SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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QUATTRO PARENT LLC, Index No.: 651555/2017
Plaintiff,

-against- Motion Seq. No. 002

ZAKI RAKIB,
Defendant.
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Masley, J.:

In motion sequence number 002, plaintiff Quattro Parent LLC (Quattro) moves, pursuant to CPLR 3212, for summary judgment on its breach of contract claim against defendant Zaki Rakib and to dismiss Rakib's counterclaims.

Quattro is a limited liability holding company (NYSCEF Doc. No. 33, Ho-Walker aff, ¶2; NYSCEF Doc. No. 38, Rakib aff, ¶ 12). Quattro's principal asset is nonparty On Telecomunicacoes Ltda. (On Telecom), a telecommunications company based in Sao Paolo, Brazil (Ho-Walker aff, ¶3; Rakib aff, ¶ 12). On Telecom allegedly held a portfolio of 15-year spectrum licenses (Spectrum Rights) enabling On Telecom to build a broadband network in Sao Paolo. In 2013, Quattro's board, including Rakib, hired nonparty, Detecon International GmbH (Detecon) to value the Spectrum Rights (NYSCEF Doc. No. 34, Ho-Walker aff, exhibit C). Detecon produced a 59-page report containing a net present value estimate (NPV Estimate) of the Spectrum Rights (2013 Report) (*id.*). On June 2, 2015, Quattro's board, including Rakib, met to discuss Quattro's state of affairs and its future, if any. Options discussed: the cost for Quattro to stop new sales and focus on improving collections and delinquency or sources to raise capital (*id.*, exhibit E). Quattro's CEO, Fares Nassar, opined that $60 million was required (*id.* at 3).

After this meeting, Rakib made an offer to acquire a majority interest in Quattro for $7.5 million (NYSCEF Doc. 33, Ho-Walker aff, ¶¶ 25, 26.) Rakib's offer was accepted, and on October 9, 2015, Rakib and Quattro entered into a transaction agreement (the Agreement)[1] (NYSCEF Doc. No. 35, Ho-Walker aff, exhibit K). Under the Agreement, Rakib agreed to pay $7.5 million to Quattro for 100,000,000 shares of Quattro (*id.*, ¶4). Because the transaction involved an indirect change in control of On Telecom, approval by the Agencia Nacional de Telecomunicacoes of the Federative Republic of Brazil (Anatel) was essential (*id.*, ¶2). Anatel granted approval on November 3, 2015 (NYSCEF Doc. No. 35, Ho-Walker aff, exhibit M).

Rakib failed to tender payment and Quattro commenced this breach of contract action by summons and complaint on March 24, 2017 (NYSCEF Doc. No. 1). On October 8, 2017, Rakib filed his answer with counterclaims for rescission based on mutual mistake of fact, rescission based on unilateral mistake of fact, negligent misrepresentation, fraudulent inducement, and for a declaratory judgment that the Agreement terminated without liability (NYSCEF Doc. No. 19). Rakib also raised multiple affirmative defenses, the fourth and fifth of which provide that the Agreement is unenforceable because of mistakes of fact and misrepresentations respectively (*id.*). These claims and defenses center on Rakib's assertion that, up until October of 2015, Quattro represented to him that the Spectrum Rights were worth $90 million, but in actuality, they were valueless.

On May 1, 2017, Rakib moved to dismiss Quattro's breach of contract claim, arguing that Rakib's obligations to perform terminated under a certain provision in the

[1] The Agreement does not contain a merger clause and the parties do not raise any such arguments.

Agreement (NYSCEF Doc. No. 7). This provision provides that if Quattro "liquidates, dissolves, or winds up its or any of its Key Subsidiary's affairs, the obligations of the parties under this Agreement shall terminate" (NYSCEF Doc. No. 35, Ho-Walker aff, exhibit K, section 3). This court denied the motion and the Appellate Division, First Department, affirmed holding that "plaintiff's unwinding of Quattro and a subsidiary one year after defendant's breach does not foreclose plaintiff's breach of contract claim" (*Quattro Parent LLC v Rakib*, 160 AD3d 478, 478 [1st Dept 2018]).

Quattro now moves for summary judgment on its breach of contract claim and to dismiss Rakib's affirmative defenses and counterclaims. It is undisputed that Rakib did not tender the $7.5 million within five business days as required by the Agreement. (*Quattro Parent*, 160 AD3d at 478). Therefore, Quattro contends that Rakib breached the Agreement. Quattro argues that Rakib's first and second counterclaims for mutual and unilateral mistake must be dismissed because the purchase price that Rakib agreed to pay under the Agreement allegedly establishes that neither party believed that the Spectrum Rights had any substantial value. Quattro also contends that Rakib's third counterclaim for negligent misrepresentation must be dismissed because Rakib did not allege that Quattro was aware that Rakib was relying on the 2013 NPV estimate contained in the 2013 Report.

Quattro asserts that Rakib's fourth counterclaim for fraudulent inducement must be dismissed because claims based upon projections are not actionable as they are merely statements of prediction or expectation. Quattro asserts that, even if Rakib relied on the 2013 NPV estimate, it was not reasonable because, as a sophisticated investor, Rakib knew as of June 2015 that Quattro was not close to meeting the projections set out in the 2013 NPV estimate. As to Rakib's fifth counterclaim, Quattro

argues that the First Department has already held that winding up Quattro's affairs and those of On Telecom do not bar Quattro's breach of contract claim.

In opposition, Rakib argues that, in 2015, Nassar, James Melnick, a consultant to Quattro, and Andre de Albuquerque[2], acting as agents of Quattro, told Rakib that the 2013 Report represented an accurate valuation of the Spectrum Rights. Moreover, at every meeting and communication related to the investment opportunity, Melnick and/or Nassar affirmed that valuation. Rakib asserts that during an October 2015 meeting concerning the Agreement, before the Agreement was executed, Rakib was assured that he could rely on the 2013 Report as representing the current value of the Spectrum Rights. Indeed, Rakib asserts that he had numerous conversations with Nassar in 2015 where Nassar discussed comparable valuations confirming the valuation in the 2013 Report.

Rakib further contends that the reasonableness of his reliance on the 2013 Report is a fact question for trial. Rakib also asserts that both parties believed that the valuation of the Spectrum Rights set forth in the 2013 Report was accurate in the Fall of 2015 when the Agreement was being negotiated. Rakib contends that the value of the Spectrum Rights was one of the principal bases upon which he agreed to the investment contemplated in the Agreement.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). This standard requires the movant to make a prima facie

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[2] The June 2, 2015 minutes of the meeting of Quattro's Board of Managers identifies Melnick as a consultant to Quattro and its former Business Development Director and identifies de Albuquerque as Quattro's COO (NYSCEF Doc. No. 34, Ho-Walker aff, exhibit E).

showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The court views this evidence in the light most favorable to the non-moving party opposing summary judgment and draws all reasonable inferences in that party's favor (*see Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Should the movant make a prima facie showing of entitlement to summary judgment, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*see Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]).

Quattro has made a prima facie showing of entitlement to judgment as a matter of law with respect to its breach of contract claim. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum*, 71 AD3d at 91). The parties do not dispute that they entered the Agreement which provides that Rakib would tender the $7.5 million to Quattro within five days of Anatel's approval and thus the first element is satisfied (NYSCEF Doc. No. 35, Ho-Walker aff, exhibit K at section 4.1). Quattro was obligated to obtain the approval of Anatel and it did (NYSCEF Doc. No. 51 at ¶ 2, NYSCEF Doc. No. 35, Ho-Walker aff, exhibit M). Quatro was also ready willing and able to transfer the shares to Rakib. Thus, the second element is satisfied. Within 5 days of Anatel's approval, "Rakib never paid" (NYSCEF Doc. No. 33, Ho Walker aff, ¶ 34). Indeed, the First Department found that "[i]t is undisputed that [Rakib] never made the $7,500,000 payment required by the terms of the parties' agreement, giving rise to a cognizable claim for breach of contract" (*Quattro Parent LLC*, 160 AD3d

at 478). Thus, the third element is satisfied. As to damages, Ho-Walker states that "largely as a consequence of Rakib's failure to provide the promised equity . . . Quattro's board decided to prepare for an orderly wind-down of Quattro and its subsidiaries" (NYSCEF Doc. No. 33, Ho-Walker aff, ¶ 39.) Thus, the fourth element is satisfied.

Quattro has made a prima facie showing of entitlement to judgment on its breach of contract claim. The burden now shifts to Rakib, who fails to demonstrate a genuine material issues of fact.

Rakib fails to raise a triable issue of fact with respect to his fifth affirmative defense of misrepresentations, both fraudulent and negligent. Rakib only states in his affidavit that Nassar and Melnick affirmed the 2013 Report; however, this statement is insufficient to show fraud. Indeed, nothing in the record supports the allegation that Quattro, Nassar, Melnick or de Albuquerque made a misrepresentation of present fact that they knew to be false (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]).

Further, nothing in the record demonstrates that Rakib reasonably relied on the 2013 Report because "[c]laims based upon ... projections of returns on investment ... are not actionable" (*ESBE Holdings, Inc., v Vanquish Acquisition Partners, LLC.*, 50 AD3d 397, 398 [1st Dept 2008]). "[S]uch projections are merely statements of prediction or expectation" (*id.*). To the extent that Rakib alleges that Nassar and Melnick affirmed the 2013 Report, and therefore, he believed the Spectrum Rights were worth $90 million in 2015, the 2013 Report at no point values the Spectrum Rights at $90 million in 2015 or otherwise (NYSCEF Doc. No. 34, Ho-Walker aff, exhibit C). Indeed, the only place this figure appears is in the affidavit of Rakib who fails to provide

any other support for its assertion (NYSCEF Doc. No. 38, Rakib aff, ¶50; n 3). Rakib's self-serving affidavit is filled with nothing more than contradictions of Rakib's own testimony, and therefore, is insufficient to raise a triable issue of fact to defeat summary judgment (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). Because Rakib failed to demonstrate an issue of fact as to reasonable reliance, the affirmative defense for misrepresentations insofar as it encompasses negligent misrepresentation also fails (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [1st Dept 2011]). Accordingly, summary judgment dismissing Rakib's fifth affirmative defense is granted.

For the reasons above, Rakib's fourth affirmative defense for unilateral mistake also fails because "[i]n the absence of legally sufficient allegations of fraud ... [a] theory of unilateral mistake [can] not survive the motion for summary judgment" (*Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 1198 [1st Dept 2011]). To the extent that Rakib's fourth affirmative defense asserts mutual mistake, it does not raise an issue of fact either. "In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Associates v Paul*, 66 NY2d 570, 573 [1986]). Rakib "sets forth no basis for his contention that both parties reached an agreement other than that contained in the writing" (*id.* at 574-575). Indeed, Rakib "was required-and failed-to come forward with something more than his own conclusory assertion that mistake existed" (*id.* at 575).

Moreover, the alleged mutual mistake – that the Spectrum Rights were valued at $90 million - does not undermine the foundation of the Agreement (*Simkin v Blank*, 19 NY3d 46, 54 [2012]). Indeed, the Agreement makes absolutely no mention of the Spectrum Rights, let alone their value (*id.*). As the Court of Appeals has reiterated,

"courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 277 [2011]).

Accordingly, summary judgment dismissing the fourth affirmative defense for mistake is granted.

Summary judgment dismissing Rakib's correlating first counterclaim for mutual mistake, second counterclaim for unilateral mistake, third counterclaim for negligent misrepresentation, and fourth counterclaim for fraudulent inducement are also granted for the reasons stated above.

Lastly, Quattro's motion for summary judgment dismissing Rakib's second affirmative defense for a declaration that he has no performance obligations to Quattro or anyone else under the Agreement is granted. The Appellate Division has already spoken on this matter quite plainly that "plaintiff's unwinding of Quattro and a subsidiary one year after defendant's breach does not foreclose plaintiff's breach of contract claim" (*Quattro Parent LLC v Rakib*, 160 AD3d at 478.) As a matter of law, the second affirmative defense is dismissed. Summary judgment dismissing Rakib's redundant fifth counterclaim is also granted.

The court has considered the balance of affirmative defenses, none of which Rakib raised in his opposition to this motion, and found them to be without merit.

It appearing to the court that plaintiff is entitled to judgment on liability and the only triable issue of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that plaintiff Quattro Parent LLC's motion for summary judgment on its breach of contract claim is granted as to liability; and it is further

ORDERED that an immediate trial on the issue of damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 10 days from entry of this order on NYSCEF, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (600 Centre St., Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – www.nycourts.gov/supctmanh); and it is further

ORDERED that the portion of plaintiff Quattro's motion for summary judgment seeking dismissal of defendant's counterclaims is granted and the counterclaims are dismissed; and it is further

ORDERED that the parties are directed to contact the Part 48 Clerk (646-386-3265) within seven days of plaintiff's filing of the note of issue for a trial date.

Dated: 1/4/19

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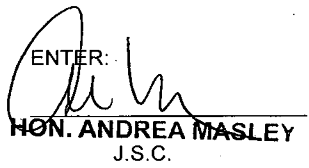

HON. ANDREA MASLEY
J.S.C.