

Endothelix, Inc. v Vasomedical, Inc.

2020 NY Slip Op 32388(U)

July 21, 2020

Supreme Court, New York County

Docket Number: 651015/2016

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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ENDOTHELIX, INC.,

Plaintiff,

- v -

VASOMEDICAL, INC., LEO WOMACK, JACK SMYTH,

Defendant.

INDEX NO. 651015/2016

MOTION DATE _____

MOTION SEQ. NO. 005, 006

**DECISION + ORDER ON
MOTION**

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 61, 62, 63, 64, 71 were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 68, 69, 70, 72, 73 were read on this motion to/for TRIAL DE NOVO.

In this action to recover damages for, *inter alia*, breach of contract, defendant Vasomedical, Inc. moves for (1) an award of attorneys’ fees; (2) a judgment declaring that it has a first priority lien and security interest in all copyrights, patents, trademarks, trade secrets and other intellectual property related to VENDYS, plaintiff Endothelix, Inc.’s collateral; and (3) a preliminary injunction enjoining plaintiff Endothelix, Inc. (and its affiliated entities) from selling, transferring, licensing, distributing, promoting, pledging or encumbering the VENDYS collateral until Endothelix, Inc has satisfied its whole debt obligation under the parties’ secured line of credit agreement and promissory note (motion seq. 005). Plaintiff Endothelix, Inc. (“Endothelix”) moves to set aside the jury’s verdict and for a new trial pursuant to CPLR Section 4404 (motion seq. 006).

After a trial in this action, the jury reached its verdict on August 22, 2019, finding that Vasomedical breached the parties' product development agreement but that Endothelix interfered with, impeded or frustrated Vasomedical's ability to perform. The jury therefore did not award Endothelix damages on Endothelix's breach of contract claim. The jury also found that, on Vasomedical's breach of contract claims, Endothelix had not breached the parties' product development agreement, but did breach the parties' secured line of credit agreement and note. On this breach of contract claim the jury awarded Vasomedical damages.

In support of its motion to set aside the verdict and for a new trial pursuant to CPLR Section 4404, Endothelix argues that the jury's finding that it interfered with, impeded or frustrated Vasomedical's ability to perform the product development agreement was against the weight of the evidence. Endothelix contends that there was no evidence showing that Endothelix did anything to impair, impede or frustrate Vasomedical's ability to perform under the product development agreement and there was no evidence that Vasomedical's ability to perform was actually frustrated. In any event, interference with the ability to perform a contract would be a separate tort claim and not a defense to a breach of contract claim.

In opposition, Vasomedical points to evidence adduced at trial that it argues demonstrated that Endothelix did frustrate Vasomedical's ability to perform under the contract.

A jury verdict may be set aside as against the weight of the evidence only where the jury could not have reached the verdict on any fair interpretation of the evidence. *Jamal v. N.Y. City Health & Hosps. Corp.*, 280 A.D.2d 421 (1st Dept. 2001). “It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses.” *Exarhouleas v. Green 317 Madison, LLC*, 46 A.D.3d 854, 855 (2nd Dept. 2007). In the absence of “indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Indeed, the court must cautiously balance the great deference to be accorded to the jury's conclusion . . . against the court's own obligation to assure that the verdict is fair.” *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195, 206 (1st Dept. 2004)(internal citations and quotations omitted).

Here, contrary to Endothelix’s contention, the jury found, upon a fair interpretation of the evidence, that Endothelix interfered with, impeded or frustrated Vasomedical’s ability to perform under the parties’ product development agreement. As such, the jury’s verdict was not against the weight of the evidence and Endothelix’s motion to set aside the jury’s verdict is denied.

In its motion, Vasomedical seeks an award of attorneys’ fees, a declaratory judgment and a preliminary injunction. At the hearing on these motions, I directed that the matter of attorneys’ fees be sent to a referee to make a recommendation as to reasonable attorneys’ fees.

With regard to Vasomedical's request for a judgment declaring that that it has a secured, first priority lien and security interest in all copyrights, patents, trademarks, trade secrets and other intellectual property related to VENDYS, plaintiff Endothelix, Inc.'s collateral, Vasomedical has not submitted sufficient proof in evidentiary form showing that it has a perfected first priority lien, and as such, this declaratory relief is not appropriate. Instead, Vasomedical is granted a judgment in accordance with the Credit and Security Agreements declaring that, because of Endothelix Inc.'s default thereunder, Vasomedical is entitled to "a worldwide exclusive license on all intellectual properties defined as Collateral in the parties' Credit and Security Agreements, and to utilize the Collateral in any manner specifically set forth in the parties Credit and Security Agreements."

Finally, Vasomedical's request for a preliminary injunction is denied without prejudice at this time. Vasomedical has not submitted sufficient evidence showing that it would suffer irreparable harm without a post-trial injunction or that a balancing of the equities requires me to issue a post-trial injunction. Vasomedical has numerous, adequate post-trial remedies to secure payment of its judgment.

In accordance with the foregoing, it is hereby

ORDERED that the branch of defendant Vasomedical, Inc.'s motion seeking attorneys' fees is referred to a referee for a hearing and recommendation and, upon receipt of the referee's report and a motion to confirm the referee's report, the court will enter judgment for attorneys' fees; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

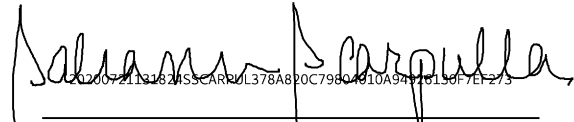
ORDERED that the remainder of Vasomedical, Inc.’s motion is granted only to the extent that a declaratory judgment is granted as set forth above, and the motion is otherwise denied; and it is further

ORDERED, ADJUDGED AND DECLARED THAT, on account of Endothelix’s default in its obligations under the parties Credit and Security Agreements, Vasomedical, Inc. is entitled to “a worldwide exclusive license on all intellectual properties defined as Collateral in the parties’ Credit and Security Agreements, and to utilize the Collateral in any manner specifically set forth in the parties Credit and Security Agreements.” It is further

ORDERED that plaintiff Endothelix, Inc.'s motion to set aside the jury's verdict and for a new trial pursuant to CPLR Section 4404 is denied.

This constitutes the decision and order of the court.

7/21/2020
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE