| **MYOS RENS Tech. Inc. v RENS Tech., Inc.** |
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| 2017 NY Slip Op 30725(U) |
| April 11, 2017 |
| Supreme Court, New York County |
| Docket Number: 650116/2017 |
| Judge: Marcy Friedman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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MYOS RENS TECHNOLOGY INC.,

*Plaintiff,*

– against –

RENS TECHNOLOGY, INC., RENS AGRICULTURE SCIENCE & TECHNOLOGY CO. LTD., and REN REN, individually,

*Defendants.*

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Index No.: 650116/2017

DECISION/ORDER

This action is brought by plaintiff MYOS RENS Technology Inc. (MYOS) against defendants RENS Technology, Inc. (Technology), RENS Agriculture Science & Technology Co. Ltd. (Agriculture), and Ren Ren, individually (Ren). The action arises out of defendant Technology's alleged breach of a Securities Purchase Agreement, dated as of December 17, 2015, entered into between Technology and MYOS, then known as MYOS Corporation (the SPA).

Under the SPA, Technology agreed to purchase certain shares of common stock of MYOS and warrants to purchase additional shares, in exchange for an aggregate payment of $20,250,000 in three tranches. (Compl., ¶ 1.) It is undisputed that although Technology made payment of the first tranche and received 1,500,000 shares of common stock and a warrant to purchase 375,000 shares in exchange (together, the Shares), it failed to make payment on the second tranche. (Id.) The complaint pleads that defendants Agriculture and Ren tortiously interfered with the SPA by causing Technology to breach the agreement. Defendant Agriculture is allegedly the sole shareholder of defendant Technology, and defendant Ren allegedly owns

and controls Agriculture. (Id., ¶¶ 5-7.)

MYOS moves for an order attaching the Shares that Technology purchased in connection with the first tranche; enjoining Technology from, among other things, selling, transferring, or encumbering the Shares; and directing Technology to deliver the Shares to the sheriff for the purpose of the attachment. By order to show cause, dated January 11, 2017, this court temporarily enjoined Technology and its agents, including Agriculture and Ren, from transferring the Shares, and directed MYOS to file an undertaking of $100,000. Defendant Technology cross-moves to increase the undertaking to $4,650,000 million, the value of the Shares as of late January 2017.

ATTACHMENT

An attachment "effects the prejudgment seizure of a debtor's property, to be held by the sheriff, actually or constructively, so as to apply the property to the creditor's judgment if the creditor should prevail in court." (Hotel 71 Mezz Lender LLC v Falor, 14 NY3d 303, 310–11 [2010] [internal quotation marks, brackets, and citation omitted]; see also Siegel, NY Prac § 313 [5th ed].) CPLR 6212 (a) requires that, on a motion for an order of attachment, "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." The grounds for attachment set forth in CPLR 6201 include that "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state."

It is well settled that "[a]ttachment is a 'harsh' remedy, and is construed narrowly in favor of the party against whom the remedy is invoked." (VisionChina Media Inc. v Shareholder

Representative Servs., LLC, 109 AD3d 49, 59 [1st Dept 2013] [VisionChina]; P.T. Wanderer Assocs., Inc. v Talcott Communications Corp., 111 AD2d 55, 56 [1st Dept 1985]; Penoyar v Kelsey, 150 NY 77, 80-81 [1896]; Rowles v Hoare, 61 Barb. 266 [1870].) Notwithstanding the satisfaction of the statutory requirements described above, the grant of attachment remains an exercise of discretion. (See VisionChina, 109 AD3d at 59-60; Capital Ventures Intl. v Republic of Argentina, 443 F3d 214, 219-222 [2d Cir 2006]; Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd., 5 Misc3d 285, 301 [Sup Ct, NY County, Aug. 9, 2004, Cahn, J.].) As discussed in further detail below, in addition to the statutory requirements, Courts must consider whether an attachment is necessary for jurisdictional or security purposes. (Infra, at 6-7.)

Likelihood of Success on the Merits

The court finds that MYOS has stated a claim against Technology for breach of contract and demonstrated a likelihood of success on the merits of that claim. It is undisputed that Technology was required to invest $5,000,000 in MYOS within six months of the closing of the first tranche—i.e., by September 3, 2016—and that Technology failed to make such payment. (Compl., ¶ 17; Aff. of Joseph Mannello [interim CEO of MYOS], ¶¶ 16, 22.)

Technology, in opposition, contends that its failure to close on the second tranche could not have breached the SPA because the parties never reached agreement on the use of proceeds from the transaction. Technology contends that agreement on the use of proceeds was a condition precedent to each closing. Section 2.3 (b) of the SPA (Mannello Aff., Exh. A), on which Technology relies, provides that the "obligations of the Purchaser [Technology] hereunder in connection with each applicable Closing are subject to the following conditions being met: . . . (vi) as to the First Closing, the Company [MYOS] and the Purchaser shall have agreed on the use of proceeds from the transactions contemplated hereunder."

MYOS makes a showing of likelihood of success on the merits of its claim that agreement on the use of proceeds from the transaction was a condition precedent only "as to the First Closing." Although the opening provision of section 2.3 (b) refers to the "obligations of the Purchaser hereunder in connection with each applicable Closing," subdivision (vi), which specifically refers to the obligation of the parties to agree on the use of proceeds, applies by its terms to the First Closing, and not to the subsequent closings. Technology's contention that agreement on the use of proceeds was a condition of the closing of each of the tranches reads out of the SPA the limiting language "as to the First Closing." Had the parties intended that agreement on the use of proceeds would be a condition precedent to each closing, they would have clearly so provided.[1] (See generally Schron v Troutman Sanders LLP, 20 NY3d 430, 437 [2013]; Bank of N.Y. Mellon v WMC Mtge., LLC, 136 AD3d 1, 7 [1st Dept 2015], affd 28 NY3d 1039 [2016].)

Technology acknowledges in its memorandum in opposition that it closed on the first tranche without having reached an agreement with MYOS on the use of proceeds from the transaction. (Technology's Memo. In Opp., at 5-6; see also Aff. of Joseph Dos Santos [former CFO of MYOS], ¶¶ 5-8 & Exh. B [Dos Santos Aff.] [representing that he prepared a use of proceeds schedule and delivered it to defendant Ren's attorney prior to the first closing, and that Ren's counsel represented that Ren was comfortable closing without the schedule].) Assuming arguendo that this waiver of the condition precedent as to the first closing did not serve as a continuing waiver with respect to Technology's future obligations under the SPA, Technology has not made a showing that, prior to the second closing, it took any action to reassert or reinstate the condition, or to negotiate in good faith with MYOS on the use of proceeds. Even if this court

[1] The other subdivisions of section 2.3 (b), notably, do not contain equivalent limitations of scope, indicating that the "as to the First Closing" language in subdivision (vi) was deliberate.

were to consider the declaration of defendant Ren, which is unaccompanied by a translator's affidavit pursuant to CPLR 2101 (b), his assertions in paragraphs 10-13 that he informed MYOS that Technology would not be closing on the second tranche due to MYOS's failure to agree on the use of proceeds are self-serving, conclusory, and not supported by the record. MYOS submits, among other things, an email from Ren's counsel, dated June 5, 2016, in which counsel states, without any mention of the use of proceeds from the transaction, that Ren "has confirmed that [] Technology will continue to make the second stage investment in MYOS based on the agreement" (Manello Aff., Exh. B); a letter from Ren on behalf of Technology, dated August 13, 2016, in which Ren demanded that MYOS "adjust the terms of our Second Closing . . . ," including the purchase price and the size of the board of directors, but not mentioning the use of proceeds from the transaction (Manello Reply Aff., Exh. A); and the minutes of an August 19, 2016 meeting of the board of directors of MYOS, which likewise record no objection by Ren to MYOS's use of proceeds from the transaction. (Id., Exh. B; see also Dos Santos Aff., ¶ 9 & Aff. of Joshua N. Englard [corporate counsel of MYOS], ¶ 7 [disputing contention that Ren demanded agreement on use of proceeds before deadline for second closing].)

Technology's remaining defenses for its failure to make payment on the second tranche are equally unavailing at this stage. Like his claims with respect to use of proceeds, Ren's claim that MYOS has been wasting assets is conclusory and without support in the record. Technology's further allegation that MYOS breached the SPA by hiring an interim CFO without Technology's permission is not shown, on this preliminary record, to be sufficiently material to excuse Technology's failure to close on the second tranche. (See generally Unigard Sec. Ins. Co., Inc. v North River Ins. Co., 79 NY2d 576, 584 [1992]; Zyskind v FaceCake Mktg. Techs., Inc., 110 AD3d 444, 446 [1st Dept 2013]; N450JE LLC v Priority 1 Aviation, Inc., 102 AD3d

631, 632 [1st Dept 2013].)

Given the court's finding that MYOS has demonstrated a likelihood of success on the merits of its first cause of action, the court need not address the remaining causes of action in the complaint.

The Remaining Statutory Requirements and the Court's Discretion to Deny an Attachment in Appropriate Circumstances

It is undisputed that defendants are nondomiciliaries and/or foreign corporations not authorized to do business in New York. The only potential counterclaims discussed by Technology on this motion are based upon MYOS's alleged corporate waste and breaches of contract in failing to agree on a use of proceeds and unilaterally appointing an interim CEO. (See Technology's Memo. In Opp., at 15.) As held above, Technology's claims of waste and breach of contract are conclusory. Moreover, Technology has not quantified the damages it would seek on such claims. Under these circumstances, MYOS has adequately demonstrated that the amount demanded exceeds any counterclaims that might be pleaded by Technology. The express statutory requirements of CPLR 6212 (a) are therefore satisfied.

As noted, however, the court has discretion to deny an attachment even where the statutory requisites are met. (Supra, at 3.) The U.S. Court of Appeals for the Second Circuit, applying New York attachment law, has stated that "[i]n reviewing appeals from the denial or grant of an attachment, the [New York] Appellate Division has considered both the existence of the statutory requirement and its justification in light of the statutory purposes of the attachment remedy, viz., to obtain quasi in rem jurisdiction over the property of non-resident defendants and provide security for potential judgments. That is, its review of a motion court's discretion has focused on whether the plaintiff has any need for the attachment." (Capital Ventures Intl. v Republic of Argentina, 443 F3d 214, 221 [2d Cir 2006] [internal citations omitted], citing

Maitrejean v Levon Props. Corp., 45 AD2d 1020, 1020-1021 [2d Dept 1974] and Dean v James McHugh Constr. Co., 43 AD2d 1009, 1009-1010 [4th Dept 1974].) The Courts' focus on the need for an attachment, in addition to the statutory requirements, is reflected in the legislative history of the attachment statute, which emphasizes that Courts should "consider whether [an attachment] is actually needed in the case of a foreign corporation." (NY Adv Comm on Prac & Proc 3d Prelim Rep, 144 [1959].) The importance of need as a factor is also reflected in CPLR 6223 (a), which requires that the Court vacate an attachment if it "determines that the attachment is unnecessary to the security of the plaintiff." (See also Siegel, NY Prac, § 317 [5th ed] ["Even if the plaintiff makes out a case for attachment under CPLR 6201, its granting is still discretionary with the court. . . . [I]f the judge should perceive from the papers that the plaintiff does not need an attachment, either for jurisdiction or security, discretion is appropriately exercised against it even though a CPLR 6201 showing has been made"].)

The First Department has recognized that Courts must consider the need for an attachment in addition to the statutory requirements. In VisionChina, the Court held that, "[i]n addition to establishing that a defendant subject to the court's personal jurisdiction meets the statutory requirements for an attachment, the party seeking attachment [for security purposes] must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment." (109 AD3d at 60.) "The risk should be real, 'whether it is a defendant's financial position or past and present conduct.'" (Id., quoting Ames v Clifford, 863 F Supp 175, 177 [SD NY 1994] ["New York courts have required an additional showing that something, whether it is a defendant's financial position or past and present conduct, poses a real risk to the enforceability of a future judgment"].) "The court may consider the defendant's history of paying creditors, or a defendant's stated or indicated intent to dispose of assets." (Id. [internal citation omitted].)

"There must be more than a showing that the attachment would, in essence, be helpful." (Id., at 61 [internal quotation marks and citation omitted].)[2]

In this case, it is undisputed that Technology was formed solely for the purpose of performing under the SPA, and that the Shares are now its sole or principal asset. Technology does not contend that it has other sources of income which might be used to satisfy a judgment. Technology itself estimates that the present value of those Shares is approximately $4,650,000, far less than the $15,000,000 Technology was obligated to pay to MYOS in connection with the closing of the second and third tranches. These facts alone, however, do not warrant issuance of an order of attachment. MYOS has not shown that attachment of the Shares is necessary or even helpful to it for security purposes.

As an initial matter, the court cannot conclude, on the present record, that the value of the Shares held by Technology will be insufficient to satisfy any judgment in this action. The complaint does not specify the amount of compensatory and consequential damages sought by MYOS. To the extent that MYOS seeks to recover the remaining $15,000,000 investment promised by Technology in the SPA, MYOS has not shown that it will be entitled to recover that amount. As previously noted, the transaction at issue was structured in three separate tranches. MYOS received consideration for its sale of the Shares in the first tranche. Although it has been deprived of the remainder of Technology's expected investment, MYOS has retained ownership of the shares that would have been transferred to Technology in connection with the second and third tranches. MYOS fails to account for the fact that MYOS may accordingly sell or derive value from those Shares in a replacement transaction or otherwise—a circumstance which may

[2] Federal Courts, applying New York law, have frequently stated that "attachment should issue only upon a showing that drastic action is required for security purposes." (Bank of China, N.Y. Branch v NBM L.L.C., 192 F Supp 2d 183, 188 [SD NY 2002] [emphasis in original, internal quotation marks and citation omitted]; Elliott Assocs., L.P. v Republic of Peru, 948 F Supp 1203, 1211 [SD NY 1996] [same].)

affect the amount of damages MYOS can recover in this action.

Even assuming that a judgment for MYOS in this action would exceed the current value of the Shares, MYOS also fails to demonstrate that attachment of Technology's assets is proper solely on the ground that Technology lacks sufficient assets to fully satisfy the judgment sought in the complaint. Although the First Department in VisionChina held that a plaintiff "must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment" (109 AD3d at 60), the Court did not suggest that this showing, alone, is sufficient to warrant an attachment. In that decision, the Court also reaffirmed that an attachment must be more than "helpful," and that the "mere fact that defendant is a non-domiciliary residing without the State of New York is not sufficient ground for granting an attachment." (Id., at 61-62 [internal quotation marks and citations omitted].)

MYOS has not cited any case in which the harsh remedy of attachment has been imposed upon a nondomiciliary merely because it lacked sufficient assets to satisfy a potential judgment. Indeed, a rule that attachment is appropriate whenever a nondomiciliary lacks sufficient assets to satisfy a final judgment could unnecessarily harm nondomiciliaries and provide an incentive to plaintiffs to exaggerate their damages when drafting complaints against nondomiciliaries, in order to craft the appearance of an "identifiable risk" that the nondomiciliary will not be able to satisfy the potential judgment. Instead, the First Department has focused on whether assets of the nondomiciliary then or soon to be available to satisfy a potential judgment are likely to be encumbered or depleted before judgment is entered. For example, this Department has found attachment of a nondomiciliary's assets proper in cases where the plaintiff made a showing that the defendant was in "serious financial distress" and had not made timely payment to secured creditors (Elton Leather Corp. v First Gen. Resources Co., 138 AD2d 132, 134 [1st Dept 1988]

[reversing order vacating attachment]), or where the defendants' affiliate, their only source of revenue, would imminently receive and distribute funds to investors, leaving the plaintiff without assets to satisfy a judgment. (Morgan v Worldview Entertainment Holdings, Inc., 141 AD3d 461, 462 [1st Dept 2016]; see also Habitations Ltd. v BKL Realty Sales Corp., 160 AD2d 423, 424 [1st Dept 1990] [awarding attachment in aid of arbitration where petitioner demonstrated not only that corporate respondent was "merely a shell, with no appreciable liquid assets," but also that the individual respondent had stripped the corporation of assets, had "historically failed to pay his creditors," and had "stated to others that he intend[ed] to remove his assets from the State and d[id] not intend to satisfy the award"].)

MYOS fails to show that there are any factors or circumstances other than Technology's limited assets warranting attachment for security purposes. There is no evidentiary support for MYOS's speculation that Technology will transfer or encumber the Shares in a manner that materially alters the status quo with respect to MYOS's ability to satisfy a judgment in this case. MYOS does not contend that Technology or the other defendants have a prior history of fraudulent conduct, of not paying creditors, or of avoiding judgments. Technology admits that any transfer of the Shares would have to be to an accredited investor for fair consideration, which would be available to satisfy a judgment in this action. (See Technology's Memo. In Opp., at 20; see also General Textile Print. & Processing Corp. v Expromtorg Intl. Corp., 862 F Supp 1070, 1074 [SD NY 1994] [where complaint alleged that defendant failed to deliver goods owed to plaintiff, denying attachment on grounds that profits from defendant's sale of the goods to others would be available to satisfy a judgment, and because plaintiff's papers "fail to advance any probative evidentiary facts that defendant has disposed or is about to dispose of any property in order to frustrate a potential judgment, or to flee the jurisdiction of the Court"].) MYOS does

not contend that the owners of Technology expect soon to receive distributions from the company, that they have stated any intent to remove the Shares from Technology, or that Technology has liabilities which may require that payments be made to other creditors.[3]

MYOS appears to argue that defendants acted wrongfully or fraudulently in that, "[f]rom the outset, RENS Technology was intentionally undercapitalized and did not have sufficient assets to consummate the purchases required by the [SPA]." (Pl.'s Memo. In Supp., at 6.) According to MYOS, the total capitalization of Technology upon its formation was only $10,000. (Compl., ¶ 26.) MYOS acknowledges, however, that Technology was subsequently capitalized with sufficient assets to make payment of $5,250,000 on the first tranche. (Id., ¶ 11.) MYOS cites no authority for its apparent contention that the founders of a holding company, formed solely to fund the purchase of corporate shares in multi-million-dollar installments over a period of more than one year, act wrongfully if they do not fund the company at the outset with assets sufficient to consummate the entire transaction.

Far from being necessary for security purposes, attachment of the Shares could actually harm MYOS. For example, attachment would prevent Technology from selling the Shares in the event that their value begins to decline—a possibility that cannot be ruled out, given MYOS's assertion that, at present, its own "financial viability is in serious doubt." (Pl.'s Memo. In Supp., at 22.) If the Shares are attached and their value declines, MYOS will necessarily recover less value from Technology upon entry of judgment.[4]

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[3] In any event, it has been held that an attachment is not a means to obtain priority over other creditors. The fact that a defendant may be in shaky financial condition as a result of numerous other civil actions asserted against it does not justify an attachment. (Ames v Clifford, 863 F Supp 175, 178 [SD NY 1994] [applying New York law].)

[4] As Technology correctly argues on its cross-motion, the risk that the Shares could lose substantial value during the course of this litigation at the very least warrants a substantial increase in the amount of the bond. In opposition to Technology's cross-motion, however, MYOS contends, among other things, that a larger bond will cause MYOS severe financial hardship. (Pl.'s Memo. In Opp. To Cross-Motion, at 4.) MYOS's inability to adequately protect Technology from the total loss of its assets if it is subsequently determined that an attachment was unwarranted also supports the denial of an attachment in this case.

The absence of need for an attachment is further supported by Myos's failure to seek this relief for several months following Technology's purported breach of the SPA, while the parties negotiated. This delay and the nature of the attachment sought (an attachment of MYOS's own Shares) raise an inference that MYOS is acting not to secure its potential judgment but, rather, to tie Technology to the fate of MYOS during this litigation.

Finally, the complaint pleads that MYOS was aware, at the time it entered into the SPA, that Technology was formed approximately three weeks prior "for the sole purpose of holding the shares of MYOS []." (Compl., ¶¶ 20-21.) Notwithstanding this fact, MYOS did not insist on any provision in the SPA restricting Technology's transfer of the Shares upon Technology's failure to close on the second or third tranche. By failing to secure such provision by contract, MYOS knowingly risked the possibility that it would be unable to collect more than the value of the Shares from Technology upon Technology's default. Absent evidence that defendants are likely to lose, mismanage, deplete, or hide the limited assets in Technology's possession, the parties should be held to the remedies afforded by their contract.

INJUNCTION

MYOS also seeks an injunction "in aid of the attachment." (Pl.'s Memo. In Supp., at 19.)[5] As no attachment is warranted, an injunction in aid of an attachment is not warranted. Even if MYOS's papers could be construed as seeking, in the alternative to an attachment, an order enjoining Technology from transferring the Shares, MYOS does not make a showing that

[5] Although MYOS's order to show cause arguably seeks an order enjoining Technology from transferring the Shares pending the outcome of this litigation, MYOS has repeatedly stated that it seeks injunctive relief only "until the MYOS shares are delivered to the Sheriff of New York County to perfect the attachment." (Pl.'s Reply Memo., at 14; Pl.'s Memo. In Supp., at 19 [seeking injunction "in aid of attachment"]; Transcript of Oral Arg. on Feb. 14, 2017, at 9 [Myos's counsel: "the request for injunctive relief is secondary because that is intended to be short lived. That is intended only to prevent the defendants from doing something with those shares until they can be delivered to the sheriff"].)

such an injunction would be appropriate.

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; CPLR 6301.) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

Here, MYOS fails to show irreparable harm absent an injunction, as money damages will be sufficient to compensate it with respect to its causes of action. (See generally Meissner v Yun, 126 AD3d 565, 566 [1st Dept 2015]; Kurlandski v Kim, 111 AD3d 676, 678 [1st Dept 2013].) Moreover, for the same reasons that MYOS has failed to show a need for an attachment, they have also failed to show the need for injunctive relief. MYOS has also failed to show the balance of the equities in its favor.

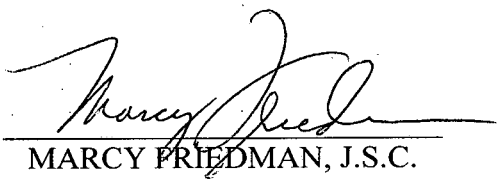
The court has considered the parties' remaining contentions and finds them to be without merit. It is accordingly hereby ORDERED that the motion of plaintiff MYOS RENS Technology Inc. is denied; and it is further

ORDERED that the temporary restraining order is vacated; and it is further

ORDERED that the cross-motion of defendant RENS Technology, Inc. to increase the amount of the undertaking is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
April 11, 2017



MARCY FRIEDMAN, J.S.C.