Alan Lucks, P.C. v Niaz
2017 NY Slip Op 31671(U)
July 12, 2017
Supreme Court, Suffolk County
Docket Number: 03915/2016
Judge: William G. Ford

[* 1]

SHORT FORM ORDER **INDEX NO.: 03915/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 01/11/17
Motion Seq #: 001 MD

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ALAN LUCKS, P.C.

Plaintiff,

-against-

MOHAMMAD K. NIAZ, M.D.,

Defendant.

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PLAINTIFF'S ATTORNEY:
Harold I. Guberman, Esq.
35 Pinelawn Road, Suite 218 E
Greenlawn, NY 11747

DEFENDANT'S ATTORNEY':
Eric Cahalan, P.C.
191 New York Avenue, 2nd Fl.
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Upon the following papers read on plaintiff's motion for summary judgment pursuant to CPLR 3212; Notice of Motion dated November 3, 2016; Affirmation in Support dated October 31, 2016; Affidavit in Support dated October 31, 2016 and supporting papers; Affidavit in Opposition dated December 21, 2016; Reply Affidavit in further support and supporting papers dated January 3, 2017; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 dismissing the counterclaims asserted in defendant's answer and entering judgment as demanded in the complaint is denied as thoroughly discussed herein.

Factual Background

This breach of contract action is currently pending before the Court on plaintiff Alan Lucks, P.C.'s motion for summary judgment. Plaintiff is medical practice, solely owned or operated by Alan Lucks, M.D. The practice operated out of two locations: 7 Mark Tree Road, Centereach, New York and 681 Whiskey Road, Ridge New York, both located in Suffolk County. Plaintiff sold his medical practice to defendant Mohammad K. Niaz, M.D.

On or about November 13, 2013, the parties closed on the purchase and sale of plaintiff's practice, which was structured such that defendant paid plaintiff a price of $225,000.00. Specifically, defendant paid $100,000.00 in a down payment, and promised to pay the remaining $125,000.00 balance via note. Defendant's promissory note in plaintiff's favor called for 36 consecutive monthly payments of $3,746.37. The debt would mature by November 15, 2016 at 5% annual interest.

Pursuant to the note's payment schedule, defendant made part payments to plaintiff until May 2014, at which time plaintiff alleges defendant defaulted on his obligations due under the note. After making due demand for payment in writing on August 28, 2014 via counsel, plaintiff contends he is owed approximately $103,137.04 as a remaining balance for the sale and purchase of his former medical practice to the defendant.

Procedural Posture

The action was commenced when plaintiff filed summons and complaint *pro se* on July 6, 2016. Defendant joined issue interposing a verified answer asserting counterclaims against plaintiff on August 15, 2016. Subsequently, plaintiff obtained legal counsel and amended its complaint on September 7, 2016. Defendant then amended his answer on September 29, 2016. Plaintiff served its reply denying defendant's counterclaims on October 23, 2016.

The Parties' Arguments & Positions

By his motion, plaintiff seeks to dismiss defendant's counterclaims. Plaintiff first argues that defendant has acknowledged the existence of the promissory note and has additionally, acknowledged the debt due and owing and his default thereunder. Therefore, plaintiff contends that he has made out a *prima facie* case for breach of contract entitling him to judgment as a matter of law and an award of damages for the remaining balance of defendant's debt.

In so doing, plaintiff also seeks to dismiss as legally insufficient defendant's asserted counterclaims. Therefore a brief summary and discussion of each is thus warranted.

By his Amended Answer, defendant has asserted two separate counterclaims against plaintiff. First, defendant argues that he owes no further debt or payments under the promissory note entered into by and between plaintiff and defendant dated November 13, 2013 because he alleges that plaintiff fraudulently induced or materially misrepresented certain facts that artificially inflated the medical practices purchase price, or in the alternative, omitted certain material facts that diminished the actual value of the medical practice. Secondly, defendant argues that he has been damaged, since by his subjective view, plaintiff may have violated the Stark Law amendment to the Social Security Act, 42 USC § 1395-nn, by being a physician with an ownership interest or stake in referring medical providers.

Taken as a whole, defendant's position appears to be that he has paid good and actual value for the medical practice and that no further payments should be due and owing to the plaintiff. In furtherance of his fraud or misrepresentation claims, defendant states that he demanded that plaintiff supply him with a patient roster with medical charts and income information (accounts payable and receivable, income, etc.) prior to closing. He contends that he received incomplete information, but for whatever reason, proceeded to closing. Sometime thereafter in late 2013, he alleges that he discovered that plaintiff had an arrangement whereby somewhere close to 75% of all his patients were referred to a particular medical provider for sonogram procedures. When he inquired of plaintiff regarding this practice, he further claims that he was advised that plaintiff billed and collected $10,000.00 monthly rent from this provider, so long as he guaranteed 100 – 120 sonogram patient referrals. Defendant argues that he determined this practice to be medically unnecessary, unethical or otherwise unsound, and immediately discontinued the practice, decreasing the practice's profit margin or value.

Arguing in opposition to the motion, defendant emphasizes that outstanding discovery on material and relevant points of content remains unproduced by plaintiff. Defendant argues that he still has not yet been produced all of the income information concerning the sonogram referral practice as well as tax and accounting (bank account statements, payroll, etc.) information previously demanded in a Notice for Discovery and Inspection dated September 29, 2016. Thus, defendant argues plaintiff's motion for summary judgment is premature in that he has deprived an opportunity to do discovery on matters pertinent to his counterclaims which he purports are within the exclusive knowledge, care custody or control of plaintiff. Moreover, defendant notes that neither party has conducted any pretrial depositions at this point in the litigation.

Plaintiff disputes defendant's latter point, arguing that he lacks any ownership interest in any medical provider, making the Stark Law and any alleged violation thereof inapposite or inapplicable. Plaintiff further argues that to the extent that defendant claims fraud in the inducement or material misrepresentation, he notes that since the practice sold in November 2013, defendant's raising of this defense three years later is beyond the applicable limitations period.

Further and more importantly, plaintiff argues that the sonogram patient referral practice collected its rental payments under a separate corporation formed for that purpose. Thus, plaintiff disputes that defendant was deprived a fair and accurate accounting of the practice's gross income and value prior to closing on the sale and purchase. Because this Court has determined that plaintiff has raised this new argument and interjected new facts not previously briefed or contained in the motion papers in chief, these revelations will not be considered (*see e.g.* ***Alto v Firebaugh Realty Corp., N.V.***, 33 AD3d 738, 739, 822 NYS2d 610, 612 [2d Dept 2006][new matters raised for the first time in a reply affidavit are not properly considered]).

Standards of Review

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote***

Big Alpha Foods, Inc. v Schefman, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

"A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or [that] the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (***Interboro Ins. Co. v Clennon***, 113 AD3d 596, 597, 979 NYS2d 83, 84 [2d Dept 2014]).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated. ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***FamilyBFriendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 AD3d 855, 856, 988 NYS2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" ***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

Legal Discussion

I. Defendant's Counterclaim for Fraudulent Inducement or Material Misrepresentation

Generally speaking under the CPLR a counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed" (CPLR 203[d]), except that if the counterclaim arose from "the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the

complaint were interposed" (***Marshall v. Bonica***, 86 AD3d 595, 596, 928 NYS2d 48, 50 [2d Dept 2011]).

Thus, a motion to dismiss a counterclaim properly lies if that counterclaim is untimely and outside the applicable statute of limitations (***Rothschild v. Indus. Test Equip. Co.***, 203 AD2d 271, 271, 610 NYS2d 58, 59 [2d Dept 1994]; ***Boccone v. Island Fed. Mortg. Corp.***, 261 AD2d 350, 350, 689 NYS2d 184, 185 [2d Dept 1999][counterclaim dismissed where it did not relate to the same transactions or occurrences referred to in the original complaint or the original answer and was otherwise is time-barred]).

"To dismiss a cause of action on the ground that it is barred by the Statute of Limitations, a movant bears the initial burden of establishing prima facie that the time in which to sue has expired." Where this burden is met, the burden then shifts "aver evidentiary facts establishing that the case falls within an exception to the Statute of Limitations" (***Hebrew Inst. for Deaf and Exceptional Children v Kahana***, 57 AD3d 734, 734, 870 NYS2d 85, 86 [2d Dept 2008]). Non-movant may also defeat the application by raising a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable or that the cause of action was actually interposed within the applicable limitations period. Under CPLR 203(d), a "counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed" (***E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 90 AD3d 821, 822, 935 NYS2d 616, 618 [2d Dept 2011][internal citations omitted]).

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages, and must be plead with particularity or specificity as called for by CPLR 3016(b) (***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559 [2009]). Under our common law, to successfully maintain a claim of "fraudulent representations ... in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged" (***Amalfitano v Rosenberg***, 12 NY3d 8, 11 [2009][emphasis in original omitted]). However, if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the representation, he [or she] must make use of those means, or he [or she] will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (***Orlando v Kukielka***, 40 AD3d 829, 831, 836 NYS2d 252, 255 [2d Dept 2007]).

Generally speaking "[a]ll of the elements of a fraud claim 'must be supported by factual allegations containing the details constituting the wrong' in order to satisfy the pleading requirements of CPLR 3016(b)." However, courts have acknowledged that under certain circumstances, it may be nigh "impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party". In those instances, "the heightened pleading requirements of CPLR 3016 (b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme" (***JP Morgan Chase Bank, N.A. v Hall***, 122 AD3d 576, 579–80, 996 NYS2d 309, 314 [2d Dept 2014][internal citations omitted]).

In addition to the traditional elements of misrepresentation, scienter, reliance, and damages, a plaintiff alleging fraud based upon fraudulent concealment must allege a duty to disclose material information. That duty must be based upon some special relationship between the parties. The failure to plead or prove such a contractual or fiduciary relationship will prove fatal to a fraudulent concealment of a material fact claim since "absent such a relationship, there is no duty to disclose." Nevertheless, our courts have found that the requisite duty to disclose has at times been established where one party has superior knowledge, the context invariably involving direct negotiations between parties to a business transactions (***Albion All. Mezzanine Fund, L.P. v State St. Bank and Trust Co.***, 8 Misc 3d 264, 269, 797 NYS2d 699, 704 [Sup Ct 2003], *affd*, 2 AD3d 162, 767 NYS2d 619 [1st Dept 2003]; *but see* ***Knight Sec. L.P. v Fiduciary Trust Co.***, 5 AD3d 172, 174, 774 NYS2d 488, 489 [1st Dept 2004][plaintiff's negligent misrepresentation claim should be dismissed since there was no special relationship between the parties, whether there was a special relationship between the parties at bar is a factual issue inappropriate for summary adjudication]).

Stated in sum, the Second Department thus has found that a counterclaim should be dismissed where there was no confidential or fiduciary relationship between the parties and the defendant failed to allege that the plaintiff engaged in any conduct that constituted active concealment (***Jae Heung Yoo v Se Kwang Kim***, 289 AD2d 451, 452, 735 NYS2d 572, 572–73 [2d Dept 2001]).

CPLR 3016(b) provides, in relevant part, that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake ... the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The specificity requirements are relaxed where it is alleged that the particular circumstances of the alleged fraud are peculiarly within the defendants' knowledge (***Colasacco v Robert E. Lawrence Real Estate***, 68 AD3d 706, 708, 890 NYS2d 114, 116 [2d Dept 2009]). Mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud (***Heffez v L & G Gen. Const., Inc.***, 56 AD3d 526, 527, 867 NYS2d 198, 199 [2d Dept 2008]; *see also* ***Bando v Achenbaum***, 234 AD2d 242, 243, 651 NYS2d 74, 75 [2d Dept 1996][mere silence is insufficient to support a cause of action sounding in fraudulent misrepresentation, particularly where the plaintiffs were on notice of a condition prior to closing and failed to discover the severity of the problem]).

II. Applicable Statute of Limitations Period

To dismiss a cause of action on the ground that it is barred by the Statute of Limitations, [the party asserting that the cause of action is time-barred] bears the initial burden of establishing prima facie that the time in which to sue has expired." If the movant meets this burden, the nonmoving party, in order to successfully oppose the motion, must raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or that the cause of action was actually interposed within the applicable limitations period. Moreover, pursuant to CPLR 203(d), a "counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed" (***E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 90 AD3d 821, 822, 935 NYS2d 616, 618 [2d Dept 2011]).

A claim for negligent misrepresentation is governed by the six-year Statute of Limitations

governing equitable actions in general (***Fandy Corp. v Lung-Fong Chen***, 262 AD2d 352, 352–53, 691 NYS2d 572, 573 [2d Dept 1999]; ***Milin Pharm., Inc. v Cash Register Sys., Inc.***, 173 AD2d 686, 687, 570 NYS2d 341, 341 [2d Dept 1991]; ***CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC***, 146 AD3d 60, 67, 44 NYS3d 2, 8 [1st Dept 2016]).

As regards claims sounding in fraud, claimant must commence an action or bring their claim within 6 years from the date of the alleged fraudulent act or 2 years from the date of discovery, or when in the exercise of due diligence, the fraud could have been reasonably discovered (***Kaufman v Cohen***, 307 AD2d 113, 122, 760 NYS2d 157, 167 [1st Dept 2003]; ***Watts v Exxon Corp.***, 188 AD2d 74, 76, 594 NYS2d 443, 444 [3d Dept 1993]["the statute of limitations in a fraud action is two years from discovery but, in no event, is it less than six years from commission"]). Further expounding on the discovery rule concerning fraud and misrepresentation, the Third Department has held that "having positive knowledge of fraud is not required to commence the running of the two-year Statute of Limitations ... rather "to start the limitations period regarding discovery, a [litigant] need only be aware of enough operative facts "so that, with reasonable diligence, she could have discovered the fraud." Put differently, all that is necessary are sufficient facts to suggest to a person of ordinary intelligence the probability that they may have been defrauded (***Watts supra.***)

Analysis & Application

After carefully reviewing the motion record and all of the parties' arguments, this Court finds that plaintiff's motion for summary judgment is premature and thus must be denied without prejudice at this juncture.

Distilled to its essence, defendant makes two distinctly separate claims via counterclaim as against plaintiff. The first alleging a federal statutory violation suffers from a lack of any corroborative evidence on the present record. That notwithstanding, defendant has persuasively stated a case that the pertinent financial information which would supply a foundational basis to prove this claim reasonably rests with the plaintiff, being the owner, operator and sole shareholder or officer and predecessor in interest for the medical practice in issue. In other words, defendant has specifically identified particular classes of documents and records sought, resting with their custodian, the plaintiff, which have yet to be produced during discovery, which are material and relevant to proving or disproving claims and defenses in this action. Presumably, defendant, now in possession of the practice could just as well review the billing records and books, plaintiff as a litigant is in receipt of defendant's discovery request and has not produced discovery to date. Thus, the very information defendant asserts he needs to substantiate his claim of statutory violations concerning the sonogram referral and rental arrangement has not been probed by any pretrial discovery and disclosure, making summary disposition and award of judgment as a matter of law to plaintiff wholly premature at this point.

Therefore, to the extent that plaintiff seeks a finding of summary judgment dismissing defendant's counterclaim alleging federal Stark Law violations is hereby **DENIED** without prejudice with leave to renew, as this motion is determined premature, since pretrial discovery has yet to be conducted.

For much the same reasons defendant's allegations of fraudulent inducement or material misrepresentation cannot be appropriately dismissed as a matter of law at this point. Viewed in

the light most favorable to the defendant/non-movant, defendant claims that plaintiff willfully withheld certain pertinent financial information concerning gross income of the medical practice prior to its sale, or conversely, overstated the practice's value or income by including in it approximately $120,000.00 of annual income solely attributed to the questionable sonogram referral rental billing arrangement.

The relevant temporal inquiry then becomes when did defendant actually discover the alleged fraud or misrepresentation, or when should he in view of the objective evidence, be constructively charged with such a discovery. Here, defendant in his answer pleads that he attempted to exercise due diligence prior to the November 2013 closing by seeking customer lists, patient charts and financial information, but was provided with incomplete records. Nevertheless, he proceeded to close on that deal, and subsequently while going over the practices' financial books with the plaintiff, he discovered the objectionable sonogram referral practice sometime in the latter part of 2013.

Plaintiff has argued that any claim arising therefrom should be time-barred, without notably citing to any case law or authorities to fix the appropriate limitations period. The pleadings on file with this Court make clear however that defendant first voiced his concerns regarding fraud or misrepresentation by answer dated August 15, 2016. Although not explicitly stated as such, plaintiff appears to argue that defendant is untimely under a 3 year limitations period. However, this Court finds that in applying applicable precedent, which at its earliest defendant could, should and by his own pleadings, did discover the alleged fraud or misrepresentation sometime between November and December 2013. Thus, even by plaintiff's own timeline, defendant had until November/December 2016 to make his claims. Here, defendant put plaintiff on notice that he believed he was deceived by the omission of material, relevant and pertinent financial information bearing squarely on the correct, true and accurate purchase price for the medical practice vis-à-vis the sonogram referral and billing practice.

Thus this Court finds that defendant has adequately plead a fraudulent inducement or material misrepresentation theory concerning the sonogram billing practices, and more importantly, that this claim made via defendant's counterclaim is timely, under the 6 year statute of limitations period, rather than the less generous 3 year interpretation advanced by plaintiff. Nonetheless, even under plaintiff's interpretation defendant's claim still is timely. Thus, that aspect of plaintiff's motion for summary judgment with the practical effect being to dismiss defendant's fraud or misrepresentation claims as untimely is therefore **DENIED**.

Conclusion

In accord with all of the foregoing, this Court is of the opinion that plaintiff's motion for summary judgment dismissing the counterclaims must fail because plaintiff has failed to carry its burden of establishing *prima facie* entitlement to judgment as a matter of law. To the contrary, defendant has demonstrated that significant discovery remains outstanding and unproduced pertaining to material and relevant issues dealing squarely with the asserted counterclaims. Furthermore, defendant has raised material and triable issues of fact bearing on whether or not plaintiff provided defendant with sufficient and pertinent financial information concerning the sonogram referral and rental billing arrangement of the medical practice both before and after closing on the sale and purchase transaction. Given this, plaintiff has not proven his case for breach of contract.

It is well settled that the elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see* ***JP Morgan Chase v. J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237; ***Furia v. Furia***, 116 AD2d 694, 695, 498 NYS2d 12;***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 806, 921 NYS2d 260, 264 [2d Dept 2011]).

Here, defendant has adequately raised a defense directly raising factual questions on the correct amount or measure of damages, i.e. whether plaintiff has been paid the proper amount given the value of the medical practice sold or whether defendant owes plaintiff additional unpaid monies on a remaining balance. These triable factual and unresolved questions clearly implicate defendant's counterclaims alleging fraudulent inducement and misrepresentation, and thus to the extent they remain inextricably linked, plaintiff has failed to present a clear entitlement to summary judgment with significant pretrial discovery remaining incomplete at the present moment.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment dismissing defendant's counterclaims is **DENIED** without prejudice as premature; and it is further

ORDERED that plaintiff serve defendant with a notice of entry and a copy of this decision and order via counsel forthwith.

The foregoing constitutes the decision and order of this Court.

Dated: July 12, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**