

**Fordham Fin. Mgt., Inc. v Rekor Sys., Inc.**

2022 NY Slip Op 33552(U)

October 7, 2022

Supreme Court, New York County

Docket Number: Index No. 654571/2020

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

FORDHAM FINANCIAL MANAGEMENT, INC., Plaintiff, INDEX NO. 654571/2020, MOTION DATE 08/18/2022, MOTION SEQ. NO. 003

- v -

REKOR SYSTEMS, INC., Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112 were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion is granted, and defendant's cross-motion is denied.

Background

On October 29, 2018, defendant, Rekor Systems, Inc. ("Rekor"), then known as Novume Solutions, Inc., entered into an underwriting agreement (the "Underwriting Agreement") with ThinkEquity, a division of plaintiff, Fordham Financial Management, Inc. ("FFM"), to underwrite a public offering of Rekor's common stock (the "Offering"). NYSCEF Doc. No. 64.

Pursuant to Section 7.3 of the Underwriting Agreement:

Provided that the [Rekor] Shares are sold in accordance with the terms of this Agreement, [FFM] and The Benchmark Company, LLC ("Benchmark") shall each have an irrevocable right of first refusal on an equal basis in each of their sole discretion (the "Right of First Refusal"), for a period of fifteen (15) months after the date the Offering is completed, to act as sole investment bankers, sole book-runners, and/or sole and exclusive placement agents, at [FFM] and Benchmark's sole and exclusive discretion, for each and every future public and private equity and debt offering, including all equity linked financings (each, a "Subject Transaction"), during such fifteen (15) month period, of the Company, or any successor to or subsidiary of the Company, on terms and conditions customary to [FFM] and Benchmark for such Subject Transactions. ...

[Rekor] shall notify [FFM] and Benchmark of its intention to pursue a Subject Transaction, including the material terms thereof, by providing written notice thereof by registered mail or overnight courier service addressed to [FFM]. If

both [FFM] and Benchmark fail to exercise their Right of First Refusal with respect to any Subject Transaction within ten (10) Business Days after the mailing of such written notice, then [FFM] and Benchmark shall have no further claim or right with respect to the Subject Transaction. [FFM] and/or Benchmark may elect, in its sole and absolute discretion, not to exercise its Right of First Refusal with respect to any Subject Transaction ... If both [FFM] and Benchmark do not elect to exercise the Right of First Refusal and the material terms of the Subject Transaction are subsequently materially modified as to scope and nature, then the Company shall resubmit the proposed modified terms of the Subject Transaction in writing to [FFM] and Benchmark, and [FFM] and Benchmark shall have ten (10) Business Days after receipt of such written notice to advise the Company of its respective election to participate in the proposed transaction...

NYSCEF Doc. No. 64.

Section 9.4 of the Underwriting Agreement provides that the “Agreement may only be amended by a written instrument executed by each of the parties hereto.” Id.

Section 9.7 of the Underwriting Agreement provides that Rekor “agrees that the prevailing party(ies) in any such action shall be entitled to recover from the other party(ies) all of its reasonable attorneys’ fees and expenses relating to such action or proceeding and/or incurred in connection with the preparation therefor.” Id.

Schedule 2-A of the Underwriting Agreement listed 4,125,000 Firm Shares on offer, set the “Public Offering Price per Share” at \$0.80, and projected “Proceeds to Company per share (before expenses)” at \$0.744. Id.

Also on October 29, 2018, a Prospectus Supplement (the “Prospectus”) was filed with the Securities and Exchange Commission (the “SEC”) to Rekor’s “shelf” registration statement Form S-3, File No. 333-224423. NYSCEF Doc. No. 66.

Pursuant to the Prospectus, Rekor estimated “the net proceeds from the sale of the shares of common stock that we are offering hereby will be approximately \$2.8 million, or approximately \$3.2 million if the underwriters exercise in full their option to purchase additional shares to cover overallotments, in each case, after deducting underwriting discounts and commissions and estimated offering expenses payable by us.” Id.

The Offering closed on November 1, 2018, and Rekor had a net return of \$2.8 million. NYSCEF Doc. Nos. 63 and 77.

On August 14, 2019, Rekor entered into an “At Market Issuance Sales Agreement” (the “Sales Agreement”) with non-party B. Riley FBR, Inc. (“B. Riley”), n/k/a B. Riley Securities, Inc., to run a so-called “At the Market” sale (“ATM Sale”). NYSCEF Doc. No. 65.

Pursuant to Schedule 2 of the Sales Agreement, B. Riley was entitled to “an amount equal to 3.0% of the gross proceeds from each sale.” NYSCEF Doc. No. 65.

On September 18, 2020, FFM commenced the instant action asserting three causes of action: (1) breach of contract; (2) declaratory judgement; and (3) for legal fees. NYSCEF Doc. No. 63.

On September 21, 2020, Rekor “elected to voluntarily terminate its Sales Agreement with” B. Riley having “sold an aggregate of 6,509,202 shares of common stock pursuant to the Sales Agreement, which resulted in aggregate gross proceeds of \$34,154,000.” NYSCEF Doc. No. 69.

On April 22, 2021, Rekor answered the complaint and asserted five counterclaims: (1) fraud; (2) breach of contract; (3) negligence; (4) breach of fiduciary duty; and (5) breach of good faith and fair dealing. NYSCEF Doc. No. 77.

On June 23, 2021, FFM moved to dismiss Rekor’s counterclaims; and in a Decision and Order dated October 20, 2021, this Court granted the motion without prejudice to renew. NYSEF Doc. Nos. 16 and 31.

On November 11, 2021, Rekor moved to reargue; and in a Decision and Order dated March 3, 2022, this Court granted the motion and, upon reargument, adhered to its original determination. NYSCEF Doc. Nos. 34 and 58.

On April 7, 2022, FFM moved, pursuant to CPLR 3212, for summary judgment on its first and third causes of action. NYSCEF Doc. No. 60.

On May 26, 2022, Rekor cross-moved, pursuant to CPLR 3212, for summary judgment dismissing FFM’s complaint, and, pursuant to CPLR 3124, to compel responses to outstanding discovery demands. NYSCEF Doc. No. 74.

### Discussion

To obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.” Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (citations omitted).

The elements of a breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep’t 2010).

Here, it is undisputed that there was a contract between plaintiff and defendant: the Underwriting Agreement. NYSCEF Doc. Nos. 63 and 77.

There is also no real dispute that plaintiff performed under the Underwriting Agreement. The parties contracted “to issue and sell to the several Underwriters, an aggregate of 4,125,000 shares” of Rekor common stock, and those shares were sold.

Rekor implies FFM did not fully perform because it allegedly promised greater proceeds than the “undersized” \$2.8 million actually raised. NYSCEF Doc. Nos. 77 ¶56 and 77 ¶7. But Rekor’s evidence of these promises are mere bald assertions unsupported by documentary evidence. According to the Prospectus, the parties “estimate[d] that the net proceeds from the sale of the shares of common stock that we are offering hereby will be approximately \$2.8 million” and Rekor’s net return from the Public Offering was \$2.8 million. NYSCEF Doc. No. 77 ¶ 56.

The question, then, is if the Underwriting Agreement was breached and, if it was, then when and by whom.

Section 7.3 of the Underwriting Agreement says that, as long as Rekor’s shares were “sold in accordance with the terms of” the Underwriting Agreement, FFM was entitled to an irrevocable Right of First Refusal for 15 months after the completion of the sale “to act as sole investment bankers, sole book-runners, and/or sole and exclusive placement agents ... for each and every future public and private equity and debt offering, including all equity linked financings (each, a “Subject Transaction”).”

FFM alleges that Rekor breached when it entered into the Sales Agreement with B. Riley on August 14, 2019, because the ATM Sale that agreement created was exactly the sort of Subject Transaction the Underwriting Agreement’s Right of First Refusal provision contemplated, and the Sales Agreement was entered into within 15 months of the conclusion of the Offering.

In reply, Rekor first argues that its Sales Agreement with B. Riley was not the kind of “Subject Transaction” contemplated by the Underwriting Agreement. That argument fails because: (1) the Sales Agreement clearly describes an equity offering; and (2) defendant when it filed its answer admitted as true the statement the “Sales Agreement involves a Subject Transaction under Section 7.3 of the Underwriting Agreement that occurred during [FFM’s]’ Right of First Refusal period.” NYSCEF Doc. No. 77 ¶ 16.

Next, defendant argues that FFM had already terminated the Underwriting Agreement by allegedly declining to manage an ATM Sale on Rekor’s behalf. Specifically, Rekor says it engaged FFM in a conversation about a future offering, but that “when the discussions pivoted thereafter to an ATM Program in lieu of a conventional offering, [FFM] declined the opportunity to manage it.”

In support of this argument Rekor submits: (1) a July 30, 2019, email from Eric Lord (“Lord”), FFM’s Head of Investment Banking, to Robert A. Berman (“Berman”), Rekor’s CEO, in which FFM proposed “preparing to market” a non-ATM Sale offering; and (2) an affidavit from Berman in which he alleges that after the previously cited email, William Baquet (“Baquet”), FFM’s President, orally declined to conduct an ATM Sale on Rekor’s behalf (“We can’t do that.”). NYSCEF Doc No. 85 and 78 ¶18. Berman further alleges “there may have also been a text exchange confirming these discussions” but because Berman had “changed phones and providers” his “search for those texts came up empty.” Id.

This argument is also unavailing - even if a text thread were to be found - as Rekor has failed to show, or that it might be able to show, that it notified FFM “of its intention to pursue a Subject Transaction, including the material terms thereof, by providing written notice thereof by registered mail or overnight courier service,” as required by Section 7.3. Nor has Rekor shown any evidence that the parties amended the Underwriting Agreement to allow for such notice to be oral or via text message, as required by Section 9.4 of the Underwriting Agreement. Tierney v Capricorn Inv'rs, L.P., 189 AD2d 629, 631 (1st Dep’t 1993) (“When a written contract provides that it can only be changed by a signed writing, an oral modification of that agreement, as here, is not enforceable.”); see also General Obligations Law § 15-301(1).

Lastly, Rekor argues, both in Berman’s affidavit and an affidavit of Georgetown University associate professor James J. Angel, that FFM breached the Underwriting Agreement, and potentially SEC regulations, by orchestrating the Public Offering in a “suspicious” manner possibly involving “naked” short selling. NYSCEF Doc. Nos. 78, 94, and 97. As such, Rekor argues that further discovery is necessary. But this argument not persuasive as Rekor, which by its own admission has been aware of these alleged violations since December 2018 (*after* the Public Offering and *before* Rekor began discussions of another sale with FFM), has failed over the past two years of this case to pursue discovery and now offers no basis to suggest that discovery might lead to relevant evidence. See Bailey v New York City Tr. Auth., 270 AD2d 156, 157 (1st Dep’t 2000).

Further, this Court addressed Rekor’s “naked” short selling suspicions in its Decision and Order dated October 20, 2021. NYSCEF Doc. No. 31.

Therefore, Rekor materially breached the Underwriting Agreement when it did not grant FFM a Right of First Refusal to manage a Subject Transaction within 15 months of the conclusion of the Public Offering.

The only remaining question, then, is to determine what damages, if any, FFM suffered because of Rekor’s breach.

FFM argues that it is entitled to the same “commission equal to 3.0% of the gross proceeds from each sale of the Shares” which B. Riley earned from the ATM Sale pursuant to the Sales Agreement, or \$1,024,620 (3% of the gross proceeds of \$34,154,000 which Rekor reported to the SEC). NYSCEF Doc. Nos. 70 and 69.

Rekor objects that the damages FFM seeks in the instant motion (\$1,024,620) are far greater than those which it sought in its initial complaint (“damages in an amount to be determined at trial, but believed to be in excess of \$236,000”), and argues that any damages are “academic” but also that because “the vast majority of the proceeds yielded by the ATM [Sale] were not generated until the late summer and early fall of 2020, well after the expiration of plaintiff’s Right of First Refusal ... Plaintiff cannot collect commissions based upon market activity that occurred outside the” Right of First Refusal Period.

Defendant is incorrect. The damages here are not academic – a Subject Transaction occurred to which FFM was unable to either exercise its Right of First Refusal or collect a commission on – and plaintiff clearly left room in its complaint to determine a final amount at a later date. It also

fails because, if FFM had been offered the opportunity to exercise its Right of First Refusal to operate the ATM Sale, it is hardly speculative that such a sale and its commissions would have continued beyond the 15 months of the Right of First Refusal period.

Thus, FFM suffered damages in the amount of \$1,024,620.00 (3% of the gross proceeds of \$34,154,000.00 from the ATM Sale which Rekor reported to the SEC). Matter of Rothko's Estate, 43 NY2d 305, 323 (1977) (“[S]o long as the figure arrived at had a reasonable basis of computation and was not merely speculative, possible or imaginary, the [court] had the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense in arriving at that amount. This is particularly so where the conduct of wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible.”) (internal citations omitted).

Accordingly, this Court grants FFM’s first cause of action for breach of contract and dismisses Rekor’s cross-motions. Further, this Court, sua sponte, dismisses plaintiff’s second cause of action for declaratory judgment, as duplicative.

This Court has considered defendant’s remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

Thus, plaintiff Fordham Financial Management, Inc.’s motion for summary judgment is granted on its first and third causes of action; its second cause of action is dismissed sua sponte; defendant Rekor Systems, Inc.’s cross-motions for summary judgment and to compel discovery are denied; and the Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,024,620.00 plus pre-judgment interest at the statutory rate from August 14, 2019.

It is further ordered that plaintiff’s request for summary judgment on its cause of action for attorneys’ fees is granted on liability only, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff’s failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest.

10/7/2022  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE