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Merger clauses: satisfying the 'Danann' specificity requirement

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The 'Danann' case stands for the now well-recognized principle that a specific merger clause—one encompassing the representations that are the subject matter of the fraud claim—will likely bar a plaintiff's fraud claim that looks outside the agreement. Recent Commercial Division decisions applying this 'Danann' standard are instructive as to how specific that clause must be.

New York courts generally enforce protections against fraud claims built into commercial contracts, reasoning that "evidence outside the four corners of [an agreement] as to what was really intended but is unstated or misstated is generally inadmissible to add to or vary the writing." *Bruni v. County of Otsego*, 192 A.D.2d 939, 942 (3d Dep't 1993). This is especially true when the parties' agreement contains a merger clause providing that no party has relied on representations not set forth in the agreement itself.

To establish fraud, a plaintiff must plead and prove the following elements: a misrepresentation or material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it; justifiable reliance of the other party on the misrepresentation or material omission; and injury. *Laduzinski v. Alvarez & Marsal Taxand*, 132 A.D.3d 164, 167 (1st Dep't 2015). When the parties' agreement includes a merger clause, fraud litigation focuses on whether the plaintiff can establish the element of justifiable reliance, and courts often dismiss such claims for lack of justifiable reliance where faced with a merger clause. However, not all merger clauses are equal, and some are insufficient to bar such fraud claims.

The 'Danann' standard

In the seminal case of *Danann Realty v. Harris*, 5 N.Y.2d 317 (1959), the plaintiff alleged the defendant fraudulently induced him to purchase a lease of defendant's building by orally misrepresenting the building's operating expenses and its profit potential. The New York Court of Appeals closely analyzed the merger clause in the parties' contract, finding the plaintiff "expressly acknowledges" in it that defendant did not make any representations pertaining to the buildings "expenses, operation or any other matter or thing." The court found that merger clause fatal to plaintiffs' fraud claim because it explicitly disclaimed reliance on representations on the exact subject matter that was the focus of the fraud claim. The court compared the specific merger clause in *Danann* to more

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general, boilerplate merger provisions, holding that "if the language here used is not sufficient to estop a party from claiming that he entered the contract because of fraudulent representations, then no language can accomplish that purpose."

The *Danann* case stands for the now well-recognized principle that a specific merger clause—one encompassing the representations that are the subject matter of the fraud claim—will likely bar a plaintiff's fraud claim that looks outside the agreement. Plaintiffs cannot satisfy the justifiable reliance requirement in contradiction to the plain language of the agreement. The converse is true where the merger clause is general or vague, merely containing an "omnibus statement that the written instrument embodies the whole agreement or that no representations have been made." In the face of such a general clause, justifiable reliance may still be established. Recent Commercial Division decisions applying this *Danann* standard are instructive as to how specific that clause must be.

Application

In *Artificial Intelligence Tech. v. Robotic Ventures*, 2019 NY Slip Op 32522 (U) (N.Y. Co. Aug. 22, 2019), Justice Gerald Lebovits of the New York County Commercial Division held the merger clause was too general under *Danann* to bar plaintiff's fraud claim. There, the plaintiff alleged that the defendant breached an agreement to purchase plaintiff's securities. In response, the defendant alleged that the plaintiff fraudulently induced defendant to enter the agreement by misrepresenting it had the "knowledge, experience, and financial wherewithal" to become a leader in the artificial intelligence space. The court held that the parties' merger clause was not sufficiently specific under *Danann* because it did not track plaintiff's "knowledge, experience, or financial wherewithal," which was the substance of the alleged fraud.

Similarly, in *Laduzinski v. Alvarez & Marsal Taxand*, 132 A.D.3d 164 (1st Dep't 2015), plaintiff accepted an at-will employment offer from the defendant based on the defendant's representations regarding the nature of the position. The merger clause in the agreement stated that "this Agreement constitutes the entire agreement between the parties with respect to subject matter and supersedes all previous understandings, representations, commitments or agreements, oral or written." When defendant's representations about the position turned out false, the plaintiff sued for fraud. The First Department allowed the fraud claim to proceed, holding that the "boilerplate" merger clause here was too general as it did not reference the specific misrepresentations allegedly made by the defendants.

Likewise, in *United States Life Ins. Co. in the City of N.Y. v. Horowitz*, 2020 NY Slip Op 32445 (U) (N.Y. Co. July 23, 2020), Justice O. Peter Sherwood of the New York County Commercial Division held a merger clause was too general to bar the plaintiff's fraud claim. There, plaintiff U.S. Life issued a life insurance policy to "Ricky Nicholas" and later learned that it was not Nicholas who completed or executed the application. Nicolas' son produced a video alleging that the signatures were in fact his father's, which motivated U.S. Life to enter into a settlement agreement with the defendants. When evidence later came to light that the statements made in the video were false, U.S. Life brought suit for fraudulent inducement. The settlement agreement's merger clause provided that "all representations and promises made by any party to another, whether in writing or orally, concerning the Policy, the Lawsuit, or this Agreement, are understood by the Parties to be merged into the Agreement." Justice Sherwood held that the merger clause was too general to bar the fraud claim because it "only covered general statements concerning the Policy, the Lawsuit, or this Agreement'" and did not track the other specific misrepresentations alleged.

Conversely, recently in *Arco Acquisitions v. Tiffany Plaza*, 2021 NY Slip Op 51039 (U) (N.Y. Co. Nov. 4, 2021), Justice Elizabeth Emerson of the Suffolk County Commercial Division held a merger clause was specific enough under Danann to bar the fraud claim. There, the plaintiff purchased a parcel of defendants' property and subsequently alleged that defendants misrepresented the rent roll in order to increase the value of the property. The parties' agreement provided, in pertinent part, that "Seller has specifically bargained for the assumption by Purchaser of all responsibility to investigate" "the property, Laws and Regulations, Rights, Facts, Condition, Leases, Open Permits, Violations or Tenancies." Justice Emerson analogized this case squarely with *Dannon* because the "allegations clearly track the language used in the disclaimer, which specifically includes 'leases' and 'tenancies.'" The court found the merger clause sufficiently specific to bar plaintiff's fraud claim, and agreed with the *Danann* court that "to 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."

A blurry line

Not surprisingly, the line between merger clauses that are too general and those that are specific enough is not always clear. For example, in *Norman Realty & Constr.* v 151 E. 170th Lender, 2022 NY Slip Op 50212(U) (Bronx Co. March 21, 2022), the plaintiff and the defendant entered into several mortgage agreements related to a piece of real property. The plaintiff subsequently alleged fraud on the grounds that the defendant did not advise plaintiff that, after executing the agreement, plaintiff would immediately be in default at a 24% interest rate. The agreement between the parties provided that plaintiff "acknowledges that, with respect to the Loan, Mortgagor is relying solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Mortgagee or any parent, subsidiary or affiliate of Mortgagee." While this language appears similar to the merger clauses in *U.S. Life Insurance* and *Laduzinski* discussed above, Justice Fidel E. Gomez of the Bronx County Commercial Division held the contractual disclaimers were sufficiently specific under the *Danann* standard to bar a fraud claim.

Likewise, in *Avnet v. Deloitte Consulting*, 2019 NY Slip Op 33026 (U) (N.Y. Co. Oct. 11, 2019), defendant Deloitte developed a software platform for Avnet that was later allegedly discovered to be faulty. The parties entered into a settlement agreement providing that "all prior and tentative agreements, promises, understandings, negotiations, proposals, offers, acceptances and drafts are merged herein and extinguished hereby." Avnet brought suit alleging fraud in relation to Deloitte's work on the system. Justice Jennifer G. Schecter of the New York County Commercial Division held that "Avnet's contention that this disclaimer is not specific enough to be enforceable is wrong." The court explained that the merger clause is not a boilerplate general disclaimer but rather an extensive and lengthy provision. Therefore, it satisfied the *Danann* standard and barred plaintiff's fraud claim.

Conclusion

The above cases suggest several best practices for defendants wishing to use a merger clause to bar a plaintiff's fraud claim. The strongest merger clauses will include highly specific language, aimed at encompassing the precise subject matter of the allegations in the plaintiff's fraud claim. The further the clause drifts from that high-level of specificity, the greater the chance it will be found to be too general to bar fraud claims. In any event, where merger clauses are somewhat specific but perhaps not specific enough, it may be difficult for parties to predict the outcome with confidence.