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DAVID M. NAMEROW, M.D., Plaintiff, v. PEDIATRICARE ASSOCIATES, LLC; SCOTT W. ZUCKER, M.D.; JEFFREY M. BIENSTOCK, M.D.; and MELISSA CHISM, M.D. Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. C-273-17 **OPINION**

Argued: September 28, 2018

Decided: September 28, 2018

Appearances: Robert Novack, (Bressler, Amery & Ross, P.C., attorneys) for plaintiff

Steven D. Gorelick, (Garfunkel Wild, P.C., attorneys) for defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Defendants' PediatriCare Associates, L.L.C., Scott W. Zucker, M.D., Jeffrey M. Bienstock, M.D., and Melissa Chism, M.D., ("Defendants") application for Partial Summary Judgment filed on September 4, 2018 by their attorneys, Garfunkel Wild, P.C. Plaintiff David M. Namerow, M.D. ("Plaintiff"), by his attorneys Bressler, Amery & Ross, filed opposition to Defendants' Motion for Partial Summary Judgment, as well as a Cross-Motion for Partial Summary Judgment, on September 18, 2018.

BACKGROUND

The Parties entered into an original Operating Agreement on or about January 1, 2000, to form PediatriCare as a limited liability company, with the purpose of owning and operating a

medical practice. On or about March 12, 2001, the Parties entered into the Amended and Restated Operating Agreement (the "Agreement"), which is the operative document that governs the relationship.

Pursuant to the Agreement, a Member has the right to retire once the Member has reached the age of sixty (60) and has provided twenty-five (25) years of membership or service to the Practice. Section 9.9 of the Agreement (titled "Retirement of a Member") provides that the "Retirement Purchase Price" is calculated in accordance with Section 10 of the Agreement (titled "Determination of Value"). The specific language of Section 10 is determinative, and is cited here in full:

> The total value of the Company ("Company Value") shall be the last dated amount set forth on the Certificate of Agreed Value, attached hereto as Exhibit G and made part hereto, executed by the Members. The Members shall exercise their best efforts to meet not less than once per year for the purpose of considering a new Value but their failure to meet or determine a value shall not invalidate the most recently executed Certificate of Agreed Value setting forth the Company Value then in effect. If the Parties fail to agree on a revaluation as described above for more than two (2) years, the Company Value shall be equal to the last agreed upon Value, adjusted to reflect the increase or decrease in the net worth of the Company, including collectible accounts receivable, since the last agreed upon Value. The value of a Member's Interest ("Value") shall mean the Company Value multiplied by the percentage interest held by said Member and being purchased hereunder, less any indebtedness that the Selling or Disabled Member, the Decedent, or a Member departing for any other reason contemplated hereunder may have to the Company or to the other Members, whichever the case may be. Gorelick, Cert., Exh. 1.

The most recent Certificate of Agreed Value attached to the March 2001 Operating Agreement stated the "Value of the Company" at $2.4 million, and was signed by Dr. Namerow, Dr. Zucker, Dr. Bienstock, and Dr. Chism, dated January 1, 2000.

Plaintiff announced his intention to retire in January 2016, triggering application of Section 10 of the Agreement. Plaintiff's retirement marks the first time that a Member of the Practice has retired, and thus the first time that PediatriCare has attempted to apply the Section 10 provision of

the Operating Agreement with a Certificate of Agreed Value greater than two years old.

In or about March of 2016, the Parties, as Members of PediatriCare, engaged Butzel, Karadimas, Carrabba, Testin, LLC ("BKCT") to perform a fair market valuation for the purpose of assisting the LLC in the matter of Business and Succession Planning. The 2016 BKCT Appraisal employed the fair market valuation methodology. In or about October of 2016, Defendants engaged the Coker Group, a healthcare consulting firm, to provide a fair market valuation of the Practice for the purposes of determining the Retirement Purchase Price in relation to Plaintiff's retirement. Defendants requested the Coker Group use the fair market valuation methodology. The Parties are in agreement that the two 2016 fair market valuations for the purpose of reaching a settlement as to a voluntarily negotiated buy-out number. The Parties are also in agreement that no voluntary buy-out number was ever reached.

Section 25 of the Agreement provides: "This Agreement may be amended only by the vote of at least eighty percent (80%) of the Percentage Interests of the Members of the Company; except, however, other than by application of Sections 5 and 6, the Percentage Interests of the Members may not be adjusted without the unanimous consent of the Members." The Agreement was never amended through a vote of the Members, nor does any document exist reflecting a vote to amend was ever considered or undertaken by the Members. Plaintiff then commenced this action on October 10, 2017.

LEGAL ARGUMENT

Standard for a Motion for Summary Judgment

Summary judgment is designed to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Thus, the court shall grant a summary judgment motion "if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits . . . 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." N.J.S.A. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

The Terms of the Operating Agreement are Unambiguous and Section 10 Applies

Under New Jersey law, "where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written." Risikatv Olajide v. One Main Financial, 2017 WL 2705413 (App. Div. June 23, 2017) (internal

citations omitted). When presented with an unambiguous contract, the Court should not look outside the "four corners" of the contract to determine the parties' intent, and parol evidence should not be used to alter the plain meaning of the contract. "The court has no right to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Connecticut General Life Ins. Co. v. Punia, 884 F. Supp. 148, 152 (D.N.J. 1995) (internal citations omitted).

Here, Plaintiffs primary contention is that the Parties course of conduct over a sixteen-year period modified the terms of the Agreement to require use of a fair market valuation methodology when valuing the practice, rather than a net worth valuation methodology. Specifically, Plaintiff asserts that the Parties have previously ignored Section 10 of the Operating Agreement providing for the use of net worth valuation methodology when determining the value of the Practice on three specific occasions: (1) In 2009 to perform a fair market valuation for the purpose of assisting the Members in their business and financial planning; (2) In March 2016 for the purpose of assisting in the matter of business and succession planning in anticipation of Plaintiff's retirement; and (3) In October 2016 for the purpose of exploring a possible negotiated buy-out price for Plaintiffs interest. As a result, Plaintiff argues that the parties' prior use of a fair market valuation methodology on these occasions evidence a mutual and clear intent to modify the Operating Agreement's terms to require a fair market valuation methodology when valuing the practice.

Plaintiff cites two cases in an attempt to demonstrate his position that the Members did in fact alter the Operating Agreement by course of conduct. First, Plaintiff cites DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999) in stating that New Jersey has long recognized the ability to modify one's contract "by an explicit agreement to modify or by the action and conduct of the parties as long as *the intention to modify is mutual and clear*." (emphasis added). This particular

case in not on point in any regard with the facts presented in the instant case. There, the Appellate Division was assessing breach of contract and implied covenants of good faith and fair dealing claims in a legal malpractice suit centered on an exclusive representation clause. See generally, Id. In other words, the Appellate Division in DeAngelis was evaluating a personal services contract in which a law firm had provided services by other lawyers not named specifically in the contract, and also accrued more costs and fees than the $30,000 cap that was agreed to in direct contravention with the agreement in place. Id. at 280. Here, on the other hand, there is no question that the parties are *not* in fact abandoning or dishonoring the Operating Agreement, all of whom ratified at the inception of the LLC and put in a specific provision addressing amendments and modification procedures. Further, it is clear that there was no "mutual and clear" intention by the three Defendant members to modify.

Plaintiff also cites Wells Reit II-80 Park Plaza, LLC v. Dir., Div. of Taxation, 414 N.J. Super. 453, 466 (App. Div. 2010) for the notion that "a modification can be proved by an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear." There, the Appellate Division was analyzing whether *actual amendments already made to the contract* constituted novations, relieving parties to the contract of certain contractual duties and obligations, which is not relevant to the facts of this case. See generally, Id. Further, the Court is unclear the proposition counsel makes by citing to this case, because the Appellate Division in Wells Reit II-80 Park Plaza, found that there was *no modification* to the agreement. Yet, Plaintiff here makes no attempt to distinguish the outcome of that case from the one before this court. Again, it is clear to this court that there was no "mutual and clear" intention by Defendants to formally modify or amend the LLC's Operating Agreement.

In or about 2009, the Parties engaged BKCT to perform a fair market valuation *for the*

purpose of assisting the Members in their business and financial planning. Namerow, Cert. at 7 (emphasis added). By Plaintiff's own words, this appraisal was done for reasons entirely unrelated to the retirement buyout purchase price of one of the members, and gives zero indication that the parties intended to modify Section 10 of the Agreement thereafter. Subsequently, in March of 2016, the Parties again retained BKCT to do a second appraisal – again, "for the purpose of assisting in the matter of business and succession planning." Id. at 13. Finally, in October of 2016, Defendants engaged the Coker Group, a healthcare consulting firm, to provide a fair market valuation of the Practice in relation to determining the Retirement Purchase Price pursuant to Plaintiff's retirement. Id. at 18. However, the record reflects that Defendants retention of the Coker Group, as confirmed by Plaintiff's own deposition testimony, were aimed at trying to achieve an amicable resolution of the buyout price to which all four Members would agree. Pl. Dep. Tr., 116-117. It is clear, based on the litigation that ensued, that the four Members were *not* able to agree on a buyout price.

Section 10 expressly provides that if the Members fail to agree on a revaluation of the Company for more than two years, the "company value shall be equal to the last agreed upon value, adjusted to reflect the increase or decrease in the *net worth* of the company, including collectible accounts receivable, since the last agreed upon value." (emphasis added). Plaintiff's complaint concedes that the $2.4 million figure was "the last agreed upon value" of the company under the terms of the Agreement. Plaintiff unambiguously demonstrated his understanding that no formal modifications were made either to Section 10 of the Operating Agreement or to the Company Value in his deposition:

> Q: During the process that you've described you were hopeful that it would be an amicable, collegial process leading to a resolution in a buyout price, correct?
> A: Correct.
> Q: An agreed-upon buyout price that the four of you would agree upon, correct?
> A: Correct.
> [Pl. Dep. Tr., 117]

Q: Okay. The four Members of PediatriCare never voted to amend this provision of the agreement, correct?
A: Correct.
[Pl. Dep. Tr., 120]

In addition to Plaintiff's concession that he nor the other Members ever voted or agreed to make any amendments prior to the announcement of his retirement, the individual Defendant certifications reflect this mutual understanding. In all of Drs. Zucker, Bienstock, and Chism's certifications, each one individually certifies the exact same sentiments: (1) that none of them agreed, even orally, to amend or modify Section 10 of the Agreement, including to discard the application of Net Worth Methodology; and (2) that none of them, at any time or in any manner, knowingly relinquished his or her full rights to rely on and enforce Section 10 of the Agreement, including the Net Worth Methodology provision, with respect to Dr. Namerow's retirement and Retirement Purchase Price, or their own, or other Members' ultimate retirement.

Defendants correctly point out that the Agreement unambiguously provides a clear method for calculating the buyout price. Further, the Operating Agreement clearly provides that it can only be modified through the *vote of 80% of the membership interests of the Company* (Agt. Section 25) (emphasis added), and not through Plaintiff's self-serving interpretation of the parties "course of conduct" over the years. Specifically, it is well settled under New Jersey law that "a proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify; unilateral statements or actions made after an agreement has been reached or added to a completed agreement clearly do not serve to modify the original terms of a contract." McGrath v. Poppleton, 550 F. Supp. 2d 564, 571 (D.N.J. 2008) (internal citations omitted). Here, although Plaintiff asserts that the Agreement was changed through the parties' course of conduct, there is no evidence that the remaining members agreed to a formal change of Section 10 of the Agreement to

reflect a new valuation methodology or Certificate of Agreed Value.

The plain language of Section 10 itself, along with the undisputed material facts, warrant the ordering of summary judgment with respect to the applicability of Section 10, and the dismissal of Plaintiff's claim asking the Court to order the use of a "fair market valuation" methodology for determining Plaintiff's Retirement Purchase Price.

Accordingly, Count I of Plaintiff's Second Amended Complaint is dismissed.

Plaintiff Suffered no "Oppression" as a "Minority Member"

Count II of Plaintiff's Second Amended Complaint asserts minority oppression under the New Jersey Revised Uniform Limited Liability Company Act ("RULLCA"). The RULLCA provides judicial recourse for minority members who have been "oppressed" by the majority members. See N.J.S.A. § 42:2C-48(a)(5). Under New Jersey law, "oppression has been defined as frustrating a [member's] reasonable expectations" and "is usually directed at a minority [member] personally . . . ." Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). Thus where a minority member's reasonable expectations have been frustrated by the majority members, the minority member has been oppressed and has a genuine claim for judicial recourse under the RULLCA.

Plaintiff's allegations on Counts I, II, and III are all contractual in nature, flowing directly from the parties' interpretation of the Operating Agreement. Plaintiff's primary contention is that he had a reasonable expectation that his 25% membership interest would be purchased using a fair market valuation methodology. As discussed above, Section 10 of the Operating Agreement clearly covers the disputed conduct, and the unambiguous language of Section 10 of the Operating Agreement calls for the use of a net worth methodology evaluation in determining the retirement purchase price. Plaintiff points to Judge Contillo's January 2018 ruling denying Defendants' Motion to Dismiss, where Judge Contillo had held that "Count II . . . suggests a cause of action for

oppression" because, at that time, "Plaintiff arguably had a reasonable expectation that . . . the fair market value as opposed to the stated value," would be utilized in calculating the retirement purchase price. After discovery, however, and the determination by this Court that the Defendants are in fact correct in asserting that the net worth methodology applies in accordance with the Operating Agreement, Defendant's actions clearly do not rise to a level supported by an action for oppression under RULLCA.

Under the "economic loss doctrine," courts look to the parties' contract, *where it applies*, and preclude claims based on extra-contractual purported rights and duties. Specifically, "the economic loss doctrine prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract." Coleman v. Deutsche Bank Nat. Trust Co., 2015 WL 2226022 at *4 (D.N.J. May 12, 2015) (internal citations omitted). See also Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 579 (1985) (dismissing plaintiff's tort-based claims as a matter of law where plaintiff alleged that defendant did not fulfill its contractual obligations).

Here, Defendants have not acted fraudulently, illegally, or in a manner that can be construed as an abuse of their authority as members towards Plaintiff. Count II of Plaintiff's Second Amended Complaint fails as a matter of law because the economic loss doctrine clearly bars Plaintiff from recovering based on "oppression," when Plaintiff's entitlement clearly flows from the Operating Agreement. Just as the fact that Plaintiff relied on an erroneous interpretation of the Operating Agreement to his detriment does not justify the Court rewriting the agreement, Plaintiff's detrimental reliance on his interpretation of the agreement does not warrant a finding of oppressive behavior by the Defendants.

Accordingly, Count II of Plaintiff's Second Amended Complaint is dismissed.

Defendants Exhibited no Breach of Fiduciary Duties Owed to Plaintiff

Count III of Plaintiff's Second Amended Complaint alleges a breach of fiduciary duty Defendants owed Plaintiff. Under New Jersey law, "in order to establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant had a duty to the plaintiff; (2) the duty was breached; (3) injury to plaintiff occurred as a result of the breach; and (4) the defendant caused that injury." Diaz v. Bank of New York, 2016 WL 111420 (D.N.J. January 11, 2016). Under the RULLCA, in a member managed limited liability company, each member owes the company and other members a duty of care. See N.J.S.A. § 42:2C-39(a)-(c).

As addressed above, Section 10 of the Agreement clearly covers the disputed conduct. Like Count II of Plaintiff's Second Amended Complaint alleging oppression from Defendant members, Plaintiff's Count III alleging breach of fiduciary duty also stems from the misbelief that Defendants erred in some manner by *not* applying the fair market valuation method that Plaintiff sought the members to utilize. It is clear that absent Count I, Plaintiffs allegations in Counts II and III have no real merit when not bootstrapped to Count I – seeking enforcement of the Operating Agreement "as modified by the parties' conduct." Plaintiff's opposition to Defendant's Motion repeatedly states in conclusory fashion that Plaintiff had a "reasonable expectation" that the remaining members would disregard Section 10 of the Operating Agreement and that therefore Defendants acted in bad faith by not agreeing with him.

In addition, Plaintiff once again points to Judge Contillo's January 2018 ruling – denying Defendant's motion to dismiss – as prima facie evidence that a genuine dispute of material fact exists and therefore Counts II and III cannot be decided on summary judgment. Again, Judge Contillo's denial of Defendant's motion to dismiss spoke to the issues prior to extensive discovery, and prior to a ruling on the applicability of Section 10 of the Operating Agreement and the proper

methodology to be used in determining the retirement purchase price. Other than Plaintiff's contention that the Operating Agreement should have been modified based on the prior conduct of the parties there are no underlying facts in dispute that suggest Defendants breached any fiduciary duty owed to Plaintiff, or that Plaintiff suffered in some way as a result of an alleged breach by Defendants. There is no valid claim for breach of fiduciary duty based on members in a member-managed company acting in conformity with the provisions clearly set forth in the Operating Agreement.

Accordingly, Count III of Plaintiff's Second Amended Complaint must be dismissed.

A Genuine Dispute of Fact Regarding the 1,000 Hours of Service Requirement For 2017 Profit Sharing Plan Contribution Remains

Count V of Plaintiff's Second Amended Complaint alleges a Breach of the Practice's Profit Sharing Plan.

As noted above, and as set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995), pursuant to R. 4:46-2, a court should deny a summary judgment motion "only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged," such that "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute."

Defendants' put forth that PediatriCare's "Volume Submitter Profit Sharing Plan Adoption Agreement" requires that an employee must be credited with at least 1,000 actual "hours of service" during the 2017 Plan year in order to be eligible for a profit sharing allocation in the plan year. Further, there is no dispute between the Parties that in 2017, Plaintiff worked a reduced schedule consisting of six (6) months, and four (4) days per week.

Defendants provide the certification of Linda Bleiweiss, the former Practice Manager for

PediatriCare, who certified that the method used for *all* salaried employees, including the four Members, was based on the following calculation:

(Eight (8) hours/day)

X

(Number of weeks employed in the plan year)

X

(Number of days/week the person was employed to work (e.g. 5 if full-time employee, 4 or 3 if reduced-schedule employee).

Ms. Bleiweiss, the former Practice Manager for PediatriCare, described the administration of the plan in detail in her certification:

> "Through and including the Plan year 2016, under Dr. Namerow's supervision and direction as Plan Administrator, year after year, the 'hours of service' designated for each potentially eligible employee appeared in a column on the Annual Census, which was prepared by me in draft, and, for all years through and including 2016, ultimately, approved by Dr. Namerow, for submission to Intac Acturarial Services, Inc. – the company that assisted PediatriCare with administration of the Plan, and the payment of annual contributions to employees – for preparation of a final annual allocation schedule for eligible employees." Bleiweiss Cert.

As such, Defendants assert that based on Plaintiff's reduced schedule in 2017, combined with the fact that he only worked for six months of the year, Plaintiff's hours worked equal 832 hours.

Plaintiff, however, disputes this method as applied specifically to the four Members. Plaintiff, as the former Plan Administrator, certifies that in prior years, under his supervision, the four Members were automatically deemed to have satisfied the minimum hour requirement under the Plan based upon their status as Member of the Practice – an exact agreed upon 2,080 hours for the Plan Year. Thus, a reduced schedule that would have had Plaintiff work half the year in 2017 would have given him approximately 1,040 hours for the Plan Year.

A genuine issue of material fact remains, however, because of services provided to PediatriCare by Plaintiff that remain in dispute as to whether they should apply towards his hours of service. For instance Plaintiff certifies as to many professional responsibilities outside of direct patient care, such as practice management; weekday on-call duties; attending education and department meetings; serving on credentials committees; and conducting hospital rounds, all of which may be contributable to Plaintiff's "hours of service" requirement. Although there is no question that PediatriCare utilized some equation in calculating hours of service for other employees, there is clearly a dispute as to the calculation of each *members* hours of service pursuant to the Profit Sharing Plan.

As such, Defendant's Motion for Partial Summary Judgment, as to Count V of Plaintiff's Second Amended Complaint, is denied.

Plaintiff's Cross-Motion on Defendant's Second Counterclaim

Plaintiff filed a cross-motion concerning Defendants' Second Counterclaim for Declaratory Relief seeking offsets against Plaintiff's ultimate Retirement Purchase Price.
Defendants allege that they are entitled to offsets in the amounts of $50,000.00 and $22,327.00 as a result of Plaintiff's issuance of several "unauthorized" checks issued prior to his departure. These checks consisted of $50,000.00 checks issued to Dr. Namerow himself and each of the other three members (Drs. Zucker, Bienstock, and Chism). Plaintiff argues that his actions were entirely proper and authorized because prior to his departure all members of the LLC had check writing authority. Specifically, Plaintiff alleges that "there were no rules or formal process concerning how the Members were to make distributions when there was excess cash," because said process on making periodic distributions was never memorialized in writing in a formal agreement.

The circumstances surrounding the issuance of the checks of interest represent a clear factual

issue that precludes the granting of summary judgment in Plaintiff's favor. In particular, Plaintiff's conclusion that partial summary judgment should be granted because Defendants "offer no legal theory," as to why they are entitled to offset the checks against the Purchase Price fails to address the factual discrepancies regarding the authorization of check writing amongst the members pertinent to a summary judgment ruling.

Plaintiff further asserts that because Defendants suffered no injury from Plaintiff's conduct, that Plaintiffs cross-motion for summary judgment pertaining to Defendant's claim for offsets should be granted. Plaintiff's claim fails to address potential damages to the individual members of the LLC, and instead emphasizes that the LLC itself did not appear to suffer damages. Yet, simply pleading that the LLC did not suffer financially in 2017, the year the checks were issued, does not negate the possibility that a genuine dispute of material fact remains regarding potential harm suffered by Drs. Zucker, Bienstock and Chism, or more importantly, the potential impropriety of Dr. Namerow's actions.

Accordingly, Plaintiff's cross-motion for partial summary judgment is denied.

CONCLUSION

For the aforementioned reasons, Defendants' motion for partial summary judgment is hereby granted in part and denied in part. Accordingly, Counts I, II, and III of Plaintiff's Second Amended Complaint are dismissed. Additionally, Plaintiff's cross-motion as to Defendants' second counterclaim is denied.