

**Kolkhidashvili v S-Skinova Corp.**

2024 NY Slip Op 32317(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 652629/2023

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

NIKA KOLKHIDASHVILI, ANA KOVZIRIDZE,

Plaintiff,

- v -

S-SKINOVA CORP., R.D. 69 REALTY INC, RAMJI DASS

Defendant.

-----X

**INDEX NO.** 652629/2023

**MOTION DATE** 07/21/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiffs' motion to dismiss defendants' counterclaims for misrepresentation and attorneys' fees is granted for the reasons set forth in the moving papers (NYSCEF Doc. Nos. 10-12) and the exhibits attached thereto, in which the court concurs, as summarized herein.

Plaintiffs and defendants S-Skinova Corp. and Ramji Dass ("buyers") are parties to an asset purchase agreement and installment promissory note by which plaintiffs sold their business, Aesthetics by Skinova Corp., to buyers (asset purchase agreement, NYSCEF Doc. No. 3; note, NYSCEF Doc. No. 4). The business and its assets were sold as is, and buyers agreed to assume liability for "the services that need to performed to the current clientele and also assume[] the account receivables that the clientele owes to Aesthetics by Skinova Corp." (asset purchase agreement, NYSCEF Doc. No. 3, ¶ 1). Plaintiffs commenced the instant action upon buyers' failure to pay under the note, alleging breach of contract, fraud, and fraudulent conveyance claims against defendants. Defendants now counterclaim for misrepresentation and attorneys'

fees, stating that plaintiffs overstated the value of certain assets included in the purchase, and either misrepresented or failed to disclose the existence of substantial prepaid service liabilities.

Fraud must be pled with particularity (CPLR 3016 [b]). “Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). For a claim of fraudulent concealment, a plaintiff must allege the same elements, and further “that the defendant had a duty to disclose material information and that it failed to do so” (*Gomez-Jimenez v New York Law School*, 103 AD3d 13, 18 [1st Dept 2012]). Allegations of fraud must include who spoke, what they said, and the date on which they said it (*EI Entertainment U.S. LP v. Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1st Dept 2011]).

Here, defendants have failed to adequately allege fraud. Defendants do not allege who made the misrepresentations or when they made them. Only three specific misrepresentations are pleaded in the answer: (1) that an EVO laser was sold without a handle, significantly reducing its value; (2) a YAG laser was significantly overvalued; and (3) plaintiffs failed to disclose the existence of prepaid service liabilities, and other unspecified liabilities. The references to liabilities other than prepaid services are vague and conclusory, and the “actual value” of the YAG laser is pleaded only “upon information and belief” (answer, NYSCEF Doc. No. 7, ¶ 11). The asset purchase agreement specifically references the existence of prepaid service liabilities and places the responsibility therefor with buyers (asset purchase agreement, NYSCEF Doc. No. 3, ¶ 1). The EVO laser is specifically listed in the schedule of physical assets, including the fact that it has “no handle” (*id.*, Ex. A). As the items are addressed in the contract, defendants cannot

claim that they were misrepresented. Further, defendants fail to plead justifiable reliance. While “the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss” (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]), defendants simply do not allege, except in conclusory fashion, that their reliance on plaintiffs’ alleged misrepresentation was reasonable, in that they fail to allege what, if any steps they took to confirm that the value and liabilities of the business were as represented (*Rodas v Manitaras*, 159 AD2d 341, 343 [1st Dept 1990] [“Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament”]). Given that the terms of the asset purchase agreement disclose both the condition of the EVO laser and the existence of prepaid service liabilities, it was incumbent on buyers to seek further assurances, and they evidently did not do so (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010] [“Indeed, there are many cases in which the plaintiff’s failure to obtain a specific, written representation is given as a reason for finding reliance to be unjustified”]). Accordingly, the counterclaim for misrepresentation must be dismissed.<sup>1</sup>

Plaintiffs do not make any specific arguments as to why the attorneys’ fees counterclaim should be dismissed, but do seek such relief in the notice of motion, and the court will therefore address it. A party may not recover its own attorney’s fees absent a contract, statute, or court rule that allows such recovery (*e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]). Defendants do not submit any such provision allowing them to recover attorneys’ fees, and the counterclaim must be dismissed.

---

<sup>1</sup> To the extent defendants assert negligent misrepresentation, there is no special or privity like relationship in an arm’s length business transaction such as is presented here that would justify such a claim (*e.g. Deven Lithographers, Inc. v Eastman Kodak Co., Inc.*, 199 AD2d 9, 10 [1st Dept 1993]).

Accordingly, it is hereby

ORDERED that the motion to dismiss the counterclaims is granted; and it is further

ORDERED that the counterclaims are severed and dismissed.

This constitutes the decision and order of the court.

*Louis L. Nock*

7/2/2024

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE