

Sina Drug Corp. v Mohyuddin

2010 NY Slip Op 30383(U)

February 11, 2010

Supreme Court, Nassau County

Docket Number: 008814/2006

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

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PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

SINA DRUG CORP. d/b/a ONCOMED
PHARMACEUTICAL SERVICES, and
KAVEH ASKARI,

Plaintiffs,

INDEX NO.: 008814/2006
MOTION DATE: 12/07/2009 and
01/19/2010
MOTION SEQUENCE: 005 and 006

-against-

MOHAMMAD ALI MOHYUDDIN,
TONYA KILLIKELLY, SORKIN'S RX LTD.
and MUHAMMAD TY YEB,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmation, Affidavit & Exhibits Annexed	1
Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	2
Affirmation in Opposition of William D. Wexler & Exhibits Annexed	3
Reply Affirmation of Edward G. McCabe, Affirmation in Support of Robert C. Reichelscheimer & Exhibit Annexed	4

PRELIMINARY STATEMENT

By Order to Show Cause returnable on December 7, 2009, Defendants seek an Order enjoining Plaintiffs from disposing of any part of Sina Drug Corp., Sina Drug Corp., d/b/a Oncomed Pharmaceutical Services, and/or Oncomed Pharmaceutical Services without depositing a sum equal to 18% of the sales proceeds, the claimed interest of Mohammad Ali Mohyuddin ("Mohyuddin"). This application is unopposed and the motion is granted.

In Motion Sequence # 6 Defendants seek summary judgment dismissing Plaintiff's First and Third Causes of action as to each Defendant, and granting Mohyuddin judgment on his First, Second, Third and Fourth Counterclaims, and awarding him an accounting of the profits of Sina Drug Corp. since May 2006. Plaintiffs oppose the summary judgment on the ground that there exist questions of fact which preclude such relief, and that such motion is premature in the absence of completed discovery.

Defendants reply that discovery is complete, the matter has been certified for trial, and the claimed open item are depositions of non-party witnesses, which Plaintiffs have had three and one-half years to complete. By its March 23, 2007 Decision and Order, this Court dismissed the Second, Fourth, Fifth, Sixth and Seventh Causes of Action. Defendant now seeks dismissal of the First and Third.

BACKGROUND

Exhibit "A" to the Order to Show Cause and "E" to the summary judgment motion is a cryptic handwritten note which serves as the basis for Mohyuddin's claim to be the owner of 18% of Sina Drug Corp. It provides as follows: "I Kaveh Askari do agree that 18% of Sina Drug Corp. Dba Oncomed Pharmaceutical Services belongs to Ali Mohyuddin.

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/s/ Kaveh Askari

I have told this fact to my wife Eleanor Askari

Saba, Donna, Sophia"

Ali is a medical doctor and clinical pharmacist, with training in chemo-pharmacy. He began working for Sina Drug in or about April 2003, and continued there until May 2, 2005. Sina is a provider of pharmaceutical services, including infusion therapy, which focuses on the pharmacological treatment of chronic diseases. The field is claimed to be a narrow one, requiring the skill of oncologists and hematologists. When Ali left Sina, he associated with Sorkin's, a retail pharmacy, which Plaintiffs claim would have been unable to provide services of infusion therapy without the efforts of defendants Ali and Killikelly, a technician previously employed by Sina.

Plaintiff included in its Amended Verified Complaint, allegations of Conspiracy against Ali and Killikelly; Defamation against Ali; Conversion of proprietary information, including

recommending physician lists, and the business contact book belonging to Askari; misappropriation of trade secrets; tortious interference with contractual relations; tortious interference with prospective contractual relations; and, breach of duty of fidelity to employer. Of these, only conspiracy and conversion of proprietary information remain. Defendants also seek summary judgment on their First through Fourth Counterclaims. They are: 1) a declaratory judgment to the effect that Ali has a true and equitable 18% ownership in Sina Drug; 2) an accounting from his date of termination to the present and dividends and monies removed from Sina during the same period; 3) breach of fiduciary duty against Askari; and 4) for unjust enrichment in that as Sina's principal officer, Askari has refused to recognize Ali's 18% interest in Sina or distribute to him his 18% share of Sina profits.

DISCUSSION

Motion to Dismiss the First and Third Causes of Action

Ali's motion to dismiss the First Cause of Action, conspiracy, is granted. The other remaining cause of action, conversion of proprietary information, is alleged only against defendant Killikelly. Ali cannot be responsible for a conspiracy unless it is a conspiracy to commit some tort. No such allegation is made in the complaint. Conspiracy is not an independent cause of action under New York law. (*Kestenbaum v. Suroff*, 268 A.D.2d 560 [2d Dept. 2000]).

The motion to dismiss the Third Cause of Action, for conversion, against Tonya Kilikelly, is also granted. Plaintiffs have wholly failed to identify what was taken by her, and how they were thereby damaged. In order to recover for conversion, one must establish plaintiff's possessory right or interest in the property and defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. (*Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50 (2006)).

The Third Cause of Action alleges that after Ali left the employ of Plaintiff, defendant Killikelly removed proprietary information from the office, and then purged from the computer system, the names, addresses, and telephone numbers of "at least 408 of Sina's current patients, proprietary forms used by Sina in its business and other data or documents containing healthcare information and the identification of patients in violation of HIPAA and the privacy rights of

Sina's patients".

Plaintiff Askari was deposed with respect to the items allegedly converted, and was unable to identify what was taken.¹ Despite the language of the complaint, Askari was at a loss to identify any particular documents, much less how the exercise of dominion over them by Killikelly in any way led to damages. In the face of non-conclusory allegations as to theft of proprietary information, and its impact upon the plaintiff, the claim for conversion must be dismissed. (*Algomod Technologies Corp. v. Price*, 65 A.D.3d 974, 975 [1st Dept. 2009]).

Motion for Summary Judgment on the Counterclaims

The First Counterclaim is for Declaratory Judgment that Ali Mohyuddin has an 18% interest in Sina Drug, and is entitled to all rights and benefits of a shareholder, including the issuance of shares of stock representing such interest, as well as the distribution of monthly and annual net profits on a going forward basis.

The Second Counterclaim demands a judgment compelling Defendants to provide access to Sina's books and records and a full financial accounting of monies received and retained by the company as well as a statement of all dividends paid and monies removed from the company from the date Mohyuddin received an interest in the company to the present.

The Third alleges breach of fiduciary duty in that Defendant Askari has paid himself dividends and diverted funds from Moyhuddin and deprived him of the benefits of stock ownership.

The Fourth Counterclaim alleges unjust enrichment to the extent that Askari received any portion of Sina's net profits or enjoyed benefits which should have been conferred upon Moyhuddin, and was thereby unjustly enriched.

Declaratory judgments are intended to establish respective legal rights of the parties to a justiciable controversy. CPLR § 3401; 43 N.Y.Jur2d Declaratory Judgments § 4.22. "The generalized purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations". (*James v. Alderton Dock Yards*, 256 N.Y. 298 [1931]).

¹ Affirmation of Edward G. McCabe, Esq. at p. 6 and transcript at Exh. "F".

In this case the parties are entitled to a determination of their respective statuses as shareholders of Sina Drug. Plaintiffs argue that there has been no consideration for the issuance to Moyhuddin of an 18% interest in Sina; but the deposition testimony of Askari² makes it clear that there were ongoing negotiations with Moyhuddin in an effort to bring him to work for Sina. In Askari's words "(i)t was late November that I reached an agreement with him at \$2,400 a week and 18 percent". While there was some further testimony that they "did not have an agreement but a handshake", the simple fact is that Moyhuddin then began working for Sina.

In retrospect, Askari may regret an outright conveyance of 18% of the shares of Sina when Mohyuddin terminated his employment in May 2006, about three years after starting. The writing by Askari³ is clear and unambiguous, and imposes no additional conditions upon the terms of employment. The Court determines that Mohyuddin is an 18% shareholder of Sina Drug Corp. and Plaintiff Askari is directed to issue a certificate in the name of Mohammad Ali Mohyuddin representing 18% of the outstanding shares.

Because Mohyuddin's interest is less than 20%, he is not entitled to seek a statutory dissolution of the corporation. General Business Law § 1104-a. As a consequence, the right to purchase option by the majority owner has not been triggered. (*Fedele v. Seybert*, 250 A.D.2d 519 (1st Dept. 1998)). In the absence of a remedy at law to force dissolution, Mohyuddin is relegated to the equitable relief of accounting. Defendant's motion for an accounting is granted. To the extent that an accounting may reveal that there have been profits, dividends or other distributions to shareholders, to the exclusion of Mohyuddin, Plaintiffs are directed to redistribute the funds so as to reflect the entitlement of Mohyuddin as a holder of 18% of the shares of Sina Drug Corp.

It is clear that Plaintiffs have breached their fiduciary obligations to a minority shareholder, and, to the extent they have retained or diverted dividends or profits due to the minority shareholder, they have been unjustly enriched at Defendants' expense.

This matter is hereby referred to Frank Schellace, Esq., a Court Attorney/Referee, for the purpose of calculating the amount of dividends, profits, or other distribution to which Mohyuddin,

² P/O Exh. "F" to Motion for Summary Judgment.

³ Exh. "E" to Motion for Summary Judgment.

as an owner of 18% of the shares of Sina Drug Corp., d/b/a Oncomed Pharmaceutical Services, is entitled for the period April , 2002 through May 3, 2005. The parties are directed to contact Mr. Schellace at (516) 571-2725 for scheduling of further proceedings.

This constitutes the Decision and Order of the Court.

Dated: February 11, 2010



J.S.C.

ENTERED
FEB 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE