Camofi Master LDC v Oncovista Innovative Therapies, Inc.
2014 NY Slip Op 30769(U)
March 25, 2014
Sup Ct, New York County
Docket Number: 652374/11
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

----------X

CAMOFI MASTER LDC and CAMHZN MASTER LDC,

Plaintiffs,

- against -

ONCOVISTA INNOVATIVE THERAPIES, INC. and ONCOVISTA, INC.

Defendants.

----------X

DECISION and ORDER
Index No. 652374/11
Motion Seq. No. 001
Submission Date: 2/4/13

HON. SALIANN SCARPULLA, J.:

Plaintiffs move pursuant to CPLR 3212 for summary judgment in their favor on all six of the causes of action asserted in the Verified Complaint, and to dismiss the affirmative defenses asserted by defendants.

At oral argument held on the record on January 17, 2013, this Court (Kapnick, J.) granted plaintiffs' motion only with respect to their first cause of action for declaratory judgment and dismissed defendants' affirmative defenses. The Court further concluded that the parties' anti-dilution agreement is unambiguous, and dismissed defendants' argument that the parties' entered into their agreements [that agreement?] under mutual mistake. The Court otherwise reserved judgment as to plaintiffs' second, third, fourth, fifth and sixth causes of action.

Background

The parties assert that there are no issues of fact.

Plaintiffs CAMOFI Master LDC ("CAMOFI") and CAMHZN Master LDC ("CAMHZN") are private hedge funds. Defendant OncoVista, Inc. ("OncoVista"), which conducts cancer research and develops and commercializes anti-cancer therapies, is a wholly-owned subsidiary and the sole line of business of defendant OncoVista Innovative Therapies, Inc. ("OVIT"). OVIT is publicly traded over the counter.

In order to advance its business, OncoVista sought to raise capital from potential investors through a private placement offering of shares of common stock and warrants ("Offering"). As part of these efforts, in July, 2007, plaintiffs received a Confidential Private Placement Memorandum dated July 25, 2007 ("PPM"), which set forth terms and conditions of investing in the Offering. Thereafter, on August 2, 2007, CAMOFI invested $1.68 million dollars for the purchase of 240,000 units ("Units") in the Offering, with each Unit consisting of four (4) shares of common stock of OncoVista, par value $0.001 per share ("Common Stock"), and one warrant to purchase, at any time within a five-year period, one share of fully paid and non-assessable Common Stock ("Warrant"). The purchase price per Unit was $7.00. The initial exercise price of the Warrant was $2.50 per share of Common Stock. In addition, on August 2, 2007, CAMHZN invested $319,998 for the purchase of 45,714 Units in the Offering and one Warrant to purchase, within five years, one share of fully paid and non-assessable Common Stock. These terms were set forth in subscription agreements

("Subscription Agreements") entered into by plaintiffs.

On or about August 15, 2007, defendants executed and delivered the Warrants, which provide, in pertinent part, as follows:

> [1(e)] Upon the exercise of this Warrant, the Company [OncoVista] shall issue and cause promptly to be delivered upon such exercise (but not later than five business days following delivery to the Company of the Election to Purchase and other deliverables pursuant to Section 1(b) or (c), as applicable) to, or upon the written order of, the Holder and in such name or names as the Holder may designate, a certificate or certificates for the number of full Warrant Shares to which Holder may be entitled, together with cash in lieu of any fraction of a Warrant Share otherwise issuable upon such exercise in an amount equal to the product of (i) such fraction multiplied by (ii) the Fair Market Value on the date of exercise. Such certificate or certificates shall be deemed to have been issued, and any person so designated to be the person or persons entitled to receive the Warrant Shares issuable upon exercise of this Warrant shall be deemed to have become a holder of record of such Warrant Shares for all purposes, as of the close of business on the date of the surrender of this Warrant and full payment of the Exercise Price.
>
> * * * *
>
> [5(a)] The Company shall at all times reserve and keep available out of its authorized and unissued Common Stock, solely for the purpose of providing for the exercise of the Warrants, such number of shares of Common Stock as shall, from time to time, be sufficient therefor [...]
>
> [5(b)] The transfer agent for the Common Stock and every subsequent transfer agent for any of the Company's securities issuable upon the exercise of this Warrant shall be irrevocably authorized and directed at all times to reserve such number of authorized securities as shall be required for such purpose. The Company shall keep a copy of this Warrant on file with the transfer agent for the Common Stock and with every subsequent transfer agent for shares of the Company's securities issuable upon the exercise of this Warrant. The Company shall supply such transfer agent with duly executed certificates representing the Common Stock or other securities for such purposes.

In addition, plaintiffs provided $500,000 for OncoVista to purchase control of Aviation Upgrader Technologies, Inc., a publicly-traded shell corporation into which defendants were merged. In consideration for this funding, the parties entered into an anti-dilution agreement ("Anti-Dilution Agreement") which provides, as relevant, anti-dilution protections for the Common Stock acquired by CAMOFI[1] in the Offering as follows:

> ii. The shares of Common Stock acquired by CAMOFI in the private placement described in the Memorandum (the "*Offering*") shall be entitled to the following additional anti-dilution protection:
>
> Until the third anniversary of the date of the Initial Closing Date, if the Company issues additional shares of Common Stock or Common Share Equivalents (as hereinafter defined) at an effective price (the "*Effective Price*") per share less than the then per share purchase price (such lower price, the "*Base Share Price*" and such issuances collectively, a "*Dilutive Issuance*"), as adjusted hereunder (if the holder of the shares of Common Stock or Common Share Equivalents so issued shall at any time, whether by operation of purchase price adjustments, reset provisions, floating conversion, exercise or exchange prices or otherwise, or due to warrants, options or rights per share which is issued in connection with such issuance, be entitled to receive shares of Common Stock at an effective price per share which is less than the Base Share Price, such issuance shall be deemed to have occurred for less than the Base Share Price), then, the per share purchase price of the shares of Common Stock acquired by CAMOFI in the Offering shall be reduced to equal such lower Effective Price and the Company shall issue to the Purchasers such additional number of shares of Common Stock equal the excess of (A) minus (B), where (A) equals a fraction, the numerator of which equals the product of (q) the Base Share Price immediately prior to such adjustment multiplied by (r) the number of shares of Common Stock acquired by CAMOFI in the Offering held beneficially and of record by CAMOFI immediately prior to such adjustment, as therefore adjusted pursuant hereto, and where the

---

[1] Section (iii) of the Anti-Dilution Agreement contains similar anti-dilution language applicable to the Common Stock purchased by CAMHZN.

denominator equals the Effective Price, and where (B) equals the Number of shares of Common Stock acquired by CAMOFI in the Offering held beneficially and of record by CAMOFI immediately prior to such adjustment.

With regard to CAMOFI's Warrants,[2] as set forth in section (iv) of the Anti-Dilution Agreement, defendants agreed that:

> The exercise price of the Warrants (the "*Exercise Price*") and the number of shares of Common Stock issuable upon the issuance of the Warrants acquired by CAMOFI in the Offering shall be entitled to the following anti-dilution protection:
>
> Until the termination of the Warrants held beneficially and of record by CAMOFI, if the Company shall consummate any Dilutive Issuances (if the holder of the shares of Common Stock or Common Share Equivalents so issued shall at any time, whether by operation of purchase price adjustments, reset provisions, floating conversion, exercise or exchange prices or otherwise, or due to warrants, options or rights per share which is issued in connection with such issuance, be entitled to receive shares of Common Stock at an effective price per share which is less than the Base Share Price, such issuance shall be deemed to have occurred for less than the Base Share Price), then, the Exercise Price shall be immediately reduced to equal such lower Effective Price and the number of shares of Common Stock issuable upon the exercise of the Warrants shall be immediately adjusted to equal a fraction, the numerator of which equals the product of (q) the Exercise Price immediately prior to such adjustment multiplied by (r) the number of shares of Common Stock for which the Warrants then held by CAMOFI held beneficially and of record immediately prior to such adjustment, as therefore adjusted pursuant hereto, and where the denominator equals the Effective Price.

It is undisputed that plaintiffs fully performed their contractual obligations by providing defendants with the solicited investment and capital. Plaintiffs further allege that after investing in the Offering, defendants authorized multiple issuances of Common Stock,

---

[2] Section (v) of the Anti-Dilution Agreement contains similar anti-dilution language applicable to the Warrants purchased by CAMHZN.

Options and Warrants at exercise prices below those provided to plaintiffs. Defendants allegedly failed to inform plaintiffs of these issuances and to reduce the purchase price and exercise prices of the Common Stock and Warrants as required under the Anti-Dilution Agreement.

During 2009 and 2010, defendants made various filings with the United States Securities and Exchange Commission (the "SEC") disclosing the disputed issuances of Common Stock, Options and Warrants. Specifically, defendants filed a Form 8-K with the SEC disclosing that on January 15, 2009, they had issued warrants exercisable for a period of five years from the date of the grant for up to an aggregate of 750,000 shares of Common Stock, par value $0.001 per share, at an exercise price of $0.50 per share. In March 2009, defendants filed a Form 10-K with the SEC disclosing that on January 6, 2009, they had granted stock options to two employees to purchase approximately one million shares of Common Stock at a price of $0.001 per share. On February 16, 2010, defendants filed a Form 8-K with the SEC disclosing that on February 12, 2010, they had amended terms of a certain bridge note financing agreement with certain accredited investors and in consideration for the modifications further extended the expiration date of the warrants discussed in the January 2009 8-K and reduced the exercise price of the warrants to $0.10 per share from $0.50 per share. Finally, on June 30, 2010, defendants filed a Form 10-Q with the SEC disclosing that in May 2010, they had issued warrants to a consulting firm to purchase 250,000 shares of its common stock at an exercise price of $0.38 per share.

Plaintiffs allegedly made several demands that defendants provide information detailing all of their issuances that might have triggered plaintiffs anti-dilution protection, issue additional shares of Common Stock and reduce the exercise price of the Warrants in accordance with the terms of the Anti-Dilution Agreement, and issue to plaintiffs the appropriate multiple of additional shares of Common Stock and Warrants contemplated by the Anti-Dilution Agreement. Specifically, plaintiffs demanded that with regard to (a) the Common Stock CAMOFI and CAMHZN acquired during the Offering, defendants issue 1,679,040,000 and 301, 672,767 additional shares of Common Stock, respectively; (b) CAMOFI's Warrants to purchase 240,000 of Common Stock at an original exercise price of $2.50 per share, defendants reduce the exercise price to $0.001 per share of Common Stock and increase the number of shares of Common Stock issuable upon exercise of the Warrants to 600,000 shares; and (c) CAMHZN's Warrants to purchase 45,714 shares of Common Stock at an original exercise price of $2.50 per share, defendants reduce the exercise price to $0.001 per share of Common Stock, and increase the number of shares of Common Stock issuable upon exercise of the Warrants to 102,857,500. Defendants allegedly refused all of plaintiffs' foregoing demands.

Plaintiffs assert in their complaint causes of action for: (1) declaratory judgment; (2) specific performance; (3) breach of contract: failure to adjust the Common Stock purchase price and Warrant exercise price; (4) breach of contract: failure to issue additional Common Stock and Warrants; (5) anticipatory breach of contract; and (6) attorneys' fees.

Discussion

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (internal citations omitted). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion. *Id.* A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of material fact. *Rotuba Extruders, Inc. v. Ceppos,* 46 N.Y.2d 223, 231 (1978).

Plaintiffs plead their third and fourth causes of action for breach of contract in the alternative to their first and second causes of action for declaratory judgment and specific performance, respectively. The declaratory judgment cause of action has already been disposed as indicated above. Moreover, because "specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action," *Warberg Opportunistic Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 86 (1st Dep't 2013)(internal citation omitted), the Court will first consider plaintiffs' breach of contract claims, followed by their claim for specific performance.

Breach of Contract and Anticipatory Breach of Contract

Plaintiffs base their third cause of action for breach of contract on defendants' alleged breach of the Anti-Dilution Agreement. Specifically, plaintiffs allege that defendants failed to perform their contractual obligation to honor adjustments to (i) the purchase price of Common Stock paid by plaintiffs in the Offering, and (ii) the exercise price of the Warrants issued in the Offering to plaintiffs.

Plaintiffs' fourth cause of action for breach of contract is based on defendants' alleged breach of their contractual obligation to (i) issue additional shares of Common Stock to plaintiffs, and (ii) increase the number of shares of Common Stock issuable upon exercise of the Warrants, so that the per share price of the shares of Common Stock issued to plaintiffs in connection with the Offering, and the Warrants exercise price, were equal to the per share price set by defendants in connection with the January 6, 2009 issuance of the option to purchase one million shares of Common Stock at an exercise price of $0.001 per share.

In order to plead a cause of action for breach of contract, a plaintiff must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *See U.S. Bank Natl. Assoc. v. Lieberman,* 98 A.D.3d 422, 423 (1st Dep't 2012)(*citing JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010)). As previously indicated, this Court has already ruled in plaintiffs' favor on their first cause of action for declaratory judgment in which they sought, *inter alia*, a declaration that defendants have failed to comply with their obligations owed to plaintiffs under the Subscription Agreements, Warrants and Anti-Dilution Agreement, that

defendants are obligated to comply with the Subscription Agreements, Warrants and Anti-Dilution Agreement, that defendants wrongfully have repudiated their obligation to comply with adjustment of shares of Common Stock or future exercises of the Warrants by plaintiffs, and that plaintiffs are entitled to a declaration preliminarily and permanently directing defendants to honor their obligations under the Subscription Agreements, Warrants and Anti-Dilution Agreement. In light of the above determination, as well as plaintiffs' injury in the form of the dilution of their interest in OncoVista, plaintiffs succeed on their two breach of contract claims.

In addition, plaintiffs assert a fifth cause of action for anticipatory breach of the parties' agreements based on defendants' alleged refusal to honor any future demand by plaintiffs that they perform thereunder. An anticipatory breach of contract occurs when "a party has indicated an unequivocal intent to forego performance of his obligations under a contract," *Rachmani Corp. v. 9 East 96th St. Apt. Corp.*, 211 A.D.2d 262, 266-67 (1st Dep't 1995)(internal citations and quotation marks omitted), at a time "before performance by the breaching party is due." *Kaplan v. Madison Park Grp. Owners, LLC,* 94 A.D.3d 616, 618 (1st Dep't 2012). "[W]here there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach." *IDT Corp. v. Tyco Grp., S.A.R.L.,* 104 A.D.3d 170, 177 (1st Dep't 2012)(citing *Rachmani,* 211 A.D.2d at 266). This Court has already declared that "defendants wrongfully have repudiated their obligation to comply with adjustment of shares of Common Stock or future exercises of the Warrants by plaintiffs." Based on this judicial finding alone, plaintiffs

also succeed on their claim for anticipatory breach of contract.

Specific Performance

In plaintiffs' second cause of action for specific performance, they allege that they have no adequate remedy at law and will be irreparably harmed unless the Court orders specific performance and directs defendants' compliance with the Anti-Dilution Agreement. In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate or inequitable burden on the breaching party. *Cho v. 401-403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 (1st Dep't 2002)(internal quotations omitted). The question of whether specific performance should be awarded to a party is ordinarily committed to the sound discretion of the trial court. *Stellar Sutton LLC v. Dushey*, 82 A.D.3d 485, 486 (1st Dep't 2011).

Plaintiffs concede that, generally, courts will not allow specific performance directing ownership of publically-traded securities. *See Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145-46 (1971)(finding no exceptional circumstances to justify specific performance of contract for the delivery of shares of stock); *Maxim Group LLC v. Life Partners Holdings, Inc.*, 690 F.Supp.2d 293, 302 (S.D.N.Y. 2010)(denying specific performance because plaintiff would be adequately compensated with money damages). However, plaintiffs argue that where, as here, there is a "thin" market for the securities, the defendant is unable to obtain a sufficient number of securities from public or non-public markets, or the securities

are otherwise illiquid, then the general rule does not apply and an aggrieved party, having no remedy at law, is entitled to specific performance. *See Haymarket LLC v. D.G. Jewelry of Canada Ltd.*, 290 A.D.2d 318, 319 (1st Dep't 2002).

Defendants argue that plaintiffs' request for specific performance must be denied because to grant it would lead to an inequitable result, and would disproportionately harm defendants relative to any benefit to plaintiffs. *See Van Wagner Adv. Corp. v. S&M Enters.*, 67 N.Y.2d 186, 195 (1986)(finding that "the imposition of an equitable remedy must not itself work an inequity" and "specific performance should not be an undue hardship"); 71 Am. Jur.2d Specific Performance § 90. Defendants claim that neither they nor plaintiffs had contemplated at the time the Anti-Dilution Agreement was entered into that its strict and literal enforcement would result in plaintiffs' virtual ownership of OncoVista and in the reduction of the public shareholders' interest to less than 3%. As such, defendants insist that the issuance of 702,857,500 shares at $0.001 and 409,576,767 shares of stock would create an undue hardship to defendants and their shareholders.

Here, plaintiffs have not met their burden for obtaining specific performance because money damages are available for the breach. *See e.g. Special Situations Fund III, L.P. v. Versus Tech.*, 227 A.D.2d 321 (1st Dep't 1996), *lv. denied* 88 N.Y.2d 815 (1996) (affirming trial court's award of money damages where defendant breached the parties' anti-dilution agreement); *Lucente v. Int'l. Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002)(denying the "extraordinary" equitable remedy of specific performance in lieu of money damages); *Maxim Group LLC v. Life Partners Holdings, Inc.*, 690 F.Supp.2d 293, 302 (S.D.N.Y.

2010)(dismissal of specific performance in a case involving publically-traded stock because money damages were available).

Finally, pursuant to Section 22 of the Subscription Agreements, plaintiffs are awarded reasonable attorneys' fees incurred in enforcing their rights under the Warrants and the Anti-Dilution Agreement. The issue of the amount of money damages and reasonable attorneys' fees plaintiffs may recover against defendant is referred to a Special Referee to hear and report with recommendations, or upon stipulation of the parties, to hear and determine.

Counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[3] upon the Special Referee Clerk in the Trial Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of this Court.

Date: New York, New York
March 25, 2014

ENTER:

Saliann Scarpulla, J.S.C.

[3] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/courts/1jd/supctmanh/References.shtml.