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| Rapisarda v Lifeline Ambulance Serv., Inc. |
| 2021 NY Slip Op 32544(U) |
| December 1, 2021 |
| Supreme Court, Kings County |
| Docket Number: Index No. 515301/2020 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ALONZO RAPISARDA; RAPISARDA CORPORATE
STOCK TRUST; ANTHONY RAPISARDA; GRACE
RAPISARDA; JOHN RAPISARDA; and PAUL
RAPISARDA,

Plaintiff, Decision and order

- against -

Index No. 515301/2020

LIFELINE AMBULANCE SERVICE, INC.; UDER
HEALTH MANAGEMENT, LLC; MARVIN RUBIN;
SOLOMON RUBIN; MOSES (a/k/a "Michael")
WERZBERGER; JOEL LANDAU; ELIMELECH
RUBIN; and MORDECAI FEIG,

Defendants, December 1, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3025 seeking to amend the pleadings to assert counterclaims. The plaintiffs have opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on August 22, 2018 the plaintiffs and defendants entered into a security pledge agreement whereby the plaintiffs agreed to sell their interest in defendant Lifeline Ambulance Service Inc., for two million dollars. That amount was to be paid in installments and was personally guaranteed by defendants Joel Landau, Marvin Rubin, Moses Michael Werzberger, Mordecai Feig, Solomon Rubin and Elimelech Rubin. A payment due June 10, 2019 was not made and pursuant to the agreements the plaintiffs now seek the full amount due of approximately \$1,015,000 and late fees of

approximately \$20,000. The court denied an earlier motion seeking summary judgment in lieu of a complaint on the grounds there were questions of fact whether the plaintiffs fraudulently induced the defendants to sign the agreement by inflating and misrepresenting the true value of the entity.

The defendants now seek to assert two counterclaims alleging fraudulent inducement and fraudulent misrepresentation. The plaintiffs oppose the request.

Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

It is further well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & McLaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Likewise, to state a claim for fraudulent misrepresentation the party must establish a misrepresentation of fact that was false when made for the purpose of inducing another to rely upon it and they justifiably relied upon it to their detriment (Mandarin Trading Ltd., v. Wildenstein, 16 NY3d 173, 919 NYS2d 465 [2011]). Thus, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]).

The counterclaims proposed essentially assert the plaintiffs misrepresented revenue earned by engaging in fraudulent Medicare billing practices which they knew were fraudulent. The counterclaims state the defendants relied upon those misrepresentations in agreeing to purchase the plaintiff companies. The plaintiffs do not really substantively oppose the


motion except to note that the defendants reneged upon a proposed settlement which would have resolved all outstanding claims. However, even if true, that is not a basis upon which to oppose allegations of fraud. The plaintiffs further argue the defendants waited an excessive amount of time in which to file the motion and that somehow such delay is an attempt to "manipulate the judicial system at Plaintiffs' expense" (see, Affirmation in Opposition, ¶27). However, that allegation, which can only be interpreted as prejudice, fails to explain why any delay in seeking the counterclaims actually resulted in any prejudice to the plaintiffs. This is particularly true since the court only recently denied the motion seeking summary judgement. Thus, discovery has only just begun, therefore, a motion seeking to assert counterclaims cannot be deemed so late as to deny their potential merits.

Therefore, the plaintiffs have failed to substantively demonstrate the proposed amendments have no merit. Consequently, the motion seeking to add these counterclaims is granted.

So ordered.

ENTER:

DATED: December 1, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC