

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RGC INTERNATIONAL INVESTORS, LDC,)
)
 Plaintiff,)
)
 v.) Civ. No. 03-0003-SLR
)
 ARI NETWORK SERVICES, INC.)
)
 Defendant.)

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MEMORANDUM OPINION

Dated: January 22, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On January 2, 2003, plaintiff RGC International Investors, LDC filed the present action against defendant ARI Network Services, Inc. seeking a declaration of rights and obligations under a certain contract between the parties, damages for breach of that contract, and injunctive relief. (D.I. 1) Presently before the court is plaintiff's motion for summary judgment. (D.I. 23)

II. BACKGROUND

Plaintiff is a Cayman Islands limited duration company with its principal place of business in Bala Cynwyd, Pennsylvania. Defendant is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. On April 21, 2000, pursuant to a Stock Purchase Agreement ("SPA") (D.I. 1, ex. 1), defendant issued and sold to RGC a debenture and an option to purchase additional shares of common stock ("the Securities"). (D.I. 1) The transaction permitted defendant to borrow a total of \$4,000,000, to be repaid in April 2003.

On August 28, 2002, the parties' representatives met at plaintiff's Pennsylvania offices to discuss the Securities. At that meeting, plaintiff proposed to sell the Securities back to defendant ("August 28 Offer"). (D.I. 26, ¶ 6) Under that proposal, defendant would make an initial payment of \$500,000. In return, plaintiff would promise to not exercise its default

rights under the Securities for a period of eight months (the "stand-still period"). (Id.) During the stand-still period, defendant would have the right to repurchase the Securities for \$1 million cash with three days notice to plaintiff (hereinafter "Repurchase Agreement"). (Id.) Defendant's representatives indicated at the meeting that it was inclined to accept plaintiff's proposal, but that the approval of defendant's board of directors would be necessary. (Id., ¶ 7) Defendant requested that plaintiff confirm the terms of the August 28 Offer in writing so that it could be presented at the next meeting of defendant's board of directors on September 13, 2002.

On September 12, 2002, plaintiff transmitted to defendant a document entitled "Term Sheet for ARI Network Services, Inc.," confirming the offer ("Term Sheet"). (D.I. 1, ex. 2) Defendant asserts that the Term Sheet was not an accurate reflection of the terms of the August 28 Offer. On September 13, 2002, defendant's board of directors voted to accept the August 28 Offer, and defendant sent a redlined version of the Term Sheet and a signed agreement reflecting certain alterations ("Amended Term Sheet").¹

¹The Amended Term Sheet made the following additions and corrections: (1) the date of the agreement was changed from September 12, 2001 to September 13, 2001; (2) the term "convertible preferred" was replaced with "convertible debentures;" (2) the \$500,000 payment would be applied to the "principle amount" of the debenture; (3) the final agreement was conditioned upon mutual releases; (4) the agreements' confidentiality restrictions provided for sharing with accountants and lenders; and (5) the expiration date of the offer

(Id., ex. 8) Defendant's alterations to the Term Sheet were intended to conform its acceptance with its understanding of the August 28 Offer.

On September 18, 2002, during a telephone conversation between plaintiff's employee Philip Ashton and defendant's employee Howard Schenfield, Ashton indicated that he had received the Amended Term Sheet and that he was "glad to have received [it], and that he did not see any problems with the deal." (D.I.25, ex. 9 at 13)

On September 27, 2002, plaintiff entered into a transfer agreement (the "Transfer Agreement") with ARI Network Services Partners, Dolphin Offshore Partners, LP, and SDS Merchant Fund, LP (collectively "Taglich"). (D.I 31, ex. 2) The Transfer Agreement provided for the sale of the Securities for a total of \$2.1 million, and included certain express warranties pertaining to the parties and the Securities.

On November 8, 2002, defendant commenced suit in Milwaukee County Circuit Court against plaintiff and Taglich. Defendant's claims against Taglich were settled when defendant acquired the Securities by paying \$500,000 in cash, issuing new unsecured notes to Taglich for \$3.9 million, and issuing new warrants for 250,000 of defendant's common stock at \$1.00 per share. As part

was changed from September 12, 2001 to September 17, 2001. (D.I. 25, ex. 8)

of that settlement, defendant received an assignment of any claims Taglich might assert against plaintiff (the "Taglich counterclaims").

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party

opposing the motion.” Pa. Coal Ass’n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

Plaintiff’s motion for summary judgment seeks declarations that no Repurchase Agreement exists affecting plaintiff’s rights with respect to the Securities; that defendant’s counterclaims are without merit; and that defendant violated the SPA’ forum selection clause by bringing suit in Wisconsin. (D.I. 23)

B. Choice of Law Clause

A preliminary issue to resolve is whether the SPA’s choice of law clause applies to the contract claims between plaintiff and defendant. Plaintiff argues that the SPA’s choice of law clause applies to the present dispute. Defendant contends that under Delaware choice of law jurisprudence, Pennsylvania law should be applied as it is the jurisdiction with the strongest

relationship to the contract at issue. See Rest. (2d) Conflict of Laws § 188. In so arguing, defendant asserts that the choice of law clause contained in the SPA and related agreements is not applicable as to the Repurchase Agreement, as that agreement is a distinct contract.

Paragraph 8(a) of the SPA states: "This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin applicable to agreements made and to be performed in the State of Wisconsin (without regard to principles of conflict of laws)." (D.I. 1, ex. 1) Each of the accompanying exhibits pertaining to the debenture, stock warrants, investment option and registration rights contain identical language. (D.I. 1) If the court were to conclude, as defendant contends, that a Repurchase Agreement exists, the subject matter of that agreement is, nevertheless, inseparable from the subject matter of the SPA; the SPA and related agreements expressly select Wisconsin law to govern the rights and liabilities created thereunder.

Absent any evidence of the parties' intent to the contrary, any subsequent modification of those rights and liabilities between parties in privity with the original agreement, whether asserted as an amendment or as a separate contract, would still be governed by the choice of law provisions. See Bush v. National School Studios, Inc., 407 N.W.2d 883, 886 (Wis. 1987) ("[P]arties to a contract may expressly agree that the law

of a particular jurisdiction shall control their contractual relations."); Rest. (2d) Conflict of Laws § 187. Consequently, the court concludes that Wisconsin law applies to the contract claims arising in the present case.

C. Existence of a Contract for the Repurchase of the Securities

Defendant contends that a Repurchase Agreement was created between the parties, arising from one of the following events: (1) defendant's acceptance of plaintiff's August 28 Offer; (2) defendant's acceptance of the Term Sheet; or (3) plaintiff's acceptance of defendant's Amended Term Sheet through plaintiff's conduct. Defendant further argues that these are genuine issues of material fact precluding summary judgment.

It is well established that essential to formation of a contract are an offer, an acceptance and consideration. See Briggs v. Miller, 186 N.W. 163, 164 (Wis. 1922). It is also well established that an offer is freely revocable by the offeror at any time prior to its acceptance by the offeree. See Rest. (2d) Contracts §§ 36, 42. An offer may, by its express terms, expire at a time certain. See also Atlee v. Bartholemew, 33 N.W. 110 (Wis. 1887); Rest. (2d) Contracts § 36. Revocation of an offer may result either through direct communication to the offeree that the offer is revoked or through conduct which would cause a reasonable person to conclude that the offer is revoked, and of

which the offeree has knowledge. See Rest. (2d) Contracts §§ 40, 42-43. An offer is revoked where the offeror makes a second offer to the offeree that is inconsistent with the first offer. See Farnsworth on Contracts § 3.17 (2d ed. 1998); Corbin on Contracts § 2.20 (rev. ed. 1993). It is also well established that where an offeree purports to accept an offer, but does so conditional upon the acceptance of additional terms, that communication is a rejection and counteroffer. See Pick Foundry, Inc. v. General Door MFG. Co., 55 N.W.2d 407, 410 (Wis. 1952).²

Plaintiff's August 28 Offer was superceded and revoked by the Term Sheet transmitted on September 12. As a consequence, the offeree's power of acceptance was terminated with respect to the August 28 Offer. See Rest. (2d) Contracts § 35 ("A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated"). See also C.G. Schmidt, Inc. v. Tiedke, 510 N.W.2d 756 (Wis. App. 1993) (applying Rest. (2d) Contracts § 35); Norca Corp. v. Tokheim Corp., 227 A.D.2d 458, 458-59 (N.Y. App. Div. 2d Dept., 1996) (applying Rest. (2d)). Therefore, the court finds, as a matter of law, that no contract

²See also Koehring Co. v. Glowacki, 253 N.W.2d 64, 68 (Wis. 1977) (holding that where an acceptance is on different terms from the offer, it is a counteroffer as there is "no meeting of the minds."); Hess v. Holt Lumber Co., 185 N.W. 522, 523 (Wis. 1921) ("The acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer."); Rest. (2d) Contracts § 39.

could have arisen from the August 28 Offer as the defendant's power of acceptance extinguished upon receipt of the Term Sheet.

The court also finds that no contract could arise from the Term Sheet transmitted by plaintiff on September 12. On September 13, defendant transmitted to plaintiff the Amended Term Sheet, which among other things extended the time for acceptance, conditioned consummation of the final agreement upon mutual releases, and changed the manner in which the \$500,000 payment would be treated.

Wisconsin applies the common law mirror image rule to acceptances of offers. See Pick Foundry, 55 N.W.2d at 410. In Pick Foundry, the lessor of a warehouse executed a lease agreement and delivered duplicate original copies of the lease to the lessee. The lessee then made three alterations to the lease agreement, signed the agreement, and returned it to the lessor with a check for the first month's rent. The Wisconsin Supreme Court concluded that the "legal effect of the act of the defendant, in making three material alterations in the lease, was to reject plaintiff's offer and to make a new counter-offer."³

³In Pick Foundry, the court characterized the alterations to the lease agreement as "material." 55 N.W.2d at 410. However, under the strict application of the mirror image rule, any alteration in the lease agreement would constitute a rejection and counteroffer. See Leuchtenberg v. Hoeschler, 72 N.W.2d 758, 760-61 (Wis. 1955). Notwithstanding, there is no indication that Wisconsin courts have abrogated the common law mirror image rule to contracts in this context. See Superview Network, Inc. v.

Pick Foundry, 55 N.W.2d at 410. In the present case, defendant's transmission of the Amended Term Sheet to plaintiff constituted a counteroffer under Wisconsin law and, therefore, defendant's power of acceptance in the original Term Sheet was terminated as it had legally rejected the offer.

The court also concludes that no contract could arise from the Amended Term Sheet transmitted by defendant on September 13. As discussed above, the Amended Term Sheet constituted a counteroffer. As such, the power of acceptance rested with plaintiff which did not exercise that power. The Amended Term Sheet, like the original Term Sheet, contained an express requirement stating: "This term sheet will be considered void if it is not executed by both parties." (D.I. 25, ex. 8)

In McWhorter v. Employers Mutual Casualty Co., the Wisconsin Supreme Court concluded that where a contract expressly requires written execution by both parties, a contract is not formed if

SuperAmerica, Inc., 827 F. Supp. 1392 (E.D. Wis. 1993).

Whether materiality may now be a consideration under Wisconsin law, however, is of no consequence as the court concludes that the alterations in the Amended Term Sheet are material. The materiality standard applied to additional terms is whether consent may be presumed. Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333, 1335-36 (7th Cir. 1991). The Amended Term Sheet varied substantially from the original Term Sheet as it expressly conditioned the agreement upon "mutual releases," provided that the \$500,000 payment would be applied to the principle amount owed on the debenture, and extended the period for acceptance by both parties by five days. (D.I. 25, ex. 8)

one party fails to sign the contract. 137 N.W.2d 49 (Wis. 1965). In that case, a customer at an automobile dealership signed a contract, tendered a down payment, and was given possession of the automobile by a salesman. The salesman and customer signed the contract, but the contract expressly provided that it was not valid until signed by the auto dealer. The court concluded that the customer's tendering of a down payment and the transfer of possession of the car could not constitute acceptance as they were "contrary to the method proposed in the offer for its acceptance."⁴ Id. at 52. See also Rest. (2d) Contracts § 30 cmt. a ("[T]he offeror is entitled to insist upon a particular mode of manifestation of assent.").

There is no dispute that the Amended Term Sheet was not executed by both parties. Instead, defendant argues that the court should disregard the Amended Term Sheet's clear language, and conclude that plaintiff's subsequent conduct constituted an acceptance.

A party's conduct can, under certain circumstances, constitute valid acceptance of an offer. See Pick Foundry, 55 N.W.2d at 410. In Pick Foundry, the Wisconsin Supreme Court concluded that the lessor's receipt of the lessee's counteroffer,

⁴McWhorter highlight's Wisconsin's strict application of this principle, as the consequence of the decision was that the automobile dealership was liable in tort for injuries arising from the vehicle's use by the intended purchaser of the vehicle.

awareness of the material alterations, coupled with its cashing of lessee's check for the first month's rent constituted acceptance of the counteroffer. The court held that "[i]f the conduct of the offeree is such as to lead the offeror to believe that the offer has been accepted, there may be an acceptance by estoppel." 55 N.W.2d at 410 (quotations omitted). Similarly, in Hoffman v. Ralston Purina Co., the Wisconsin Supreme Court concluded that where two parties had an existing business relationship, an offeree's silence coupled with retention of a check offered in accord and satisfaction, constituted acceptance. 273 N.W.2d 214, 219 (Wis. 1979); see also Clay v. Bradley, 246 N.W.2d 142 (Wis. 1976). The present case is easily distinguished from those in which a party's conduct amounts to acceptance, in that defendant has not alleged that plaintiff retained any benefit under the alleged contract.

