

89 Misc.3d 1257(A)

Unreported Disposition

(The decision is referenced in the New York Supplement.)

This opinion is uncorrected and will not be
published in the printed Official Reports.

Supreme Court, New York County

Commercial Division

VXI LUX HOLDCO S.À R.L., Plaintiff,

v.

SIC HOLDINGS, LLC, Symbio Investment
Corp., Flanderit Holding AB, CapMan Equity

VII A L.P., CapMan Equity VII C L.P.,

MANEQ 2005 AB, Financial Technology

Ventures II (Q), L.P., Financial Technology

Ventures II, L.P., Actua Holdings, Inc.,

CapMan Equity Sweden KB, Landtek

Corporation, Treasure High Holdings,

Waterton Resources Limited, University

Ventures Inc., Randy Lee, Ethos Technologies

Holding Ltd., Joning Ta, South China (Jersey)

Holdings Limited, Graham Bolton, Michael

Keating, Jean Cholka, James Reesing, Paul

Machle, Bo Huang, Gagandeep Singh, John

Wagster, Big Bend XI Investments, L.P.,

Anthony Massa, Deborah Baldini, Susan

Kirchhoff, Jacob Hsu, Qing Lu, Defendant.

Index No. 652064/2017

I

Decided August 28, 2026

Attorneys and Law Firms

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Opinion[Robert R. Reed, J.](#)

***1** The following e-filed documents, listed by NYSCEF document number (Motion 018) 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 454, 455, 485, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 660, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 724, 725, 727, 734 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 019) 453, 456, 457, 486, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 639, 640, 641, 642, 643, 644, 658, 659 were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

At the outset, what the court is entertaining for consideration, upon the transcript of the present motions (denominated by the clerk's office as motion sequence numbers 018 and 019), and upon the papers timely submitted, are defendants' separate motions for summary judgment. The court is not considering for resolution at this time any application for dismissal of the action based upon any alleged lack of necessary substitution, any alleged lack of capacity to sue, or any alleged lack of jurisdiction. Defendants purport to have reserved their right to seek such relief — in a footnote dropped in their moving papers. And that is all well and good, but the present motions for summary judgment by defendants are not the appropriate vehicle for the resolution of such application. No notice of motion filed herein identifies such relief as being sought and no order to show cause has been presented seeking

such relief. Importantly, moreover, no notice of motion has been served nor has any order to show cause been signed upon this record, setting forth — for response by plaintiff and due and careful consideration by the court — either the specific statutory basis for, or the factual underpinnings of such applications for relief.¹

*2 Now, turning to the matter properly before this court:

BACKGROUND

This action arises out of the purchase and acquisition of all equity shares in Symbio S.A. (“Symbio”), a Luxembourg registered technology and software engineering company. Plaintiff, VXI Lux Holdco S.à r.l. (“VXI”), is the successor in interest to VXI Offshore Ltd., the purchaser under the Share Purchase Agreement dated November 26, 2014 (the “SPA”), and defendants are selling shareholders of Symbio. Plaintiff alleges that defendants inflated Symbio's earnings to make the company appear more profitable than it actually was, and induced VXI to pay more than it would have, or should have, had it known certain material facts about the company's expenses. VXI commenced this action in April 2017, seeking recovery of damages resulting from alleged fraud and purported breaches of contractual representations and warranties contained in the SPA.

The Second Amended Complaint (SAC) asserts three causes of action. Count I is asserted against the selling shareholders for breach of contract. Count II is asserted against the selling shareholders for declaratory relief. Count III is asserted against defendants Jacob Hsu, Qing Lu, SIC Holdings, LLC and Symbio Investment Corp. for fraud, fraudulent inducement, fraudulent misrepresentation, and fraudulent concealment.

In motion sequence 018, defendants CapMan Equity VII A L.P., CapMan Equity VII C L.P., CapMan Equity Sweden KB, and Maneq 2005 AB (collectively, “CapMan Defendants”) move for summary judgment, pursuant to [CPLR 3212\(a\) and \(e\)](#), seeking dismissal of Counts I and II. CapMan Defendants principally argue that they are entitled to summary judgment because:

(1) plaintiff has not identified admissible evidence demonstrating that Symbio has breached any provision in the SPA to warrant indemnification by CapMan defendants;

(2) plaintiff's claim for future damages and unrealized loss are speculative and not authorized under the SPA's indemnification provision;

(3) plaintiff's claims for damages in excess of the contractual damages cap for others' alleged fraud is contrary to the plain language of the indemnification provision; and

(4) the second cause of action for declaratory relief seeks relief identical to the breach of contract cause of action.

In motion sequence 019, defendants Symbio Investment Corp., SIC Holdings, LLC, Jacob Hsu, Qing Lu, Landtek Corporation, Treasure High Holdings, Waterton Resources Limited, and University Ventures Inc. (collectively, “Symbio Defendants”) move for summary dismissal on all three counts of the SAC, pursuant to 3212(a) and (e). Symbio Defendants adopt and incorporate by reference CapMan Defendants' grounds for summary judgment related to Counts I and II. Their motion papers separately assert independent grounds with respect to the breach of contract cause of action, as well as grounds for summary dismissal on behalf of defendants Jacob Hsu, Qing Lu, SIC Holdings, LLC and Symbio Investment Corp. regarding the fraud causes of action.

This decision and order addresses both motions for summary judgment. The court will refer to CapMan Defendants, Landtek Corporation, Treasure High Holdings, Waterton Resources Limited, and University Ventures Inc. as Selling Shareholder Defendants. Counts I and II are asserted against Selling Shareholder Defendants. VXI alleges that the selling shareholders are named in the suit because “they either directly participated in the fraudulent acts complained of [or] are contractually liable to VXI for breaches of the representations and warranties” (SAC at ¶ 44).

DISCUSSION

*3 “To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor,” and must do so by tendering evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], citing [CPLR 3212\(b\)](#) [internal quotation marks omitted]). “Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest*

v. Jewish Guild for the Blind, 3 NY3d 295, 315 [2004] [citation omitted]).

“The moving party’s [f]ailure to make [a] prima facie showing ... requires a denial of the motion, *regardless of the sufficiency of the opposing papers*” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted, emphasis in original]). Where the moving party makes a prima facie showing of entitlement to summary judgment, the burden shifts to the non-moving party “to establish the existence of material issues of fact which require a trial of the action” (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d at 496 [internal quotation marks and citation omitted]).

On the record here presented, the Selling Shareholder Defendants are entitled to summary dismissal of Count II for declaratory relief. Count II seeks two judicial determinations: (1) that VXI is entitled to recover the entirety of the sums in the indemnification escrow account due to Selling Shareholder Defendants’ breaches of the SPA’s representations and warranties; and (2) that VXI is entitled to recover beyond the sums in the indemnification escrow account because the breaches by Selling Shareholder Defendants arise out of the fraud and willful misconduct of Symbio and its lead negotiators, acting as agents for all of the shareholders, and therefore the SPA’s limitation on damages to only the escrow account does not apply.

The equitable relief sought in Count II involves piercing the limitation of VXI’s exclusive remedy set forth in the SPA. Pursuant to Section 8.09 of the SPA, VXI’s recoverable losses are limited to the amounts allocated to the indemnification escrow account, unless the losses resulted from fraud or willful misconduct. The cause of action for declaratory relief seeks relief identical to that available under VXI’s breach of contract claim. Given that the parties’ respective legal rights under the SPA are already being adjudicated under the breach of contract cause of action, the declaratory relief sought is duplicative. Accordingly, summary dismissal of Count II, as asserted against Selling Shareholder Defendants, is granted.

The Appellate Division, First Department previously reinstated Counts I and II of the First Amended Complaint (FAC), reversing the motion court’s decision to dismiss the counts with prejudice pursuant to CPLR 3211(a)(1). In that earlier decision (mot. seq. 003), Justice Bransten held that the language of the notice of claim provision in Section 8.03 of the SPA set forth a condition precedent for preserving claims

of breach, which VXI failed to meet. In its remittitur, the Appellate Division concluded that the language in Section 8.03 — that VXI “shall” give notice “of any matter that an Indemnified Party has determined has given or could give rise to a right of indemnification within 30 days of such determination” — could not be properly construed as an express condition precedent but, rather, should be viewed as a contractual promise (*see* NYSCEF doc. no. 93 at pg. 8). The Court also found that the terms of the SPA were ambiguous as to what constitutes a “determination” and ruled that there was a question of fact concerning when (*i.e.*, at what point in time) VXI determined there was a matter that might give rise to a right of indemnification (*id.* at 2).

*4 Here, Symbio Defendants argue that the breach of contract claim must be dismissed on the additional standalone ground that the now-current evidentiary record confirms that plaintiff was aware of the basis for its indemnification claim in 2015. In other words, defendants’ earlier failure on the motion to dismiss, to conclusively establish that VXI made a “determination” in 2015, so as to trigger the Notice of Claim procedure of Section 8.03 of the SPA, is now remedied by evidence currently submitted on this record. This court disagrees.

Symbio Defendants’ argument misses the full scope of the First Department’s holding. The remittitur did not simply reinstate the breach of contract claim due to insufficient documentary evidence, but held that it was error to interpret the 30-day notice language as a condition precedent “with no inquiry whatsoever concerning the materiality of the provision” (*id.* at 10). Defendants submit no evidence or testimony on this motion to demonstrate that the 30-day notice condition was a material part of the parties’ agreement, except to the extent it asserts that VXI’s failure to provide its Notice of Claim within the 30-day period deprived defendants of the opportunity to investigate and resolve any potential disputes without litigation. This argument is unavailing. Defendants’ ability to investigate or resolve claims was not foreclosed by VXI’s failure to provide notice within 30 days.

Indeed, Section 8.01 of the SPA provides: “[i]f written notice of a claim has been given prior to the expiration of the applicable representations and warranties by the Purchaser to the Indemnifying Parties, then the relevant representations and warranties shall survive as to such claim, until such claim has been finally resolved” (*see* NYSCEF doc. no. 430 at pg. 58). The terms of the SPA set forth various procedures for the resolution of notice of claims and available

remedies, including resolution of contested claims by “final nonappealable judgment” (*id.* at pg. 61, ¶(c)). Certainly, against this backdrop, it cannot be said that Symbio Defendants have established beyond dispute that the 30-day notice period was a condition material to the parties’ agreement. Indeed, to uphold the interpretation of Section 8.03 as a condition precedent would cause disproportionate forfeiture by effectively shortening the statute of limitations on VXI’s claims to 30 days (NYSCEF doc. no. 93 at pgs. 9 and 10). Accordingly, Symbio Defendants’ motion on these grounds is denied.

Turning to defendants’ remaining arguments for dismissal of Count I, defendants submit no affirmative evidence contradicting VXI’s claims of breach of the enumerated representations and warranties. Specifically, with respect to the representation contained in Section 3.04 of the SPA, defendants’ argument — that Symbio was only warranting that its minute books contain accurate records of all meetings — is unavailing, and does not warrant granting partial summary judgment dismissing VXI’s claim for breach of that provision. Defendants fail to engage with VXI’s claims that Symbio falsified records from 2010-2014 or affirmatively establish through their own submission of evidence that their minute books are accurate. Although the records VXI claims to be falsified were employment records and records regarding mandatory social benefit payments, VXI stated in Point II of the Notice of Claims that it believed additional falsified records likely existed that VXI has not yet been able to discover. The affirmations submitted in support of defendants’ motions do not address the accuracy of the minute books specifically.

***5** Even if this court were inclined to grant partial summary judgment with respect to Section 3.04, Points 1-6 of the Notice of Claims indicated that VXI believed 3.04 to have been violated in connection with each basis asserted for indemnification. Defendants have not affirmatively presented evidence dispelling plaintiff’s remaining claims regarding completeness and accuracy of corporate books and records pursuant to Section 3.04. Plaintiff has not moved for summary judgment, and this court is not assessing plaintiff’s proffered evidence. Defendants do submit evidence in connection with VXI’s claim of breached representations and warranties contained in Sections 3.11 and 3.18, but that evidence fails to conclusively establish a defense to breach with respect to those sections.

Section. 3.11 warrants Aaathat Symbio had conducted its business “in all material respects” in accordance with all laws and governmental orders, and that neither Symbio nor its subsidiaries is in violation of same. Section 3.18, among other things, provides that, except as set forth in the disclosure schedule, the company and each subsidiary has complied with all applicable laws relating to employment. Defendants submit the affirmations of defendants Hsu and Lu, then-CEO and CFO of Symbio, appearing simply to reiterate the SPA’s representations. Defendants Hsu and Lu affirm that neither was aware of any illegal conduct in connection with Symbio’s payment of Social Benefits Insurance and Housing Fund Contributions to the Chinese government, other than what had been identified in the Disclosure Schedule accompanying the SPA (NYSCEF doc. nos. 492 and 499). Specifically, Lu affirms that he “approved lump-sum payments on a weekly basis for social benefits insurance and housing fund contributions that were submitted to the authorities monthly, according to Chinese requirements” (NYSCEF doc. no. 499, ¶3).

Such evidence fails to address VXI’s factual allegations of shortfall payments by Symbio’s subsidiary, Shenzhen Symbio Systems, which are not disclosed in the Disclosure Schedule of the SPA, and does not rebut the purported manipulations of accounts and employee agreements pursuant to Point I of VXI’s Notice of Claims. Moreover, this court is not persuaded by defendants’ argument that VXI’s failure to incorporate recommended warranties and representations or failure to conduct a detailed due diligence review demonstrates that Symbio’s compliance with payment of social insurance contributions and housing tax was not “material” to the parties’ agreement. Defendants’ interpretation of the words “material” and “violation,” in an effort to preempt VXI’s arguments in opposition, and VXI’s later opposition to those interpretations, demonstrate issues of triable fact and warrant the denial of this branch of CapMan Defendants’ motion with respect to Count I.

Pursuant to Article VIII of the SPA, VXI seeks indemnification for alleged losses arising from purported breaches of the SPA’s representations and warranties. Section 8.02 of the SPA provides indemnification for VXI against “all Liabilities, losses, diminution in value actually suffered or incurred” by the indemnifying parties “severally and not jointly” (NYSCEF doc. no. 430 at pg. 58). Defendants argue that the indemnity provision bars VXI’s claims of speculative future damages. In support, defendants submit VXI’s amended responses to defendants’ first set of requests

for admission in which VXI admits that it has not yet received any notice or assessment from the Chinese government, nor made any payment to the Chinese government, in connection with undisclosed liabilities alleged in Points 1-3 of its Notice of Claims (*see* NYSCEF doc. no. 500 at pgs. 18-19, Resp. Nos. 35-38).

In opposition, VXI argues that, even though it has not yet been required to repay any amounts to the Chinese government since acquiring Symbio, such anticipated repayment obligations are losses that it has already incurred by virtue of Symbio's alleged failure to disclose the misreporting and underpayments. In this court's assessment, VXI raises a question of triable fact concerning whether liabilities subject to future repayment are deemed to be incurred by VXI and eligible for indemnification pursuant to the SPA. VXI will need to distinguish for the trier of fact those future expenses that have an ascertainable date for repayment against future expenses that are speculative and may never come due. Should the trier of fact determine that certain future expenses are not speculative, and that alleged breaches of the relevant representations and warranties arose from fraud or misconduct by defendants, VXI may be entitled to recover beyond the sums in the indemnification escrow account under Article VIII of the SPA.

***6** To the extent that VXI seeks breach of contract damages related to its alleged overpayment on the purchase price of Symbio, such damages would not appear to arise from a breach of the SPA. Defendants submit deposition testimony by defendant Hsu, who participated in price negotiations, that the parties did not agree to use a specific valuation methodology to determine Symbio's purchase price (*see* NYSCEF doc. nos. 492 and 506). VXI contends that its own relative valuation, which VXI relied on to establish the purchase price, was based on an EBITDA multiple of 12.8 times Symbio's projected 2014 EBITDA.

While the basis of VXI's claim for breach of contract damages related to "diminution in value" arise from breaches of the SPA's representations and warranties, there is no provision of the SPA that prescribes the methodology used in arriving at Symbio's purchase price. That VXI was damaged by the difference in the expected value of Symbio and its actual value does not demonstrate a decline in value, but rather an alleged concealment or deception concerning Symbio's true value. If Symbio was not worth what VXI thought it was, or if VXI was made to believe that Symbio was worth more than Symbio actually was, and suffered damage as a result, the

merits of that claim will be adjudicated in VXI's fraud causes of action in Count III, and therefore are not an appropriate consideration with respect to breach of contract damages.²

In its second remittitur in this case, the First Department reinstated Count III of the SAC for this very reason. Although fraud claims seeking damages recoverable on a breach of contract cause of action are often dismissed as duplicative, the First Department held that a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim (*see* NYSCEF doc. no. 279). VXI may separately maintain its fraud causes of action for its alleged overpayment for Symbio, as well as its breach claims involving the social insurance and housing tax warranties purportedly arising out of fraud and willful misconduct. For these reasons, partial summary judgment is granted to the Selling Shareholder Defendants, dismissing VXI's claims under Count I for breach of contract damages, to the limited extent that such damages are sought in connection with the purchase price paid in acquiring Symbio.

Furthermore, Section 8.09 limits VXI's recourse to the escrow fund as its sole and exclusive remedy for indemnification for losses arising under Section 8.02, except for breaches resulting from fraud or willful misconduct. Selling Shareholder Defendants argue that plaintiff's claims — that the social insurance and housing tax breaches arise from fraud or willful misconduct by Symbio and its lead negotiators — are simply attempts to: (1) impose joint liability on the Selling Shareholder Defendants for the conduct of others in violation of Section 8.02; and (2) use imputed fraud or misconduct to pierce the recovery limitation for all shareholders under Section 8.09.

In its opposition, VXI argues that it does not seek to hold Selling Shareholder Defendants liable for another party's misconduct, which it admits would run afoul of the SPA's allocation of several and not joint liability. Rather, VXI argues that it seeks to hold CapMan Defendants liable for their own purported misconduct, asserting that: (1) CapMan defendants are Selling Shareholders who agreed to be bound by the accuracy of the SPA's representations and warranties; (2) CapMan Defendants are defined as "Principal Shareholders" under the SPA, whose knowledge is imputed as the knowledge of the company, thereby placing their own conduct directly at issue; and (3) there is evidence of CapMan Defendants actively participating in misrepresenting the value of Symbio. To support its argument, VXI submits emails by a Symbio board member Vesa Wallden, who VXI claims acted

as CapMan Defendants' agent and allegedly failed to correct misinformation communicated to and relied upon by VXI.

*7 As discussed above, the SPA provides that indemnifying parties shall only be severally, and not jointly, liable, for VXI's losses (*see* NYSCEF doc. no. 430 at § 8.02, § 8.07[ii], § 8.07[iv], § 8.09[b], and § 8.09[e]). VXI fails to support its claim that CapMan Defendants' alleged knowledge of Symbio's financial misrepresentations, by virtue of being "Principal Shareholders," requires that the SPA's recourse limitation be pierced as to CapMan Defendants. According to Section 1.01 of the SPA, Principal Shareholders are defined as:

"(i) Symbio Investment Corp., a company incorporated and existing under the laws of the British Virgin Islands, (ii) Flanderit Holding AB, a limited liability company incorporated and existing under the laws of Sweden, (iii) CapMan Equity VII A L.P., a limited partnership formed under the laws of the Guernsey, (iv) CapMan Equity VII C L.P., a limited partnership formed under the laws of the Guernsey, (v) CapMan Equity Sweden KB, a limited partnership formed under the laws of Sweden, (vi) Maneq 2005 AB, a limited liability company incorporated under the laws of Sweden, (vii) Financial Technology Ventures II (Q), L.P., a limited partnership formed under the laws of the State of Delaware, (viii) Financial Technology Ventures II, L.P., a limited partnership formed under the laws of the State of Delaware, and (ix) Actua Holdings, Inc. (f/k/a ICG Holdings Inc.), a Delaware corporation" (*id.* at pg. 9).

