SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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QUATTRO PARENT LLC

Plaintiff,

- v -

ZAKI RAKIB,

Defendant.

INDEX NO. 651555/2017

MOTION DATE 11/20/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 236, 237

were read on this motion to/for JUDGMENT - MONEY.

Upon the foregoing documents, it is

Plaintiff Quattro Parent LLC (Quattro) moves for summary judgment on damages. (NYSCEF Doc. No. [NYSCEF] 238, Tr at 32:24-33:2; NYSCEF 136, Notice of Motion [Seq. 006].)

Prior to discovery, plaintiff moved for summary judgment on liability which the court granted, and discovery proceeded. (NYSCEF 224, Decision and Order [Seq. 002], *affd Quattro Parent LLC v Rakib*, 181 AD3d 518 [1st Dept 2020].) The sole issue is the value of plaintiff's shares, if any, on November 15, 2015, when defendant Zaki Rakib refused to proceed to close the deal to purchase shares of Quattro for $7.5 million. Any such value will be deducted from the $7.5 million that defendant owes to plaintiff.

Since this motion was filed eight months after the note of issue, plaintiff must first establish good cause for the delay in filing the motion. (*See* NYSCEF 136, Notice of Motion [filed July 31, 2020]; NYSCEF 113, Note of Issue [filed November 15, 2019].) "*Brill* holds that to rein in these late motions, brought as late as shortly before trial, CPLR 3212(a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed." (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013] [citation omitted] [discussing *Brill v City of New York*, 2 NY3d 648 [2004].)

Defendant argues that plaintiff's dispositive motion has already been denied four times; effectively, a law of the case argument. Defendant demands an in-person trial, claiming that factual issues existed before discovery and discovery revealed that plaintiff represented to its auditors, taxing authorities, and prospective investors that it had a value far in excess of the $7,500,000 purchase price negotiated in the Transaction Agreement.[1] Defendant insists that he has a right to cross examine plaintiff's witness at trial.

[1] At the time of the writing of this decision, 840,286 people have died in the U.S. from Covid (Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [last accessed January 13, 2022]), 5.5 million people have died worldwide (World Health Organization, Covid19.who.int [last accessed January 13, 2022]), and there is a surge of Omicron across the United States which New York courts have not escaped. (Andrew Denney, *NY Judges Call for In-Person Appearances to Cease as Omicron Rages Through Courthouses*, , NYLJ January 6, 2022; Molly Crane-Newman, *COVID Cases Surge in NYC Courts: Everyone who is entering These Spaces is Getting Sick*, NY Daily News, January 5, 2022.)

Plaintiff has established good cause for this motion. After the trial was adjourned on February 18, 2020, first by the First Department issuing a stay pending appeal of the January 23, 2019 decision (NYSCEF 206),[2] and then due to COVID, the court was prepared to try this case virtually in July or August 2020, but defendant insisted on an in-person bench trial even though defendant was located in Israel, international flights to the United States were limited by Covid restrictions, and, if he could reach the United States, the Covid pandemic necessitated a 2-week quarantine before he could come to court. (NYSCEF 131, Scheduling Order [dated July 2, 2020].) Plaintiff countered that damages could be established on paper as there were no issues of fact necessitating trial. (*Id.*) The court granted plaintiff's request to file such a motion. (*Id.*) Plaintiff's motion solved a problem created by Covid;[3] it did not perpetuate the problem *Brill* sought to fix.

Further, defendant was on notice that this was a dispositive motion to determine damages without a trial if there are no issues of fact as to damages, though plaintiff did

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[2] The First Department decision issued March 17, 2020. Contrary to defendant's Memorandum of Law (MOL), the Appellate Division did not order a trial, and it did not address damages since the issue of damages was not raised in plaintiff's motion for summary judgment prior to discovery.

[3] Defendant opines that the court's order for a virtual trial and consideration of this motion are motivated by animosity toward him. The court has the responsibility to ensure justice is done, and justice delayed is justice denied; insisting on an in-person trial during Covid was dangerous and unnecessarily prolonged this case. As circumstances changed with Covid, the courts were compelled to change too. The court's initial ambivalence toward virtual proceedings necessarily evolved as Covid continued, and the court had significantly more and highly positive experience with virtual proceedings. Contrary to defendant's objection, the court has the authority to order a virtual trial. (*Ciccone v One W. 64th St., Inc.*, 69 Misc 3d 585 [Sup Ct, NY County 2020]; *see also Wyona Apartments LLC v Ramirez*, 70 Misc 3d 591 [Civ Ct, Kings County 2020]. Indeed, courts have embraced virtual technology to ensure that justice would be done during Covid and probably long thereafter; virtual proceedings are here to stay. (*See Bonilla v State*, 71 Misc 3d 235 [Ct Cl 2021].)

not label the motion as one for summary judgment. Defendant's opposition to this motion corroborates that he understood that this was a dispositive motion. (NYSCEF 192, MOL; NYSCEF 193, Affirmation of Defendant's Counsel; NYSCEF 194-231, Defendant's Exhibits A-LL.) Therefore, the court will consider plaintiff's motion as one for summary judgment on damages.

Under CPLR 3212, "the proponent of a summary judgment motion 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 issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Defendant has no right to cross examine witnesses at trial unless there is an issue of material fact.

The measure of damages here is the difference between the price defendant promised to pay for 100 million shares, $7.5 million, or 59%,[4] and the value of those shares at the time of breach. (*Emposimato v CIFC Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2001]; Uniform Commercial Code § 2-708.) The formula makes sense because, in theory, a plaintiff has a duty to mitigate damages. (*See Losei Realty Corp. v City of New York*, 254 NY 41, 47 [1930].) Here, the value of the shares that plaintiff continues to hold after the breach reduces the damages defendant owes to plaintiff. The key to determining fair market value is the amount a knowledgeable investor would

[4] The court adopts the calculation of CPA Michael J Garibaldi who states that defendant's purchase of 100 million of 149.50 million outstanding shares is 59%. (NYSCEF 204, Garibaldi aff ¶¶ 21, 22, 34, 35, 49, 50, 51 [aff submitted by defendant].)

pay for the shares -- "what knowledgeable investors anticipated the future conditions and performance would be at the time of the breach." (*Aroneck v Atkin*, 90 AD2d 966, 967 [4th Dept 1982] [citation omitted].)

Plaintiff relies on the testimony of Joshua Ho-Walker to establish the fair market value of its shares on November 15, 2015. Ho-Walker was a member of plaintiff's board during the relevant period when he served as a principal of the Strategic Investment Group at Soros Fund Management (Soros). (NYSCEF 186, Ho-Walker aff ¶¶ 1, 3-4 [Direct Trial Testimony].)[5] Soros, through its private fund, Quantum Strategic Partners (Quantum), was plaintiff's largest investor. (*Id*. ¶¶ 1, 11-12.) Part of Ho-Walker's job was to manage and value the Quattro investment. (*Id*. ¶¶ 2, 53.)

"Quattro was the U.S. holding company for a telecommunications business in Brazil. Beneath Quattro was a Brazilian company called Quattro Brasil Participaçõés Ltda. ('Quattro Brasil'). Quattro Brasil held two wholly owned Brazilian subsidiaries: On Telecomunicacoes Ltda. ('On Telecom'), the operating company, and Sequoia

[5] An in-person bench trial was scheduled for February 18, 2020. (NYSCEF 114, Conference Order [dated November 22, 2019].) On January 29, 2019, parties submitted pre-trial MOLs consistent with Part 48's rules. (NYSCEF 115, Plaintiff's MOL; NYSCEF 116, Defendant's MOL.) On March 19, 2020, the courts were closed to in-person proceedings due to Covid-19, and the court immediately pivoted to virtual proceedings. (AO/71/20.) The trial was rescheduled for July 27 or August 3, 2020, whichever was more convenient for the parties. (NYSCEF 126, Pre-trial Order [dated June 12, 2020].) If the courthouse was not open for public proceedings, then it would proceed virtually. (*Id*.) Defendant objected. (NYSCEF 129, July 1, 2020 Letter.) In the absence of both a motion to compel the virtual trial and authority to compel a virtual trial, on July 2, 2020, the court adjourned the virtual trial until in-person proceedings returned to 60 Centre Street. (NYSCEF 131, Scheduling Order.) The court also granted plaintiff's request to submit this motion. (*Id*.) Meanwhile, the law on virtual trials evolved. (*See* n 3, *supra*.)

Telecomunicacoes Ltda." (*Id.* ¶ 7.) Defendant co-founded the predecessor of On Telecom in 2011. (*Id.* ¶ 11.)

Ho-Walker is educated and experienced in investments. He is "familiar with the different tools used by investors to evaluate and value companies and investment opportunities" because that has been his job since 2006. (*Id.* ¶ 4.) He explains his valuation of plaintiff as follows:

> "[a] standard measure of the value of a company is its fair value (the price that would be received to sell an asset between market participants at a certain date). Valuation methods include market approaches, based on guideline public companies or comparable transactions, and income approaches, such as a discounted cash flow. For Quattro, our primary valuation method was a discounted cash flow analysis because the market lacked appropriate comparable, and Quattro was a start-up business with limited revenues (and even greater expenses)." (*Id.*)

Plaintiff's investors, including defendant, Quantum, and International Finance Corporation (IFC), invested almost $150 million in plaintiff between 2011 and 2014. (*Id.* ¶¶ 11-12, 13.) Initially, the plan was to operate plaintiff at a deficit as it built its data network and expanded its operations. (*Id.* ¶ 13.) Plaintiff's plan projected profits by the end of 2015. (*Id.*) Plaintiff's history is set forth in the court's January 4, 2019 decision granting its motion for summary judgment on liability and will not be repeated here except as necessary to this decision. (NYSCEF 79, Decision and Order [Seq. 002].)

In the summer of 2014, plaintiff communicated with major telecommunications companies which had indicated some level of interest in the past, but all declined to invest in or purchase plaintiff. (NYSCEF 186, Ho-Walker aff ¶ 34 [Direct Trial Testimony].) In late 2014, plaintiff engaged investment banks, to try to raise additional capital for the business by contacting nearly 150 potential investors, but, again, there was no interest. (*Id.* ¶¶15, 25, 30.)

Meanwhile, plaintiff had a heavy debt load, accounts payables, and continuing capital expenditures. (*Id.* ¶¶ 18-19.) Plaintiff owed approximately $40 million to its creditors. (*Id.* ¶18; NYSCEF 145, July 2015 Monthly Report; NYSCEF 147, August Monthly Report; NYSCEF 151 September 2015.) By June of 2015, plaintiff was running a monthly operating deficit, contrary to its initial plan. (NYSCEF 186, Ho-Walker aff ¶ 17 [Direct Trial Testimony]; NYSCEF 144, June 201 Monthly Report.) Meanwhile, a major economic contraction began in Brazil in 2015. (NYSCEF 186, Ho-Walker aff ¶16.) The recession severely diminished the prospects of the business and eliminated any prospective market for Quattro's shares. (*Id.*)

In June 2015, plaintiff was failing in nearly every essential metric. (*Id.* ¶¶20-27; NYSCEF 158, Board Minutes.) The June 2, 2015 board minutes reflect the fact that drastic improvements across the board would be required to create a sustainable business and plaintiff would need an infusion of at least $75-100 million simply to breakeven. (*Id.* ¶¶ 23-24.) The minutes indicate that defendant attended this meeting. (NYSCEF 158, Board Minutes.) "Just a few days after the board meeting, on June 8, 2015, Mr. Rakib made his initial offer to acquire a controlling interest in the company-he offered $10 million for 55% of the company ultimately leading to the $7.5 million transaction agreement." (*Id.* ¶ 27.)

On September 30, 2015, Soros marked down to zero its investment in plaintiff, because the investment fund saw no prospect of any return on its hundred-million-dollar investment. (*Id.* ¶ 54.)

Plaintiff continued its efforts to market and sell its shares or assets in 2016. (*Id.* ¶¶ 25, 55.) No investor expressed interest. (*Id.* ¶¶ 25, 55-56.) Quattro eventually

received an offer that would have required its original shareholders to provide additional funding and assume certain contingent liabilities of the company. (*Id*. ¶¶ 56-57.) Therefore, Ho-Walker concluded that the fair market value was thus zero. (*Id*. ¶¶ 58-60.)

In December 2016, three minor shareholders sold their 1.1 million shares[6] of plaintiff to Quantum for a penny; not a penny per share. (*Id*. ¶¶ 58-61; NYSCEF 164, Purchase & Sale Agreement, §2.02.)

Defendant's objection to Ho-Walker's testimony is that he is presumably a paid witness, which can only be determined at trial, according to defendant. In addition, defendant objects that Ho-Walker fails to present any calculations or analysis supporting his opinion other than a conclusory assessment. Defendant does not otherwise object to Ho-Walker's testimony or dispute the events to which Ho-Wallker testifies.

Defendant offers CPA Michael Garibaldi, who is accredited in business valuation and certified in business forensics and has significant experience as an expert witness in New York state courts on business valuation and forensic accounting. (NYSCEF 204, Garibaldi Trial Aff ¶¶ 1-2.) Garibaldi states that he was asked to provide an opinion on whether plaintiff was worth more than $7.5 million on November 15, 2015 and demands to do so at a trial. (*Id*. ¶ 5.)[7]

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[6] Plaintiff issued 149.5 million shares. (NYSCEF 140, Ho-Walker Aff ¶ 6 [dated February 22, 2018].) The court calculates defendant's interest after the purchase of 100 million shares for $7.5 million at 66.8% (100 million shares /[149.5 million shares-1.1 million shares plaintiff purchased from its shareholders]).

[7] As a nonparty, Garibaldi has no right to a trial. (*Id*. ¶5.)

First, Garibaldi notes that the book value of plaintiff on December 31, 2015, based on audited financial statements, was $16,151,840,[8] making defendant's 59% $9,529,836. (*Id*. ¶¶ 17, 21.) Garibaldi opines that it is significant that the auditor did not mention a "going concern issue," which is the inability of the entity to exist beyond one year. (*Id*. ¶¶ 18, 19, 20.) Garibaldi notes that with defendant's injection of $7.5 million, plaintiff's value would be $7.5 million more or $23,652,265, making defendant's 59% $13,954,836. (*Id*. ¶ 22.)

Next, Garibaldi notes that plaintiff's tax returns list its book value as $15,479,227 as of December 31, 2015, making defendant's 59% interest $ 13,557,743. (*Id*. ¶ 35.)

Using a memorandum prepared by plaintiff's investment bankers to solicit investors from January thru June 2015, Garibaldi opines that plaintiff's discounted future earnings would be $14,484,372, making the value of defendant's 59% interest $12,970,779. (*Id*. ¶¶ 36-52.)

Plaintiff objects to Garibaldi's testimony because his opinion is based on an outdated marketing presentation that projected massive revenues in 2018 and 2019, along with an equity infusion of BRL 360 million (equivalent to about $109 million as of July 3, 2015) and massive capital expansion to get there. (*See* NYSCEF 204, Garibaldi Aff ¶¶36-50; NYSCEF 138, Ho-Walker Aff ¶¶43-44; NYSCEF 179, marketing presentation.) However, there never was a BRL 360 million investment and the undisputed facts, which includes testimony from defendant, show that there was no prospect for such an investment. (NYSCEF 138, Ho-Walker Aff ¶44.)

[8] The audited financial statements are stated in Brazilian reals (BRL), Brazil's currency. The parties use 3.796 as the conversion rate.

Defendant has repeatedly stated under oath to this court that plaintiff's shares were "worthless" unless the company obtained an additional $75 million in financing, which he conceded would never happen. (NYSCEF188, Rakib Aff ¶ 8.)

• "[U]nless On Telecom could obtain at least $75,000,000 in investment and make significant improvements in its business model, On Telecom would go out of business, and Quattro's interest in On Telecom (even after the $7,500,000 contemplated by the Transaction Agreement was funded to On Telecom) would be zero. Because On Telecom was Quattro's only significant asset, if that occurred, Quattro would be worthless. Because there was no way to obtain additional investments once it became clear that the Spectrum Rights had no value, the bridge financing that my contemplated $7,500,000 investment would have supplied to On Telecom would not have saved On Telecom, and those funds would be lost and Quattro would have no funds as a result of my investment and would have a value of zero." (*Id*. ¶8.)

• "[The $7.5 million investment] would only have funded operations for a matter of months, and if no additional investments were obtained, then On Telecom would cease operations and the value of On Telecom, and of Quattro, of which On Telecom was the sole substantive asset, would be zero." (*Id*. ¶7.)

• "The stand-alone market value of [Quattro's] primary asset, the Spectrum Rights, was nearly zero." (NYSCEF 187, Rakib Aff ¶ 50.)

• "[T]he intrinsic value of the Spectrum Rights was virtually zero at the time the Transaction Agreement was being negotiated." (NYSCEF 188, Rakib Aff ¶16).

• "It was only after I learned (after the Transaction Agreement was executed) that the Spectrum Rights were virtually worthless that the investment contemplated by the Transaction Agreement transformed from 'risky' to futile." (NYSCEF 187, Rakib Aff ¶ 49.)

Defendant refused to honor the contract because the shares were worthless. He stated that he "learned after the Transaction Agreement was executed but before my investment was required that the Spectrum Rights were 'virtually worthless.'" (NYSCEF 231, Rakib Trial Aff ¶ 7.) At his deposition, he said that he failed to make the $7.5 million payment (i.e., breached the contract) because "the Spectrum Rights" were "so impaired, not only because they went down in value, but because no one else was

bidding; no one else was interested in operating something similar to what we were doing." (NYSCEF 190, Rakib Depo. Tr at 52:12-16.)

Defendant's contradictory statements do not create an issue of fact. A "party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment." (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] [citation omitted].)

The court finds that the best indication of market price is the price that was paid to the shareholders who sold 1.1 million shares in December 2016 for $.01, not per share, but per 1.1 million shares. Defendant does not challenge this transaction. There is no evidence that these shareholders are interested or conflicted in any way. Based on Ho-Walker's testimony, the court finds that the shares were no more valuable than $.01/1 million shares in November 15, 2015. The court credits Ho-Walker's analysis as it was contemporaneous and factual. Most significant is Soros's decision to mark the value of its investment to zero on September 30, 2015, 45 days before the November 15 2015 closing date. Defendant's contention that Ho-Walker is paid and thus bias is undermined by defendant's failure to counter any of Ho-Walker's factual statements.

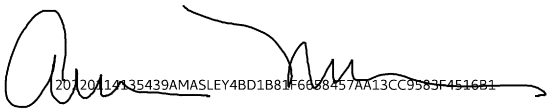
The court credits Garibaldi's data and analysis but disagrees that book value or value for the purposes of taxes are a substitute or approximation for market value – the price that a knowledgeable investor would pay for Quattro shares. Likewise, the court rejects Garibaldi's reliance on the investment banker's projections from January 2015 to June 2015 when they were soliciting investors. These projections were based on an injection of funds which never occurred.

Finally, the court credits defendant's evaluation of the shares as "worthless." Indeed, the court credits defendant's statements more than any other evidence. Defendant co-founded plaintiff's predecessor, successfully attracted significant investments from Soros and others of $150 million, and was an active board member throughout—no one knew plaintiff's value, or the lack thereof, better. (*See* NYSCEF 186, Ho-Walker ¶¶ 6, 11-13.)

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on damages is granted and damages are $7,499,900 ($7,500,000 -$100 [100 million shares x .01/million shares]); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of $7,499,900, with interest at the rate of 9% per annum from the date of November 15, 2015, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.



1/14/2022
DATE

ANDREA MASLEY, 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