NOT TO BE PUBLISHED WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

JORDAN HEALTH PRODUCTS III, INC., and ONCOLOGY SERVICES INTERNATIONAL, INC.;

Plaintiff,

v.

OSI HOLDINGS I, LLC, FOUNDERS EQUITY NY, L.P., FOUNDERS EQUITY I, L.P., UPSTATE LINAC SERVICES, LLC, TREMONT ASSOCIATES, LLC, BERNARD AMATO, JON CLAYBOURN, RONALD DRAKE, DOMENIC GRECO, RICHARD HALL, SCOTT JOHN, RICKY KREIDER, LES MANN, JOSEPH O'CONNOR, PHILIP PODMORE, JAMES SHARKEY, WARREN STANTON, VINCENT TERRIBILE, and WILLIAM YAEGER;

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO. **BER-L-2509-20**

Civil Action

OPINION

Argued: February 18, 2022
Decided: March 3, 2022

HONORABLE ROBERT C. WILSON, J.S.C.

Jason R. Scheiderer, Esq. appearing on behalf of Plaintiffs Jordan Health Products III, Inc. and Oncology Services International, Inc. (from Dentons US LLP)

Anthony Paduano, Esq. appearing on behalf of Defendants OSI Holdings I, LLC, Founders Equity NY, L.P., and Founders Equity I, L.P. (from Paduano & Weintraub LLP)

Eric S. Latzer, Esq. appearing on behalf of Defendant Richard Hall (from Cole Schotz P.C.)

Daniel S. Eichhorn, Esq. appearing on behalf of Defendants Philip Podmore, James Sharkey, Ronald Drake, Vincent Terribile, John Claybourn, Upstate Linac Services, LLC, Ricky Kreider, Domenic Greco, William Yaeger, Scott John, Warren Stanton, Les Mann, Bernard Amato, and Joseph O'Connor (from Cullen & Dyckman LLP)

FACTUAL BACKGROUND

THIS MATTER arises out of a claimed breach of a provision contained within a Stock Purchase Agreement ("SPA"). Jordan Health Products III, Inc. ("Jordan Health") and Oncology Services International, Inc. ("OSI", and together with Jordan Health, "Plaintiffs") completed an SPA with OSI Holdings I, LLC ("Defendant Holdings"), Founders Equity NY, L.P., Founders Equity I, L.P., Upstate Linac Services, LLC, Tremont Associates, LLC, Richard Hall ("Defendant Hall"), Bernard Amato, John Claybourn, Ronald Drake, Domenic Greco, Scott John, Ricky Kreider, Les Mann, Joseph O'Connor, Philip Podmore, James Sharkey, Warren Stanton, Vincent Terribile, and William Yaeger ("Defendants" and "Sellers") on or about July 6, 2016. Pursuant to the SPA, Jordan Health bought all of Defendants' equity in OSI, a company which sells and services medical equipment. Defendant Holdings was made the authorized representative of the Sellers/Defendants and as the holder of ODI stock. Defendants each were a party to the SPA in their individual capacities and as owners of various classes of OSI stock.

The parties' sale was subject to various representations and warranties set forth in the SPA. Specifically, under Section 5.21 of the SPA, Defendants represented and warranted that OSI, prior to the closing date of the transaction, had not made any illegal or improper payments in past transactions. Defendants also represented and warranted, under Section 5.10 of the SPA, that OSI, again prior to the closing date of the transaction, had good and marketable title to the assets sold in the transaction.

Indemnification Obligations Under the SPA

Article X of the SPA governs indemnification. Section 10.1 provides, in pertinent part, as follows, "From and after the Closing Date, subject to the limitations set forth in this Agreement, each Seller hereby agrees to, severally in proportion to such Seller's Pro Rata Percentage, and not

jointly, indemnify and hold harmless the Purchaser Indemnified Parties from and against any and all Losses . . . ." The SPA defines "Losses" to include "any and all losses, liabilities, obligations, damages, judgments, fines, penalties, fees, costs and expenses." Defendants agreed to indemnify Plaintiffs for any Losses resulting from a breach of Sections 5.10 and 5.21.

A claim for indemnification may arise under the SPA by virtue of a meritorious third-party action. Section 10.5 requires Plaintiffs to promptly notify Defendants upon "becom[ing] aware of a third party claim which [Jordan Health or OSI] believes is likely to result in a Claim for indemnification pursuant to this Agreement[.]"

The Arbitration and Plaintiffs' Demands

In May 2019, Centro Avanzado de Radioterapia and Centro Oncologico Internacional (together, "CART") made an AAA Demand for Arbitration against OSI. CART alleged a breach of contract related to four sales agreements that CART and OSI entered into in 2012 and 2013, several years before the SPA. In October 2019, CART filed an "Amended Statement of Claim," in which it alleged that certain commissions paid by OSI "constituted commercial bribes in violation of New York law." Plaintiffs allege the Amended Statement of Claim "was the first time CART made OSI aware of any allegation of bribery with respect to the sale of equipment."

Plaintiffs' counsel served Defendant Holdings with a demand for indemnification by notice date January 15, 2020 ("January Demand"). The January Demand expressly acknowledges that Plaintiffs' entitlement to indemnification is contingent on a finding that Defendants are, in fact, in breach of a representation or warranty in the SPA. The Complaint similarly acknowledges that Defendants' obligation to indemnify is contingent on a finding that Defendants breached a representation or warranty in the SPA. Plaintiffs allege they served the January Demand after becoming aware of allegations that could trigger Defendants' indemnification obligations pursuant

to Sections 5.21 and 10.1(a)(i) of the SPA. Plaintiffs similarly allege that CART's Amended Statement of Claim alerted Defendants to new allegations which amounted to a potential breach of Section 5.21's Fundamental Representation that OSI had not made any improper or illegal payments to assist it in obtaining or retaining business.

Plaintiffs became aware, shortly after serving the January Demand, that in December 2019 CART brought a criminal complaint against OSI in the Central Office for the Investigation of Financial Crimes of the Attorney General of Mexico City (the "Criminal Action"). Upon learning of the Criminal Action, Plaintiffs sent a second demand for indemnification to Defendants.

Plaintiffs' Lawsuit

Plaintiffs filed their initial complaint in this action on April 27, 2020, against several individual and corporate Defendants seeking to enforce the indemnification provisions of the SPA. Consistent with the Indemnification Demands, Plaintiffs acknowledged in the initial complaint that their claims are predicated on a finding that Defendants breached a representation or warranty in the SPA.

On August 14, 2020, the Court granted Defendants' motions to dismiss the complaint, in its entirety, on the basis that plaintiffs' claims were not ripe for adjudication, as they were subject to the pending Arbitration. If the Arbitrator determined that OSI did not breach Section 5.21, Plaintiffs would not be entitled to any indemnification, as Article X only provides for indemnification "for Losses arising from a breach" of Section 5.21. The Court ruled that Plaintiffs could refile the Lawsuit, upon the conclusion of the Arbitration, provided that damages had accrued as a result of the decision in that Arbitration. Plaintiffs prevailed in the Arbitration as there was no finding of any illegal or improper payments. Therefore, no damages accrued because

there was no breach of the so-called Fundamental Representation by Richard Hall, or any of the Defendants. Nonetheless, Plaintiffs insisted on re-filing the instant suit.

On March 31, 2021, approximately eight months after the Court's dismissal ruling, the Arbitrator entered the Final Award in Arbitration. The Final Award was fully favorable to OSI, as the Arbitrator rejected, in every possible respect, CART's claim that OSI made improper payments in connection with its transaction with CART or committed conversion. On July 23, 2021, Plaintiffs reinstated the lawsuit by filing the Complaint. The Complaint acknowledges that Defendants' indemnification obligation is triggered only if they are found in breach of a representation or warranty in the SPA, and the Final Award in the Arbitration was fully favorable to OSI.

For the reasons below, Defendants' Motions for Summary Judgment are **GRANTED,** and Defendant Hall's Counterclaim is **GRANTED**.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the

non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

I. Breach of Contract Claim (Count I)

Plaintiffs argue that Defendants breached the SPA by refusing to comply with their indemnification obligations to Plaintiffs stemming from claims related to a misrepresentation contained in Section 5.21. Plaintiffs misstate the SPA's terms and Defendants' obligations. Section 10.1(a)(i)(B) of the SPA requires Defendants to "indemnify and hold [Plaintiffs] harmless . . . from and against any and all Losses resulting from: (i) . . . (B) any misrepresentation or breach of warranty made by the [Defendants] in Article V." By these terms, a claim or accusation of breach is insufficient to trigger Defendants' indemnification obligations, an actual breach is required.

Under Delaware law, the stipulated choice of law applicable for this matter, "indemnity provisions . . . [are] to be construed strictly rather than expansively." Computer Scis. Corp. v. Pulier, No. 11011-CB, 2019 Dee. Cha. LEXIS 177, at *5 (Del. Ch. May 19, 2019). Under settled law, "it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently . . . it is the court's job to enforce the clear terms of contracts. DeLucca v. KKAT Mgmt., No. 1382-N, 2006 Del. Ch. LEXIS 19, *7 (Del. Ch. Jan. 23, 2006).

The Delaware Supreme Court has previously rejected a similar argument proffered by Plaintiffs. In Winshall v. Viacom Intl., Inc., 76 A.3d 808 (Del. 2013), Viacom sought indemnification from former shareholders of a company Viacom acquired pursuant to a Merger Agreement that required indemnification of Viacom against "Losses, which may be sustained or

suffered by [Viacom] based upon, arising out of or by reason of : (i) the breach of any representation or warranty of the [shareholders'] Company." Id. at 820. The Delaware Court rejected Viacom's argument "that the . . . Agreement impose[d] an 'independent duty to pay defense costs' that [wa]s separate from and 'broader than the duty to indemnify,'" ruling the "plain language" of Section 8.2 "conditions indemnification upon the existence of a breach of a representation or warranty in [the Merger] Agreement." Id. at 820, 822. That Court stated, "where, as here, the contract expressly imposes only a duty to 'indemnify,' as opposed to 'indemnify and defend,' the courts generally hold that there is no duty to defend." Id. at 820. "If the parties intended to require the Selling Shareholders to reimburse the Defendants for the costs of defending every infringement claim regardless of its merit, they could have used appropriate language to accomplish that result." Id. 821-822.

Plaintiffs attempt to distinguish Winshall on the basis that, there, the Merger Agreement was silent about defense costs, whereas here, the SPA has a separate provision that mentions in passing that, "Losses . . . include attorneys' fees." However, this distinction is irrelevant because the SPA here "did not impose any independent duty to pay defense costs in the absence of a breach of an underlying representation or warranty." See Winshall, 76 A.3d at 820.

In Plaintiffs' Opposition they identified no document, testimony, or other evidence in support of their claim for breach of Section 5.10 of the SPA. Accordingly, the claim should be deemed abandoned and dismissed. See Machado v. N.J. Dep't of Corr., No. HNT-L-604-09, 2012 N.J. Super. Unpub. LEXIS 719, *32-33 (Super. Ct. Mar. 30, 2012) (finding a plaintiff abandoned claims and dismissing them where he failed in his opposition to defendants' summary judgment motions, to provide facts that show a genuine issue of material fact requiring resolution at trial); see also N.J. Ct. R. 4:46-5(a) ("When a motion for summary judgment is made and supported as

provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading . . . .").

II. Claims of Unjust Enrichment (Count II), Promissory Estoppel (Count III), and Declaratory Judgment (Count IV)

Plaintiffs do not dispute the enforceability of the SPA. Therefore, they cannot proceed on an unjust enrichment theory where the rights they seek to enforce, the indemnification rights, are defined by the SPA. See Segovia v. Equities First Holdings, LLC, No. 06C-09-149-JRS, 2008 Del. Super. LEXIS 197, at *22 (Super. CT. May 30, 2008) ("Because Plaintiffs have not challenged the enforceability of the loan documents, Plaintiffs are precluded from recovering on a theory of unjust enrichment.") The same is true for the claim of promissory estoppel. See Dolan v. Altice USA, Inc., No. 2018-0651-JRS, 2019 Del. Ch. LEXIS 242, at *25 (Ch. June 27, 2019) (ruling that "[p]romissory estoppel does not apply . . . where a fully integrated, enforceable contract governs the promise at issue," that a Court "must look to the contract as the source of a remedy," and that only "where a defendant denies that she is contractually bound to the plaintiff, or asserts that the contract is unenforceable, . . . may [a plaintiff] plead promissory estoppel as an alternative").

Plaintiffs also seek a declaratory judgment as to their rights under the SPA which Plaintiffs acknowledge is derivative of their breach of contract claim. A declaratory judgment claim must be dismissed where it seeks an interpretation as to a party's contractual rights, and the related breach of contract claim is dismissed. See Microstrategy Inc. v. Acacia Research Corp., No. 5735-VCP, 2010 Del. Ch. LEXIS 254 (Del. Ch. Dec. 30, 2010). Thus, just as the breach of contract claim is defective and is dismissed, so too, the claim for declaratory judgment is defective and dismissed. Therefore, Plaintiffs' quasi-contract claims must be dismissed.

III. Judicial Estoppel Bars Plaintiffs' Claims

The doctrine of judicial estoppel operates to bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted. Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996). It provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. See New Hampshire v. Main, 532 U.S. 742, 749 (2001); see also State v. Gonzalez, 142 N.J. 618, 623 (1995). The doctrine is equally applicable when an inconsistent statement or position has been taken and accepted in a prior quasi-judicial proceeding. Ramer v. New Jersey Transit Bus Operations Inc., 335 N.J. Super. 304, 312 (App. Div. 2000). Arbitrations are quasi-judicial proceedings to which judicial estoppel applies. Snyder v. American Ass'n of Blood Banks, 144 N.J. 269, 301 (1996).

Courts have held that the doctrine of judicial estoppel applies to positions taken by parties in prior arbitrations. See City of Trenton v. Cannon Cochran Management Services, Inc., No. 1169-08 WL 10464478, at *2 (N.J. Super. L. Aug. 31, 2009). In Konieczny v. Micciche, 305 N.J. 375, 384-87 (App. Div. 1997), the Court found that the plaintiff was estopped from asserting contrary facts to those asserted in a prior arbitration against the defendant under the doctrine of collateral estoppel.

Plaintiffs are now seeking to abruptly switch sides from the position they maintained and successfully achieved at the Arbitration and now relitigate the same matter to a finding of improper behavior. A final and binding decision was reached in the Arbitration in favor of Plaintiffs. Their position was that wrongful payments were not made, and no improper sales of equipment occurred. Plaintiffs now somehow assert the opposite on the instant claims for indemnification. The judicial estoppel doctrine requires that this contradictory position be prohibited.

IV. Defendant Richard Hall's Counterclaim

In response to Plaintiffs' Complaint, Defendant Hall asserted a breach of contract counterclaim against Jordan Health. Defendant Hall's counterclaim is based on a promissory note date February 2, 2018 (the "Note"), that Jordan Health provided Defendant Hall as consideration for its repurchase from Defendant Hall of certain stock in connection with the SPA transaction. Pursuant to Section 1 of the Note, Jordan Health agreed to make three total payments, each payment consisting of one-third the original principal amount of the Note ($337,500.00), plus interest accruing daily at a rate equal to six percent per annum.

In February 2019, Jordan Health made the first payment due under the Note. Jordan Health, however, failed to make the second payment due on February 2, 2020. As a result, Defendant Hall, through counsel, sent a notice of default to Jordan Health demanding it make the payment. Jordan Health rejected the demand. Jordan Health has failed to make the third and final payment due under the Note.

While not disputing the monies due under the Note, Jordan Health claims it has no obligation to pay the monies as a result of their presently rejected claim for indemnification. Jordan Health contended that the amount of its indemnification claims against Defendant Hall far exceed the amounts payable under the Note, and that Jordan Health is entitled to a setoff of such amounts. Shortly, after Jordan Health rejected Defendant Hall's demand, Jordan Health provided Defendant Hall with a copy of the Final Award entered in the Arbitration. As noted previously, the Final Award confirms that Plaintiffs are not entitled to indemnification. Despite the earlier Arbitration ruling, Jordan Health continues to refuse to make the payments under the Note.

Jordan Health's refusal to pay the amounts due under the Note is predicated again on the "setoff" defense which is based on the indemnification claim. However, Plaintiffs'

indemnification claims fail as a matter of law, as explained above. Consequently, so does Jordan Health's setoff defense. Thus, Defendant Hall is entitled to a judgment for all of the amount due under the Note plus interest, totaling $285,754.94, and therefore Defendant Hall's counterclaim is GRANTED.

CONCLUSION

As such, and for the reasons set forth in this decision, Defendants' Motions for Summary Judgment are **GRANTED**, and Defendant Hall's Counterclaim is **GRANTED.**