

Zydus Worldwide DMCC v Teva Pharms. Indus. Ltd.
2021 NY Slip Op 31229(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 654824/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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ZYDUS WORLDWIDE DMCC	INDEX NO.	<u>654824/2019</u>
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>003</u>
TEVA PHARMACEUTICALS INDUSTRIES LTD.,	DECISION + ORDER ON	
Defendant.	MOTION	

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 50 were read on this motion to/for DISMISSAL.

In motion sequence number 003, defendant Teva Pharmaceuticals Industries Ltd. (Teva), moves, pursuant to CPLR 3211(a)(4), to dismiss this action in its entirety to avoid the risk of a conflicting judgment in an allegedly related action pending before the United States District Court, District of New Jersey, *Zydus Worldwide DMCC v Teva API Inc.*, No. 2:19-cv-17086 (NJ Action), or in the alternative, stay this action pending the outcome of the NJ Action. Teva also moves in the alternative, pursuant to CPLR 3211(a)(7), to dismiss plaintiff Zydus Worldwide DMCC's (Zydus) third (unjust enrichment) and fourth (breach of the implied covenant of good faith and fair dealing) causes of action.

Background

The following facts are alleged in the complaint unless otherwise noted, and for the purposes of this motion, accepted as true.

This action arises from an Asset Purchase Agreement (APA) between Zydus and Teva involving the sale of Teva's "assets related to the manufacture and sale of generic

rotigotine pharmaceutical product.” (NYSCEF Doc. No. [NYSCEF] 17, Complaint ¶1; NYSCEF19, APA.)

On July 26, 2015, Teva announced plans to acquire the generic drug business of Allergan plc (Allergan). (NYSCEF 17, Complaint ¶12.) The United States Federal Trade Commission (FTC) started an investigation into this acquisition as it was concerned that there would be anticompetition effects in certain U.S. product markets. (*Id.* ¶13.) The FTC and Teva negotiated to divest Teva of certain assets which would “permit the purchasers of those assets to replace the lost competition in the U.S. marketplace by manufacturing, marketing, and selling certain generic pharmaceutical products Teva had developed or acquired in the in the Allergan transaction.” (NYSCEF 17, Complaint ¶14.) Teva proposed a divestment of its rotigotine product assets by selling them to Zydus. (*Id.* ¶16.)

On July 26, 2016, the FTC issued a decision and order arising out of its investigation. (NYSCEF 17, Complaint ¶17; see *also* NYSCEF 18, FTC Order.) The FTC Order states, in part,

“[f]or each Divestiture Product for which Teva is listed in the Application as a qualified source of any of the active pharmaceutical ingredient(s), at the option of the Acquirer of that Divestiture Product, Respondent Teva shall:

1. supply to the Acquirer the active pharmaceutical ingredient(s) [API] for which Teva is listed a qualified source in the Application for use in the manufacture of the Divestiture Product for a period of at least four (4) years after the Closing Date at a price set not to exceed the prices contained in the relevant binding letters of intent submitted by Respondent Teva to the Commission”

(NYSCEF 18, FTC Order at 75 – 76.) The FTC Order also states that “the supply of the active pharmaceutical ingredients by Respondent Teva to the Acquirer shall not be

interrupted or reduced ... during the four (4) year term required by this Order except for circumstances beyond the control of, and not the fault of, Respondent Teva" (*Id.* at 76.)

On June 16, 2016, Teva and Zydus entered into the APA. (NYSCEF 19, APA.)

The APA incorporates the FTC Order. Specifically, Section 1.4 of the APA states, in relevant part,

"(a) Incorporation of FTC Order. The parties hereby agree and acknowledge that the terms and provisions of the Order of the FTC shall govern this Agreement. A copy of the Order proposed as of the date hereof is attached as Appendix I, and upon issuance by the FTC, the final Order shall replace the currently proposed Order as Appendix I attached hereto without any other action by the parties hereto. The terms and provisions of the Order that pertain to this Agreement are hereby deemed incorporated by reference into this Agreement.

(b) Supremacy of FTC Order. To the extent that any term or provision of this Agreement conflicts with any corresponding term or provision of the Order, the parties hereby agree that the terms or provisions of the Order shall control the rights and obligations of the parties."

(NYSCEF 19, APA § 1.4 [a], [b].) Zydus alleges that there was an express agreement that the acquisition of Teva's assets under the APA would include access to supplies of the active pharmaceutical ingredient, known as Form I rotigotine, which was required for the manufacturing of the generic rotigotine pharmaceutical products. (NYSCEF 17, Complaint ¶¶1.) This was a necessary requirement for the parties' deal as Teva and its affiliate, nonparty Teva API Inc. (TAPI), are the only approved suppliers of the active pharmaceutical ingredients used in the rotigotine products. (NYSCEF 17, Complaint ¶¶18.) If Zydus did not have access to the active pharmaceutical ingredients through an approved supplier, it would not be able to make or sell the rotigotine pharmaceutical products, contrary to the purpose of the FTC's order to prevent anticompetition. (*Id.*)

The APA also sets forth the mechanism for seeking termination, amendment, waiver, rescission, modification. (NYSCEF 19, APA Article XI.) Under Article XII of the

APA, Teva agreed to indemnify Zydus for any losses to the extent that such losses arise from the breach of any representation or warranty contained in the APA. Section 12.4(f) of the APA states, in part,

“[e]xcept for claims based on fraud, the right of the Buyer Indemnified Parties and the Seller Indemnified Parties under this Article XII shall be the sole and exclusive monetary remedy of the Buyer Indemnified Parties and the Seller Indemnified Parties ... with respect to matters covered here under including but not limited to claims relating to the Products, the Transferred Assets, Products Technology, Assumed Liabilities or Excluded Liabilities and no Indemnified Party shall have any other cause of action or remedy at Law in equity for breach of contract, rescission, tort, or otherwise against the other party arising under or in connection with this Agreement and the matters and transactions contemplated hereby. Without limiting the generality of the preceding sentence, except in the case of specific performance and for claims based on fraud, no legal action sounding in contribution, tort, or strict liability ... may be sustained by the Indemnified Party ... against the Seller or Buyer or any of their Affiliates with respect to any matter that is the subject of Article XII, and Buyer and Seller, for themselves and the other Indemnified Parties ... hereby waive any and all statutory rights of contribution or indemnification ... that any of them might otherwise be entitled to under any Law with respect to any matter that is the subject of Article XII.”

(*Id.* §12.4[f].) Additionally, the APA also contains choice of law and forum selection clauses. Specifically, Section 13.8 of the APA states that “[t]his Agreement and any and all matters arising directly or indirectly herefrom shall be governed by and construed and enforced in accordance with the Laws of the State of New York, U.S.A. applicable to agreements made and to be performed entirely in such State.” (*Id.* §13.8.) Section 13.9(a) of the APA provides, in part, that the parties,

“agree to irrevocably submit to the exclusive jurisdiction of (i) the Supreme Court of the State of New York, New York County, or (ii) the United States District Court for the Southern District of New York, U.S.A., for the purposes any suit, action or other proceeding arising out of this Agreement or any transaction contemplated thereby.”

(*Id.* §13.9.)

Prior to and in anticipation of the APA, on May 24, 2016, TAPI, by a letter of intent, memorialized its intention to supply Zydus with the active pharmaceutical ingredient rotigotine (LOI). (NYSCEF 34, LOI.) The LOI sets forth the price of the active pharmaceutical ingredient for an initial term of thirty-six months and allows for a price increase after the initial term. (*Id.* ¶¶2, 3.) The LOI also states,

“the Initial term shall automatically extend for two (2) successive two (2) year renewal terms unless a written notice of non-renewal shall be given by Zydus at least six (6) months prior to the expiration date of the Initial Term or applicable renewal term (the Initial Term, as so extended by such renewal term(s), the ‘Term’).”

(*Id.* ¶3.) The LOI further states that it “represents a binding commitment with respect to the supply terms included herein.” (*Id.* at 1.) Teva is not a party to the LOI, and the LOI is silent as to the FTC Order. (See *id.*) TAPI is not a party to the APA. (See NYSCEF 19, APA.)

