendants' breach was immaterial at the pleading stage); cf. Goodstein Const. Corp. v City of New York, 80 NY2d 366, 374 (1992) (affirming the trial court's granting of defendants' summary judgment motion as plaintiff's damages were not within the parties' contemplation at the time the contract was made).

2) Breach of Implied Covenant of Good Faith and Fair Dealing

Brighthill's second cause of action must be dismissed as duplicative of its' breach of contract claim. "[I]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995); see 511 W. 232nd Owners Corp. v Jennifer Realty, Co., 98 NY2d 144 (2002). Stated otherwise, "a breach of the covenant of good faith and fair dealing is a breach of the contract itself" (Parlux v Carter Enterp., LLC, 204 AD3d 72, 92 [1st Dept. 2022]), such that a breach of the implied covenant of good faith and fair dealing claim must be dismissed as duplicative if it arises out of the same facts as a breach of contract claim (see MDRN Intelligence Living Wolfhome v Hartford Fin. Svcs. Group, Inc., 216 AD3d 409 [1st Dept. 2023]; Ahsanuddin v Addo, 175 AD3d 1213 [1st Dept. 2019]).

In opposition to Abrams' motion, Brighthill argues that its breach of the implied covenant of good faith and fair dealing claim is not duplicative by pointing to specific allegations made in the amended complaint that are not governed by the Engagement Letter. However, Brighthill's allegations against Abrams in the amended complaint with respect to this claim includes conduct that is governed by the Engagement Letter, such as, *inter alia*, that Abrams failed to cooperate and communicate with Brighthill (Section 3(i), which requires Abrams to provide Brighthill access to SiO2's officers and other employees), made false statements to potential investors (Section 3(ii), which requires Abrams to provide potential investors with an opportunity to ask questions and receive answers), and attempted to circumvent the Engagement Letter (the introduction to the Engagement Letter provides that Brighthill is exclusively engaged by Abrams). Furthermore, Brighthill seeks the same $67.5 million in damages for this claim as it does for its breach of contract claim. "Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks the same damages as a cause of action for breach of contract, the good faith claim is duplicative and should be dismissed." AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgmt., LLC, 214 AD3d 111, 132-33 (1st Dept. 2023).

3) Fraudulent Inducement

The elements of a claim for fraudulent inducement are: 1) a false representation of material fact 2) known by the utterer to be untrue, 3) made with the intention of inducing reliance and forbearance from further inquiry, 4) that is justifiably relied upon, and 5) results in damages.

See Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V., 17 NY3d 269, 276 (2011). Fraudulent inducement must be pleaded with particularity under CPLR 3016(b). In New York, damages under a fraud claim are measured by the "out-of-pocket" rule, under which damages are calculated to compensate the plaintiff for what the plaintiff lost because of the defendant's fraud, and not for what the plaintiff might have gained in the absence of the fraud. See Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137 (2017). Such damages are shown through actual pecuniary loss sustained by the plaintiff as a direct result of the fraud. See Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996).

Brighthill fails to allege damages in its fraudulent inducement claim, as it seeks the same damages as in its breach of contract claim, $67.5 million. This figure represents the amount that Brighthill could have made had Abrams not breached the Engagement Letter, and not any pecuniary loss sustained by Brighthill due to Abrams' fraud. Indeed, Brighthill, in opposition to this motion, submits a list purportedly showing that Brighthill sustained a loss of $17,262.58 in out-of-pocket expenses resulting from Abrams' fraud. However, neither this list, nor the $17,262.58 figure, appear in the amended complaint, and are alleged for this first time in opposition to this motion. While a court may, on a motion to dismiss under CPLR 3211(a)(7), consider affidavits submitted by a plaintiff to remedy defects in the complaint (see Leon v Martinez, supra at 88), Brighthill relies solely on its memorandum of law in opposition to the motion and submits no such affidavit to support the $17,262.58 figure or to otherwise remedy its defective fraudulent inducement claim.

Moreover, to the extent Brighthill's fraudulent inducement claim is based on representations that Abrams was the founder and president of SiO2, the claim is duplicative of the breach of contract claim, as those same representations were included in the Engagement Letter. See FPG Maiden Lane, LLC v Bank Leumi USA, 211 AD3d 528, 529 (1st Dept. 2022); New York City Waterfront Dev. Fund II, LLC v Pier A Battery Park Assoc., LLC, 206 AD3d 565, 566 (1st Dept. 2022); ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC, 50 AD3d 397, 398 (1st Dept. 2008).

4) Account Stated

Dismissal of the claim for an account stated is not warranted on this motion. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and

the balance due, if any, in favor of one party or the other. . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated." Shea & Gould v Burr, 194 AD2d 369, 370 (1st Dept. 1993); see Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept. 2004). It is well settled that a cause of action for account stated may be established by demonstrating either partial payment or retention of bills without objection. See Id; M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1st Dept. 2004).

Here, Brighthill alleges that the day after the Engagement Letter was executed, the parties entered into an additional agreement requiring Brighthill to dedicate itself exclusively to work on the Transaction for four weeks in exchange for an additional $100,000.00. Brighthill further alleges that it performed under that agreement and, upon its request, Abrams made partial payment of $35,000.00 and indicated to Brighthill that he would pay the balance in two weeks. He did not. In light of the partial payment, Abrams' current argument that the additional agreement was either non-existent or invalid is unavailing. While the Engagement Letter provides that its terms cannot be amended or waived without a signed writing by the parties, this was a separate and independent agreement between the parties. See Duane Reade v Cardinal Health, Inc., 21 AD3d 269 (1st Dept. 2005).

5) Punitive Damages

Brighthill's demand for punitive damages is dismissed. Punitive damages may be awarded only "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). For that reason, "punitive damages are not recoverable for an ordinary breach of contract." Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994). This is an ordinary breach of contract action and Brighthill makes no specific allegations that Abrams' conduct was immoral, evil, or reprehensible.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendant's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(7) is granted to the extent that the second and third causes of action and the demand for punitive damages are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the defendant shall serve and file an answer to the remaining causes of action within thirty (30) days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 17, 2024, at 11:00 a.m., via Microsoft Teams; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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7/29/2024
DATE

NANCY M. BANNON, J.S.C.

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