In the present case, the conduct that defendant alleges to be objective manifestations of plaintiff's acceptance are statements by plaintiff that it was "glad" to have received the Amended Term Sheet and that it did not see any "problems" with the transaction.⁵ In a sophisticated transaction between parties

⁵Defendant asserts that discovery is necessary to inquire into plaintiff's intent, however, the controlling issue here is the objective manifestations of plaintiff's intent. See Hoffman v. Ralston Purina Co., 273 N.W.2d 214, 217 (Wis. 1979) ("The question is not the actual intent of the offeree, but his manifested intent.).

negotiating at arms length, the court concludes, in light of the Amended Term Sheet's express requirements, that plaintiff's oral statements are an insufficient objective manifestation of an intent to accept defendant's counteroffer, and no reasonable jury could find otherwise.

Consequently, the court concludes that plaintiff and defendant did not enter into any agreement that amended or otherwise affected the terms, rights, and liabilities of the parties under the SPA and related agreements or that affected plaintiff's rights to transfer the existing securities to a third party.

D. Breach of SPA's Forum Selection Clause

On July 31, 2003, the court concluded that the forum selection clause contained in the SPA, which granted exclusive jurisdiction to the United States District Court for the District of Delaware over any suit arising from the SPA and related agreements, was prima facie valid and, therefore, denied defendant's motion to dismiss in favor of the Wisconsin litigation. (D.I. 20) Plaintiff contends that defendant violated this clause by bringing suit in Wisconsin, and should be liable for damages arising from that breach. Generally, enforcement of a forum selection clause results in a transfer, dismissal or a retention of jurisdiction. In the present case, plaintiff obtained enforcement of its rights under the forum

selection clause, as the Wisconsin court declined to hear the action, and this court denied defendant's motion to dismiss or stay the proceeding. Plaintiff has cited no authority for the proposition that under Wisconsin law it is also entitled to damages. Consequently, as plaintiff can not establish that under Wisconsin law it is entitled to any other remedy, the court will dismiss plaintiff's breach of contract claim as moot. See Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (holding that an actual controversy must exist through all stages of litigation.).

D. Defendant's Counterclaims

Defendant asserts ten counterclaims in its amended answer. (D.I. 26) Claims one through three are contract claims premised upon the existence of a Repurchase Agreement. Having reached the conclusion that no such contract exists, summary judgment must be entered for plaintiff as to counterclaims one, two and three.

The remaining counterclaims are asserted by defendant as the assignee of Taglich and include claims of: (1) breach of warranty; (2) breach of contract; (3) indemnification; (4) breach of the covenant of good faith and fair dealing; (5) negligent misrepresentation; (6) intentional misrepresentation; and (7) securities fraud. (D.I. 26)

The Taglich counterclaims arise from the Transfer Agreement, and allege both claims on the contract and in tort. The Transfer

Agreement contained nine express warranties by plaintiff, including that: (1) plaintiff would have good and valid title, free and clear of any and all encumbrances, immediately prior to the transaction date; (2) the Securities were subject to sale and transfer by plaintiff without defendant's consent; (3) plaintiff had legal authority and power to conduct its business; (4) plaintiff had authority to execute the transaction and carry out all acts necessary to consummate the transaction; (5) other than the SPA and registration rights agreements, no other agreements existed between plaintiff and defendant; (6) the Transfer Agreement would not violate or conflict with any other agreement or commitment of plaintiff; (7) no governmental approval was required for the transaction; (8) the SPA and related agreements were in full force and effect and had not been rescinded or modified; (9) plaintiff's investment option in defendant, provided for under the SPA, had expired. The Transfer Agreement also expressly disclaimed the presence of any other representation by plaintiff upon which Taglich relied.⁶ The

⁶That disclaimer provides that:

Other than the express representations and warranties, covenants and agreements made by [plaintiff] in this [Transfer] Agreement or in the Escrow Agreement, neither [plaintiff] nor any person or entity acting by or on behalf of [plaintiff] has made any representation, warranty, inducement, promise, agreement, assurance or statement, oral or written of any kind to [Taglich] in this Agreement or elsewhere,

parties agree that Taglich's contract claims are governed by New York law pursuant to the Transfer Agreement's choice of law clause. (D.I. 30, 39)

Defendant alleges that plaintiff did not disclose the existence of the Repurchase Agreement, the August 28 Offer, the Term Sheet, or the Amended Term Sheet. Defendant alleges that each of these events are material and that had Taglich been aware of them, it would not have entered into the contract. (D.I. 26, ¶ 21-22)

1. Breach of Warranty

Under New York law, breach of an express warranty requires: (1) the existence of an express warranty; (2) material breach of the warranty; (3) damages proximately resulting from the breach; and (4) justifiable reliance on the warranty. See Metromedia Co. v. Fugazy, 983 F.2d 350, 360 (2d Cir. 1992). Defendant claims that plaintiff failed to "inform [Taglich] that such representations and warranties were untrue" or that it concealed information pertaining to plaintiff's negotiations with defendant for a Repurchase Agreement. (D.I. 26, ¶ 64)

The Transfer Agreement contains no express warranty concerning the existence of negotiations between plaintiff and

upon which [Taglich] is relying in entering into this Agreement and the transactions contemplated hereby.

(D.I. 31, ¶ 9)

defendant, and the Transfer Agreement expressly disclaims all other representations not contained in the agreement. Consequently, defendant has failed to allege any representation by plaintiff that contravenes the warranties contained in the Transfer Agreement. Therefore, the court finds that defendant's counterclaim for breach of warranty is without merit, and summary judgment will be granted to plaintiff.

2. Breach of Contract

Counterclaim five is for breach of contract and alleges that "by its false representations and warranties, omissions, concealments, and failure to perform as required by the Transfer Agreement," plaintiff breached its contract with Taglich. (D.I. 26, ¶ 69) An action for breach of contract under New York law requires proof of: "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525 (2d Cir. 1994). Defendant's argument is premised upon the existence of a Repurchase Agreement which would have precluded plaintiff from fulfilling its obligations under the Transfer Agreement. (D.I. 26, ¶ 69) Having concluded that no Repurchase Agreement exists, defendant has failed to allege the presence of a contractual breach by plaintiff, and summary judgment will be granted.

3. Indemnification

Defendant's claim for indemnification arises from the costs associated with defendant's suit against Taglich and Taglich's settlement of that suit. As plaintiff breached no warranty or other contractual obligation owed to Taglich, there is no basis in law or equity to seek indemnification. See N.Y. Jur. Contrib. § 88 (2003) ("[I]t is clear that a claim for common-law indemnity will not lie where there is no basis for finding that the alleged indemnitor owed and breached any duty owed either to the injured party or to the alleged indemnitee."). Summary judgment will be granted to plaintiff.

4. Covenant of Good Faith and Fair Dealing

Defendant contends that plaintiff breached the covenant of good faith and fair dealing associated with the Transfer Agreement. Having concluded that plaintiff did not breach its contract with Taglich, as a matter of law, it could not have breached its contractual duty of good faith and fair dealing. See Silvester v. Time Warner, Inc., 763 N.Y.S.2d 912, 918 (N.Y. Sup. Ct. 2003) ("Where, as here, no party has acted in a way to prevent the performance of or the rights under the contract, the claim must fail."). Defendant's counterclaim is without merit, and summary judgment will be granted to plaintiff.

5. Tort Claims

Counterclaims eight, nine, and ten sound in tort as they are for negligent misrepresentation, intentional misrepresentation, and securities fraud. According to defendant, these "claims ... do not depend on the existence of the Repurchase Agreement. Rather, the Taglich [tort] claims are based on [plaintiff's] failure to inform Taglich that [defendant] would make competing claims to the ownership of the [Securities]." (D.I. 33 at 24)

An essential element to each of the alleged torts is the presence of a duty to disclose. See Kimmell v. Schaefer, 89 N.Y.2d 257, 263 (N.Y. 1996); Kaufman v. Cohen, 307 A.D.2d 113, 119-20 (N.Y. App. Div. 2003) (holding that where fraud is predicated on an omission there must be a duty to disclose). In the present case, plaintiff owed no duty to Taglich to disclose a non-existent contract. See Canpartners Investments IV, LLC v. Alliance Gaming Corp., 981 F. Supp. 820, 826 (S.D.N.Y. 1997) ("Regular business relations, such as those at issue here, do not rise to the level of a special relationship without more."); Howard v. Galesi, 1987 WL 18460, at 6 (S.D.N.Y. 1987) ("Failure to disclose even material facts does not state a claim unless the defendant has a duty to disclose."); South Shore Skate Club, Inc. v. Fatscher, 17 A.D.2d 840, 841 (N.Y. App. Div. 1962) (holding no duty to disclose negotiations with a third-party).⁷

⁷Defendant contends that it is too early for a choice of law determination to be made, and suggests that Pennsylvania law

The tort claims fail for a second reason, that is, defendant is estopped from alleging that Taglich relied on extra-contractual representations. Under New York law an express disclaimer of reliance on extra-contractual representations is valid. See *Dannan Realty Corp. V. Harris*, 5 N.Y.2d 317 (N.Y. 1959).⁸ In *Dannan Realty*, the Court of Appeals distinguished an express disclaimer of reliance on extra-contractual representations from general merger clauses. *Id.* at 321-22. In upholding the validity of such express disclaimers, the court

might apply to the Taglich tort claims. (D.I. 39 at 12) Because the court concludes that on this point, Pennsylvania law is consistent with New York law, the court does not need to resolve the choice of laws issue. See *Bortz v. Noon*, 729 A.2d 555, 560-62 (Pa. 1999) (discussing torts of intentional misrepresentation and negligent misrepresentation under Pennsylvania law). See *Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) ("It is axiomatic, of course, that silence cannot amount to fraud in the absence of a duty to speak."); *Id.* ("A typical business relationship does not form the basis for such a relationship unless one party surrenders substantial control over some portion of his affairs to the other.") (quotations omitted). The court also notes, however, that if Pennsylvania law were to apply to the Taglich tort claims as defendant contends, its not clear that those claims would lie under the Pennsylvania "gist of the action" doctrine. *Id.* at 651 ("Pennsylvania courts examine the claim and determine whether the "gist" or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is "collateral" to conduct that is primarily tortious.").

⁸Pennsylvania law is in accord on this issue of express disclaimers of reliance. See *Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp.2d 644, 654-55 (W.D. Pa. 1999) (discussing unavailability of tort of misrepresentation where the parties have expressly disclaimed reliance on extra-contractual representations).

noted that “[t]o hold otherwise would be to say that it is impossible for two businessmen dealing at arm’s length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.” Id. at 323.

In the present case, the Transfer Agreement expressly disclaims Taglich’s reliance on any representations other than those contained in the agreement, and affirmatively represents that Taglich based its acceptance of the agreement on its own independent judgment as to the transaction, the Securities, and the defendant’s business. Consequently, as a matter of law, defendant can not allege now that Taglich’s assent was obtained through representations upon which Taglich has affirmatively denied relying. Therefore, the court concludes that defendant has failed to allege essential elements of counterclaims eight, nine, and ten, and summary judgment will be granted.

V. CONCLUSION

Having found that no material facts preclude entry of summary judgment, the court concludes that no Repurchase Agreement exists, and plaintiff is entitled to summary judgment as to its claims for declaratory relief and as to defendant’s counterclaims. An appropriate order consistent with this opinion shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RGC INTERNATIONAL INVESTORS, LDC,)
)
 Plaintiff,)
)
 v.) Civ. No. 03-0003-SLR
)
 ARI NETWORK SERVICES, INC.)
)
 Defendant.)

O R D E R

At Wilmington, this 22nd day of January, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff did not enter into any agreement that amended or otherwise affected the terms of the Securities Purchase Agreement and related securities or that affected plaintiff's rights to transfer the existing securities to the Taglich Partnerships. The clerk is directed to enter judgment for plaintiff RGC International Investors, LDC and against defendant ARI Network Services, Inc. on count one. (D.I. 23-1)

2. Defendant's counterclaims are without merit and the clerk is directed to enter judgment in favor of plaintiff RGC International Investors, LDC and against defendant ARI Network Services, Inc. (D.I. 23-2)

3. Plaintiff's motion for summary judgment that defendant

violated the choice of forum clause in the Securities Purchase Agreement and related securities is **denied** and the claim is dismissed as **moot**. (D.I. 23-3)

4. Plaintiff's motion to dismiss counts four through ten of defendant's counterclaims and to strike certain affirmative defenses is **denied** as moot. (D.I. 29)

Sue L. Robinson
United States District Judge