SINCLAIR BROADCAST GROUP, INC., Plaintiff, - against - BANK OF MONTREAL, Defendant.

94 Civ. 4677 (LMM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1995 U.S. Dist. LEXIS 1969

February 21, 1995, FILED

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JUDGES: LAWRENCE M. McKENNA, U.S.D.J.

OPINIONBY: LAWRENCE M. McKENNA

OPINION: MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiff, Sinclair Broadcast Group, Inc., commenced this action against Defendant, Bank of Montreal ("BOM"). On August 29, 1994, BOM moved to dismiss the Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Sinclair filed a brief opposing BOM's motion, but on September 21, 1994, also filed an amended complaint. BOM now moves the Court to dismiss the amended complaint. BOM also seeks a protective order, pursuant to Fed. R. Civ. P. 26(c), staying discovery until the motion is resolved. For the reasons discussed below, BOM's motion is granted in part and denied in part.

I. Facts

Sinclair alleges the following facts, which are taken as true on the instant motion. Sinclair, which owns and operates several television stations, sought financing to acquire an additional station, to pay off debt, and to finance other capital expenditures. (Am. Compl. PP 10-11, 16.) BOM, which expressed interest in providing a portion of the financing, received Sinclair's financial history in January, 1991, and subsequently received weekly revenue pacing reports and monthly reports [*2] of Sinclair's revenue, expenses, and cash flow. (Id. PP 12,14-15.)

From at least March, 1991, BOM also expressed its interest in serving as agent for a syndicate of banks that would provide the remainder of the $95 million loan package. (Id. P 17.) Relying upon BOM's "high level of confidence in syndicating and closing the financing itself," Sinclair terminated negotiations with other potential co-lenders. (Id. P 19.)

On June 26, 1991, BOM and Sinclair entered into a Commitment Letter ("June 26 letter") n1. Sinclair claims that the letter manifests BOM's agreement "to commit $25 million of financing, and to act as agent for a syndicate of lenders which was to provide the remaining $70 million of financing." (Id. P 21.) BOM observes, however, that the letter contains several explicit preconditions to its participation in the venture, including:

(i) syndication of the Facilities to other banks in an amount not less than $70,000,000, (ii) the completion by BOM of its customary due diligence with respect to the Borrower and its Subsidiaries, and (iii) the negotiation and execution of definitive loan, security and other related documentation satisfactory to [BOM], [*3] as to credit matters, and to [BOM] and [its legal] counsel, . . . as to legal matters."

(Ex. A to Shea Aff. at 14. n2) A further condition precedent to the financing was that there be:

No material adverse change in the business condition (financial or otherwise), performance, operations, properties or prospects of the Borrower or its Subsidiaries since December 31, 1990.

(Id. at 8 (emphasis supplied).)

n1 Because Sinclair relies upon the June 26 letter in its Amended Complaint, the Court, pursuant to Fed. R. Civ. P. 10(c), considers the letter in deciding the instant motion. *Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)*, cert. denied, *112 S. Ct. 1561 (1992)*.

n2 In sworn affidavits dated September 21, 1994 and December 2, 1994, Edward F. Maluf, attorney for Sinclair, submitted "true copies" of the June 26 letter. Each copy omitted page 14 of the agreement, the provisions of which substantially undercut Sinclair's position that BOM's agreement to provide financing was essentially unconditional. After BOM apprised the Court of the missing page, Maluf observed, in a January 6 letter to the Court, only that the double omission was "inadvertent". In the absence of evidence that the omission of page 14 was willful, the Court finds it to be simply negligent.

[*4]

Sinclair claims that prior to signing the Commitment Letter, its Controller asked Michael Robinson, Senior Account Manager at BOM, what was meant by a "material adverse change." (Am. Compl. P 23.) Sinclair alleges that:

Mr. Robinson falsely and negligently advised [the Controller] that the clause was not significant, and declined to define any particular level of performance required by Sinclair in order for the financing to occur. Mr. Robinson fully intended that [the Controller] would rely on this advice which Mr. Robinson knew to be false.

(Id. P 24.) Sinclair, in reliance on this advice, entered into the Commitment Letter, and paid BOM $237,500 of a non-refundable "arrangement fee" of $475,000, which was never refunded. (Id. PP 25-26, 57.)

Shortly after the Commitment Letter was signed, Sinclair provided BOM, at the latter's request, with financial projections for the latter half of 1991. (Id. P 27.) Sinclair acknowledges that these projections were lower than the ones developed in late 1990. (Id. P 28.) It contends, however, that the weekly "revenue pacing reports" and other documents that BOM had been receiving prior to June 26 "clearly illustrated" [*5] the decline in advertising sales and the increase in expenses. (Id. PP 29-30, 32-33.) Sinclair alleges that BOM knew, or recklessly disregarded, information that Sinclair's financial condition "adversely, though not materially, was changing." (Id., PP 29, 34.)

Sinclair observes that Catherine Shea, BOM's Account Manager for the financing, "expressed . . . her surprise at finding the lower projections for the second half of 1991." (Id. P 39.) In reviewing the data with Sinclair's Controller, Shea discovered that BOM had been basing its credit decision on the original financials prepared in late 1990, rather than on the weekly and/or monthly updates. (Id. PP 40-41.) On July 11, 1991, BOM advised Sinclair that it considered that the latter had suffered a "material adverse change" in its financial condition. (Id. P 43.) By letter dated July 12, BOM confirmed its withdrawal from the Commitment Letter. (Id. P 45.)

With the closing date for the acquisition of the new station fixed at August 31, 1991, Sinclair needed to rapidly secure alternative financing. Sinclair complains that BOM's withdrawal from the Commitment Letter, "tainted" it in the financing marketplace, [*6] with the result that it suffered $3 million in excess financing costs. (Id. PP 47-48, 51-54.)

Sinclair argues, in the alternative, for relief based upon breach of contract, breach of an implied covenant of good faith, negligence, negligent misrepresentation, and fraud.

II. Legal Standard

In resolving a motion to dismiss pursuant to Rule 12(b)(6), the Court reads the Complaint generously, accepting the truth of, and drawing all reasonable inferences from, the well-pleaded factual allegations. *Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993);* accord *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991),* cert. denied, *112 S. Ct. 1561 (1992); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991).*

When determining the sufficiency [*7] of plaintiff's claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in . . . [the] complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.

Brass, 987 F.2d at 150 (citing *Cortec, 949 F.2d at 47-48).* The Court will only dismiss a Complaint for failure to state a claim when the Court finds beyond a doubt that Plaintiff "can prove no set of facts" to support the claim that Plaintiff is entitled to relief. See *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).*

The Court is required to draw all reasonable inferences in Plaintiff's favor, but not all possible inferences. See *Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 58 (1st Cir. 1990).* Only when "the suggested inference rises to what experience indicates is an acceptable level of

[*8] probability," must the Court accept it as fact for pleading purposes. *Id. at 52.*

III. Notice Pleading

BOM, in opposing several of Sinclair's claims, argues that the Amended Complaint contains only "baldly conclusory" statements that the Court need not credit. *Haviland v. J. Aron & Co., 796 F. Supp. 95, 97* (S.D.N.Y.) (quoting *Duncan v. AT&T Communications, 688 F. Supp. 232, 234 (S.D.N.Y. 1987))*, aff'd, *986 F.2d 499 (2d Cir. 1992)*, cert. denied, *113 S. Ct. 1945 (1993)*. A fuller quote from Duncan is, however, more instructive regarding the Rule 8(a) standard for modern notice pleading:

Allegations which are not "well-pleaded" should not, and often simply cannot, be accepted as true. . . . [A] complaint may be so poorly composed as to be functionally illegible. This is not to say that a complaint need resemble a winning entry in an essay contest. . . . The court's responsibilities do not include cryptography, especially when the plaintiff is represented by counsel. . . . Second, individual allegations, although grammatically [*9] intact, may be so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains. Such allegations are meaningless as a practical matter and, as a matter of law, insufficient to state a claim.

688 F. Supp. at 234 (emphasis supplied); see also *Wade v. Johnson Controls, Inc., 693 F.2d 19, 21 (2d Cir. 1982)* (citation omitted) ("Under the liberal theory of notice pleading in the federal rules a complaint need not state 'facts' or 'ultimate facts' or 'facts sufficient to constitute a cause of action.'"); *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188, 98 L. Ed. 618, 74 S. Ct. 452 (1954)* ("Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.")

While Sinclair's pleading is inartfully drafted as regards mustering the best facts in support of each of its asserted legal theories, it cannot be said that the Complaint fails to "give notice of the [*10] basic events and circumstances" underlying its claims. Stripped to its essence, Sinclair complains that BOM, which knew or should be held to have known of the 1991 downturn, either breached a contractual obligation, or committed a tort, by withdrawing from the Commitment Letter. Sufficient facts in support of BOM's knowledge of Sinclair's financial position and BOM's subsequent withdrawal from the Commitment Letter have been pled to satisfy the liberal standard of Rule 8(a).

IV. Failure to State a Claim

A. Breach of Contract

BOM concedes that the Commitment Letter it entered into on June 26, "imposes an obligation on the part of the proposed lender to negotiate in good faith with the proposed borrower to consummate the proposed financing." (Def.'s Mem. at 3.) Sinclair alleges that BOM's withdrawal from the agreement was in bad faith, and therefore constitutes a breach of a contractual obligation. (Am. Compl. P 59.)

BOM seeks dismissal of Sinclair's contract claim on the ground that, other than a recitation of the phrase "bad faith," the Complaint is devoid of facts supporting the claim. BOM relies on *Stoner v. Walsh, 772 F. Supp. 790, 806 (S.D.N.Y. 1991),* [*11] for the proposition that "simply adding the words 'bad faith,' or a synonym to a complaint is not sufficient to withstand a motion to dismiss -- even under the liberal requirements of Rule 8(a)." Stoner relies, in turn, on *Stern v. General Elec. Co., 924 F.2d 472, 476 (2d Cir. 1991)*. In Stern, the Second Circuit determined that an action could proceed if the plaintiff amended its complaint to add allegations of "bad faith." *Id. at 477-78*. The Court warned, however:

that to survive a future motion to dismiss [plaintiff] will have to do more than add the words "bad faith" to the complaint. Rather, if he intends to amend the complaint to allege that the Director's actions were motivated by an improper purpose, he must state what that purpose was, and why it was improper, in terms clear enough to provide notice to [defendants] of the claim and the grounds upon which relief is sought. . . .

Id. at 478 n.8 (emphasis supplied).

In Stoner a shareholder sued the board of directors of the nominal corporate defendant for mismanagement and corporate waste. Before commencing the [*12] action, plaintiff's attorney made the obligatory request that the corporation sue those responsible for the waste, which the board unanimously refused to do. The trial court dismissed the shareholder's complaint because she

failed to state a factual, as opposed to a rhetorical basis for inferring that a majority of the Board was other than disinterested when they rejected her demand. . . . Notably, although plaintiff states in conclusory terms that there was a grand design and conspiracy to conceal the truth, when her allegations are shorn of rhetoric and such devices as the word "purported" and quotation marks to suggest sinister meanings in otherwise neutral words, plaintiff alleges no fact that would suggest the

existence of such a conspiracy other than the naked fact that her demand was rejected.

772 F. Supp. at 802.

Allegations of bad faith, unlike allegations of fraud, do not need to satisfy the particularized pleading standard of Rule 9(b). *Stern, 924 F.2d at 477.* Stoner and Stern suggest, however, that a plaintiff alleging bad faith fails to provide the defendant with adequate notice of the complained [*13] of conduct unless facts are pled which suggest a motive for the conduct.

BOM contends that its motivation for withdrawing from the Commitment Letter was, and could only have been, its concern as to Sinclair's ability to satisfy its loan obligations. Withdrawal under such circumstances would constitute a prudent business decision on BOM's part, and would likely be mandated by BOM's fiduciary obligations -- clearly not evidencing bad faith.

Sinclair's pleading is, however, consistent with another scenario, in which BOM was motivated by the $237,500 non-refundable fee payment to withdraw from the deal at the first colorable sign of financial instability. If this instability fell short of a "material adverse change" in Sinclair's financial position, then BOM's withdrawal would be pretextual, and therefore in bad faith. Having found a single scenario, consistent with Sinclair's Complaint, in which bad faith breach of contract might be established, it cannot be said that Sinclair "can prove no set of facts" in support of its claim. *Conley, 355 U.S. at 45-46.* As in Stoner, Sinclair has "stated in conclusory terms that there [*14] was a grand design and conspiracy," but it has saved its contract claim by suggesting, however obliquely, that receipt of the non-refundable fee may have motivated BOM's conduct. Consequently, the breach of contract claim may not be dismissed.

Sinclair has not alleged that BOM should not have charged an "arrangement fee," or that this particular fee was excessive, or that the fee exceeded BOM's actual expenditures in this venture. Nor has Sinclair explicitly pled a connection between payment of the arrangement fee and BOM's withdrawal from the venture. On a generous reading of the Complaint, however, the Court can infer a causal relationship between these two events. While it seems implausible that a commercial lender would long survive in the marketplace by engaging in the conduct alleged here, the Court may not dismiss an action simply because it appears that the plaintiff is unlikely to prevail on its claims. *Egelston v. State Univ. College, 535 F.2d 752, 755 (2d Cir. 1976).*

BOM also argues that the cases sustaining a cause of action for bad faith breach of a commitment letter involve more egregious conduct than has been alleged by Sinclair. In [*15] *Teachers Ins. & Annuity Ass'n v. Ormesa Geothermal, 791 F. Supp. 401 (S.D.N.Y. 1991),* a sharp decline in interest rates rendered a loan agreement less advantageous to the borrower. The borrower insisted on a lower interest rate than the one agreed upon in the Commitment Letter, and later declared, with no apparent support, that the Commitment Letter had expired. The court found that such conduct a clear manifestation of bad faith. Similarly, in *Cauff, Lippman & Co. v. Apogee Fin. Group, Inc., 807 F. Supp. 1007, 1023-24 (S.D.N.Y. 1992),* the court held that a commitment letter was breached where one of the parties made no good faith attempt, as the commitment letter required, to obtain the approval of its parent corporation.

BOM's argument that the conduct alleged in the instant case is less odious than that proven in Teachers and Cauff misses the mark on the instant motion, since those cases did not purport to set a minimum standard of culpable behavior that would sustain a claim of bad faith breach. In any event, withdrawal from the Commitment Letter for purposes of obtaining a $237,500 arrangement fee, if [*16] such was BOM's motivation, would certainly constitute sufficiently egregious behavior to support a claim of bad faith. The Court therefore declines to dismiss Sinclair's breach of contract claim.

B. Breach of Implied Covenant of Good Faith

New York recognizes in all contracts an implied covenant of good faith and fair dealing. *Don King Prods., Inc. v. Douglas, 742 F. Supp. 741, 767 (S.D.N.Y. 1990); Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566 (1978).* "The covenant is violated when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other of the right to receive the benefits under their agreement." *Don King, 742 F. Supp. at 767.*

In paragraph 62 of the Amended Complaint, Sinclair states:

BOM breached the implied covenant when in bad faith it withdrew the Commitment Letter fully aware of Sinclair's financial condition which did not change in the fifteen-day period between the parties entering the Commitment Letter, and BOM withdrawing it.

BOM [*17] seeks dismissal of this claim on the ground that "Sinclair attempts, contrary to established law, to impose upon BOM an 'implied' duty that contradicts express terms of the June 26 Letter." (BOM

Reply Mem. at 4.) BOM contends that this allegation suggests an implied covenant that it would not withdraw from the venture unless Sinclair's financial condition materially changed in the period after the letter was signed on June 26, 1991. BOM observes, however, that the Commitment Letter explicitly states the precondition that there must have been no material adverse change in Sinclair's financial condition since December 31, 1990. (Ex. A to Shea Aff. at 8.)

A court cannot imply a covenant inconsistent with terms expressly set forth in a contract. *Geren v. Quantum Chem. Corp., 832 F. Supp. 728, 732 (S.D.N.Y. 1993)* ("An implied covenant . . . can only impose an obligation 'consistent with other mutually agreed upon terms in the contract.'") (quoting *Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 514 N.Y.S.2d 209, 506 N.E.2d 919 (1987))*. To the extent that Sinclair has sought, in its implied covenant [*18] claim, to assert a cause of action distinct from its breach of contract claim, predicated on the disparity in the two dates, the second claim is defective as a matter of law.

C. Negligence Claims

Sinclair's third and fourth claims are for negligence and gross negligence. Sinclair contends that BOM had a duty to determine Sinclair's financial condition accurately prior to June 26, 1991, by reviewing the weekly and monthly financial updates that BOM had received from Sinclair. (Am. Compl. PP 65, 69.) Had BOM fulfilled this obligation, Sinclair believes that it would not have been "surprised" by the projections provided after the Commitment Letter was signed. (Am. Compl. P 39.)

As a general matter, "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987)*. The New York Court of Appeals further noted that "merely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple [*19] breach of contract into a tort claim." *Id. at 390*.

BOM correctly observes that courts have consistently rejected the notion that a lender owes a duty of care to a prospective borrower.

It is well settled that "a tort may accompany a breach of contract . . . only where the contract creates a relation out of which springs a duty, independent of the contract obligation, and that independent duty is also violated. . . . Here, plaintiff's wholly conclusory allegation that "defendant . . . negligently . . . administered the loan . . ." does no more than "assert violations of a duty which is identical to and indivisible from the contract obligations."

Quail Ridge Assoc. v. Chemical Bank, 162 A.D.2d 917, 558 N.Y.S.2d 655, 657 (A.D. 3d Dept. 1990) (citations omitted) (emphasis in original); see also *Middle East Bank v. Harmony Sportswear, Inc., 1994 WL 74057* (S.D.N.Y. Mar. 10, 1994) (dismissing negligence claim because borrower alleged no legal duty springing from circumstances extraneous to, and not constituting an element of, the contract); *Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank, 819 F. Supp. 1282, 1295 (S.D.N.Y. 1993).* [*20]

Sinclair, ignoring the controlling caselaw, instead argues that a lender owes the same duty of care to a prospective borrower when evaluating financial statements that an accountant owes to his clients. (Pl.'s Mem. at 13-15.) Sinclair presents no legal support for this proposition. To the extent that a duty of care was owed Sinclair due to the payment of the arrangement fee, that duty was clearly not "a legal duty independent of the contract itself." *Clark-Fitzpatrick, 70 N.Y.2d at 389.*

Lacking a duty of care to Sinclair, BOM cannot be liable for a breach of duty. Sinclair's claims for negligence and gross negligence are therefore dismissed.

D. Negligent Misrepresentation Claim

Sinclair's fifth claim is for negligent misrepresentation.

Under New York law, there is no cause of action for negligent misrepresentation "in the absence of a special relationship of trust or confidence between the parties." Neither an ordinary contractual relationship nor a banking relationship, without more, is sufficient to establish a "special relationship," which only occurs in the context of a previous or continuing relationship between [*21] two parties. . . . These two parties were sophisticated financial institutions that came together solely to engage in an arm's length transaction to finance the conversion of the [subject] properties. There was no "special relationship." Thus, as a matter of law, there can be no negligent misrepresentation.

Banque Arabe, 819 F. Supp. at 1293 (internal citations omitted) (quoting *Congress Fin. Corp. v. John Morrell & Co., 790 F. Supp. 459, 474 (S.D.N.Y. 1992));* see also *Stewart v. Jackson & Nash, 976 F.2d 86, 90 (2d Cir. 1992)* ("Under New York law, a plaintiff may recover for negligent misrepresentation only where the defendant owes [it] a fiduciary duty."); *Interallianz Bank AG v. Nycal Corp., 1994 WL 177745,* *6-7 (S.D.N.Y. May 6, 1994) (same in context of lender/borrower relationship).

Sinclair contends that an anticipated future relationship can be the basis for a special relationship between two parties, relying on dicta to that effect in *Banque Arabe, 819 F. Supp. at 1293*. However the court in Banque Arabe dismissed the negligent misrepresentation [*22] claim, in the context of a new banking relationship, for plaintiff's failure to establish a special relationship. The court observed that the plaintiff had failed to point to any facts that established the existence of an ongoing relationship between the parties "at the time the Participation Agreement was negotiated and executed." Id.

In the instant case, it is uncontested that Sinclair and BOM had no ongoing relationship at the time they negotiated and executed the Commitment Letter. Their preliminary negotiations for a single financing venture could not constitute both the basis for a special relationship and a breach of the trust inherent in that relationship.

E. Fraud Claim

Sinclair pleads the following in support of its fraud claim:

23. . . . prior to signing the Commitment Letter, David B. Amy . . . , the Controller at Sinclair, asked Michael Robinson . . ., Senior Account Manager LS & S, at BOM, what was meant by a "material adverse change."

24. Mr. Robinson falsely and negligently advised Mr. Amy that the clause was not significant, and declined to define any particular level of performance required by Sinclair in order for the financing to occur. Mr. Robinson [*23] fully intended that Mr. Amy would rely on this advice which Mr. Robinson knew to be false.

25. In reliance on BOM's false and negligent advice, Sinclair entered into the Commitment Letter.

. . . .

78. BOM deceived and defrauded Sinclair by inducing Sinclair into relying upon BOM's material misrepresentation that the change in Sinclair's financial status from December 31, 1990 to June 26, 1991 was not enough to cause a withdrawal by BOM of the Commitment Letter.

(Am. Compl.)

As a general matter, the reasonableness of reliance in fraud actions is to be determined by a fact-finder. However, under New York law, a claim for fraudulent inducement will not lie where a plaintiff asserts reliance upon an oral promise that the defendant would not enforce a condition in the written contract. See *Glenfed Fin. Corp. v. Aeronautics & Astronautics Servs., Inc., 181 A.D.2d 575, 581 N.Y.S.2d 62, 64 (A.D. 1st Dept. 1992)* (parol evidence rule bars proof of an oral condition precedent which is expressly contradicted by written loan agreement); *Clanton v. Vagianellis, 187 A.D.2d 45, 592 N.Y.S.2d 139* (A.D. [*24] 3d Dep't 1993) (citation omitted) ("In such situations 'the conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter.'")

Sinclair relies on *Keywell Corp. v. Weinstein, 33 F.3d 159, 164 (2d Cir. 1994),* which stated that "decisions holding that reliance on misrepresentations was not justified are generally cases in which plaintiff was placed on guard or practically faced with the facts." In the instant case, given the explicit definition in the Commitment Letter of December 31 as the measuring date, it cannot be said that Sinclair was not "faced with the facts." Furthermore, the Court in Keywell observed that "where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." Id. Finding that Sinclair cannot ultimately prove reasonable reliance, its fraud claim must fail.

F. Punitive Damages

Sinclair seeks punitive damages from BOM based on its tort claims. BOM has moved to strike this request from Sinclair's [*25] claim, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

The New York Court of Appeals has explained that the purpose of punitive damages is not to remedy private wrongs, but to vindicate public rights. *Rocanova v. Equitable Life Assur. Soc., 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 634 N.E.2d 940 (1994).* The Court further observed that:

Where the breach of contract also involves a fraud evincing a "high degree of moral turpitude" and demonstrating "such wanton dishonesty as to imply a criminal indifference to civil obligations," punitive damages are recoverable if the conduct was "aimed at the public generally". . . [A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.

Id.

Sinclair has neither alleged such publicly directed misconduct by BOM, nor pled any facts in support of such behavior. Furthermore, the Court has dismissed all but Sinclair's breach of contract claim. Consequently Sinclair cannot prove "fraud [*26] evincing a 'high degree of moral turpitude,'" to support of an award of punitive damages. The Court therefore grants BOM's request to strike the request for punitive damages from Sinclair's Complaint.

V. Conclusion

For the foregoing reasons, each of Sinclair's claims is dismissed, except for its breach of contract claim. BOM's motion for a protective order is denied as moot.

Dated: February 16, 1995
New York, New York

SO ORDERED.

LAWRENCE M. McKENNA U.S.D.J.