Sybron Can. Holdings, Inc. v Niznick
2016 NY Slip Op 31450(U)
July 25, 2016
Supreme Court, New York County
Docket Number: 650908/14
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

SYBRON CANADA HOLDINGS, INC., et al.

Plaintiffs,

-against-

GERALD A. NIZNICK, et. al.,

Defendants.

Index No. 650908/14
Mot. Seq. 021

OSTRAGER, J:

This action involves a joint venture agreement between the parties for the manufacture and sale of dental implant devices and related products. Before the Court at this time is the motion by defendants for summary judgment dismissing the First and Second Causes of Action in the First Amended Complaint (Exh II to the moving papers)(motion 21 of the 26 motions filed in this case). In the First Cause of Action, plaintiffs seek a declaratory judgment that the acts of defendant Gerald A. Niznick constitute "Cause" within the meaning of the Operating Agreements to which the parties are signatories. In the Second Cause of Action, plaintiffs seek a declaratory judgment that defendant Niznick resigned without "Good Reason," and that plaintiffs as a result are entitled to exercise the Employment Call Option included in the Operating Agreements. The Employment Call Option (ECO) purportedly gives plaintiffs the right to purchase all of the Implant Direct companies' shares in the Joint Venture Companies at the discounted price set forth in the Operating Agreements if Niznick leaves his employment before the conclusion of the employment term without "Good Reason."[1]

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[1] The Implant Direct companies are the three corporate defendants named herein, all of which were controlled by defendant Niznick when the parties formed the

In a decision on the record on June 29, 2016, this Court denied so much of defendant Niznick's summary judgment motion that requested dismissal of the First Cause of Action based on the existence of numerous disputed issues of fact. The Court reserved decision on the balance of the motion related to the Second Cause of Action pending the receipt of supplemental papers addressing the issue whether plaintiffs' ECO claim is barred by a Release contained in a Consulting Agreement executed on December 20, 2013, after Dr. Niznick's purported resignation from his employment. The Court intimated and hereby affirms that, but for the Release issue, the motion for summary judgment with respect to the Second Cause of Action would be denied based on the existence of numerous disputed issues of fact.

The parties simultaneously submitted letters on July 7, 2016 at the direction of the Court. This decision addresses that part of the motion that seeks dismissal of the Second Cause of Action based upon the Release. The narrow dispositive issue is whether the Release contained in the Consulting Agreement remains valid if the releasee (here Dr. Niznick) allegedly breaches the representations that formed material consideration for the Release and/or fraudulently induced the releasor to issue the Release.

The Release at issue is included in the Third Amendment to the Operating Agreements, which is described in section 7.2 of the Consulting Agreement as "material consideration for this Consulting Agreement." The Release provides in relevant part in

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Joint Venture Companies.

paragraph A that "Consultant [defendant Dr. Niznick] hereby unconditionally and irrevocably waives and releases any claim he might have against Company [plaintiffs Sybron] ... that arises out of the employment agreement and employment relationship between Consultant and Company." As particularly relevant here, the Release contains a mutual provision in paragraph B which provides that "Company [plaintiffs Sybron] hereby unconditionally and irrevocably waives and releases any claim any of them might have against Consultant [defendant Dr. Niznick] ... that arises out of the employment agreement and employment relationship between Consultant and Company."[2]

Defendants assert in support of the motion for summary judgment that in circumstances such as those presented in this case, the Release survives to bar any claim that plaintiffs had to enforce the ECO and limits plaintiffs to a breach of contract claim. The defendants' principal argument is that the Release is part of the Consulting Agreement, other provisions of which were implemented. Consequently, defendants argue, the Consulting Agreement is not divisible because it provides that the release and all of the other terms and conditions of the Consulting Agreement are in consideration for each other and interdependent. Paragraph 8.5 of the Consulting Agreement provides that: "As material consideration for this Agreement, Company and Consultant shall be bound by Exhibit 'B' ... to this Agreement, which is made a part hereof." (The Consulting Agreement is attached as Exhibit B to the moving papers,

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[2] The Third Amendment to the Operating Agreements is attached as Exhibit A to the Consulting Agreement, and the Release is attached as Exhibit B.

along with the two Exhibits; i.e., the Third Amendment to Operating Agreements and the Release). Exhibit B to the Consulting Agreement expressly describes the Release as "material consideration for the [Consulting] Agreement."

There is case law that supports the proposition that there are circumstances in which a contract may not be affirmed in part and rescinded in part. These cases, if applied in the context of this case, could collide with the universally recognized principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity. . . ." *See generally Campbell v. Thomas*, 73 A.D.3d 103, 116 (2d Dep't 2010) (citing *Riggs v. Palmer*, 115 NY 506, 511 (1889) and others).

In this case, the Consulting Agreement was entered into on December 20, 2013. In paragraph D of the Release attached thereto, Dr. Niznick indicated that he was not aware of any claims against plaintiffs, stating that: "Consultant hereby acknowledges that he is not aware of any claims he [has] against Company [plaintiffs Sybron]. Shortly thereafter, Dr. Niznick initiated litigation against the plaintiffs, asserting a long litany of alleged wrongdoing and affirmative claims. In these circumstances it would appear that even if the plaintiff were limited to a breach of contract claim, a potential measure of damages might be the loss of the benefit of the ECO. Consequently, it would be peculiar in the context of a motion for summary judgment to hold, as a matter of law, that plaintiffs cannot assert their rights under the ECO. By the same token, it is abundantly clear that the plaintiffs wish to secure the benefit of other provisions of the Consulting Agreement. Depending on the proof adduced at trial, it may well be that the

plaintiffs will be held to the terms of the Release barring their rights under the ECO. But, there are so many disputed issues of fact that defendants are not entitled to summary judgment on the Second Cause of Action.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment (seq. No. 021) dismissing the First and Second Causes of Action in the First Amended Complaint is denied for the reasons stated on the record on June 29, 2016, as supplemented herein.

Dated: July 25, 2016

J.S.C.
BARRY R. OSTRAGER
JSC