SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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KARSAH INTERNATIONAL, INC.,KAREN WANG, A.O. TEXTILE, INC. (COUNTERCLAIM DEFENDANT)

Plaintiff,

- v -

JONG SOO KIM,

Defendant.

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INDEX NO. 154340/2018

MOTION DATE 09/07/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 265, 267, 269, 271, 272, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 298

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 264, 266, 268, 270, 273, 276, 277, 278, 296, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiffs commenced this action seeking a declaratory judgment related to the parties' rights and obligations from the sale of a company from Jong Soo Kim (Kim) to Karsah International, Inc. (Karsah). A.O. Textile, Inc. (AOT) was the company that was sold. Karen Wang (Wang) is the owner of Karsah.

PENDING MOTIONS

On May 27, 2022, plaintiffs moved for an order pursuant to CPLR §3212 granting them summary judgment on their declaratory judgment claim, declaring that there is no balance due to Kim under the promissory note given by Karsah to Kim and dismissing Kim's counterclaims.

On the same date Kim moved for summary judgment on his first, second, third, fourth, fifth and sixth counterclaims.[1]

On September 7, 2022, the court heard oral argument and reserved decision. The motions are consolidated herein for determination. For the reasons stated below plaintiffs' motion is granted and defendant's motion is denied.

ALLEGED FACTS

Kim was the founder and owner of AOT. In August 2016, Kim decided to sell AOT and retire. Kim shared his plans with James Lee of Friedman LLP, who put him in contact with a potential buyer, Wang. Negotiations for the sale of 100% of AOT stock to Karsah occurred between June 2016 through February 2017.

Plaintiffs were advised by their accountants, Skwiersky Alpert & Bressler LLP ("Skwiersky"), and Skwiersky preformed due diligence in connection with the transaction.

The parties negotiated a consulting agreement (the "Consulting Agreement") which provided for Kim to act as a consultant for AOT through February 2020, at an annual salary of $400,000 a year. The parties also agreed on a $2.5 million purchase price for the Company pursuant to a Stock Purchase Agreement (SPA), $1.0 million of which would-be paid-up front and the remainder through a promissory note ("Promissory Note" or "Note"), which Karsah executed in favor of Kim and Wang personally guaranteed would be paid to Kim over the three-year period post-Closing.

The transaction documents contemplated that the overall Purchase Price was subject to upward or downward adjustments based on (i) the Company's actual stockholder equity as of the Closing date, relative to the $793,000 estimate that the parties used at the Closing; and (ii) the

[1] Kim has withdrawn its seventh counterclaim for Anticipatory Breach.

Company's performance during the three-year duration of the Promissory Note—specifically, if the Company obtained a pre-tax income above $800,000, the balance of the Note would increase, and if the Company did not, the balance would decrease. [NYSCEF Doc. No. 2] §§ 2.2 & 2.5.

Originally the term sheets circulated during negotiations provided the Consulting Agreement could only be terminated "for cause" or upon Kim's death, disability or retirement.

However, on November 10, 2016, Wang emailed her then-attorney, Harlan Lazarus, stating she wanted to the right to terminate the Agreement without cause in the event she and Kim did not get along. Wang never expressed these intentions to Kim, and shortly before the Closing, Plaintiffs inserted language into the termination provision of the Agreement which allowed Karsah to terminate the Consulting Agreement without cause on thirty days' notice.

Kim alleges that he executed the Consulting Agreement at the Closing and was unaware of this change.

The Closing occurred on February 15, 2017, and Karsah became 100% owner of AOT.

The parties also executed an Escrow Agreement (Escrow Agreement) among Karsah, Kim, and Ballon Stoll Bader & Nadler, P.C., as Escrow Agent, under which the Escrow Agent held AOT's stock in the event that Karsah exercised the Termination Option; and a Termination Option (Termination Option) between Wang and Kim entitling Karsah to return the shares of AOT if Karsah or Wang defaulted in making any payment to Kim for more than two months after those payments became due.

After the Closing, Kim did not want his employees to know he had sold the company to Wang. Kim went on a business trip to Asia, and Wang went to AOT's offices and announced she was the new owner.

On May 1, 2017, Wang terminated the Consulting Agreement without cause and demanded Kim leave AOT's office immediately.

On May 15, 2017, Karsah made its first $50,0000 payment towards the Promissory Note, followed by a $50,000 payment on August 15, 2017, and a third payment of $50,000 on November 15, 2017.

Pursuant to the SPA, the Purchase Price, and consequently the Note, could be further adjusted upward or downward as a result of: (1) a subsequent determination of AOT's actual Stockholder Equity being less than the estimated Stockholder Equity prior to the closing of $793,000; and (2) AOT's pre-tax income being less than $800,000 in each of the calendar years of 2017, 2018, and 2019. The adjustment pursuant to AOT's actual Stockholder Equity resulted in a dollar-for-dollar decrease of the Purchase Price (Ex. 5, SPA, § 2.2). Whereas, the adjustment pursuant to AOT's pre-tax income resulted in an amount equal to 35% of the shortfall being deducted from the Purchase Price (Ex. 5, SPA, § 2.5).

As of February 15, 2017, according to the balance sheet prepared by AOT's accountant AOT's common stock was valuated at $30,200, and AOT retained earnings in the amount of $794,042.14, totaling $779,243.14 for Stockholder Equity. However, these figures did not account for distributions made by Kim immediately prior to closing which included $356,493 in payments for the tax liabilities of Kim and his family members, in addition to an additional distribution of $2,072.73.

Additionally, Stockholder Equity was adjusted to reflect an increase of $13,555.71 rather than a loss of $14,453.29, as provided in the February 15, 2017 balance sheet. Accordingly, based on the pre-closing distributions to Kim to pay personal tax obligations, AOT's common

stock value, AOT's retained earnings, and AOT's then current retained earnings as of February 15, 2017, the Stockholder Equity equaled $434,232.12.

Per Section 2.2 of the SPA, the amount due under the Note must be reduced by the difference between the estimated and actual Stockholder Equity, or $358,767.88, because $793,000 (estimated Stockholder Equity) minus $434,232.12 (actual Stockholder Equity) equals $358,767.88. After the adjustment under Section 2.2 of the SPA, the balance due under the Note totaled $991,232.12 (before further adjustments under section 2.5 of the SPA).

Based on the testimony of AOT's accountant regarding AOT's tax returns, AOT's pre-tax income for the years 2017-2019 was: $536,409 in 2017; and ($687,616) in 2018; and ($285,247) in 2019.

Plaintiff thus alleges pursuant to the parties' agreement that the purchase price and balance due on the note is therefore reduced by $92,256.85 in 2017, $520,665.60 in 2018 and $379,836.45 in 2019. Plaintiff therefore alleges that after such deductions no further monies are due to Kim.

Additionally, on February 26, 2021, pursuant to Section 2.6 of the SPA, Karsah forfeited the AOT stock, which was the collateral for the Note covering the balance of the purchase price, and directed the Escrow Agent to release that collateral to Kim pursuant to Section 2 of the Escrow Agreement. Plaintiffs allege that forfeiting AOT's stock satisfied all of Plaintiffs' obligations to Kim, and thus, eliminated all of Kim's claims against Plaintiffs arising from the SPA, Note and Guaranty. According to Section 2.6 of the SPA, Karsah's obligation to make payments under the Note is non-recourse and it shall have no liability therefor beyond the pledge of the Collateral. Additionally, according to Section 2.6 of the SPA, in the event that

Karsah fails to make any payment required, within ten days of receipt of written notice from Kim, then the Collateral may be forfeited to pay the amounts due.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Karsah and Wang seek a judgment declaring that there is no balance due on the Note and that neither Karsah nor Wang, under either the SPA, Guaranty or Termination Option, have any

obligation to pay to Kim any amount pursuant to the Note. Plaintiffs have made a *prima facie* showing of entitlement to this relief.

"In an action for declaratory judgment, the rights and legal relations of the parties are to be determined as of the time they are declared" (*Dog Owners Ass'n of N.Y. State v. Hilleboe*, 206 Misc. 119, 122 [Sup. Ct. Westchester Cnty. 1953], *aff'd* 307 N.Y. 734 [1954]). "All of the material facts and circumstances should be fully developed before the respective rights of the parties may be adjudicated" (*Armstrong v. Onondaga County Water Dist.*, 31 A.D.2d 735, 735 [4th Dept. 1968]; *see also Wolff v. 969 Park Corp.*, 86 A.D.2d 519, 520 [1st Dept. 1982]; *Kronish, Lieb, Shainswit, Weiner and Hellman v. John J. Reynolds, Inc.*, 33 A.D.2d 366, 369 [1st Dept. 1970]; *Medical World Publ. Co., Inc. v. Kaufman*, 29 A.D.2d 859, 859 [1st Dept. 1968]).

Plaintiff has established that the stockholder equity and income required the above enumerated reductions in the purchase price of AOT. Plaintiff correctly argues that Stockholder Equity is the net worth of the business arrived at by subtracting the liabilities of the company from the assets. The distributions to Kim prior to the closing decreased the stockholder equity.

Plaintiff further established by the submission of the tax returns and the testimony of AOT's accountant that further reductions were warranted based on the reported tax income for the years 2017 through 2019.

Kim does not deny that the parties entered into the Transaction Documents, and that the SPA contains two separate provisions by which the balance due under the Note may be reduced. Thus, Sections 2.2 and 2.5 of the SPA should be enforced by their plain terms. *See RMP Capital Corp. v. Victory Jet, LLC*, 139 A.D.3d 836, 838-39 (2d Dept. 2016).

Documentary evidence and the sworn, unrebutted testimony of AOT's accountant established that the adjustments pursuant to Sections 2.2 and 2.5 have resulted in a zero balance

due under the Note. Kim presented no evidence in the record disputing the testimony of AOT's accountant, who confirmed the accuracy of AOT's financial records, including the tax returns. Kim only rejects such adjustments through self-serving or conclusory statements. The fact that plaintiffs revised their calculations since discovery or that Kim does not agree with the figures without more, is insufficient to create an issue of fact.

In regard to his preclosing distributions, Kim argues that because Wang was made aware of the distributions to pay for his families' tax obligations prior to closing, they were already reflected in the price. However, the email relied upon by Kim also indicates the price would be readjusted to take the distributions into account and it is undisputable that the distributions to pay taxes reduced the Stockholder Equity.

Plaintiffs acknowledge that the pre-tax income figures represented in its interrogatory responses differ slightly from AOT's accountant's testimony, which occurred after plaintiffs served their interrogatory responses, but regardless plaintiffs used the accountant's figures in their motion. Kim disputes the accuracy of the pre-tax income figures but has not rebutted these figures by any documentary or testimonial evidence.

Therefore, the balance due under the Note is unrebutted and there is no issue of fact.

Defendant's Counterclaims Should be Dismissed

In his First, Second, Fifth, and Seventh Counterclaims, Kim alleges that Counterclaim Defendants breached the Note, Guaranty, and SPA, respectively, by failing to pay him the amounts he believes are due under the Note. In his Eleventh and Twelfth Counterclaims, Kim claims entitlement to an award of his legal fees based on those breaches.

As discussed above the court finds that there is nothing remaining due under the Note and that Plaintiff is therefore not in breach of said agreements.

Kim has not presented any evidence to rebut Mr. Bressler's sworn testimony concerning AOT's 13 financial records which were used by plaintiffs to determine AOT's actual Stockholder Equity and its losses in 2017, 2018, and 2019. Thus, Kim cannot establish that he suffered any damages arising from any alleged breach of contract. *See, e.g., Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988).

Additionally, on February 26, 2021, pursuant to the SPA § 2.6, Karsah forfeited the AOT stock, which was the collateral for the Note covering the balance of the purchase price, and directed the Escrow Agent to release that collateral to defendant Kim pursuant to the Escrow Agreement § 2. Forfeiting AOT's stock satisfied all of Counterclaim Defendants' obligations to Kim, and, thus, eliminated any of Kim's remaining claims against Counterclaim Defendants arising from the SPA, Note and Guaranty.

Kim's third counterclaim for fraudulent inducement fails because it is duplicative of his breach of contract claim. Kim asserts that Wang induced him to enter into the agreements by falsely promising to perform under their terms. When the fraud alleged is an insincere promise to perform a contract, the cause of action for fraud is duplicative of a breach of contract claim and is not independently cognizable (*see, e.g., Mañas v. VMS Assoc., LLC*, 53 A.D.3d 451, 453 [1st Dept 2008]; *Town House Stock LLC v. Coby Hous. Corp.*, 36 A.D.3d 509, 509 [1st Dept. 2007]; *Laduzinski v. Alvarez & Marsal Tax and LLC*, 132 A.D.3d 164, 169 [1st Dept. 2015].

As held by the First Department in *Jeffers v. Am. Univ. of Antigua*:

> A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud.

(125 A.D.3d 440, 442-43 [1st Dept. 2015], *quoting J.M. Bldrs. & Assoc., Inc. v. Lindner*, 67 A.D.3d 738, 741 [2d Dept. 2009]; *see also Eastman Kodak Co. v. Roopak Enterprises, Ltd.*, 202 A.D.2d 220, 222 [1st Dept. 1994]).

In this action, Kim's fraudulent inducement claims are based on the same facts and seek the same relief as his breach of contract claims. Kim's argument that Wang guaranteed his position under the Consulting Agreement fails because the Consulting Agreement by its plain terms could be, and was, terminated without cause. Kim's reliance on *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291-92 (1st Dept. 1999), is misplaced. In that action the Appellate Division held "(a) fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*Gordon v Dino De Laurentiis Corp.,* 141 AD2d 435, 436)." This is exactly Kim's claim in the case at bar. [*First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1999)].

The fourth counterclaim for breach of the Consulting Agreement is subject to dismissal because the agreement provided for Kim's termination without cause, and said provision is enforceable despite the fact that Kim did not read it before signing it. Kim is a sophisticated businessperson who was represented by counsel during the transaction and is bound by the contract he executed. [*Vulcan Power Company v. Munson*, 89 A.D.3d 494, 495 (1st Dept. 2011); *Melvin v. Melvin*, 154 A.D.3d 596, 596 (1st Dept. 2017)]. The court notes that the Consulting Agreement is less than four pages and consists of only 12 paragraphs. It is not unreasonable to assume that both Kim and his counsel would have read the final document before having Kim sign it at the closing.

Kim's sixth counterclaim for breach of the implied covenant of good faith and fair dealing is duplicative of his breach of contract claims. Kim alleges that Karsah breached its implied covenant of good faith and fair dealing by frustrating Kim's rights under the Transaction Documents. This claim duplicates his breach of contract claim, as both claims arise from the same facts (*see Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 [1st Dept. 2010]; *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297 [1st Dept. 2011]). Kim fails to identify any obligation tangential to, but not specifically included in, the Transaction Documents that Karsah purportedly breached (*Vanlex Stores, Inc. v. BFP 300 Madison II LLC*, 66 A.D.3d 580, 581 [1st Dept. 2009]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Xerox Corp.*, 25 A.D.3d 309, 310 [1st Dept. 2006]).

Similarly, Kim's eighth and ninth counterclaims sounding in conversion and unjust enrichment are duplicative of his breach of contract claims. In his eighth counterclaim, Kim alleges that plaintiffs' failure to pay the balance due pursuant to the Transaction Documents constitutes conversion. In his Ninth Counterclaim, Kim alleges that Wangs conduct was wrongful and unjustly enriched her.

Claims sounding in tort and quasi contract claims should be dismissed as duplicative where they are indistinct from a breach of contract claim (*Sebastian Holdings, Inc. v. Deutsche Bank, AG.*, 108 A.D.3d 433, 433 [1st Dept. 2013]; *Andrews v. Cerberus Partners*, 271 A.D.2d 348, 348 [1st Dept. 2000]).

Kim's counterclaim for an accounting is also subject to dismissal. Kim is not entitled to an accounting because he does not have a fiduciary relationship with Karsah and Wang. "The right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue" (*Town of New Windsor v. New Windsor Volunteer*

Ambulance Corps, Inc., 16 A.D.3d 403, 404 [2d Dept. 2005]; *see also Akkaya v. Prime Time Transp., Inc.*, 45 A.D.3d 616 [2d Dept. 2007]). "To obtain an accounting, a plaintiff must show that there was some wrongdoing on the part of a defendant with respect to the fiduciary relationship" concerning property in which the plaintiff has an interest (*Benedict v. Whitman Breed Abbott & Morgan*, 110 A.D.3d 935, 938 [2d Dept. 2013]; *see also Lawrence v. Kennedy*, 95 A.D.3d 955, 958 [2d Dept. 2012]). Parties engaged in an arms-length business transaction are not fiduciaries (*OppenheimerFunds, Inc. v. TD Bank N.A.*, 2014 NY Slip Op 30379[U], *11 [Sup. Ct. N.Y. Cnty. 2014]). In this action the parties engaged in an arms-length business transaction under the SPA and other Transaction Documents. There was no fiduciary relationship between them. Consequently, Kim is not entitled to any accounting remedy.

Kim relies on the Consulting Agreement however the Consulting Agreement while it creates an employer employee relationship, does not provide that Kim's salary would be lowered or effected by any corporate losses. The cases cited by Kim in his opposition papers all acknowledge that where the employment agreement does not provide that the employee would share in losses no fiduciary relationship is created [*Michnick v. Parkell Prod., Inc.*, 215 AD2d 462, 462-63 (2d Dept 1995); *Lawrence v. Kennedy*, 95 AD3d 955, 958 (2d Dept 2012); *LoGerfo v. Trustees of Columbia Univ. in City of New York*, 35 AD3d 395, 397 (2d Dept 2006)].

While Kim argues that the sales price of the company was permitted to be lowered by corporate losses Kim cites no legal authority suggesting the sale of stock in such a situation creates a fiduciary relationship.

Additionally, Kim has failed to come forward with any evidence to establish that the accounts relied upon by plaintiffs are inaccurate or incomplete. Karsah produced in discovery voluminous documentation concerning AOT's stockholder's equity and pre-tax income

supporting their claim that the balance under the Note should be reduced to $0. Based on the foregoing no accounting is warranted as a matter of law. (see *Cooper v. Tomback*, 5 Misc.3d 1007(A), at *3-5 [Sup. Ct. N.Y. Cnty. 2004]; *Matter of Robinson*, 282 A.D.2d 607, 607 [2d Dept. 2001]).

WHEREFORE it is hereby:

ORDERED that Plaintiffs' motion is granted and Defendant's motion is denied; and it is further;

ORDERED that the branch of plaintiffs' motion that seeks summary judgment in plaintiffs' favor on the first cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

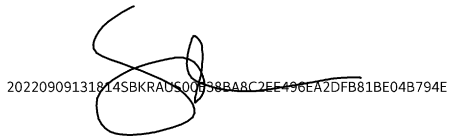
ADJUDGED and DECLARED that there is no balance due to Jong Soo Kim from Karsah International Inc., and Karen Wang under The Stock Purchase Agreement dated February 15, 2017, and The Non-Negotiable Promissory Note and Guaranty of the Same Date; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment dismissing the counterclaims is granted; and it is further

ORDERED that, within 20 days from entry of this order, plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.



9/9/2022
DATE

SABRINA KRAUS, J.S.C.

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