On August 22, 2019, Zydus commenced the NJ Action, alleging that TAPI breached the LOI by failing to supply the active pharmaceutical ingredient, Form I rotigotine. (NYSCEF Doc. No. 21, NJ Action Complaint.) Zydus claims that TAPI repudiated promises it made to induce it to purchase assets related to the manufacture and sale of generic pharmaceutical products from Teva. (*Id.* ¶1.) It alleges that it paid a significant purchase price to Teva and seeks to recover from TAPI the extensive losses it allegedly suffered, resulting from TAPI’s failure to supply Form I rotigotine needed to manufacture the generic pharmaceutical products. (*Id.* ¶¶1, 4.) In the NJ Action, Zydus alleges causes of action for breach of the LOI, specific performance of the LOI, and in the alternative, promissory estoppel. (*Id.* at 7-9.)

On May 20, 2020, United States District Judge Kevin McNulty denied, in part, TAPI's motion to dismiss. (NYSCEF 47, NJ Action Opinion.) Judge McNulty denied the dismissal of the breach and specific performance claims on forum selection grounds, stating "[u]nder New Jersey law, TAPI cannot enforce the forum selection clause in the APA against Zydus because TAPI is not a signatory to, or third-party beneficiary of, the APA or any other agreement with Zydus that has a forum selection clause." (*Id.* at 22.)

On August 22, 2020, Zydus also commenced this action, claiming that Teva breached the terms of the APA by repudiating its obligation to supply the generic pharmaceutical products, and that under the terms of the APA, Teva must indemnify it for any losses arising from the breach. (NYSCEF 17, Complaint ¶¶4, 23.) Zydus alleges causes of action for indemnification under the APA (first cause of action); specific performance of the APA (second cause of action); unjust enrichment, in the alternative (third cause of action); and breach of the covenant of good faith and fair dealing (fourth cause of action). (*Id.* at 8-12.) Zydus claims that it suffered "extensive losses" as a result of Teva's failure to supply the generic pharmaceutical products, despite "[h]aving pocketed the significant purchase price." (*Id.* ¶4.)

Teva now seeks to dismiss or stay this action pending the determination in the NJ Action, or to dismiss the third and fourth causes of action in the Complaint.

Discussion

On a motion to dismiss, the court must presume the allegations in the complaint to be true and accord plaintiff every favorable inference; however, "conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to

survive a motion to dismiss.” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [citation omitted].)

Under CPLR 3211(a)(4), “[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that ... there is another action pending between the same parties for the same cause of action in a court of any state of the United States” A court has broad discretion in determining whether an action should be dismissed based upon another action pending. (*Whitney v Whitney*, 57 NY2d 731, 732 [1982].)

“It is not necessary that the ‘precise legal theories presented in the first action also be presented in the second action.’” (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013], quoting *Cherico, Cherico. & Assocs. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009].) “Rather, ‘[t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs.’” (*Id.*) For example, two actions may arise out of the same subject matter when “both are based on the same contractual agreements and arise out of the same actionable wrongs.” (*JC Mfg. v NPI Elec., Inc.*, 178 AD2d 505, 506 [2d Dept 1991].) Further, “[w]ith respect to the subject of the actions, the relief sought must be ‘the same or substantially the same.’” (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997] [citations omitted].)

In seeking to dismiss or stay this action, Teva argues that this action is duplicative of the NJ Action since both actions concern the same subject matter, involve substantially identical parties, and seek substantially the same relief. However, construing the factual allegations in the light most favorable to Zydus, and in an exercise of its broad discretion,

dismissal or stay of this action pending the NJ Action is not justified under CPLR 3211(a)(4).

[D]ismissal under CPLR 3211(a)(4) is not necessarily defeated by substantial, as opposed to complete, identity of parties, which generally is present when at least one plaintiff and one defendant is common in each action.” (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990] [citations omitted].) However, here, Zydus is the only party who is common in both actions. Teva, which is the only other signatory to the APA, is not named in the NJ Action, and TAPI is not named in this action. That TAPI is a wholly owned, indirect subsidiary of Teva is insufficient to provide identity of parties required to sustain a motion to dismiss under CPLR 3211(a)(4) since the two entities are legally distinguishable. (*See id.*; *see also Atrinsic, Inc. v Mother Nature, Inc.*, 2011 NY Slip Op 33984[U], *11 [Sup Ct, NY County 2011] [“Parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control”] [citation omitted].)

Furthermore, even though the two actions generally involve Teva’s divestiture of certain generic pharmaceutical products, the pleadings show the actions are not sufficiently similar since they are based on distinct contractual agreements and allege separate wrongs. As previously stated, in the NJ Action, Zydus alleges that TAPI breached the LOI by failing to supply the active pharmaceutical ingredient. In this action, Zydus alleges that Teva breached the terms of the APA by repudiating its obligation to supply the generic pharmaceutical products. Teva’s characterization of the APA and LOI

as “interlocking” is unavailing since a review of the agreements reveals that they entered into at different times, contain different terms, and relate to different transactions.

Nor is the relief sought in both actions substantially the same. In the NJ Action Zydus seeks damages for breach of the LOI and specific performance of the LOI, whereas in this action, Zydus seeks indemnification for losses under the APA, specific performance of the APA, and damages for breach of the covenant of good faith and fair dealing, or in the alternative, damages for unjust enrichment. The express terms of the APA differ greatly from the terms of the LOI. Thus, Teva’s concerns about inconsistent damage awards in the two actions are unwarranted.

Moreover, the assertion that the NJ Action was filed before this action is unavailing since the submissions reveal that both actions were filed on August 22, 2019. In any event, the APA expressly states that it and all matters arising therefrom are governed by the laws of New York, and that the parties agree to submit to the courts of this State. “[C]ourts should not interfere with parties’ agreements to designate a specific venue for determination of controversies that may arise out of contract.” (*Seneca v Seneca*, 293 AD2d 56, 59-60 [4th Dept 2002] [citations omitted].) Thus, the branch of the motion that seeks to dismiss or stay this action in favor of the NJ Action is denied.

Alternatively, Teva seeks to dismiss Zydus’s claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing.

“Unjust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. The plaintiff must show that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to

retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011] [internal quotation marks and citations omitted].)

Zydus asserts that it paid Teva a substantial price for the purchase of Teva’s generic pharmaceutical products, and that Teva has been significantly enriched at Zydus’s expense by the receipt of the purchase price. However, Teva does not dispute the existence of the APA, and §12.4(f) expressly details the parties’ agreement as to limitations of liability. Zydus cannot recover based on a theory of unjust enrichment where, as here, there is an express agreement governing the subject matter. (See *Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382, 388 [1987].) Thus, the cause of action for unjust enrichment is dismissed.

The claim for breach of the implied covenant of good faith and fair dealing must also be dismissed. “Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.” (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995] [citation omitted].) “Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed.” (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014] [citation omitted].)

Here, Zydus asserts that Teva undermined the core purpose of the APA, constituting a breach of the implied covenant of good faith and fair dealing under the APA. Zydus further asserts that Teva’s breach of the implied covenant has deprived it of the ability to seek approval for the pharmaceutical products and to market and sell the products, and that it has suffered substantial damages as a result of Teva’s breach. However, a cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to

the damages allegedly resulting from a breach of the contract” (*Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2d Dept 2008] [citations omitted].) Thus, the claim for breach of the implied covenant of good faith and fair dealing is also dismissed.

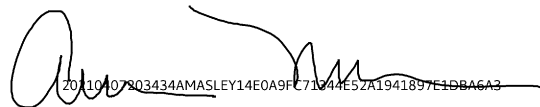
Accordingly, it is

ORDERED that the motion is granted, in part, to the extent that the causes of action for unjust enrichment and breach of the implied covenant of good faith and fair dealing are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and continues; and it is further

ORDERED that defendant is directed to serve an answer to the Complaint within 20 days after service of a copy of this Order with notice of entry; and it is further

ORDERED that the parties are directed to submit a preliminary conference order to the court (SFC-Part48@nycourts.gov) within 30 days of this order’s entry on NYSCEF. If the parties cannot agree on a proposed PC order, they may each submit a proposed PC order for the court’s review.



4/7/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: