

Brawer v Lepor

2019 NY Slip Op 31193(U)

April 24, 2019

Supreme Court, New York County

Docket Number: 652334/2017

Judge: O. Peter Sherwood

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

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**MICHAEL BRAWER, individually and acting for and
on behalf of MEDREVIEWS, LLC,**

Plaintiff,

-against-

**HERBERT LEPOR, JEFFREY ARNOLD,
STEVEN BLACK and MEDREVIEWS, LLC,**

Defendants.

**DECISION AND ORDER
Index No.: 652334/2017**

Motion Seq. Nos.: 004-005

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O. PETER SHERWOOD, J.:

I. BACKGROUND

These motions made in response to the amended complaint (Complaint, NYSCEF Doc. No. 56), are consolidated for disposition. In motion sequence number 004, defendants MedReviews, LLC (MedReviews), Jeffrey Arnold, and Stephen Black move to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) (documentary evidence, legal capacity and failure to state a cause of action). In motion sequence number 005, defendant Lepore moves to dismiss pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), and (a)(7) (documentary evidence, legal capacity, prior resolution, and failure to state a cause of action)

On both motions, plaintiff cross-moves for summary judgment on claims 10-13, seeking a declaration that defendants are prohibited from charging personal expenses to MedReviews, an injunction enjoining them from doing so, a declaration that defendants must indemnify plaintiff against harm from any such misconduct, and awarding plaintiff attorneys' fees. The motions are consolidated for disposition.

II. FACTS

As this is a motion to dismiss, these facts are taken from the amended complaint (Complaint) and assumed to be true.

Plaintiff Michael Brawer sues on his own and derivatively on behalf of MedReviews, LLC (MedReviews), which published journals, made podcasts, and produced seminars regarding specialized topics in medicine. Brawer and Herbert Lepor were the original 50/50 members of MedReviews, which is governed by an Operating Agreement (the Agreement). They now each own about 43%. Brawer claims Lepor abused his control of MedReviews by using over \$2 million

in MedReviews funds to pay his personal expenses. Defendants Jeffrey Arnold and Steven Black are each 5% owners of MedReviews and are the president and vice president, respectively. Arnold and Black helped and allowed Lepor to raid MedReviews' coffers.

Until July 2005, Brawer's wife, Patti Brawer (PB) kept the MedReviews books and records. Thereafter, the accounting function was performed by others. Lepor then started causing MedReviews to pay certain of his personal expenses and concealing that fact from Brawer. Improper payments to Lepor included a \$100,000 "employee advance," paying the Lepor family nanny, Lepor's car, family vacation travel, accountants' fees, personal meals, expenses for his daughter's Bat Mitzvah, and so forth (Complaint, ¶¶ 29-34). The company books show at least \$1.45 million of personal charges by Lepor.

Pursuant to the Operating Agreement, MedReviews was supposed to be dissolved as of December 31, 2009. Brawer and Lepor talked about extending the company, but Lepor said that because the company was in poor financial shape, it would have to be restructured to give Lepor a bigger interest. Brawer agreed to sell Lepor 23.5% of his 43.5% stake for \$700,000, just above book value. Arnold and Black purchased part of this interest. The money for this purchase came from MedReviews (either as a "bonus" or "loan"). The payments from MedReviews were not disclosed to Brawer and were in violation of the Agreement. Then, the ownership was: 57% Lepor (and Lepor trust); 20% Brawer (and Brawer trust); 10% Norman Lepor; 5% each Arnold and Black; and 3% Diane Gern.

Now that Arnold is president, he is responsible for the day to day financial operations, and he has allowed Lepor's personal charges to continue. Black, as Vice President, signed the checks. Black and Arnold have also charged personal expenses to MedReviews. Black has taken personal loans, some of which have been forgiven by the company.

In 2016, Lepor told Brawer the structure would have to be changed again, and that Brawer would have to sell his remaining interest. Lepor offered \$50,000. Brawer insisted on reviewing the financial records first and discovered the scheme. Brawer demanded more information, and Lepor and Arnold caused MedReviews to issue an improper capital call to freeze Brawer out.

MedReviews conducted an internal investigation, which, Brawer believes, was not independent and was significantly flawed. The investigation report asserted that members may, in fact, charge personal expenses to the company as a type of compensation. It did not address personal expenses charged to the company by Black or Arnold, who approved the report. Brawer

believes Lepor, as the sole manager, worked with Arnold and Black to prevent MedReviews from conducting a good faith investigation.

Brawer asserted the following claims:

- 1) Derivative Claim for Breach of Fiduciary Duty against Lepor for using company funds and blocking an independent report;
- 2) Derivative Claim for Breach of Fiduciary Duty against Arnold and Black for using company funds and allowing Lepor to do the same, and for blocking the report;
- 3) Derivative Claim of Aiding and Abetting Breach of Fiduciary Duty against Lepor, Arnold and Black for allowing each other to take company funds;
- 4) Fraud against Lepor for lying about MedReviews' financial condition to induce Brawer to sell his interest in the company to Lepor in 2010;
- 5) Fraudulent Concealment against Lepor for failing to accurately disclose the company's financial position and Lepor's self-dealing;
- 6) Fraudulent Concealment against Arnold and Black for failing to accurately disclose the company's financial position and self-dealing by Lepor, Arnold and Black;
- 7) Derivative Claim for Conversion against Lepor;
- 8) Accounting;
- 9) Declaratory Judgment that the capital call is without force and effect;
- 10) Declaratory Judgment that MedReviews members are prohibited from charging personal expenses to the Company;
- 11) Injunctive Relief precluding defendants from charging personal expenses to the company;
- 12) Indemnity to the extent that Brawer is found liable for the defendants' charging personal expenses to the company, he seeks indemnification; and
- 13) Attorney Fees to the extent he recovers company funds by this action.

III. 004, Motion to Dismiss by MedReviews, Arnold, and Black Arguments by MedReviews, Arnold, and Black

In motion sequence number 004, MedReviews, Arnold, and Black (together MAB Defendants) contend plaintiff lacked the legal capacity to sue derivatively at the time he filed suit, as Delaware law only allows a member to pursue a derivative claim when the directors wrongfully

refuse to pursue a corporate claim after demand is made, or where demand would be futile. Here, Brawer made a demand, so cannot argue it would be futile. He also has the burden of showing the directors wrongfully refused to pursue the claim (004 Memo, NYSCEF Doc. No. 73). At the time Brawer sued, the defendants had not had sufficient time to act on his demand, but they subsequently did so (*id.* at 8). MAB Defendants never refused the demand. To the contrary, they acted on it, found Lepor owed certain amounts to the company and recovered the funds from Lepor (*id.* at 9). Brawer's assertion that the injury to MedReviews totaled \$3 million is incorrect and was not substantiated by the independent forensic examination conducted by the company (*id.*). The demand was not refused, and, as far as Brawer is dissatisfied with the response, MAB Defendants are protected by the business judgment rule (*id.* at 10-11). The court may only consider whether the board's refusal (if the actions taken may constitute a refusal) was made in good faith and if the investigation was reasonable (*id.* at 11). As far as Brawer claims the investigation was insufficient because it did not include charges made by Arnold and Black, Brawer made no demand about them and had not suggested any improper spending by them. The investigation was not conducted by Arnold and Black. An independent accountant retained by MedReview performed the review (*id.* at 13). There was a full report, in addition to the brief letter. MedReviews then took action to recoup money from both Lepor and Brawer (*id.* at 14).

The fraudulent concealment claim, which is asserted as an individual claim, should also be dismissed, as it is truly a derivative claim. Brawer's injury is not independent of the company, and the company, not Brawer, would recover if he prevailed on this claim (*id.* at 15). Since the harm alleged to Brawer is that the value of MedReviews dropped, the injury, and the claim, belong to the company, making this a derivative claim which should be dismissed for the reasons discussed above (*id.* at 15-16).

The accounting claim is also a derivative claim, as Brawer has no right to seek an accounting (*id.* at 16). The Operating Agreement does not give him that right (*id.* at 18). Further, Brawer has already received all of that information from the investigation (*id.*).

Claim 9, regarding the capital call, is moot. The capital call was cancelled, and there is no outstanding demand for funds from Brawer (*id.* at 19). There is no case or controversy regarding that capital call.

As to Claims 10 and 11 for a default judgment and injunction regarding business expenses, the Agreement (§6.7[b][1]) provides that reimbursable business expenses are separate from

compensation. However, it allows members to charge non-business expenses which will then be treated as compensation by MedReviews and should be treated as income by the recipient (*id.* at 21-22). This is just another form of compensation.

Claim 12, for indemnity, should be denied because charging expenses is allowed by the Agreement. Further, Brawer concedes he suffered no loss as a result of expense-charging. He does not allege any such claim has been made against him. Accordingly, this claim is speculative and should be denied (*id.* at 24). Further, Brawer is not entitled to indemnification under either the Agreement or common law. Common law indemnity claims under Delaware law do not accrue until the one seeking indemnification is confident claims against him have been resolved (*id.*). That is not the case here.

Claim 13, for attorney fees, is a claim for the recovery of company funds. As such, it is a derivative claim and fails for the same reasons as the other derivative claims.

Brewer Arguments in Opposition

Brawer argues that the MAB Defendants did not undertake the investigation in good faith and ignored their fiduciary duties as managers (004 Opp at 11). The managers who oversaw the investigation are not independent, but instead are tainted by their self-interest in protecting themselves and Lepor as demonstrated by their pointing the finger at Brawer (*id.* at 12). Even if outside counsel and a forensic accountant conducted the investigation, it was led by people with conflicts, and cannot be considered independent and in good faith (*id.* at 14). As to MAB Defendants' arguments about the investigation itself, those facts are not yet before the court, and are not the proper subject for a motion to dismiss (*id.* at 15).

As far as MAB Defendants contend the derivative claims were not ripe when this action was filed, they are now ripe. Any defect in the original verified complaint has been cured by the amended complaint (*id.* at 16).

Brawer argues that the derivative claims against Arnold and Black (2 and 3) should survive, as demand would be futile. They are interested managers under Delaware law, and demanding they investigate their own conduct would have been futile (*id.* at 17).

The claim for attorneys' fees (13) should survive because the derivative claims are proper, and one who confers a monetary benefit on the stockholder class is entitled to fees (*id.* at 18).

The fraudulent concealment claim is a direct, not derivative claim (*id.* at 18). The direct harm to Brawer is that his investment suffered (*id.* at 19).

The accounting claim should survive because controlling New York law gives LLC members the right to demand an accounting when there is a fiduciary relationship, such as the one here (*id.* at 20-21). Also, the Agreement gives members the right to inspect books and records, making this claim appropriate (*id.* at 22).

As to Claim 9, regarding the capital call, Brawer notes Arnold has only stated that the capital call was cancelled. Brawer has received no such notice. There is no documentary evidence to support that statement, and his statement is insufficient, at this stage (*id.* at 23).

Regarding Claims 10 through 11, to prevent payment of personal expenses with MedReviews funds, the Agreement does not allow for treating such reimbursement as compensation. *See* the arguments in the cross-motion for summary judgment, (*infra.*).

Concerning Claim 12 for indemnity, Brawer argues this claim is not speculative, but anticipatory, which is allowed (*id.* at 25).

Reply

1. The MAB defendants argue that since Brawer made a demand, he cannot now claim he should be excused from making one and he has not shown wrongful refusal. The demand requested MedReviews to “conduct a full examination” and make “efforts to recover the full amount of funds improperly taken by Lepor,” which MAB Defendants did (004 Reply at 2). He now challenges the results of the examination, claiming MedReviews should seek more from Lepor and ignore Brawer’s use of company funds for personal purposes (*id.*). Even if the demand was refused, that refusal is subject to the business judgment rule, and the court must consider whether the actual investigation was reasonable and made in good faith (*id.* at 3). MAB Defendants’ alleged conflicts cannot satisfy this element (*id.*). While Brawer claims the inclusion of his expenses in the investigation is evidence of conflict and bad faith, it is actually evidence that the investigation was thorough (*id.* at 4). Nor has plaintiff even alleged gross negligence. MedReviews hired DLA Piper to perform the review, which then hired a forensic accountant. Brawer has not met its burden to show the company did not act on an informed basis (*id.* at 5). At the time the investigation was conducted, Brawer had made no allegations about Arnold or Black. Based on the allegations at the time, Arnold and Black were not conflicted and could perform the investigation.

2. The fraudulent concealment claim is derivative. Brawer has admitted the harm he suffered was the damage to his investment. Under Delaware and New York law, a claim is only

direct if the shareholder suffers an injury separate from the company, which remedy he or she would receive directly if the claim were successful (*id.* at 7). Courts have held that a claim is derivative when damages are measured by the drop in investment value (*id.*). Diversion of corporate assets is also a derivative claim.

3. Brawer has no right to an accounting. The Agreement allows for the inspection of books and records, which is distinct, as an accounting requires the company or other members to perform affirmative acts (*id.* at 9). Brawer also improperly relies on New York cases. Delaware law applies here, as MedReviews is a Delaware company. Delaware law requires both a fiduciary relationship and a duty to provide an accounting. No such duty exists here. An LLC is a creature of contract, and the relevant contract does not create that right (*id.* at 10). In any event, Brawer has already received an inspection of records (*id.* at 10-11).

4. The capital call (Count 9): has been withdrawn. Defendants admit Brawer has no obligations here. This claim is moot. As far as Brawer seeks a declaratory judgment related to a possible future capital call, this claim should be dismissed because there is no present controversy,.

5. As to the Personal Expenses claims, the section of the Agreement implicated is captioned "Compensation to Members." Reimbursements for business expenses are not compensation and would make the title meaningless. The language should be interpreted so as to give all of the terms meaning (*id.* at 12-13). The Agreement allows the members "to earn additional compensation in the form of spending up to a maximum amount per year" (*id.* at 13). The parties to the Agreement are allowed to do that. As far as plaintiff seeks injunctive relief, plaintiff has not shown an irreparable injury. Any injury alleged can be compensated with money (*id.* at 14).

6. Because no claims have been brought or are threatened against Brawer, there is no true controversy and the claim for indemnity should be dismissed (*id.* at 15).

004, Discussion

1. Standards

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the

documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85). Here, the documentary evidence is the Agreement, which is properly considered documentary evidence for this motion.

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2^d Dept 2010]).

2. Derivative Claims

MedReviews took action on Plaintiff's demand that it investigate and take action against L.e.por. Brawer argues that MAB Defendants could not have investigated in good faith because

Arnold and Black had conflicting interests, lacked good faith, and so are not entitled to the presumption created by the business judgment rule that the directors are acting in corporate interests (004 Opp at 12). The case relied upon by plaintiff, *Rich ex rel. Fuqi Intern., Inc. v Yu Kwai Chong*, states that “[i]f the plaintiff is able to raise a reasonable doubt that the directors are acting in good faith or with due care, the directors' actions taken in response to a demand are not entitled to the business judgment rule's presumption that the directors are acting in the corporate interest” (66 A3d 963, 977 [Del Ch 2013]). That doubt can only be raised “by particularized pleading” (*id.*). Plaintiff has alleged conflicts of interest and other motivations, but he has not alleged the defendants did anything in the investigation which was lacking, other than the result.

Actions described in *Rich* which may raise a reasonable doubt include a failure to act on information which was uncovered, disbanding the committee which was to make the report, abandoning the investigation, and several resignations of independent directors. Here, plaintiff has not pled, or alleged with the required particularity, that the MedReviews directors abdicated their responsibility to investigate or failed act, but disputes their motives and conclusions, (*see id.* at 979). Additionally, as far as Arnold and Black are accused of inappropriate reimbursements of personal expenses, they maintain such reimbursements are allowed. Plaintiff has not pled facts to show this position is taken in bad faith. Accordingly, the MAB Defendants are entitled to the protection of the business judgment rule. As the entity took action to recover funds, plaintiff Brawer is not entitled to bring derivative claims. Therefore, claims 1,2,3, and 7 shall be dismissed.

As plaintiff's derivative claims have been dismissed, the plaintiff is not conferring a benefit on the stockholder class. The claim for attorneys' fees (13) also fails.

3. Direct Claims

Regarding the fraudulent concealment claim against Arnold and Black, Brawer cites cases where the damage was based on bad investment decisions made as a result of the misleading information. Here, Brawer is not claiming to have made any decisions based on information provided by Arnold and Black. The reduction in value of his investment is not a direct injury. Additionally, “[t]o plead a claim for fraud in the inducement or fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations” (*ACA Fin. Guar. Corp. v Goldman. Sachs & Co.*, 25 NY3d 1043, 1044 [2015]). Plaintiff states that he relied on the representations of Arnold and Black, but does not state what plaintiff did in reliance. The statement is conclusory and is insufficient. Claim (6) also fails.

As far as plaintiff seeks injunctive relief to prevent Arnold and Black from charging personal expenses to the company, that claim fails as well. To receive injunctive relief, the moving party must “establish a likelihood of success on the merits, irreparable injury absent the grant of injunctive relief, and that the balance of the equities tips in their favor” (*Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008]). Any wrongful charge of personal expenses to the company can be compensated with money, and so is not irreparable. This claim (11) also fails.

Regarding the capital call claim, “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed” (Civil Practice Law and Rules 3001). As defendants have withdrawn the capital call, there is no claim on Brawer, and no dispute. So, this claim (9) seeking a default judgment, also fails.

Regarding the request for a declaratory judgment that the parties may not charge personal expenses, defendants rely on the title of the relevant section of the Agreement “Compensation of Members.” While “compensation” means “remuneration and other benefits received in return for services rendered” which includes expense reimbursement (Black’s Law Dictionary), the language of section 6.7(b)(i) makes it clear that section is intended to reimburse members for “out-of-pocket costs and expenses incurred in connection with the conduct of the business and affairs of the Company.” It is not intended to provide an extra source of compensation to the members. This claim (10) shall survive.

Plaintiff also seeks indemnification for “any liability resulting from Defendants’ reckless position that personal charges may be run through the Company and treated as compensation” (004 Opp at 24). Section 6.4 of the Agreement provides that “[t]he Company . . . agrees to and shall indemnify the Members . . . for all costs, losses, liabilities, and damages paid or incurred by such Member . . . in connection with the business of the Company. There is no claim threatened against Brawer at this time, and he has not shown what liability he could have. Accordingly, plaintiff fails to state a claim for indemnification. This claim 12 fails.

“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). “To be entitled to an equitable accounting, a claimant must demonstrate that he or she has

no adequate remedy at law” (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011], *see Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]). Defendants argue New York Law does not apply. “Delaware law provides a right to accounting only in the following circumstances: (1) where there are mutual accounts between the parties; (2) where the accounts are all on one side but there are circumstances of great complication; and, (3) where a fiduciary relationship exists between the parties and a duty rests upon defendant to render an account” (*Weiner v King*, 43 Misc 3d 1203(A) [NY Sup 2014]). Accountings have been granted where the defendants had control of the books and owed fiduciary duties, and where the defendants failed to maintain accurate records (which they have a duty to do) (*id.*; *Carlson v Hallinan*, 925 A2d 506, 537 [Del Ch 2006], *op clarified*, CIV.A. 19466, 2006 WL 1510759 [Del Ch May 22, 2006]; *Debbs v Berman*, CIV.A. 7973, 1986 WL 8399, at *2 [Del Ch Aug. 1, 1986]). According plaintiff the benefit of every possible inference, plaintiff has alleged facts sufficient to state a claim. This branch of the motion to dismiss (Claim 8) is denied.

IV. 005 Motion to Dismiss by Lepor

Lepor moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(3), (a)(5) and (a)(7) (documentary evidence, legal capacity, prior disposition, failure to state a cause of action). Lepor asserts that the arguments regarding the derivative claims against Lepor are similar to those asserted against Arnold and Black above and should be dismissed.

A. Lepor Arguments

Lepor also argues that the fraud claims are time-barred because the conduct alleged occurred in 2009, and plaintiff received the books and records in July 2009. The statute of limitations in Delaware is 3 years, and in New York it is 6 years from the event or 2 years from discovery. Either way, plaintiff sold the relevant portion of his interest in MedReviews on December 31, 2009, almost 8 years before the suit was filed. Further, on July 24, 2009, plaintiff received spreadsheets of MedReviews’ financial information, which revealed \$257,000 in travel and entertainment expenses in 2008 (005 Memo at 10). Therefore, plaintiff was on notice of the expenditures as of that date. Additionally, Lepor had emailed plaintiff discussing how Lepor had been charging expenses and would continue to do so (*id.* at 10-11).

Lepor also argues that plaintiff has failed to allege supporting facts with the required specificity. The complaint only vaguely states that Lepor told him at some point that MedReviews’ financial performance was lacking and that, to proceed, Lepor needed to be the majority

shareholder. These allegations are vague and do not meet the requirements of CPLR 3016(b).

The Agreement contains a merger clause (section 17.1). It bars misrepresentation claims (005 Memo at 11).

B. Plaintiff's opposition

Brawer notes that Lepor has only moved to dismiss the derivative counts (1 and 7) and the fraud claim (4) (005 Opp at 23-24). He argues he has pled sufficiently that Lepor withheld the key information that the reduced value of the company was due to Lepor's actions in charging personal expenses to the company when they discussed the company's financial straits. Brawer is not required to plead the exact time and place of the particular communications. It is enough to "provide sufficient detail to inform defendants of the substance of the claims" (005 Opp at 13, quoting *Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept 2003]). Nor did the provided financial documents reveal Lepor's conduct. All they show is that money was spent on "travel and entertainment," a misrepresentation that the money was spent on company business or business development (005 Opp at 14).

Brawer also argues that, although his cause of action accrued in 2009, he only discovered the fraud in November 2016, when he got access to the company Quickbooks files (*id.* at 15). The claim is timely because it was filed within 2 years of discovery. The documents provided in 2009 did not indicate the personal nature of the expenses. They listed only a line item for "travel and entertainment," which is not enough to put plaintiff on notice (*id.* at 16). Further, the e-mails exchanged in 2009 (*see* NYSCEF Doc. No. 78) only indicate the company made reimbursements for travel and meals, not that these were not business expenses (005 Opp at 16). The fact that the company reimbursed Lepor is not sufficient notice, without the information that the reimbursements were for non-business expenditures (*id.*). As far as Lepor claims the large amount of the reimbursements should have put Brawer on notice, such a clue is insufficient to qualify as notice of the claim (*id.* at 18). Lepor owed Brawer a duty to provide such information. Brawer also argues Lepor is equitably estopped from asserting a statute of limitations defense because it is his own wrongdoing which caused the delay between the accrual and filing of the claim (*id.* at 20).

Finally, Brawer argues the merger clause is irrelevant, as only an express disclaimer of reliance on the statement will bar claims for fraudulent inducement (*id.* at 22). The general merger clause in the Agreement does not refer to the specific misrepresentations at issue.

C. Reply

In reply, Lepor makes clear he is moving to dismiss all claims alleged against him (005 Reply at 2).

The derivative claims should be dismissed because plaintiff lacks standing. Brawer made demand on the company, and the company took action. Plaintiff has not pled facts to support the acting directors' bad faith.

The fraud claim is not pled with the required particularity (*id.* at 6). Plaintiff does not specify the place, time, or manner for communicating the statements, the specific content, or the precise nature of the damage to plaintiff or the benefit to defendant (*id.* at 7).

The fraud claim is also time-barred. Plaintiff had access to the company's financial documents in 2009 and those documents showed the amount of money spent on travel and entertainment expenses in 2008 (*id.* at 8-9). As a managing member of MedReviews in July 2009, Brawer had a duty to investigate any suspected fraud, and he did nothing (*id.* at 11). As far as plaintiff claims equitable estoppel, that argument requires a separate wrong in addition to the original tort, here the fraud (*id.* at 12, citing *Knobel v Shaw*, 90 AD3d 493, 494 [1st Dept 2011] ["[E]quitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action"]) [quoting *Kaufman v Cohen*, 307 AD2d 113, 122 [2003]].

D. 005, Discussion

The derivative claims against Lepor fail for the same reasons those claims failed in motion 004, discussed above.

Regarding the statute of limitations defense to claims 4 and 5 (Fraud and Fraudulent Inducement), Lepor has not shown that the communications and documents provided in 2009 put Brawer on notice of the additional reimbursements, of which he complains here. The documents themselves do not reveal that reimbursements are being made for non-business purposes, and whether the documents should have raised a red flag is an issue of fact. The allegations are sufficiently specific to satisfy the requirements of CPLR 3016 (b).

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169

[1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). “[A] cause of action for fraudulent concealment also requires a duty on the part of the defendant to disclose material information and the failure to do so” (*Hogan Willig, PLLC v Kahn*, 145 AD3d 1619, 1621 [4th Dept 2016]). “In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform” (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; see also *J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] “[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud”). Representations of opinion, even as to matters of fact, are not actionable unless guaranteed (see *Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

Here, the misrepresentation is about the company’s financial condition and why it was in a precarious state. CPLR 3016 (b) “requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 494 [2008]). That standard has been met by the allegations here.

That branch of the motion seeking dismissal of the fourth and fifth causes of action, fraud and fraudulent inducement, is denied.

V. Brewer Cross Motion for Summary Judgment

Plaintiff cross-moves for summary judgment on claims 10 through 13, seeking a declaration that defendants are prohibited from charging personal expenses to MedReviews, an injunction enjoining them from doing so, a declaration that defendants must indemnify plaintiff against harm from any such misconduct, and awarding plaintiff attorneys’ fees. As claims 11 through 13 have been dismissed for the reasons discussed above, the court will not return to the issues raised in those claims.

As to the remaining issues, the motion must be denied as premature because issue has not yet been joined (see *City Rochester v Chiarella*, 65 NY2d 92, 101 [1985] [“A motion for summary judgment may not be made before issue is joined. . . and the requirement is strictly adhered to”]; *AQ Asset Mgt. LLC v Levine*, 128 AD3d 620, 622 [1st Dept 2015]).

VI. CONCLUSION

For the reasons discussed above, the motions to dismiss shall be granted as to claims 1, 2, 3, 6, 7, 9, 11, 12 and 13 only. Claims 4, 5, 8, and 10 shall survive.

It is hereby

ORDERED that the motion to dismiss of defendants MedReviews, LLC, Jeffrey Arnold and Steven Black (motion sequence number 004) is GRANTED to the extent that the First, Second, Third, Sixth, Seventh, Ninth, Eleventh, Twelfth and Thirteenth causes of action are DISMISSED and is otherwise DENIED; and it is further

ORDERED that the motion to dismiss of Herbert Lepor is GRANTED to the extent that the First, Third, Seventh and Thirteenth causes of action are DISMISSED and is otherwise DENIED; and it is further

ORDERED that the cross motion of plaintiff for partial summary judgment is DENIED; and it is further

ORDERED that counsel for the parties shall appear at a preliminary conference on Tuesday, June 11, 2019 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: April 24, 2019

ENTER,

O. PETER SHERWOOD J.S.C.