Matter of Tapimmune Inc. v Island Capital Mgt., LLC
2013 NY Slip Op 32979(U)
April 8, 2013
Sup Ct, New York County
Docket Number: 654460/12
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

MATTER OF TAPIMMUNE INC

-v-

MICHAEL GARDNER

INDEX NO. 654460/12

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ie by petitioner for a preliminary injunction is DENIED per the attached Decision and Order.

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

Dated: April 8, 2013

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

In the Matter of the Application of TAPIMMUNE INC.,	
Petitioner,	Index No. 654460/12
pursuant to CPLR § 7502 (c) for an injunction in aid of arbitration against MICHAEL GARDNER,	DECISION AND ORDER
Respondent,	Motion Sequence No. 001
and	
ISLAND CAPITAL MANAGEMENT, LLC d/b/a ISLAND STOCK TRANSFER,	
Nominal Respondent.	

MELVIN L. SCHWEITZER, J.:

TapImmune Inc. (TapImmune) is a Nevada biotechnology corporation engaged in developing vaccine treatments for various types of diseases. It seeks here a preliminary injunction prohibiting the respondents from selling, transferring, assigning, encumbering or otherwise disposing of 5.6 million common shares of its stock representing 9.9% of its outstanding shares. In an ancillary arbitration proceeding TapImmune seeks the return of those shares issued to respondent Michael Gardner (Mr. Gardner).

Background

TapImmune, in order to continue product research and development, had sought additional sources of capital financing. To that end, TapImmune entered into consulting agreements with Mr. Gardner, as well as Sailesh Barchha (Mr. Barchha) and George Cardona. Mr. Gardner's Consulting Agreement (Agreement) was executed on May 8, 2012. After a

bridge financing transaction failed to close, and Mr. Gardner refused to modify an anti-dilution provision, TapImmune terminated the Agreement on September 18, 2012.

The Agreement provided that Mr. Gardner would:

1. Assist TapImmune in long-term financial planning, and expansion;

2. Review and assist in the preparation of budgets and financial forecasts prepared by employees of TapImmune;

3. Review internal and other financial statements prepared by employees or consultants to TapImmune;

4. Assist management and others in the preparation of presentations;

5. Work with TapImmune's counsel and auditors in conjunction with the preparation of any documentation referred to above;

6. Provide advice to TapImmune's management concerning the proposed agreements;

7. If requested by TapImmune , communicate, correspond and negotiate on behalf of TapImmune with regard to the potential acquisition or sale of other businesses and entities; and

8. If requested, evaluate the financial condition and review the financial information supplied relating to the business' entities referred to in Section 8 [sic] above.

The Agreement provided that TapImmune issue 9.9% of its common shares to Mr. Gardner, subject to an anti-dilution provision. The anti-dilution provision became a major obstacle to securing investors, but Mr. Gardner consistently asserted his right to the shares pursuant to the terms of the Agreement.

The consulting agreement between TapImmune and Mr. Barchha is virtually identical to Mr. Gardner's agreement, except that Barchha's agreement includes an additional obligation:

> Assist management and its counsel as requested in negotiating any proposed equity or debt financing, whether such financing involves conventional institutional loans or public or private offers of securities; . . .

One week before Mr. Gardner would have been free to transfer his shares, the court granted a temporary restraining order preventing Mr. Gardner and Nominal Respondent Island Capital Management, LLC d/b/a Island Stock Transfer from removing a restrictive legend with respect to transfers from the stock certificates. T.R.O., Dec. 20, 2012. On January 22, 2013, TapImmune filed its Demand for Arbitration and Statement of Claim against Mr. Gardner with the American Arbitration Association.

Discussion

TapImmune, in seeking a preliminary injunction prohibiting Mr. Gardner and Nominal Respondent Island Capital Management, LLC d/b/a Island Stock Transfer from disposing of the 5.6 million common shares in aid of its arbitration seeking the return of those shares, argues that unless preliminary relief is granted, Mr. Gardner will sell or transfer his stock interest, thereby making it impossible for TapImmune to reclaim the shares should TapImmune ultimately prevail on the merits in arbitration.

Applicability of Traditional Equitable Elements

As an initial matter, the court must determine the legal standard applicable to the provisional relief sought here. CPLR 7502 (c) governs requests for preliminary injunctions in connection with pending arbitration proceedings. It provides, in relevant part:

> The supreme court . . . may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application . . . except that the sole ground for the granting of the remedy shall be stated above.

CPLR 7502 (c). Article 63 is a formulation of the traditional equitable criteria necessary for provisional relief: (1) irreparable harm; (2) a likelihood of success in arbitration; and (3) a balance of equities in favor of the moving party. *See e.g. Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 (2005) (citing CPLR 6301).

TapImmune argues that CPLR 7502 (c) merely requires a finding that an arbitration "award may be rendered ineffectual" if injunctive relief is not granted. Mr. Gardner argues that, in addition to satisfying the "rendered ineffective" standard, TapImmune must also satisfy the three traditional elements for injunctive relief, including a likelihood of success on the merits.

"New York case law is at best ambivalent about whether or not CPLR 7502 (c) requires that traditional equitable criteria for the granting of temporary relief be met." *S.G. Cowen Sec. Corp. v Messih*, 224 F3d 79, 82 (2d Cir 2000). Prior to *Messih*, some New York courts expressly refrained from considering the traditional equitable criteria, while others continued to consider factors such as irreparable harm and a likelihood of success. *Compare Drexel Burnham Lambert Inc. v Ruebsamen*, 139 AD2d 323 (1st Dept 1988) ("CPLR 6301 [is] simply inapplicable to the instant situation") *with In re Cullman Ventures, Inc.*, 252 A2d 222, 230 (1st Dept 1998) ("we apply the general criteria governing the issuance of injunctive relief to an application for a preliminary injunction under CPLR 7502 (c)"). After conducting an analysis of New York law, the court in *Messih* held that preliminary relief in connection with arbitration proceedings "can be denied under the traditional standards and granted only if those standards and the 'rendered ineffectual' test are met." *Messih*, 224 F3d at 82.[1] New York courts have

[1]Because the Second Circuit determined that certification of the procedural question to the New York Court of Appeals was "not feasible in light of the need for prompt resolution," there is uncertainty regarding the applicability of the holding. *Messih*, 224 F3d at 83 n.1; *see AIM Int'l Trading LLC v Valcucine SpA*, 188 F Supp 2d 384, 386 n.4 (SDNY 2002) ("this argument is of no moment because. . . . federal rather than state law governs the future course of proceedings"); *In re M.B. Int'l W.W.L.*, 2012 WL 3195761, at *9 n.4

since adopted an inquiry that incorporates both the traditional equitable criteria as well as whether an arbitration award would be "rendered ineffectual." *See e.g. Erber v Catalyst Trading, LLC*, 303 AD2d 165, 165 (1st Dept 2003).

In addition to the statute's explicit mention of the equitable provisions embodied in article 63, the legislative history strongly suggests that CPLR 7502 (c) was intended to incorporate the traditional equitable elements. CPLR 7502 (c) was crafted to "enabl[e] the supreme court, *upon meeting the standard of proof currently required by Articles 62 and 63* to provide for remedies in conjunction with the arbitration." *Messih*, 224 F3d at 83 (citing Committee on Civil Practice Law and Rules, N.Y. State Bar Association, Legislation Report No. 57 (1985)). Rather than eviscerating the traditional equitable criteria for preliminary injunctions, the New York legislature sought to provide an avenue for preliminary relief in connection with arbitration proceedings that would mirror the procedures already available in the courts. *Id.* (citing 1985 Report of the Advisory Committee on Civil Practice to the Chief Administrator of the Courts of the State of New York, at 112). Nothing in the legislative history suggests that a completely novel legal standard was ever envisioned. Given these circumstances, it seems likely that the New York legislature intended to incorporate the traditional requirements for an application for preliminary relief into CPLR 7502 (c).

Such an interpretation of CPLR 7502 (c) is bolstered by concerns that disregarding equitable factors like irreparable harm and the likelihood of success may offend the Due Process Clause of the Fourteenth Amendment. If an issuing court need not consider the traditional

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(SDNY Aug. 6, 2012) ("the court's conclusion that CPLR 7502 (c) incorporates the equitable criteria traditionally required for granting preliminary injunctive relief renders the federal-/state-law distinction largely academic"). Nonetheless, the interpretation of section 7502 in *Messih* contains cogent analysis and is helpful to this inquiry.

equitable criteria, a litigant otherwise unable to state a colorable claim could theoretically obtain preliminary relief at considerable harm to the enjoined party. *See Messih*, 224 F3d at 84. In light of its legislative history, it is reasonable to interpret CPLR 7502 (c) to require the traditional equitable elements and thereby avoid any constitutional conflicts.

The court finds that CPLR 7502 (c) requires an applicant to demonstrate the three traditional equitable criteria: (1) irreparable harm; (2) a likelihood of success in arbitration; and (3) a balance of equities in favor of the moving party. *See e.g. Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 (1st Dept 2009) (applying both the "rendered ineffective" standard as well as the traditional equitable criteria in granting a preliminary injunction in aid of a pending arbitration).

Likelihood of Success on the Merits

The gravamen of TapImmune's claims is Mr. Gardner's alleged failure to provide meaningful services in locating and securing investors for TapImmune. TapImmune will argue in arbitration that the Agreement is subject to rescission on the grounds that: (1) the Agreement was fraudulently induced by misrepresentations and omissions by Mr. Gardner; (2) the Agreement is unenforceable because TapImmune did not receive consideration; and (3) Mr. Gardner materially breached the Agreement.[2]

[2]In its Demand for Arbitration and Statement of Claim, TapImmune asserts that it will also argue that the Agreement is unconscionable and therefore unenforceable. The claim for unconscionability is duplicative of the claim that the Agreement lacks mutual consideration; both claims derive from the allegations that TapImmune did not receive any benefit from the Agreement. TapImmune's argument concerning unconscionability is implicitly addressed in the court's discussion of the claim that the Agreement is subject to rescission for lack of mutual consideration. *See Mandel v. Liebman*, 303 NY 88, 93-94 (1951) ("courts sometimes look to the adequacy of the consideration in order to determine whether the bargain provided for is so grossly unreasonable or unconscionable . . . as to be unenforcible [sic]").

As demonstrated below, each of TapImmune's claims for rescission of the Agreements fail as a matter of law. TapImmune fails to demonstrate a likelihood of success in arbitration with respect to any one of its claims for rescission. Because a likelihood of success in arbitration is an essential requirement for provisional relief pursuant to CPLR § 7502, the court denies the petition for a preliminary injunction.

Claims of Fraud Regarding the Consulting Agreement

TapImmune argues "that the Consulting Agreement is subject to rescission because it was wrongfully induced by misrepresentations and misleading omissive statements . . . concerning, *inter alia*, Gardner's questionable background, his access to investors, and his ability to secure the prompt infusion of capital that TapImmune sought." Because each claim for fraud fails as a matter of law, TapImmune fails to demonstrate a likelihood of obtaining rescission on these grounds.

To obtain rescission based on a claim of fraudulent inducement of contract, a plaintiff must demonstrate that the allegedly insincere promise of future performance is collateral to the contract between the parties. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 (1st Dept 2012). A statement of future intentions, promises or expectations will not sustain an action for fraud unless it is made with the intent not to perform. *P. Cimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 385-86 (1st Dept 1994). "Statements of prediction or expectation" regarding acquisitions of financing are not actionable. *See Naturopathic Labs. Int'l, Inc. v SSL Americas, Inc.*, 18 AD3d 404, 404 (1st Dept 2005) (dismissing fraud claim based on statements "that financing 'would be no problem'").

TapImmune has not demonstrated a likelihood of success on its claim for fraudulent inducement because Gardner's alleged statements are not collateral to the Agreement.

Importantly, the agreement executed between TapImmune and Sailesh Barchha expressly provides for an obligation to assist "in negotiating any proposed equity or debt financing." The Agreement does not include an obligation to obtain financing, much less a statement regarding an ability to secure capital investments. Because the two consulting agreements are otherwise identical, the omission of this provision indicates that any promise to secure future financing is not collateral to the Agreement executed between TapImmune and Mr. Gardner. Finally, TapImmune's conclusory allegation that Gardner never intended to perform is not actionable in fraud. *See e.g. Manas v VMS Ass'n*, 53 AD3d 451, 454 (1st Dept 2008) ("general allegations the defendants entered into a contract while lacking the intent to perform it . . . are insufficient to support the fraud-based claims" (quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995) (internal citations omitted)).

A claim for fraudulent concealment based on material omissions must be predicated on a duty to disclose. *Moser v Spizzirro*, 31 AD2d 537 (2d Dept 1968), *affd*, 25 NY2d 941 (1969). A duty to disclose arises where the parties enjoy a confidential relationship or some other type of special relationship. *See Gomez-Jimenez v New York Law School*, 103 AD3d 13, 18 (1st Dept 2012) (affirming dismissal) of claim for fraudulent concealment where plaintiffs failed to allege any special relationship or fiduciary obligation requiring disclosure). Under the "special facts doctrine," a duty to disclose arises where one party has special knowledge of certain information that is not available to the other party, and the first party is aware that the second party is acting on the basis of mistaken knowledge. *See Swersky v Dreyer & Traub*, 219 AD2d 321, 327-28 (1st Dept 1996). Absent such a duty to disclose, mere silence does not constitute actionable fraud. *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 119 n.2 (1st Dept 1985).

TapImmune fails to demonstrate a likelihood of success on the ground that Mr. Gardner did not disclose his allegedly questionable background. TapImmune's allegations do not suggest the existence of a special relationship or fiduciary obligation that would require Mr. Gardner to disclose facts concerning his alleged criminal history, involvement in past lawsuits and prior dealings with the SEC. TapImmune and Mr. Gardner negotiated the Agreement at arm's-length. *See Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 (1st Dept 2006) ("A fiduciary relationship does not exist between parties engaged in an arm's length business transaction."). TapImmune does not allege that Gardner made any affirmative statements regarding his past history. That Gardner holds a 9.9% common stock interest and had access to TapImmune confidential information is not sufficient to establish a special relationship that would give rise to a duty to disclose. Finally, the "special facts doctrine" is not implicated because nothing suggests that Mr. Gardner had knowledge that TapImmune executed the Agreement on the basis of mistaken knowledge concerning his background. *See Banque Arabe et Internationale D'Investissement v Maryland Nat'l Bank*, 57 F3d 146, 155-56 (2d Cir 1995) (applying New York law) (affirming dismissal of a claim for fraudulent concealment where plaintiff was unable to show that defendant "knew that Banque Arabe was acting in reliance on mistaken knowledge"). Thus, Mr. Gardner's failure to disclose facts concerning his past history does not permit rescission of the Consulting Agreement.

Consideration Received in Exchange for the Agreement

TapImmune also asserts that the Agreement is subject to rescission on the ground that TapImmune did not receive valid consideration in exchange for the common shares issued to Mr. Gardner. TapImmune alleges that Mr. Gardner "did not use his best efforts to locate investors" and that "TapImmune received no benefit from [Gardner's] services."

TapImmune's own arguments and affirmations indicate that valid consideration was received in exchange for the shares issued to Mr. Gardner. As already discussed, unlike the agreement that TapImmune signed with Mr. Barchha, the Agreement does not obligate Mr. Gardner to assist in securing financing. There is no requirement to utilize best efforts to accomplish a purpose that is not contemplated by the Agreement. Mr. Gardner performed a number of meaningful services to the benefit of TapImmune including, *inter alia*, ending TapImmune's relationship with its prior corporate counsel, and recommending new counsel, arranging meetings with TapImmune's CEO Glynn Wilson in Mr. Gardner's New York office, working with Wellfleet Partner's Inc. to procure financing for TapImmune, and communicating the outcome of financing deals.

It is well settled that the adequacy of consideration is not a proper subject for judicial scrutiny absent a showing of fraud or unconscionability. *See e.g. Mencher v Weiss*, 306 NY 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy . . . is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced."). The Agreement is not unconscionable – the alleged inequality in consideration is not "so strong and manifest as to shock to the conscience and confound the judgment of any man of common sense." *Mandel v Liebman*, 303 NY 88, 94 (1951). TapImmune has not sufficiently demonstrated a likelihood that it will succeed in obtaining rescission on the ground that the Agreement lacked consideration.

Material Breach of the Agreement

TapImmune argues that Mr. Gardner materially breached the Agreement on the grounds that: (1) Mr. Gardner failed to provide any meaningful investment contacts; and (2) the anti-dilution provision in the Agreement drove prospective investors away. These arguments are

unavailing. Unlike Mr. Barchha's agreement, Mr. Gardner's agreement with TapImmune did not require him to assist in "negotiating any proposed equity or debt financing." A failure to provide investment contacts cannot constitute a material breach of an agreement where the agreement does not obligate any such action.

TapImmune's argument concerning the anti-dilution provision bears no merit. It is undisputed that the anti-dilution provision had "become a major obstacle to [obtaining] financing" and that TapImmune unsuccessfully requested modification. Mr. Gardner's refusal to modify the anti-dilution provision obviously does not constitute breach of the Agreement. *See Eldridge v Shaw*, 99 AD3d 1224, 1226 (4th Dept 2012) (refusal to modify stipulation to settlement cannot constitute breach). The Agreement states: "[t]his anti-dilution provision is an essential part of this agreement." The anti-dilution provision itself, or refusal to modify it, cannot constitute a breach by Mr. Gardner that would subject the Agreement to rescission.

TapImmune has failed to demonstrate a likelihood of success in arbitration with respect to rescission of the Agreement and return of the 9.9% common stock interest. Because a likelihood of success is an equitable prerequisite to provisional relief pursuant to CPLR 7502 (c), the court denies TapImmune's petition for a preliminary injunction.

Accordingly, it is

ORDERED that petitioner's request for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order is vacated.

Dated: April 8, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER