

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

RUBIN SCHRON, et al.

Plaintiffs,

-against-

LEONARD GRUNSTEIN, et al.,

Defendants.

INDEX NO. 650702/2010

MOTION DATE Dec. 2, 2011

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: March 15, 2012


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
**RUBIN SCHRON, CAM-ELM COMPANY, LLC,
SMV PROPERTY HOLDINGS LLC,
SWC PROPERTY HOLDINGS LLC,
SWC SPECIAL HOLDINGS, LLC,
SMV SPECIAL HOLDINGS, LLC,
CAMMEBY'S EQUITY HOLDINGS LLC,
CAMMEBY'S FUNDING LLC,
CAMMEBY'S FUNDING II LLC,
CAMMEBY'S FUNDING III LLC,
CAMFIVE HOLDINGS, LLC,
CAMMEBY'S MANAGEMENT CO. LLC, and
CAMMEBY'S INTERNATIONAL, LTD.,**

Plaintiffs,

-against-

**LEONARD GRUNSTEIN, MURRAY FORMAN,
TROUTMAN SANDERS LLP,
CANYON SUDAR PARTNERS LLC,
SVCARE HOLDINGS, LLC,
SAVASENIORCARE LLC,
FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC,
THI OF BALTIMORE, INC.,
NATIONAL SENIOR CARE, INC.,
MARINER HEALTH CARE, INC.,
METCAP SECURITIES, LLC,
METCAP HOLDING, LLC,
METCAP ADVISORY SERVICES, LLC,
HARRY GRUNSTEIN, and
LAWRENCE LEVINSON,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

In a Decision and Order, dated January 20, 2011, former Justice Yates granted plaintiffs' motion *in limine* and precluded defendants from offering any extrinsic evidence concerning plaintiff, Cameby's Equity Holdings LLC's ("Cam Equity")¹ right to enforce an agreement granting Cam Equity an option to purchase up to 99.999% of all membership units in SVCARE Holdings LLC

¹CamEquity is controlled by plaintiff, Rubin Schron ("Schron").

**DECISION AND
ORDER**

Index No.: 650702/2010

("SVCARE") at a purchase price of \$100 million pursuant to the terms of a Unit Purchase Option Agreement ("Option")(see *Schron v Grunstein*, 32 Misc3d 231 [NY Sup Ct Jan. 20, 2011]). The background facts are set forth in that Decision and Order. The form used in connection with the Option in this case is the same form discussed in this court's Decision and Order in *Cammeby's Holding, LLC v Mariner Health Care, Inc.*, Index No. 650778/2011, dated August 26, 2011 ("*Mariner Action*"), even though the two cases involve different sets of assets. Also, in a Decision and Order dated today, the court granted plaintiff's motion for summary judgment for breach of the option agreement involved in the *Mariner Action*. Familiarity with all three decisions is assumed.

This Decision and Order involves two motions. In motion sequence no. 014, plaintiffs move for summary judgment as to the fifteenth cause of action (breach of the Option) and for specific performance directing defendants (1) to acknowledge and cooperate with a change of management of defendant, SVCARE and (2) to fulfill their obligations under sections 6 and 7 of the Option not to interfere with plaintiff, Cam Equity's, efforts to exercise the Option and close the acquisition.

In motion sequence no. 019, the Grunstein Defendants move for leave to amend their answer to allege fraudulent inducement as an affirmative defense. Defendants believe that by this affirmative defense they will be able to introduce parol evidence they were previously barred from introducing as a result of the January 20, 2011 Decision and Order.

The Option was entered into as of December 2004, and subsequently amended in June 2006.

The Option provides that

[f]rom the date of the agreement until June 9, 2011, Cam Equity has the option to purchase 99.999% of all membership units in SVCARE for the price of \$100 million which may be paid, at the Option Holder's discretion, in cash or the assumption and release of then existing indebtedness of SVCARE. In turn, the Option Holder agrees that if it should subsequently sell its acquired units, it shall only retain up to \$400 million of net proceeds and turn any excess over to SVCARE.

On June 22, 2010, Cam Equity issued a written notice exercising the Option to acquire SVCARE member units ("Notice"). The Notice states that Cam Equity will pay for shares "as permitted by the Option Agreement, by assumption and satisfaction of [SVCARE's] liability on debt to [Cam Equity's] affiliates". Aware that the parties dispute the existence and amount of the loan, the Notice also states that Cam Equity is prepared to pay any deficiency in cash in the event the amount of the loan is determined to be less than \$100 million. The Notice also states that pursuant

to Section 5 of the Option, Cam Equity was exercising a right to remove all of the managers and directors of SVCARE and replace them with Cam Equity's designees.

SVCARE refused to honor the Notice and, together with Leonard Grunstein, Murray Forman and others, commenced an action to declare the Option unenforceable (the "*Mitch II Action*"). Plaintiffs then commenced this action seeking to enforce the Option (the "*Schron Action*").

On January 20, 2011, this court (Yates, J.) dismissed the *Mitch II Action*. The court also granted plaintiffs' motion *in limine* to preclude consideration of any extrinsic evidence when determining whether a \$100 million loan that Cammeby's Funding III LLC - another Schron-controlled entity - had allegedly promised defendants was a condition precedent to exercise of the Option and whether the loan was actually funded. In the Decision and Order, Justice Yates stated that "the central question to be determined by this motion is the legal question regarding the clarity or ambiguity of the Option Agreement on its face." Justice Yates held that the Option Agreement is "clear and unambiguous" and ordered that defendants in the *Schron Action* "are precluded from offering any extrinsic evidence ... concerning Cam Equity's right to enforce the SVCARE Option". Plaintiffs then filed this motion for summary judgment. They seek specific performance of the Option.

Defendants, Grunstein, Forman, SVCARE, Metcap Holdings LLC and Canyon Sudar Holdings, LLC (the "Grunstein Defendants") argue that the motion should be denied because there are genuine issues of material fact as to:

1. whether Schron has complied, strictly or otherwise, with the exercise provisions of the Option;
2. the payment of the exercise price, including whether SVCARE owes any debt to Schron;
3. whether Schron can obtain required regulatory approvals to exercise the Option;
4. whether Schron will or is required to comply with the SVCARE Operating Agreement if he exercises the Option; and
5. whether a 2007 agreement written in Schron's handwriting supersedes the Option.

Defendant, SAVASENIORCARE LLC ("Sava"), adds that the demand for the immediate removal of current management and substitution of nominees of Cam Equity is inequitable and should be denied.

DISCUSSION

A. Summary Judgment Motion

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see*, *Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

However, once the initial demonstration has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see*, *Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see*, *Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and, further, that summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see*, *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see*, *Zuckerman v City of New York*, *supra*; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine credibility issues, but simply to determine whether such issues of fact requiring a trial exist (*see*, *Powell v HIS Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]; *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]). Whether a writing is ambiguous is a question of law to be resolved by the courts (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1991]). With these standards in mind, the court will now consider the claims of the parties.

1. Compliance with Notice Requirements

The Grunstein Defendants argue that plaintiffs can only exercise the Option in strict accordance with its terms (*see Urban Archeology Ltd v Dencorp, Inv., Inc.*, 12 AD3d 96, 104 [1st Dept 2004]) and that the Notice does not satisfy that standard. They contend that there are material issues of fact as to whether plaintiffs' Notice is valid because the Notice fails to specify, as required by Section 2 of the Option, "the selected Cash Amount, Indebtedness and Specified Indebtedness" to be used to pay the \$100 million Option price. Instead the Notice proposes to litigate whether there is an indebtedness and upon a determination of that issue and the amount thereof, any deficiency will be paid in cash.

Where an option agreement is clear and unambiguous, it must be enforced in accordance with its terms in the manner specified in the option (*see Ronan v Willis*, 249 AD2d 299, 300 [2d Dept 1998]). Parol evidence is not admissible to vary the terms of the option (*see Foye v Parker*, 15 AD3d 907, 908 [4th Dept 2005]). The court has already held that parol evidence to explain or interpret the terms of the Option is barred (*see Schron*, 32 Misc3d at 237).

Section 1 of the Option permits the Option Holder to determine the form of consideration to be paid. It provides that "the Option Holder shall determine in its discretion how much of the exercise price will be paid in cash, ... how much will be paid by the assumption and release of indebtedness ... and the particular indebtedness to be assumed and released." Consistent with this provision, the Notice specifies that the purchase price shall be paid through the assumption of debt owed to a Cam Equity affiliate and, if it is determined that the debt to be assumed is less than the \$100 million Cam Equity believes is available, the difference will be paid in cash.

The Notice fully complies with the terms of the Option. In recognition of the dispute among the parties at the time the Notice was delivered as to (1) the very existence of the an enforceable option and (2) the amount of loan funds available to be contributed toward the purchase, the Notice states that if there is a shortfall resulting from a third party decision fixing the amount of the debt to be assumed or forgiven, the deficiency will be paid in cash which shall be delivered at the closing as provided for in Section 3 of the Option.

Urban Archeology, supra which concerned application of the critically important "'time of the essence' principle" (*id* at 103) common in option agreements, does not require that the Notice be any more specific. This is not a case in which the option holder failed to exercise the option by

placing a condition on its exercise (*see Lamanna v Wing Yuen Realty*, 283 AD2d 165 [1st Dept 2001]), by failing to make a downpayment at the time required in the option or failing to satisfy an unambiguous term thereof (*see Duane Sales v Carmel*, 49 AD2d 862 [1980] and *Ronan*, 249 AD2d 299) or by attempting to make a purchase on terms that differ from that specified in the option agreement (*see Foye*, 15 AD3d 907).

2. Existence and Amount of SVCARE Debt

The Grunstein Defendants next assert that summary judgment should be denied because there is a fact dispute as to whether SVCARE has a \$100 million debt that CamEquity could assume in order to make payment at a closing. Plaintiffs state that Cam Equity is ready, willing and able to close. Defendants have not shown otherwise. Pursuant to the terms of the Notice, Cam Equity has elected to pay the full consideration at the closing, first by the assumption/release of all available SVCARE indebtedness and then by tender of cash. Any dispute of fact as to the amount of debt available to be contributed at the closing is no bar to a grant of summary judgment. The issue of how much debt is available to pay the consideration is not before the court on this motion. That question may be decided at an immediate trial limited to that issue (*see CPLR 3212[c]*).

3. Regulatory Approvals

As to the claim that there are open questions relating to any required regulatory approvals, whether such approvals are required prior to acquisition of SVCARE must be determined initially by the relevant regulatory authorities. Further, Section 3 of the Option expressly provides that transfer of certificates for the Acquired Units and delivery of necessary resolutions are “subject to all required regulatory filings and approvals.” As the court has already held, any order directing transfer of units of ownership interests “will be made subject to receipt of all applicable regulatory approvals” (*see [Fundamental Long Term Care Holdings LLC v Cammeby’s Funding LLC*, Index No. 650332/2011 [Aug. 26, 2011], *aff’d* 92 AD3d 449 [2012])(the “*Fundamental Action*”). Any failure of SVCARE to cooperate with CamEquity in its efforts to obtain such approvals constitutes a breach of the Option.

4. Capital Contribution Requirement

The assertion that the motion for summary judgment should be denied because there is a genuine issue of fact as to whether Cam Equity can become a member of SVCARE without first

making a capital contribution as provided for in SVCARE's operating agreement must be rejected for the reasons the court rejected the same claim in the *Fundamental Action*.

5. Schron Note

Finally, the Grunstein Defendants make the sweeping claim that a brief handwritten note signed in 2007 by Rubin Schron only, supercedes the complex and carefully crafted agreements of the parties, including the Option. This claim is meritless. The note, which makes no reference to the Option, is not signed by "all of the Parties" as is provided for in the no waiver clause at Section 14 of the Option. Further, the brief note lacks any of the indicia of an enforceable agreement. There is no evidence of a definite agreement sufficient to be enforceable (*see Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475 [1990]), no indication of a meeting of the minds of the parties on all essential terms of the contract (*see Express Indus. and Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584 [2000]) and no expression of acceptance by all of the parties (*see Woodward v Tan Holding Corp.*, 32 AD3d 467 [2d Dept 2006]). The note may well represent a way station in negotiations that had they progressed, could have been concluded with the signing of an agreement. The note is no substitute for a final enforceable contract that supercedes the existing agreement of the parties relating to a transaction valued at an amount well in excess of \$100 million.

B. Specific Performance and Change of Control

Plaintiffs maintain that pursuant to Section 5 of the Option, they are entitled to remove and replace all of the incumbent directors and managers of SVCARE as of the time the Notice was delivered. When interpreting a contract, the court must read all of its parts in harmony to determine its meaning (*see Bombay Realty Corp. v Magna Carta, Inc.*, 100 NY2d 124 [2003]). The court should construe the contract so as to give full meaning and effect to all of its material provisions (*see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]).

Section 5 of the Option provides:

From and after exercise of the Option: (a) the Option Holder or its designee shall be entitled to exercise all rights and prerogatives as if it were the sole voting member of SSH, including the election and removal of directors and managers of SSH, and any such board of directors or managers elected by the Option Holder shall be entitled to exercise all rights and prerogatives of a Board of managers of SSH, including the election and removal of officers of SSH and acting with respect to the subsidiaries of SSH.

Plaintiffs' interpretation of Section 5 turns on their view that the term "exercise" within the meaning of the Option is an event that occurs when the Notice is delivered. This interpretation is inconsistent with a number of provisions in the Option that contemplate the occurrence of a series of events of "exercise" at various times and which culminate in a closing on a date subsequent to the date of the Notice. Thus, Section 1 of the Option provides for a "closing of the exercise of the Option." The phrase suggests a process of exercise which ends with a closing. The same section provides that the "consideration payable upon exercise shall be \$100,000,000.00" but plaintiffs did not tender that sum along with the Notice.² Plaintiffs' failure to pay at that time is consistent with the virtually universal practice of exchange of ownership and control at a closing at which time the consideration for the purchase is paid. Further, Section 7 of the Option provides that "upon exercise" SVCARE shall "execute *and deliver* such amendments and schedules to the Operating Agreement of [SVCARE] to reflect the issuance of the Acquired Units to the option Holder" (*emphases added*) but pursuant to Section 3 of the Option, the certificates of the "Acquired Units" are to be delivered at the closing.

Read in its entirety, the Option unambiguously provides for its exercise to begin upon issuance of a notice and to end upon a closing. For these reasons, the court concludes that the branch of plaintiffs' motion requesting an order directing defendants to cede control of SVCARE to plaintiffs prior to a closing must be denied. In view of this determination, the court need not

²Plaintiffs argue that the consideration is "payable on exercise, not that it shall be paid at that time" (Reply Br., p. 5). Plaintiff finds support to the argument in Black's Law Dictionary (9th ed. 2009): "An amount may be payable without being due."

"Payable" is an adjective. It modifies or specifies the noun "consideration". However, the term does not specify *when* the consideration should be paid. Other words are needed. Thus, as the discussion in Black's Law Dictionary of the word "payable" illustrates, "payable on demand" means "payable when presented or upon request"; "payable to order" means payable only to a specified payee"; and "payable after sight" means "payable after acceptance or protest of nonacceptance."

In this case, the consideration is payable "upon exercise." The noun "exercise" is not defined in the Option and unlike phrases such as "upon notice" or "at closing," it does not specify whether the consideration must be paid upon issuance of the notice or at a later time. Similarly, the phrase "from and after exercise" in Section 5 of the Option does not necessarily require transfer of control prior to a closing. However, as discussed above, the meaning of the term becomes clear upon a reading of the entire Option.

consider SVCARE's arguments for denial of the request for an immediate change of management control.

C. Motion for Leave to Amend Answer

In a motion fashioned as a motion for leave to amend, defendants seek to add an affirmative defense to allege that the Option "cannot be enforced because it was fraudulently induced" Memorandum of Law in Support of Motion for Leave to Amend Verified Answer, p. 1 ("Leave to Amend Brief"). Defendants seek to plead that in 2006 Rubin Schron falsely represented to SVCARE that "he would provide the \$100 million to SVCARE that he had promised in 2004 but had never funded" (*id* at 2) that SVCARE signed the Option in reliance on that representation and that "Schron's failure to fund and his current false representations that the \$100 million loan was funded constitute fraud and show that Schron intended never to provide the \$100 million to SVCARE" (*id* at 3). By the proposed amendment, defendants seek to introduce the same evidence the court has barred by repackaging the original defense that the consideration for the Option included the loan.

"Motions for leave to amend pleadings should be freely granted absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). A delay in seeking leave to amend is not grounds for denial of the motion except where the delay would cause prejudice or surprise (*see Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Although leave to amend should be freely granted, an examination of the underlying merits of the proposed defense is warranted in order to conserve judicial resources (*see Eighth Ave. Garage Corp. v H.K.L. Rlty, Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). Whether to permit amendment is within the sound discretion of the court (*see Pellegrino v NYC Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

A fraud in the inducement claim requires proof of a representation of a material fact, known to be false made with an intention of inducing reliance, actual reliance and injury (*see Frank Crystal & Co. v Dillmann*, 84 AD3d 704 [1st Dept 2011]; *Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004]). Pursuant to CPLR 3016(b), each of those elements must be pleaded with particularity.

The facts on which the proposed amendment is based have been known to the parties from the outset of this litigation in March 2010. Defendants elected not to include fraudulent inducement as an affirmative defense because they believed that the loan was consideration for the Option and

that the failure to fund constituted a breach of the option thereby rendering the Option void and unenforceable. Defendants' rationale does not explain either the failure to plead in the alternative or the eight month delay following the January 20, 2011 Decision and Order in seeking leave to amend.

The passage of time alone is not a basis for denial of a motion for leave to amend. In this case, plaintiffs will be prejudiced because allowing the amendment will further delay an orderly transfer of control of SVCARE as is CamEquity's right and which right CamEquity has been seeking to exercise since June 2010. Allowing the amendment might still be warranted in these circumstances were prejudice the sole factor present. However, defendants have offered virtually no evidence tending to show the existence of a meritorious defense.

Defendants acknowledge that the option was given in 2004, long before the alleged misrepresentations. Although the original option makes no reference to the \$100 million loan as consideration, defendants urge that consideration for that option included the alleged loan, that the loan was never funded, that between 2004 and 2006 Schron repeatedly assured defendants, Murray Forman and Leonard Grunstein, that the loan would be funded and that Forman signed the 2006 amendment to the original option only after Schron promised to fund the loan out of the proceeds of the 2006 refinancing of the original transaction.

The 2004 option, like the 2006 Option, recites that it is given:

[i]n consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged by the Parties)

Schron states that the 2004 option was given because Schron's "companies made possible the financing of the entire transaction and assumed the risks of a \$1 billion mortgage" (Schron Memorandum of Law in Opposition to Motion, p. 5). Defendants offer no evidence, other than Forman's testimony in this case, that at about the time of the 2006 refinancing, Schron told him, in words or substance that "I will cause companies I control to provide the \$100 million to SVCARE that I committed to provide in 2004 but have not yet provided" (Amended Answer ¶ 414).³

³The testimony of Benjamin Dwyer, that he could not find evidence of a \$100 million disbursement does not prove that the loan was not funded.

Forman's recent testimony contradicts contemporaneous documentary evidence in which Forman represented that the loan was funded (*see* Affm of Steven Engel, dated October 24, 2011, Ex. N, O, P and Q).⁴

Defendants do not dispute that the record contains multiple admissions by Forman and Grunstein that the loan was funded. Instead they claim that "extra-judicial admissions are not conclusive, but merely evidence that must be weighed like any other evidence" (Defendants' Reply Br., p. 8)(*see Bondy & Schloss v Strategri Dev. Ptns LLC*, 82 AD3d 615 [1st Dept 2011]). Defendants argue that weighing this conflicting evidence is in the exclusive province of the fact-finder.

Defendants fail to recognize that an examination of the underlying merits is proper, even on a motion for leave to amend (*see Lucido*, 49 AD3d at 229). That examination entails a review of the elements of the proposed affirmative defense and consideration of the facts forming the basis of the claim, which facts must be pleaded with particularity (*see* CPLR 3016[b]).

Accepting as true, defendants' allegation that prior to and on June 9, 2006, Schron promised to make good on an earlier (2004) promise to fund a \$100 million loan to SVCARE when the 2004 mortgage relating to the Mariner transaction was refinanced, that Schron failed to fund and that Schron now falsely claims that he funded the loan a year and a half before he made the false promise in 2006 (*see* proposed Amended Verified Answer, ¶¶ 414-417), these allegations are insufficient to establish "a material representation known to be false [and] made with the intention of inducing reliance" (*see Frank Crystal & Co., Inc. v Dillman*, 84 AD3d 704 [1st Dept 2011]). According to the proposed Amended Answer, promises were made "in 2004 and 2005" (proposed Amended Answer, ¶ 408). These promises were repeated "in May and June 2006" (*id.*, ¶ 414) to induce Forman to execute the Option (which Option did not alter the original option in any material way). The "May and June 2006" statements which merely repeat allegedly broken promises made long before the 2006 refinancing, cannot satisfy the required proof of a material misrepresentation made with the intention of inducing reliance. Moreover, "[g]iven the clarity with which defendant[s] by [their] pre-litigation conduct acknowledged the obligation at issue, defendant[s'] subsequent protestations of

⁴Additionally, plaintiffs have pointed to the testimony of attorneys representing SVCARE in the 2006 refinancing to the effect that the failure to fund was not brought to their attention.

inadvertence and error were not sufficient to raise factual issues necessitating a trial” (*Schechter Assocs. v Major League Players Ass’n*, 256 AD2d 97, 98 [1st Dept 1998]).

Apart from the absence of evidence of any material misrepresentation prior to the 2006 refinancing with an intention to induce reliance, the proposed amended answer fails to allege reasonable reliance. The merger clause of the Option provides in relevant part that:

Section 16. No Party has (directly or indirectly) offered, made accepted or acknowledged any representation, warranty, promise, assurance or other agreement or understanding (whether written, oral, express, implied or otherwise) to, with or for the benefit of the other Party or any of its representatives respecting any of the matters contained in this Agreement except for those expressly set forth in this Agreement. This agreement contain the entire agreement and understanding of the Parties, and supersedes and completely replaces all prior and other representations, warranties, promises, assurances and other agreements and understandings (whether written, oral, express, implied or otherwise) among the Parties with respect to the matters contained in this Agreement.

Forman’s protestations of oral representations to the contrary are directly contradicted by the above quoted section of the Option. Section 16 negates the claim of justifiable reliance (*see Bango v Naughton*, 184 AD2d 961, 963 [2d Dept 1991]). This is especially true where, as here, the integration clause is included in a multi-million dollar transaction and is a product of negotiations among sophisticated business people who were represented by skilled lawyers and the fraud defense is inconsistent with other specific recitals in the agreement (*see Emergent Capital Inv. Mgmt. LLC v Stonepath Grp, Inc.*, 165 F Supp2d 615, 622-23 [EDNY 2001], *rev’d in part on other grounds*, 343 F3d 189 [2d Cir 2003]).

Defendants assert that Grunstein and Forman had been asking Schron to fund the loan for almost two years prior to the refinancing, that Schron repeatedly promised to fund the loan and that he failed to do so. These include alleged representations made “[i]n 2004 and 2005” that “I (Schron) will ... provide \$100 million to SVCARE sometime soon in 2005”. Defendants have not identified any contemporaneous writing that references any of the alleged multiple requests to fund or the alleged repeated promises to do so. In contrast, the record contains several carefully crafted documents signed by Grunstein and/or Forman acknowledging funding despite an alleged history of failures to fund. Reliance on repetition of many unfulfilled promises without any action to secure the funding or at least an acknowledgment of a past failure to fund, simply cannot satisfy the

requirements that such reliance be reasonable. On these facts, defendants have failed to allege reasonable detrimental reliance.

Leave to amend the answer shall be denied.

D. Interim Relief

Plaintiffs argue that they may never be able to obtain all of the needed regulatory approvals because of a lack of cooperation by incumbent management at SVCARE. The concern may be justified given the contentious history of this litigation. In this regard, the court reminds the parties of management's affirmative obligations under Sections 6 and 7 of the Option. The Order entered today includes a directive requiring compliance with those contractual obligations.

ORDER

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is GRANTED; and it is further

ORDERED that SVCARE and Canyon Sudar shall comply immediately and in good faith with their obligations pursuant to Section 6 and 7 of the Option; and it is further

ORDERED that defendants' motion for leave to amend the answer is DENIED; and it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, April 3, 2012 at 3:30 PM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York on the limited issue of the amount, if any, of indebtedness available to be paid at the closing toward the purchase price.

This constitutes the decision and order of the Court.

DATED: March 15, 2012

ENTER,



O. PETER SHERWOOD

J.S.C.