

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

Facie Libre

INDEX NO. 651696/11

MOTION DATE 2/24/12

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -

Second Market Holdings

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

4-5

7

8-9

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 2/10/12

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----x  
FACIE LIBRE ASSOCIATES I, LLC and  
FACIE LIBRE ASSOCIATES II, LLC,

Plaintiffs,

-against-

SECONDMARKET HOLDINGS, INC.,

Defendant.  
-----x

SHIRLEY WERNER KORNREICH, J.:

Index No.: 651696/11

**DECISION AND ORDER**

This case involves a pre-IPO sale of Facebook stock to plaintiffs, Facie Libre Associates I, LLC and Facie Libre Associates II, LLC (collectively, Facie Libre). Facie Libre is suing defendant SecondMarket Holdings, Inc. (SecondMarket) for breach of contract as a third-party beneficiary, breach of fiduciary duty, negligence, intentional misrepresentation, malpractice, and unjust enrichment. SecondMarket moves to dismiss Facie Libre's claims under CPLR 3211(a)(1) (documentary evidence), (5) (statute of limitations), (7) (failure to state a claim) and CPLR 3016(b) (failure to state misrepresentation with particularity). SecondMarket's motion is granted in part and denied in part for the reasons that follow.

*Background*

On this motion to dismiss, the facts are taken from the complaint.

In 2009, the Facie Libre entities were organized as Delaware Limited Liability Companies to purchase Facebook shares for investment purposes and to hold the shares until Facebook became a public company. Compl. ¶ 12. On January 25, 2010, Karl Voskuil, a non-party and former Facebook employee, notified Facebook that he intended to sell a percentage of his Facebook shares. ¶ 16. That same day, Facie Libre entered into a Stock Transfer Agreement (STA) with Voskuil to purchase 75,000 shares of Facebook Class B Common Stock at \$33 per

share for a total purchase price of \$2,475,000. ¶ 20. Under the STA, Voskuil was obligated to deliver a counsel's legal opinion (the Legal Opinion) to Facebook to verify that registration is not required under the Securities Act of 1933. ¶ 22.

SecondMarket created and operates an online marketplace website where privately-held companies' securities are bought and sold. ¶ 7. Voskuil and SecondMarket entered in a contract (the Intermediary Services Agreement or ISA) whereby SecondMarket would "design, implement and facilitate the entire transaction, for a fee of \$75,000." ¶ 27. Facie Libre alleges that "the various responsibilities SecondMarket undertook pursuant to its agreement with Voskuil included designing, implementing and facilitating the entire transaction, obtaining a Legal Opinion on behalf of Voskuil and delivering it to Facebook, obtaining Facebook's signatures to authorize the transaction, ensuring that Facebook and Voskuil complied with all the requisite conditions of closing, and collecting, organizing and delivering the signatures of all parties on all the transaction documents." ¶ 29. If the parties failed to execute and deliver all documents and wire transfer the purchase price by the March 26, 2010 deadline, the deal would not close, because Facebook requires parties to consummate the deal within 60 days after the seller gives notice of sale. ¶ ¶ 26, 27, 30.

According to Facie Libre, SecondMarket was involved in approximately 20 previous transactions where Facie Libre purchased Facebook shares. ¶ 13. On each of these occasions, SecondMarket "facilitated the entire transaction," including delivery of the Legal Opinion. ¶ 14. Facie Libre claims that in this case, SecondMarket once again undertook to deliver the Legal Opinion. ¶ 29.

On March 5, 2010, SecondMarket's in-house counsel informed Facie Libre and their counsel that Facebook had authorized the transaction and that she was holding Facebook's signatures in escrow until Facie Libre paid the purchase price. ¶ 33. SecondMarket instructed Facie Libre to wire the purchase price to Voskuil the following Monday, March 8, 2010, at which time SecondMarket would release the signatures. ¶¶ 33-35. Facie Libre alleges that they relied on SecondMarket's representation that all conditions of closing were satisfied, and instructed their bank to wire the purchase price to Voskuil. ¶ 37.

On March 17, 2010, Facie Libre wired \$618,750 to Voskuil, and on March 22, 2010, Facie Libre wired \$1,289,062.50 to Voskuil. ¶¶ 38, 39. On March 24, 2010, SecondMarket reminded Facie Libre and their counsel that they must pay Voskuil the balance of the purchase price by close of business, Friday, March 26, 2010. ¶ 40. On March 26, 2010, Facie Libre sent the final wire of \$567,187.50 to Voskuil. ¶ 41. Voskuil acknowledged that he received the purchase price and SecondMarket's in-house counsel congratulated Facie Libre on closing and purchasing Voskuil's Facebook shares. ¶ 42.

In fact, SecondMarket had not obtained approval from Facebook's counsel because they did not deliver the Legal Opinion until March 27, 2010, a day after the deadline. ¶¶ 35, 47. As a result, Facebook refused to consent or acknowledge the closing of the Voskuil deal. ¶ 49.

Facie Libre allege that after March 26, 2010, SecondMarket stone-walled them when they sought to obtain copies of all the closing documents for evidence that the transaction closed. ¶ 46. Three months after the deal supposedly closed, SecondMarket told Facie Libre that Facebook refused to approve the stock transfer because it had not received the Legal Opinion within 60 days as required by company policy. ¶ 53. More than a year after March 26, 2010,

Voskuil returned \$2,400,000 to Facie Libre (the purchase price minus the fee that Voskuil paid to SecondMarket). ¶ 58.

### *Legal Standard*

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). CPLR 3026 mandates that “[p]leadings shall be liberally construed.” *Skillgames*, 1 AD3d at 250. “Defects shall be ignored if a substantial right of a party is not prejudiced.” *Rovello*, 40 NY2d at 636. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250. “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Rovello*, 40 NY2d at 636. “The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved.” *Stern v Consumer Equities Associates*, 160 AD2d 993, 994 (2d Dept 1990).

In assessing a motion under CPLR 3211(a)(1) (documentary evidence), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello*, 40 NY2d at 635-36. When the defendant submits affidavits or other documentary evidence, dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Id.*

Finally, where a defendant moves to dismiss on statute of limitation grounds, the defendant bears the initial burden of proving the action is time-barred. *Chung v Wang*, 79 AD3d 693, 694 (2nd Dept 2010).

*Discussion*

*A. The User Agreement (Statute of Limitations & Limitation of Liability Clause)*

SecondMarket requires that parties consent to the terms of a User Agreement prior to using its website and argues that the terms of the User Agreement preclude the claims in this case. Specifically, it contends: (1) the User Agreement sets a one year time limit to bringing a claim and this action was brought more than a year after March 26, 2010; and (2) the User Agreement limitations on SecondMarket's liability bars liability on the claims in this case.

The Court rejects both arguments. The User Agreement does not govern the claims in this case. Facie Libre's claims relate to SecondMarket's alleged failure to timely deliver the Legal Opinion and Second Market's alleged misrepresentations about whether the deal closed. As discussed *infra*, the obligation to deliver the Legal Opinion is governed by the STA, not the User Agreement. The User Agreement merely governs the use of SecondMarket's website. Any limitations of liability contained therein relate solely to disputes relating to the website, not the underlying stock transaction.

*B. Breach of Contract-Third Party Beneficiary*

"One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." *Edge Mgmt Consulting, Inc. v*

*Blank*, 25 AD3d 364, 368 (1st Dept 2006) (citing *State of California Employee's Retirement System v Shearman & Sterling*, 95 NY2d 427, 435 (2000)).

Facie Libre's third-party beneficiary claim against SecondMarket is dismissed because the documentary evidence clearly establishes that the contract under which SecondMarket asserts its claim (the ISA) was not breached. The ISA does not require SecondMarket to obtain a Legal Opinion and deliver it to Facebook by March 26, 2010. The ISA only states that Voskuil agrees to pay SecondMarket a fee of \$75,000 and that such fee may be reduced for expenses related to, *inter alia*, the Legal Opinion. ISA, ¶ 1.1, 1.2. Nothing in the ISA suggests that SecondMarket had a duty to deliver the Legal Opinion, a duty that was Voskuil's under the STA. Consequently, Facie Libre's third-party beneficiary claim fails and is dismissed because the ISA was not breached.

### C. *Negligence*

"To sustain a negligence claim a plaintiff must prove that the defendant owed a duty to the plaintiff, the duty was breached, and the breach was the proximate cause of the resulting injury." *Friedman v Anderson*, 23 AD3d 163, 164 (1st Dept 2005). "It is a well established principle that a simple breach of contract should not be considered a tort unless a legal duty independent of the contract has been violated." *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987); *see Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107, 111 (1st Dept 2005) (claim arising from alleged breach of contract may not be converted into tort claim absent violation of legal duty independent of that created by contract.).

Facie Libre claims that SecondMarket undertook to deliver the Legal Opinion and was negligent in this undertaking by failing to deliver it by March 26, 2010. SecondMarket contends

that this is really an allegation of breach of the STA, not negligence. There is no question that under the STA, the duty to deliver the Legal Opinion was Voskuil's and Voskuil's alone. Nonetheless, Facie Libre claims that it reasonably relied on SecondMarket to deliver the Legal Opinion based on the parties' prior dealings in which SecondMarket had performed similar services for Facie Libre on at least 20 prior occasions. *See* Compl. ¶ 13. On all of those occasions, SecondMarket always "obtained and delivered the requisite legal opinions on behalf of sellers." ¶ 14. In fact, SecondMarket did deliver the Legal Opinion on March 27, 2010, however, such delivery was too late for the deal to close.

Even assuming that SecondMarket had a duty to deliver the Legal Opinion, such duty was to Voskuil, not Facie Libre, because SecondMarket allegedly contracted with Voskuil to perform services related to the STA. Nevertheless, none of the agreements in this case (the STA, ISA, and the User Agreement) impose any duty on SecondMarket to deliver the Legal Opinion. The negligence claim asserted by Facie Libre seeks to rewrite the STA to transfer Voskuil's obligation to SecondMarket, who is not a party to the STA. If the parties to the STA wanted to obligate SecondMarket, they could have indicated so in the STA. Facie Libre cannot use a negligence claim to alter the obligations of the parties that are clearly governed by contract. Moreover, even if SecondMarket assumed Voskuil's duty to deliver the Legal Opinion, the proper cause of action would be a breach of the STA, not negligence, because the duty arises under a contract (which makes a negligence claim improperly duplicative). *See Renck*, 19 AD3d at 111. Therefore, the negligence claim is dismissed.

*D. Breach of Fiduciary Duty*



This claim is dismissed because SecondMarket did not have a fiduciary duty to Facie Libre. A fiduciary duty is a relationship of higher trust that arises out of an obligation to act for or give advice to another upon matters within the scope of the relation. *EBICI, Inc. v Goldman Sachs*, 5 NY3d 11, 31 (2005). A fiduciary relationship is fact specific and grounded in a higher level of trust than normally is present in the marketplace in an arms-length business transaction. *Id.*; *RNK Capital LLC v Natsource*, 76 AD3d 840 (1st Dept 2010). Where the parties have entered into a contract, courts look to the agreement to find the nexus of the parties relationship and should not ordinarily transport the parties to the realm of higher duty. *ECBI, supra*.

Facie Libre claims that they subscribed to SecondMarket's website and relied on their expertise in connection with the transaction. Facie Libre argues that SecondMarket breached its fiduciary responsibility by failing to deliver the Legal Opinion on time. However, Facie Libre's reliance on SecondMarket's expertise does not demonstrate that SecondMarket had a fiduciary duty to it. "Plaintiff's alleged reliance on defendant's superior knowledge and expertise . . . ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties." *Sebastian Holding, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 (1st Dept 2010). Given that the parties engaged in an arm's-length transaction governed by contracts, Facie Libre's alleged reliance on SecondMarket's superior knowledge does not establish a fiduciary relationship.

*E. Intentional Misrepresentation*

Pursuant to CPLR 3016(b), "[w]here a cause of action or defense is based upon misrepresentation . . . the circumstances constituting the wrong must be stated in detail." *Pace v Raisman & Associates, Esqs., LLP*, 95 AD3d 1185, 1188-89 (2d Dept 2012). The plaintiff must

establish that there was a material misrepresentation, falsity, scienter, reliance, and injury. *See Standis-Parkin v Lorillard Tobacco Co.*, 12 AD3d 301, 303 (1st Dept 2004).

Facie Libre properly pled the elements of intentional misrepresentation in sufficient detail. Facie Libre claims that SecondMarket told them that the deal had closed on March 26, 2010. Such a statement is clearly false. Facie Libre claims that SecondMarket knew that such statement was false and lied to cover-up the fact that the deal did not close. Facie Libre contends that their reliance on such statement was reasonable because SecondMarket was in the best position to know if the deal had closed. Finally, Facie Libre has pled an injury that was proximately caused by such statement because they allege that if SecondMarket would have been truthful about the fact that the deal had not yet closed: (1) Facie Libre would have been able to remedy the outstanding obligation (by procuring and delivering the Legal Opinion before the deadline) so that the deal would have closed; (2) Facie Libre would have received the Facebook stock; and (3) Facie Libre would have realized the benefit of such stock appreciating in value since the closing. In sum, Facie Libre's intentional misrepresentation claim has been properly pled and is not dismissed.

*F. Professional Malpractice*

Facie Libre withdrew their professional malpractice claim at oral argument.

*G. Unjust Enrichment*

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff." *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dept 1998).

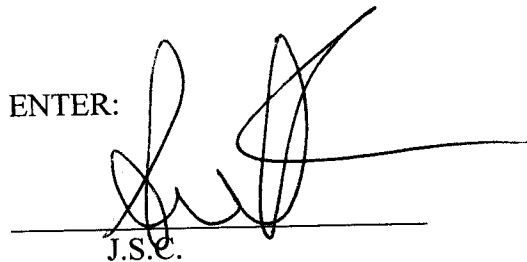
Facie Libre's unjust enrichment claim is dismissed because it did not confer a benefit on SecondMarket without being adequately compensated. The benefit allegedly conferred upon SecondMarket was the \$75,000 fee payable under the ISA. However, such fee was paid by Voskuil, not Facie Libre. SecondMarket has no unjust enrichment claim related to this money and the claim is therefore dismissed. Accordingly, it is hereby

ORDERED that the motion by defendant SecondMarket Holdings, Inc. against plaintiffs Facie Libre Associates I, LLC and Facie Libre Associates II, LLC is granted on the causes of action for breach of contract against a third-party beneficiary, breach of fiduciary duty, negligence, and unjust enrichment, which are hereby dismissed, and denied on the cause of action for intentional misrepresentation; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a preliminary conference on August 23, 2012, at 9:30 am.

Dated: August 10, 2012

ENTER:



J.S.E.