

LG Capital Funding LLC v Intellicell Biosciences, Inc.
2016 NY Slip Op 32270(U)
November 4, 2016
Supreme Court, Kings County
Docket Number: 505143/2015
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of November, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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LG CAPITAL FUNDING LLC,

Plaintiff(s),

DECISION AND ORDER

- against -

Index # 505143/2015

INTELLICELL BIOSCIENCES, INC. and
STEVEN VICTOR,

Defendant(s).

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The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-3

Opposing Affidavits (Affirmations) _____

4-6

Reply Affidavits (Affirmations) _____

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After oral argument and upon the foregoing papers, the motion by Plaintiff, LG CAPITAL FUNDING LLC, to compel Defendant, STEVEN VICTOR ("Victor"), to produce certain documents is denied. Defendants' cross-motion for partial summary judgment dismissing Plaintiff's complaint as against Victor is granted to the extent granted herein.

Background

Defendant, INTELLICELL BIOSCIENCES, INC. ("Intellicell")(collectively, with Victor, referred to as "Defendants"), is a Nevada corporation in the business of manufacturing stromal vascular fraction cells from the vasculature in adipose tissue for use in regenerative medicine through patented technology developed by Victor in 2010. Victor is a medical doctor licensed to practice in New York and is the chief executive officer of Intellicell.

According to Defendants, because Intellicell's technology is relatively new, the company has never generated significant revenue from the sale of its product and, as a result, has consistently needed to raise capital through various means, including retaining consultants for that purpose. Defendants further state that one such consultant introduced Intellicell to an investor relations

company known as Crowning Capital LLC (“Crowning”), who Intellicell ultimately retained to provide investor relations services. Intellicell paid for Crowning’s services by issuing a \$250,000 non-convertible, non-interest-bearing promissory note (“Crowning Note”) to Crowning on or around January 10, 2013.

Although the circumstances surrounding the purchase is somewhat disputed, it is undisputed that Plaintiff purchased the Crowning Note from Crowning in three tranches for a total price of \$200,000, which, with Intellicell’s cooperation, was amended and restated into three new interest-bearing, convertible promissory notes. Said notes gave Plaintiff the right to convert portions of the principal balance and interest into shares of Intellicell common stock at a discount to the market price.

According to Defendants, between December 6, 2013 and January 23, 2014, Plaintiff submitted eleven conversion notices to Intellicell’s transfer agent and received 184,000,000 shares of Intellicell stock. As a result, two out of the three restated promissory notes were converted in full and the amount due under the third restated promissory note was reduced to \$63,857.23. On March 19, 2014, Plaintiff sought to convert a portion of the third promissory note and informed Victor by email of the intention to do so. It is undisputed that Victor responded in an email stating that he would no longer approve any further conversion notices from Plaintiff.

Plaintiff commenced this action on April 28, 2015, alleging breach of contract, unjust enrichment, conversion and equitable fraud against Intellicell. Plaintiff also alleges claims of unjust enrichment, fraud and equitable fraud against Victor. Specifically, Plaintiff alleges that Victor refused to perform his duties under the note to unjustly enrich himself; that Victor represented that Plaintiff would have a right to convert the note into shares of Intellicell common stock but that Victor knew, at the time, that Plaintiff’s investment would be used for his personal benefit and that he would not allow Plaintiff to fully convert the note.

Plaintiff’s Motion to Compel

With the instant motion, Plaintiff moves to compel responses to its discovery demands served on or around October 28, 2015. Plaintiff states that its “Request 8” to Victor seeks production of “[a]ll documents showing any compensation, whether in the form of money or equity, paid to you by Intellicell or in relation to Intellicell in the last five (5) years” and “Request 9” seeks “[a]ll documents sufficient to show the uses of the funds provided to Intellicell in relation to any convertible notes in the last five (5) years.” It is Plaintiff’s position that these documents are “relevant to Plaintiff’s fraud-related claims as well as to the satisfaction of any judgment against Defendants...but it will also show whether such money invested in the Company is being used for Defendant’s own purposes.”

In opposition, Defendants argue that the claims and counterclaims in this action do not relate to Victor’s compensation or to Intellicell’s use of monies received in relation to the convertible notes that it issued, and as such, Plaintiff’s request for these documents constitutes an “unbridled fishing

expedition.” Moreover, it is Defendants’ position that Plaintiff can obtain information about Victor’s salary and Intellicell’s convertible debentures in Intellicell’s public filings. In addition, Defendants submit that, if the Court grants its cross-motion for summary judgment as to Victor, Plaintiff’s discovery demands would be moot.

Defendants’ Motion for Summary Judgment Dismissing Complaint Against Victor

Defendants move for partial summary judgment seeking dismissal of Plaintiff’s claims against Victor for unjust enrichment, fraud and equitable fraud.

First, Defendants argue that an unjust enrichment claim is barred because the complaint seeks to enforce an allegedly valid contract, i.e. the promissory note, to which Victor was neither a party nor a guarantor. In addition, Defendants assert that Plaintiff has failed to plead unjust enrichment with sufficient particularity because Plaintiff fails to provide details as to Victor’s purported enrichment, and moreover, that Victor could not have been enriched because Plaintiff paid money to Crowning to acquire the Crowning Note and not to Victor or Intellicell.

With regards to Plaintiff’s cause of action for fraud, Defendants contend that Plaintiff’s allegations do not sufficiently plead fraud because there is no indication that the alleged representations regarding Plaintiff’s investment into Intellicell and its right to convert its note into shares of Intellicell common stock were false or that Victor knew them to be false. Moreover, that it would have been impossible for Victor to have known that Plaintiff’s “investment” would be used for his personal benefit since neither Plaintiff nor Crowning ever paid any money to Intellicell or to Victor. Further, that Victor gave irrevocable instructions to Intellicell’s transfer agent to reserve a sufficient number of stock shares, which were to be issued to Plaintiff upon presentation of conversion notices and without any further approval from Intellicell or Victor but that despite having successfully converted much of the Crowning Note debt into shares of Intellicell stock previously, Plaintiff did not submit its final conversion notice to Intellicell’s transfer agent. That, as a result, any “damage” suffered by Plaintiff could not have been caused by Victor.

With regards to equitable fraud, Defendants argue that Plaintiff merely reasserts its prior allegations which do not support a claim for equitable fraud because Plaintiff fails to allege Victor owed any duty to Plaintiff; that Victor was in a dominant position vis-à-vis Plaintiff or that Plaintiff placed trust or confidence in Victor.

Finally, Defendants seek sanctions against Plaintiff on the basis that the causes of action against Victor are frivolous and based on false and distorted allegations.

In opposition to Defendants’ motion, Plaintiff argues Victor was unjustly enriched because Plaintiff bought the Crowning Note, thereby extending the maturity date and allowing the debt to be repaid through the issuance of stock instead of cash, which, in turn, allowed the money saved to be used to line Victor and his wife’s pockets. Further, that Plaintiff’s claim of unjust enrichment centers

on the funds freed up by Plaintiff's investment, not the terms of the investment itself and that, therefore, the express contract does not preclude Plaintiff's unjust enrichment claim.

Plaintiff also contends that summary judgment as to its fraud claim is inappropriate because Victor's arguments do not show that he did not intend to defraud Plaintiff and the requested discovery is needed to show Victor's wrongdoing and bad faith.

Discussion

The Court first turns to Defendants' motion for partial summary judgment dismissing Plaintiff's complaint against Victor. It is well established that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]). Issue finding, rather than issue determination constitutes the key to the procedure (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [Ct App 1957]). Moreover, in deciding the motion, the court is required to accept the opposing party's version of the facts as true (*see Rizk v Cohen*, 73 NY2d 98, 103 [Ct App 1989]).

Here, with the foregoing principles in mind, the Court finds Plaintiff's claims against Victor fail as a matter of law.

The doctrine of unjust enrichment invokes an "obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [Ct App 2009]). The existence of a valid contract governing the subject matter generally precludes recovery in quasi-contract for events arising out of the same subject matter (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 [Ct App 2005]; *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [Ct App 2008]). Moreover, there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim (*see Paragon Leasing, Inc. v Mezei*, 8 AD3d 54, 55[1st Dept 2004]).

Here, Plaintiff seeks to enforce the promissory note, the validity of which is not in dispute. Because a contract governs the subject matter in dispute, Plaintiff's unjust enrichment claim fails as a matter of law (*see Pappas v Tzolis*, 20 NY3d 228, 234 [Ct App 2012]), even against Victor, who is a non-signatory to the contract.

In addition, Plaintiff's complaint fails to state a cause of action for fraudulent inducement since it essentially alleges that Victor did not intend to perform under the contract at the time Plaintiff made its investment, which gives rise only to a breach of contract claim (*see Forty Cent. Park S., Inc. v Anza*, 117 AD3d 523, 524 [1st Dept 2014][citations omitted]). "A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract ... when he made it" (*Gordon v De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Here, Plaintiff essentially alleges that Victor represented that Plaintiff would have a right to convert the note into shares of Intellicell common stock but that Victor knew, at that time, that he would not allow

Plaintiff to fully convert the note. In this regard, Plaintiff has failed to state a cause of action for fraudulent inducement.

With regards to Plaintiff's cause of action for equitable fraud, Plaintiff merely alleges that "Defendants misrepresented and concealed material facts as to the terms of LG's investment" and that as a result, Plaintiff has been damaged. This cause of action is insufficiently plead under CPLR 3016 which provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong shall be stated in detail." In any case, the Court finds that the facts, as alleged by Plaintiff, do not support a fraud claim.

Accordingly, Defendants' motion for partial summary judgment dismissing the Complaint as against Victor must be granted.

Turning then to Plaintiff's motion to compel responses to its discovery demands, the Court finds Plaintiff's request for documents concerning Victor's compensation paid by Intellicell or the use of funds provided to Intellicell in relation to any convertible notes to be wholly immaterial to Plaintiff's claims. The extent of Victor's compensation by Intellicell and any other funds provided to Intellicell have no bearing on Plaintiff's claim that Intellicell failed to honor the terms of the promissory note. As such, Plaintiff's motion must be denied (*see H.R. Prince, Inc. v Elite Envtl. Sys., Inc.*, 107 AD3d 850, 850 [2d Dept 2013]).

Conclusion

It is hereby

ORDERED that Plaintiff's motion to compel is DENIED; and it is further

ORDERED that Defendants' cross-motion for partial summary judgment is GRANTED to the extent that Plaintiff's complaint is dismissed as to Victor but that Defendants' request for sanctions is DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.