

Ludwig Plus, LLC v Biz2Credit, Inc.

2025 NY Slip Op 34793(U)

December 11, 2025

Supreme Court, New York County

Docket Number: Index No. 653830/2024

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

INDEX NO. 653830/2024
MOTION DATE 07/31/2025
MOTION SEQ. NO. 002

LUDWIG PLUS, LLC,

Plaintiff,

- v -

BIZ2CREDIT, INC.,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64,

were read on this motion to DISMISS

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion to dismiss defendant's counterclaims is granted in part and denied in part as follows.

Background

On October 15, 2022, plaintiff, Ludwig Plus, LLC ("Ludwig"), agreed, in a "Master Services Agreement" (the "MSA"), to provide certain advertising and marketing services to defendant, Biz2Credit, Inc. ("Biz2"), and Biz2 agreed to pay for those services. NYSCEF Doc. No. 48. The same day, the parties executed a Statement of Work #1 (the "SOW"), agreeing to two phases of work with "Phase 1" going from October 15, 2022, to March 15, 2023, and "Phase 2," subject to approval, going from "approximately" March to December 2023. NYSCEF Doc. No. 49.

In a July 28, 2023 response to a demand for payment, Biz2 informed Ludwig that Ludwig's work was unsatisfactory and possibly infringed on another advertising campaign, but that Biz2 would "continue to use the partial materials provided under the contract, for which [Biz2] has already overpaid, and for which [Biz2] will expect to be indemnified." NYSCEF Doc. No. 12.

On July 31, 2024, Ludwig sued Biz2, asserting three causes of action: (1) breach of contract; (2) unjust enrichment; and (3) quantum meruit. NYSCEF Doc. No. 1.

In a Decision and Order dated May 19, 2025, this Court denied defendant's motion to dismiss the complaint, finding that "Biz2 apparently owes, at a minimum, \$180,000 of the initial \$450,00; and may owe" more for the use of "intellectual property." NYSCEF Doc. No. 30.

On June 13, 2025, Biz2 answered with a general denial, 16 affirmative defenses; and four counterclaims: (1) fraud in the inducement; (2) negligent misrepresentation; (3) breach of contract; and (4) breach of the implied covenant of good faith and fair dealing. NYSCEF Doc. No. 32.

Ludwig now moves, pursuant to CPLR 3211(a)(1) (defense based on documentary evidence) and (7) (failure to state a cause of action), to dismiss Biz2's four counterclaims and for reasonable attorneys' fees. NYSCEF Doc. No. 38.

Discussion

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. See Trade Source v Westchester Wood Works, 290 AD2d 437 (2002). In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory. See Dye v Catholic Med. Ctr. of Brooklyn & Queens, 273 AD2d 193 (2000). The court "is not concerned with determinations of fact or the likelihood of success on the merits." Detmer v Acampora, 207 AD2d 477 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBCI, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005).

Fraudulent Inducement

A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract.

HSH Nordbank AG v UBS AG, 95 AD3d 185, 206 (1st Dept 2012) (emphasis in original).

In its fraudulent inducement and negligent misrepresentation counterclaims, Biz2 alleges that Ludwig "knew or with reasonable diligence should have known that the 'Small Can't be Stopped' slogan and platform" used in its pre-contract pitch "was violative or potentially violative of the rights of the United States Postal Service."¹ NYSCEF Doc. No. 32 ¶ 37.

Ludwig now moves to dismiss those claims based on the documentary evidence of a "Nonfinal Office Action" from the United States Patent Trademark Office, stating that the "trademark examining attorney has searched the USPTO database of registered and pending marks and has found no conflicting marks that would bar registration" (NYSCEF Doc. No. 47), and an email

¹ In its opposition to the instant motion, Biz2 acknowledges that it named the United States Postal Service in error and that the "actual party holding the intellectual property rights is the United Parcel Service." NYSCEF Doc. No. 51 fn. 1.

exchange between Biz2's counsel and an intellectual property attorney in which the latter allegedly says the subject trademark application "Looks good to go."²

Here, Ludwig has failed to produce documentary evidence that utterly refutes Biz2's counterclaim for fraudulent inducement. The nonfinal office action from the UTPTO was, of course, non final, and Ludwig's alleged promises were collateral to the subject contract and therefore distinct from any alleged breach of contract. Accordingly, Biz2's first counterclaim for fraudulent inducement should not be dismissed.

Negligent Misrepresentation

It is well settled that "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information."

...

A special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."

Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180 (2011) (internal citations omitted).

Ludwig also moves to dismiss Biz2's negligent misrepresentation claim on the grounds that Biz2 has not sufficiently alleged Ludwig owed it a duty of care, and, pursuant to § 10(m) of the underlying agreement, which states that:

NEITHER PARTY SHALL BE LIABLE TO THE OTHER, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT OR OTHERWISE, FOR ANY FOR ANY [SIC] INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT. INCLUDING BY WAY OF EXAMPLE AND NOT BY WAY OF LIMITATION, LOST PROFITS, LOST BUSINESS OPPORTUNITIES [SIC] OR BUSINESS INTERRUPTION, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LIABILITY.

NYSCEF Doc. No. 48.

At this time, Biz2's counterclaim for negligent misrepresentation should not be dismissed, as § 10(m) relates to conduct "arising out of or relating to" the agreement, whereas Biz2's counterclaim arises from pre-contract representations. Further, Biz2's counterclaim sufficiently

² It appears plaintiff inadvertently filed an October 10, 2022 email to the docket twice, as both Exhibit B and C to the Ludwig Affidavit, and so the Court cannot confirm the "good to go" quote. NYSCEF Doc. Nos. 42 and 43.

alleges a special relationship to survive a motion to dismiss for failure to state a cause of action by asserting that

Based on inherent position of the parties and B2C’s reliance on the skill and expertise of Ludwig in developing and implementing marketing and advertising campaigns, Ludwig owed B2C a duty of care to B2C in the development of any slogans and campaigns, to not expose B2C to any liability or potential liability for using any slogan or campaign developed and advanced by Ludwig.

NYSCEF Doc. No. 32 ¶44.

Breach of Contract

Biz2’s counterclaim for breach of contract should not be dismissed as Biz2 has sufficiently pled its allegations (NYSCEF Doc. No. 32 ¶¶ 14, 16-23) and Ludwig’s documentary evidence (including an affidavit of Ludwig’s principal and a text thread) fails to conclusively refute those allegations. Lawrence v Miller, 11 NY3d 588, 595 (2008) (“Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action.’”).

Breach of Covenant of Good Faith and Fair Dealing

Finally, Biz2’s counterclaim for breach of the covenant of good faith and fair dealing should be dismissed as duplicative, as “Generally, a breach of the covenant of good faith and fair dealing is a breach of the contract itself” and thus a separate cause of action for breach of the covenant cannot be maintained where, as here, ‘it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract.’ Parlux Fragrances, LLC v S. Carter Enters., LLC, 204 AD3d 72, 91-92 (1st Dept 2022) (internal citations omitted).

This Court has considered the parties’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, that part of the motion of plaintiff, Ludwig Plus, LLC, seeking to dismiss the fourth counterclaim of defendant, Biz2Credit, Inc., alleging breach of the covenant of good faith and fair dealing, is hereby granted, the motion is otherwise denied, and the Clerk is hereby directed to enter judgment accordingly.

HON. ARTHUR F. ENGORON

ARTHUR F. ENGORON, J.S.C.

12/11/2025

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE