SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7

NASSAU COUNTY

THOMAS KRAMER

Plaintiff,

-against-

LEONID AYNBINDER,

Defendant.

MOTION DATE: 1/18/08

MOTION SEQ. NO.: 002, 003

INDEX NO.: 19231/06

The following papers read on this motion (numbered 1-4):

Notice of Motion **1**
Notice of Cross-Motion **2**
Reply Affirmation in Support of Summary Judgment Motion and in Opposition to Cross-Motion **3**
Affidavit in Reply to Plaintiff's Affidavit in Opposition To Defendant's Cross-Motion **4**
Memorandum of Law.....**A**

Plaintiff's motion for summary judgment pursuant to **CPLR §3212**, and defendant's cross-motion for leave to amend the answer pursuant to **CPLR §3025** are determined as follows.

This is an action to recover the balance due on a contract for the purchase and sale of an ownership interest in a limited liability company known as 1220 East New York Realty Co., LLC. (the "Company"). At the time of the transaction, plaintiff owned fifty (50%) percent of the Company, and the other fifty (50%) percent was owned by Eric St. Louis ("St. Louis"), who is not a party to this action. In or about August 2006, plaintiff agreed to sell one half of his membership (a 25% interest in the Company) to the defendant, and the other half to St. Louis. The transaction was reduced to two separate agreements: (i) the Agreement of Sale between plaintiff and defendant dated August 15, 2006 and amended August 29th 2006 (the "Aynbinder Agreement"); and (ii) the Agreement of Sale between plaintiff and St. Louis, dated August 29, 2006 (the "St. Louis Agreement"). Both of the agreements were signed by all three parties to the transaction – plaintiff, defendant and St. Louis.

The Aynbinder Agreement, as amended, provided for a purchase price of $150,000, payable as follows: (i) a non-refundable deposit of $20,000 due upon the signing of the agreement, (ii) $80,000 on or before August 24, 2006; (ii) $30,000 on or before September 29, 2006; and (iii) $20,000 on or before October 29, 2006. It is undisputed that defendant paid the first $100,000, but did not pay the final two installments.

Plaintiff commenced this action by filing a summary judgment motion in lieu of a complaint pursuant to **CPLR §3213**. By Short Form Order dated May 12, 2007, this Court denied plaintiff's motion upon the ground that the Aynbinder Agreement did not constitute an instrument for the payment of money only, and converted the moving and opposition papers to a complaint and answer, respectively. Plaintiff now moves for summary judgment in the amount of $50,000, plus statutory interest, costs and disbursements. Defendant cross-moves for leave to amend the answer to interpose the defenses and counterclaims of (1) breach of contract, based upon plaintiff's alleged failure to deliver the Closing Documents, as defined and required by the Aynbinder Agreement and (2) fraud in the inducement, based upon alleged prior misrepresentations regarding the assets of the Company. Defendant seeks to rescind the Aynbinder Agreement and to recover the $100,000 paid thereunder, plus interest.

Insofar as it is undisputed that a balance of $50,000 is due and owing pursuant to the Aynbinder Agreement, plaintiff has established *prima facie* entitlement to judgment. *See* **CPLR §3212; Winegrad v. New York University Medical Center,** 64 NY2d 851. The burden then shifts to defendant to raise an issue of fact as to the existence of a viable defense or counterclaim by tender of evidentiary proof in admissible form. *See generally,* **Zuckerman v. City of New York,** 49 NY2d 557. Summary judgment is not defeated by "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." **Id.** As discussed below, the Court determines that the evidence submitted with respect to each of the proposed defenses /counterclaims fails to satisfy defendant's burden.

Breach of Contract

Pursuant to Paragraph 5 of the Aynbinder Agreement, entitled "Closing Documents," plaintiff was required to execute and deliver to defendant at the closing: (i) duly endorsed certificates representing the twenty-five "Units of Membership Interest" being transferred; (ii) copies of the Articles of Organization and the By-Laws, minute book, unit certificate book and copies of plaintiff's cancelled certificates; and (iii) such other instruments as were necessary to effect the transfer of a 25% interest in the

Company to defendant. This requirement was a condition precedent to closing pursuant to Paragraph 9 of the Aynbinder Agreement.

Defendant asserts that he has received none of the Closing Documents and that therefore, "I am the owner of nothing." Affidavit of Leonid Aynbinder in Opposition to Motion and in Support of Cross-Motion, Sworn to on the ____ [sic] day of November 2007 ("Aynbinder Affidavit"), ¶6. "It is my position that I am not an owner of the company, nor did I receive what I bargained for in the contract, to wit: an interest in this limited liability company." Aynbinder Affidavit ¶7.

Plaintiff responds that all documents necessary to transfer ownership were delivered to defendant at the closing. In addition to the Aynbinder Agreement, three documents evidencing the transfer were executed by the parties, copies of which are attached to plaintiff's Reply Affirmation: (i) St. Louis' waiver of the right of first refusal to purchase Kramer's interest; (ii) St. Louis' consent to defendant's purchase of Kramer's interest; and (iii) amendments to the Company's operating agreement reflecting ownership of the Company by St. Louis (75%) and defendant (25%). Plaintiff's counsel affirms that plaintiff and St. Louis never completed a corporate kit, and therefore, there were no certificates evidencing unit membership, nor By-Laws nor Company minutes to be tendered to defendant.

Two distinct issues are raised by the parties' arguments: first, whether an effective transfer of ownership was accomplished; and second, whether a record of that transfer was delivered to defendant. The Court determines, as a matter of law, that despite the casual or non-adherence to certain corporate formalities, plaintiff effectively transferred his ownership interest to defendant by means of the documentation set forth above, and plaintiff and St. Louis would be estopped from maintaining otherwise. Defendant's purported belief that he is the owner of nothing is belied by his actions, as sworn to in his Affidavit in Support on February 28, 2007, ¶24 (submitted on the prior motion): "[S]ince I signed the agreement I had invested another $50,000.00 into the business." His real aggrievement, to the extent that he has one, is not that he doesn't own the Company, but that the Company which he does own is unprofitable.

Assuming, without deciding, that defendant did not receive a record of the transfer, the question is whether that constitutes a breach of contract sufficient to warrant rescission. The answer is no. It is well settled that rescission of a contract is not available on the basis of a casual or technical breach. Only a breach which is substantial and essential, that defeats the entire consideration for the contract, furnishes an ample basis for rescission. **John F. Trainor Co. v. G. Amsinck & Co.,** 236 NY 392; **Clark Contracting Co. v. City of New York,** 229 NY 413. The Court having determined that

defendant has received the essential consideration for his agreement, finds that the failure, if any, to deliver a record of the transaction at the closing or thereafter is not a material breach and therefore, not a basis for rescission. Further, to the extent that defendant closed the transaction without objection or receipt of the Closing Documents, he may be said to have waived that condition precedent.

The Court thus finds that, even accepting defendant's version of the disputed facts, defendant cannot sustain a defense or counterclaim based upon breach of contract. Accordingly, summary judgment cannot be defeated on that basis, and the Court need not reach the cross-motion with respect to that proposed defense or counterclaim.

Fraud in the Inducement.

The Court notes at the outset that the general merger and disclaimer clauses in the Aynbinder Agreement do not bar parol evidence of fraudulent misrepresentations allegedly made by plaintiff or his agents. *See* **Lee v. Goldstrom,** 135 AD2d 812; **Great Neck Car Care Center, Inc. v. Artpat Auto Repair Corp.,** 107 AD2d 658. The issue is whether the parol evidence submitted is sufficient to preclude summary judgment on the basis of fraudulent inducement.

To establish *prima facie* fraud as a contractual defense or counterclaim, the defendant must show that: (1) the plaintiff made a material representation of fact that was false; (2) the plaintiff knew that the representation was false and made it with intent to deceive (scienter); (3) the defendant justifiably relied upon plaintiff's misrepresentation in entering the contract; and (4) the defendant suffered some loss or harm as a result of such reliance. *See* **PT Bank Central Asia v. ABN Amro Bank N.V.**, 301 AD2d 373; **Otto Roth & Co. v. Gourmet Pasta, Inc.**, 277 AD2d 293; **Giurdanella v. Giurdanella,** 226 AD2d 342.

Defendant's evidence consists of his own affidavit and reply affidavit, in which he states that he entered into the transaction in reliance upon the following representations of plaintiff or his agents: (i) that the Company was worth $600,000; (ii) that the Company had at least $60,000 in receivables and $400,000 in claims, and (iii) that the Company owned the MRI, dentist chairs, other dental equipment and medical tables that were on the premises leased by the Company. According to defendant, he was told by Attorney Russell C. Friedman that "in his view, if properly operated, the company could do $1,000,000 a year." Aynbinder Affidavit ¶15.

Defendant states that in October of 2006, he discovered that, pursuant to the St. Louis Agreement, St. Louis had been permitted to use $170,534.18 of the Company's

accounts receivable to purchase his share of plaintiff's interest. He further discovered that the Company did not own the MRI or any of the dental or medical equipment, and that the Company "may not even have a direct lease to the premises which they advised that they did." Aynbinder Affidavit ¶25. He claims that he would never have entered the contract had he known the truth.

Plaintiff denies the representations attributed to him or his agents, except to the extent that his attorney may have opined as to the value of the Company or its accounts receivable. To the extent that Mr. Friedman made any statement regarding the potential future income of the Company, such opinion or prediction is not actionable as fraud. *See* **Chase Investments, Ltd. v. Kent,** 256 AD2d 298. Even if defendant's remaining allegations are taken as true, however, and it is assumed that plaintiff or his agents made the representations attributed to them, defendant's proof fails in at least two respects. First, defendant has not shown that the representations regarding the value of the Company or its accounts receivable were false, or made with knowledge of their falsity. Defendant offers no evidence as to the true value of the Company or accounts receivable at the time of the transaction, or in October of 2006 when the purported "discoveries" were made. Without a comparison of the stated and true values, defendant cannot establish the falsity of the alleged representations. *See* **Great Neck Car Care,** 107 AD2d 658. Defendant himself admits that at the time of the transaction, he "spot checked" the accounts receivable and was satisfied that they were equal to the amounts represented. Aynbinder Affidavit ¶17. Further, there is no evidence regarding the value of the medical/dental equipment and MRI which defendant purportedly relied upon as assets of the Company. Accordingly, the Court cannot determine whether the valuation of the Company at $600,000 was necessarily false in the absence of those assets. Defendant's speculation that the Company does not own a lease to the premises is unsubstantiated.

Second, however, even if the alleged representations were false (which the Court assumes for purposes of discussion only), defendant has not shown that his reliance upon them was justified. "A party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence." **KNK Enterprises, Inc. v. Harriman Enterprises, Inc.,** 33 AD3d 872. *See also* **Zanett Lombardier, Ltd. v. Maslow,** 29 AD3d 495, **Tanzman v. La Pietra**, 8 AD3d 706. Defendant admits that the computer data and boxes of claims were made available for his review, and that he was satisfied with his own brief perusal of them. He made no request to see proof of ownership of the medical and dental equipment, or a copy of the Company's lease or subleases. There is no record that he made any inquiry of the subtenants who were the source of the Company's income.

Defendant asserts that his "naivete" and immigrant status, and his belief that he was being represented by Mr. Friedman, justify his reliance upon the plaintiff's misrepresentations (if any). First, defendant's purported belief that Mr. Friedman was his

attorney is contradicted by his own admission that he believed Mr. Friedman was the attorney for the Company [Aynbinder Affidavit ¶15] and defendant's own letter to Mr. Friedman stating that he would inform Mr. Friedman of the name of his attorney [Exhibit D, Reply Affirmation of Russell C. Friedman, dated November 27, 2007]. Accordingly, to the extent that defendant relied upon Mr. Friedman to protect his interests, that could not be considered reasonable. Second, to the extent that language remained a barrier after ten years in the United States [Aynbinder Affidavit, ¶11], that does not relieve defendant of his obligation of diligence. Rather, it suggests that more diligence (such as enlisting the aid of an interpreter, attorney or other advisor who speaks his own language) would have been reasonable under the circumstances. As owner and manager of a small surgical supply company [Aynbinder Affidavit, ¶12], defendant is assumed to be possessed of the ordinary intelligence and resources of a business person of that ilk, and as such, defendant is expected to undertake a reasonable investigation prior to entering a business transaction. **KNK Enterprises, Inc.,** 33 AD3d 872; **Zanett Lombardier, Ltd.,** 29 AD3d 495; **Tanzman**, 8 AD3d 706.

The heart of defendant's grievance is that St. Louis used Company assets (a portion of the accounts receivable) to purchase his shares, so that, in effect, any representations as to the total value of such assets were immediately rendered false by the execution of the transaction. Defendant claims that plaintiff or his agents reassured him that their discussion of accounts receivable (which defendant overheard at the closing) referred to those of another company. Plaintiff denies that any such reassurance was given. Even if it were, however, defendant could not have reasonably relied on it, in view of the fact that the St. Louis Agreement clearly states otherwise. *See generally* **Tanzman**, 8 AD3d 706. In Paragraph 2, it states that "[t]he balance of $170,534.18 shall be paid out of the first No Fault receivables, purchased and collected by the above named entity. Defendant signed the agreement. "[D]efendant's failure or purported inability to read the [agreement], in the absence of any evidence of coercion, provides no basis for relief, inasmuch as defendant was under an obligation to exercise ordinary diligence to ascertain the terms of the document he signed." **Chemical Bank v. Masters,** 176 AD2d 591. The law does not protect a party from a bad bargain, fairly entered at arms length.

Defendant has failed to establish the elements of fraudulent inducement defense or counterclaim, and no material issue of fact emerges requiring a trial.

* * *

Based upon the foregoing, the Court finds that summary judgment in plaintiff's favor is warranted and that the cross-motion is thereby rendered moot. Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment **granted**; it is further

ORDERED, that the cross-motion is dismissed.

Submit judgment on notice. Plaintiff shall serve a copy of this Order with Notice of Entry upon defendant forthwith upon receipt from any source. This constitutes the Order of the Court.

ENTER:

Dated: 5/15/08

J.S.C.

ENTERED

JUN 06 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE