

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
AUCTUS FUND, LLC)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	NO. 19-10641-WGY
VERUS INTERNATIONAL, INC. f/k/a)	
REALBIZ MEDIA GROUP, INC.)	
)	
Defendant.)	
_____)	

YOUNG, D.J.

February 25, 2020

ORDER

Auctus Fund, LLC ("Auctus") alleges that Verus International, Inc. ("Verus"), formerly known as RealBiz Media Group, Inc., materially misrepresented its corporate prospects before Auctus invested in the company, and further alleges that Verus failed to honor a settlement agreement that was supposed to end the first dispute. In moving to dismiss, Verus claims that the case is moot and that a release signed by Auctus in that settlement agreement bars the claims now before the Court. As briefly explained below, the Court agrees with Verus that Auctus is bound by the release. Nonetheless, Auctus also brings several claims that are not barred by the release, some of which may go forward.

The following facts are drawn from Auctus's amended complaint. Pl. Auctus's First Am. Compl. Dem. Jury Trial ("Am. Compl."), ECF No. 29. Auctus and Verus executed two initial transactions as part of Auctus's "investment" in Verus, each of which contained a Securities Purchase Agreement and a Convertible Promissory Note: the first set of transactions occurred on May 7, 2017 and the second set on July 26, 2018. Id. ¶¶ 9-10. When a dispute arose between Auctus and Verus -- in part due to Verus's "spin-off transaction" in the summer of 2018 of its former real-estate division, Nesbuilder.com Corporation ("Nestbuilder"), id. ¶ 42 -- the two companies negotiated. Id. ¶ 48. On February 8, 2019, Auctus and Verus reached an agreement ("Inducement Agreement") under which Verus agreed to pay Auctus \$200,000 and "facilitate the delivery" of 201,153 shares of Nestbuilder stock by March 8, 2019, and also that Verus would pay a \$10,000 monthly penalty if it failed to deliver the shares. Id. ¶¶ 50-53. In exchange, Auctus signed a release id., Ex. M., Release ("Release"), ECF No. 29-14, which released Verus from all claims except "those arising from or related to the Releasor's rights under Section 1.6 of the Notes with respect to shares of common stock of Nestbuilder.com Corp." Am. Compl. ¶ 53. Auctus alleges that the Inducement Agreement and Release were obtained by fraud because Verus never intended to comply. Id.

The amended complaint alleges nine causes of action against Verus: violations of federal securities laws (count I), id. ¶¶ 67-69; violations of Massachusetts securities laws (count II), id. ¶¶ 70-73; breaches of contract (count III), id. ¶¶ 74-81; breaches of implied covenant of good faith and fair dealing (count IV), id. ¶¶ 82-88; unjust enrichment (count V), id. ¶¶ 89-93; breach of fiduciary duty (count VI), id. ¶¶ 94-97; fraud and deceit (count VII), id. ¶¶ 98-100; negligent misrepresentation (count VIII), id. ¶¶ 101-103; violations of Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 2, 11 (count IX), id. ¶¶ 104-107.

On October 24, 2019, Verus moved to dismiss the amended complaint. ECF No. 35. Verus argues that the amended complaint is moot because Auctus already received 201,157 (a few extra due to a rounding error, Verus says) shares of Nestbuilder. Mem. Law Supp. Mot. Dismiss Pl.'s Am. Compl. ("Def.'s Mem.") 3-4, ECF No. 37. Verus further argues that the alleged misrepresentations described in the amended complaint are not actionable for a variety of reasons, id. at 5-14, and that the amended complaint is otherwise deficient, id. at 14-20. In particular, Verus argues that Auctus is barred from bringing several of its claims due to the Release. Id. at 17.

Verus's mootness argument is unavailing. "A case becomes moot . . . 'only when it is impossible for a court to grant any

effectual relief whatever to the prevailing party.'" Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) (quoting Knox v. Service Emps. Int'l Union, 567 U.S. 298, 307 (2012)). This impossibility arises only when a plaintiff has "received complete relief." Bais Yaakov of Spring Valley v. ACT, Inc., 798 F.3d 46, 51 (1st Cir. 2015) (quoting Cruz v. Farquharson, 252 F.3d 530, 533 (1st Cir. 2001)). Auctus has not "received complete relief" here, for the simple reason that Auctus also seeks "consequential damages and losses, costs, interest, plus multiple and/or punitive damages, attorneys' fees." Am. Compl. ¶ 3; id. ¶ 51 ("Defendant has refused and has failed to pay Auctus \$10,000.00 on or before March 8, 2019, and is liable for an additional penalty of \$10,000.00 to the Plaintiff on each and every monthly anniversary thereafter as to such continuing Default."). Verus's rebuttal turns on its factual assertion that Auctus did not suffer any losses and has therefore been made completely whole. Def.'s Mem. 4, 18. For the time being, however, the Court must accept Auctus's factual account. Thus, because the Court could still award relief should Auctus prevail, the case is not moot.

Yet the Court agrees with Verus that many of the claims are barred by the Release. Auctus argues that the Release should not be enforced because Verus procured it through fraudulent inducement by promising to deliver shares of Nestbuilder -- a

promise it had no intention to keep. Am. Compl. ¶ 49. Under Nevada law, which governs the Release pursuant to a choice-of-law clause in the document, fraud in the inducement is grounds to rescind the contract. Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980). "Whether rescission [for fraud in the inducement] shall be granted rests largely in the sound discretion of the court," and "[f]raud . . . must be clearly and satisfactorily proved." Havas v. Alger, 85 Nev. 627, 631, 461 P.2d 857, 860 (1969). Here, Auctus has sufficiently alleged facts from which it may be inferred that Verus fraudulently induced Auctus to sign the Release.

Nevertheless, the Court exercises its discretion to deny rescission and thus enforces the Release. This is because Auctus has already procured the \$200,000 and the Nestbuilder shares that formed its benefit of the bargain under the Release in a follow-up agreement with Nestbuilder, Pl.'s Mem. Opp'n Verus's Mem. ("Pl.'s Opp'n"), Ex. A, Settlement Agreement, ECF No. 46-1, and Auctus evinces no intention of giving those shares and cash back. During oral argument on January 13, 2010, ECF No. 50, the Court put the question directly to Auctus if it would return the cash and stock. Counsel for Auctus declined to make that commitment, asking instead for partial rescission. Informed by the Court that under Nevada law "there can be no partial rescission," Bergstrom v. Estate of DeVoe, 109 Nev. 575,

854 P.2d 860, 861 (1993),¹ Auctus still would not commit to return the money and shares. So be it. The Court declines to rescind the Release, which bars all claims (other than those expressly preserved) prior to February 8, 2019. All unpreserved claims relating to the initial transactions are extinguished, including the securities law claims (counts I and II).

What remains are the various state law claims (fraud, negligent enrichment, breach of contract, unjust enrichment, and chapter 93A) insofar as they relate to second series of contracts in which the parties sought to settle their differences. The Court now turns to these claims.

With regard to breach of contract and breach of implied covenant of good faith, Verus argues that any claims arising from actions predating the Release are barred, except for claims

¹ As the Nevada Supreme Court explained:

When a contract has been partially performed, and one of the parties to it makes default, the other has a choice of remedies. He may and he must rescind or affirm the contract, but he cannot do both. If he would rescind it, he must immediately return whatever of value he has received under it, and then he may defend against an action for specific performance . . . and he may recover back whatever he has paid. . . . He cannot at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens.

Bergstrom, 854 P.2d at 861 (emphasis in original) (quoting German Sav. Inst. v. De La Vergne Refrigerating Mach. Co., 70 F. 146, 149-50 (8th Cir. 1895) & 5 Arthur Linton Corbin, Corbin on Contracts § 1114 (1964)).

arising from the Nestbuilder shares as expressly provided in the Release. This is correct, for the reasons given above. Verus further argues that even with respect to the claims not barred by the Release, Auctus suffered no loss since it eventually received the shares and, furthermore, Verus did not technically breach because it was only required "to facilitate" the transfer of the shares but not actually to procure and deliver them. Def.'s Mem. 17-18. The distinction that Verus seeks to draw between facilitating the transfer of the shares and actually delivering them does not persuade the Court. It is plain what Verus's contractual obligation was and it did not initially perform. As for the loss, Auctus sufficiently alleged loss in the form of costs and expenses in negotiating for the shares on its own, and further in the unpaid \$10,000 monthly penalty that the Inducement Agreement imposes on Verus. Accordingly, the Court DENIES the motion to dismiss with respect to counts III and IV, save for those claims barred by the Release.

As for unjust enrichment, Verus argues that no such claim is possible when there is a written contract. Def.'s Mem. 19; Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975, 113 Nev. 747, 942 P.2d 182, 187 (1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement."). Auctus replies

that, because it seeks to void the Inducement Agreement, there in fact is no contract and thus the unjust enrichment count reemerges. Pl.'s Opp'n 20, ECF No. 46. Auctus's argument is sound as far as it goes, but for the reasons given above the Court rules that the Inducement Agreement and Release are not rescinded and thus the contract exists. Accordingly, the Court **ALLOWS** the motion to dismiss as to the unjust enrichment claim (count V).

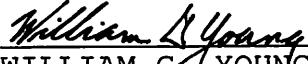
Verus next argues that Auctus has not stated a claim for breach of fiduciary duty because Nevada does not recognize a fiduciary duty owed by a corporation (as opposed to the individual directors and officers) to its shareholders. Def.'s Mem. 19 (citing Brignand v. Van Wagoner Funds, Inc., No. 3:07-CV-242-ECR-VPC, 2009 WL 2175623, at *6 (D. Nev. July 16, 2009)). Auctus has no response to this other than to accuse the director of breach of fiduciary duty -- but the director is not a named defendant in this case. Accordingly, the motion to dismiss the breach of fiduciary duty claim (count VI) is **ALLOWED**.

Finally, the amended complaint asserts several claims that sound in tort law, including fraud and deceit (count VII), negligent misrepresentation (count VIII), and chapter 93A violations (count IX). Verus's main arguments in rebuffing these allegations are similar to those it offered in responding to the securities law claims; namely, that Auctus has not met

the clarity and particularity requirements to plead fraud under Rule 9(b) of the Federal Rules of Civil Procedure; that the alleged misrepresentations were not materially misleading; that Auctus could not have reasonably relied on them; and that Auctus suffered no loss. These are largely fact-bound determinations, however, and Auctus has sufficiently alleged fraud, negligent misrepresentation, and violations of chapter 93A with respect to the Inducement Agreement. Accordingly, the motion to dismiss is DENIED as to these counts, but only for allegations that are not barred by the Release.

In sum, this Court ALLOWS the motion to dismiss, ECF No. 35, as to counts I, II, V, and VI. Yet the Court DENIES the motion to dismiss as to counts III, IV, VII, VIII, and IX.

SO ORDERED.


WILLIAM G. YOUNG
DISTRICT JUDGE