Sabby Healthcare Master Fund Ltd. v Microbot Med. Inc.
2019 NY Slip Op 34294(U)
February 28, 2019
Supreme Court, New York County
Docket Number: Index No. 654581/2017
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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SABBY HEALTHCARE MASTER FUND LTD. and SABBY VOLATILITY WARRANT MASTER FUND LTD.'

INDEX NO. 654581/2017

Plaintiffs,

- v -

MICROBOT MEDICAL INC.,

Defendant.

DECISION AND ORDER AFTER TRIAL

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BARRY R. OSTRAGER, J.S.C.:

The bench trial of this action took place on February 11, 2019. The parties previously cross-moved for summary judgment with the plaintiff expressly representing that the sole remedy plaintiff was seeking was rescission (*see* Transcript of Proceedings at 3-4, NYSCEF Doc. Nos. 211 & 212).[1] The only issue in this bench trial is framed by this Court's September 28, 2018 decision and order, which dismissed on consent plaintiffs' Second Cause of Action seeking damages for breach of contract and denied defendant's cross-motion for summary judgment.[2] The trial was conducted to determine whether plaintiffs are entitled to rescind their purchase of shares in the defendant corporation. For the reasons stated below, the Court finds that plaintiffs established their right to the equitable remedy of rescission under the First Cause of Action for breach of contract.

Briefly, as set forth in the Court's prior order, plaintiffs Sabby Healthcare Master Fund Ltd. and Sabby Volatility Warrant Master Fund Ltd. (together "Sabby") seek rescission of a

[1] The Transcript is mistakenly dated September 26, 2018; the proceedings were held on September 27, 2018.
[2] Plaintiffs' motion for summary judgment was denied in open court on September 27, 2018. (NYSCEF Doc. No. 91)

stock purchase agreement ("SPA") to purchase 1,250,000 shares of stock in defendant Microbot Medical Inc. ("Microbot"). The principals of Sabby, Hal Mintz and Rob Grundstein, are extremely sophisticated investors who manage successful investment funds that engage in active trading and direct investments in public companies. Microbot is a pre-clinical medical device company specializing in the research, design and development of next generation micro-robotic assisted medical technologies designed to minimize invasive surgery. Harel Gadot, who testified at the trial with limited recollection about the subject transaction, is the CEO and Chairman of the Board of Microbot.

On Wednesday, May 31, 2017, Microbot issued a press release containing positive news about Microbot's product development. On that same date, Microbot also engaged Ladenburg Thalmann & Co. Inc. ("Ladenburg") as its banker to explore potential financing opportunities. Following Microbot's press release, the company's share price and volume increased sharply above the pre-press release price, closing at $5.41 and $3.81 per share on June 1 and June 2, 2017, respectively. Significantly, the trading volume of Microbot shares, which had been relatively thinly traded, dramatically increased after the press release. The increase in the value of Microbot shares and the spike in the trading volume of Microbot shares created favorable conditions for Microbot to sell additional shares to private investment funds, such as Sabby, in a registered direct offering. On Thursday, June 1, 2017, a Ladenburg representative, Mark Wainberger, reached out to Mintz to inquire whether Sabby was interested in participating in an approximate $10 million offering of shares by Microbot, the precise terms of which had not been determined. Mintz had dozens of prior dealings with Ladenburg and agreed to consider further information relating to such a transaction.

On the morning of Friday, June 2, 2017, Microbot's board of directors met and unanimously approved the potential sale of between $5 million and $15 million of common stock at a per share price reflecting up to a 25% discount to the closing market price that day. Later that Friday, Ladenburg forwarded a draft SPA for Sabby's review, with the price and share amount blank. Ladenburg also informed Mintz that the economic terms and participants in the offering were still undetermined, but the price would be based on a discount to the market closing price on Friday, June 2, 2017.

On Sunday, June 4, 2017, at approximately 9:00 a.m. Eastern Time, Microbot's board of directors met and unanimously approved a potential direct sale of $10 million of common stock to three investors at a per share price of $2.70, which reflected an almost 30% discount to the $3.81 closing price of the company's stock on Friday, June 2, 2017.

Later that afternoon, Ladenburg informed Sabby that the proposed terms for each investor participating in the offering were 1,250,000 common shares at $2.70 per share. Ladenburg also provided Sabby with a draft of the Disclosure Schedule that would be incorporated in the SPA and advised Sabby that the SPA had to be signed *before* the market opened the following day, Monday, June 5, 2017. A footnote contained in the Disclosure Schedule identified Alpha Capital Anstalt ("Alpha") as both a significant owner of preferred shares of Microbot and an affiliate of Microbot.

During the afternoon of June 4, 2017, Mintz engaged in email exchanges with both Ladenburg and Mintz' partner, Grundstein, about the Microbot offering. The email discussions largely focused on the extent to which Alpha's preferred shares could be converted to common stock and sold into the market, thereby potentially driving the price of Microbot shares down. Grundstein was negative about the proposed Microbot transaction, but Mintz is the sole decision

maker with respect to Sabby investments. There are conflicting inferences that can be drawn from the emails exchanged between Ladenburg and Sabby on June 4, 2017. Nevertheless, a preponderance of the documentary and credible testimonial evidence adduced at trial clearly established that on June 4, 2017 Mintz communicated to Ladenburg that Mintz was operating on the assumption that Alpha was an affiliate of Microbot and Alpha was therefore restricted in the amount of preferred shares it could convert. Mintz recognized that Alpha, as an affiliate, could nevertheless convert a portion of its preferred shares to Microbot common stock subject to trading volume and other restrictions. The evidence admitted at trial established that Ladenburg never disabused Mintz of his justified belief that Alpha was an affiliate of Microbot. Thus, Mintz understood that Alpha could convert additional preferred shares to common stock, but that Alpha was subject to volume and percentage ownership restrictions. Ladenburg also advised Mintz that there were no contractual limitations on Alpha's ability to sell Microbot common shares such as a "lock-up" agreement.

After reviewing the Disclosure Schedule, Sabby confirmed to Ladenburg in the evening of Sunday, June 4, 2017, that Sabby would participate in the proposed Microbot offering. On Monday, June 5, 2017, before the market opened, Sabby and Microbot exchanged signature pages for the SPA, and Microbot issued a press release announcing the sale. The SPA closed on June 9, 2017.

The plaintiffs contend they would not have entered into the SPA but for the statement in the SPA's Disclosure Schedule that stated that Alpha was an "affiliate" of Microbot. Sabby contends that this representation was material because Alpha, as an affiliate, would necessarily be subject to certain trading volume restrictions under SEC Rule 144(e)(1). It is undisputed that Alpha was not an affiliate of Microbot.

Mintz was familiar with Alpha and was also aware that Alpha controlled preferred stock which, if Alpha converted the preferred shares to common stock, would allow Alpha to control approximately 30% of the common shares of the company. More importantly, Mintz understood that if Alpha was not an affiliate of Microbot, nothing would stop Alpha from selling large amounts of Microbot shares once Microbot acquired additional financing. Significantly, Ladenburg advised Mintz that Alpha had acquired its Microbot shares at a minor fraction of the June 2, 2017 closing price. Mintz was also aware from the disclosure documents that prior to May 31, 2017, Alpha had converted a significant amount of its preferred stock to common stock on May 18, 2017 and again on May 26, 2017. Mintz was not told that on June 2, 2017 Alpha had made a request to convert additional preferred stock for 500,000 Alpha common shares and that the issuance of those shares would not take place until June 6, 2017. Ladenburg was, perhaps, disingenuous in response to a specific request by Mintz as to whether there were any other conversions, answering in words or substance "not that we are aware." No witness from Ladenburg testified at trial.

Shares of Microbot declined precipitously after June 5, 2017, and ten days later Sabby promptly sought rescission of the transaction on the ground that disclosure relating to Alpha was materially misleading. Microbot's Gadot both refused to rescind the transaction or accept a proposed settlement. Mintz credibly testified that Gadot was equivocal about Alpha's status as a non-affiliate during Gadot's discussions with Mintz. This case was commenced on June 29, 2017.

In the Court's September 28, 2018 decision, the Court summarized the legal standard required to warrant rescission. Specifically, to warrant rescission a party must demonstrate a breach of a contract that is material and willful, or if not willful, so substantial and fundamental

as to strongly defeat the object of the parties in making the contract. Microbot, through its agent Ladenburg, was either insufficiently informed about relevant facts or less than candid with Sabby during the extremely telescoped time within which this transaction was proposed and executed. Ladenburg knew that Sabby was laser focused on Alpha's status as an affiliate and repeatedly failed to correctly respond to Sabby's questions relating to the affiliate status of Alpha even though all representations made in the registered direct offering were certified as being true through the June 9, 2017 date of closing. The circumstance that no disclosure was made about a 500,000-share conversion Alpha initiated on June 2, 2017, and made effective on June 6, 2017, was certainly material information that was not provided to Sabby.

Sabby has established that Microbot's breach was of such a material nature that it substantially defeated Sabby's purpose in entering into the transaction. *Matter of Kassab v. Kasab*, 137 A.D.3d 1138, 1140 (2d Dep't 2016). Additionally, Sabby established that, as a result of Microbot's breach, Sabby was "deprived of the reasonably expected benefit of the bargain in a way that cannot be compensated." *Knoll v. Equinox Fitness Clubs*, 2003 WL 23018807, at *6 (S.D.N.Y. Dec. 22, 2003); *modified on other grounds*, 2004 WL 439500 (S.D.N.Y. Mar. 10, 2004). The computation of money damages caused by Microbot's false representation would be speculative because there is no reliable method to determine the impact of Alpha's ability to sell Microbot's shares on the publicly traded price of Microbot's stock.

The Court finds that Sabby lacks a complete and adequate remedy at law and that Sabby and Microbot may both be restored to the positions they respectively occupied prior to entering the SPA. According, it is

ORDERED that the SPA be and hereby is rescinded and that the parties be restored to the status quo ante. As rescission is an equitable remedy, the Court exercises its discretion to decline

any award of prejudgment interest. *See* Siegel, D. and Connors, P., New York Practice § 411 (6th ed. 2018).

Dated: February 28, 2019

Barry R. Ostrager, JSC

BARRY R. OSTRAGER
JSC