SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

RAVI MADDALI, VENKATESHWARA MADDALI, and SRINIVAS MADDALI,

Plaintiffs,

-against-

Index No. 28560/2017E

MEMORANDUM DECISION/ORDER

RAVINDER ANNAMANENI a/k/a RAVI RAO ANNAMANON, PADMAJA ANNAMANENI, JOLIN RX INC., RAJESH MATHEW, LUMIT RX INC., RAVIKUMAR MAMIDELA, SCHEER RX INC., NAGA JYOTHI VEMULAPALLI, SHARATH CHANDRA VEMUGANTI, SNVK PHARMACY INC., SUN PHARMA INC., Z RX INC., SEKAR SWAMIYAPPAN, SR PHARMACY INC., SRINIVASA EDAVALAPATI, SRINIVAS PARACHURI, BERNHARD RX INC., NARASIMHAN MOTAGAN, JOHN DOES AND JANE DOES 1-10

Defendants.

Rubén Franco, J.

This action arises out of an alleged fraudulent scheme perpetrated by defendants Ravinder Annamaneni (RavA), and his wife Padmaja Annamaneni (PadA), regarding the transfer of eight pharmacies located in Bronx County. The pleading in this action, which was commenced in 2017, is the First Amended Complaint. This case was consolidated with a related action commenced in 2019. The pleading in the 2019 action is the Complaint. The motions in the two actions here were made prior to the consolidation, but are treated together for purposes of this decision.

Defendants RavA, PadA, Jolin Rx Inc., Rajesh Mathew (Mathew), Lumit Rx Inc., Ravikumar Mamidela (Mamidela), Naga Jyothi Vemulapalli (Vemulapalli), SNVK Pharmacy Inc., Sun Pharma Inc., Z Rx Inc., and Sekar Swamiyappan (Swamiyappan), (collectively,

"Pharmacy defendants") move to dismiss the First Amended Complaint for failure to state a cause of action (CPLR 3211 [a] [7]), and based on documentary evidence (CPLR 3211 [a] [1]). Defendants Scheer RX, Inc. (Scheer RX) and Sharath Chandra Vemuganti (Vemuganti) (together, "Scheer defendants") cross-move to dismiss the First Amended Complaint on the same grounds. In two separate cross motions, plaintiffs cross-move for leave to file amended pleadings (CPLR 3025 [b]). In a separate motion, Pharmacy defendants, SR Pharmacy, Inc., Srinivasa Edavalapati, Srinivas Parachuri, Bernhard Rx Inc., Narasimhan Motagan (together, "Pharmacy Plus defendants") move to dismiss the Complaint in the 2019 action (#22880/2019E) for failure to state a cause of action (CPLR 3211 [a] [7]) and based on documentary evidence (CPLR 3211 [a] [1]).

The facts, as culled from the pleadings, affidavits and exhibits submitted with the instant motions, are as follows: Venkateshwara Maddali (VenkatM), is an investor in pharmacies. His son, Ravi Maddali (RaviM), is a New York licensed dentist and also an investor in pharmacies. Srinivas Maddali (SrinivasM), a pharmacist, is VenkatM's son and RaviM's brother (VenkatM, SrinivasM and RaviM, collectively, "plaintiffs").

Beginning in 2002, VenkatM, with the assistance of SrinivasM, partnered with RavA to open a number of pharmacies. SrinivasM and RavA are part of a close-knit community of Indian-Americans from the same area in India and both speak the same native language. In time, RaviM became an investor in the pharmacies established by VenkatM and RavA. Neither VenkatM nor RaviM played an active role in the operation of the pharmacies, however, SrinivasM represented their interests by checking on the six pharmacies in which they had invested. SrinivasM held an economic interest in the two additional pharmacies that are also the subject of this litigation.

In late 2013, SrinivasM for himself, and as representative of VenkatM and RaviM, discussed with RavA entering into an agreement, which plaintiffs claim, is common in the

pharmacy industry, particularly in the Indian-American community, to restructure the ownership of the initial six pharmacies in which VenkatM and RaviM had an interest. The agreement called for RavA to assume nominal ownership of the six pharmacies and to continue to share profits with VenkatM and RaviM, and at some point RavA would transfer those interests to SrinivasM. RavA was to purchase the interests of VenkatM and RaviM in each of the six pharmacies with loans ranging from $150,000 to $400,000 per pharmacy, which are sums below their total estimated value of $14 million. The pharmacies had combined annual gross sales of approximately $25.5 million in 2014. VenkatM and RaviM would not receive a salary or share in profits in 2013, instead they would receive the "purchase price." However, starting in 2014, VenkatM, RaviM, RavA, PadA, and their agents, would split profits in the same proportion as prior to the transfer, despite the change in record ownership, and the six pharmacies would continue to operate as in the past with respect to salaries and bonuses paid to owners, including to VenkatM and RaviM. In addition to obtaining control of the six pharmacies, RavA took control of the two additional pharmacies in which SrinivasM held an economic interest.

Plaintiffs allege that, with intent to defraud them, RavA had sales contracts and supporting documents prepared which provided for the transfer of each of the pharmacies, but did not contain the material terms of the agreement to which the parties had previously agreed. In seeking to obtain VenkatM and RaviM's signatures on the documents, RavA represented to plaintiffs that the documents contained the terms of their agreement, which plaintiffs relied on, based on the parties' longstanding and trusting relationship. Neither VenkatM, nor RaviM, received copies of the sales contracts or of the closing statements. Plaintiffs further allege that in December 2013, RavA transferred VenkatM and RaviM's entire ownership interests in the pharmacies to himself, as well

as to PadA, and his associates, and refused to fulfill his commitment to transfer the appropriate interest in sthose pharmacies to SrinivasM.

When SrinivasM learned that the documents in RavA's transaction did not provide that he would acquire the interest in the pharmacies, he confronted RavA who made excuses and said that he would make it right and honor the agreement. However, after providing VenkatM and RaviM with profit payments for a short period of time after the closing, RavA refused to continue to pay their share of the profits and refused to transfer the pharmacies to SrinivasM.

Plaintiffs further allege that beginning in 2014, RavA and his associates used their control of the pharmacies to loot corporate assets by engaging in self-dealing and payment of excessive, unauthorized, and inappropriate distributions. Although each of the pharmacies earned substantial profits in every year through 2013, RavA asserts that none of the pharmacies are profitable.

With respect to the two additional pharmacies, SrinivasM had an agreement with RavA, PadA, and Srinivas Parachuri (SrinivasP) that they would all invest in these two pharmacies and the other individuals would hold SrinivasM's interest nominally, and that SrinivasM would receive payments commensurate with his investment. The payments ceased in December 2014, and the other investors refused to acknowledge that SrinivasM has an economic interest in, and the right to acquire his full interest in the two pharmacies.

In summary, plaintiffs' allegations include that RavA's statements and promises that he would transfer the interests to SrinivasM, were false and fraudulent and were made to induce the transfer of their interests in the six pharmacies from VenkatM and RaviM to RavA and his associates without any intention of ever transferring the ownership interests to SrinivasM; that RavA abused the trust and confidence that SrinivasM, VenkatM and RaviM held for him by fraudulently inducing VenkatM and RaviM to sign documents to transfer the pharmacies; that

RavA fraudulently promised that the pharmacies would then be transferred to SrinivasM; and, that profits during the interim period would be paid to VenkatM and RaviM. After obtaining control of the pharmacies RavA gave salary increases and bonuses to himself, his wife, and his associates.

Plaintiffs claim damages in the sum of $12 million, and punitive damages, and seek a declaration that the sale documents are null and void, and that VenkatM and RaviM remain owners of their share of the pharmacies.

Defendants Mathew, Mamidela, Vemulapalli and Swamiyappan are co-owners and working pharmacists at four of the six pharmacies. They allegedly permitted RavA to loot the pharmacies, necessitating an accounting of the assets, income and expenditures of the pharmacies as of the date of the alleged fraudulent transfer of ownership.

A motion to dismiss a Complaint under CPLR § 3211 (a) (1) will be granted only if the documentary evidence conclusively disposes of plaintiff's claim and resolves all factual issues (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Attias v Costiera*, 120 AD3d 1281 [2nd Dept. 2014]). The documentary evidence needed to support such a motion must be "unambiguous, authentic, and undeniable" (*Attias v Costiera, supra*, at 1282, quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2nd Dept 2010]; *Phillips v Taco Bell Corp.*, 152 AD3d 806 [2nd Dept 2017]). And even where the proffered evidence qualifies as documentary evidence, "[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law" (*Amsterdam Hosp. Grp. v Marshall-Alan Assocs.*, 120 AD3d 431, 433 [1st Dept 2014]). The proponent for dismissal under CPLR 3211 (a) (1) submits the documents that it alleges will definitively defeat the cause of action (*see AG Capital Funding Partners, L.P.*

v. State St. Bank & Trust Co., 5 NY3d 582, 590-591 [2005]; *Amsterdam Hospitality Group, LLC v. Marshall Alan Assoc., Inc.*, 120 AD3d at 433]).

In support of their motions to dismiss, RavA, PadA, and the Pharmacy Plus defendants submit closing statements, minutes of a special joint meeting of the board of directors and shareholders, the resignation of RaviM, checks, and stock sale agreements for the initial six pharmacies. In support of their cross motion to dismiss, the Scheer defendants assert that in December 2013, RaviM transferred his shares of stock in Scheer Rx Inc. to Vemuganti. The Scheer defendants also rely on the closing statements and stock purchase agreements, as well as Vemuganti's receipt of K-1's from Scheer Rx Inc. indicating his ownership interest in Scheer Rx Inc. These documents evince a transfer of the pharmacies, but do not conclusively dispose of plaintiff's claim, nor do they resolve all factual issues. The execution of the documents is not inconsistent with plaintiffs' allegation that there was to be an initial transfer of the pharmacies.

On a motion pursuant to CPLR 3211 (a) (7), the Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Affidavits may be considered freely "to preserve inartfully pleaded, but potentially meritorious, claims" in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are

insufficient to maintain a cause of action (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

In *Rovello*, the Court stated that where a plaintiff asserts claims "on his pleading alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint." Relying on *Rovello*, the Court in *E & D Grp., LLC v Vialet* (134 AD3d 981, 982 [2nd Dept 2015]), stated that " 'on a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party' (*Sokol v Leader*, 74 AD3d at 1181), and a plaintiff 'will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint.'"

In support of the motions, defendants review the elements of each of the eleven causes of action in the First Amended Complaint and the Complaint and argue that certain claims are duplicative. Plaintiffs have established that the pleadings in the consolidated action state some cognizable claims.

With respect to the first cause of action for fraudulent misrepresentation/common law fraud, a plaintiff must allege that the defendant "knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged." (*Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958].) "The essential constituents of the action are fixed as representation of a material existing fact, falsity, scienter, deception and injury." (*id.* at 407.) Thus, if a defendant fraudulently makes a misrepresentation of intention for the purpose of inducing a plaintiff to act or refrain from action in reliance on the misrepresentation in a business transaction, the defendant may be liable for the harm caused by

the plaintiff's justifiable reliance upon the misrepresentation (*id.*; s*ee Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 233 [1st Dept 1999]).

CPLR 3016 (b) provides: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, … the circumstances constituting the wrong shall be stated in detail." In *Pludeman v Northern Leasing Sys., Inc.* (10 NY3d 486, 491 [2008]), the Court cautioned that CPLR 3016 (b) "should not be so strictly interpreted" so that an otherwise valid cause of action is prevented from being upheld in situations where it "may be impossible to state in detail the circumstances constituting a fraud." The Court explained that CPLR 3016 (b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (*id.* at 492; *see Kaufman v Cohen*, 307 AD2d 113, 120-121 [1st Dept 2003]).

The elements of the second cause of action in the First Amended Complaint for fraudulent inducement are stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC* (19 AD3d 273, 275, [1st Dept 2005]) as "a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment (*Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-408 [1958]; *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 213 [(1st Dept) 1991])." The Court continued: " 'An expression or prediction as to some future event, known by the author to be false or made despite the anticipation that the event will not occur, 'is deemed a statement of a material existing fact, sufficient to support a fraud action' ' (*Cristallina S.A. v Christie, Manson & Woods Intl.*, 117 AD2d 284, 294-295 [(1st Dept) 1986], quoting *Channel Master Corp.*, 4 NY2d at 407)."

Plaintiffs have stated both of the fraud claims by alleging, with sufficient detail, that RavA created a fraudulent scheme to deprive VenkatM and RaviM of their ownership interests in the

pharmacies by refusing to fulfill his material representation that he would transfer the shares to SrinivasM; that plaintiffs reasonably relied upon RavA's misrepresentations; and, that they suffered damages as a result.

Generally, a separate cause of action seeking damages for fraud cannot stand when the only fraud alleged relates to a breach of contract (*see Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). In *Dynamic-Hakim, LLC v. Maloney* (169 AD3d 411, 412 [1st Dept 2019]), the Court held that the fraud cause of action was not duplicative of the breach of contract cause of action, because it was alleged that the misrepresentation was made before the drafting of the contracts, and thus, was collateral to the promises to perform contained in the contracts.

In the First Amended Complaint plaintiffs allege that RavA induced plaintiffs to transfer their ownership interests to him by promising that he would transfer VenkatM and RaviM's ownership interests to SrinivasM, and that he would continue to pay to plaintiffs their share of the profits in six pharmacies. In the Complaint of the consolidated action, it is alleged that, in furtherance of the fraud, defendants have refused to acknowledge SrinivasM's interest in all of the pharmacies, and to pay the sums to which he is entitled. The court finds that the promises were collateral to the sale agreements, and the alleged misrepresentations constitute fraudulent inducement, which is a breach of duty distinct from the breach of contract claim and is not duplicative (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]).

The third cause of action in the First Amended Complaint and ninth cause of action in the Complaint in the consolidated action is for a declaratory judgment pursuant to CPLR 3001, which provides in part: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy

whether or not further relief is or could be claimed." In *Chanos v MADAC, LLC* (74 AD3d 1007, 1008 [2nd Dept 2010]), the Court explained that to "constitute a 'justiciable controversy,' there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect…" There is a controversy "where the plaintiff asserts rights which are actually challenged by the defendant" (*id.*). The Court further stated: "The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligations (*see Goodman v Reisch*, 220 AD2d 383 [(2nd Dept) 1995])." The court is not required to dismiss a declaratory judgment action merely because other adequate remedies may exist (*see Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140-142 [1995]).

Here, the declaratory judgment and the breach of contract claims are not duplicative because each seeks different relief. While plaintiffs pursue a declaration with respect to the parties' ownership interest and rights to payment, the breach of contract claim seeks monetary relief, which will not fully resolve the dispute between the parties by making a determination regarding who owns the pharmacies and their respective percentages of interest. The declaratory judgment will ensure that there is no ambiguity as to the parties' rights, and will provide clarity which a breach of contract award for money damages may not.

The fourth cause of action in both pleadings is for unjust enrichment, for which the elements are that (1) the other party was enriched, (2) at movant's expense, and (3) that it is against equity and good conscience to permit a party to retain what is sought to be recovered (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Where there is a bona fide dispute as to the existence of an oral contract, the Court in *Art & Fashion Group Corp. v Cyclops Prod., Inc.* (120 AD3d 436, 439 [1st Dept

2014]), noted that "a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies." (*See Basu v Alphabet Mgt. LLC*, 127 AD3d 450, 450-451 [1st Dept 2015]; *Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 448 [1st Dept 2010]; *Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007]; *Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [2nd Dept 2003].)

The elements of the unjust enrichment claim have been satisfied in that plaintiffs allege that RavA and his associates have been unjustly enriched, at plaintiffs' expense; by fraudulently transferring for their own use plaintiffs' ownership interests in the pharmacies; failing to transfer these interests to SrinivasM; failing to pay profits to plaintiffs; and, failing to recognize SrinivasM's interests in the additional two pharmacies and to make payments in accordance with those interests. Inasmuch as defendants dispute that RavA made a separate oral agreement with plaintiffs, and claim that the sale agreements are the sole documents regarding the transaction between the parties, the court finds that plaintiffs' unjust enrichment claim is not duplicative of the breach of contract claim, and the claim does not depend on the existence of valid and enforceable contracts between the parties, but rather arises from facts independent of any of plaintiffs' contract claims.

The elements for the fifth cause of action in both pleadings for conversion are "(1) plaintiff's possessory right or interest in the property … and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, [2006]; *see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]). In *Johnson v Cestone* (162 AD3d 526, 527-528 [1st Dept 2018]), the Court dismissed the conversion claim as duplicative of the breach of contract claims because it was predicated on a breach of contract and did not allege facts that would give rise to tort liability.

The Court stated: "The fact that the motion court upheld the unjust enrichment claim because defendants dispute the existence of the oral agreements does not alter this result (*see e.g. Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]; *see also Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014])." (*See TOT Payments, LLC v First Data Corp.*, 128 AD3d 468, 469 [1st Dept 2015].)

Here, plaintiffs allegations, that RavA, PadA, and Vemuganti seized and took control of their shares in the pharmacies and the designated funds representing their share of the profits; and, that RavA, PadA, and Vemuganti have failed and refused to return the shares to plaintiffs or to transfer the shares to SrinivasM, are a restatement of the claim for damages under the breach of contract theory and should be dismissed as duplicative.

The elements of the sixth cause of action in the First Amended Complaint and seventh cause of action in the Complaint in the consolidated action for breach of fiduciary duty are, "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014])." (*Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016].) A plaintiff must plead a claim for breach of fiduciary duty in accordance with the particularity required by CPLR § 3016(b). An arm's length business relationship does not give rise to a fiduciary relationship (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012]; *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 164 [1993]).

In *EBC I, Inc. v Goldman, Sachs & Co.* (5 NY3d at 19), the Court stated that a fiduciary relationship exists between two people "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*See Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*,

11 NY3d 146, 158 [2008].) If the claim is duplicative of a breach of contract claim, if should be dismissed (*see Saul v Cahan*, 153 AD3d 947, 949 [2nd Dept 2017]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]).

Plaintiffs have not alleged facts with sufficient particularity to maintain a cause of action for breach of fiduciary duty, because they do not establish the existence of a fiduciary relationship. Further, this cause of action is duplicative of plaintiffs' cause of action for breach of an oral contract. Plaintiffs' assertion, that because RavA and associates are the shareholders of Jolin Rx, Lumit Rx, SNVK Pharmacy and Sun Pharma and have control of the books, records, and accounts of those pharmacies, is not enough to make out a breach of fiduciary duty claim, even combined with the allegation that defendants have refused to provide plaintiffs with access to the books and records of the companies. These assertions do not concern conduct that allegedly occurred while plaintiffs were shareholders of the pharmacies and no fiduciary relationship arises out of the subsequent arms' length transactions between the parties (*see MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 292-293 [1st Dept 2016]).

Plaintiffs' allegations relate to plaintiffs' interests and the failure to pay plaintiffs their share of the profits of the pharmacies and concerns conduct which arises out of the purported oral agreement and does not show that there is a separate duty. Thus, these allegations are duplicative of the breach of oral contract claim (*see Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015]; *Tradewinds Fin. Corp. v Repco Sec., Inc.*, 5 AD3d 229, 230 [1st Dept 2004]) and are dismissed.

The seventh cause of action in the First Amended Complaint and eighth cause of action in the Complaint in the consolidated action are for an accounting which may be ordered if there is "(1) a fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and (4) a

demand and refusal of an accounting" (*Matter of Mary XX*, 33 AD3d 1066, [3rd Dept 2006]; *see Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). The right to an accounting is premised upon the existence of a confidential or fiduciary relationship, together with a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (*see Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). In *Roslyn Union Free School Dist. v Barkan* (16 NY3d 643, 653 [2011]), the Court defined an accounting as an "equitable remedy … designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession."

As discussed, plaintiffs fail to allege sufficient details to establish a fiduciary relationship. Accordingly, the cause of action for an accounting must be dismissed.

The elements for the eighth cause of action in the First Amended Complaint and second cause of action in the Complaint in the consolidated action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*see Meyer v N. Shore-Long Island Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2nd Dept 2016]; *US Bank Nat. Ass'n v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]; *Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). If an oral contract is in issue, the plaintiff should specifically so state and set forth all the relevant terms of the oral agreement (*see Bomser v Moyle*, 89 AD2d 202, 205 [1st Dept 1982]).

An oral contract must satisfy all the elements of a contract claim and not be barred by the statute of frauds. In *Sheehy v Clifford Chance Rogers & Wells LLP* (3 NY3d 554, 559-560 [2004]), the Court stated:

> The statute of frauds, as incorporated in section 5-701 (a) (1) of the General Obligations Law, provides that an agreement is void if it is not in writing and

> "subscribed by the party to be charged therewith" when the agreement "[b]y its terms is not to be performed within one year from the making thereof." The statute of frauds was intended to prevent "fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury" (*D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 453 [1984]).

There is no assertion that the oral agreement between the parties is barred by the statute of frauds because it is "an oral agreement for an indefinite period" (*Moses v Savedoff*, 96 AD3d 466, 469 [1st Dept 2012]).

In *Atkinson v Mobil Oil Corp.* (205 AD2d 719, 720 [2nd Dept 1994]), the Court stated that "[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based." The pleadings must be " 'sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved' as well as 'the material elements of each cause of action or defense' " (*DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 239 [2nd Dept 1984] [quoting CPLR 3013]).

Although defendants argue that the agreement is missing necessary material terms and that the consideration is not clear, the Court in *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.* (78 NY2d 88, 91 [1991]), referred to the doctrine of definiteness and noted that it should not be applied rigidly. The Court stated: "Contracting parties are often imprecise in their use of language, which is, after all, fluid and often susceptible to different and equally plausible interpretations. Imperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract." (*See Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-483 [1989]; *Cowen & Co., LLC v Fiserv, Inc.*, 141 AD3d 18, 21 [1st Dept 2016]; *Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1998].)

While consideration is required in order to find that there is a valid contract (*see Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475 [1993]), in *Goldston v Bandwidth Tech. Corp.* (52 AD3d 360, 366 [1st Dept 2008]), the Court stated that "parties to a contract may make a bargain as they see fit 'even if the consideration exchanged is grossly unequal or of dubious value' (*Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475 [1993]), of importance is whether the promised consideration 'is acceptable to the promisee' (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982])." (*See Dafnos v Hayes*, 264 AD2d 305, 306 [1st Dept 1999].) The concept of consideration is that "it consists of either a benefit to the promisor or a detriment to the promisee" (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464, [1982]). "It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." (*Id.*; *see Reversible Destiny Found., Inc. v Post*, 173 AD3d 647, 648 [1st Dept 2019].)

Plaintiffs allege that RavA agreed to the terms of the understanding; that plaintiffs performed by transferring nominal ownership of the pharmacies to RavA and his associates; that RavA and his associates failed to perform by failing to pay plaintiffs their full share of the profits, and failing to transfer the pharmacies to SrinivasM; and that plaintiffs have suffered significant monetary damages. As described in the First Amended Complaint, necessary and material terms regarding profits, consideration, and timing are alleged so that the agreement that is described is not an indefinite agreement. The allegation is clear that profits were to be shared by RavA, who was to provide plaintiffs with payments after the closing. RavA did pay plaintiffs the sum of $500,000 in alleged profit share for 2014, as required by the agreement.

The consideration for the transfers included that RavA and his associates would receive, for a temporary period, nominal ownership of VenkatM and RaviM's shares in the pharmacies,

and that plaintiffs would incur a detriment in reliance upon RavA's promise to abide by the agreement by transferring to him their interests in the pharmacies, and trusting him to pay their share of the profits.

Defendants rely on the merger clause set forth in the Stock Sale Agreement (¶ 9 [C]), which states:

> This instrument sets forth the entire agreement between the parties relating to the contemplated transaction and supersedes all prior agreements and understandings of the parties in connection therewith....

However, the Court in *Barash v Pennsylvania Term. Real Estate Corp.* (26 NY2d 77, 86 [1970]) stated: "The presence of the general merger clause does not bar the introduction of the parol evidence of fraudulent representations in actions to rescind a contract (*Sabo v. Delman*, 3 NY2d 155, 161 [1957]; *Carlinger v. Carlinger*, 21 AD2d 656 [1st Dept 1964]). So, too, a general merger clause does not bar an action to reform a contract, which by reason of fraud and mistake does not contain the agreement of the parties (*Brandwein v. Provident Mut. Life Ins. Co.*, 3 N Y 2d 491, 495-496 [1957])." In *Sabo* (3 NY2d at 161), the Court recognized that if the rule were otherwise, "a defendant would have it in his power to perpetrate a fraud with immunity, depriving the victim of all redress, if he simply has the foresight to include a merger clause in the agreement."

In *Magi Communications v Jac-Lu Assoc.* (65 AD2d 727, 728 [1st Dept 1978]), the Court found that "where, as here, the agreement contains only a general merger clause, proof by parol may be offered to establish either fraud in the inducement or fraud in the execution." In *Danann Realty Corp. v Harris* (5 NY2d 317, 320 [1959]), the Court stated: "To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made."

As a general clause, the provision in the Stock Sale Agreement is not effective to preclude oral proof of false or fraudulent misrepresentations. Plaintiffs here allege a fraudulent scheme, which should not be sanctioned by use of a merger clause. There is evidence that RavA made a payment of $500,000 purportedly in accordance with the parties' agreement as a profit share, more than one year after the sale agreements were signed, which contradicts defendants' contention that the transfers pursuant to the sale agreements were final and absolute. The merger clauses do not bar plaintiffs' causes of action or preclude them from making their claims

The elements for the third cause of action in the Complaint in the consolidated action for third-party beneficiary are "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983])." (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006].)

In *Dormitory Auth. of the State of N.Y. v Samson Constr. Co.* (30 NY3d 704, 710 [2018]), the Court explained: " 'We have previously sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was "an intent to permit enforcement by the third party' (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985])."

In this action, RavA, VenkatM and RaviM entered into an agreement to transfer VenkatM and RaviM's ownership interest in the six pharmacies to SrinivasM, who was the intended beneficiary of the agreement. Inasmuch as SrinivasM was the representative for VenkatM and RaviM, it was intended that he would enforce the agreement.

The elements for the sixth cause of action in the Complaint in the consolidated action for contractual reformation by reason of mistake are "that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation" (*Gunther v Vilceus*, 142 AD3d 639, 640 [2nd Dept 2016]; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Plaintiffs have a heavy burden in that they must show not only that mistake or fraud exists, but what was agreed to by the parties. In the case of unilateral mistake, "it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement" (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]).

The relevant allegation is that RavA induced the execution of the sale agreements through fraud, and, that the sale agreements do not reflect the initial agreement made by the parties. However, plaintiffs do not allege that there was either a mutual or unilateral mistake to support a claim for reformation. Accordingly, this cause of action must be dismissed.

Turning to plaintiffs' cross motions to amend the First Amended Complaint and Complaint in the consolidated action, CPLR 3025 (b) provides:

> A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Plaintiffs' cross motions are denied, as plaintiffs do not provide a proposed amended or supplemental pleading as required by CPLR 3025 (b) (*see Sirohi v Lee*, 222 AD2d 222, 223 [1st Dept 1995]; *see also Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 483 [1st Dept 2015]). In any event, plaintiffs' cross motions appear to have been contingent on the determination of

defendants' motions. Plaintiffs state that the application is made to cure any deficiencies in the pleadings, thus, the application is premature. The cross motions are deficient and are denied.

Accordingly,

Pharmacy defendants' motion and Scheer defendants' cross motion to dismiss the First Amended Complaint is granted with respect to the fifth cause of action for conversion, sixth cause of action for breach of fiduciary duty, seventh cause of action for an accounting, and is denied as to the remaining causes of action.

Plaintiffs' cross motions for leave to amend their pleadings are denied.

Pharmacy Plus defendants' motion to dismiss the Complaint in the consolidated action (formerly #22880/2019E) is granted with respect to the fifth cause of action for conversion, seventh cause of action for breach of fiduciary duty, eighth cause of action for an accounting, and sixth cause of action for reformation, and is denied as to the remaining causes of action.

Defendants are directed to serve an Answer to the combined First Amended Complaint and Complaint within twenty days after the service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the court.

Dated: December 23, 2019

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO