

Spicer v GardaWorld Consulting (UK) Ltd.
2022 NY Slip Op 33841(U)
November 10, 2022
Supreme Court, New York County
Docket Number: Index No. 655352/2017
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

<p>TIMOTHY SIMON SPICER, JEFFREY PAUL ARNOLD DAY, MARK ANDREW BULLOUGH, DOMINIC EDWARD MCCAUSLAND ARMSTRONG, LORD PETER ANTHONY INGE, JOHN ALLAN BIRCH, JAMES WILLIAM MARRIOTT ELLERY</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p style="text-align: center;">GARDAWORLD CONSULTING (UK) LIMITED,</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>655352/2017</u></p> <p>MOTION DATE <u>N/A</u></p> <p>MOTION SEQ. NO. <u>013</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
---	---

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 531, 541, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents and for the reasons set forth on the record (10.28.22, 10.31.22),

Timothy Simon Spicer, Jeffrey Paul Arnold Day, and Mark Andrew Bullough's (collectively, the **Counterclaim Defendants**) motion for summary judgment dismissing GardaWorld Consulting (UK) Limited's (**Garda**) counterclaims for fraud and aiding and abetting fraud must be granted.

The Relevant Facts and Circumstances

Reference is made to (i) a Decision and Order (the **Summary Judgment Decision**; NYSCEF Doc. No. 165), dated September 10, 2018, pursuant to which the court (Ramos, J.) granted the plaintiffs' motion for summary judgment for declaratory judgment and denied Garda's motion

for summary judgment to dismiss that claim, (ii) a Decision and Order dated June 3, 2021 (the **Severance Decision**; *Spicer v GardaWorld Consulting (UK) Ltd.*, 198 AD3d 522 [1st Dept 2021], *lv denied* 38 NY3d 903 [2022]), pursuant to which the Court severed the Plaintiffs' declaratory judgment claim from Garda's counterclaims (iii) a Judgment, (the **Judgment**; NYSCEF Doc. No. 386) dated June 8, 2021, and filed on June 29, 2021 and (iv) a Decision and Order dated April 14, 2022 (the **Attachment Decision**; NYSCEF Doc. No. 481; the Attachment Decision, together with the Summary Judgment Decision, the Severance Decision, and the Judgment, hereinafter, collectively, the **Prior Decisions**) denying Garda's application for a temporary restraining order and an order of attachment to prevent collection of the Earnout Payment (hereinafter defined) holding that, among other things, (x) Garda sought an attachment to prevent the payment of funds it had previously agreed to pay, (y) Garda failed to demonstrate irreparable harm, and (z) Garda had not established a likelihood of success on the merits of its counterclaims.

The relevant facts are set forth in the Prior Decisions. Familiarity is presumed. Briefly, Garda and the Plaintiffs entered into a transaction pursuant to which Garda purchased all of the shares in Hestia B.V. (the **Company**) which owned Aegis Defense Services LLC (**Aegis**) for approximately \$200 million. The base price was approximately \$130 million. Approximately \$70 million of the price was deferred as an **Earnout Payment**.

Prior to entering into a certain Purchase and Sale Agreement (the **PSA**; NYSCEF Doc. No. 545), dated as of July 10, 2015, by and among the Company, Garda, the Sellers (*i.e.*, the shareholders of the Company), and Mr. Day as the Sellers' Representative, the well-represented parties

engaged a series of professionals, including KipsDeSanto & Co., Crowell & Moring LLP (**Crowell & Moring**), and Deloitte LLP (**Deloitte**). Deloitte issued a Due Diligence Report to Garda dated April 2, 2015, *i.e.*, three months before the PSA was executed. In the Due Diligence Report, Deloitte warned Garda, among other things, that there were significant issues with respect to certain amounts recognized as a revenue and recorded as accounts receivable because of missing documentation:

At Dec-14, the Company had \$37.1 million of unbilled revenue on the balance sheet which has been recognized in earnings over the Jul-12 to Dec-14 period. \$2.8 million of this balance relates to revenue recognized prior to June 2013, and an additional \$2.5 million was recognized in the July 2013 to June 2014 period. Management advised they expect these balances to be collected and have been in the process of gathering the appropriate documentation

(NYSCEF Doc. No. 523, at 19).

