

**Errant Gene Therapeutics, LLC. v Sloan-Kettering
Inst. for Cancer Research**

2017 NY Slip Op 32703(U)

December 21, 2017

Supreme Court, New York County

Docket Number: 150856/2017

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART

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ERRANT GENE THERAPEUTICS, LLC,
Plaintiff,

INDEX NO. 150856/2017

MOTION DATE _____

- v -

MOTION SEQ. NO. 005 & 006

SLOAN-KETTERING INSTITUTE FOR CANCER RESEARCH
and BLUEBIRD BIO INC.,

DECISION AND ORDER

Defendants.

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OSTRAGER, J:

This case arises out of a contract dispute regarding the development of a gene therapy treatment for fatal, inherited blood disorders such as thalassemia and sickle cell. Plaintiff Errant Gene Therapeutics, LLC (“EGT”) filed the First Amended Complaint (“FAC”) alleging breach of contract and fraudulent inducement against defendant Sloan-Kettering Institute for Cancer Research (“SKI”) and alleging civil conspiracy to commit fraud and unfair competition against defendant Bluebird Bio Inc. (“Bluebird”). Defendants have each moved separately to dismiss the FAC pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff EGT cross-moved for leave to amend the FAC pursuant to CPLR 3025(b). For the following reasons, plaintiff’s cross motion for leave to amend the FAC is granted and defendants’ motions to dismiss are denied, without prejudice, as moot.

I. BACKGROUND

In 2005, EGT, a biopharmaceutical company, obtained an exclusive license to certain of SKI's gene therapy patent rights which EGT sought to develop into a commercial product. The 2005 EGT-SKI agreement was subsequently modified in 2011. It is alleged in the FAC that Bluebird, EGT's competitor, attempted to purchase EGT to preclude competition for the rights to develop this type of treatment. EGT informed Bluebird that it would only make such a deal if Bluebird guaranteed that it would develop EGT's therapy, the "EGT Vector", and not Bluebird's own therapy that Bluebird had been developing and which EGT considered to be inferior. It is alleged that Bluebird refused to make such a guarantee and that negotiations ceased as a result.

The FAC alleges that shortly after Bluebird was rebuffed by EGT, SKI and Bluebird entered into a secret partnership to wrest away control of EGT's intellectual property and proprietary information. Plaintiff asserts that Dr. Craig Thompson, who was named CEO of SKI in 2010, had long-standing business relations with Bluebird executives and investors. This relationship allegedly provided Bluebird with an opportunity to obtain the EGT technology from SKI and eliminate EGT from the marketplace. The FAC asserts that SKI provided Bluebird with EGT's proprietary information and intellectual property related to the development of the gene therapy treatment.

In 2011, SKI and EGT entered into another agreement requiring SKI to make reasonable efforts to develop the EGT Vector in exchange for half of any consideration from any exploitation of the EGT Vector. The FAC further alleges that SKI unreasonably delayed development of the EGT Vector in breach of the 2011 agreement and as part of its secret agreement with Bluebird.

II. DISCUSSION

“On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations,” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep’t 2010), rather, “[t]he court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or defense, or is patently devoid of merit.” *Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dep’t 2008) (internal quotations omitted). If the proposed amendment is not patently devoid of merit, leave to amend will be “freely given absent prejudice or surprise resulting directly from the delay.” *McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp.*, 59 N.Y.2d 755, 757 (1983).

Here, EGT’s proposed Second Amended Complaint (“SAC”) adds significant factual allegations that have purportedly been uncovered through initial discovery. For example, discovery has revealed that Bluebird and SKI did, in fact, meet throughout the Fall of 2010 and Winter of 2011. Email correspondence between Bluebird and SKI provides at least a circumstantial basis for EGT’s allegation that SKI improperly disclosed EGT’s proprietary information to Bluebird. The documentary evidence submitted shows that SKI and Bluebird entered into a collaboration agreement in the area of gene therapy for hemoglobinopathies on November 21, 2011. Internal emails among SKI scientists indicate that they were concerned that SKI was providing significant value to Bluebird under the agreement and receiving little in return. Other internal emails show a belief among SKI employees that SKI’s agreement with Bluebird was holding back development of the EGT Vector.

Taken together, these allegations, supported by email correspondence, meeting minutes, and contractual agreements, provide a circumstantial basis for the causes of action pled in the SAC. The Court cannot hold that the proposed amendment is “patently devoid of merit” such

that leave to amend should be denied. Further, at this early stage of a relatively complex action sounding in fraud, defendants will not be prejudiced by the minor delay necessarily associated by the filing of the SAC.

Accordingly, it is hereby

ORDERED that plaintiff's cross motion for leave to amend the FAC is granted. Plaintiff is directed e-file the SAC by January 3, 2018. Defendants are directed to answer within twenty days.

ORDERED that defendants' motions to dismiss are denied, without prejudice, as moot.

12/21/2017
DATE

Ray O'Keefe
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	