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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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BARBARA TICHNER,

Plaintiff,

-against-

GOLDEN BRIDGE INC. d/b/a HERITAGE FARM, PATRICIA GRIFFITH and CHRISTOPHER B. MILLER DVM. P.C.,

Defendants.

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Index No.: 651517/2013
Submission Date: 10/2/13

**DECISION AND ORDER**

For Plaintiff:
Bernstone & Grieco, LLP
295 Madison Avenue, 25th Floor
New York, NY 10017

For Defendants Golden Bridge:
Axelrod, Fingerhut & Dennis
260 Madison Avenue
New York, NY 10016

For Defendant Christopher Miller:
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Papers considered in review of this motion to dismiss (motion seq. no. 001):

Notice of Motion/Affirm. Of Counsel/Exhibits . . . . . 1
Plaintiff's Affirm. in Opposition/Affidavit . . . . . 2
Defendant's Affirmation in Reply . . . . . 3

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**HON. SALIANN SCARPULLA, J.:**

In this action arising from the purchase of a horse, defendants Golden Bridge Inc. d/b/a Heritage Farm ("Heritage Farm") and Patricia Griffith ("Griffith") (collectively, "the defendants") move to dismiss plaintiff Barbara Tichner's ("Tichner") complaint pursuant to CPLR § 3211(a)(1) and (7).[1]

[1] Heritage Farm and Griffith specifically move to dismiss the first, second, fourth, fifth, sixth, seventh, and eighth causes of action. Tichner asserts the third cause of action against defendant Christopher B. Miller ("Miller") for professional negligence.



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Plaintiff Barbara Tichner sought to purchase a horse for her daughter, a beginner in horse competitions. Tichner alleges that, on or about March 15, 2012, she contacted Heritage Farm and Griffith to find a suitable horse for her daughter to ride in equestrian jumping competitions for a short period, and thereafter, sell or lease the horse for profit. Tichner alleges that, a few days later, the defendants presented to her a horse named "Sports Talk." The defendants allegedly told Tichner that Sports Talk was "the perfect horse" for her daughter, and "an incredible jumper."

Shortly thereafter, Tichner told Griffith that she wanted "a pre-purchase examination and vetting" of Sports Talk to be performed. According to Tichner, Griffith then arranged for defendant Miller, a veterinarian, to perform the pre-purchase examination. Miller performed the pre-purchase examination of Sports Talk, including radiographs, on March 24, 2012. Tichner claims that after the examination, the defendants advised her that Sports Talk was "sound, healthy, possessed no physical defects, was fit for competitive jumping and was a good investment pony."

On or about March 29, 2012, Tichner alleges that she purchased Sports Talk from Lane Change Farms for $175,000. Tichner's daughter then began riding Sports Talk in competitions.

In or about November 2012, Sports Talk was moved to Florida when Tichner's daughter went to a new trainer. The trainer in Florida informed Tichner that something was wrong with Sports Talk and asked to see the pre-purchase examination report and

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radiographs. Tichner alleges that the March 24 radiographs revealed rotation in Sports Talk's feet, laminitis, and other physical defects that resulted in Sports Talk's inability to compete. Tichner claims that the defendants concealed this information about Sports Talk's physical health in order to induce her to purchase the horse.

Tichner asserts seven causes of action against the defendants for fraudulent misrepresentation, negligent misrepresentation, breach of contract, violation of General Business Law § 349, breach of express warranty, breach of implied warranty of merchantability, and breach of warranty of fitness for a particular purpose. [2]

The defendants move to dismiss Tichner's complaint pursuant to CPLR §§ 3211(a)(1) and (7). The defendants argue that the complaint should be dismissed because all the claims against them are based on the erroneous allegation that they sold the horse to Tichner. The defendants claim that they did not sell the horse to Tichner, and they submit copies of the bill of sale, which lists Bibby Hill as the seller of the horse. The defendants also submit copies of invoices for training, boarding, and other services that Heritage Farm provided to Tichner.

The defendants also argue that Tichner fails to state a claim for fraudulent misrepresentation or negligent misrepresentation because any representations related to the horse's health or investment prospects are opinion and puffery that cannot form the

[2] As to the fifth cause of action for a violation of General Business Law § 349, Tichner consents to dismissal without prejudice. I therefore grant the Heritage Farm defendant's motion to dismiss the fifth cause of action, with leave to replead.



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basis of a fraud claim. Further, the defendants claim that Tichner could not have justifiably relied on their representations because Tichner obtained professional advice about Sports Talk from Miller, not from defendants.

The defendants also argue that the fourth cause of action for breach of contract should be dismissed because they were not parties to the contract of sale between Tichner and Bibby Hill. The defendants further argue that the sixth, seventh, and eighth causes of action should be dismissed because they cannot be held liable for any breach of express or implied warranty because they were not the seller of the horse.

In opposition, Tichner argues that defendants' motion should be denied because she sufficiently stated claims against them. Tichner argues that she does not assert her claims against the defendants as the seller of the horse, but as her agents. Tichner submits an affidavit stating that she hired defendants as her agents, and that she paid them a 15% commission based on the sale price (i.e., $26,250). Tichner argues that the defendants induced her to purchase Sports Talk through their misrepresentations about his health, and that they breached their contract with her by failing to find her a suitable horse.

Tichner further submits a copy of the pre-purchase examination report dated March 25, 2012. In her affidavit, Tichner states that the report was delivered directly to Heritage Farm and then passed on to her. The pre-purchase examination report lists Lane Change Farm as the seller.

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**Discussion**

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Under CPLR § 3211(a)(7), a defendant may move for judgment dismissing the complaint on the grounds that "the pleading fails to state a cause of action." In determining whether to grant a motion to dismiss based on a failure to state a cause of action, the "court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002).

Under CPLR § 3211(a)(1), a defendant may move for judgment dismissing the complaint on the grounds that "a defense is founded upon documentary evidence." Dismissal is "warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d at 88.

**1. Fraudulent Misrepresentation**

CPLR § 3016(b) provides that where a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail." "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, intent to induce reliance, justifiable reliance by the plaintiff, and damages." *Eurycleia*

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*Partners, LP v. Seward & Kissel, LP*, 12 N.Y.3d 553, 559 (2009); *Ross v. Louise Wise Services Inc.*, 8 N.Y.3d 478, 488 (2007).

In a fraud cause of action, a plaintiff must allege a misrepresentation of fact. *Lemle v. Lemle*, 92 A.D.3d 494, 499 (1st Dep't 2012). An opinion or prediction of something which is hoped or expected to occur in the future does not constitute a misrepresentation of fact. *Marx v. Mack Affiliates*, 265 A.D.2d 202, 203 (1st Dep't 1999); *Chase Investments, Ltd. v. Kent III*, 256 A.D.2d 298, 299 (2d Dep't 1998).

Tichner successfully stated a cause of action for fraudulent misrepresentation. Tichner alleged that the defendants made a material misrepresentation of fact to her – i.e., that the horse was healthy and suitable for competitive jumping when in fact the horse suffered from rotation in its feet and laminitis. Tichner also alleged that the defendants knew that their representations to her about the horse were false, and that they intended to induce her reliance on their representations so that she would purchase the horse. Tichner further alleges that she justifiably relied on the defendants' representations because they acted as her agents and she possesses only rudimentary knowledge of horses.

The defendants argue that any representations regarding the horse's health and investment prospects are puffery and opinion, which cannot form the basis of a fraud action. However, I find that the representations allegedly made by defendants are not puffery and opinion as a matter of law, and therefore Tichner has sufficiently alleged a fraud claim. *Yuzwak v. Dygert*, 144 A.D.2d 938, 939 (4th Dep't 1988) (seller's

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representations that a horse is quiet and suitable for children is not puffing or opinion as a matter of law, and presents a question of fact for the jury's resolution). Although the defendants' alleged representation that Sports Talk was a "good investment pony" concerns the future value of the horse, a "prediction as to some future event, known by the author to be false or made despite the anticipation that the future event will not occur" is a statement sufficient to support a fraud cause of action. *Cristallina v. Christie, Manson & Woods Intl.*, 117 A.D.2d 284, 294 (1st Dep't 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273, 275 (1st Dep't 2005).

Therefore, the defendants' motion to dismiss is denied with respect to the first cause of action for fraudulent misrepresentation.

**2. Negligent Misrepresentation**

"A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information." *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 A.D.3d 487, 489 (2d Dep't 2004).

Here, I find that Tichner stated a cause of action against the defendants for negligent misrepresentation. Tichner alleges that the defendants acted as her agents to find a suitable horse, and therefore, they owed a duty of reasonable care to provide her with correct information about Sports Talk. Tichner also alleges that the defendants

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provided her with false information about Sports Talk's health and suitability for competition, and that Tichner reasonably relied on the false information provided by the defendants when she purchased the horse.

Therefore, the defendants' motion to dismiss the second cause of action for negligent misrepresentation is denied.

**3. Breach of Contract**

To prove a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach; and (4) damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Tichner sufficiently stated a cause of action against the defendants for breach of contract. Although the complaint refers to the contract between Tichner and the defendants as a "contract of sale", it is clear from Tichner's affidavit that she alleges the existence of an agency contract with the defendants. "In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon*, 84 N.Y.2d at 88.

Tichner alleges that she and the defendants entered into a contract, in which the defendants agreed to locate a suitable horse in exchange for a commission based on the sale price. Tichner alleges that she fully performed under the contract by paying a 15% commission to the defendants, but that the defendants breached the contract when they

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failed to find a horse suitable for competitive jumping. Tichner further alleges that she suffered damages resulting from the defendants' breach of the contract.

Although the defendants submit invoices showing that they provided training, boarding, and other services to Tichner, the invoices do not conclusively establish a defense to Tichner's breach of contract claim. The defendants did not submit any evidence to demonstrate that they were not hired by Tichner to find a suitable horse.

Therefore, I deny defendants' motion to dismiss the fourth cause of action for breach of contract.

**4. Breach of Express Warranty, Breach of Implied Warranty of Merchantability, and Breach of Implied Warranty of Fitness for a Particular Purpose**

To state a claim for breach of an express warranty, the plaintiff must allege that the seller made an affirmation of fact or promise to the buyer, the natural tendency of which was to induce the buyer to purchase, and that the warranty was relied upon by the buyer. UCC § 2-313(1); *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 79 (1st Dep't 2004); *Schimmenti v. Ply Gem Industries, Inc.*, 156 A.D.2d 658, 659 (2d Dep't 1989).

The "implied warranty of merchantability is a guarantee by the seller that its goods are fit for the intended purpose for which they are used." *Saratoga Spa & Bath Inc.*, 230 A.D.2d 326, 330 (3d Dep't 1997); UCC § 2-314. The implied warranty of fitness for a particular purpose arises where "the seller at the time of contracting has reason to know

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any particular purpose for which the goods are required" and the buyer relies on the "seller's skill or judgment to select or furnish suitable goods." UCC § 2-315.

I grant the defendants' motion to dismiss Tichner's claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose (sixth, seventh, and eighth causes of action). Both Heritage Farm and Griffith established that they did not sell the horse to Tichner, and therefore they cannot be held liable for a breach of warranty related to the sale of the horse. Tichner argues that even though Heritage Farm and Griffith did not sell the horse, they can still be held liable under a breach of warranty theory. However, a party that is "outside of the manufacturing, selling or distribution chain" such as the defendants cannot be held liable for breach of warranty. *Laurin Maritime AB v. Imperial Chemical Industries PLC*, 301 A.D.2d 367, 367-68 (1st Dep't 2003).

Accordingly, the defendants' motion to dismiss the sixth, seventh, and eighth causes of action is granted.

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In accordance with the foregoing, it is hereby

ORDERED that defendants Heritage Farm and Patricia Griffith's motion to dismiss plaintiff Barbara Tichner's complaint pursuant to CPLR § 3211(a)(1) and (a)(7) is denied with respect to the first, second, and fourth causes of action, and granted with respect to the fifth, sixth, seventh, and eighth causes of action; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 18, 2013

ENTER:

Saliann Scarpulla

Saliann Scarpulla, J.S.C.

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