SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SPORTS TECHNOLOGY APPLICATIONS, INC,

Plaintiff,

- v -

MLB ADVANCED MEDIA, L.P.,

Defendant.

INDEX NO. 652609/2014

MOTION DATE N/A

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 177, 178, 185, 260, 261, 262, 263, 264, 265
were read on this motion for SUMMARY JUDGMENT.

Plaintiff Sports Technology Applications Inc. ("STA") develops sports related downloadable software applications. Defendant MLB Advanced Media ("MLBAM") is the internet and interactive-media branch of Major League Baseball ("MLB"). It is jointly owned by the 30 MLB clubs and centralizes MLB's internet and interactive-media operations. MLBAM also develops apps and holds the right to license MLB trademarks as well as data about plays, players, and scores that is generated during an MLB game for uses online, through interactive media or digital apps.

In 2012, STA and MLBAM discussed the development of a smartphone app (the "App") that would enable users to earn points by predicting the outcome of certain events during MLB games. On December 1, 2012, STA and MLBAM entered into a licensing agreement ("the Agreement") whereby MLBAM granted STA a non-exclusive license to use various MLB intellectual property to prepare, market, and sell the App. In exchange, MLBAM agreed to promote the App. The promotions were to include the distribution of two promotional emails in each of Year 1 and Year 2 of the agreement, a banner ad that generates at least one million impressions, and at least five Tweets and Facebook posts during each year. NYSCEF 107 at 15. The Agreement also provides that for the first two years of the contract the license is royalty-free. For the subsequent five years STA is to pay MLBAM the greater of 15% of the Net Receipts of the Application, or set amounts specified in the contract totaling $5 million. *Id*. at 4.

STA planned to use Spring Training of the 2013 season to test the App, with plans to launch it for the 2013 season. Due to various technical difficulties, the release was delayed. The App launched at the end of August 2013 and was disabled in October 2013.

In October 2013, STA received a letter from non-party PrePlay, Inc. ("PrePlay") alleging that STA's App was infringing on a patent owned by PrePlay. PrePlay was a competitor of STA and had a similar in-game prediction app. Shortly thereafter, STA discovered that MLBAM had given PrePlay an exclusive license for their gaming app in April 2012 (the "PrePlay License"), over seven months before entering into the Agreement with STA. In addition, STA discovered that Jamie Leece, VP of Gaming at MLBAM, and STAs primary contact at MLBAM, was a board member of PrePlay and that MLBAM was a shareholder in PrePlay.

According to the STA Agreement, the first payment of the greater of $500,000 or 15% of Net Receipts of the Application was due on November 1, 2015. STA failed to make the

payment. On November 2, 2015, MLBAM sent a notice of default to STA, giving STA five days to make the payment before all minimum payments under the Agreement come due. NYSCEF 109. STA has not paid. On December 2, 2015, MLBAM terminated the agreement. NYSCEF 110.

Procedural History

Plaintiff filed this action in August 2014 asserting claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing. In April 2015, the Complaint was amended to include claims for Fraudulent Inducement, Fraudulent Misrepresentation, Negligent Misrepresentation, Rescission Due to Fraud, and Rescission Due to Breach of Contract. On December 9, 2015, Defendant filed an Answer with Counterclaims for Breach of Contract.

Defendant moves for summary judgment in its favor on its counterclaim for breach of contract. For the reasons set forth below, that motion is denied.

Defendant also moves for summary judgment to dismiss Plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, fraudulent inducement, negligent misrepresentation, and rescission. For the reasons set forth below, that motion is granted with respect to Plaintiff's claims for breach of the covenant of good faith and fair dealing and negligent misrepresentation but is otherwise denied. Plaintiff has withdrawn its claim for rescission.

The Parties' Contentions

Defendant argues that it performed under the Agreement and is owed the annual fees set in the contract as a result of Plaintiff's breach. Defendant maintains that it had the full authority to enter into the Agreement, despite its exclusive agreement with PrePlay and that it met its

promotional obligations under the agreement. Defendant also contends that it was not obligated to fully perform a year's worth of promotions in the few weeks the App was available for download at the end of the 2013 season, which was due to Plaintiff's failure to launch the App earlier in the season. In addition, Defendant argues that Plaintiff breached the Agreement by failing to provide the "relevant content and copy" for the promotions that Defendant was required to run.

Plaintiff argues that there are issues of material fact for trial surrounding its contract claims and Defendant's breach of contract counterclaims. First, Plaintiff maintains Defendant lacked the authority to enter into the Agreement because it had entered into an exclusive license with PrePlay months before its agreement with STA. This created a scenario in which PrePlay could have brought suit to terminate the STA license at any moment. As such, Plaintiff contends, Defendant was in breach of the representations and warranties clause of the Agreement. Plaintiff also maintains that Defendant fell short of its promotional obligations and failed to provide a working data feed to Plaintiff, in breach of the Agreement. Furthermore, Plaintiff argues that Leece's and MLB's relationship with PrePlay and MLBAM's failure to disclose the PrePlay License create issues of material fact as to Plaintiff's fraud claims.

Analysis

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits." *Brunetti v. Musallam*, 11 A.D.3d 280, 280 (1st Dep't 2004). Upon making a motion for summary judgment, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). If such a showing has been made, the

burden shifts to the opposing party to "produce evidentiary proof in admissible form" sufficient to establish the existence of material issues of fact which require a trial in the action. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

The essential elements of a claim for breach of contract are well-established. Plaintiff must show: (1) the existence of a valid contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) damages resulting from defendant's breach. *See, e.g., Harris v. Seward Park Housing Corp*., 79 A.D.3d 425, 426 (1st Dep't 2010); *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007). "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Franklin Apt. Assoc., Inc. v. Westbrook Tenants Corp*., 43 A.D.3d 860, 861 (1st Dep't 2007). A contract should be "'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Ins. Co. of New York v. Central Mut. Ins. Co*., 47 A.D.3d 469, 471 (1st Dep't 2008) (quoting *Empire Properties Corp. v. Mfrs. Trust Co*., 288 N.Y. 242 (1942)). The parties do not dispute the validity of the Agreement.

Defendant's Counterclaim for Breach of Contract

Defendant is not entitled to summary judgment on its counterclaim for breach of contract. In short, the summary judgment record does not establish that Defendant performed its obligations under the Agreement. In Section 14 of the Agreement's Standard Terms and Conditions, MLBAM "represents and warrants to the other party that: (i) it has full power and authority to execute and deliver this Agreement…" NYSCEF 107 at 11. At a minimum, there is

a legitimate dispute as to whether Defendant had the "full power and authority" to enter into the Agreement.

The PrePlay License, by its terms, is an exclusive license. Section III(B) of the license states, in relevant part, that "(1) Licensor shall not license to any third party the right to use the Licensed Properties in or in connection with the Business Category…" NYSCEF 138. The parties do not dispute that the STA Agreement involves "Licensed Properties" and falls squarely within the "Business Category," as those terms are defined in the PrePlay License. Although Defendant asserts that it did have authority to enter into the Agreement, and that it had an understanding with PrePlay that it was free to enter into an agreement with Plaintiff, that assertion does not suffice to obtain summary judgment in Defendant's favor.

Regardless of any informal understandings Defendant may have had with PrePlay, there is a serious question whether the terms of the PrePlay License are consistent with the representations contained in the STA Agreement. The PrePlay License contains a merger clause, stating that "[t]his Agreement shall not be modified or amended, and no provision of this Agreement may be waived, except in writing executed by each of the parties." NYSCEF 138 at 19. Thus, even assuming there was an informal understanding between PrePlay and MLBAM that *might* have permitted STA to retain its rights under the Agreement, there is a risk that it would not be binding, thus putting the enforceability and value of the Agreement to STA at risk. In any event, there is at a minimum an issue of fact as to the accuracy of Defendant's unconditional representation that it had authority to convey the rights contained in the Agreement.

Accordingly, given that there is legitimate question as to whether Defendant breached the Agreement, Defendant's motion for summary judgment on its counterclaim for breach of contract is denied.

Plaintiff's Claim for Breach of Contract

Defendant also is not entitled to summary judgment dismissing Plaintiff's claim for breach of contract. In addition to the question as to Defendant's breach discussed above, there are issues of material fact as to whether MLBAM fully satisfied its contractual obligation to promote the App.

Defendants point to an email from Jamie Leece stating that as of September 23, 2013, MLBAM had run 50% of the one million required impressions, and as of September 26, 2013, he believed they had reached or almost reached the requirement of one million impressions. NYSCEF 127. These representations from Leece do not establish conclusively that MLBAM fulfilled its obligations. Defendant also argues that it sent two promotional email blasts, while only providing evidence of one. NYSCEF 125.

There is also an issue of fact as to whether MLBAM's alleged failure to meet the promotional requirements was at the directive of STA, which could excuse noncompliance. Defendant cites to the deposition of Kevin Brodsky, the 75% shareholder of STA, wherein he suggested that STA would not have asked MLB to promote the App before it was released as "we would not want to promote something that wasn't out there for people to grab onto and before it was in the Apple store." NYSCEF 108 at 74. This, Defendant argues, excuses any alleged failure to perform as STA asked MLBAM not to advertise before the App was launched. However, this statement is conjecture, as Brodsky specifically states the he does not recall that specific conversation or whether STA asked MLB to promote the app prior to its release. *Id.* In

addition, Plaintiff cites to the deposition of Nathanial Heisler, the "inventor" of the App, wherein he stated that STA wanted MLBAM to promote the App before it launched because "[t]hings are promoted all the time before they launch." NYSCEF 100 at 159-160. These potentially conflicting statements by two STA representatives raises an issue of material fact to be resolved at trial. *See Valente v. Lend Lease (US) Const. LMB, Inc.*, 29 N.Y.3d 1104, 1105 (2017) (finding that "arguably conflicting accounts" provided by Plaintiff's witness created an issue of fact as to whether Plaintiff's conduct was the proximate cause of the accident).

Breach of the Covenant of Good Faith and Fair Dealing

A claim for breach of the covenant of good faith and fair dealing is duplicative of a breach of contract claim when "both claims arise from the same facts and seek identical damages for each alleged breach." *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010). Here, STA's claims of sabotage by MLBAM's failure to promote the App and provide the proper data feed are the same facts as alleged in their breach of contract claim. In addition, the allegations that Leece failed to promote the App and spent his time promoting PrePlay stem from the same facts and seek the same damages as the breach of contract claim. As such, Defendant's motion for summary judgment dismissing Plaintiff's claim for breach of the covenant of good faith and fair dealing is Granted.

Plaintiff's Fraudulent Inducement and Fraudulent Misrepresentation Claims

There are material issues of fact with respect to STA's fraudulent inducement claim. "Fraudulent inducement requires proof of '[1] a representation of a material fact, [2] the falsity of the representation, [3] knowledge by the party making the representation that it was false when made, [4] justifiable reliance ... and [5] resulting injury.'" *JPMorgan Chase Bank, N.A. v.*

Controladora Comercial Mexicana S.A.B. De C.V., 2010 WL 4868142 at *6 (Sup. Ct. N.Y. Cty., Mar. 16, 2010) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003)).

STA contends that it would not have entered into the licensing agreement if it knew that PrePlay had a preexisting exclusive license. STA admits that it was aware of PrePlay's existence and that it purported to be the "official" App of MLB, but STA asserts that it was unaware of the exclusive license. Furthermore, when asked about PrePlay, MLB stated that it was simply competition, but did not mention the exclusive license. STA's contention that this was a material omission of fact cannot be dismissed as a matter of law. NYSCEF 167 at ¶ 77.[1]

STA has also raised issues of material fact relating to its knowledge of Leece's position as a board member of PrePlay and MLB's equity interest in PrePlay. STA claims that had it known Leece was on the board of PrePlay and MLB was a shareholder in PrePlay, it would not have entered into the Agreement. Again, a finder of fact could conclude that these were material omissions.

In view of those factual disputes, Defendant's motion for summary judgment dismissing Plaintiff's fraudulent inducement and fraudulent misrepresentation claims is Denied.

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

[1] An STA witness testified in his deposition that STA sought an exclusive license from MLBAM but was denied. NYSCEF 99. He testified that, "[a]s I remember, I think they said they don't give exclusive licenses. I don't really remember." *Id.*, at 44. By itself, such uncertain testimony would not suffice to avoid summary judgment.

'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 N.Y.3d 173, 180 (2011) (citations omitted).

Plaintiff's claim for negligent misrepresentation is dismissed, as Plaintiff has failed to submit evidence to show that there was a special relationship between the parties that would impose an affirmative duty of disclosure on Defendants.

Rescission

Plaintiff has withdrawn its rescission claim, as stated on the record at a hearing held on June 27, 2019. NYSCEF 267, Oral Arg. Tr. at 45.

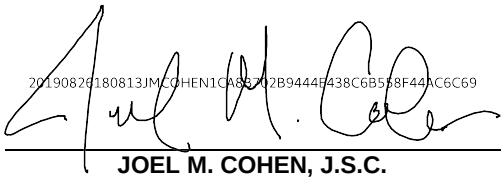
Therefore, it is

ORDERED that Defendant's motion for summary judgment on Defendant's counterclaim for breach of contract is **Denied**; it is further

ORDERED that Defendant's motion for summary judgment is **Granted** as to Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and rescission, and **Denied** as to Plaintiff's claims for breach of contract, fraudulent inducement, and fraudulent misrepresentation.

The parties are to appear for a pre-trial conference on Wednesday, November 6, 2019, at 2:30 p.m.

This constitutes the Decision and Order of the Court.



8/26/2019
DATE

JOEL M. COHEN, 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**