

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

PRESENT: BERNARD J. FRIED

PART 60

Justice

E-FILE

Turbine, Inc.,

PLAINTIFF

INDEX NO. #602639-2009

MOTION DATE _____

- v -

MOTION SEQ. NO. #003

Atari, Inc. et al.,

MOTION CAL. NO. _____

DEFENDANTS

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

RECEIVED

MAR 04 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 3/3/2010

Bernard J. Fried
HON. BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [] REFERENCE

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

ant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
TURBINE, INC., :

Plaintiff, :

-against- : Index No. 602639/09

ATARI, INC. and ATARI INTERACTIVE, INC., :

Defendants. :

-----X
ATARI, INC. and ATARI INTERACTIVE, INC., :

Plaintiffs, :

-against- : Index No. 602751/09

TURBINE, INC., :

Defendant. :

-----X
Appearances:

For Plaintiff:

Goodwin Procter LLP
620 Eighth Avenue
New York, NY 10018
Jeffrey A. Simes, Esq.

For Defendants:

Olshan Grundman Frome
Rosenzweig & Wolosky LLP
65 East 55th Street
New York, NY 10022
Kyle C. Bisceglie, Esq.

Fried, J.:

This is a breach of contract action brought by the plaintiff Turbine, Inc. ("Turbine") against the defendants Atari, Inc. and Atari Interactive, Inc. (collectively, "Atari"). The action arises out of a business relationship between the parties wherein they sought to create and market an online "Dungeons & Dragons[®]" game. Motion sequence numbers 003 (Index No.

602639/09) and 002 (Index No. 602751/09) are consolidated for disposition.¹

Before me is Atari's motion (sequence number 003) to dismiss Turbine's fourth, fifth and sixth causes of action of the Amended Complaint, which assert unjust enrichment, fraud/fraudulent inducement and negligent misrepresentation,² respectively, and punitive damages, pursuant to CPLR 3211(a)(1) and (a)(7). At argument, Turbine withdrew its cause of action for unjust enrichment. (*See* 12/10/09 Tr, at 7).

This case centers on several agreements between the parties. Both parties allege breaches by the other with respect to those agreements. On January 25, 2003, Turbine and Atari entered into a License, Development and Publishing Agreement, subsequently amended by Amendment Numbers One through Five (the "License Agreement"); on April 10, 2006, they entered into a Digital Distribution Agreement (the "Distribution Agreement"); and on May 13, 2009, they entered into a Letter Agreement (the "Letter Agreement") (collectively, the "Agreements").

Under the License Agreement, Atari granted Turbine a sublicense of the "Dungeons & Dragons[®]" ("D&D") and "Advanced Dungeons & Dragons[®]" ("Advanced D&D") intellectual properties, of which Atari had obtained a license from Hasbro, Inc., in 2000. Turbine was charged with developing a subscription-based "massively multiplayer online

¹ In accordance with the stipulation between the parties, dated October 6, 2009, this action has been consolidated with the related action entitled *Atari, Inc. and Atari Interactive, Inc. v Turbine* (Index No. 602751/09) (the "Atari Action"). (*See* 12/10/09 Tr, at 5).

² Atari's motion (sequence number 002 in the Atari Action) to dismiss Turbine's counterclaims is granted on the basis that the counterclaims are duplicative of Turbine's claims in its amended complaint. Turbine's cross-motion for fees and costs is denied.

role-playing game” (“MMO”) service, based upon the D&D and Advanced D&D intellectual properties. The game is called “Dungeons & Dragons Online®: Stormreach™” (“DDO: Stormreach”). Atari was to publish and distribute the retail component of the service.

Amendment Numbers One through Five subsequently amended the various provisions of the License Agreement, including certain royalty provisions. Section 6.2 of the License Agreement, as amended by Amendment Number Two, defined certain royalties Turbine agreed to pay to Atari. These royalties included a “License Royalty” based upon a specified percentage of “Turbine Net Receipts,” as defined in the License Agreement; a “Subscriber Fee Royalty” based upon a specified percentage of “Turbine Net Receipts;” and a “Sublicense Royalty.” Atari alleges that Turbine has paid no License Royalties or Subscriber Fee Royalties, besides “an advance payment,” pursuant to the Letter Agreement, described below.

Under the Distribution Agreement, Atari granted Turbine a license to distribute the DDO: Stormreach software to consumers, called “subscribers” or “players.” Players are required to purchase the software in order to subscribe to the MMO service. Section 2(iii) of the Distribution Agreement defined, *inter alia*, certain other royalties Turbine agreed to pay Atari. These included, 60% of the “Digital Receipts,” as defined in the Distribution Agreement, accrued by Turbine during the initial thirty (30) days after the date of the first digital sale of the Product,³ and 50% of the “Digital Receipts” thereafter. Turbine alleges that

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The term “Product” is defined in the recitals of the Distribution Agreement as “the client software portion of the multiplayer online game entitled ‘Dungeons & Dragons Online: Stormreach’ (including the client software portion of all add-ons, modules, expansion packs and enhancements thereto).”

the parties entered into the Distribution Agreement so that Turbine could assume key publishing and distribution responsibilities that Atari had failed to perform under the License Agreement.

Following an audit of Turbine, the parties entered into the Letter Agreement, whereby Turbine agreed to make a non-refundable payment of \$500,000 (the "Good Faith Payment") "deemed to be due from Turbine to Atari based on the results of the Audit[.]" (Letter Agmt, at 2). Turbine alleges that Atari made fraudulent misrepresentations and omissions regarding its intentions and ability to perform going forward when the parties were negotiating the terms of the Letter Agreement.

Nevertheless, Atari asserts that, by letter dated June 26, 2009, it requested that Turbine cure its various breaches of the Agreements within sixty days. The breaches alleged by Atari include Turbine's underreporting of its gross revenues while simultaneously inflating its reported deductions, resulting in an underreporting of "Turbine Net Receipts" and a corresponding underpayment of royalties to Atari. Atari further asserts that Turbine responded to this request to cure by commencing the instant action.

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the plaintiff is afforded the "benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Id.* at 88). Under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated

one.” (*Id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

To state a claim for fraud or fraudulent inducement, requires an allegation of “a knowing misrepresentation of a present material fact with the intent to deceive.” (*Glatt v Mariner Partners, Inc.*, 63 AD3d 428, 429 [1st Dep’t 2009]). In addition, CPLR 3016 provides that “[w]here the cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

In the Fifth Cause of Action, Turbine alleges that Atari engaged in fraudulent conduct when, during the parties’ contractual negotiations, Atari made material misrepresentations and omissions regarding its financial situation and ability to fully perform under the Agreements. Essentially, Turbine alleges that it was induced to enter into several of the Agreements based upon its reliance on Atari’s representations. However, the complaint contains only generalized statements and fails to plead with the level of particularity required by CPLR 3016. For example, the complaint contains no allegations with respect to when and where the alleged misrepresentations took place, to whom the misrepresentations were made and the details of the particular conversations. Therefore, although the Fifth Cause of Action must be dismissed based on its deficient pleading, Turbine is granted leave to replead with the submission of an affidavit containing the requisite particularity.

To state a claim for negligent misrepresentation, the plaintiff’s pleadings must show the existence of a special relationship of trust and confidence between the parties, which imposes a duty on the defendant to impart correct information to the plaintiff. (*See J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Such a relationship is generally not

present between parties to an arm's length commercial transaction. (*See Parisi v Metroflag Polo, LLC*, 51 AD3d 424, 424 [1st Dep't 2008]). However, the Court of Appeals has recognized the duty to speak with care in the commercial context, but "only on those 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." (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]).

In the Sixth Cause of Action, Turbine asserts a claim of negligent misrepresentation in the alternative with respect to the aforementioned alleged misrepresentations of Atari. Turbine argues that it has adequately pled the existence of a special relationship of trust and confidence between itself and Atari by alleging that the nature of the parties' complex business arrangement required that Turbine was forced to rely on Atari with respect to key aspects of the parties' relationship. It further argues that such a relationship existed in that Atari possessed unique and specialized expertise with respect to the D&D intellectual properties and had a special and unique knowledge of its financial problems and operational capabilities. (*Swersky v Dreyer & Traub*, 219 AD2d 321, 327-28 [1st Dep't 1996]).

However, the specialized knowledge of a company with respect to its own business and financial particulars is not the type envisioned by the Court of Appeals to impose a duty to speak with care in the limited context of commercial transactions. (*JP Morgan Chase Bank v Winnick*, 350 F Supp 2d 393, 402 [SD NY 2004]). Here, there is no indication that Turbine and Atari's relationship was anything more than a typical arm's length commercial transaction and, as such, it does not rise to the level of a special relationship. Indeed, Turbine is a sophisticated corporation represented by counsel that claims it to be "one of the world's

leading developers, operators, and publishers of MMOs.” (Am Compl, ¶ 22). Thus, Turbine’s contention that it was forced to rely on Atari’s superior expertise, when the parties are experts in the same field, is unpersuasive.

Turning to the request for Punitive Damages. In New York, such a request must be dismissed, unless the plaintiff can demonstrate that the defendant’s alleged conduct was “part of a pattern directed at the public generally.” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). In its fraud claim, Turbine claims that it is entitled to, *inter alia*, punitive damages. (Am. Compl., ¶ 92). However, it also concedes that there is no allegation in the complaint that Atari’s alleged fraud or misrepresentations were directed at the public. (*See* 12/10/09 Tr, at 22). Therefore, this request warrants dismissal.

Accordingly, it is

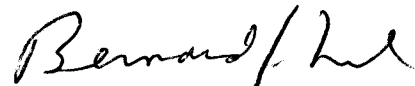
ORDERED that Atari’s motion to dismiss (Seq. No. 003/Index No. 602639/09) is granted to the extent that the Sixth Cause of Action is dismissed; that the Fifth Cause of Action is dismissed without prejudice with leave to replead; and the request for Punitive Damages is dismissed; and it is further

ORDERED that Atari’s motion to dismiss Turbine’s counterclaims (Seq. No. 002/Index No. 602751/09) is granted; and it is further

ORDERED that Turbine’s cross-motion (Index No. 602751/09) for fees and costs is denied.

Dated: March 3, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED