SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DAIWA CORPORATE ADVISORY LLC,

Plaintiff,

- v -

T-REX GROUP, INC.,

Defendant.

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INDEX NO. 654395/2022

MOTION DATE 05/10/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 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, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 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, 133, 134, 138, 139, 140

were read on this motion to/for JUDGMENT - SUMMARY.

INTRODUCTION

In this breach of contract action, the plaintiff, Daiwa Corporate Advisory LLC f/k/a DCS Advisory LLC, seeks payment of an advisory fee allegedly owed to it by the defendant, T-Rex Group, Inc., pursuant to a 2018 letter agreement between the parties (the "Agreement"). The plaintiff now moves for summary judgment pursuant to CPLR 3212 on its one-count complaint for breach of contract. The defendant opposes the motion and cross-moves for summary judgment dismissing the complaint. The plaintiff opposes the cross-motion. Both parties seek attorney's fees. The plaintiff's motion and the defendant's cross-motion are denied.

BACKGROUND

In 2018, the defendant, a technology company, sought to sell itself and held preliminary meetings with the plaintiff, a middle market investment bank. In September of that year, the plaintiff's principal, Matthew Epstein, represented to the defendant's CEO, Benjamin Cohen, that it knew of a potential purchaser, the Kroll Bond Rating Agency ("Kroll"), who Epstein said was "very interested" in acquiring the defendant. Cohen met with Kroll's CEO, Jim Nadler, to discuss a sale and, on October 3, 2018, the defendant and Kroll executed a non-disclosure agreement (the "NDA") to facilitate the exchange of confidential information in furtherance of their ongoing discussions.

The next day, October 4, 2018, the plaintiff and the defendant executed the Agreement, pursuant to which the defendant agreed to engage the plaintiff as its financial advisor on an exclusive basis during the term of the Agreement. The defendant further agreed, as relevant here, to pay the plaintiff fees if the company closed an "Alternative Transaction" at any time during the term of the Agreement or in the thirty-six (36) months following its termination or expiration (the "Tail Period"). An "Alternative Transaction" was defined as "a transaction that involves the transfer of a material portion of the Company's . . . capital stock (either by the Company or in a secondary sale) . . . that would have constituted a Sale had it involved the transfer of a majority of such capital stock . . . ." A "Sale" was defined as a transaction whereby "a majority of the equity securities of the Company. . . is transferred for consideration[.]" The Agreement provided for payment to the plaintiff of an advisory fee equal to 6% of total proceeds from an Alternative Transaction. However, the defendant would not owe the plaintiff any portion of Alternative Transaction proceeds paid "by the Company's existing stockholders."

The plaintiff failed to facilitate an acquisition of the defendant and, in January 2019, the defendant cut off its working relationship with the plaintiff. On January 19, 2022, the defendant executed a $40 million equity financing in the form of a Series C Preferred Stock Purchase Agreement (the "Series C"). It is undisputed that the Series C closed during the Tail Period and was not a Sale, as it did not involve a transfer of a majority of the equity shares in the defendant.

On August 25, 2022, the plaintiff sent the defendant an invoice for payment of its agreed-upon advisory fee in connection with the Series C (the "Invoice"). The defendant refused to pay the Invoice.

The plaintiff thereafter commenced this action in November 2022, asserting a single cause of action for breach of contract. The defendant answered the complaint, asserting, as relevant here, an affirmative defense that it was fraudulently induced into executing the Agreement. The parties thereafter engaged in discovery and a Note of Issue was filed on January 31, 2024. The instant motions ensued.

LEGAL STANDARD

On a motion for summary judgment, the moving party must establish, *prima facie*, its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b);

Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant meets this burden, it then becomes incumbent upon the nonmoving party to demonstrate, by the submission of evidentiary proof in admissible form, the existence of a triable issue of fact. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra.

DISCUSSION

(1) Breach of Contract

The elements of a cause of action for breach of contract are (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). The plaintiff's evidentiary submissions in support of its motion satisfy these elements and are thus sufficient to demonstrate its *prima facie* entitlement to summary judgment on its breach of contract claim.

The plaintiff demonstrates the existence of a contract by its submission of the parties' Agreement. It demonstrates its own performance under the Agreement by its submission of an affidavit from the plaintiff's managing director, Jordan Finkler; transcripts from the depositions of Cohen, Epstein, and Finkler; email correspondence between the parties; documents generated by the plaintiff on behalf of the defendant, such as financial models and marketing materials; and the defendant's responses to the plaintiff's requests for admission. These submissions demonstrate that, in furtherance of its contractual obligations under the Agreement, the plaintiff: assisted the defendant to develop a strategy to accomplish a sale of the company and to identify, contact, and screen potential acquirers; arranged meetings between the defendant and potential acquirers, coordinated the execution of confidentiality agreements by the defendant and such potential acquirers, and assisted with the conduct of due diligence with respect to certain of these potential acquirors; prepared financial models to assist the defendant in assessing its financial performance; helped prepare and distribute marketing materials for potential acquirers; and prepared the defendant's officers, directors, and/or employees for presentations to potential acquirers.

The plaintiff further submits the Series C Preferred Stock Purchase Agreement; the Invoice submitted to the defendant for payment of the "Alternative Transaction" advisory fee in

connection with the Series C; and the defendant's responses to the plaintiff's requests for admission, as well Finkler's affidavit, both of which state that the defendant did not pay the advisory fee set forth in the Invoice. It is undisputed the defendant closed the Series C prior to the expiration of the Tail Period and, as will be discussed further below, under the unambiguous terms of the Agreement, the Series C constitutes an Alternative Transaction. As such, the plaintiff's evidentiary submissions also demonstrate, *prima facie*, the defendant's breach of the Agreement by failing to pay the plaintiff an advisory fee in connection with the Series C, and resulting damages.

The defendant, in opposition, raises a triable issue of fact with respect to the sufficiency of the plaintiff's performance under the Agreement. The defendant submits the portion of Cohen's deposition testimony wherein Cohen testified that the plaintiff failed to perform certain of its contractual obligations, as set forth in Section 2 of the Agreement. Specifically, Cohen testified that the plaintiff did not create a financial model for the defendant (Section 2[a]); did not prepare either a confidential investment memorandum or acceptable marketing materials as an alternative thereto (Section 2[d]); and did not always prepare the defendant's officers and directors for presentations to potential acquirers (Section 2[f]).

The plaintiff argues that this testimony is insufficient to raise a triable issue of fact. It points to language in the Agreement stipulating that its services were to be provided only "to the extent requested by [the defendant] and appropriate," and contends the defendant has submitted no evidence demonstrating that there were any unanswered requests for the specific services the plaintiff purportedly failed to provide. This argument is unavailing.

In considering a motion for summary judgment, the court must "view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmov[ant]." Vega v Metro. Transp. Auth., 212 AD3d 587, 588 (1st Dept. 2023); see Jacobsen v New York City Health & Hosps. Corp., supra.Viewing Cohen's testimony in the light most favorable to the defendant, it is reasonable to infer that his testimony relates to services the defendant requested and expected to receive. As such, and given that the plaintiff does not establish that the defendant *did not* request the subject services, there is a triable issue of fact as to the sufficiency of the plaintiff's performance under the Agreement.

The defendant also contends its admitted refusal to pay the plaintiff an advisory fee in connection with the Series C is not a breach of the Agreement because the Series C was not an

Alternative Transaction, and thus did not give rise to an obligation to pay an advisory fee in the first instance. Relying on the text of the Agreement and the Series C Preferred Stock Purchase Agreement, the defendant argues the Series C was not an Alternative Transaction because "transfer," as used in the Agreement, including in the definitions of both Sale and Alternative Transaction, purportedly refers only to the sale of *existing* stock, whereas the Series C involved the sale of *newly issued* stock. This argument is unavailing, as the distinction the defendant draws has no basis in the text of the Agreement, which unambiguously encompasses the Series C within its definition of Alternative Transaction.

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'" MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009), quoting Greenfield v Philles Records, 98 NY2d 562, 569 (2002); see Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 442 (1st Dept. 2007) ("courts must afford the unambiguous provisions of the [contract] their plain and ordinary meaning"). Similarly, "[a] court should not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning." Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 54 (1st Dept. 2015) (internal quotation marks omitted).

Here, the Agreement defines an Alternative Transaction, in pertinent part, as a "transaction that involves the transfer of a material portion of the Company's . . . *capital stock* (either *by the Company* or in a secondary sale)" (emphasis added). Black's Law Dictionary [12th ed 2024] defines "capital stock" as "[t]he total number of shares of stock that a corporation may issue under its charter or articles of incorporation, including both common stock and preferred stock," and it defines "transfer" as "[a]ny mode of disposing of or parting with an asset or an interest in an asset," or "[a] conveyance of property or title from one person to another." Nowhere in the definition of Alternative Transaction does the Agreement distinguish between a transfer of "new stock" and previously "existing stock." Indeed, the word "existing" does not appear anywhere in the definition. Therefore, affording the Agreement's terms their plain and ordinary meaning, a "transfer" of the defendant's "capital stock" would not only encompass transactions by the defendant involving its previously existing stock, but also transactions involving newly issued and/or authorized shares, such as the Series C. Nothing in the

Agreement's definition of "Sale," which is incorporated into the definition of "Alternative Transaction," creates ambiguity on this point.

Further, and contrary to the defendant's contention, interpreting the Agreement to cover an equity financing, such as the Series C, would not "rewrite [the Agreement] such that the definition of 'Sale' did not exist." The Agreement provides for the payment of different advisory fees to the plaintiff depending on whether the defendant consummates a Sale ($1.5 million plus 4% of consideration in excess of $55 million on a deal involving the transfer of a *majority* of the defendant's equity) or an Alternative Transaction (6% of total proceeds on a deal that involves a *material portion*, but less than a majority, of the defendant's equity).

Given the determination that the Agreement is unambiguous and encompasses the Series C within its definition of Alternative Transaction, the court will not consider extrinsic evidence proffered by the defendant in support of its construction of the Agreement, as "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement" and "may not be considered unless the document itself is ambiguous." South Rd. Assocs., LLC v IBM, 4 NY3d 272, 278 (2005); see R/S Assoc. v NY Job Dev. Auth., 98 NY2d 29 (2002).

Therefore, the plaintiff's motion for summary judgment is denied as there is a triable issue of fact as to the sufficiency of the plaintiff's performance under the Agreement.

The court notes the defendant's additional argument that, should it ultimately be found liable for breach of the Agreement, the plaintiff is not entitled to recover a fee on funds raised from any of the defendant's "existing shareholders" as of the date of the Series C—*i.e.*, that the basis for calculating the fee owed to the plaintiff should be reduced by any proceeds paid by Series C investors who became stockholders in the period between the execution of the Agreement and the closing of the Series C. In light of the denial of the plaintiff's motion, the court need not, and, in its discretion, does not, reach this damages argument at this juncture.

(2) Fraudulent Inducement

In addition to the evidence and arguments just discussed regarding the plaintiff's performance and the defendant's breach, the defendant also challenges the validity of the Agreement itself, arguing that it was fraudulently induced into entering the contract. This argument is unavailing.

The elements of fraudulent inducement are: (1) a false representation of material fact, (2) known by the party charged 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. United States Life Ins. Co. in City of New York v Horowitz, 192 AD3d 613, 614 (1st Dept. 2021), citing Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 (1996). The defendant asserts that the plaintiff fraudulently induced it into executing the Agreement by misrepresenting Kroll's interest in a potential acquisition of the defendant. The defendant supports this contention with Cohen's deposition testimony and contemporaneous email communications discussing Epstein's representations to Cohen regarding Kroll's interest in an acquisition. These evidentiary submissions, however, fail to demonstrate that Epstein made a false representation of material fact. For example, Cohen testified that Epstein had "guaranteed" that "[Kroll] wanted to buy T-Rex," that "there was a transaction there with Kroll based on [Epstein's] experience or recent experience with [Kroll's CEO] Jim Nadler" and that Kroll "would put in a bid to buy T-Rex." These are not statements of material fact, but rather nonactionable puffery and predictions of expected future events. See Solomon Capital, LLC v Lion Biotechnologies, Inc., 171 AD3d 467, 468 (1st Dept. 2019) (statement that investments were "a done deal" is mere puffery), citing Sidamonidze v Kay, 304 AD2d 415 (1st Dept. 2003); Dragon Inv. Co. II LLC v Shanahan, 49 AD3d 403 (1st Dept. 2008) ("[A] prediction of something which is [] expected to occur in the future will not sustain an action for fraud").

Moreover, the defendant submits no evidence demonstrating that Epstein's alleged representations were false, let alone that Epstein knew them to be false. The mere fact that Kroll ultimately determined not to go through with an acquisition does not demonstrate that Epstein's representations were false when made, and certainly not that they were knowingly false. Indeed, it is undisputed that Kroll's CEO met with Cohen and that the defendant and Kroll signed the NDA to facilitate their continued discussion of the proposed acquisition, indicating that there was at least some degree of interest in an acquisition on Kroll's part.

Nor does the defendant establish justifiable reliance upon Epstein's representations in executing the Agreement with the plaintiff. It is well established that, "if the facts represented are not matters peculiarly within the [plaintiff's] knowledge, and the [defendant] 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 defendant] 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) (internal quotation

marks omitted); see Rubin v Sabharwal, 171 AD3d 580, 580 (1st Dept. 2019). Here, it is undisputed that Cohen met with Kroll's CEO, Jim Nadler, the day before the parties herein executed the Agreement. As such, the defendant cannot claim to have justifiably relied on Epstein's alleged misrepresentations because it had an opportunity to directly gauge for itself Kroll's interest in an acquisition before executing the Agreement with the plaintiff. See ACA Fin. Guar. Corp. v Goldman, Sachs & Co., supra; Rubin v Sabharwal, supra.

Therefore, the defendant fails to carry its *prima facie* burden of demonstrating its entitlement to judgment as a matter of law on its affirmative defense of fraudulent inducement. As such, and given the court's determinations above that there is a triable issue of fact regarding the plaintiff's performance and that the nonpayment of an advisory fee in connection with the Series C was a breach of the Agreement, the defendant's cross-motion for summary judgment is denied.

CONCLUSION

Any arguments raised by the parties and not expressly addressed herein have been considered by the court and determined to be without merit.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion for summary judgment and the defendant's cross-motion for summary judgment are denied; 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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11/21/2024
DATE

NANCY M. BANNON, 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**