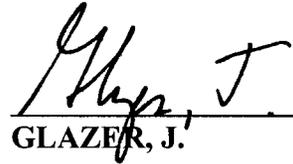


3. Summary judgment as to Count IV for negligent misrepresentation and Count V for fraud is **GRANTED** only as to the factual disputes regarding the valuation of stock and revenue from the billboard leases and **DENIED** as to representations regarding the alleged amendments to the Bylaws and statements that the plaintiff was not permitted to discharge the board of directors.
4. Summary Judgment as to Count VI for unjust enrichment is **GRANTED** only as to the factual disputes regarding the revenue from the billboard and **DENIED** as to all other claims.
5. Summary judgment is **DENIED** as to all other allegations.

BY THE COURT:



GLAZER, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

_____	:	NOVEMBER TERM, 2012
MARGARET PETACCIO, as	:	
Executrix of Joseph F. Petaccio, Jr.	:	NO. 02873
v.	:	
	:	COMMERCE PROGRAM
ALTERNATIVE ENERGY	:	
TECHNOLOGIES, LLC, ET AL	:	CONTROL NO. 13082374
_____	:	
	:	
MARGARET PETACCIO, as	:	JULY TERM, 2011
Executrix of Joseph F. Petaccio, Jr.	:	
v.	:	NO. 00650
	:	
MICHAEL FOGLIETTA, ET AL	:	
_____	:	

OPINION

GLAZER, J.

October 10, 2013

PROCEDURAL AND FACTUAL HISTORY

Plaintiff, Margaret Petaccio, as executrix of Joseph F. Petaccio, Jr., commenced the current action against defendants, Michael Foglietta, Mark Ward, Herb Ligon, David DeClement, Esquire, and JP Rail, Inc, alleging claims for: (1) breach of contract, (2) breach of fiduciary duty¹; (3) injunctive relief; (4) negligent misrepresentation; (5) fraud, fraudulent inducement, fraudulent concealment; (6) unjust enrichment; (7) breach of contract with respect to exercise of the option; and (8) legal malpractice². Subsequently, plaintiff brought a separate suit against defendants, Alternative Energy Technologies, LLC, Unit, Inc., TTI Technologies,

¹ Moving defendants do not address the claim for breach of fiduciary duty and thus summary judgment is denied as to that claim.

² Plaintiff has dropped its legal malpractice claim against David DeClement. See Plaintiff's answer to moving defendants' motion for summary judgment, ¶ 18.

and 166 Research, Inc.³ alleging claims for: (1) breach of contract; (2) breach of fiduciary duty; (3) injunctive relief; (4) negligent misrepresentation; (5) fraud, fraudulent inducement, fraudulent concealment; (6) unjust enrichment; and (7) breach of contract with respect to exercise of the option. This court consolidated the actions on February 19, 2013. Defendants, Michael Foglietta, Mark Ward, Herb Ligon, David DeClement, Alternative Energy Technologies, LLC, (collectively and hereinafter “moving defendants”) along with Unit, Inc., TTI Technologies, and 166 Research, Inc. bring the instant motion for summary judgment. Moreover, the motion for summary judgment is also joined by defendant JP Rail, Inc. For the reasons set forth below, the motion is granted in part and denied in part.

This case arises out of a shareholders dispute. In 1990 Joseph F. Petaccio, Jr. (hereinafter “Petaccio”) organized the company JP Rail, Inc. (hereinafter “JP Rail”) which was in the business of owning and/or operating short rail lines. Petaccio was the sole shareholder owning all 100 outstanding shares. On or about March 31, 2006, JP Rail borrowed \$1,260,000 to purchase equipment. JP Rail, Petaccio, and his wife Margaret Petaccio were designated as co-borrowers and pledged their personal residence and other properties. See Complaint, ¶ 9. The loan payment was \$15,750 per month. Id. at ¶ 10.

In August of 2006, Petaccio sold twenty-five (25) shares of JP Rail to Alternative Energy Technologies, LLC (hereinafter “AET”) for \$1,000,000. Petaccio further sold three (3) shares each to David DeClement, Angelo Foglietta, and Michael Foglietta leaving Petaccio with sixty-six (66) remaining shares in JP Rail. See plaintiff’s answer in opposition to summary judgment, Exhibit B and C, Stock Purchase Agreement and Addendum to Stock Purchase Agreement, respectively. Pursuant to the agreement and addendum, Petaccio was to select two board

³ Plaintiff does not provide any evidence to support claims against Unit, Inc., TTI Technologies, and 166 Research, Inc. and thus the parties are dismissed.

members, AET was to select two board members, and one board member was to be selected jointly. Petacco selected himself and David DeClement as directors. AET selected Mark Ward and Herb Ligon as directors. The parties jointly selected Michael Foglietta as the fifth director.

The stock purchase agreement (hereinafter “agreement”) and addendum to stock purchase agreement (hereinafter “addendum”) reserved the right for JP Rail to purchase outstanding shares under certain conditions. Id. One of those specific conditions was upon a shareholder’s death.

The addendum provided:

3.1 Right to Purchase from Shareholder’s Estate. Upon notice of death of a shareholder (the “Decedent”), the Company has 60 calendar days in which to elect to purchase the decedent’s shares (the “Decedent’s Shares”) at fair market value by giving written consent notice of its intent to purchase to the decedent’s estate. The Corporation’s decision to purchase the Decedent’s Shares shall be made by the vote of the remaining Shareholder or Shareholders owning a majority of the Common Stock other than the Decedent’s Shares.

Id. at Exhibit C.

Moreover, the agreement specifically carved out assets that would not be included in purchase. The agreement provides:

8. Excluded Assets.

8.1 The parties acknowledge that the Seller has leases for billboards on and along railroad property. The income from the current billboards and ones in Pleasantville NJ will be excluded from this transaction and due, owing and paid to Joseph F. Petaccio Jr., individually for the term of the current lease. At the first renewal, the leases shall revert to the corporation.

Id. at Exhibit B. Plaintiff alleges that according to Petaccio’s son, Jason Petaccio, this carve out includes three (3) or more billboards located along the rail and along the bridge trestle in Pleasantville, NJ. Joseph Petaccio signed a billboard lease renewal on August 4, 2008. See moving defendants’ motion for summary judgment, Exhibit O. However, moving defendants

allege that the company was not notified of the renewal and Petaccio continued to receive payments from the billboard leases.

On August 1, 2009, while still the majority shareholder of JP Rail, Petaccio passed away. Plaintiff alleges that on September 8, 2009 the moving defendants held a secret special meeting of the Board of Directors, without representation from the Estate. Further, plaintiff alleges that at this special meeting, the Bylaws were “amended, ratified, approved, and adopted.” See plaintiff’s answer in opposition to summary judgment, Exhibit O. Plaintiff alleges that the “new” Bylaws were not the same as the original 2006 Bylaws. The alleged “new” bylaws state:

(a) Removal by the shareholders. The entire board of directors, or any class of the board, or any individual director may be removed from office without assigned any cause by the vote of shareholders, or of the holders of a class or series of shares, entitled to elect directors, or the class of directors. In case the board or the class of the board or any one or more directors are so removed, new directors may be elected at the same meeting. The board of directors may be elected at the same meeting. The board of directors may be removed at any time with or without cause by the unanimous vote or consent of shareholders entitled to vote thereon.

Id. at Exhibit G. Contrary to the alleged “new” Bylaws, a 2006 document titled unanimous consent of shareholders states:

IT IS FURTHER RESOLVED, that each Director named in this Unanimous Written Consent (a) shall hold office until the next annual meeting of the Shareholders or until his successor shall have been duly elected and qualified and (b) may be removed at any time, with or without cause by the written consent action of the Shareholders, as provided in Article 2 of the Company’s Bylaws.

Id. at Exhibit E. Article 2 of JP Rail’s “new” Bylaws refers to “Notice-Waivers-Meetings Generally.” Id. at Exhibit G.

Plaintiff alleges that the reference to Article 2 of the Bylaws in the 2006 unanimous consent of shareholders clearly shows that there is an original set of Bylaws other than the one moving defendants have produced.⁴ Pursuant to the “original” Bylaws, the entire board of directors may be dismissed without cause. On September 15, 2009, plaintiff attempted to discharge the entire board of directors. Plaintiff then alleges that Roy J. Breeling, Esq., an attorney attending the meeting, represented to those in attendance, that the Bylaws of JP Rail created “classes” of directors, and thus the board could be discharged only with cause. See Complaint, ¶ 39. Moreover, the “new” Bylaws state that the board of directors may be removed for cause by the unanimous consent of the shareholders entitled to vote thereon.

On October 9, 2009, JP Rail, through Michael Foglietta, sent a letter to Margaret Petaccio indicating that the company wanted to purchase the decedent’s shares. Id. at Exhibit H. JP Rail estimated the fair market value of the decedent’s remaining sixty-six (66) shares to be \$1,452,000, which equals \$22,000 per share. Id. Accompanying the letter was a check for \$24,200. Id. Subsequently, “[p]laintiff challenged [m]oving [d]efendant’s self-serving, unilateral determination of the ‘fair market value,’ and refused to accept any payments from [m]oving defendants.” See plaintiff’s memorandum of law in opposition to moving defendant’s motion for summary judgment, pp. 8.

Moving defendants now bring the instant motion for summary judgment alleging that plaintiff bears the burden to prove each of its causes of action but is unable to adduce evidence to meet this burden for each, and thus summary judgment is appropriate. Moving defendants support this theory by “boil[ing] down” plaintiff’s claims to four factual issues: (1) the assignment of income from the billboards; (2) moving defendants alleged improper interference

⁴ Plaintiff alleges that it does not have a copy of the “original” Bylaws and that moving defendants refuse to produce it. However, moving defendants state that the unanimous consent of the shareholders referencing Article 2 was a typo.

with its right to discharge the entire board of directors; (3) JP Rail's exercise of its option to repurchase shares; and (4) the valuation of the shares. See moving defendant's memorandum of law in support of summary judgment, pp. 1.

DISCUSSION

Summary judgment will be granted only when the pleadings, depositions and admissions show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Boring v. Erie Insurance Group, 641 A.2d 1189, 1190 (Pa. Super. 1994) (quoting Pa.R.C.P. 1035 (b)). The court must examine the record in the light most favorable to the non-moving party, resolve doubts against the moving party and not decide issues of fact, but determine whether any exists. Id. at 1190-91 (citing Washington Federal Savings and Loan Association v. Stein, 357 Pa. Super. 286, 288-89 (1986)). When considering a motion for summary judgment, "the court must accept as true all well pleaded facts in a non-moving party's pleadings, and give to him or her the benefit of all reasonable inferences to be drawn therefrom." Jefferson v. State Farm Insurance, 380 Pa. Super. 167, 170, 551 A.2d 1261, 1262 (1988).

Rule 1035.2 provides that, a party may move for summary judgment "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury." Moreover, "[u]nder subparagraph (2), if the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury.... [t]o defeat this motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense." Id.

Breach of Contract

As a threshold matter, while it may be abundantly clear to the parties that the instant case boils down to four factual disputes, it is also abundantly clear to this court that numerous factual allegations remain unaddressed. Additionally, neither party provides clear or concise arguments or evidence as to which allegations the claim for breach of contract encompasses. It seems the parties know something the court is not aware of. This court is now left to assume arguments and determine which factual disputes apply to which claim. As to the claim for breach of contract, moving defendants do not address the allegations of plaintiff that moving defendants refused to issue minutes of the September 15, 2009 meeting, attempted to pursue frivolous claims against the Executrix, failed to act in good faith and fair dealing, and held secret board meetings. Therefore, this court is unable to grant summary judgment but will limit the claims to the evidence addressed by the parties.

Whether the Billboard Lease was Renewed

Pursuant to the agreement and addendum, the contract is to be governed and interpreted in accordance with the laws of the State of Delaware. Under Delaware law, the elements for a breach of contract claim are: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff. See VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). “Contracts are to be interpreted as written, and effect must be given to their clear and unambiguous terms.” Shifan v. Morgan Joseph Holdings, Inc., 57 A.3d 928, 935 (Del. 2012). The terms of a contract are ambiguous when they are “fairly susceptible to different interpretations or may have two or more different meanings.” Eagles Industry, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997). The court finds

that the clause relating to the billboard to be unambiguous. The plain language of the agreement, in reference to the billboards, states,

The income from the current billboards and ones in Pleasantville NJ will be excluded from this transaction and due, owing and paid to Joseph F. Petaccio Jr., individually for the term of the current lease. At the first renewal, the leases shall revert to the corporation.

See plaintiff's answer in opposition to summary judgment, Exhibit B. Plaintiff alleges that the lease was not renewed because it did not expire for another ten (10) years. However, this argument is meritless. This court finds the fact that the terms of the lease were not up for renewal and that the lease had not expired to be of no relevance. The contract does not address the expiration date of the lease. The plain language of the contract simply states at the first renewal the lease will revert to the corporation. Moving defendants have provided evidence of a renewal. However, plaintiff has not provided any evidence to support its conclusory allegations that the leases were not renewed and thus this court finds no merit to the argument that moving defendants breached the agreement by refusing to redirect billboard lease payments to plaintiff.

Moving Defendants Alleged Improper Interference with its Right to Discharge the Entire Board of Directors

Moving defendants allege that summary judgment is appropriate as to plaintiff's right to discharge the entire board because the Bylaws are unambiguous as to how the board of directors may be discharged and that plaintiff failed to give the required notice. Pursuant to the "new" Bylaws, the board of directors can only be dismissed without cause by unanimous consent of the shareholders. Moreover, the "new" Bylaws provide:

In the case of a special meeting of the shareholders, the notice shall specify the general nature of the business to be transacted, and in all cases the notice shall comply with the express requirement of the section. The corporation shall not have a duty to augment the notice.

Id. at Exhibit G. The notice of special meeting of shareholders provided:

[T]he general nature of the business to be transacted is as follows:

1. The determination of the shareholder of record (record date August 31, 2009);
2. The nomination and election of 2 class one directors (vote of shares in the name of Joseph Petaccio, Jr. only);
3. Information regarding the identification of corporate counsel as required by the Attorney General of New Jersey;
4. The election of the corporation whether to exercise its right to acquire the shares of Joseph Petaccio Jr. (vote of shares other than those in the name of Joseph Petaccio, Jr. only).

See moving defendant's motion for summary judgment, Exhibit S.

Plaintiff alleges, however, that on September 8, 2009 the moving defendants held a secret special meeting of the Board of Directors, without representation from the Estate and the Bylaws were amended, ratified, approved, and adopted to require a unanimous vote to remove the board of directors. Assuming that the Bylaws were amended to require unanimous consent, notice of plaintiff's intent to dismiss the entire board of directors was never given. Moreover, plaintiff does not provide any evidence to the contrary. Thus, this court finds no evidence that moving defendants breached any contract by refusing to let plaintiff dismiss the entire board at the special shareholders meeting as plaintiff's notice of the meeting was procedurally flawed.

Based on the foregoing, summary judgment as to the claim for breach of contract is granted only on the factual disputes regarding the failure to discharge the entire board of directors and the failure to redirect billboard revenue.

Negligent and Fraudulent Misrepresentation

The elements of fraudulent misrepresentation are well settled in Pennsylvania. The party alleging fraud must prove the following elements, by clear and convincing evidence: "(1) a

representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance.” Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999); Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994). Moreover, the Pennsylvania Supreme Court set forth that a claim of “negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to the party acting in justifiable reliance on the misrepresentation.” Bilt-Rite Contractors, Inc. v. The Architect Studio, 866 A.2d 270 (Pa. 2005). Both claims for negligent and fraudulent misrepresentation require a party acting in justifiable reliance of the misrepresentation.

In the instant case, plaintiff alleges that moving defendants made material misrepresentations about the amendments to the Bylaws, the value of the shares of stock of JP Rail, and the right to receive the rental income from certain billboard leases between defendant JP Rail and third parties. Plaintiff readily admits throughout its complaint that it did not rely on moving defendants’ value of the shares of stock at JP Rail. Plaintiff specifically states that it “challenged [m]oving [d]efendant’s self-serving, unilateral determination of the ‘fair market value,’ and refused to accept any payments from [m]oving defendants.” See plaintiff’s memorandum of law in opposition to moving defendant’s motion for summary judgment, pp. 8.

Additionally, as discussed above, the plain language of the contract, in reference to the billboards, does not amount to a misstatement of fact. Therefore, while the claims for fraud and negligent misrepresentation are not dismissed, the claims are limited to the misrepresentations

regarding the alleged amendments to the Bylaws and the statements that the plaintiff was not permitted to discharge the board of directors.

Based on the foregoing, summary judgment for the claims of negligent and fraudulent misrepresentation is granted only as to the factual disputes regarding the valuation of the stock and the revenue from the billboard leases.

Unjust Enrichment

To prove a claim for unjust enrichment, a plaintiff must plead and prove that the defendant: (1) received a benefit from plaintiff; (2) appreciated the benefit; and (3) accepted the benefit under such circumstances that it would amount to an inequity for defendant to retain the benefit without payment of value. Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999). Plaintiff alleges that moving defendants were unjustly enriched because moving defendants purposely failed to pay back an outstanding \$1,260,000 loan.⁵ Unfortunately, while plaintiff does not provide evidence to support its contention that it was required to pay back the outstanding \$1,260,000 loan, moving defendants do not even address the matter. Therefore, viewing the evidence in the light most favorable to the non-moving party, this court is unable to grant summary judgment.

Breach of Contract with Respect to Exercise of the Option

Pursuant to the addendum, defendant JP Rail purportedly exercised its option to purchase the decedent's sixty-six (66) shares of JP Rail's common stock. To exercise this option, the addendum requires the payment of the estate of "at least fair market value" in sixty (60) equal monthly installments. "[W]hen the provisions in controversy are fairly susceptible of different interpretations or may have to or more different means, there is ambiguity." Eagle Industries,

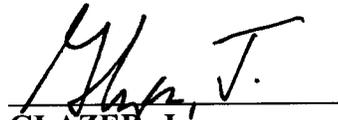
⁵ As previously discussed, the billboard leases were to revert to the company upon first renewal and thus plaintiff is precluded from asserting that defendants were unjustly enriched by revenue from the billboard.

inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997). It is evident to the court that both parties have different interpretations of what the fair market value of the shares are and how to measure them. As a factual dispute exists, the motion for summary judgment with respect to the exercise of the option, is denied.

CONCLUSION

Based on the foregoing, Unit, Inc., TTI Technologies, and 166 Research, Inc. are dismissed from the case. Further, the motion for summary judgment is granted in part and denied in part as discussed above.

BY THE COURT:



GLAZER, J.