At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of April, 2017.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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SHERMAN-ABRAMS LABORATORY, INC.,

PLAINTIFF,

- AGAINST -

Index No. 510696/14

HERBERT ABRAMS, M.D.,

DEFENDANT.

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The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	6
Other Papers Memoranda of Law	7, 8, 9

Upon the foregoing papers, defendant Herbert Abrams, M.D. (defendant) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Sherman-Abrams Laboratory, Inc. (plaintiff), and pursuant to 22 NYCRR § 130-1.1 (a) for costs and reasonable attorney's fees.

Overview

In this action for breach of contract, plaintiff, a clinical and pathology laboratory, seeks to recover from defendant, a medical doctor and former owner of the laboratory, a fine and related costs paid by plaintiff to the New York Attorney General's (AG) Medicaid Fraud Control Unit in connection with the AG's investigation of the laboratory.

Facts and Procedural History

In his sworn affidavit, defendant avers that he owned and operated the subject clinical and pathology laboratory for over 40 years. During this time, the laboratory operated as a full service clinical and pathology laboratory serving the New York metropolitan area. The laboratory offered a broad range of services including, but not limited to, blood chemistry, cholesterol and heart function, thyroid function, prostate function, liver function, sexually transmitted diseases and cancer screening (Abrams Affidavit at ¶¶3-5).

In December 2010, defendant sold his interest in the laboratory to Nelya Zeydelis and Yan Lyubomirsky (the Original Purchasers). Pursuant to the purchase and sale agreement, defendant agreed to continue to provide services to the laboratory as its medical director until February 2011. On February 9, 2011, defendant ceased providing his services to the laboratory, removed all his personal belongings from the laboratory, and did not return (*id.* at ¶¶6, 8, 9).

In or around March 2011, a dispute arose concerning the sale of the laboratory. As a result, the Original Purchasers and the laboratory filed an action against defendant in the Supreme Court, New York County sounding in breach of contract and fraud, relating to,

among other things, breach of the stock purchase agreement for sale of the laboratory and false representations allegedly made by defendant with respect to the physical condition of the laboratory and its compliance with regulations. Defendant brought counterclaims against the Original Purchasers for, among other things, failing to make payments due him in connection with the sale of the laboratory, failing to pay him the continued salary he was promised, and retaining payments that should have been paid to him pursuant to the stock purchase agreement (*id.* at ¶¶10-12).

While in the midst of this litigation, in 2012, David Motovich and Yakov Leybovich (the New Purchasers) negotiated for the purchase of the laboratory from the Original Purchasers (Affidavit of David Motovich at ¶3). The terms of purchase from the Original Purchasers involved a portion of the purchase price to be paid directly to defendant in order to settle the pending litigation between defendant, Lyubomirsky, Zeydelis and the laboratory (*id.*). According to Mr. Motovich, in connection with the settlement, defendant made representations to him related to an inquiry by the New York State Attorney General's Office through a letter which was received by the laboratory dated June 15, 2012 (*id.*, citing Exh. A, Letter from Office of the Attorney General, Medicaid Fraud Control Unit). The letter, written by Carolyn T. Ellis, Special Assistant Attorney General for the Medicaid Fraud Control Unit, requested certain information regarding laboratory services in connection with gynecological testing for which the laboratory had submitted claims for reimbursement to the Medicaid program in the years 2003 through 2011 (*id.*, Exh. A at 1). In particular, the letter advised that under 18 NYCRR § 504.3 (a), as a participating provider of laboratory services

in the New York Medicaid Program enrolled as a Medicaid provider, the laboratory was required ""to prepare and maintain contemporaneous records demonstrating its right to receive payment under the medical assistance program"" and to keep these records for six years from the date of care (*id.*). As such, AG Ellis requested that the laboratory provide the information described for the years 2006 to 2012 and if still available, for the years 2003 to 2005, and to preserve all "original provider records pertaining to the identified claims" (*id.* at 1-2).

Further, with respect to certain claims submitted to the Medicaid program for gynecological laboratory procedures, AG Ellis requested that the laboratory identify which claims, if any, were for laboratory services performed by Pathology and Laboratory Services LLC (PLS), a laboratory located in Connecticut (*id.* at 2). The letter also informed the laboratory that failure to comply with the request could result in the imposition of program sanctions, including the recovery of overpayments and exclusion from the Medicaid program (*id.*).

Since Mr. Motovich and Mr. Leybovich did not yet own the laboratory, and the records requested "were within the knowledge of [defendant]," defendant contacted the AG (Motovich Affidavit at ¶4). Defendant "claimed he spoked with [AG Ellis] and he was informed that [the laboratory] was not the target of any investigation and that if [the laboratory] was unable to respond to the letter it would suffer no adverse consequences" (Motovich Affidavit at ¶4, Abrams Affidavit at ¶20-21). According to defendant, "Ms. Ellis informed me during this telephone call that neither I nor [the laboratory] was, at that time,

a target of the Attorney General's investigation (*id.* at ¶21). "[Defendant alleges he] informed Ms. Ellis that [he] did not have the records sought by the request and, given that [he] was no longer working at the [laboratory], was unsure whether the [laboratory] had such records. After [he] informed her of this, Ms. Ellis did not indicate the [laboratory] would suffer any adverse consequences" (*id.* at ¶22).

On October 16, 2012, defendant entered into a settlement agreement (the Settlement Agreement or Agreement) with the Original Purchasers and the laboratory, which resolved the 2011 action. With respect to the execution of the Settlement Agreement, Mr. Motovich and Mr. Leybovich agreed to make certain outstanding payments that were due defendant that were the subject of his counterclaims (Abrams Affidavit at ¶13). In return, they acquired complete ownership of the laboratory. According to Mr. Motovich, since he and his partner were paying defendant $375,000, they wanted to document defendant's representations regarding AG Ellis in writing "and ensure that he was bound to them" (Motovich Affidavit at ¶5).

The Settlement Agreement released defendant from liability for all "actions, causes of action . . . [and] claims and demands whatsoever, *whether known or unknown,* in law or equity, of every kind and nature . . . the [Lab Releasors][1] . . . ever had, now have, or hereafter can, shall or may have against [defendant] . . . *for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Agreement*" (Abrams Affidavit, Exh. C, Settlement Agreement at ¶5) (emphasis added).

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[1]The "Lab Releasors" for paragraph 5 only, were Zeydelis, Lyubomirsky, and the laboratory (Abrams Affidavit, Exh. C, Settlement Agreement at ¶5).

The Settlement Agreement further provided that defendant "*has never made any representations to the Buyers . . . concerning the Lab's . . . deficiencies, proficiencies or compliance with applicable regulations*" (*id.* at ¶7) (emphasis added).

With respect to defendant's representation regarding the AG, the Settlement Agreement provided that:

> "Notwithstanding the foregoing, Abrams agrees that he shall cooperate with the Buyers in connection with any inquiries or audits conducted by the New York State Department of Health or the New York State Attorney General relating to the period through December 31, 2010 at which time operation of the Lab was transferred to Zeydelis and Lyubomirsky, and that he will further cooperate with the Buyers, if necessary, to effectuate the transfer of the Lab and the assignment of any contracts or provider agreements, if necessary. *Reference is hereby made to a letter dated June 15, 2012 seeking documentation pursuant to 18 NYCRR 504.3 (a) for certain gynecological testing that occurred when Abrams was still the owner of the Lab, between 2003-2011. Abrams represents that he had telephone contact with Carolyn T. Ellis of the Attorney General's Office and he was informed that the Lab was not a target of the investigation and the Lab would not be adversely affected if it is unable to comply with such request*" (*id.*) (emphasis added).

In addition, the Settlement Agreement provided that defendant was "not in possession of any records pertaining to services provided and billed during the period he was Owner of the Lab and if he finds such documents in his possession he shall forward them to the Lab and Buyers" (*id.* at 7).

At the time defendant signed the Settlement Agreement, he was not in possession of any records pertaining to the services the laboratory rendered while he owned it and did not have any such records in his possession as of the date of his affidavit (Abrams Affidavit at ¶18).

In April 2013, Mr. Motovich was served with two subpoenas from the AG's Medicaid Fraud Control Unit requesting, among other things, records with respect to certain patients on a particular "Schedule B" demonstrating the laboratory's right to receive Medicaid reimbursement for each laboratory service performed, and records with respect to services provided by PLS, the laboratory in Connecticut (Motovich Affidavit at ¶7). Mr. Motovich was able to locate all of the items requested from December 2010 to the current date as they were computerized. However, "[a]n initial search of [the laboratory's] computer systems indicated that none of the patients on the Schedule B were able to be found" which "confirmed [his] initial suspicion that these subpoenas were directly related to the inquiry made in the June 15, 2012 letter and were directly related to activity conducted by Abrams prior to December 31, 2010" (*id.* at 8) (emphasis added). Mr. Motovich instructed plaintiff's employees to search for paper records that were maintained at its offices, including many documents that were left by defendant in the basement of the laboratory (*id.* at 9). Plaintiff's employees were diverted from their regular tasks and spent many hours looking through boxes of records to locate documents responsive to the subpoenas (*id*).

Throughout the process, Mr. Motovich continued to call defendant and request his assistance, but defendant ignored the requests and did not provide help (*id.*). Plaintiff was able to locate some of the documents responsive to the subpoenas (the hard copy requisition forms that matched the patient names listed on Schedule B to the subpoena), which confirmed that "the dates of service for these patients were exclusively within the period prior to December 31, 2010" (*id.*).

After plaintiff's initial production of documents in response to the subpoenas, and due to the failure of defendant to cooperate and maintain records in an organized manner, plaintiff became the subject of a further audit and request for additional documentation (*id.* at 10). Subsequently, Mr. Motovich learned from defendant that another laboratory, called Psyche Systems, was previously used by defendant and could possibly have additional records of plaintiff responsive to the subpoena (*id.*, Exh. B, May 23, 2013 Letter from Malvina Lin, P.C. [plaintiff's counsel] at 1). Mr. Motovich had to pay a huge sum to obtain this additional documentation from Psyche Systems (*id.* at 11). According to Mr. Motovich, the actual dates of service of all of the patients that were requested for the audit were between 2007 and the end of 2010 (*id.*).

During this time period, Mr. Motovich informed AG Ellis of the representations defendant had made regarding his telephone call with her after she sent the June 15, 2012 letter to the laboratory. According to Mr. Motovich, AG Ellis stated that defendant's representations were false in that she had told defendant that the laboratory had to comply and that it was going to be the subject of an audit (*id.* at 12). She also told Mr. Motovich that Mr. Abrams was a defendant in a federal qui tam action,[2] which was specifically related to records requested in the June 15, 2012 letter, and that defendant had illegally billed Medicaid for laboratory services that were performed by PLS, the Connecticut laboratory, which was

[2]A "qui tam" action is a lawsuit under a statute, which gives to the plaintiff (generally a private citizen called a "whistle blower") bringing the action a part of the penalty recovered with the balance going to the state. The plaintiff describes himself/herself as suing for the state as well as for himself/herself.

not a Medicaid provider. According to Mr. Motovich, "[a]s an owner and medical director of [the laboratory] for forty years Abrams knew very well what that inquiry was about and purposely concealed that information so that he could get paid his settlement" (*id.* at 13).

On July 14, 2014, plaintiff settled with the AG to resolve the audit for $75,000, including Mr. Motovich's personal guaranty since payments were spread out over time.

In November, 2014, plaintiff commenced the instant action against defendant alleging causes of action for fraudulent representation (representation by defendant regarding his conversation with AG Ellis) and breach of contract (the Settlement Agreement). Defendant interposed his answer, generally denying the allegations of the complaint.

In October, 2015, Ms. Denise Hall, a former employee of defendant who subsequently worked for Mr. Motovich, testified that she had worked for defendant at the laboratory for approximately 10 years, from 2000 to June, 2010, and that Mr. Motovich terminated her employment in June, 2010 (Gunnel Affirmation, Deposition Testimony of Denise Hall at 7, 29, 30, 38). Ms. Hall testified that defendant sold the laboratory in 2010 and had not been there since June, 2010 (*id.* at 10, 29) or as soon as Mr. Motovich took over the laboratory (*id.* at 30).

Ms. Hall further testified that in February, 2011, Mr. Motovich told her and an office manager (hired by Mr. Motovich), to box items in the basement of the laboratory, including biopsy records from biopsies performed at the laboratory and pap smear records from PLS, the Connecticut laboratory (i.e. the PLS records requested by the AG) which were to be discarded (*id.* at 13-17, 22-25, 26-28, 44-45). Ms. Hall, with some assistance from the office manager, packed up the subject records, among other things, which were picked up by a

carting company to be destroyed (*id.* at 44). Ms. Hall testified that defendant was not present during this conversation (*id.* at 48), and that the conversation occurred after defendant had sold the laboratory (*id.* at 49). However, Ms. Hall also testified that sometime in 2012, at the suggestion of defendant, she interviewed with Mr. Motovich, and began working for him (*id.* at 34-35), but her job was terminated in the year (*id.* at 47). In addition, she testified that Mr. Motovich had told her to dispose of the subject records in 2010 (*id.* at 37). Ms. Hall testified that she had had a stroke in 2013, that it had affected some of her memory, and that she was "foggy on these dates and times" (*id.* at 39-40, 43).

As noted above, in December 2010, defendant had sold the laboratory to Mr. Zeydelis and Mr. Lyubomirsky, but continued to work for the laboratory as its medical director until February 9, 2011, when he removed his personal belongings from the laboratory and did not return.

In August, 2016, defendant made the instant motion for summary judgment which is presently before the court for disposition.

Arguments

In support of his motion for summary judgment, defendant argues that he is entitled to dismissal of the breach of contract claim on the grounds that the complaint fails to identify a material breach of the Settlement Agreement; that identification of his representation regarding his conversation with AG Ellis in the complaint merely states a fraud claim, not one for breach of contract; that plaintiff cannot establish causation because the alleged damages were caused by the voluntary settlement it entered into with the AG, not by his description of his conversation with AG Ellis; that in any event, the records requested by the

AG concerning the Connecticut laboratory were destroyed at the direction of Mr. Motovich *after* defendant sold the laboratory, which was a superceding, intervening cause of the damages plaintiff incurred; and that the court should decline plaintiff's invitation to read an indemnification provision against him into the Settlement Agreement which does not exist. Lastly, based upon the arguments above, defendant contends that court should impose sanctions against plaintiff because the action is frivolous.

With respect to the fraudulent misrepresentation claim, defendant argues that it is barred by the broad release set forth in the Settlement Agreement; that plaintiff has failed to allege intentional misrepresentation; and that plaintiff has failed to demonstrate transaction causation (that it was induced by his description of the telephone call in the Settlement Agreement to enter into the Agreement), or loss causation (that the alleged misrepresentation caused plaintiff's claimed losses).

In opposition, plaintiff argues that the Settlement Agreement specifically excluded the representation made by defendant regarding his conversation with AG Ellis. In this regard, plaintiff contends that the Settlement Agreement was meant to resolve the claims in the prior lawsuit with the Original Buyers, and that since there were specific representations made to plaintiff and the New Buyers, any releases set forth in the Agreement did not "cover the misrepresentations that were carved out of the agreement and which caused injury to [plaintiff] after [the Agreement] was signed" (Affirmation of Malvina Lin in Opposition to Summary Judgment at ¶¶5,2). Plaintiff also asserts that defendant failed to demonstrate his compliance with his obligation under the Agreement to cooperate with any future inquiries

for laboratory services provided while he was owner of the laboratory (*id.* at ¶¶2,4). In addition, plaintiff argues that defendant continued to collect receivables from a patient although barred from doing so under the Agreement (*id.* at ¶4).

In its memorandum of law, as to the breach of contract claim, plaintiff argues that it repeatedly identified in its memorandum and in "the accompanying affidavit" (i.e. that of Mr. Motovich) the specific provision of the Settlement Agreement which was breached (Memorandum of Law in Opposition to Defendant's Motion at 8 ("A party suffers a legal wrong from the moment that a misrepresentation is made"). In addition, plaintiff asserts that the initial breach occurred when the false representation was made and occurred again when defendant failed to cooperate.

With respect to the fraud claim, plaintiff asserts that this cause of action will be "upheld when a plaintiff 'alleges that it was induced to enter into a transaction because a defendant misrepresented material facts . . . even though the same circumstances also give rise to the plaintiff's breach of contract claim'" (*id.*, quoting *First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 [1st Dept 1999]). In particular, plaintiff states, albeit without analysis, that "'[u]nlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty'" (*id.*, quoting *First Bank of the Americas*, 257 AD2d at 292).

Plaintiff next argues that having made the effort to protect itself from misrepresentations by obtaining a specific representation in the Agreement, it was entitled to rely upon defendant's representations without making an independent inquiry.

Next, with respect to causation, plaintiff states that: "[t]here can be no doubt that the settlement payment and other costs associated with the audit would not have been incurred had Abrams not violated the law and then lied about it to [plaintiff] and its new buyers."

Lastly, plaintiff argues that defendant has failed to establish that he is entitled to costs and attorney's fees because defendant has made false statements by accusing the AG of making false statements, and by proffering the mischaracterized testimony of Ms. Hall. With regard to Ms. Hall, in her counterstatement of facts, plaintiff asserts that her deposition testimony cannot be credited because she testified that she was confused due to memory loss from a 2013 stroke, and because she testified that Mr. Motovich instructed her to box up and discard the records relating to the Connecticut laboratory in 2010, and the biopsies performed at the laboratory, when he did not yet own the laboratory.

Discussion

Breach of Contract

"A release is a contract, and its construction is governed by contract law" (*Powell v Adler*, 128 AD3d 1039, 1040 [2d Dept 2015] [internal citations and quotation marks omitted]). "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*143 Bergen St., LLC v Ruderman*, 144 AD3d 1002, 1003 [2d Dept 2016]). Moreover, "[i]n order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (*Barker v Time*

Warner Cable, Inc., 83 AD3d 750, 751 [2d Dept 2011]). In addition, a plaintiff must establish a causal relationship between a breach of contract and damages (*Ackerman v D'Agostino Supermarkets, Inc.*, 96 AD3d 672, 674 (1st Dept 2012]).

With respect to this cause of action, the complaint alleges that "Abrams entered into a Stipulation with [plaintiff] in which he received valuable consideration in exchange for certain promises, covenants and representations;" that "Abrams failed to comply with certain promises, covenants and representations made in the Stipulation;" and that "Abrams breached the terms of the Stipulation" which caused plaintiff to incur "significant injury in the form of certain costs and expenses" (Gunnel Affirmation, Exh. 2, Complaint at ¶¶55-58). However, as defendant argues, the complaint does not identify the specific provision of the Settlement Agreement that he allegedly breached, namely it does not identify any obligation he failed to perform and only states in a conclusory manner that he failed to comply with the Settlement Agreement

Further, defendant also correctly notes that to the extent plaintiff bases its breach of contract claim upon the allegation in the complaint that he violated the Settlement Agreement by submitting a patient account to a collection agency, which caused it to sustain damages (*id.* at ¶¶ 35-36, 44), the complaint in fact alleges that the account in question was submitted for collection in June 2012, four months *before* the date the Settlement Agreement was signed on October 16, 2016 (*id.* at ¶36; *Schaffe v SimmsParris*, 82 AD3d 867, 868 [2d Dept 2011] [internal citations and quotations marks omitted] ["It is axiomatic that (w)ithout (an) agreement … there can be no contract (and) (w)ithout a contract there can be no breach of

the agreement"]). In addition, defendant has submitted evidence establishing that the collection efforts alleged in the complaint occurred in June, 2012, before the Settlement Agreement was signed (Gunnel Affidavit, Exh. 3). In any event, as defendant points out, the Settlement Agreement releases him from any liability for conduct up to the date of the Settlement Agreement (Abrams Affidavit, Exh. C, Settlement Agreement at ¶5 ["the Lab and their respective successors in interest . . . release and discharge Abrams . . . from all actions . . . whether known or unknown, in law or equity, of every kind and nature the Lab Releasors ever had, now have, or hereafter can, shall or may have against [defendant] [] for, upon or by reason of any matter, cause or thing whatsoever, *from the beginning of the world to the date of this Agreement*"] [emphasis added]).

It is true that the complaint identifies the statement made by defendant about his conversation with AG Ellis which was incorporated into the Settlement Agreement. In this regard, the complaint alleges that defendant "promised that [plaintiff] was not the target of the [AG] inquiry and that there would be no adverse consequences to [plaintiff] as a result of the AG's inquiry;" that at the time defendant made this representation, "it was false and he knew it to be false;" and that "as a result of Abrams' misrepresentations [regarding the telephone conversation] [plaintiff] was caused to incur significant legal fees in order to defend itself in connection with the AG audit" (*id.* at ¶¶23,25,31). However, as defendant argues, to the extent the breach of contract claim is premised upon his alleged misrepresentation about his conversation with AG Ellis, the claim only purports to state a

claim for fraud, not breach of contract (*see e.g. First Bank of the Americas,* 257 AD2d at 291).

In any event, defendant has established that even assuming that plaintiff has plead a valid breach of contract claim, plaintiff did not and cannot establish causation. As defendant argues, whether or not defendant made any representation about his conversation with AG Ellis, the AG would still have requested the records concerning the Connecticut laboratory from plaintiff, plaintiff still would not have been able to produce those records, and plaintiff would still have settled with the AG based upon its failure to produce those records. Stated otherwise, the damages were incurred because plaintiff entered into a voluntary settlement with the AG's office based upon its failure to produce the records relating to tests performed at the Connecticut laboratory - an inability which would have occurred regardless of whether defendant had the telephone conversation with AG Ellis, and regardless of how he described the conversation.[3]

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[3]Defendant also argues that the deposition testimony of Ms. Hall, his former employee, demonstrates that the records requested by the AG could not have been produced because Ms. Hall testified that she personally boxed them and prepared them to be thrown away at the direction of Mr. Motovich, after defendant had sold the laboratory. Thus, defendant argues that the damages plaintiff incurred were the result of a superceding intervening cause, the destruction of the laboratory's records by Mr. Motovich, and not his description of his conversation with AG Ellis. In opposition, plaintiff argues that Ms. Hall's testimony should not be credited because Ms. Hall was confused, and testified that Mr. Motovich instructed her to destroy the subject records in 2010, when Mr. Motovich did not yet own the laboratory.

Ms. Hall's testimony regarding the dates in which certain events occurred is conflicting. In this regard, she testified that Mr. Motovich instructed her to discard the subject records in either 2010 or February, 2011, and that she began working for Mr. Motovich in 2012. Nevertheless, she also testified that Mr. Motovich instructed her to discard the subject records at a time when defendant had already sold the laboratory, and that defendant was not present at the time this conversation occurred. As such, defendant has made a prima facie showing that Mr. Motovich instructed Ms. Hall to discard the records sought by the AG after defendant had sold

In opposition, plaintiff fails to identify the specific provision of the Settlement Agreement which was breached, presumably relying upon defendant's description of his conversation with AG Ellis. In any event, as noted above, to the extent the breach of contract claim is premised upon defendant's alleged misrepresentation about his conversation with AG Ellis, the claim only purports to state a claim for fraud, not breach of contract (*see e.g. First Bank of the Americas*, 257 AD2d at 291).

Further, plaintiff has failed to raise an issue of fact regarding defendant's purported breach of the Agreement by submitting a patient account claim to a collection agency. In this regard, plaintiff has not submitted any evidence that this act occurred after defendant entered into the Settlement Agreement. Moreover, plaintiff does not dispute that the Settlement Agreement released defendant from any liability for conduct engaged in up to the date of the Agreement.

Plaintiff also fails rebut defendant's argument regarding proximate cause, only making the conclusory statement that it would not have incurred the settlement payment and other costs associated with the audit "had Abrams not violated the law and then lied about it to [plaintiff] and its new buyers" (Memorandum of Law in Opposition to Summary Judgment at 10).

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the laboratory to Mr. Motovich and his partner. However, a question of fact is raised as to this testimony because Mr. Motovich states in his sworn affidavit that his involvement with the laboratory did not begin until 2012, and that he did not instruct anyone at the laboratory, including Ms. Hall, to discard any records at the laboratory (Motovich Affidavit at ¶¶3,15).

Plaintiff also argues that in accordance with the Agreement, defendant had a duty to cooperate with any future inquiries for laboratory services provided while he owned the laboratory, and that defendant failed to do so (Plaintiff's Affirmation in Opposition at ¶¶2,4). In this regard, the Agreement provides that defendant will cooperate with the purchasers of the laboratory (the current owners) "in connection with any inquiries or audits conducted by the New York State Health Department or the [AG] relating to the period through December 31, 2010" (Abrams Affidavit, Exh. C, Settlement Agreement at ¶7). However, although the complaint alleges that defendant's failure to adequately cooperate with the June 15, 2012 AG letter caused the AG to issue the subpoena and conduct the audit (Complaint at ¶28), and that "Abrams was put on notice regarding the pending investigation and was give[n] the opportunity to participate and assist [plaintiff] with same" (Gunnell Affirmation, Exh. 2, Complaint at ¶¶27, 32), defendant correctly argues that the complaint further alleges that he was unable to produce documents to oppose the audit because he failed to follow Medicaid rules, namely: "Abrams was unable to produce the documentation requested by the AG;" and that "[u]pon information and belief, Abrams was unable to comply with producing any documents to oppose the audit by the AG because during his ownership and at the time he was medical director the [laboratory][4] violated certain rules relating to Medicaid billing and payments in connection with clinical laboratory tests that are conducted at out of state laboratories" (*id.* at ¶¶ 33-34).

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[4]Plaintiff here is referring to the laboratory when it was owned by defendant, despite its use of the word "Sherman" i.e. "plaintiff" according to the complaint.

Moreover, the Settlement Agreement includes an explicit representation by defendant that he did not possess any of the records sought by the AG. As such, even assuming defendant breached the Settlement Agreement by failing to cooperate, this breach could not have caused plaintiff any damages, which arose from its own failure to produce those documents to the AG. In this regard, it is undisputed that the records sought by the AG were those from the time period when defendant owned the laboratory, and those which defendant expressly represented that he did not possess.

Lastly, defendant points out that plaintiff seeks to recover a fine and related costs plaintiff voluntarily paid in connection with the AG's investigation. Despite seeking this relief, plaintiff specifically agreed in the Settlement Agreement that defendant was not representing the laboratory's compliance with any applicable law and that he did not have any laboratory records. As defendant argues, inasmuch as plaintiff voluntarily assumed the risk of a regulatory violation, it cannot change the terms of the Agreement, or graft upon it a provision forcing defendant to indemnify it for a risk it had already undertaken (*see generally Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 27 [1985]). Moreover, had the parties intended to include such an indemnification provision, they would have done so explicitly, as they did with two other unrelated issues (Abrams Affidavit at ¶27, Exh. C, Settlement Agreement at ¶¶ 6, 20c). Accordingly, that branch of the motion to dismiss the breach of contract cause of action is granted.

Fraudulent Representation

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State*, 64 NY2d 224, 229-230 [1984]) "particularly when the parties are represented by attorneys" (*Racanelli Constr. Co., Inc. v Tadco Constr. Corp.*, 50 AD3d 875, 875 [2d Dept 2008]), and are meant to put an end to litigation (*Hallock*, 64 NY2d at 230). "While a broad general release will be given effect regardless of the parties' unexpressed intentions, a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Rotondi v Drewes*, 31 AD3d 734, 735-736 [2d Dept 2006] [internal citations and quotation marks omitted]). "The meaning and extent of coverage of a release necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given" (*id.*).

Nevertheless, "[a] general release executed even without knowledge of a specific fraud effectively bars a claim or defense based on that fraud" (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310, 318-319 [1st Dept 2010], *affd* 17 NY3d 269 [2011]). In this regard, "a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made" (*Centro Empresarial Cempresa S.A,* 17 NY3d at 276 [internal citations and quotation marks omitted] ["a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release," otherwise, "no party could ever settle a fraud claim with any finality."]).

As indicated, "[g]enerally, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent concealment, misrepresentation, mutual mistake or duress" (*Powell v Adler*, 128 AD3d 1039, 1040 [2d Dept 2015] [internal citations and quotation marks omitted]). "A signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*id.* [internal citations and internal quotations omitted]). "A cause of action alleging fraud requires a plaintiff to establish a misrepresentation or omission of material fact which the defendant knew was false, that the misrepresentation was made to induce the plaintiff's reliance, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury" (*Cervera v Bressler*, 126 AD3d 924, 925 [2d 2015]).

The Settlement Agreement provides that defendant " . . . has never made any representations to the Buyers . . . concerning the Lab's . . . compliance with applicable regulations" and that he " is not in possession of any records pertaining to services provided and billed during the period he was Owner of the Lab" (Abrams Affidavit, Exh. C, Settlement Agreement at ¶7). The Agreement also releases defendant from all "actions . . . claims and demands whatsoever, *whether known or unknown,* in law or equity, of every kind and nature the [Lab Releasors] . . . ever had, now have, or hereafter can, shall or may have against . . . [defendant] . . . *for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Agreement*" (*id.* at ¶5) (emphasis added). Here, defendant has made a prima facie showing that the broad language

of the Agreement evinces the parties' intention to release all claims, including fraud claims (*Centro Empresarial Cempresa S.A,* 17 NY3d at 277 ["The phrase 'all manner of actions,' in conjunction with the reference to 'future' and 'contingent' actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract."]).

In any event, defendant has made a prima facie showing entitling it to dismissal of this cause of action. In this regard, the complaint alleges, in substance, that defendant's statement about his conversation with AG Ellis was a misrepresentation and that it caused plaintiff to sustain damages. Defendant has established, via his own sworn affidavit, that he did not misrepresent his conversation with AG Ellis (Abrams Affidavit at ¶¶19-26, 29).

Further, defendant has made a prima facie showing that plaintiff's reliance upon defendant's statement was not justifiable. "To plead a cause of action alleging fraud in the inducement or fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]). In addition, "'if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations'" (*id.* at 1044-1045, quoting *Schumaker v Mather*, 133 NY 590, 596 [1892], citing *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

As defendant argues, plaintiff alleges that it relied upon his conversation with AG Ellis to establish that it would not be the target of the AG's investigation and that it would not be adversely affected if it could not comply with the AG's request for records. However, just as defendant called AG Ellis to discuss the matter, plaintiff could have also contacted the AG itself or had its attorney do so to confirm defendant's representations before it entered into the Settlement Agreement, yet plaintiff failed to make this simple inquiry. Inasmuch as plaintiff was a "sophisticated [entity] that had the means available to it to learn the true nature" of the subject conversation, yet failed to do so, it cannot be said that it justifiably relied on defendant's representation (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 287 [1st Dept 2016]; *ACA Fin. Guar. Corp*, 25 NY3d at 1047 ["where a plaintiff has neglected to allege a reasonable protective step, we have held that the complaint failed, as a matter of law, to plead justifiable reliance"]; *Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009] [no justifiable reliance by plaintiff on statements by defendant because plaintiff was a financial advisor represented by counsel, and proceeded with purchase of two businesses without asking to see employee contracts or speaking with key employee, who left after the sale was consummated, taking with him 80% of clients with whom he had developed relationships over the past 20 years]).

Even assuming defendant's description of his conversation with AG Ellis was false, defendant has demonstrated that plaintiff has failed to establish that it incurred losses as a result. "To establish a fraud claim, a plaintiff must demonstrate that a defendant's

misrepresentations were the direct and proximate cause of the claimed losses" (*Vandashield Ltd v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017]). "To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" (*id.*).

Here, with respect to transaction causation, as defendant argues, plaintiff (the laboratory itself) has not alleged how the description of the telephone call in the Settlement Agreement induced it to enter into the Agreement. Stated otherwise, if plaintiff was to be investigated by the AG, the investigation would have occurred regardless of what terms were included in the Settlement Agreement. Moreover, plaintiff has failed to allege loss causation for the same reason it failed to establish causation under its breach of contract claim, namely its damages resulted from its voluntary agreement with the AG, not by defendant's description of his conversation with AG Ellis (*see Greentech Research LLC v Wissman*, 104 AD3d 540, 540 [1st Dept 2013] [plaintiff's losses were directly caused by the negative press reports about defendants and not by their alleged misrepresentations and omissions]; *Santodonato v Clear Channel Broadcasting, Inc.*, 26 AD3d 543 [3d Dept 2006] [plaintiff failed to raise issue of fact as to whether defendant's alleged misrepresentations that pop star would be interviewed at defendant radio station proximately caused decedent's injuries. Even if misrepresentations facilitated decedent's presence at defendant's radio station, plaintiff failed to demonstrate the actual cause of decedent's fall as there can be no liability when the defendant's actions merely furnished occasion for injury, therefore plaintiff did not meet his

burden of proving proximate cause, warranting dismissal of fraud cause of action]). In this regard, plaintiff could have chosen to fight for a smaller fine or none at all, rather than entering in the settlement agreement with the AG.

Plaintiff has failed to rebut defendant's prima facie showing that his telephone conversation was not a misrepresentation. First, it relies upon Mr. Motovich's inadmissible hearsay statement that AG Ellis told him that defendant's account of the telephone conversation was false. Second, plaintiff's counsel states that when AG Ellis is subpoenaed to testify at trial the matter will be one for the fact-finder (Affirmation of Malvina Lin in Opposition at ¶3), but this statement does not constitute competent evidence sufficient to raise an issue of fact. Moreover, as defendant notes, plaintiff did not notice AG Ellis' deposition testimony and did not submit a sworn affidavit from her in support of its opposition.

Further, plaintiff has failed to raise an issue of fact that its reliance upon defendant's telephone conversation with AG Ellis was justified. Plaintiff argues that it was not required to make its own inquiry with the AG because it went to the trouble to obtain defendant's written representation (*see DDJ Mgmt., LLC,* 15 NY3d at 154). In this regard, the Court of Appeals stated that "where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will *often* be justified in accepting that representation rather than making its own inquiry" (*id.* [emphasis added]). However, "[a]s the caveat 'often' suggests . . . there are circumstances under which a party's reliance may be unjustified even where it secured a written representation regarding the matter" (*Ambac*

Assur. Corp. v Countrywide Home Loans, Inc., 54 Misc3d 1215[A], 2016 NY Slip Op 51864 [U],*6 n 7 [Sup Ct, NY County 2016], quoting *DDJ Mgmt.*, 15 NY3d at 154), namely that "'when 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'" (*ACA Fin. Guar. Corp,* 25 NY3d at 1044-1045, quoting *Centro Empresarial Cempresa S.A.*, 17 NY3d at 279).

Here, Mr. Motovich avers that the AG's June 15, 2012 letter "appeared to be requesting records related to certain gynecological testing that was performed by another laboratory called [PLS]" (Motovich Affidavit at ¶3); that the request for information in the letter was limited to laboratory services performed when defendant owned the laboratory (*id.* at ¶4); and that since plaintiff was paying defendant a considerable sum of money, he (Motovich) wanted to document this representation (*id.* at ¶5). Thus, as defendant argues, the existence of the AG's letter requesting information demonstrates that plaintiff had reason to believe that the AG would pursue an investigation of the laboratory, thereby triggering a "heightened degree of diligence" which it did not address.

In addition, defendant's alleged false statement about whether or not the AG would investigate plaintiff was not peculiarly with defendant's knowledge (*see Nigro v Lee,* 63 AD3d 1490, 1492-1493 [3d Dept 2009] [plaintiff failed to establish justifiable reliance because he made no attempt to ascertain the true condition or history of the vehicle he purchased from seller before his purchase; all deficiencies alleged could have been easily discovered by routine investigation]). As indicated, plaintiff could have verified defendant's

statement by contacting the AG, but failed to do so, instead relying on defendant's description of his telephone conversation as its only assurance that it would not be subject to any investigation. Under these circumstances, it cannot be heard to complain (*id.*).

Plaintiff also argues that if Mr. Motovich "had been told the truth as to the nature of the June 15, 2012 letter he would not have paid Abrams the settlement amount of $375,000" (Memorandum of Law in Opposition, Counterstatement of Facts at 4). However, as defendant argues, this fraudulent inducement claim as it relates to Mr. Motovich was not pleaded in the complaint; could not have been pleaded as Mr. Motovich is not a party to this action; and in any event would now be time-barred (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009], citing CPLR 213 [8]; CPLR 203 [g] [fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or "could with reasonable diligence have discovered it"]). Moreover, as indicated, this action was commenced solely by the laboratory (plaintiff) itself. As such, whatever consequences it suffered as a result of the AG's investigation and its voluntary settlement would have occurred in any event, whether or not Mr. Motovich was involved, whether or not the Settlement Agreement was ever executed and whether or not defendant described his telephone conversation accurately.

Finally, as noted with respect to the breach of contract claim, as to causation, plaintiff only argues in conclusory fashion that it would not have incurred the costs incurred in

settling with the AG had defendant not violated the law and then lied about it, and fails to address defendant's prima facie showing.[5]

Since plaintiff has failed to raise an issue of fact with respect to the cause of action for fraudulent representation, that branch of defendant's motion to dismiss this cause of action is granted.

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[5]As noted, plaintiff also argues that this cause of action is not duplicative of the breach of contract claim because defendant's description of his conversation with AG Ellis was a "misrepresentation of present facts" as opposed to "a misrepresentation of future intent to perform" (*First Bank of the Americas,* 257 AD2d at 291-292). Defendant does not address this argument in its reply, except to assert, in effect, that even assuming that his description of his conversation with AG Ellis was false, he has made a prima facie showing warranting dismissal of this cause of action based upon the arguments set forth above. To the extent defendant does not address plaintiff's specific argument, it is irrelevant given the court's determination to dismiss this cause of action. Moreover, this claim is duplicative of the breach of contract claim. While defendant's description of his conversation with AG Ellis may arguably have represented a present fact, plaintiff has failed to present evidence that is was a misrepresentation. In addition, this statement was not extraneous to the contract and did not involve a duty separate from or in addition to the duties imposed upon defendant by the Settlement Agreement (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). In this regard, to the extent defendant's description of his conversation with AG Ellis involved any obligation of defendant at all, it related to defendant's obligation to cooperate with the investigation of the AG, and thus was not collateral to the Settlement Agreement (*MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 499 [1st Dept 2014]; *RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 [1st Dept 2008], *lv dismissed* 11 NY3d 804 [2008]) This claim is duplicative of plaintiff's contract claim for the independent reason that "plaintiff seeks the same compensatory damages for both claims" (*Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 531-532 [1st Dept 2014]; *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]; *Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 112 AD3d 486, 487 [1st Dept 2013] ["The fraud alleged is based on the same facts that underlie the contract counterclaim, is not collateral to the contract and does not call for damages that would not be recoverable under a contract theory."]).

The court finds that the imposition of sanctions is not warranted.

In sum, defendant's motion is granted in its entirety.

This constitutes the decision, order and judgment of the court.

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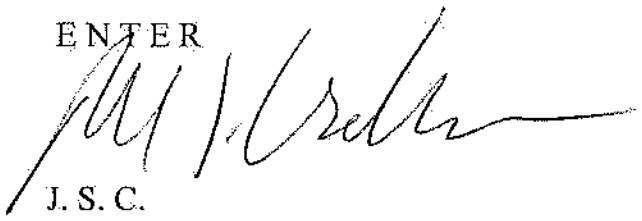

J. S. C.

HON. BERNARD J. GRAHAM