

SCAN

MEMORANDUM

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SUPREME COURT, STATE OF NEW YORK

By LALLY, J.
IAS/TRIAL PART 5

ANDREW BARRETT,

Plaintiff(s),

MOTION DATE: 5/15/09

INDEX No.: 1891/06

-against-

MOTION SEQUENCE NO: 17-20

CAL. NO.: 2009H0264

STEVEN FREIFELD, et al.,

Defendant(s).

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Motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment is denied. Motion by defendant Stephen Freifeld for an order pursuant to CPLR 3212 granting summary judgment dismissing the second amended complaint is granted in part and denied in part. Defendant Freifeld's motion for summary judgment on his counterclaim is denied. Motion by defendants Bernard Chipetine and Chipetine, Neu & Silverman, LLP for summary judgment dismissing the second amended complaint is denied. Motion by defendant Rochester Drug Cooperative, Inc. for partial summary judgment is denied.

This action for fraud, breach of fiduciary duty, and breach of contract arises from plaintiff's purchase of the stock of 222 Jamaica Economy Drug, Inc. Defendant Steven Freifeld was the owner of the corporation, which operates a retail pharmacy in Queens Village. Defendant Rochester Drug Cooperative, Inc. (Rochester Drug) is a cooperative corporation engaged in the wholesale distribution of medications to its member pharmacies. Jamaica Economy Drug is a member of Rochester Drug.

In September 2004 Freifeld was arrested on federal charges related to the wholesale distribution of prescription drugs without a license in violation of 21 U.S.C. § 353(e). On February 25, 2005, Freifeld hired defendant Gary Zweig, a Rochester Drug sales representative, to assist him in finding a purchaser for Jamaica Economy. Plaintiff Andrew Barrett is a pharmacist, and his corporation, Clarkstown Pharmacy, Inc., is also a member of Rochester Drug.

In April 2005, Steven Sabella, another Rochester Drug sales representative, approached plaintiff to inquire whether he was interested in purchasing Jamaica Economy. When plaintiff expressed an interest in learning more about the business, Sabella told him that he would be contacted by Gary Zweig. On April 25, 2005, Zweig provided plaintiff with Jamaica Economy's 2003 and 2004 financial statements and also the corporation's tax returns for the years 2002-2004. Zweig requested that plaintiff sign a "confidentiality agreement," prohibiting plaintiff from disclosing any confidential information which he acquired during the course of the negotiations. The agreement recites that Zweig was retained by plaintiff as a "consultant" for the purpose of appraising and evaluating the corporation.

The financial documents and the confidentiality agreement were delivered with a cover memo which stated that Jamaica Economy had "annual sales in the \$6 million range." The memo further stated that, "The store is debt free and the owner takes home approx[imately] 900k per year." The memo stated that "RDC is will[ing] to lend 900k for 3 years at prime plus 2%," on condition that "RDC will be the primary wholesaler for this time." The memo was signed, "Gary Zweig RDC, Inc."

On April 26, 2005, a search warrant was issued for Jamaica Economy's premises by the United States District Court for the Eastern District of New York in connection with an ongoing federal investigation. The search warrant authorized the seizure of documents relating to Jamaica Economy's purchase, dispensing, or sale of 22 different prescription drugs, which were ordered or received from PDRX, Inc., also known as Pharma Discount, from June 1, 2004 to the date of the search.

On April 28, 2005, the Food and Drug Administration and the United States Attorney for the District of Utah announced the indictment of PDRX, and certain other distributors, for an illegal drug diversion operation covering several states. Diverted drugs are medications illegally bought, sold, or otherwise circulated outside established distribution systems that assure their quality.

The announcement, which was posted on the FDA's website, listed "Economy Drug," 221-21 Jamaica Avenue, Queens Village, as one of the pharmacies which purchased drugs from PDRX.

Plaintiff read the FDA notice and learned of PDRX's indictment in May or June 2005. However, plaintiff, allegedly unaware of Freifeld's criminal activity, continued to negotiate for the acquisition of the company. On June 27, 2005, plaintiff entered into an agreement with Freifeld to purchase the stock of Jamaica Economy for \$2,700,000. The purchase price was to be paid by \$1.2 million in cash and a non-negotiable secured promissory note in the amount of \$1.5 million. In the agreement, the seller made various warranties, including that i) Jamaica Economy's tax returns present fairly the financial position of the corporation, ii) seller is responsible for taxes through the day of closing, and iii) "there are no pending or threatened judicial, administrative or other actions, suits, proceedings, or investigations against the corporation."

After signing the agreement, plaintiff thoroughly inspected the financial books and records of Jamaica Economy and its physical location. The closing of the transaction occurred on October 31, 2005. Plaintiff alleges that about ten weeks later he learned from Jamaica Economy employees about Freifeld's criminal activity and subsequently learned other information allegedly effecting the value of the corporation.

Plaintiff commenced this action on February 1, 2006. The second amended complaint was filed on December 4, 2007. The first five causes of action are asserted against Freifeld. The first cause of action is denominated "breach of contract," but is actually for rescission for fraud of the \$1.5 million promissory note given by plaintiff at the closing.

The second cause of action is for breach of express warranty. Plaintiff alleges that Freifeld's breach of the three warranties described above resulted in damages of at least \$2.7 million, the purchase price for the stock of the corporation. The third cause of action is denominated "breach of the implied covenant of good faith and fair dealing" but actually repleads in conclusory form plaintiff's fraud and misrepresentation claims.

The fourth cause of action is for fraud. Plaintiff claims that Freifeld intentionally misrepresented Jamaica Economy's sales figures on its financial statements, misrepresented the true purpose of the "Industrial Consultant" and "Legal & Collection" expense items, misrepresented the number of clinics with which Jamaica Economy did business, and failed to disclose Freifeld's arrest and the subsequent search and seizure of medications from the pharmacy. Plaintiff alleges that the true purpose of the "Industrial Consultant" and "Legal & Collections" fees was the payment of Freifeld's legal fees for his defense in the criminal prosecution. In the fifth cause of action, which is also for fraud, plaintiff seeks reformation of the contract to reduce the purchase price to \$1.2 million and cancel the promissory note.

The sixth and seventh causes of action are asserted against defendants Chipetine, Neu & Silverman, LLP, Jamaica Economy's accountants, and Bernard Chipetine, one of the members of the firm. The sixth cause of action is for intentional misrepresentation in the preparation of the financial statements. More specifically, plaintiff alleges that the financial statements significantly inflated gross sales and failed to disclose Freifeld's arrest, the seizure of medications by the FBI, the true purpose of the "Industrial Consultant" and "Legal & Collection" items, and business dealings between Freifeld and his accountants. The seventh cause of action is for negligence in the preparation of the financial statements.

The eighth cause of action is against Zweig and Rochester Drug for fraud. Plaintiff alleges that Zweig and Rochester Drug acted as brokers in the transaction and made material false representations concerning the financial condition of the company. Specifically, plaintiff alleges that Zweig and Rochester Drug

falsely represented that Jamaica Economy's gross sales exceeded \$6 million for 2002-2004, that Jamaica Economy was debt-free, and that Freifeld's annual take-home salary was approximately \$900,000. Plaintiff further claims that Zweig and Rochester Drug received a non-disclosed commission on Freifeld's sale of Jamaica Economy in the amount of \$25,000.

The ninth cause of action is against Rochester Drug for breach of the fiduciary duties of undivided loyalty, good faith, and fair dealing. Plaintiff alleges that Rochester Drug breached these duties by making the false representations concerning Jamaica Economy's financial condition described in the eighth cause of action. Plaintiff further alleges that Rochester Drug breached its fiduciary duties by failing to disclose that Freifeld and Jamaica Economy were under investigation by the FBI and were involved in a conspiracy to purchase and sell medications that were counterfeit or illegal or at prices below wholesale. Plaintiff seeks compensatory damages of \$2,700,000 and punitive damages of \$10,000,000 on the fraud causes of action.

Defendant Freifeld counterclaims against plaintiff for judgment on the \$1.5 million promissory note. In his second counterclaim, Freifeld requests a declaratory judgment as to the ownership of the Jamaica Economy stock. Freifeld's third counterclaim is for conversion of receivables earned by Jamaica Economy prior to the closing. Freifeld's fourth counterclaim is for breach of contract based upon plaintiff's failure to remit the receivables. Freifeld cross-claims against Zweig for contribution and indemnity.

Plaintiff moves for partial summary judgment as to liability with respect to the second cause of action, asserted against Freifeld for breach of warranty, and the seventh cause of action, asserted against the accountants for negligence. In moving for partial summary judgment as to the breach of warranty claim, plaintiff relies exclusively on the warranty that there were no pending investigations against the corporation. Plaintiff argues that defendant breached this warranty because there were in fact several investigations pending against Jamaica Economy at the time of the closing. On October 12, 2004, Jamaica Economy was excluded

from participation in the Medicaid program by the New York State Department of Health. In its notice of immediate agency action, the Department of Health stated that Freifeld had been charged with a crime "relating to the furnishing or billing for medical care, services or supplies." The DOH excluded Jamaica Economy from Medicaid participation based upon Freifeld's affiliation with the company. Since Jamaica Economy was granted 30 days to submit opposition to its Medicaid exclusion, the investigation by the DOH was arguably ongoing at the time of the closing. Additionally, on May 13, 2005, the Office of Professional Discipline of the New York State Education Department conducted an investigation of the pharmacists employed by Jamaica Economy, including Freifeld. Finally, plaintiff asserts that the federal criminal investigation was aimed not only at Freifeld but also the corporation.

With respect to the seventh cause of action, plaintiff argues that the accountants are liable for negligent misrepresentation because they owed plaintiff a duty to prepare Jamaica Economy's financial statements accurately. Plaintiff asserts that the accountants knew that the financial statements were being used in connection with the sale of the corporation, that plaintiff was relying on the financial statements, and the accountants made affirmative misrepresentations to plaintiff, evidencing their understanding of his reliance.

Defendant Freifeld moves for summary judgment dismissing the second amended complaint and for summary judgment on his counterclaim based on the promissory note. Freifeld asserts that because the criminal complaint did not name Jamaica Economy, all his warranties were true, including the warranty as to no pending investigations against the corporation. Freifeld argues that his representations were not made with an intent to deceive plaintiff. Freifeld further argues that plaintiff did not rely upon the representations, as plaintiff was aware that PDRX, Inc. was being investigated for selling illegal or counterfeit medications. Finally, Freifeld argues that he had no duty to disclose his own criminal involvement and plaintiff had an adequate opportunity to conduct a due diligence investigation.

Defendants Chipetine and Chipetine, Neu & Silverman move for

summary judgment dismissing the amended complaint. The Chipetine defendants argue that plaintiff may not sue for negligent misrepresentation because he did not have a relationship with the accountants approaching privity. The defendants further argue that they prepared the financial statements in accordance with the proper professional standard of care. Defendants assert that the CPA Code of Professional Conduct did not require them to disclose Freifeld's criminal investigation or the minimal financial interest which Freifeld shared with his accountants. Finally, defendants argue that plaintiff has not suffered any damages as a result of their non-disclosure.

Defendant Rochester Drug moves for partial summary judgment dismissing the eighth cause of action. Rochester Drug asserts that it made no representations to plaintiff and that its sole role in the transaction was to introduce the parties and relay financial documents prepared by the accountants. Defendant further argues that plaintiff failed to reasonably rely upon any representation of Rochester Drug and that, with due diligence, he could have discovered the facts concerning Zweig's financial representations.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). The court will begin by considering defendant Freifeld's summary judgment motion.

The equitable remedy of rescission may be invoked only when there is lacking a complete and adequate remedy at law and where the status quo ante may be substantially restored (*Sokolow, Dunaud v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]). Since plaintiff may be made whole by money damages, he has a complete and adequate remedy

at law. Moreover, because Freifeld has changed his position by withdrawing from the pharmacy business, the status quo ante cannot be restored. Indeed, plaintiff is not asking for the parties to be restored to their original positions because he is requesting rescission only of the promissory note rather than the entire contract. Since rescission of the promissory note is not an appropriate remedy, defendant Freifeld's motion for summary judgment dismissing the first cause of action is granted.

The purpose of reformation is to "restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*Lieberman v Greens at Half Hollow*, 54 AD3d 908 [2nd Dept 2008]). To reform a contract based on mistake, plaintiff must establish that the contract was executed under a mutual mistake or a unilateral mistake induced by the defendant's fraudulent misrepresentation (*Id*). There is a "heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties" (*George Backer Mgt Corp. v Acme Quilting*, 46 NY2d 211, 219 [1978]). Thus, plaintiff must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*Id*). While plaintiff alleges that defendant Freifeld misled him in several respects, he has not alleged that the parties agreed upon anything other than the terms set forth in the stock purchase agreement. Since reformation of the contract is not an available remedy, defendant Freifeld's motion for summary judgment dismissing the fifth cause of action is granted.

To establish a prima facie case for fraud, plaintiff must prove that defendant made a representation as to a material fact, such representation was false, and defendant intended to deceive plaintiff (*Ross v. Louise Wise Services*, 8 NY3d 478, 488 [2007]). Additionally, plaintiff must prove that he believed and justifiably relied upon defendant's statement and was induced by it to engage in a certain course of conduct and that, as a result of such reliance, plaintiff sustained pecuniary loss (*Id*).

The issue of justifiable reliance is generally one of fact (*Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009]). However, a sophisticated investor who acquires a business is under an

"affirmative duty" to protect himself from misrepresentations by the seller by investigating the business he is acquiring and the details of the transaction (*Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006]). "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy. When a party fails to make further inquiry or insert appropriate language in the agreement for its protection, it has willingly assumed the business risk that the facts may not be as represented" (Id). Where the purchaser fails to carry out his obligation of "due diligence," the court may rule as a matter of law that the purchaser's reliance was not justifiable (Id).

On defendant Freifeld's motion for summary judgment dismissing the complaint, the burden of proof is on Freifeld to establish prima facie that his representations were true or that plaintiff did not rely upon his representations. Defendant has failed to establish that his representations as to Jamaica Economy's sales figures, the purpose of the Industrial Consultant and Legal & Collection expense items, or the number of clinics with which Jamaica Economy did business were true. Nor has defendant established that upon further inquiry plaintiff would have determined the truth as to these representations. The court concludes that defendant has failed to carry his prima facie burden as to these representations.

However, plaintiff had a hint that defendant's representation that no investigation was pending against the corporation was untrue, once plaintiff was aware that Jamaica Economy's supplier, PDRX, had been indicted for illegal drug diversion. Thus, defendant has established prima facie that plaintiff did not rely upon the representation as to no pending investigations, and the burden shifts to plaintiff to show a triable issue as to his reliance upon this representation.

Plaintiff alleges that he questioned Freifeld as to why his inventory of medications was dwindling, in an apparent effort to learn whether any medications had been seized or whether Jamaica

Economy was otherwise a target of an investigation. According to plaintiff, Freifeld's response was that he had been advised by his accountant that inventory levels were too high and he should delay restocking. The court concludes that the duty of due diligence required plaintiff to make an independent inquiry of the appropriate agency, the Food & Drug Administration. In view of the pending criminal investigation of Freifeld, the FDA may have provided only limited information. However, the court need not speculate as to what the agency would have been willing to disclose because plaintiff failed to make any inquiry.

The court notes that plaintiff did resort to the second alternative of inserting appropriate language in the agreement for his protection. While requesting a warranty as to the truthfulness of a representation may "protect" plaintiff by allowing him to sue for breach of warranty, it does not excuse plaintiff from the requirement of justifiable reliance in a fraud cause of action. Defendant Freifeld's motion for summary judgment dismissing the fourth cause of action is granted as to defendant's representation as to no pending or threatened investigations and is otherwise denied. Defendant Freifeld's motion for summary judgment dismissing the complaint is granted as to the third cause of action because it is redundant of plaintiff's other fraud claims (See *Mastro v Oak Park Marina*, 238 AD2d 930 [4th Dept 1997]).

A warranty is "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past" (*CBS, Inc. v. Ziff-Davis Publishing Co.*, 75 NY2d 496, 503 [1990]).

The reliance element applicable to a cause of action for breach of express warranty is not that which is required for a tort action based on fraud or misrepresentation, i.e. a belief in the truth of the representation made in the express warranty and a change of position in reliance on that belief (75 NY2d at 502). Rather, the critical question is whether the promisee believed that

he was purchasing the promisor's promise as to the truth of the representation(75 NY2d 503).

This view of "reliance," as requiring no more than reliance on the express warranty as being a part of the bargain between the parties, reflects the prevailing perception of an action for breach of express warranty as grounded in tort, rather than contract (Id). An express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend upon proof that the purchaser thereafter believed that the assurances of fact made in the warranty would be fulfilled (Id).

In *CBS*, the seller of a business warranted that the financial statements had been prepared in accordance with generally accepted accounting principles. The purchaser proceeded with the transaction although prior to the closing it discovered information indicating that the financial statements had not been prepared in accordance with generally accepted accounting principles and did not fairly depict the financial condition of the company (75 NY2d at 500). Nevertheless, because the purchaser believed that he was purchasing the seller's promise that the financial statements had been prepared in accordance with generally accepted accounting principles, a cause of action for breach of express warranty was stated.

Since plaintiff was aware that Jamaica Economy's supplier, PDRX, was under investigation for selling diverted medications, plaintiff was legitimately concerned that Jamaica Economy might also be under investigation and that the profitability of the company might be affected. In these circumstances, plaintiff believed that he was purchasing the truth of Freifeld's promise that the company was not under investigation, even if plaintiff had reason to doubt the truthfulness of the warranty. Thus, Freifeld's express warranty that there were no pending or threatened proceedings or investigations against the company was relied upon by plaintiff as part of the contract.

Although Freifeld was the only defendant in the criminal

prosecution, it is clear that Jamaica Economy was also involved in the investigation. A subpoena duces tecum dated April 26, 2005 was served on Jamaica Economy requiring it to produce various documents before a federal grand jury on May 11, 2005. On the same day, a search warrant was issued for Jamaica Economy's premises. The documents sought by the subpoena and search warrant related to purchases of prescription drugs from PDRX, one of the suppliers involved in the drug diversion operation. Thus, there appears to have been an investigation "against" Jamaica Economy, regardless of whether it was actually a target of the investigation. In any event, Freifeld has not established prima facie that he did not breach his warranty that there were no pending or threatened investigations against the corporation. Defendant Freifeld's motion for summary judgment dismissing the second cause of action is denied.

An action for breach of contract requires proof 1) of a contract, 2) that plaintiff performed as required by the contract, 3) defendant breached the contract, and 4) damages (*First Investors Corp. v Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 [2d Cir. 1998]). Thus, where a promissory note is given as part of the purchase price, the seller may not obtain summary judgment on the note if the purchaser has a valid claim for breach of the underlying contract. In that circumstance, the promissory note and the purchase agreement are considered "intertwined" (*Tibbal v Catalanotto*, 269 AD2d 386 [2d Dept 2000]). In the case at bar, the promissory note was given as part of the purchase price, and plaintiff has viable claims for fraud and breach of warranty arising from the underlying agreement. Accordingly, defendant Freifeld's motion for summary judgment on his counterclaim based on the promissory note is denied.

The court turns to plaintiff's motion for partial summary judgment as to liability on the second cause of action. Because a breach of express warranty action is grounded in contract, it is plaintiff's burden to establish prima facie that he sustained some damages as a result of defendant's breach of his warranty. "[I]n breach of contract actions, the non-breaching party may recover general damages which are the natural and probable consequences of the breach" (*Bi-Economy Market v Harleysville Ins. Co.*, 10 NY3d

187, 192 [2008]). "Special or consequential damages, which do not so directly flow from the breach, are also recoverable in limited circumstances" (Id). Consequential damages, designed to compensate a party for reasonably foreseeable damages, must be proximately caused by the breach (Id at 193). Proof of consequential damages cannot be speculative or conjectural (Id).

Plaintiff is seeking consequential damages in the form of loss of future profits proximately caused by defendant's breach of his warranty that there were no pending investigations against Jamaica Economy. On this motion, it is plaintiff's burden to show prima facie that defendant's breach of the warranty as to no pending investigations resulted in loss of profits to Jamaica Economy. Plaintiff alleges that he has not been able to "maintain the same level of profitability" as the company previously earned because Freifeld was "purchasing illegal product at below wholesale" prices. However, plaintiff has offered no evidence that PDRX supplied diverted medications at prices that were cheaper than those offered by legitimate wholesalers. While the FDA notice states that the diversion of medications outside established distribution systems endangers quality, it is silent as to the effect of this practice on price. Because plaintiff has failed to establish prima facie that Freifeld's breach of his warranty as to no pending investigations caused Jamaica Economy to lose profits, plaintiff's motion for partial summary judgment as to liability on the second cause of action is denied.

For an accountant to be held liable in negligence to a third-party who relied to his detriment on an inaccurate financial report, 1) the accountant must have been aware that the financial report was to be used for a particular purpose, 2) in furtherance of which a known party was intended to rely, and 3) there must have been some conduct on the part of the accountant linking him to the third-party, which evinces the accountant's understanding of the third-party's reliance (*Credit Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]). In sum, the conduct on the part of the accountant must create a relationship with the third-party which is "the practical equivalent of privity" (65 NY2d at 554). On plaintiff's motion for partial summary judgment with respect to the seventh cause of action, plaintiff must establish prima facie that

1) the Chipetine defendants were aware that their financial report was to be used in conjunction with the sale of Jamaica Economy, 2) in furtherance of the sale, plaintiff was intended to rely on the report, and 3) there was some "linking conduct" on Chipetine's part, evincing their understanding of plaintiff's reliance.

Kenneth Neu, the Chipetine partner responsible for Jamaica Economy, testified at his deposition that he sent the financial statements to someone at Rochester Drug "to assist Mr. Freifeld in somehow inducing somebody to come take a look at his operations." Neu further testified that the purpose in inducing someone to take a look at Jamaica Economy's operations was to sell the corporation to them. Thus, plaintiff has established prima facie that Chipetine knew that its financial report was to be used in conjunction with the sale of Jamaica Economy.

Neu further testified that while he never spoke to plaintiff, he spoke with a certified public accountant, Michael Koteen, whom he understood to be acting on plaintiff's behalf. However, plaintiff offers no evidence that Neu was aware prior to the closing that plaintiff had signed a contract to purchase Jamaica Economy, or that plaintiff was the person intended to rely on the financial report. Neu spoke to Koteen only once prior to the closing. According to Neu, Freifeld telephoned him and told him that Koteen was there "reviewing the books" and had a question for him. Koteen inquired as to the "Industrial Consultant" expense, and Neu stated that it pertained to a three-year employment contract, which was part of a buy-out of Freifeld's former partner. Neu, as the accountant for Jamaica Economy, may very well have been curious why another CPA was "reviewing the books" of his client. However, it is plaintiff's burden to offer proof that Neu knew that Koteen was reviewing the financial records in anticipation of purchasing the company, as opposed to some other purpose such as extending credit.

Plaintiff offers Neu's same telephone conversation with Koteen concerning the Industrial Consultant expense as "linking conduct" evincing the accountant's knowledge of plaintiff's reliance. However, Neu's explanation of the expense item similarly fails to serve as linking conduct because plaintiff has failed to show that

Neu knew the reason why Koteen was auditing Jamaica Economy. Thus, plaintiff has failed to establish prima facie that a known party was intended to rely on the financial report or linking conduct evincing the accountants' knowledge of that reliance. Plaintiff's motion for partial summary judgment as to liability on the seventh cause of action is denied.

The court now turns to the Chipetine defendants' summary judgment motion. With respect to the seventh cause of action, defendants must establish prima facie that 1) they were not aware that their financial report was to be used in conjunction with the sale of Jamaica Economy, 2) plaintiff was not intended to rely on the report in furtherance of the sale, or 3) there was no "linking conduct" on Chipetine's part, evincing their understanding of plaintiff's reliance. By Neu's own admission, Chipetine was aware that their financial report was to be used in conjunction with the sale of Jamaica Economy. Because Neu knew that Koteen was "reviewing the books" on plaintiff's behalf, the Chipetine defendants have failed to establish prima facie that they did not intend for plaintiff to rely on the financial report in furtherance of the sale. Similarly, in view of Neu's telephone conversation with Koteen concerning the Industrial Consultant expense, defendants have failed to establish prima facie that there was no linking conduct evincing their knowledge of plaintiff's reliance on their financial report. The Chipetine defendants' motion for summary judgment dismissing the seventh cause of action is denied.

Lack of privity is not a bar to an action against an accountant for intentional misrepresentation, or the grossly negligent or reckless conduct that is its functional equivalent (*Caprer v Nussbaum*, 36 AD3d 176, 195 [2d Dept 2006]). "A representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet" (Id at 195-96).

The court notes that the financial statements which Chipetine provided to plaintiff were not certified. The Accountants' Review Report accompanying the financial statements states that "All the information included in these financial statements is the representation of the management of [the company]." The report discloses that the review which the accountants undertook "is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion." This disclaimer was perhaps intended to discourage a prospective purchaser of Jamaica Economy from relying on the financial statements. However, the report continues, "Based on our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles." Thus, despite Chipetine's disavowal of an "opinion" regarding the financial statements, the review report is misleading in that it could be understood as a representation by the accountants that the financial statements were indeed accurate. Additionally, the court notes that the Accountants' Review Report is dated February 25, 2005, the very day that Zweig was hired by Freifeld to help find a purchaser for the company.

The court concludes that the Chipetine defendants have not established prima facie that the financial statements were not issued with reckless disregard for the truth. Nor have defendants established the financial statements were not issued with the intent to deceive potential purchasers of Jamaica Economy. Defendants Bernard Chipetine and Chipetine, Neu & Silverman's motion for summary judgment dismissing the sixth cause of action is denied.

The court turns to defendant Rochester Drug's motion for partial summary judgment dismissing the eighth cause of action. On this motion, it is defendant Rochester Drug's burden to establish prima facie that plaintiff does not have a claim against Zweig for fraud or that Rochester Drug is not vicariously liable for Zweig's misrepresentation. The court concludes that defendant Rochester Drug has failed to establish prima facie that plaintiff did not rely upon Zweig's false representations concerning Jamaica

Economy's gross sales, its lack of debt, or the take-home pay of the owner of the company.

"The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. If, however, an employee for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable" (*RJC Realty v Republic Ins. Co.*, 2 NY3d 158, 164 [2004]). Whether a particular act was within the scope of employment is ordinarily a factual question (*Riviello v Waldron*, 47 NY2d 297, 303 [1979]).

The burden of establishing prima facie that Zweig was not acting within the scope of his employment is on defendant Rochester Drug. The only evidence which Rochester Drug submits in support of its claim that Zweig was not acting within the scope of his employment is that Rochester Drug did not receive any portion of the \$25,000 fee for promoting the transaction. While Zweig's keeping the entire fee is consistent with his acting on his own, it does not establish prima facie that he was not acting on behalf of Rochester Drug. Rochester Drug may simply not have known that Zweig received compensation from Freifeld. Alternatively, Rochester Drug may have acquiesced in Zweig's receiving the fee. As Rochester Drug's principal business is distributing pharmaceuticals, it was in Rochester Drug's interest for Jamaica Economy to be purchased by a pharmacist with whom the cooperative did business. Since Rochester Drug would earn profits on future sales of medications to Jamaica Economy, it may have allowed Zweig to receive a fee from Freifeld for introducing him to the purchaser.

Moreover, less than two weeks after the action was commenced, Zweig sent an email to Laurence Doud, the Chief Executive Officer of Rochester Drug. In the email, Zweig stated, "Due to the current situation, I feel at this time not [sic] to approach any person with stores for sale. I hope you understand." In a reply email,

Doud stated, "It's your job as an RDC representative, to put people in touch with each other. What else you did is not part of your job, but a conflict of interest. I hope you understand!" (emphasis in original). The exchange of communications between Zweig and Doud suggests that promoting the sale of member pharmacies was something "commonly done" by Rochester Drug sales representatives and that Zweig's promoting the sale of Jamaica Economy was generally foreseeable (*Riviello v Waldron*, supra 47 NY2d at 303). The emails leave room for argument as to whether Zweig's misrepresentations were a "departure from normal methods of performance," which might relieve Rochester Drug from liability (*Id.*). Nevertheless, there is clearly a factual issue as to whether Zweig was acting within the scope of his employment. Defendant Rochester Drug's motion for partial summary judgment dismissing the eighth cause of action is denied.

Settle order on notice.

Dated: AUG 18 2009

U. Wholly
J.S.C.