SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MICHAEL CARRAZZA, as assignee of
SOUTHPORT CONSULTING CO.,

Plaintiff,

-against- Index No. 600553/01

THINKPATH.COM, formerly known as
IT STAFFING LTD.,

Defendant .

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LOWE, J.:

Plaintiff Michael Carrazza ("Carrazza") moves for summary judgment against defendant Thinkpath.com ("Thinkpath"), or, in the alternative, for an order: (1) disqualifying the firm of Gersten Savage Kaplowitz, LLP (the "Gersten firm"); (2) imposing sanctions against Thinkpath and the Gersten firm for frivolous conduct in asserting meritless defenses in order to delay the litigation; (3) striking Thinkpath's pleadings, if Thinkpath fails to produce certain documents by the date set by the court; and (4) imposing sanctions against Thinkpath and the Gersten firm for failure to produce requested documents. Thinkpath cross-moves for leave to amend its Answer and Counterclaim to add a counterclaim for recission, and for an order imposing sanctions against Carrazza and his counsel for filing a frivolous discovery motion.

On October 31, 1998, Southport Consulting Co. ("Southport") and Thinkpath, companies engaged in the business of recruiting technology consultants, entered into an agreement (the "Agreement") pursuant to which Southport sold substantially all of its assets to Thinkpath for $250,000, of which $50,000 was to be delivered upon the execution of the Agreement, plus certain shares in Thinkpath. In addition, Thinkpath was obligated under the Agreement to deliver either Thinkpath's shares in the aggregate value of $200,000, if a registration statement

for such shares had been filed by January 29, 1999, or 50,000 shares if a registration statement had not been filed by that date. Section 3.1 of the Agreement further provides for stock price protection to Southport, by obligating Thinkpath to compensate Southport for any decrease in the stock price below $5.00 for any of the 50,000 shares delivered by providing at Thinkpath's option: (1) the cash difference between the market price and $5.00 multiplied by the number of shares delivered to Southport; (2) additional shares in the amount of the value of such difference; or (3) $200,000 in cash in exchange for all of the 50,000 shares delivered to Southport. At the time of the sale, Southport also entered into an agreement to provide certain consulting services to Thinkpath from October 30, 1998 to December 31, 2000 (the "Consulting Agreement"). Thinkpath delivered $50,000 cash and 40,000 shares to Southport, and made all payments due under the Consulting Agreement. However, Thinkpath failed to deliver 10,000 shares and the additional shares and/or cash to make up for the difference between the market price per share and the guaranteed $5.00 value, pursuant to Section 3.1 of the Agreement.

As an assignee of Southport, Carrazza commenced this action for breach of contract, and, in the alternative, for unjust enrichment. Carrazza moves for summary judgment, or, in the alternative, for an order disqualifying the Gersten firm, imposing sanctions against Thinkpath and the Gersten firm for frivolous assertion of meritless defenses, and striking Thinkpath' s pleadings and imposing sanctions for failure to produce certain documents.

Carrazza moves for summary judgment on breach of contract and unjust enrichment claims. Where the language of a contract is plain and unambiguous, the interpretation of the contract is an issue of law for the court. Bethlehem Steel Co. v Turner Const. Co., 2 NY2d 456, 460 (1957). In the case at bar, neither party disputes that the language of the Agreement is clear

and unambiguous. Thinkpath, however, asserts an affirmative defense and counterclaim of fraud in the inducement.

Carrazza argues that because the Agreement contains a merger clause, which provides that the Agreement represents the entire understanding between the parties and that it supersedes all prior agreements and arrangements, Thinkpath's claim for fraud based on alleged oral misrepresentations fails as a matter of law. This argument is misplaced. The parol evidence rule, barring the introduction of extrinsic evidence to contradict or vary the terms of a written instrument, does not apply in an action to avoid an agreement which is based on fraud. Sabo v Delman, 3 NY2d 155, 161 (1957). The court will not provide protection from liability for alleged fraudulent and deceitful acts by enforcing a merger clause against an allegedly defrauded party. Id. Thus, a party to an agreement may maintain an action for fraud in the inducement seeking to avoid the contract despite a merger clause.

In order to establish a cause of action for fraud, however, Thinkpath must allege the elements of fraud, and support each element with detailed factual allegations regarding the circumstances constituting the wrong. CPLR 3016. The elements of fraud are: a representation of a material existing fact; falsity of representation; scienter, reasonable reliance; and damages. New York University v Continental Ins. Co., 87 NY2d 308, 318 (1995); Channel Master Corp. v Aluminium Ltd. Sales, Inc., 4 NY2d 403, 407 (1958).

Thinkpath alleges that Carrazza, during a series of meetings in the period between August and October, 1998, misrepresented the following: (1) that there would be a continuing flow of revenue as a result of certain lucrative contracts, including the contract with The Goldman Sachs Group, Inc. ("Goldman Sachs"); (2) that Southport had placed an individual at a high-level

management position in Goldman Sachs, who intended to continue working at Goldman Sachs for at least two additional years, thereby generating commissions for Southport over that period of time; (3) that Carrazza would introduce Declan French of Thinkpath ("French") to individuals at high-ranking positions in Goldman Sachs, and that Carrazza would be able to secure substantial business and "preferred supplier" status with Goldman Sachs; and (4) that Carrazza would obtain new accounts and "preferred supplier" status with other corporations, including Netscape, Morgan Stanley and Citigroup.

In order to sustain an action for fraud, a false representation must relate to past or existing facts. A representation which constitutes an expression of opinion is generally not actionable, absent a showing that the declarant knew that the representation was false. Platus Corp. Pension Plan v Nazareth, 271 AD2d 422, 423 (2d Dept 2000); Stuart Lipsky, P.C. v Price, 215 AD2d 102, 103 (1st Dept 1995). However, even when the declarant knew that a representation was false, a fraud claim lacks merit where the other party had the means available to ascertain the truth, but elected to rely solely upon such representation. See, Platus Corp. Pension Plan v Nazareth, supra, (The claim that a seller of a potato chip delivery route misrepresented an expected amount of weekly gross revenue was not sufficient to sustain a cause of action for fraud where claimant had all of the relevant financial records available for review); Stuart Lipsky, P.C. v Price, supra, (The claim that the seller misrepresented the size and viability of his law practice failed, where the claimant had an opportunity to verify information by reviewing financial statements); Rudnick v Glendale Systems, Inc., 222 AD2d 572 (2d Dept 1995) (The allegations of seller's misrepresentations as to gross receipts of a business and physical condition of a

building and equipment were insufficient to sustain a cause of action for fraud, when a buyer of a bakery had the means available to learn the facts underlying the alleged misrepresentations).

Thinkpath's allegations that Carrazza misrepresented that there would be a continuing flow of revenue, including the revenue from the contract with Goldman Sachs and from the placement of an individual who purportedly intended to continue at his position with Goldman Sachs for two more years, are not sufficient to sustain the cause of action for fraud. Thinkpath conducted due diligence, in which Thinkpath had an opportunity to review Southport's financial statements, with the result that Thinkpath may not rely on statements by Carrazza as to the amount of past and current revenue. Thinkpath also had an opportunity to review Southport's placement contracts and recognize that the employee placed with Goldman Sachs was an employee at will, and that the agreement with Goldman Sachs did not contain any provision that would prevent Goldman Sachs from terminating, at any time, the individual's employment arranged through Southport, and contracting directly with the individual. On the basis of the agreement between Southport and Goldman Sachs, Thinkpath could not reasonably rely on the continuation of previously placed individuals for future revenues. Whether Thinkpath reviewed the documents, or just chose to rely on the alleged representations, Thinkpath's claim fails, to the extent that it alleges that it was fraudulently induced by these representations.

Carrazza also argues that his statements, that he would introduce French to Goldman Sachs and obtain preferred supplier status and new accounts for Thinkpath, are not actionable as statements of future intent. Generally, a mere representation of a promise to perform in the future is not actionable. However, Thinkpath alleges that Carrazza never intended to perform. A promissory statement, made with a preconceived and undisclosed intent not to perform,

constitutes a misrepresentation of the declarant's state of mind, which is an existing fact, and is sufficient to support a fraud clam. Channel Master Corp. v Aluminium Ltd. Sales, supra, citing Sabo v Delman, 3 NY2d 155, 160 (1957). Similarly, a misrepresentation of a third person's present intent with respect to a future act may constitute an actionable fraud. See, Feinerman v Russ Togs, Inc., 37 AD2d 805, 806 (1st Dept 1971).

While proof of failure to perform as promised may indicate the possibility of fraud, fraudulent intent not to perform cannot be inferred merely from non-performance. Brown v Lockwood, 76 AD2d 721, 732 (2d Dept 1980). Thinkpath merely alleges that Carrazza never had an intent to introduce French to Goldman Sachs or to secure preferred supplier status or new accounts, and that Carrazza never attempted to obtain preferred supplier status or new business for Thinkpath. Thinkpath further argues that summary judgment should be denied because outstanding discovery may produce facts necessary for an effective opposition to this motion.

Thinkpath argues that the deposition of Carrazza may reveal facts related to Carrazza's intent to perform as promised. Thinkpath maintains that it needs to depose any individuals with information related to this litigation and any communications with third parties related to Thinkpath and Declan, in order to further show Carrazza's intent not to perform. Summary judgment should be denied where the existence of an essential fact to oppose a motion depends upon knowledge exclusively in the possession of the moving party. Baldasano v Bank of New York, 199 AD2d 184, 185 (1st Dept 1993). However, a mere hope that further discovery may uncover some evidence is insufficient to deny summary judgment. Best Payphones, Inc v The Empire State Payphone Association, 272 AD2d 139, 139 (1st Dept 2000). Thinkpath makes only

general assertions that depositions and documents would provide information with regard to Carrazza's state of mind, without any specificity as to any relevant facts that may be discovered.

Thinkpath also maintains that it needs to obtain documents related to the Agreement, Southport's contracts with investment banks, and valuation of Southport's assets. Since Thinkpath contracted after reviewing these documents, Thinkpath cannot prevail in its fraudulent inducement claim based on the allegation that it relied on statements contradicted by the documents regardless of the nature of the difference between the alleged misrepresentations and the documents. Thus, whatever is contained in these documents is irrelevant to Thinkpath's claim and denial of summary judgment is not warranted on this basis.

In support of his motion for summary judgment, Carrazza introduces statements of admission made by Declan and Arthur Marcus, an attorney for Thinkpath, in a telephone conversation with Carrazza. Declan and Marcus both said that the 10,000 shares owed were in the process of being issued, and discussed various strategies relating to the price guarantee payment, pursuant to Section 3.1 of the Agreement, and requested more time to work out the option of issuing additional shares without financially hurting Thinkpath. The only explanation that Thinkpath offered for these admissions is that such statements are not admissible as a matter of law. A tape recording of a telephone conversation recorded by one of the participants and without the knowledge and consent of the other participants is admissible evidence. N.V. Simons' Metaalhandel v Hyman-Michaels Co., 7 AD2d 840, 840 (1st Dept 1959); Chin v American Tel. & Tel. Co., 96 Misc 2d 1070 (Sup Ct, NY County 1978). Furthermore, even "evidence illegally obtained by a private party is admissible and competent in a civil action."

Chin v American Tel. & Tel. Co., supra, 96 Misc. 2d, at 1072 fn. 3, citing Sackler v Sackler, 16 AD2d 423 (2d Dept 1962), affd 15 NY2d 40 (1964).

In general, evidence of a statement made during compromise negotiations is inadmissible. However, admission of liability made in the course of settlement negotiations is admissible in evidence. Kineon v Bluegrass Elkhorn Coal Corp., 121 AD2d 980, 983-84 (1st Dept 1986); Bellino v Bellino Construction Co., Inc., 75 AD2d 630, 631 (2d Dept 1980). Likewise, admissions by an attorney are admissible so long as they were made by an attorney acting in his or her authorized capacity. Bellino v Bellino Construction Co., Inc., supra, at 630. This is especially true in a case like this where there was nothing to indicate that liability had even been challenged at the time that the statements were made. See, Kineon v Bluegrass Elshorn Coal Corp., supra.

Furthermore, Thinkpath failed to explain the fact that it regularly paid Carrazza for the term of the Consulting Agreement, and that Thinkpath never raised an issue of Carrazza's performance of the services provided pursuant to the Consulting Agreement, including, "introduction of leads and/or new business on or after the date hereof in connection with the direct placement of Company consultants." Consulting Agreement, ¶ 1(ii). Thinkpath also failed to explain why it operated the business, which it alleges that it was fraudulently induced to purchase, for two and half years before asserting a fraud claim defensively in response to Carrazza's claims for breach of contract and unjust enrichment. See, Doby's Delicatessen Inc. v Brunkard, 202 AD2d 626 (2d Dept 1994); Ward v Hanley, 130 AD2d 742 (2d Dept 1987); Great Neck Car Care Center Inc. v Artpat Auto Repair Corp., 107 AD2d 658 (2d Dept 1985).

Carrazza has established a prima facie entitlement to summary judgment based on undisputed, clear and unambiguous terms of the Agreement and the burden has shifted to Thinkpath to raise a triable issue of fact. However, Thinkpath has failed to introduce a triable issue of fact, and summary judgment in favor of Carrazza is warranted.

Carrazza also requests the award of attorneys' fees. Section 11.7 of the Agreement provides, in part, that, "... in the event that [Southport] commences legal action to recover any amounts owed hereunder, [Thinkpath] shall pay all professional fees and expenses, including without limitation, attorneys' fees and expenses." Therefore, Carrazza is entitled to reasonable attorneys' fees in the amount to be determined at a hearing. See, City of New York v Zuckerman, 234 AD2d 160 (1996).

Because summary judgment is granted, the court need not pass on Carrazza's alternative request for an order disqualifying the Gersten firm, imposing sanctions for frivolous conduct, striking Thinkpath's pleadings, and imposing sanctions for failure to produce requested documents.

Thinkpath cross-moves for a leave to amend its Answer and Counterclaim to add a counterclaim for recission, and for an order imposing sanctions against Carrazza and his counsel for filing a frivolous discovery motion. Generally, leave to amend is liberally granted. However, the application for leave to amend should be denied where the proposed amended pleading lacks merit. Konrad v 136 East 64th Street Corp., 246 AD2d 324, 324 (1st Dept 1998). Since Thinkpath's underlying counterclaim for fraud fails, and the proposed amended counterclaim for recission is based on the same factual allegations as the underlying counterclaim for fraud, leave

to amend to add the counterclaim for recission is not warranted. Because circumstances warranting sanctions are absent, the cross-motion for a leave to amend is denied in its entirety.

Accordingly, it is hereby

ORDERED that Michael Carrazza's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Thinkpath.com in the amount to be determined upon hearing, together with reasonable attorneys' fees to be determined upon hearing, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon filing on a note of issue and a statements of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed, and it is further

ORDERED that defendant Thinkpath.com's motion for leave to amend the Answer and Counterclaim to add the counterclaim for recission and sanctions is denied.

Dated: December 18 2001

ENTER:

JUSTICE RICHARD B. LOWE, III