

**Zyskind v Industrial Enters. of Am., Inc.**

2007 NY Slip Op 30297(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0602523

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

BERYL ZYSKIND,

Plaintiff,

INDEX NO. 602523/06

-against-

INDUSTRIAL ENTERPRISES OF AMERICA, INC.  
f/k/a ADVANCED BIO/CHEM, INC.,

Defendant.

MOTION SEQ. NO. 002

Cross-Motion: [ ] Yes [X]

Upon the foregoing papers, it is ordered that: In this action, the plaintiff seeks to enforce four convertible promissory notes and five warrants which were issued to him in 2004 in return for a loan of \$100,000, made in four installments, which he made to the defendant Industrial Enterprises of America, Inc. ("IEA") when its corporate name was Advanced Bio/Chem, Inc. ("ABC"). The promissory notes provided that plaintiff had the option of converting, in any amount, the outstanding principal, along with the interest which had accrued, into IEA common stock upon written notice during the 30 days prior to the maturity date. Two of the notes provided for a conversion price of \$0.10 per share and the two others provided for a conversion price of \$0.05 per share. All four notes provided for an adjustment in the conversion price under a specified formula in the event that there are subsequently more than 25 million outstanding shares of IEA common stock. The five warrants provide for the purchase of up to 500,000 shares of IEA common stock at a price of \$0.50 per share. The first warrant was exercisable after February 24, 2004 and the other four were exercisable after October 26, 2005. All five warrants included a provision which allows plaintiff to pay for his warrant shares in stock rather than cash by electing to receive fewer shares than would be available on a cash-paid basis and using the cash value of the untaken shares to fund the cash price for the shares he receives. In addition, the plaintiff claims that the first warrant included a formula for calculating the number of shares available at any given time on a cashless basis which entitles him to receive approximately 15,000 times as many shares as he would be entitled to receive if he paid for those shares in cash.

The complaint alleges that plaintiff timely and properly sent the defendant notice of his intent to convert all of the notes into shares and to purchase shares pursuant to the warrants but that the defendant failed to honor these notices and has never delivered any shares of common stock to him. The complaint asserts three causes of action. The first is for breach of contract with respect to the promissory notes, the second is for breach of contract with respect to the warrants and the third is for attorney's fees.

In its answer, the defendant contends, *inter alia*, that the notes and warrants were issued pursuant to a fraudulent scheme undertaken by the two ABC officers and directors who then controlled the company to transfer ABC's assets without just consideration to another company which they were soon going to control, Power<sup>3</sup> Medical Products, Inc. ("Power"). According to IEA, the two officers, Stephen B. Rash and Ira Goldknopf, obtained the requisite approval of ABC's Board of Directors and shareholders for the sale of ABC's assets to Power by issuing ABC stock to a third-party without consideration in return for its agreement to approve the transaction and by having one of the directors, Helen Park, sign a consent form without knowing what she was signing. The defendant claims that the plaintiff was aware of this scheme and participated in it by providing the capital, by way of the four \$25,000 "loans," which allowed Rash and Goldknopf to pay ABA's debts and expenses while, at the same time, transferring all of its assets

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to power. The defendant claims that the value of the notes and warrants far exceeds the amount of the loan and that plaintiff must have known or realized that the transaction was not legitimate.

The defendant's answer includes four counterclaims. The first two allege, respectively, that the plaintiff aided and abetted Rash and Goldknopf both in their fraudulent scheme and in breaching their fiduciary duty to the defendant. The third alleges that plaintiff filed a schedule with the Securities and Exchange Commission which falsely claimed that he owned 96% of IEA's stock and that he did so for the sole purpose of injuring the company. The fourth counterclaim seeks the reformation of the first warrant insofar as it may contain a formula for calculating the number of shares available at any given time on a cashless basis which entitles plaintiff to receive approximately 15,000 times as many shares as he would be entitled to if he paid for those shares in cash. The plaintiff has now moved to dismiss all four counterclaims and for sanctions.

### Discussion

On his motion, the plaintiff argues that the first two counterclaims must be dismissed because he, ABC and Power signed a mutual release in which they discharged each other from any liability for claims arising out of the sale of ABC's assets to Power. He contends that the defendant cannot therefore assert any claim against him for aiding and abetting Rash and Goldknopf in their pursuit of this transaction. In opposition, the defendant does not deny that, by its terms, the release bars the company from asserting these two claims against plaintiff. Nevertheless, it argues that the release is voidable because the ABC chairman who signed it, Helen Park, breached her fiduciary duty to the company by doing so without having even read the document but merely following Rash's directions. The defendant suggests that the release was part of Rash and Goldknopf's scheme to defraud ABC.

The defendant's argument is without merit. The release was entered into in order to settle a claim which plaintiff had asserted against ABC and Power with respect to the transaction in which Power acquired ABC's assets. The defendant has not suggested that plaintiff's claim against ABC and Power was a sham. Thus, in return for plaintiff's agreement to discontinue his claim and release them from any liability in connection with their transaction, ABC and Power agreed to release the plaintiff from any similar liability. Although the defendant may now regret the fact that the release precludes it from asserting its first two counterclaims against the plaintiff, it has not even attempted to argue that the mutual release was not, at the time it was executed, in ABC's best interests since it settled a bona fide claim against the company. Under the circumstances, the court is persuaded that, as a matter of law, the release is enforceable and applicable to the first two counterclaims. The plaintiff's motion to dismiss these claims must therefore be granted.

As to the third counterclaim, the plaintiff's motion is moot since the defendant has withdrawn this claim.

As to the fourth counterclaim, there is no merit to the plaintiff's argument that it fails to state a cause of action. In asserting this claim, the defendant alleges that if, in fact, the first warrant is found to include a formula which entitles plaintiff to receive for a cashless purchase of stock approximately 15,000 times as many shares as he would be entitled to if he paid for those shares in cash, it was the result of a scrivener's error which did not reflect the parties' actual intention. It is well settled that a scrivener's error is subject to correction via the equitable remedy of reformation. *See 257 Park Avenue Assocs. v. Music Sales Corp.*, 24 AD3d 371, 372 (1<sup>st</sup> Dept 2005). *See also Nash v. Kornblum*, 12 NY2d 42, 46-47 (1962); *Clifford v. Montana Mills Bread Co.*, 263 AD2d 952 (4<sup>th</sup> Dept 1999). Since the fourth counterclaim therefore adequately states a cause of action for reformation, the plaintiff's motion to dismiss this claim must be denied.

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Accordingly, the plaintiff's motion to dismiss is granted to the extent that the first and second counterclaims are hereby dismissed. The motion is otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 10, 2007 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 3-12-07



MARYLIN G. DIAMOND, J.S.C.

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NON-FINAL DISPOSITION

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