The term "Principal Shareholders" is not mentioned in the representations and warranties of the Company or the indemnification provisions. The defined term appears only four times, and the sole instance in which it is relevant to VXI's claims is where it appears within another defined term, "Company's knowledge" or "the knowledge of the Company." This term, or similar terms used in the SPA, means:

"the actual knowledge of (i) the Management Shareholder and each of the executives listed on Schedule 1.03(j), and (ii) the Principal Shareholders, in each case, after due inquiry; provided that in the case of each Principal Shareholder that is organized as a limited partnership, actual knowledge shall mean the actual knowledge of such Principal Shareholder's general partner, after due inquiry" (*id.* at pg. 14).

Here, VXI fails to identify which CapMan Defendant is implicated by the alleged misconduct and fails to show what inquiry, if any, was conducted as to assess the actual knowledge of any Principal Shareholder, as required by the SPA. In the event that VXI can prove it conducted such inquiry and that specific defendants were involved in fraud or misconduct that breached the SPA's representations and warranties, only those defendants would be liable pursuant to the limitation exception contained in Section 8.09.

Nevertheless, Symbio Defendants are entitled to summary judgment dismissing Count III of the complaint for fraud based on diminution in value. Under New York's out-of-pocket rule, a plaintiff alleging fraud may recover only "for the actual pecuniary loss sustained as the direct result of the wrong" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996] [internal quotation marks and citations omitted]). "Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (*id.*). In the merger and acquisition context, this requires the plaintiff to submit evidence of the company's actual value as of the date the purchase price was set, and to show that the defendant's misrepresentations directly caused it to pay more than that actual value (*see Kumiva Group, LLC v Garda USA Inc.*, 146 AD3d 504, 506 [1st Dept 2017]). Here, VXI has failed to come forward with any evidence of Symbio's actual value at the time of acquisition, which is fatal to its fraud claims.

*8 VXI does not assert anywhere on this record that it conducted a formal appraisal of Symbio prior to the execution of sale, as required by the First Department's holding in *Kumiva* (146 AD3d at 508). VXI instead relies on the valuation performed by its expert, Dr. Yuan Xie, to substantiate its claims of pecuniary loss. However, Dr. Xie's reply report clarifies that he "did not put forward an independent, *de novo* valuation in the Xie Report" and that his analyses in the Xie Report "are based on VXI's valuation approach at the time of purchase and show how underpayments would have impacted VXI's offer for Symbio" (NYSCEF doc. no. 564, ¶5, ¶10).

Although VXI later discovered undisclosed liabilities and expenses that would have presumably lowered Symbio's EBITDA calculation, this only shows that VXI might have offered a lower price had it known of such facts prior to closing. Symbio Defendants assert that the parties did not negotiate Symbio's purchase price based on an agreed-upon methodology and ultimately arrived at the purchase price

based on VXI's relative valuation of Symbio, which was calculated using an EBITDA multiple of 12.8x Symbio's projected EBITDA for fiscal year 2014. At oral argument on these motions, counsel for defendants argued that plaintiff failed to perform ordinary due diligence, which would have provided VXI with the information it needed to assess Symbio's condition and market value. Defendants further argue that it was not justifiable for VXI to rely on oral representations purportedly made outside of the SPA, given that VXI is a sophisticated purchaser and was made aware of Symbio's financial issues during the negotiation process.

Having proceeded on its own EBITDA estimate without securing a contemporaneous valuation, VXI cannot now substitute the negotiated price for evidence of Symbio's actual value on November 26, 2014 (*Kumiva*, 146 AD3d at 507). VXI has no reference point from which to measure a diminution in value and, thus, cannot show nonspeculative damages. A plaintiff's assertion that it would have negotiated differently with different information, or if defendants had not made any misrepresentations, is not evidence of actual pecuniary loss (*id.* at 508). The agreed-upon purchase price for Symbio's shares is merely a figure that reflects the amount VXI was willing to pay based on the information available to it at the time.

Thus, even if VXI had established by admissible evidence that misrepresentations were made for the purpose of inducing it to purchase Symbio, which were known to be false by Symbio negotiators, and that VXI had justifiably relied upon those misrepresentations, VXI's fraud claims would have to be dismissed. For, as the New York Court of Appeals long ago noted, “[t]o give rise, under any circumstances, to a cause of action, either in law or in equity, reliance on the false representation must result in injury” (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 580-581 [2018]; quoting *Sager v Friedman*, 270 NY 472, 479-481

[1936]). In *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, the Court highlighted “the principle that, if the fraud causes no loss, then the plaintiff has suffered no damages” (31 NY3d at 580-581). “Loss causation,” the Court explained, “is a well-established requirement of a common-law fraudulent inducement claim for damages” (*Ambac*, 31 NY3d at 580; see also *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). Thus, plaintiff's post-acquisition discovery of future liabilities and expenses, standing alone, fails to raise a triable issue of fact as to pecuniary loss based upon a perceived diminution in value.

*9 Accordingly, it is hereby

ORDERED that CapMan Defendants' motion for summary judgment (motion sequence no. 018), is granted in part, to the extent that the branch of the motion seeking dismissal of Count II is granted, and to the limited extent that plaintiff's demand for breach of contract damages related to “diminution in value,” or overpayment of Symbio's purchase price detailed in Count I, is dismissed; the motion is otherwise denied; and it is further.

ORDERED that Symbio Defendants' motion for summary judgment (motion sequence no. 019), is granted in part, to the extent that the branch of the motion seeking dismissal of Count II is granted, dismissal of VXI's fraud claims in Count III is also granted, and to the limited extent that plaintiff's demand for breach of contract damages related to “diminution in value,” or overpayment of Symbio's purchase price detailed in Count I is dismissed; the motion is otherwise denied.

All Citations

Slip Copy, 89 Misc.3d 1257(A), 262 N.Y.S.3d 683 (Table), 2026 WL 2661749, 2026 N.Y. Slip Op. 51408(U)

Footnotes

- 1 CPLR sections 1018, 1021, 3211(a)(3), and 3211(a)(8), among other, may be implicated by such applications for relief — and, to determine whether any of these statutory provisions properly support the granting of the requested relief, fully informed affidavits and properly introduced documentary evidence would need to be placed into the record upon notice or by court order. That hasn't happened here — not at all. For example, to the extent an application for relief is based upon any purported untimely substitution, pursuant to CPLR 1021, the court makes several observations: first, that provision permits the motion for substitution to be made “by any party;” second, under that provision dismissal “may” be made, but is not required — in other words, dismissal is “permissive,” not mandatory; third, any dismissal under that provision could occur *only after a showing that* the person who should have been substituted has “not appeared voluntarily” (that is, in itself, another factual inquiry); fourth, that provision makes plain that “reasonableness” is an appropriate inquiry for the court to make with respect to any alleged delay in substitution; and fifth, that provision makes clear that dismissal

on the merits is disfavored — as the statutory language states that “such dismissal *shall not* be on the merits unless the court shall so indicate.”

- 2 Breach of contract damages and fraud damages redress different harms. “Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed; fraud damages are meant to indemnify losses suffered as a result of fraudulent inducement. Where all of the damages are remedied through the contract claim, the fraud claim is duplicative” ([MBIA Insurance Corp. v Credit Suisse Securities \(USA\) LLC](#), 165 AD3d 108, 114 [1st Dept 2018]).

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