SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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CICARDO NATIONAL, INC.,

Plaintiff,

- v -

MICHAEL LOEB, LOEB ENTERPRISES, LLC, LOEB ENTERPRISES II LLC, SCRIPT RELIEF LLC, OPTUMRX, INC., TWENTY STAR EQUITY POOL LLC, OPTUMRX, INC.

Defendant.

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INDEX NO. 650737/2020

MOTION DATE 07/31/2020, 07/31/2020

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 47, 48, 49, 50, 55, 57

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 51, 52, 53, 54, 56, 58, 59, 60

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Script Relief LLC, Optum Perks LLC, and OptumRx, Inc.'s (collectively, the **Optum Defendants**) motion to dismiss (Mtn. Seq. No. 005) is granted to the extent that the claim for breach of contract (first cause of action) is dismissed to the extent of the claims which predate January 31, 2014. The claim for fraudulent inducement (second cause of action) must be dismissed without prejudice because Cicardo National Inc. (the **Plaintiff**) fails to allege any misrepresentation with sufficient particularity that occurred before it was allegedly induced to acquire a certain profits interest and lower its commissions other than mere statements of puffery. The claim for violation of New York Labor Law sections 191(1)(c) and 191-b (third

cause of action) must also be dismissed because such protection is only accorded to salesperson employees and principal manufacturers but the Plaintiff is not a salesperson employee and the defendants are not principal manufacturers. Finally, Michael Loeb, Loeb Enterprises, LLC, and Loeb Enterprises II LLC's (collectively, the **Loeb Defendants**) motion to dismiss (Mtn. Seq. No. 004) is granted to the extent that the Amended Complaint is dismissed as against Mr. Loeb.

The Relevant Facts and Circumstances

The Plaintiff company is owned by Jason Cicardo and it facilitates sales in the medical field. Defendant Script Relief LLC (**SR**) provides members with discount pharmaceutical drugs through a member discount card sold in pharmacies and physicians' offices (NYSCEF Doc. No. 30, ¶ 17). SR is partly owned by Twenty Star Equity Pool LLC (**Twenty Star**), which is owned and operated by two entities that Mr. Loeb owned – Loeb Enterprises, LLC and Loeb Enterprises II LL (collectively, the **Loeb Enterprises**) (*id.*, ¶¶ 6-7, 11-13).

Pursuant to a Consulting Agreement (the **Agreement**; NYSCEF Doc. No. 48), dated December 13, 2012, by and between SR and the Plaintiff, SR retained the Plaintiff as a consultant and independent contractor to place SR's discount cards with physicians (*id.*, § 1). The parties agreed that SR would pay the Plaintiff a commission of $15.00 per card activation and $5.00 for every card activated by an approved salesperson (*id.*, § 2). The Agreement was for one year subject to earlier termination for any reason upon 30 days prior written notice (*id.*, §§ 3[a]-[b]). The Agreement also contained an integration clause and could not be amended or modified without the written consent of both parties (*id.*, § 4[e]).

Approximately three months after the parties executed the Agreement (i.e., March 2013), SR and Loeb Enterprises' Executive Director, Kimmy Scotti, allegedly approached Mr. Cicardo with a proposal from Mr. Loeb to modify the Agreement by having the Plaintiff reduce its commission rate to $12.50 per activation and $2.50 per activation by an approved salesperson in exchange for 10,000 shares of SR (NYSCEF Doc. No. 30, ¶ 28). To induce Mr. Cicardo to agree to the modification, Mr. Loeb allegedly told Mr. Cicardo that he would be "able to retire" if he took equity in SR (*id.*, ¶ 30). Ms. Scotti allegedly also tried to induce Mr. Cicardo to agree to the modification by telling Mr. Cicardo that he would "become very wealthy" if he agreed to alter the Agreement and that SR would look more profitable if the Plaintiff's commission was lowered (*id.*, ¶ 31). Ms. Scotti then sent Mr. Cicardo a certain "Profit Interest Agreement" which provided that Mr. Cicardo would hold 10,000 units in Twenty Star, which was valued at $3,423,905 (*id.*, ¶¶ 32-33).

The Plaintiff alleges that the Profit Interest Agreement did not modify or refer to the Agreement (*id.*, ¶ 34). To wit, Ms. Scotti allegedly promised Mr. Cicardo that "if the sale of SR did not result in [him] making as much as he would have made under the Agreement, [SR] would pay him the difference" and allegedly further promised that Mr. Cicardo would receive profit disbursements from SR for his equity stake (*id.*, ¶ 36). Additionally, although Mr. Cicardo asked for a writing to confirm Ms. Scotti's latest terms, she indicated that in lieu of a new writing, the parties should keep the original Agreement intact without modification so that if SR's sale made him less than he would have made under the Agreement, he would receive the compensation due under the Agreement (*id.*, ¶ 37). Based on this understanding, and Mr. Loeb and Ms. Scotti's assurances, Mr. Cicardo alleges that he signed the Profit Interest Agreement on February 13,

2013 (*id.*, ¶ 39).[1] Notwithstanding the foregoing, the Plaintiff alleges that SR unilaterally lowered the Plaintiff's commission further to $10.00 per card activation in October 2013 (*id.*, ¶ 58).

Although the Agreement expired on December 13, 2013 by its terms, the Plaintiff alleges that parties agreed that the Plaintiff would continue to perform under the Agreement based on the assurances that SR was financially healthy and that it would be purchased shortly by United Health (*id.*, ¶¶ 43-45, 59). The Plaintiff alleges that it was given continued assurances of the oral agreement by Lenny Roth, who replaced Ms. Scotti in 2015 (*id.*, ¶ 60). In 2016, Mr. Roth advised Mr. Cicardo that SR was valued at $1.3 billion in 2014 (*id.*, ¶ 61). During an interview in mid-2018, Mr. Loeb stated that SR was worth over one billion dollars (*id.*, ¶ 64). In July 2018, SR's CFO Richard Vogel assured Mr. Cicardo that "[y]ou are going to see the company skyrocket, you are going to be very happy" (*id.*, ¶ 65).

On or about February 19, 2019, Mr. Cicardo learned that SR would be sold to defendant OptumRx, Inc. (**OptumRx**) (*id.*, ¶ 70). The Plaintiff alleges that it began working with OptumRx in the same capacity as SR at or around the time of sale (*id.*, ¶ 71). At a subsequent meeting with Mr. Loeb, among others, Mr. Cicardo discovered for the first time that OptumRx purchased SR for $1.00 because SR had accumulated heavy debts (*id.*, ¶ 74). Mr. Loeb allegedly acknowledged to Mr. Cicardo that the Agreement remained in effect and advised that he contact Mr. Vogel to receive what was owed to the Plaintiff (*id.*, ¶ 77). After Mr. Cicardo sent Mr. Loeb and Mr. Vogel a spreadsheet of monies owed in early April 2019, Mr. Vogel initially confirmed

[1] For the avoidance of doubt, the Amended Complaint states that the Profit Interest Agreement was signed on February 13, 2013, which predated the parties' discussions in March 2013.

that the spreadsheet looked correct, but later denied that the numbers were accurate in May 2019 (*id.*, ¶¶ 78-82). At a meeting in May 2019, Mr. Loeb offered to set up a new company with Mr. Cicardo instead of paying the Plaintiff what was allegedly owed (*id.*, ¶ 83). Mr. Cicardo refused (*id.*, ¶ 84). Mr. Loeb then refused to pay the Plaintiff (*id.*).

In addition, the Plaintiff claims that from 2013 through 2019, SR falsely underreported card activations in order to pay the Plaintiff less than what was owed (*id.*, ¶¶ 48-51). The Plaintiff alleges that SR operated out of the Loeb Enterprises headquarters and its employees provided card activation reports to the Plaintiff under which it would receive commission payments (NYSCEF Doc. No. 30, ¶¶ 25-26). While the Plaintiff worked for SR, the Plaintiff allegedly directed complaints to individuals who worked for the Loeb Enterprises and all of SR's administrative matters were also handled through them (*id.*, ¶¶ 54-55). The Plaintiff also asserts that the Loeb Enterprises funded and received profits from SR and that Mr. Loeb and Loeb Enterprises made all business decisions related to SR (*id.*, ¶¶ 14, 57).

The Plaintiff further claims that it was underpaid by OptumRx for false and underreported card activations after SR was purchased in or around February 2019 (*id.*, ¶¶ 85-88). On March 31, 2020, the Plaintiff executed a new agreement with Optum Perks, LLC (**Optum Perks**) (NYSCEF Doc. No. 59).

The Plaintiff commenced this action on January 31, 2020 and filed an Amended Complaint (the **Amended Complaint**; NYSCEF Doc. No. 30) on June 26, 2020 alleging claims for (1) breach of contract (first cause of action), (2) fraudulent inducement (second cause of action), and (3)

commissions owed under New York Labor Law (third cause of action). The defendants responded by filing the instant motions to dismiss.

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Under CPLR § 3211 (a)(5), a cause of action may not be maintained due to the statute of limitations or the statute of frauds. Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

I. The Optum Defendants' Motion to Dismiss is Granted for Breach of Contract Solely to the Extent the Claim Predates January 31, 2014, Violation of New York Labor Law, and Fraudulent Inducement (Mot. Seq. No. 005)

A. Breach of Contract (First Cause of Action)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The Agreement was a valid contract that provided that it was to expire on December 13, 2013 (NYSCEF Doc. No. 30, ¶ 43). However, taking the allegations as true as the court must on this motion, the parties agreed that the Plaintiff would nonetheless continue to provide services to SR from 2013 onwards for which SR allegedly paid in part (*id.*, ¶¶ 44-52, 90). The Optum Defendants are therefore not entitled to dismissal based on the expiry date set forth in the Agreement because under the circumstances, as alleged,

either the requirement that modification be in writing was waived or a novation was entered into that was accepted by performance. In addition, the Plaintiff alleges that SR and OptumRx breached the Agreement by underpaying the Plaintiff on the basis of false card activation reports (NYSCEF Doc. No. 30, ¶ 92). Thus, the Plaintiff states a claim for breach of contract subject to the six-year statute of limitations (CPLR § 213[2]). As the Plaintiff commenced this action on January 31, 2020, any breach of contract claim that predates the six-year limitation period prior to January 31, 2014 must be dismissed as time-barred. The Plaintiff cannot rely upon equitable estoppel to toll the statute of limitations because it does not identify any acts that kept it from bringing a timely lawsuit (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Among other things, on the record before the court, the Plaintiff appears to have been aware of the alleged false card activation reports since 2013 (NYSCEF Doc. No. 30, ¶ 53). Nor can the Plaintiff rely upon the continuing wrong doctrine to toll the statute of limitations (*see Welwart v Dataware Elecs. Corp.*, 277 AD2d 372, 373 [2d Dept 2000] [cause of action did not accrue each time profits diverted because limitation period measured from date of the initial alleged breach]). Accordingly, the branch of the Optum Defendants' motion to dismiss the claim for breach of contract is granted solely to the extent of any claim that occurred prior to January 31, 2014.

B. Fraudulent Inducement (Second Cause of Action)

A claim for fraud requires a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The Plaintiff alleges that SR made false representations about its financial health to induce the Plaintiff "to orally agree to take valueless shares of SR via [Twenty Star]" and that the Plaintiff relied on such misrepresentations when it

continued to work for SR (NYSCEF Doc. No. 30, ¶¶ 96-100). However, all of the alleged misrepresentations about SR's financial health were made from March 2013 onwards, which was after Mr. Cicardo had executed the "Profit Interest Agreement" on February 13, 2013 (NYSCEF Doc. No. 30, ¶¶ 28-39). The documentary evidence confirms Mr. Cicardo's execution of a certain Joinder Agreement, dated February 15, 2013, pursuant to which he was granted 10,000 units of profit interest in Twenty Star (NYSCEF Doc. No. 49). Thus, the fraudulent inducement allegations fail based on the documentary evidence, which undermines the notion of reliance as the Plaintiff "cannot be induced to sign a contract by representations made after the contract has already been executed" (*O'Dell v Ginsberg*, 253 AD2d 544, 544 [2d Dept 1998]).

Additionally, the Plaintiff alleges that Mr. Cicardo was told that he would be made whole if the sale of SR netted him less than he otherwise would have realized if he had not agreed to lower his commission rate and that the Agreement was not modified (NYSCEF Doc. No. 30, ¶¶ 36-37). Stated differently, even taking these allegations as true, they fail to state a claim for fraud because (i) there was no reliance in entering into the "Profit Interest Agreement" and (ii) even if there were reliance, there are no damages resulting from this reliance because the Plaintiff claims that it remains entitled to collect the amount due under the allegedly unmodified and merely extended Agreement.

In any event, the alleged misrepresentations in March 2013 were that Mr. Cicardo would be "able to retire" if he took equity in SR and that he would "become very wealthy" (NYSCEF Doc. No. 30, ¶¶ 30-31). These statements do not form the basis for a fraud claim because they consist of mere puffery and opinions of value, rather than a false statement of fact (*see Sidamonidze v*

Kay, 304 AD2d 415, 416 [1st Dept 2003] [mere puffery, opinions of value or future expectations do not support a fraud claim but false statement of value does]; *CPC Intl. Inc. v McKesson Corp.*, 120 AD2d 221, 230 [1st Dept 1986] [statement that a business will yield large profits is promissory and a matter of opinion]). To the extent that the Plaintiff alleges that it relied on statements about SR's financial health made in 2016 and 2018, the Plaintiff fails to plead how it was induced to rely on such statements with the requisite particularity under CPLR § 3016(b). Accordingly, the fraudulent inducement claim must be dismissed without prejudice.

C. Commissions Owed Under New York Labor Law (Third Cause of Action)

The Plaintiff's claim for commissions owed under New York Labor Law fail. Pursuant to section 191(1)(c) of New York Labor Law, a commission salesperson shall be paid wages in accordance with the agreed terms of employment. A "[c]ommission salesman" is defined as "any employee whose principal activity is the selling of any goods … and whose earnings are based in whole or in part on commissions" under section 190[6] of New York Labor Law. The Plaintiff was an independent consultant and not a commission salesman employee of SR pursuant to the Agreement (NYSCEF Doc. No. 48, § 1[b]). Additionally, the claim also fails because section 191-b of New York Labor Law only applies to a sales representative of a principal that is engaged in the business of manufacturing (Labor Law § 191-a[c]). SR is not a principal because it merely provides its members with discounted drugs by discount cards (NYSCEF Doc. No. 30, ¶ 17). Accordingly, the third cause of action based on a violation of New York Labor Law is granted.

D. Dismissal Against Defendant OptumRx

The Optum Defendants' argument that the Amended Complaint should be dismissed against OptumRx because it was not a party to the Agreement and that there is merely a conclusory allegation that OptumRx assumed SR's contractual liabilities fails. The Amended Complaint alleges that after OptumRx purchased SR, the Plaintiff continued to work for and obtain payment from OptumRx (*id.*, ¶¶ 71-72, 85-88). As such, a "contract implied in fact may result … from the facts and circumstances of the case" from the time that OptumRx bought SR in or around February 2019 until March 2020 when the Plaintiff entered into a new agreement with Optum Perks (*see Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975]). Accordingly, the branch of the Optum Defendants motion to dismiss as against OptumRx is denied.

II. The Loeb Defendants' Motion to Dismiss is Granted as to Mr. Loeb (Mot. Seq. No. 004)

For the reasons set forth above, the breach of contract claim is dismissed solely to the extent that it predates January 31, 2014 (first cause of action), the claim based on violation of New York Labor Law (third cause of action) is dismissed and the claim for fraudulent inducement (second cause of action) is dismissed without prejudice.

A claim to pierce the corporate veil requires that (1) there was complete domination over the corporation, and (2) that such domination was used to commit a fraud or wrong that resulted in injury (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]). The Plaintiff alleges that the Loeb Enterprises funded SR and received profits from it (NYSCEF Doc. No. 30, ¶ 14). The Plaintiff further alleges that SR operated out of the Loeb Enterprises headquarters, that SR shared staff with Loeb Enterprises, including Ms. Scotti and that Loeb Enterprises made

all business decisions for SR. The Plaintiff also alleges that SR inaccurately reported card activations so as to deprive the Plaintiff of its due payment (*id.*, ¶¶ 23-26, 28, 46, 53-55, 57). These are sufficient allegations of domination and control over SR and its alleged wrongful withholding of payment to the Plaintiff at this stage of the pleadings (*see Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996] [factors to consider when piercing the corporate veil include failure to adhere to corporate formalities, overlap in ownership and directorship, and common use of office space and equipment]). Thus, the branch of the motion to dismiss the Amended Complaint against the Loeb Enterprises is denied.

However, the branch of the motion to dismiss the Amended Complaint as against Mr. Loeb must be granted. It is insufficient to merely allege that Mr. Loeb owned Loeb Enterprises and as such effectively made the business decisions on behalf of SR to ground the claim against him personally (NYSCEF Doc. No. 30, ¶¶ 7, 15, 57; *see P.A. Bldg. Co. v Elwyn D. Lieberman, Inc.*, 227 AD2d 277, 279 [1st Dept 1996] [defendant's role as president and sole shareholder of corporation insufficient to pierce corporate veil without showing that corporate formalities were not observed]).

Accordingly, it is

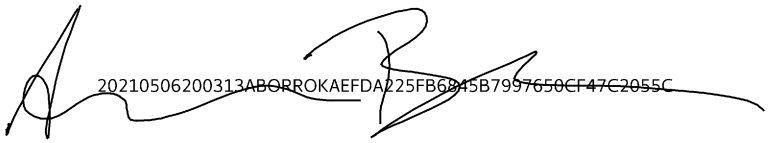
ORDERED that the Optum Defendants' motion to dismiss (Mtn. Seq. No. 005) is granted to the extent of dismissing the claim for breach of contract solely to the extent that it predates January 31, 2014 (first cause of action) and violation of New York Labor Law (third cause of action), but

the claim for fraudulent inducement (second cause of action) is dismissed without prejudice; and it is further

ORDERED that the Loeb Defendants' motion to dismiss (Mtn. Seq. No. 004) is granted to the extent that the Amended Complaint is dismissed as against Mr. Loeb; and it is further

ORDERED that the defendants shall file an answer within 20 days of this decision and order; and it is further

ORDERED that the parties shall appear for a remote preliminary conference on May 28, 2021 at 12pm.



5/6/2021
DATE

ANDREW BORROK, J.S.C.

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