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

PRESENT: HON. RICHARD B. LOWE, III PART 57

Index Number : 600173/2008
SCHIMMEL, PAUL R.
vs
PFIZER INC.,
Sequence Number : 003
DISMISS

INDEX NO.

MOTION DATE 5/16/08

MOTION SEQ. NO.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/21/08

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 56

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PAUL R. SCHIMMEL, PAUL SCHIMMEL PROFIT SHARING PLAN, DAVID H. MACK, ALTA CALIFORNIA PARTNERS III, L.P., ALTA EMBARCADERO PARTNERS II, LLC, JOHN PARRISH, PAUL GLIDDEN AS TRUSTEE OF THE THE GLIDDEN FAMILY REVOCABLE TRUST, KARLA EWALT, CYNTHIA P. DUGAN, PETER L. DUGAN, CRAIG L. GROSVENOR, TRUSTEE FBO CRAIG L. GROSVENOR TRUST DATED 8/25/89, CHRISTINE PARRISH, PHYLLIS D. PARRISH, PARISH FAMILY TRUST, KATHERINE SCHIMMEL-BAKI, K. LEAH SCHIMMEL, ERIK J. SORENSEN, JAMIE WILLIAMSON, ALISON BATES, REBECCA ALEXANDER, KATHLEEN T. MULLIGAN, TOM JUROS, SINCLAIR DeBORDENAVE and FRANCELLA OTERO,

Plaintiffs

-against-

PFIZER, INC.,

Defendant.

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Index No.: 600173/08

Hon. Richard B. Lowe, III:

Motion sequence 002 and 003 are consolidated for disposition. In motion sequence 002, Defendant Phizer Inc.(Phizer) moves for an order pursuant to CPLR 3214(b) staying disclosure pending disposition on its motion to dismiss. In motion sequence 003, Phizer moves pursuant to CPLR 3211(a)(1), 3211(a)(7), and 3016(b) and for a declaratory judgment with respect to limiting its potential liability to $8.5 million.

BACKGROUND

Plaintiffs are the former shareholders of a biopharmaceutical start-up company called

Angiosyn, Inc. Angiosyn was established to serve as the ownership and development vehicle for a fragment of a naturally growing protein known as tryptophanyl-tRNA (T2), whose primary application was expected to be for age-related macular degeneration, with some potential effect in oncology as well. Angiosyn conducted various pre-clinical experiments with T2, and the results indicated potential for further research.

In the middle of 2004, Angiosyn began looking for financing to conduct additional research with T2, and, according to the complaint, several venture capital companies were interested in investing in Angiosyn. At the same time, defendant also expressed interest in T2, but wanted to acquire the exclusive rights to T2 rather than invest in Angiosyn. Plaintiffs indicate that they decided to sell the rights to T2 to defendant rather than to acquire new capital to conduct their own research, because defendant convinced them of the benefits of that transaction.

Plaintiffs and defendant entered into an extensive period of negotiation, during which time plaintiffs allege that defendant presented them with a detailed development plan for T2, indicating that T2 would be one of defendant's top priorities.

The parties eventually executed a Merger Agreement, by which defendant purchased Angiosyn outright for an up-front payment of $10 million. Plaintiffs, the Angiodyn shareholders, would also be entitled to receive various contingent payments, depending on whether T2 development reached certain milestones specified in the Agreement. The first milestone payment would be a payment of $8.5 million, due within 30 days after the completion of a Phase 1 Clinical Study for the first product for the ophthalmology field, and each successive milestone payment was contingent upon the completion of a development step. Additionally, if

T2 were ever developed into a commercial product, plaintiffs would receive a certain percentage of the sales as a royalty, and if sales ever exceeded $500 million in one calendar year, plaintiffs would be entitled to certain additional payments.

The Merger Agreement gave defendant the exclusive right and full discretion to develop T2 as it saw fit. Section 7.6 of the Agreement states:

> "[c]ommencing upon the Closing, [defendant] shall have the exclusive right and responsibility to plan and implement all research, development, manufacturing, marketing and commercialization activities for any and all [T2] products ... . All decisions with respect to the creation, modification and implementation of all such activities shall be made by [defendant] in its sole discretion."

Pursuant to the Agreement, the only obligation placed on defendant with respect to T2's development was to use "commercially reasonable efforts" to develop T2 in the ophthalmology field and one other field. "Commercially reasonable efforts" is defined in Section 1.25 of the Agreement as

> "those efforts and resources that [defendant] would use were it actively developing or commercializing its own pharmaceutical products that are of similar stages of product life and market potential as [T2], taking into account product labeling, present and future market potential, past performance, financial return, present and future regulatory environment and competitive market conditions in the applicable Field, all as measured by the facts and circumstances at the time such efforts are due."

The Merger Agreement also included general confidentiality and merger clauses.

After two years, defendant allegedly determined that T2 would not be able to be developed into a commercially viable product, and, accordingly, on December 15, 2006,

defendant wrote to plaintiffs informing them of its decision to discontinue the development of T2 pursuant to Section 7.6 of the Agreement. In January, 2008, plaintiffs instituted the present lawsuit, asserting three causes of action: breach of contract; deceit and fraudulent inducement; and tortious interference with prospective business advantage.

Defendant moves to dismiss the action, pursuant to CPLR 3211 (a) (1) and (a) (7), and CPLR 3016 (b), or, in the alternative, to have the court declare that the amount of potential damages recoverable by plaintiffs is limited to the $8.5 million indicated in the Agreement as the first milestone contingent payment, and also moves to stay disclosure, pursuant to CPLR 3214 (b) and Commercial Division Rule 11 (d) pending disposition of its motion to dismiss.

DISCUSSION

Stay of Discovery

For reasons stated on the record of June 9, 2008, the motion is denied.

Motion to Dismiss

CPLR 3211(a) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

> (1) a defense is founded upon documentary evidence; or ...
> (7) the pleading fails to state a cause of action ... .

Under CPLR 3211 (a)(1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *(Leon v Martinez*, 84 NY2d 83 [1994]). As stated in *Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000),

> "[t]he court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable

> inference, fit within any cognizable legal theory *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211 (a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88)."

To defeat a pre-answer motion to dismiss brought pursuant to CPLR 3211 (a)(1), the opposing party need only assert facts which "fit within any cognizable legal theory [internal citations omitted]." *(Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 [1st Dept 1999]). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a)(1) is precluded. *(Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

Breach of Contract

Defendant asserts that, because the Merger Agreement provided it with the sole discretion to develop, or not develop, T2, plaintiffs may not maintain a cause of action for breach of contract. However, as even defendant points out, that "discretion" was defined as using "commercially reasonable efforts" as defendant would use for any of the products it developed in-house.

Plaintiffs assert that defendant did not utilize "commercially reasonable efforts" as indicated by certain plans shown to plaintiffs during the negotiations as indications of defendant's projected development ideas. Whether defendant used "commercially reasonable efforts," as defined by the Agreement, is generally a question of fact. *(See Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112 [1995]; *Widewaters Prop. Dev. Co. v Katz*, 38 AD3d 1225 [4th Dept 2007]). Therefore, defendants motion to dismiss the first cause of action

for breach of contract is denied.

Tort Causes of Action - Choice of Law

With respect to the tort causes of action, Plaintiffs argue that California law should be applied to decide defendant's motion. Section 12.1 of the Merger Agreement states:

> "Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York."

Although New York has a strong public policy favoring the enforcement of choice of law contractual provisions (*Finucane v Interior Construction Corp.*, 264 AD2d 618 [1st Dept 1999]), such a provision does not preclude plaintiffs from asserting a tort cause of action based on California statutes and laws (*Twinlab Corporation v Paulson*, 283 AD2d 570 [2nd Dept 2001]). Further, New York law holds that causes of action in negligence accrue in the place of injury. *(Knieriemen v Bache Halsey Stuart Shields Incorporated*, 74 AD2d 290 [1st Dept 1980], *overruled on other grounds by Rescildo v R.H. Macy's*, 187 AD2d 112 [1st Dept 1993]). Plaintiffs have asserted, and defendant has not denied, that the plaintiffs reside in California, Angiosyn is a California corporation, the Agreement was negotiated face-to-face in California, and defendant's conduct allegedly prevented plaintiffs from securing agreements to finance the California operations, including one with another California company. Under these circumstances, there are significant contacts with California to make California law the appropriate one for determination of plaintiffs' two tort claims. *(Schultz v Boy Scouts of America, Inc.,* 65 NY2d 189 [1985], *K.T. v Dash*, 37 AD3d 107 [1st Dept 2006]). It is noted that neither side disputes that New York law governs the breach of contract cause of action discussed above.

Deceit/Fraudulent Inducement

Plaintiffs' second cause of action is for deceit, fraudulent inducement. Under California law, "[f]raud allegations must be pled with more detail than other causes of action. The facts constituting the fraud, including every element of the cause of action, must be alleged factually and specifically [internal quotation marks and citations omitted]." *(Apollo Capital Fund LLC v Roth Capital Partners, LLC*, 158 Cal App 4th 226, 240 [2d App Dist 2007]). This is also true under New York law, as stated in *Friedman v Anderson* 23 AD3d 163, 166 (1st Dept 2005):

> "[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9[1st Dept 1999]) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud' (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994])."

In the instant case, plaintiffs have claimed that defendant fraudulently induced them to enter into the Merger Agreement by stating, among other things, that it would commence Phase 1 of the study of T2 immediately, that it would provide its staff with a budget sufficient to develop T2, and that it would follow the development chart shown to plaintiffs during negotiations, all of which, plaintiffs allege, defendant never intended to do.

However, in order to maintain a cause of action for fraudulent inducement, the plaintiff must plead facts which "show how, when, where, to whom, and by what means the representations were made." *(Lazar v Superior Court*, 12 Cal 4th 631, 645 [1996]).

> "A promise of future conduct is actionable as fraud only if made without a present intent to perform. A declaration of intention, although in the nature of a promise, made in good faith, without the intent to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud. Moreover, something more than nonperformance is required to prove the defendant's intent not to perform his promise. If plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance, he will never reach a jury [internal quotation marks and citations omitted]."

(Magpali v Farmers Group, Inc., 48 Cal App 4th 471 [1996]).

In the instant matter, plaintiff has only offered conclusory statements that defendant did not intend to perform; there are no specific facts stated that support this contention. Therefore, defendant's motion with respect to dismissal of the cause of action for fraudulent inducement is granted.

Plaintiffs have also alleged a cause of action based in deceit, a subset of negligent misrepresentation, an action that is recognized under California law. (*Anderson v Deloitte & Touche LLP,* 56 Cal App 4th 1468 [1st App Dist 1997]). Pursuant to California law, no actual intent to defraud need be shown, merely negligent misrepresentation of the facts that induced the injured party to act. *(See Bily v Arthur Young & Co.*, 3 Cal 4th 370, 834 P2d 754 [1992])(scienter is not an element of a cause of action for deceit). This cause of action "does not require knowledge of falsity. A defendant who makes false statements honestly believing them to be true, but without reasonable ground for such belief ... may be liable for negligent misrepresentation [internal quotation marks and citation omitted]." *(Apollo Capital Fund LLC v Roth Capital Partners, LLC*, 158 Cal App 4th 226, *supra*).

Although a cause of action for deceit does not exist under New York law, because

California law is to be applied to plaintiffs' tort claims, defendant's motion with respect to this cause of action is denied.

Tortious Interference with Prosepective Business Advantage

Plaintiffs have also alleged tortious interference with prospective business advantage.

> "To prevail on a cause of action for intentional interference with prospective economic advantage in California, a plaintiff must plead and prove (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused be the defendant's acts [citation omitted]."

(Reeves v Hanlon, 33 Cal 4th 1140, 1152 n6, 95 P3d 513 [2004]).

In their complaint, plaintiffs fail to allege that defendant had any specific knowledge of plaintiffs' prospective relationship with any particular venture capital organization, one of the elements necessary to support this cause of action. The complaint merely states that plaintiffs told defendant that they had "taken significant steps towards obtaining additional financing." (Complaint ¶ 59).

Although, according to the elements of this tort, no actual contract need exist with a third party *(Roth v Rhodes*, 25 Cap App 4th 530 [1994]), plaintiffs must allege some action that disrupted or diverted their business relationship with another, outside the boundaries of competition. (*Settimo Associates v Environ Systems, Inc.*, 14 Cal App 4th 842 [1993]). In the instant matter, plaintiffs themselves decided to contract with defendant rather than to continue negotiations with the other prospective financial institutions. Defendants did not engage in any

conduct that caused the third parties to withdraw any prospective offers. Consequently, defendant's motion to dismiss this cause of action is granted.

Declaratory Relief - Cap of Potential Liability

Lastly, defendants have requested declaratory relief that a cap of $8.5 million be put on their potential liability, the sum that it would have had to pay plaintiffs under the first milestone payment designated in the Merger Agreement.

Declaratory judgments may not be granted prior to the joinder of issue (*Durkin v Durkin Fuel Acquisition Corp.*, 224 AD2d 574, 575 [2d Dept 1996]), and since defendant has not requested such relief in a pleading, this request must be denied. *(McHugh v Weissman,* 46 AD3d 369 [1st Dept 2007]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted as to the second cause of action alleging fraudulent inducement and the third cause of action for tortious interference with prospective business advantage, but is otherwise denied; and it is further

ORDERED that portion of defendant's motion for a declaratory judgment with respect to limiting its potential liability to $8.5 million is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days

after service of a copy of this order.

Dated: August 21, 2008

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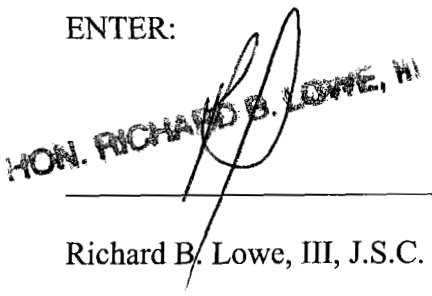

Richard B. Lowe, III, J.S.C.