

**Callisto Pharms., Inc. v Tapestry  
Pharms., Inc.**

2007 NY Slip Op 32275(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0604374/2006

Judge: Bernard J. Fried

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

**BERNARD J. FRIED**  
J.S.C.

PRESENT: \_\_\_\_\_

PART 60

Index Number : 604374/2006

CALLISTO PHARMACEUTICALS,

vs

TAPESTRY PHARMACEUTICALS,

Sequence Number : 003

DISMISS

TE \_\_\_\_\_  
1. NO. \_\_\_\_\_  
2. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUL 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/23/07

1 B. J. Fried

**BERNARD J. FRIED** J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON-FINAL DISPOSITION  
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
CALLISTO PHARMACEUTICALS, INC.

INDEX NO.: 604374-2006

Plaintiff,

-against-

TAPESTRY PHARMACEUTICALS, INC.,  
LEONARD P. SHAYKIN & KAI P. LARSON,

Defendants.

-----X

**APPEARANCES:**

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FRIED, J.:

Plaintiff, Callisto Pharmaceuticals, Inc. ("Callisto"), has brought this action for breach of contract, tortious interference with contract, and fraud against defendants, Tapestry Pharmaceuticals, Inc. ("Tapestry"), Leonard Shaykin, and Kai Larson.<sup>1</sup> Defendant Shaykin now moves to dismiss the Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

<sup>1</sup> The action against defendant Kai Larson was dismissed without prejudice pursuant to a stipulation by the parties (Exhibit A to Plaintiffs Aff. in Opp'n).

“When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff...‘the benefit of every possible favorable inference.’” AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 (2006) [quoting Leon v. Martinez, 84 N.Y.2d 83, 87 (1994)].

Plaintiff alleges that on September 25, 2006, the parties entered into a confidential disclosure agreement (“CDA”) regarding a possible business relationship. Defendant Larson, acting as Vice President and general counsel, signed the CDA on behalf of defendant Tapestry. Plaintiff claims that defendants breached the CDA when they used it to secure information concerning Donald Picker, an employee of plaintiffs, and about the work he was performing for Callisto.

Plaintiffs contend that this information was then used to secure Picker’s employment. Furthermore, plaintiffs maintain that defendants entered into secret negotiations with Picker, having knowledge of his employment contract with Callisto, and intentionally interfered with said contract by causing him to leave his position at Callisto, without any notice, during the week of December 18, 2006. Finally, plaintiff contends that defendants never intended to engage in any business relationship and only entered into the CDA to obtain access to the plaintiff’s books, records and projects. Defendants then used this information to “misappropriate vital intellectual property and employees from the plaintiff, such as hiring away Picker, despite his written employment agreement with the plaintiff.” (Compl. ¶ 22). Plaintiffs assert that they would never have disclosed such information had they known of defendants intention not to honor the agreement.

Defendant Shaykin argues that plaintiff's breach of contract claim should be dismissed because he cannot be held personally liable for a contract entered into by a corporation unless he intended to be bound individually. Defendant contends that this can be accomplished either through signing the contract in an individual capacity or by providing evidence that he intended to be personally liable for a breach of the contract. As a result, defendant Shaykin maintains that since he neither signed the contract, nor intended to be held personally liable for any potential breach, the cause action must be dismissed.

In opposition, plaintiff maintains that the language of the CDA plainly states that "the obligations contained in the Agreement shall extend to and be binding upon any employee, consultant, or affiliate of the Recipient [of confidential information]." (Aff. in Opp'n at 6). The CDA also requires that any employee receiving confidential information must be made aware of the agreement. Thus, plaintiff concludes that as the CEO of Tapestry, defendant Shaykin was directly involved in reviewing confidential information received from Callisto and therefore, must have been made aware of the agreement. As a result, plaintiff contends that the terms of the CDA hold defendant Shaykin personally liable.

"A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by a heightened pleading standard." Joan Hansen & Co., Inc. v. Everlast World Boxing Headquarters Corp., 296 A.D.2d 103, 109 (1st Dep't 2002). The general rule holds that an officer or director is only liable if he acts "for his personal rather than the corporate interests." Id. at 110. The First Department has also held that a corporate officer was not personally liable because there was not evidence that he intended to be individually bound. American Media Concepts, Inc. v. Atkins Pictures,

Inc., 179 A.D.2d 446, 448 (1st Dep't 1996). Additionally, the Court of Appeals has held that an individual officer is "not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual." Salzman Sign Co., Inc. v. Beck, 10 N.Y.2d 63, 67 (1961). Plaintiff does not dispute the fact that defendant Shaykin did not sign the CDA on behalf of Tapestry. Moreover, the Complaint fails to allege facts which demonstrate that defendant Shaykin acted based on his personal, rather than corporate, interests or intended to be individually bound. Because plaintiff's opposition fails to address these fatal deficiencies, the first cause of action alleging breach of contract is dismissed.

As to the second cause of action for tortious interference with contract, defendant argues that the Complaint is deficient in several respects. First, that it fails to allege the breach of a specific provision of Picker's contract. Second, defendant Shaykin alleges that the Complaint also fails to allege that, but for Shaykin's actions, Picker would not have breached his contract with Callisto. Therefore, defendant Shaykin maintains that plaintiff's failure to allege facts necessary to meet the pleading requirements is ground for dismissal.

In response, plaintiff argues that Picker's employment contract extended "through at least June 13, 2007, with certain provisions of notice to be followed" and that Picker breached his employment contract by failing to work until the contract period ended. (Aff. in Opp'n at 9; Compl. ¶ 8). Concerning the "but for" requirement, plaintiff points to paragraphs 9 and 15 of the Complaint. Paragraph 9 alleges that defendant Tapestry entered into secret communications with Picker, "whereby Picker would leave his employ with the

plaintiff, despite his written employment agreement, and enter into an agreement with Tapestry.” (Compl. ¶ 9). Paragraph 15 goes onto allege that defendant knew of, and intentionally interfered with, Picker’s employment contract by causing him to leave without any notice during the week of December 18, 2006. (Id. ¶ 15). According to plaintiff, these allegations satisfy the standard set forth in CPLR § 3014 requiring that, a “pleading shall consist of plain and concise statements.”

It is basic that claim for tortious interference with contract requires proof of: “(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procuring of the breach; and (4) damages.” White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, Jr., 87 N.Y.2d 744, 749-750 (1996). All of these elements must be pled in order to avoid dismissal, Bonanni v. Straight Arrow Publishers Inc., 133 A.D.2d 585, 587 (1st Dep’t 1987), and the Complaint must allege that the breach of contract would not have occurred but for the activities of the defendant. Wilmington Trust Co. v. Burger King Corp., 34 A.D.3d 401, 402-403 (1st Dep’t 2006); 68 Burns New Holding, Inc. v. Burns Street Owners Corp., 18 A.D.3d 857, 858 (2d Dep’t 2005); Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc., 299 A.D.2d 204 (1st Dep’t 2002). Finally, plaintiffs are required to allege the breach of a particular provision of the contract in order to state a cause of action for breach of tortious interference with contract. Cf. Kraus v. Visa Int’l Serv. Assoc., 304 A.D.2d 408 (1st Dep’t 2003); Lebow v. Kakalios, 156 A.D.2d 301, 302 (1st Dep’t 1989).

Although the Complaint appears to sufficiently allege the violation of a specific provision of Picker's employment agreement, it is insufficient because it fails to allege that, but for Shaykin's actions, Picker would not have breached his employment agreement. The claim that defendant Shaykin entered into secret negotiations with Picker and intentionally interfered with his employment agreement does not satisfy the "but for" requirement. Therefore, plaintiff's second cause of action for tortious interference with contract is dismissed.

Finally, regarding the third cause of action for fraud, defendant moves to dismiss on the ground that the claim is redundant, contending that the claim alleges only that defendants never intended to perform under the contract. However, defendant argues that if the Complaint does in fact state a claim for fraudulent inducement, plaintiff has failed to satisfy the pleading requirements for such a cause of action under CPLR § 3016(b).

Plaintiff maintains that the Complaint alleges more than the fact that defendants never intended to honor the CDA; Rather it alleges that defendants entered the CDA deceitfully in order to obtain the plaintiff's confidential business records and not for the purpose of entering into a business relationship. Furthermore, plaintiff argues that the Complaint satisfies the fraud pleading requirements.

"It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract. A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it..." Gordon v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436 (1st Dep't 1988); See also Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 A.D.2d 114, 115 (1st Dep't 1998). A valid

claim for fraud regarding a contract “must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract.” Orix Credit Alliance, Inc., 256 A.D.2d at 115.

Review of the Complaint shows that it sufficiently states a claim for fraud, separate from the breach of contract claim. Plaintiff not only alleges that the defendants never intended to enter into a business relationship (Compl. ¶ 20), but also that defendants sought to defraud plaintiff of its intellectual property and employees. (Id. ¶¶ 21-24). These allegations, while lacking in detail, are sufficient to state a cause of action separate from the claim that the defendants breached the CDA.

However, in order to sustain the cause of action for fraud, the plaintiff must allege, with particularity, that: (1) the opposing party made a misrepresentation or a material omission of facts which was false or known to be false by defendant, (2) the misrepresentation or omission was made for the purpose of inducing the claimant to rely upon it, (3) the claimant reasonably relied on the misrepresentation, and (4) injury. Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996). Section 3016(b) of the CPLR requires that a cause of action for fraud must be stated in detail. This section has been interpreted as requiring “only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud’ ” Lanzi v. Brooks, 43 N.Y.2d 778 (1977) [quoting Jered Contr. Corp. v. New York City Tr. Auth., 22


N.Y.2d 187, 194 (1968)]; Board of Managers of 411 East 53<sup>rd</sup> Street Condo. v. Dylan Carpet, Inc., 182 A.D.2d 551, 552 (1st Dep't 1992).

Plaintiff asserts that the false statement made by defendants was that they wanted to enter into a business relationship with plaintiff. (Aff. in Opp'n ¶ 30). Defendant correctly points out that this statement was attributed to all defendants and not to defendant Shaykin in particular. Nowhere does the Complaint allege that defendant Shaykin made such a statement. In addition, plaintiffs make no allegation as to the time or place of this statement. (Defendant's Reply M.O.L. at 12). As such, the Complaint fails to set forth in sufficient detail the first element of a cause of action for fraud. Thus, the motion to dismiss plaintiff's third cause of action for fraud is granted.

In the event that the Complaint is determined to be insufficient, Plaintiff requests leave to amend pursuant to CPLR § 3025 which provides that, leave to amend a Complaint "shall be freely given upon such terms as may be just..." While leave to amend may be freely granted, in order to conserve judicial resources, the moving party is required to support such a motion with an affidavit of merits. Non-Linear Trading Co., Inc. v. Braddis Assoc., Inc., 243 A.D.2d 107, 116 (1st Dep't 1998). Here, no such affidavit has been submitted. Therefore, the request for leave to amend the pleadings is denied.

Accordingly, defendant's motion to dismiss, as to Defendant Leonard P. Shaykin, is granted in all respects.

7/23/07

  
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J.S.C.  
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J.S.C.

**FILED**  
JUL 25 2007  
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