Significantly, Deloitte also disclosed that it had quantified the potential impact on pre-closing EBITDA if the balances in the accounts receivable were determined to be uncollectible and determined that the potential impact could reach \$4.8 million (*id.*).

In a subsequent report dated June 5, 2015, one month before the PSA was signed, Deloitte advised Garda to obtain a detailed listing of the unbilled accounts receivable (*i.e.*, the booked but unbilled revenue) and obtain indemnifications relating to the collectability of that balance (NYSCEF Doc. No. 524, at 6).

In addition, and also significantly as it relates to the instant motion, Deloitte also reported to Garda that there were significant concerns about the internal controls of the Company, including (i) that the Company recognizes unbilled revenue by analyzing invoices prepared but not issued,

such that a risk existed that unbilled receivables could be double-recorded, (ii) the auditors did not fully utilize the accounting system and manual analysis may result in errors, and (iii) the Department of State performed an audit of its contract with Aegis and raised questions of invoices that were overbilled or potentially unallowable (NYSCEF Doc. No. 523, at 5).

Crowell & Moring, Garda's legal counsel echoed the concerns articulated by Deloitte in their Due Diligence Report dated as of June 3, 2015:

During diligence, we reviewed certain information about the Company's internal controls and compliance program. Based on our experience with similarly situated companies in terms of the nature, scale, complexity, and scope of government contracts, **it appears that the Company's internal controls and compliance program are comparatively unsophisticated and may not sufficiently mitigate certain of the risks associated with the type and nature of the Company's government contracts.**

Taken individually, any single item or observation may not present a material risk. However, in the aggregate, **our observations suggest that the Company's internal controls may not be sufficiently robust and sophisticated for the types of government contracts the Company is performing.** In addition, the current state of the Company's internal controls may have obscured issues during the diligence process because the Company does not have the mechanism or infrastructure to identify potential risks or noncompliances.

(NYSCEF Doc. No. 495, at 2 [emphasis added]).

Crowell & Moring also reviewed certain cure letters that were identified in the PSA schedules and which Garda received in connection with Camp Eggers. Indeed, in its due diligence report, Crowell & Moring identified the risk raised by these letters: **“[t]he volume and nature of Corrective Action Requests, Letters of Concern, Deficiency Letters, Cure Notices, and an open Office of Inspector General (‘OIG’) Audit – coupled with the lack of comprehensive**

documentation regarding past performance reviews – should be considered a risk factor”

(NYSCEF Doc. No. 495, at 2 [emphasis added]).

In other words, the fact that revenue included certain unbilled (and potentially uncollectible) accounts receivable, that the Company lacked adequate internal controls and that the contract involving Camp Eggers had significant non-compliance and cure notices were all well documented and known to Garda prior to entering into the PSA.

Subsequently, and as a result, when the parties entered into the PSA, the parties agreed that the Earnout Payment would be due if Aegis and other subsidiaries of the Company achieved certain EBITDA and financial results, including as to the collectability of certain accounts receivable and as to Camp Eggers. Put another way, if the Company did not achieve the bargained for financial results, the Earnout Payment would not have been earned and the amount paid for the Company by Garda would have been less (*i.e.*, in approximately the amount of the Earnout Payment and not coincidentally in the amount Garda now claims they are entitled to in damages)¹.

Pursuant to terms of the PSA, the parties agreed to an escrow fund for unbilled accounts receivable that was equal to the amount of unbilled accounts receivable (NYSCEF Doc. No. 545, ¶ 1.9[d][i]). At the time the Earnout Payment, if earned, was to be paid, any of the unbilled accounts receivable that remained unpaid were to be reimbursed from the unbilled accounts

¹ In the Answer with Counterclaims, Garda claimed that EBITDA was overstated by approximately \$4 million and that they overpaid for the Company by approximately \$30 million (NYSCEF Doc. No. 27, ¶ 4). Bruce Bingham, their damages expert, claims that as a result of the Counterclaim Defendants’ alleged fraud, they are entitled to \$67.5 million in damages (NYSCEF Doc. No. 520, at 3) – approximately the amount of the Earnout Payment.

receivable escrow fund, with any remainder be remitted to the Plaintiffs (*id.*, ¶ 1.9[d][i]). The PSA also established an indemnity escrow account with \$5.6 million of the base \$130 million price Garda paid for the Company (*id.*, ¶ 1.9[b]). The Sellers agreed to indemnify Garda, once the indemnity escrow amount was exhausted in full, for losses incurred that result or arise from, among other things, any breach of a representation or warranty (*id.*, ¶ 9.2[a]).

Pursuant to the terms of the PSA, the sellers represented that the financial statements had been prepared in accordance with US GAAP (*id.*, ¶ 3.5[d]) and that the Company and its subsidiaries have sufficient internal controls to provide reasonable insurance about the reliability of their financial reporting (*id.*, ¶ 3.5[f]). Certain representations and covenants regarding Camp Eggers, a contract between the United States Department of State (the **State Department**) and Aegis pursuant to which Aegis was to provide security to the United States embassy in Kabul, Afghanistan, were included in the PSA (NYSCEF Doc. No. 545, ¶¶ 3.29, 7.22). Garda was also aware of substantial issues arising at Camp Eggers, beginning in 2011 because Garda received various cure notices, letters of concern, or deficiency letters sent by the State Department to Aegis before entering into the PSA. These letters (collectively, the **Camp Eggers Cure Notices**), received by Aegis between 2011 and 2015, detailed problems and risks in connection with Aegis' performance of its contractual obligations at Camp Eggers (NYSCEF Doc. Nos. 637-652). As discussed above, these letters were reviewed by Crowell & Moring in its due diligence.

As relevant to the instant motion, Garda filed an answer with counterclaims for fraud and aiding and abetting fraud (the **Answer with Counterclaims**; NYSCEF Doc. No. 27) dated October 13,

2017. The gravamen of the allegations is that the Counterclaim Defendants provided Garda with financial statements that fraudulently overstated the Company's gross profit margins by falsifying its revenue, accounts receivable, and liabilities (*id.*, ¶ 3), Garda relied on these material misrepresentations when it entered into the PSA and ultimately acquired the Sellers' shares in the Company (*id.*, ¶ 4), and that as a result the Company was worth \$30 million less than what Garda agreed to pay (*id.*, ¶¶ 4-5)².

During discovery in this case, Garda learned that the Counterclaim Defendants had a Consolidated CEO Board Report (NYSCEF Doc. No. 587) dated May 6, 2015, that contained a risk register that they did not receive during the due diligence process. The risk register rated risks on a sliding scale. As relevant to the instant motion, among other things, compliance with the schedule and meeting milestones at Camp Eggers (discussed in detail in the Camp Eggers Cure Notices which Garda received and which Garda's advisers commented on prior to Garda entering the PSA as part of the due diligence process) is included as a moderate risk in the risk register.

Garda also learned during discovery that, approximately two weeks prior to the closing, Mr. Day and Mr. Bullough were made aware of concerns regarding the unbilled accounts receivable that they did not disclose to Garda. To wit, Michael Pilon, Aegis' recently appointed CFO (NYSCEF Doc. No. 554) and Rubino & Company, Aegis' outside auditor (NYSCEF Doc. No. 552) indicated that certain revenue/accounts receivable adjustments may be appropriate. Kevin Torlage, Aegis' financial director, emailed proposed adjustments to Mr. Day and Mr. Bullough

² According to Bruce Bingham, Garda's expert, the Company was worth \$67.5 million less as a result (NYSCEF Doc. No. 520, at 3) – approximately the amount of the Earnout Payment.

on September 3, 2015 (NYSCEF Doc. No. 553) and on September 4, 2015, Mr. Day edited a draft memorandum to Mr. Bullough addressing the unbilled accounts receivable (NYSCEF Doc. No. 557). Mr. Day testified that he did not agree with Mr. Pilon's assessment and thought that the issue was immaterial but told him that he could investigate (tr at 213, lines 2-7 [NYSCEF Doc. No. 527]). Mr. Day also testified that all of the information available to him and Mr. Pilon was in the data room and that Deloitte had access to the data room, and that the information in the data room led Deloitte to insist on inserting into the deal an escrow account for the unbilled accounts receivable (*id.*, at 212, lines 10-21).

As discussed above, and significantly, the risk that the unbilled revenue/accounts receivable was disclosed to Garda and its advisers Deloitte and Crowell & Moring indicated that they should seek additional protection with respect to the lack of documentation. Equally significant, in expert discovery, Bruce Bingham evaluated 29 different company-specific risk factors in coming up with \$67.5 million of damages (NSYCEF Doc. No. 498, at 23). When asked at his deposition to quantify the risk factors accounted for whether he could establish a connection between the risk factor and any of his purported damages, he indicated that he could not (tr at 132, lines 15-20 and 133, line 4 [NYSCEF Doc. No. 496]).

Garda asserts five factual predicates for its fraud claims. First, Garda alleges that the Counterclaim Defendants committed a fraud because they failed to disclose a withholding tax liability (the **Withholding Tax Issue**). The liability stemmed from the fact that Aegis calculated withholding tax payments for employees in Afghanistan on a fixed, rather than fluctuating, currency exchange rate. Second, Garda alleges that the Counterclaim Defendants committed a

fraud by capturing money through a favorable exchange rate from money transferred to pay the withholding taxes and keeping this money in a cashbook in Afghanistan to pay operating expenses, such that these expenses were not properly reported in Aegis's books and records (the **Expense Recording Issue**). The Withholding Tax Issue and the Expense Recording Issue together allegedly caused the Company's EBITDA to be overstated by \$2.3 million in the financial statements relied upon at closing. In support of these claims, Garda adduces five weekly situation reports (**Weekly SITREPs**) that it alleges demonstrate that the Counterclaim Defendants knew of these issues. The Weekly SITREPs each contain a provision entitled "Wage Withholding Tax" and a separate line item disclosing the amounts secured from the money sent to pay the withholding tax through the use of favorable exchange rates. For example, one Weekly SITREP from July 23, 2014, disclosed:

8.2.5 Wage Withholding Tax. CMO-A [Aegis's office in Afghanistan] WHT liabilities for June was settled on Thursday 26th June 14. The next payment is due on Thursday 31st July 14

...

8.2.11 CMO Support to TO10 Project Hammerhead

...

o. CMO-A through the use of exchange rates secured \$81,417.00 from WHT payment for the Month of May 14

(NYSCEF Doc. No. 565, ¶¶ 8.2.5, 8.2.11[o])³. Based on these Weekly SITREPs, Garda alleges that the Counterclaim Defendants knew or should have known about these issues.

³ Each of the other Weekly SITREPs submitted by Garda in connection with this motion contain substantially similar sentences, differing only in the amount secured and the month (NYSCEF Doc. Nos. 566-570).

Third, Garda alleges that the Counterclaim Defendants committed a fraud by not disclosing an unpaid liability arising from reimbursements that Aegis received from the State Department at provisional rates that were higher than the year-end adjusted rates which created an obligation for Aegis to reimburse the State Department (the **Credit Rate Issue**).

Fourth, Garda alleges that Aegis failed to maintain necessary documentation for certain portions of its unbilled accounts receivable such that Garda was forced to write off \$3.8 million worth of accounts receivable (the **Unbilled Issue**).

Finally, Garda alleges that certain non-financial risks (the **Non-Financial Risks Issue**) were not disclosed, including that (x) Aegis did not have adequate internal controls as the sellers represented and (y) Aegis's contract for Camp Eggers was performing at a much lower level than expected.

Discussion

On a motion for summary judgment, the movant 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 issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

The elements of a counterclaim for fraud are a material misrepresentation of a fact, knowledge of its falsity, and intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). To the extent that Garda's counterclaim for fraud sounds in fraudulent misrepresentation, the elements are the same (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178). The elements of a counterclaim for aiding and abetting fraud are the existence of an underlying fraud, actual knowledge, and substantial assistance (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503 [1st Dept 2018]). Where a claim sounds in fraud, the circumstances constituting the wrong must be stated in detail (CPLR 3016[b]).

Garda's claims with respect to the Withholding Tax Issue, Expense Recording Issue, Credit Rate Issue, Unbilled Issue fail, and the Non-Financial Risks Issue fail.

Withholding Tax Issue / Expense Recording Issue

In support of their motion, the Counterclaim Defendants each adduce affidavits and testified at depositions that they did not know of the Withholding Tax Issue or the Expense Recording Issue (NYSCEF Doc. No. 499, ¶¶ 6-8; NYSCEF Doc. No. 505, ¶¶ 6-7; NYSCEF Doc. No. 511, ¶¶ 6-7). While generally a self-serving affidavit without more is insufficient to meet a movant's burden on summary judgment (*Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd.*, 100 AD3d 505, 506 [1st Dept 2012]), where a party submits an affidavit testifying that they lacked requisite knowledge, the party opposing the motion must adduce evidence to raise an issue of fact (*Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704, 704 [1st Dept 2011]). Garda fails to do so here. The Weekly SITREPS on which Garda relies are

insufficient to create a material issue of fact for trial. As discussed above, all that is disclosed in those Weekly SITREPs that Garda identifies with respect to the Expense Recording Issue is that Aegis captured money as a result of favorable exchange rates. With respect to the Withholding Tax Issue, all that is disclosed in the Weekly SITREPs is that the withholding taxes were settled and otherwise paid or scheduled to be paid. Thus, the Withholding Tax Issue and Expense Recording Issue claims must be dismissed.

Credit Rate Issue

The Counterclaim Defendants are also entitled to summary judgment based on the alleged fraud caused by the Credit Rate Issue. Simply put, Garda fails to show any damages resulting from the Credit Rate Issue. Garda's own expert, Michael LaCorte, created a table in his report to demonstrate the factors that caused the decrease in EBITDA (NYSCEF Doc. No. 519, at 20). None of it was attributable to the allegedly undisclosed obligation to reimburse the State Department. When asked at his deposition how much of the drop in EBITDA was attributable to the Credit Rate Issue, Mr. LaCorte said the answer was zero dollars (tr at 144, line 9 [NYSCEF Doc. No. 518]). Thus, the fraud claims predicated on the Credit Rate Issue must be dismissed.

Unbilled Issue

The fraud claims predicated on the Unbilled Issue are also doomed. Garda was well advised as to the unbilled revenue/undocumented accounts receivable and the potential financial consequences to Aegis's financial performance if Garda failed to obtain the proper documentation and/or seek proper indemnification. It does not matter that Mr. Day failed to disclose the information he was given approximately two weeks before the closing because, (i) Garda knew of the problem and

they were advised as to its financial impact and (ii) Garda is unable to establish any damages associated with this risk (discussed below). On the record before the court, Mr. Day testified, he thought this issue was immaterial but authorized Mr. Pilon to investigate. The information that led Mr. Pilon to want to conduct an investigation was in the data room and Deloitte and Crowell & Moring had access to the data room. It was this information that led Deloitte to insist on an escrow for the unbilled accounts receivable. The fact that the escrow was not sufficient does not amount to fraud. Because Garda was advised to the Unbilled Issue and cannot demonstrate damages associated with it, there can be no justifiable reliance and the claim fails (*Kumiva Group, LLC v Garda USA Inc.*, 146 AD3d 504, 508-509 [1st Dept 2017]).

For completeness, Garda's reliance on *DDJ Mgt., LLC v Rhone Group LLC*, 15 NY3d 147 (2010) is misplaced. In that case, the defendant recipients of \$40 million of loans from the plaintiffs represented that their financial statements accurately reflected the company's financial position, that no event had occurred that would have a material adverse impact on the company, and that the loan documents, loan agreement, and financial statements contained no false statements or material omissions (*id.*, at 153). These representations were all false. The plaintiffs alleged that they relied on those representations in making the loans (*id.*). The trial court granted the motion to dismiss in part and the Appellate Division affirmed in part and reversed in part, holding that the fraud claims asserted by the plaintiffs should have been dismissed because the plaintiffs failed to conduct due diligence and merely relied on the defendants' representations. The Court of Appeals reinstated the fraud claims holding that for CPLR 3211 purposes, the plaintiffs had stated a fraud claim. As an initial matter, the Court notes that the procedural posture of that case is different than the case at bar. This is a motion for

summary judgment. Most importantly, unlike in *DJJ*, the Counterclaim Plaintiffs in this case were on specific notice of the very issues that caused the problems. Garda could not turn a blind eye to their actual specific knowledge of the very issue and the magnitude of the problem and argue that they reasonably relied on the representation in the PSA that the financial statements were prepared in accordance with GAAP. Thus, the *DJJ* simply does not apply to this case and the claims must be dismissed.

Non-Financial Risk Issue

Finally, the Non-Financial Risk Issue can not form the basis for a fraud claim either. To the extent that the Garda predicates these claims on the lack of internal controls or the risks associated with non-compliance at Camp Eggers, as discussed above, this was all disclosed and Garda received the letters of non-compliance associated with Camp Eggers. Both Deloitte and Crowell & Moring gave Garda analysis and advice as to these issues before Garda executed the PSA. In fact, the deal was structured to account for these risks. Patrick Prince, CEO of Garda, testified that the Earnout Payment was reliant on Aegis's performance with respect to Camp Eggers (tr at 241, lines 5-9 [NYSCEF Doc. No. 494]).

In its opposition papers, Garda argues that their claims must proceed to trial because it is undisputed that the Counterclaim Defendants did not disclose the risk register or the revenue concern with respect to the unbilled accounts receivable discussed internally by Mr. Day, Mr. Pilon and Rubino & Company approximately two weeks prior to the closing. The argument fails.

As discussed above, the Court notes that the parties specifically negotiated the Earnout Payment accounting for the risks associated with Camp Eggers. Second, the risks associated with Camp Eggers non-compliance including the Camp Eggers Cure Notices themselves were disclosed. Third, and most significantly, Garda can not establish its actual pecuniary loss directly **caused** by the fraudulent inducement (*Kumiva*, 146 AD3d at 506). This is fatal.

Based on *Kumiva*, to proceed to trial, Garda must be able to show (i) the actual value of the consideration received and (ii) that the Counterclaim Defendants' fraudulent inducement directly caused Garda to agree to deliver consideration greater than the value of the consideration received (*id.*). Garda would then be entitled to the difference between the value of the received consideration and the delivered consideration (*id.*). Critically, Garda's expert Bruce Bingham testified that he could not do that. At his deposition, Mr. Bingham said that "I am not going to be able to give you any specific building block A plus B plus C in determining my company's specific risk. This is a component of considering many, many qualitative factors ... Really add up to professional judgment call (tr at 115-116, lines 20-7 [NYSCEF Doc. No. 496]). When asked whether he could quantify the impact of industry specific risk, Mr. Bingham answered "[n]ot really. Again, it's a cumulative impact of the risk" (*id.*, at 116, lines 18-20). When asked what portion of his damages two specific risk factors constituted, Mr. Bingham responded "I did not have a formulaic allocation of certain percentages to the company specific risk. It was a judgmental conclusion based upon the evidence I saw" (*id.*, at 132, lines 15-20). Finally, when asked if he could quantify what portion of his damages specific risk factors accounted for, Mr. Bingham answered "[n]ot really. No" (*id.*, at 133, line 4). The inability to establish any causation mandates dismissal.

The Court has considered the Counterclaim Plaintiffs remaining arguments and finds them unavailing.

It is hereby ORDERED that the motion for summary judgment is granted.


20221110134054ABORROK9AAE4FB834EAF63B903985BCFFE30DE6

11/10/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE