At an IAS Term, Part Comm-8 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 4th day of September, 2019.

P R E S E N T:

HON. LEON RUCHELSMAN,

Justice.

----------X

CANBE PROPERTIES LLC,

Plaintiff,

- against -

Index No. 504879/16

CATHERINE CURATOLA, AS EXECUTRIX OF THE ESTATE OF CARL J. FODERA, AND MARK J. CARUSO, ESQ., AS ESCROW AGENT,

Defendants.

----------X

The following papers numbered 1 to 2 read herein:

	Papers Numbered
Transcripts of July 10-11, 2019 Trial	1-2

Upon the foregoing papers, this is an action by plaintiff Canbe Properties LLC (Canbe) against defendants Catherine Curatola (Curatola), as the executrix of the estate of Carl J. Fodera (Fodera), and Mark J. Caruso, Esq. (Mr. Caruso), as an escrow agent, alleging a claim of fraudulent inducement and seeking to recover a down payment of $250,000, rescind a common stock purchase and sale agreement (the agreement), and cancel a

$1,250,000 promissory note. Curatola has interposed counterclaims based upon Canbe's failure to make payments under the promissory note.[1]

Facts and Procedural Background

Fodera was the owner of all of the issued and outstanding stock of three companies, namely, Technical Worldwide Tattoo Supply Corp. (Technical Worldwide), Tattoo Media, Inc. (Tattoo Media), and Millennium Colors, Inc. (collectively, the companies). The companies are in the business of distributing tattoo supplies, such as inks and needles, to tattoo parlors. Tattoo Media also distributes magazines and provides media coverage regarding tattoos and tattoo art. Alexander Rossetti (Rossetti) is the general manager of all three of the companies.

Canbe is a limited liability company with two members, Michael Tadross (Tadross) and Christopher Conover (Conover). Tadross was a long time friend of Fodera, who he knew for about 30 years. In May 2015, an initial meeting was held between Fodera, Rossetti, Tadross, and Conover, in which they discussed the terms of Canbe's potential investment in the companies, including that Canbe would make an initial payment of $250,000 and pay an additional $1,250,000 over an extended period of time for the purchase of 50% of the companies' stock. Canbe asserts that at this meeting, Fodera represented that all of its initial $250,000 payment would be used to purchase new inventory for the companies, such as inks

[1]By an assignment agreement dated May 1, 2019 and executed on May 6, 2019, Curatola, as the executrix of Fodera's estate, assigned all of her rights and interests in the promissory note to the Rubino Revocable Trust.

and needles. There was also a second meeting between Tadross, Rossetti, Fodera, and a person named Andrew Girardi (Girardi), who was to be hired for marketing. According to Canbe, Fodera stated, at this second meeting, that the money that Canbe was going to invest in the companies would be used for marketing, along with buying more product and increasing inventory.

Following the two meetings, Canbe and Fodera entered into the agreement, dated June 8, 2015, under which Fodera agreed to sell and Canbe agreed to purchase from Fodera 50% of the issued and outstanding common stock of the three companies for a total purchase price of $1,500,000. The agreement provided that the first $250,000 of the purchase price was to be paid by Canbe to Fodera at the closing, and the balance was to be paid by the execution and delivery at the closing of a promissory note in the principal amount of $1,250,000.

The agreement set forth that the promissory note was to provide that the $1,250,000 was payable over 30 months with interest at five percent in five equal installments of $250,000, with the first installment due six months from the date of closing, i.e., on December 8, 2015. The agreement further provided that pending final payment of the promissory note, the shares from Fodera were to be held in escrow to guarantee the remaining payments under the promissory note. The agreement stated that if Canbe failed to pay the remaining amount in total, the shares would be returned to Fodera in full settlement of the promissory note and Canbe would have no interest in the companies. Mr. Caruso, a partner in the law firm Caruso, Caruso & Branda P.C., was named as the escrow

agent in the agreement, and was required to hold the common stock certificates, which were issued to Canbe at the closing, in escrow, pursuant to article 13 of the agreement.

Article 8 (h) of the agreement provided, in pertinent part, as follows:

> "8. Seller's Representations to the Purchaser:
> *To induce* the Purchaser to purchase the common stock stated herein and to pay the purchase price therefore, the Seller represents and warrants to the Purchaser as follows:
> . . .
> (h) All creditors of the [companies] shall be current at time of closing" (emphasis added).

Fodera and Canbe, by its members, Conover and Tadross, executed the agreement on June 8, 2015. The closing also took place on June 8, 2015. Canbe paid Fodera the $250,000 and executed the promissory note at the closing. Canbe asserts that it relied upon Fodera's representations and warranties in executing the agreement, delivering the initial $250,000 payment, and signing the promissory note.

Canbe alleges that in July 2015, Tadross learned that contrary to the representation and warranty in article 8 (h) of the agreement, the companies were in considerable debt at the time of the closing on June 8, 2015. Canbe claims that contrary to Fodera's representations at the meetings as to how its $250,000 initial payment was to be used, Fodera used $120,660.79 of the $250,000 to pay off invoices from creditors, which were already past due at the time of the closing, and not to purchase new supplies, such as needles and ink, or for media. Canbe further claims that the remaining amount of its $250,000 payment was taken by Fodera for his own personal use, and that it was not used to purchase new supplies or for

media. On October 6, 2015, Fodera died. Curatola was Fodera's sister and is the executrix of Fodera's estate. Canbe requested the return of its $250,000, and did not make any payments under the promissory note. Curatola did not return Canbe's $250,000.

On March 31, 2016, Canbe filed the instant action, alleging that it was fraudulently induced to enter into the agreement by Fodera's false representations, and seeking the return of its $250,000, rescission of the agreement, and cancellation of the promissory note. Canbe's first cause of action alleges a claim for fraudulent inducement, and Canbe's second cause of action seeks to enjoin the escrowee, Mr. Caruso, from releasing the stock certificates being held pursuant to the agreement. Curatola interposed an answer, dated May 11, 2016, which contains counterclaims for the alleged breach of the promissory note. Canbe interposed a reply dated June 30, 2016. On February 13, 2018, Canbe filed its note of issue.

A nonjury trial was held before the court on July 10, 2019 and July 11, 2019. At the trial, Canbe was represented by Mark N. Antar, Esq. (Mr. Antar) of Rivkin Radler, LLP, and Curatola was represented by Leo K. Barnes Jr., Esq. (Mr. Barnes) of Barnes Catterson LoFrumento Barnes, LLP. Mr. Antar called Rossetti and Tadross as witnesses for Canbe. Rossetti and Tadross both testified and were cross-examined at the trial. The court had the opportunity to observe the demeanor of these witnesses and assess their credibility. Mr. Barnes read Conover's May 2, 2018 deposition testimony into the trial transcript since Conover was in California and unavailable to appear at the trial. There were also exhibits submitted by both parties, some of which were admitted into evidence at the trial.

The court, at the trial, sustained the objection by Mr. Barnes seeking to preclude Tadross from testifying as to any conversations that he had with Fodera based upon the Dead Man's Statute (CPLR 4519; July 11, 2019 tr at 36-37). The court overruled the objection by Mr. Barnes to Rossetti's testimony based upon the Dead Man's Statute, and permitted Rossetti to testify since he was not "a person interested in the event" as he had no stake or pecuniary interest in the outcome of this litigation (July 10, 2019 tr at 17). The court also overruled an objection made by Mr. Barnes based on the parol evidence rule since it found that an "as is" clause in article 9 (d) of the agreement (which is discussed below) did not preclude parol evidence establishing fraudulent inducement to enter into the agreement (*id.* at 15, 17; *see Brown v Cerberus Capital Mgt., L.P.*, 173 AD3d 513, 514 [1st Dept 2019]). These objections had been the subject of a motion in limine by Mr. Barnes (doc #88). In addition, the court denied a motion made by Mr. Barnes for a directed verdict in favor of Curatola and dismissing Canbe's action (July 11, 2019 tr at 64). The parties made their summations at the conclusion of the trial (*id.* at 111-124). The court has duly considered the testimony of the witnesses and the documentary evidence.

Discussion

"It is axiomatic that in order to state a claim for fraudulent inducement, 'there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury'" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 438-439 [1st Dept 2015], quoting *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st

Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). In other words, the requisite elements of a claim for fraudulent inducement are: "a misrepresentation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007]; *see also Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *260 Mamaroneck Ave., LLC v Guaraglia*, 172 AD3d 661, 662 [2d Dept 2019]; *Lloyd I. Isler, P.C. v Sutter*, 160 AD2d 609, 610 [1st Dept 1990]).

It is well established that "[i]n the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim" (*Wyle Inc.*, 130 AD3d at 439). "Moreover, these misrepresentations of present fact must be 'collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract'" (*id.*, quoting *Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). "Therefore, '[a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract'" (*Wyle Inc.*, 130 AD3d at 439, quoting *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]).

"A fraud claim 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" (*MBIA Ins. Corp. v*

Countrywide Home Loans, Inc., 87 AD3d 287, 293 [1st Dept 2011]; *see also First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]). "Unlike 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" (*First Bank of Ams.*, 257 AD2d at 292; *see also Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *GoSmile, Inc.*, 81 AD3d at 81; *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2d Dept 2008]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept 2001]).

Mr. Barnes, at the trial, contended, however, that, since the misrepresentation as to the outstanding invoices is a breach of article 8 (h), which is a contractual warranty contained in a specific provision of the agreement itself, the misrepresentation is not collateral to the contract, thus rendering Canbe's fraudulent inducement claim to be a breach of contract claim, which was not pleaded, and not a viable fraudulent inducement claim. This contention is devoid of merit. "'A warranty is not a promise of performance, but a statement of present fact'" (*Wyle Inc.*, 130 AD3d at 441, quoting *First Bank of Ams.*, 257 AD2d at 292; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 120-121 [1969]). As previously noted, "'a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract),'" and, as such, it "'involves a separate breach of duty'" (*Wyle Inc.*, 130 AD3d at 440-441, quoting *First Bank of Ams.*, 257 AD2d at 292; *see also Deerfield Communications Corp.*, 68 NY2d at 956). Indeed, it has been specifically held that

a misrepresentation of a contractual warranty may form the basis of a separate fraudulent inducement claim (*see Wyle Inc*, 130 AD3d at 441-442). This is particularly true where, as here, the misrepresentation concerns the core value of the business which is the subject of the contract (*see id.* at 439).

The misrepresentation at issue here was, in fact, warranted to be accurate at the time the agreement was executed and, by the express terms of article 8 (h), it was made for the purposes of inducing Canbe to purchase 50% of the common stock of the companies (*see id.* at 441-442). Thus, the warranty in article 8 (h) was designed to be relied on to arrive at an accurate value of common stock of the companies being purchased by Canbe. This misrepresentation did not merely evince a "mere insincere promise of future performance," but, instead, was a "misrepresentation of then present fact that was collateral to the contract" (*GoSmile, Inc.*, 81 AD3d at 81; *see also Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 184 [2d Cir 2007]; *Wyle Inc.*, 130 AD3d at 441-442; *RKB Enters. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept 1992]). The intentional failure to disclose the outstanding invoices constitutes a misrepresentation as to a present fact, upon which an action for rescission may be predicated (*see Wyle Inc.*, 130 AD3d at 439). Thus, Canbe has sufficiently alleged a viable cause of action for fraudulent inducement.

If fraud in the inducement is proven, it "renders the contract voidable," and rescission of the contract will be granted (*Mix v Newf.*, 99 AD2d 180, 182-183 [3d Dept 1984], citing *Adams v Gillig*, 199 NY 314, 317 [1910]). A fraud in the inducement claim "requires 'proof

by clear and convincing evidence' as to each element of the claim" (*Basis PAC-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017], quoting *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 350 [1999]; *see also State of New York v Industrial Site Servs., Inc.*, 52 AD3d 1153, 1157 [3d Dept 2008]).

Canbe has demonstrated that there was a misrepresentation of material fact by Fodera. Contrary to the representation made by Fodera in article 8 (h) of the agreement, Rossetti testified that there were open invoices from quite a few businesses that were due before the date of closing that were not paid (July 10, 2019 tr at 23). Rossetti explained that these invoices were for products that the companies had ordered and received, and for which the companies did not pay after receiving the invoices (*id.* at 24). Rossetti unequivocally testified that the companies were in debt at the time of the closing (*id.*). Rossetti painstakingly set forth the names of these numerous businesses to which the companies owed money, the amount of money owed by the companies to these businesses, and the fact that the companies did not pay the businesses the amount that the companies owed and for which they were invoiced (*id.* at 24-54). Rossetti testified that the total amount that was owed by the companies to its creditors at the time of closing was approximately $150,000 (*id.* at 54). Rossetti's testimony was credible, supported, and unrefuted.

Mr. Barnes cross-examined Rossetti as to the amount owed by the companies to the creditors, referring to an earlier affidavit by Rossetti, dated August 3, 2016, in which Rossetti

stated that the amount that the companies were indebted to its creditors as of June 8, 2015 was at least $83,113.17 (July 11, 2019 tr at 12). Rossetti, in his redirect testimony, clarified that this earlier affidavit used the language "at least," and that the amount owed was actually more than the amount that he had previously believed (*id.* at 31). In any event, Rossetti's testimony establishes that there was a substantial amount owed by the companies to its creditors, rendering the representation made in article 8 (h) of the agreement false.

Mr. Barnes, in cross-examining Rossetti, attempted to show that the debts were incurred by another company, Technical International, and that Technical Worldwide (which, as noted above, is one of the three companies whose stock was the subject of the agreement), which was formed in 2014, was paying off the debts of Technical International (July 10, 2019 tr at 68-69). Mr. Barnes argues that the relationship between the vendors with outstanding bills at the time of the closing and Technical International existed prior to 2010, and the three companies were not formed until years later (July 11, 2019 tr at 115). Mr. Barnes' argument in this regard appears to be that the debts were not owed by the companies, but by Technical International, and, therefore, there was no misrepresentation in article 8 (h) of the agreement.

Rossetti testified that he had worked for Technical International in October 2010 (July 10, 2019 tr at 68). Rossetti, however, testified that the invoices were, in fact, for Technical Worldwide since they were dated after 2014 when Technical Worldwide had been formed (*id.* at 76). Rossetti explained that in 2014, there was a transition from Technical

International to Technical Worldwide (July 11, 2019 tr at 20). Rossetti also testified that invoices addressed to a company called Technical Tattoo Supply were actually for Technical Worldwide based upon the dates of the invoices (July 10, 2019 tr at 80). Mr. Barnes additionally questioned Rossetti as to the relationship between Technical International and certain businesses (*id.* at 85-88; July 11, 2019 tr at 3). These prior relationships, however, did not indicate that the invoices at issue were not owed by Technical Worldwide (July 10, 2019 tr at 76, 80). In fact, when questioned about the relationship between Technical International and one of these businesses, Softwhite Inc., prior to his arrival at Technical International in October 2010, Rossetti noted that the bill by Softwhite Inc. was, in fact, made out to Technical Worldwide (*id.* at 86). Mr. Barnes' attempt to show that the debts were not owed by Technical Worldwide is rejected as not credible, unsupported, and belied by the documentary evidence and Rossetti's testimony.

Canbe further established that Fodera was aware of the falsity of his representations when made. Rossetti testified that he would discuss the amounts that were owed by the companies with Fodera every other day (*id.* at 54). Rossetti described how he and Tadross would go into Fodera's office and show him a report of the debts owed, and Fodera would choose what was to be paid or not paid (*id.* at 55). Rossetti specifically testified that he had informed Fodera of the amount that was outstanding for the three companies at the time of closing, and that Fodera was aware of the amount owed by the companies at the time of closing (*id.*). Rossetti explained that the reason that the amounts had not been paid was

because it was Fodera's decision not to pay those creditors (*id.*). Rossetti testified that this information was not disclosed to Canbe prior to the closing, and that Fodera never told Canbe that the companies owed all of this money to creditors (*id.* at 55-56).

Rossetti also testified that at the second meeting prior to the closing, at which he, Tadross, Fodera, and Girardi (who, as noted above, was to be hired for marketing) attended, Fodera represented that the money that Canbe was investing in the companies would be used to provide marketing and to buy inventory (*id.* at 57-58). Rossetti specifically testified that $120,660.79 of the $250,000 paid to Fodera by Canbe were used by Fodera after the closing to pay these old bills owed by the companies (*id.* at 58-59, 62-63, 82). Rossetti testified as to how this was shown by a spreadsheet listing the businesses paid and the amounts paid after closing, which came from the $250,000 payment made by Canbe (*id.* at 61-62; exhibit 24). Rossetti further testified that the remaining $130,000 of Canbe's $250,000 payment did not go into the companies at all (July 10, 2019 tr at 63). Rossetti also testified that Canbe's payment did not go for inventory or marketing, contrary to what was represented at the second meeting prior to the execution of the agreement (*id.* at 64). Rossetti's testimony was credible, supported, and unrefuted.

Tadross similarly testified that in the second meeting before the signing of the agreement, it was represented by Fodera that Girardi, who attended the meeting, was supposed to be hired to do all of the marketing for Tattoo Media with respect to all the different ink lines and supplies, but Fodera never hired Girardi (July 11, 2019 tr at 38, 40).

Tadross further testified that the money that Canbe was to invest was meant to go to marketing and inventory, such as inks, needles, tubes, binders, stencils, and whatever supplies that tattoo artists needed to perform their art (*id.* at 38, 40-41). Tadross testified that he learned that the $250,000 was never used for inventory or marketing (*id.* at 42-43). Tadross' testimony was credible and unrefuted.

Canbe has shown that the misrepresentations by Fodera were intended to deceive it and induce it to execute the agreement. Indeed, as set forth above, article 8 (h) expressly provided that Fodera represented and warranted to Canbe that all creditors of the companies would be current at the time of closing in order "to induce [Canbe] to purchase the common stock [of the companies] . . . and to pay the purchase price" for the companies. Canbe has also established, by the testimony of Rossetti and Tadross, that the representations concerning the use of Canbe's money for new inventory and for marketing, as opposed to paying past debts of the companies, were made to induce Canbe into entering into the agreement.

Canbe has also established that it reasonably relied upon Fodera's misrepresentations. Tadross testified that the information that the companies were in debt at the time of the execution of the agreement was not revealed in the financial information presented to Canbe (July 11, 2019 tr at 39). Tadross testified that Canbe considered the representation in article 8 (h) in executing the agreement (*id.* at 38; exhibit A). Tadross stated that he took this representation at face value, and he would not have agreed to sign the agreement and enter

into this deal, on behalf of Canbe, if not for this representation (July 11, 2019 tr at 38). Tadross testified that he also relied on the representation that the money that Canbe paid would be used to buy new inventory (*id.* at 39).

Mr. Barnes argued, at the trial, that article 9 (d) of the agreement contained a disclaimer which precluded reliance by Canbe (*id.* at 70-71). This argument is rejected. Article 9 (d) of the agreement provided that Canbe represented and warranted that Fodera "has afforded [Canbe] with access to all information about [Fodera] and the [companies] that [Canbe] has requested," and that Canbe "is fully familiar and satisfied with the present business activities and financial condition of the corporation and agrees to accept the same as is." Such an "as is" clause does "not shield a defendant from judicial inquiry into specific allegations of fraud in the inducement of the contract" (*Chopp v Welbourne & Purdy Agency*, 135 AD2d 958, 959 [3d Dept 1987]; *see also Sabo v Delman*, 3 NY2d 155, 162 [1957]; *Benitez v Martinez*, 1 AD2d 959, 959 [2d Dept 1956]). Fodera's fraud vitiates the agreement despite this language. This language does not waive or disclaim reliance on Fodera's representation and warranty in article 8 (h) of the same agreement (*see Haenel v Allmetal Screw Products Corp.*, 85 Civ 9987 [LLS], 1986 WL 10473, *2 [SD NY Sept. 16, 1986]).

Mr. Barnes, at the trial, read the deposition testimony of Conover into the record in an attempt to cast doubt upon whether Conover exercised due diligence in not discovering the companies' debt prior to the execution of the agreement. Mr. Barnes pointed to the fact that Conover did not perform an audit or hire an accountant (July 11, 2019 tr at 116).

Conover testified that he performed financial due diligence on the three companies (*id.* at 85), but admitted that he did not engage any third-party auditors or accountants to review the companies prior to closing (*id.* at 86). Conover noted that this was not an impersonal transaction, referring to the long friendship between Tadross and Fodera (*id.* at 107). Specifically, Conover testified that this was not a transaction between two strangers since Tadross and Fodera had a long personal relationship, and that there was no reason to doubt that what Fodera had told Canbe was true, or to believe that the information given to Canbe by Fodera was inaccurate (*id.* at 88-89). Conover noted that article 8 (g) of the agreement referred to an outstanding promissory note owed by Fodera to the Rubino Revocable Trust, and testified that this was put in the agreement to show that this was Fodera's responsibility and was the only debt existing at the time of the sale (*id.* at 105-106). Conover testified that Canbe did not request verification of bank statements because it took Fodera at its word (*id.* at 103).

Mr. Barnes' attempt to blame Canbe for not discovering Fodera's fraud and for relying upon Fodera's fraudulent misrepresentations, is rejected. "It is 'no excuse for a culpable misrepresentation that means of probing it were at hand'" (*Lloyd I. Isler, P.C.*, 160 AD2d at 610, quoting *Albert v Title Guar. & Trust Co.*, 277 NY 421, 423 [1938]; *see also Rosenschein v McNally*, 17 AD2d 834, 834 [2d Dept 1962]). Thus, the mere presence of opportunities for investigation will not preclude the right of reliance (*see Albert*, 277 NY at 423). This is especially true where there has been intentional fraud (*see Lloyd I. Isler, P.C.*,

160 AD2d at 610; *Angerosa v White Co.*, 248 App Div 425, 426 [4th Dept 1936], *affd* 275 NY 524 [1937]). Moreover, "to deny relief to the victim of a deliberate fraud because of [its] own [alleged] negligence would encourage falsehood and dishonesty" (*Angerosa*, 248 App Div at 426). Canbe should have been able to reasonably rely upon the representation of Fodera, who was the sole shareholder of the companies, and who had knowledge about the debts of the companies. Fodera falsely represented and warranted in writing in the agreement that the companies were current with their creditors at the time of closing, and the nature of the transaction was such as to cause Canbe to rely on Fodera's misrepresentation.

Canbe seeks damages in the amount of its initial payment of $250,000. It is undisputed that Canbe paid Fodera this sum. These are the only damages which Canbe is seeking in this action (July 11, 2019 tr at 78). Canbe never received any benefit from this payment. Tadross testified that while article 13 of the agreement provided that it was understood by Fodera and Canbe that "for every dollar taken out by . . . Fodera, . . . [Canbe] will have the right to take an equal pay out" (*id.* at 41, 43; exhibit A), Canbe never received any pay out despite Fodera's use of the $250,000 (July 11, 2019 tr at 43-44). The shares in the companies are still being held in escrow, and Canbe never received them (*id.* at 49). Since Canbe seeks rescission, the return of Canbe's $250,000 is necessary to make Canbe whole.

In summary, the court credits the testimony of Rossetti and Tadross as being worthy of belief on the material issues. After hearing all of the testimony at the trial, giving weight

to the credible testimony of the witnesses, and reviewing all documentary evidence produced by the parties at the trial, the court finds in favor of Canbe on its fraudulent inducement cause of action. The court specifically finds that Canbe has established by clear and convincing evidence that Fodera made material misrepresentations of presently existing facts, which were false and known by him to be false when made, and were made for the purpose of inducing Canbe to enter into the agreement, and that Canbe justifiably relied upon the material misrepresentations of fact, causing Canbe to sustain the loss of its $250,000 payment. Since the court finds that Canbe was fraudulently induced to enter into the agreement, the remedy of rescission is warranted (*see Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]; *11 S. Laundry, Inc. v MCD Assets, LLC*, 39 Misc 3d 1218[A], 2013 NY Slip Op 50658[U], *7 [Sup Ct, Westchester County 2013]).

Since the agreement must be rescinded, the promissory note given by Canbe to Fodera in connection with the agreement must likewise be cancelled and rescinded. Contrary to the argument made by Mr. Barnes, in his pretrial memorandum of law (Doc #85), the promissory note cannot provide an independent basis for liability on the part of Canbe with respect to the counterclaims. The promissory note was given by Canbe solely in connection with the agreement, and the rescission of the agreement mandates the cancellation of the promissory note (*see Eurotech Dev. v Adirondack Pennysaver*, 224 AD2d 738, 739 [3d Dept 1996]).

Conclusion

Accordingly, judgment is granted in favor of Canbe and against Curatola, as the executrix of Fodera's estate, as to Canbe's first cause of action for fraudulent inducement. The agreement between Fodera and Canbe is hereby rescinded. Curatola is directed to return to Canbe its payment of $250,000; Canbe is awarded a money judgment in this amount against Curatola, as the executrix of Fodera's estate. With respect to Canbe's second cause of action, Mr. Caruso is directed to return the stock certificates being held by him in escrow to Curatola, as the executrix of Fodera's estate, and, upon such return, any claim against Mr. Caruso is dismissed. Curatola's counterclaims against Canbe, which have been assigned to the Rubino Revocable Trust, are hereby denied and dismissed.

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

E N T E R,

J. S. C.

HON. [illegible] RUCHELSMAN