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

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United Acquisition Corp.

Plaintiff,

- v -

MedCap Growth Equity Fund I, LP et al

Defendants.

INDEX NO. 653847/2022

MOTION DATE 02/02/2023

MOTION SEQ. NO. (MS) 003

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 24, 25, 27, 28, 29, 39, 40, 41, 42, 43, 44, 45, 60, 61

were read on this motion to/for DISMISSAL.

In this investment venture, plaintiff United Acquisition Corp. executed subscription documents on January 16, 2016, that obligated plaintiff to invest $2,000,000 in defendants' venture capital fund, MedCap Growth Equity Fund I, LP (MedCap). Plaintiff claims that it was fraudulently induced by defendants to invest in MedCap and commenced this action on October 17, 2022, seeking to recover its $2,000,000 investment and $1,000,000 in punitive damages. Plaintiff alleges six causes of action: (i) fraud; (ii) negligent misrepresentation; (iii) breach of fiduciary duty; (iv) unjust enrichment; (v) money had and received; and (vi) constructive trust. Defendants move to dismiss the complaint on two grounds: plaintiff's claims are time-barred; and the proper forum for this action is Delaware state or federal court, as agreed in the parties' partnership agreement. Plaintiff opposes defendants' motion to dismiss.

For the reasons below, defendants' motion to dismiss is granted.

FACTS[1]

Plaintiff is organized in Delaware and has its offices in New York City. Defendants Joseph A. Cari and Christopher Velis organized MedCap, a limited partnership, in Delaware, and Velis operates its headquarters in Massachusetts. Under the Partnership Agreement (the Agreement), "any action must be commenced and prosecuted in the state or federal courts located in Delaware, and each limited partner hereby waives any objection..." (NYSCEF # 23 – Partnership Agreement – §§ 13.6, 13.7).

[1] Except otherwise indicated, the facts are taken from plaintiff's complaint (NYSCEF # 8).

Plaintiff's allegations of fraud centers on defendants' misrepresentations of (a) defendant Joseph A. Cari and (b) MedCap's affiliation with Harvard Medical School's Wellman Center.

As to the misrepresentation about defendant Cari, plaintiff charges that in soliciting plaintiff to invest in MedCap, Cari and Velis, among other MedCap representatives, offered plaintiff a Private Placement Memorandum (PPM) and Investment Brochure. Plaintiff alleges that the PPM stated that "Cari as having "extensive experience in the healthcare device industry as an adviser, investor, and attorney" (NYSCEF # 8, Compl ¶¶ 11-13 [emphasis in original]). Plaintiff asserts that "defendants misrepresented Cari's background . . . [of being] an attorney and an expert in the field, when in fact he was a disbarred convicted felon." (NYSCEF # 8, compl ¶13). Plaintiff adds that the PPM omitted information about Cari's conviction of a federal crime of extortion (*id.*).

Plaintiff claims that plaintiff "happened to discover" Cari's criminal past on October 10, 2017, and defendants finally disclosed Cari's criminal past publicly in February 2018 (*id.* ¶¶ 19, 25, 31). Plaintiff claims that "[h]ad [p]laintiff known these facts, [p]laintiff never would have made its investment in the MedCap Fund." (*id.* ¶ 28). Plaintiff echoed this claim at oral argument (NYSCEF # 62, tr at 25:5-9). According to plaintiff, a potential investor – a sovereign wealth fund from the United Arab Emirates – either declined to invest or reduced its investment because of the disclosure about Cari. Plaintiff claims that Cari resigned from MedCap due to the loss of this UAE investor (Compl ¶¶ 32, 33).

As to the misrepresentation about MedCap's affiliation with Harvard Medical School's Wellman Center, defendants' Solicitation Brochure (NYSCEF # 42) led plaintiff to believe that MedCap had exclusive and favored access to the Wellman Center, which is known for its innovative medical technology (Compl ¶¶ 15-17). This affiliation added to plaintiff's decision to invest $2,000,000 in MedCap. Thus, on January 16, 2016, plaintiff entered into a Partnership Agreement and executed several subscription agreements obligating it to pay $2,000,000 in three payments (*id.* ¶¶ 20-23).

Plaintiff alleges that the representation about the affiliation with the Wellman Center was but one of defendants' misrepresentations to induce investors to fund MedCap because there was no such affiliation (*id.* ¶ 16). A year after Cari's criminal past was disclosed, MedCap terminated its exclusive relationship with the Wellman Center in February 2019, allegedly because Wellman's technologies "did not meet 'the criteria outlined in our investment strategy' " (*id.* ¶¶ 34, 35). In March 2019, MedCap changed its brand name to "Miraki Innovation" (*id.* ¶ 39). Plaintiff believes defendants made this move to disassociate MedCap from Cari.

By then, plaintiff had already made its initial payment of $1,058,076.19 on June 1, 2016, and a second payment in October 2017 under the subscription agreements. The third and final payment of $200,000 was made in late January, 2021, under an express reservation of rights. Plaintiff felt obligated to pay its full $2,000,000 commitment or else forfeit its prior payments (*id.* ¶ 39). Thus, based on defendants' alleged fraud and misrepresentation about Cari and the termination of MedCap's affiliation with the Wellman Center, plaintiff claims it is damaged in the amount of $2,000,000, the amount of its investment (*id.* ¶¶ 21-23).

DISCUSSION

Defendants argue that this action should be dismissed as the parties' agreement designates Delaware as the forum for this action, and this action is barred by the statute of limitations under both Delaware and New York law.

In a motion to dismiss under CPLR 3211, "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC 1, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Forum Selection

It is undisputed that the choice of law and the forum selection in the Agreement is Delaware. The language of sections 13.6 and 13.7 in the Agreement, using compulsory language, states: "any action *must* be commenced and prosecuted the state or federal courts located in Delaware, and each limited partner hereby waives any objection." (NYSCEF # 23 at 28, §§ 13.6, 13.7 [emphasis added]).

Plaintiff claims that because the Agreement "is permeated by fraud, the choice of law and choice of forum provisions are not enforceable" (NYSCEF # 40 – aff in opp of Nelson Happy ¶ 44). Thus, plaintiff asserts the proper venue is New York, where plaintiff has its headquarters. Plaintiff adds that it was in New York where defendant Cari, among other defendants, fraudulently induced plaintiff to invest with MedCap (NYSCEF # 39 – Pltf's MOL at 11-12).

"A contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)" *Landmark Ventures, Inc. v Birger*, 147 AD3d 497, 497 [1st Dept 2017] [internal quotes and citations omitted]). "Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes . . ." (*Brooke Group Ltd v JCH Syndicate 488*, 87 NY2d 530, 534 [1996] [internal citations omitted]. The public policy in New York is to enforce mandatory forum selection clauses, such as the one at issue, unless enforcement of the clause is shown to be invalid due to fraud or overreaching (*id.*). Where the complaint alleges that the contract is void ab initio because the contract is permeated with fraud, the doctrine of separable contracts is inapplicable (*DeSola Group v Coors Brewing Co.*, 199 AD2d 141, 141-142 [1st Dept 1993]).

Here, plaintiff contends that "contracts are void ab initio if the harmed party relied on a material misrepresentation to enter into the contract" (NYSCEF # 39 – Pltf's MOL in Opp at 8 citing *Friedman v Ostego Mut. Fire Ins. Co.*, 179 AD3d 1023, 1025 [2d Dept 2020]). Plaintiff asserts that it relied on defendants' misrepresentations about Cari and the Wellman Center when it entered into the Agreement. Thus, the Agreement, which is permeated with fraud, is void ab initio, and the forum selection clause is unenforceable.

But contracts based on misrepresentations are not void but voidable (*Davis v Gifford*, 182 AD 99, 101 [1st Dept 1918]; *see VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 56 [1st Dept 2013]). The defrauded party, upon

learning of the fraud, has several remedies such as rescission of the contract (*id.* quoting *Wood v Dudley*, 188 App Div 136, 140 [1st Dept 1919]; *see also Telford v Metropolitan Life Ins. Co.*, 223 AD 175, 177 ["The general rule is that a contract induced by misrepresentation is valid until disaffirmed, that is, it is voidable, not void."]).

In arguing that the Agreement is void *ab initio*, plaintiff stresses that had it known about defendant's misrepresentation about Cari's past, it would not have entered into the PPM with defendants. However, plaintiff's action subsequent to learning of the misrepresentations detracts from this argument. The timeline of the events regarding defendants' fraud shows that plaintiff knew of defendants' misrepresentation about Cari on October 10, 2017, at the earliest, when plaintiff learned on its own about Cari's criminal past (*see Cusimano v Schnurr*, 137 AD3d 527, 531 [1st Dept 2016] " [a] plaintiff will be held to have discovered the fraud when the plaintiff has knowledge of facts from which the fraud could be reasonably inferred]), or in February 2018 at the latest, when defendants publicly revealed Cari's criminal past. Despite learning of the misrepresentation about Cari, plaintiff nonetheless continued its investment with defendants after February 2018. Indeed, plaintiff made its third and final payment pursuant to the PPM in January 2021, even after learning about the misrepresentation of the Wellman Center in February 2019. To explain its reason for making the third, plaintiff stated that it was "obligated by the documents it signed to invest in the full $2,000,000 . . . or it would forfeit its prior payment" (Compl ¶ 39). Plaintiff did not commence this action until October 17, 2022.

Given plaintiff's timeline from first learning about the fraud to the commencement of this action, it cannot be said that the PPM is void *ab initio*, which would void the forum selection clause. Thus, the proper forum is Delaware, as provided in the Agreement. In any event, plaintiff's argument that the statute of limitations under New York law should apply does not help plaintiff's case.

Statute of Limitations

Defendants apply the statute of limitation under the laws of Delaware, Maryland, and New York to plaintiffs' six causes of action and asserts that plaintiff's claims are time-barred in all three states. Plaintiff applies the statute of limitations under New York law only and is silent as to law of Delaware and Maryland, thereby waiving any objections to those arguments. This order addresses the statute of limitations under New York law.

The statute of limitation for fraud in New York is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud or could with reasonable diligence have discovered it" (CPLR 213 (8); *see Boesky v Levine*, 193 AD3d 403, 405 [1st Dept 2021]).

Defendant argues that plaintiff is time-barred because, as alleged, the fraud, occurred on January 16, 2016, when plaintiff entered into the Partnership Agreement. Defendants quotes plaintiff's allegation in support: "'In January 2016, [p]laintiff agreed to invest $2,000,000 in the MedCap Fund. It agreed to do so in reliance on [d]efendants' PPM, Brochure, and other solicitation documents, as well as other written and oral representations and/or omissions made by [d]efendants'" (NYSCEF # 25 – Defts' MOL at 10 quoting compl ¶ 20). But plaintiff commenced this action six years and nine months later,

on October 16, 2022. Defendants therefore conclude that plaintiff's complaint is time-barred in both New York and Delaware[2] (Delaware in the proper venue under the Agreement).

Plaintiff counts its time as accruing from February 2018 at the earliest, when it suffered damages arising from disclosure of Cari's criminal background and disbarment, or February 2019 upon the termination of MedCap's relationship with the Wellman Center (Pltf's MOL at 14-15). Defendants calculate the accrual date as January 16, 2016, the occurrence of the fraud, or two years from the time plaintiff discovered the fraud (Defts' MOL at 10). Defendants point out that even viewing the later date of February 14, 2019 – when the Wellman Center relationship terminated allegedly over Cari – plaintiff's suit is still untimely as it was commenced more than two years from the time plaintiff discovered the fraud (Defts' MOL at 10-11). Thus, even considering the later accrual date – two years from February 14, 2019 – plaintiff's fraud claim, brought in October 2022, is time-barred.

Plaintiff posits that under the "continuing wrong" doctrine, the statute of limitations is tolled to the date of the last wrongful act (*id.* at 16). Plaintiff does not claim that the February 2019 date is the date of the last wrongful act but neither does plaintiff elaborate on what that the last wrongful act was, is, or will be. Defendants see plaintiff's "continuing wrong" argument as allowing the fraud claim based on Cari's criminal past as continuing in perpetuity (NYSCEF # 60, Reply at 4). Defendants assert that "[t]he continuous wrong doctrine tolls the running of the statute of limitations where there is a series of 'independent, distinct wrongs rather than a single wrong that has continuing effects." (*Ganzi v Ganzi*, 183 AD3d 433, 434 [1st Dept 2020]).

Based on the timeline of events as presented by plaintiff, January 16, 2016, is the date that defendants fraudulently induced plaintiff to entering into the Agreement. Plaintiff made its first installment payment of $1,058,076.19 on June 1, 2016, and only learned of the fraud on October 10, 2017, before it made its second payment. But, as plaintiff claims, it was not injured then but in February 2019 when MedCap's exclusive relationship with the Wellman Center was terminated allegedly because of defendant's public disclosure in February 2018 of Cari's criminal past. Based on the 2019 injury, plaintiff concludes that its fraud claim is well within six years of either of those dates.

This court disagrees with plaintiff's calculation of its accrual date or tolling period for its fraud claim and agrees with defendants' position that the fraud occurred when plaintiff entered into the Agreement on January 16, 2016, and that the continuing wrong doctrine is inapplicable here. Notably, despite the various dates plaintiff offers as to when the fraud claim accrued, when plaintiff learned of the fraud, and when plaintiff suffered damages as a result of the fraud, what is clear is that as of October 10, 2017, plaintiff "possessed knowledge of facts from which the fraud could reasonably have been inferred" (*Rodriguez v State of New York*, 197 AD3d 1055 [1st Dept 2021] [internal quotation omitted]). Even if defendants' public disclosure in February 2018 were the triggering event, plaintiff is still time barred since the action was commenced in Octo 2022. Plaintiff's continued investment after learning of the fraud in either October 2017 or February 2018 is a business decision.

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[2] The statute of limitation for fraud in Delaware is three years (Del. Code Ann. Tit. 10, § 8106).

And, contrary to plaintiff's argument that the continuing wrong doctrine applies, defendants' nondisclosure of Cari's criminal past and disbarment is not a continuing wrong for tolling the statute of limitation. "The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [quoting *Doukas v Ballard*, 39 Misc 3d 1227 [A] [Sup Ct, Suffolk County 2013]). Were plaintiff allowed to pick and choose which of the continuing effect to institute a claim, defendants' point that this action would continue in perpetuity is well taken.

In sum, plaintiff's fraud claim is beyond New York's statute of limitations (six-years of the fraud or two years after discovery of the fraud) as is plaintiff's negligent misrepresentation claim. Plaintiff's own words that it would not have executed the Agreement had it known of Cari's criminal past and disbarment is the gist of the misrepresentation claim.

As to plaintiff's remaining claims, the cause of action for breach of fiduciary duty sounding in fraud and seeking money damages is time-barred by the six year statute of limitation (*see Kaufman v Cohen*, 307 AD2d 113, 113 [1st Dept 2003]). The statute of limitations for plaintiff's claims for money had and received (and constructive trust) is six years (*Knobel v Shaw*, 90 AD3d 493, 495 [1st Dept 2011]). As this claim is also based the fraud allegations, the claim accrues upon learning of the fraud. Plaintiff's cause of action for constructive trust is also governed by the six-year statute of limitations and accrues upon the "occurrence of the wrongful act giving rise to a duty of restitution . . ." (*id.*). Here, as plaintiff alleges, the wrongful act is the fraudulent inducement that led it to execute the Agreement with MedCap. Thus, this claim, too, is time-barred.

Accordingly, defendants' motion to dismiss is granted on the grounds that pursuant to the Agreement, the proper venue for this action is the state or federal courts located in Delaware, and in any event, the action is time-barred even if this action were properly commenced in New York. As such, it is

ORDERED that the motion to dismiss (MS 003) by defendants MedCap Growth Equity Fund I, LP, Miraki Innovation, LLC, MedCap Growth Equity GP, LP, Christopher J.P. Velis, and Joseph A. Cari, Jr. is granted, and the complaint is dismissed; it is further

ORDERED that defendants shall file a copy of this Decision and Order with Notice of Entry on plaintiff United Acquisition Corp. within ten days of the e-filing of this order.

This constitutes the Decision and Order of the court.

6/18/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE