SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 6

AMNON PARIZAT and ION TECHNOLOGY SOLUTIONS, LLC,

Plaintiffs,

- against -

OVADIA MERON, GALIT MERON, and JOHN DOES 1-3,

Defendants.

Index No.: 611677-21
Motion Date: 4-11-2022
Sequence No.: 001

DECISION and ORDER

The following papers were read on this motion:
Motion Seq. 001

Notice of Motion, Affidavit and Exhibits.....	1
Memorandum of Law in Opposition.....	2
Memorandum of Law in Reply, Affirmation and Exhibits.....	3

PRELIMINARY STATEMENT

In Motion Sequence 001, Plaintiffs bring this Order dismissing Defendant's Amended Counterclaims pursuant to CPLR §3211(a)(1)(5), and (7), and granting such other and further relief as this Court deems just and proper. Opposition and reply have been submitted.

BACKGROUND AND DISCUSSION

Upon the foregoing papers, Plaintiff AMNON PARIZAT and ION TECHNOLOGIES' motion, pursuant to CPLR §3211(a)(1), (5), and (7) to dismiss Defendant, OVADIA MERON's counterclaims is determined as set forth hereinafter.

The Facts

In or about February 1995, Defendant OVADIA MERON ("Meron") established non-party Discreet Industries Corporation ("Discreet") a company engaged in the semi-conductor

business. Discreet designed, manufactured, and marketed two main lines of spare semi-conductor parts, (1) the Physical Vapor Deposition ("PVD") line and the (2) ION Implant ("Implant") process use line. In or about 2001, Discreet was the subject of a lawsuit by a competitor, non-party Tokyo Electron Arizona LLC ("Tokyo") alleging misappropriation of trade secrets. On April 1, 2004, Tokyo prevailed in its action, receiving a judgment against Discreet in the amount of $10,000,000.

As a result of the judgment, Discreet sold its PVD line to non-party Unitek Solutions. The Implant line was sold to non-party I Technology Solutions ("ITS"), an entity owned by non-party David Israel, a personal friend of Meron's. Meron became an employee of ITS. Allegedly, ITS bought the implant line for $50,000, subject to an oral promise that ITS would merely hold the line for Meron, who would still be the beneficial owner of the Implant line. Subsequently, ITS was sold to non-party Moses Mizrahi ("Mizrahi") for $45,000. Meron alleges that as part of the sale, it was agreed that he would remain an employee of ITS and that ITS would continue to "hold" the Discreet line for his benefit.

Meron then alleges that in or about the beginning of 2008, he and Plaintiff/Counterclaim Defendant AMNON PARIZAT ("Parizat") began discussions about forming a joint business venture with the Implant line. Parizat allegedly told Meron that he did not want to become partners with him unless the business could be expanded, which Parizat ultimately concluded it could with his guidance. Meron alleges that it was eventually determined that Parizat would replace Mizrahi as the registered owner of ITS. Meron claims that he and Parizat agreed that they would be fifty-fifty partners in a new company to be formed and that ITS would transfer all of its assets to the new company. Parizat allegedly "specifically indicated" to Meron that even though Parizat was to be the registered owner of the new company, Meron would be fifty-percent owner with him.

Parizat then set up plaintiff and counterclaim defendant ION TECHNOLOGY SOLUTIONS, LLC ("ION"). Parizat allegedly wanted to grow ION before transferring ITS' assets to the new venture. Finally, in or about February 2009, ITS assets were transferred to ION, even though "no formal contract of sale was executed" (Counterclaims, ¶22). Instead, on March 18, 2009, a letter was allegedly sent to all of ITS' customers advising them payments should be

sent to ION's bank account at JP Morgan Chase going forward. Subsequently, on March 25, 2009, an email was sent to all the employees of ITS advising them that as of March 31, 2009, they would be terminated from employment at ITS and would be employees of ION as of April 1, 2009. Meron alleges that effective April 1, 2009, he and Parizat began operating ION as fifty-fifty owners.

On or about February 2, 2010, ION and Meron entered into a consulting agreement which specified that Parizat was the President of ION and stated that Meron was a consultant and would be paid a consultant's fee by ION; that his role was limited to promoting and selling ION products to new and existing customers; and that Meron was required to abide by ION's policies as communicated to him by ION. The consulting agreement also contained a merger clause, which stated that "This agreement embodies the entire understanding of the parties and it overrides and supersedes any prior promises, representations, undertakings, or implications exchanged by the parties." (Exhibit D to the Affidavit of Jake Nachami in Support of Plaintiffs' Motion to Dismiss Defendant's Counterclaim).

Subsequently, on December 7, 2010, Meron transferred the Implant Line to ION in a formalized written agreement (the "Asset Purchase Agreement") (Exhibit C to the Affidavit of Jake Nachami in Support of Plaintiffs' Motion to Dismiss Defendant's counterclaims). Pursuant to the Asset Purchase Agreement, ION was to pay Meron (I) $12,500 on the date of the agreement's closing (December 7, 2010) and (ii) $12,5000 120 days after the closing date on April 6, 2011 (Id).

Meron claims ION never made these payments.

The Complaint and Counterclaims

Plaintiff commenced this action by Summons and Complaint dated September 10, 2021. Plaintiff alleges, inter alia, that Meron engaged in a "malicious, gangster-like, multi-year campaign" to "extort" from Parizat and his family money to which he was not lawfully entitled. Parizat asserts that he has explained to Meron, repeatedly, that he is no longer entitled to any money and that all funds given to him post February 2011 were unjustly given to him by Parizat. Parizat alleges that Meron's tactics have become so extreme that he had no choice but to institute the action against him (Complaint ¶¶ 1-3), alleging causes of action against Meron for battery,

assault, false imprisonment, unjust enrichment, tortious interference with contact, conspiracy, and RICO violations (Complaint ¶¶ 96-166).

Meron answered, denying the allegations in the complaint, asserting affirmative defenses, and alleging counterclaims against Parizat for (1) declaratory judgment that his ownership interest in ION is 50%; (2) that Parizat breached the oral agreement between the parties; (3) unjust enrichment; (4) fraud in the inducement; (5) fraudulent misrepresentation; (6) breach of fiduciary duty; and (7) constructive trust.

The Motion to Dismiss

Plaintiffs move to dismiss Defendant's counterclaims, arguing (1) that the merger clause contained in the consulting agreement between ION and Meron defeats the claims of an oral agreement; (2) that Meron's claims are barred by the statute of limitations; and (3) that Meron's fraud claims are not pleaded with sufficient particularity.

The Claims Based on the Oral Agreement

Plaintiffs argue that Defendant's claims based on the oral agreement, for a declaratory judgment, breach of the oral agreement and for a constructive trust, cannot be maintained because the parol evidence rule excludes any evidence of the oral agreement. Plaintiffs assert that the consulting agreement between ION and Meron contains the entirety of the agreement between them. Plaintiffs contend that, even if the conversations that Meron claims occurred between Parizat and Meron happened, and Plaintiffs do not concede that they did, the merger clause renders them inadmissible to vary the terms of the consulting agreement.

Defendant argues, in opposition, that the parol evidence rule does not apply to the instant facts. Defendant asserts that the parol evidence rule only applies to oral agreements where the oral agreement is "distinct from and independent of the written agreement." Defendant argues that here, the consulting agreement deals with the provision of certain services by Meron to ION, while the 2008 oral agreement concerns the sale of the Implant Line to ION. Defendant contends that in order for the parol evidence rule to apply, it must pertain to the same subject matter as contained within the written agreement. Defendant further argues that because Parizat was not a signatory to the consulting agreement, he cannot be heard to use it to bar the litigation concerning the oral agreement.

Defendant's argument is unavailing. "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. Evidence outside the four corners of the agreement of the document as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]). Whether or not a writing is ambiguous is a question of law to be resolved by the courts (Giancontieri, 77 NY2d at 162).

Here, the consulting agreement is an unambiguous agreement between the parties. It states quite clearly that Parizat is the President of ION and that Meron was a consultant for ION to be paid a consultant's fee. Moreover, Meron's role as a consultant was limited to promoting and selling ION products to new and existing customers. In addition, Meron was required to follow ION's policies as they were communicated to him by ION. The agreement contains a very specific merger clause which states that the consulting agreement "embodies the entire understanding of the parties and it overrides and supersedes any prior promises, representations, undertakings, or implications exchanged by the parties" (supra, 3).

There is no ambiguity in the language of the consulting agreement and no reason to turn to extrinsic evidence, such as the purported oral agreement, to vary the terms of the consulting agreement. Indeed, as it has been noted, extrinsic evidence may not be considered to create ambiguity in an agreement where one does not otherwise exist (Giancontieri, 77 NY2d at 163).

Insofar as Defendant claims that Parizat, who was not a signatory to the agreement, may not invoke the parol evidence rule to bar enforcement of the oral agreement, this argument too is unavailing. In the first instance, Parizat, as the President, Managing Member and Sole Member of ION was the only person who could sign the consulting agreement on ION's behalf. Clearly, he stood to benefit from the agreement as the only individual responsible for ION's operations. "It is clear that in the case of a fully integrated agreement, where parol evidence is offered to vary its terms, the rule operates to protect all whose rights depend upon the instrument even though they were not parties to it" (Oxford Commercial Corp. v Landau, 12 NY2d 362 [1963]).

Accordingly, Defendant's first counterclaim, for a declaratory judgment that his ownership interest in ION is 50%; second counterclaim, that Parizat breached the oral agreement between the parties; and seventh counterclaim, for a constructive trust are dismissed as barred by

the parol evidence rule.

Unjust Enrichment

Defendant's third counterclaim is for unjust enrichment. Defendant alleges that Parizat, by breaching the 2008 oral agreement, unjustly enriched himself by refusing to acknowledge Meron as the owner of one-half of ION. Defendant also asserts that Parizat failed to pay Meron the $25,000 he was obligated to for the purchase of the Implant line.

In the first instance, to the extent that Defendant seeks to maintain an unjust enrichment claim against Plaintiffs based upon the oral agreement, that claim is barred as noted above. To the extent that Defendant seeks to claim that Plaintiffs were unjustly enriched as a result of their failure to pay the $25,000 that was due under the asset purchase agreement, it is well settled that a claim for unjust enrichment, which sounds in quasi-contract, may not be maintained where there is a contract between the parties on the same subject matter (Goldstein v CIBC World Markets Corp., 6 AD3d 95 [1st Dept 2004]), which the asset purchase agreement unquestionably is. Were Meron to claim that Parizat or ION breached the asset purchase agreement as a result of this non-payment, that claim would be barred by the six-year statute of limitations for breach of contract (CPLR § 213).

Accordingly, defendant's third counterclaim, for unjust enrichment, is dismissed.

The Fraud Counterclaims

Defendant's fourth and fifth counterclaims sound in fraud. The fourth counterclaim is for fraud in the inducement and the fifth counterclaim is for fraudulent misrepresentation. These counterclaims allege, respectively, that Parizat's representations to Meron that they would be fifty-fifty partners in ION were knowingly false and intended to induce Meron to transfer the Implant line to ION. The fraudulent misrepresentation counterclaim arises from the same set of facts, alleging that Parizat's representations to Meron that Meron would be the fifty percent owner of ION were fraudulent and that Meron relied on them in making the determination to transfer the Implant line to ION in the 2010 asset purchase agreement.

Defendant's counterclaims sounding in fraud are time-barred. The CPLR sets the statute of limitations for fraud claims at six years from the date of the wrong or two years from the date the fraud could have been discovered, which is later (CPLR §213[8]). The limitations period

for fraud begins to accrue "at the time when a plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence." (Seidenfeld v Zaltz, 162 AD3d 929 [2d Dept 2018][internal quotations omitted]).

Here, Defendant's allegations of fraud are based statements that were apparently made in 2008 and 2009 to induce plaintiff to sign the Asset Purchase Agreement in December 2010. Accordingly, Defendant should have commenced this action by December 2016, not by filing counterclaims in December 2021. Insofar as Defendant argues that it should be subject to the two-year discovery exception for fraud claims, Defendant has failed to establish that Parizat's purported fraud could not have been discovered until the two-year period prior to commencement of the action. It is clear from the plain language of the counterclaims that Defendant, Meron in particular, had knowledge of facts which should have caused him to inquire and discover the purported fraud well before the counterclaims were filed (Cannariato v Cannariato, 136 AD3d 627, 628 [2d Dept 2016]).

Accordingly, Defendant's fourth and fifth counterclaims are dismissed.

Breach of Fiduciary Duty

Defendant's sixth counterclaim is for breach of fiduciary duty. Defendant contends that Parizat owed a fiduciary duty to Meron based on the alleged 50-50 ownership relationship that Parizat and Meron had in ION and that Parizat breached that duty through his fraudulent scheme to deprive Meron of that 50% interest.

Given the Court's determination concerning the purported oral agreement that gave rise to the alleged joint ownership of ION, i.e., that it is barred by the parol evidence rule, Defendant's breach of fiduciary duty claim cannot be maintained. There is no evidence of the alleged joint ownership of ION in the record, and there is nothing in the integrated contract that is part of the record, or the consulting agreement, that would give rise to a fiduciary relationship. When parties enter into a contract, courts look to the terms of that agreement to discover the nature of the parties relationship and will not interpose a fiduciary relationship between the parties where it is not specified in the contract (see e.g., EBC I, Inc. v Goldman Sachs & Co. 56 NY3d 11, 19-20 [2005]).

Accordingly, Defendant's sixth counterclaim is dismissed.

To the extent that any other requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 12, 2022

ENTER:

JEROME C. MURPHY
J.S.C.