

<b>Apotex Corp. v Hospira Healthcare India Private Ltd.</b>
2022 NY Slip Op 31873(U)
June 14, 2022
Supreme Court, New York County
Docket Number: Index No. 653460/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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APOTEX CORP.,

Plaintiff,

- v -

HOSPIRA HEALTHCARE INDIA PRIVATE LIMITED,  
HOSPIRA, INC.,

Defendant.

INDEX NO. 653460/2020

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 017

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 017) 360, 361, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 383, 404 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents and for the reasons set forth on the record (6.14.22), Apotex Corp.’s (**Apotex**) motion to reargue in part the Court’s prior decision (the **Prior Decision**; NYSCEF Doc. No. 285) to the extent that the Prior Decision granted (i) Hospira, Inc. motion to dismiss is granted because the Court misapprehended that the agreement had not been assigned to Hospira Inc. until 2017, and therefore the claims could not have accrued until then and as such the claims are timely and (ii) Hospira, Inc.’s and Hospira Healthcare India Private Limited (**Hospira India**; Hospira India, together with Hospira, Inc., hereinafter, collectively, **Hospira**) motion to partially dismiss and failed to address whether equitable tolling applied is granted because the Court misapprehended Apotex’s argument that Hospira engaged in a web of lies where it fabricated documents to conceal its elaborate scheme in breaching the parties’ agreement frustrating any potential discovery by Apotex – *i.e.*, the allegations supporting equitable tolling of the four year statute of limitations are not merely that Apotex was falsely told that a firewall was in place in 2010. Hospira repeated this false representation and made other

false representations over the ensuing years, including, among other things, fabricating presentations with fake explanations as to its sourcing issues to conceal its scheme. Thus, Apotex is entitled to, discovery based on its theory of equitable tolling of the four-year statute of limitations.

Previously, Apotex argued that the statute of limitations should be tolled based on Hospira's alleged fraud and concealment in both its memorandum of law in opposition to Hospira's motion (NYSCEF Doc. No. 185) and on the record at oral argument (NYSCEF Doc. No. 314). This is not a new argument being raised first on this motion. However, the Court misapprehended this argument and failed to address it.

In its memorandum of law, Apotex alleged that it had suspected misuse of its trade secrets in 2010, but when it confronted Hospira about it, Hospira "concocted a strategy to put Apotex off the trail" and that Hospira India's head and other employees represented that the firewalls necessary to protect Apotex's information existed (NYSCEF Doc. No. 185, at 20-21). At oral argument, counsel for Apotex said, while arguing that the parties' agreement was predominantly for services, that "a lot of these arguments are irrelevant, because of the tolling doctrines because of their fraud" (tr at 42, lines 6-8 [NYSCEF Doc. No. 314]). The Court misapprehended that Hospira Inc. was not a part of the parties' agreement until 2017, and therefore any breach of contract claims against Hospira Inc. could not have accrued until then. Apotex additionally argued that it was entitled to equitable tolling of the statute of limitations because Hospira was actively concealing its breach of contract **and frustrating any possibility of discovery by Apotex**. To wit, Apotex argued that Hospira presented it with information about product

backlogs and proposed solutions that did not reflect the reality that Hospira was selling products to Apotex's competitors to Apotex's detriment (*see, e.g.*, NYSCEF Doc. No. 55). The Court misapprehended this argument at the time.

Pursuant to CPLR 2221(d), a motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in the prior motion but not include any matters of fact not offered on the prior motion. A motion for reargument may not be based on arguments different from those previously asserted (*Independent Chemical Corp. v Puthanpurayil*, 165 AD3d 578, 578 [1st Dept 2018]). In order for a plaintiff to be entitled to equitable estoppel to save claims that would otherwise be untimely, the plaintiff must show that (i) it was induced by fraud, misrepresentations or deception to refrain from filing a timely action and (ii) it reasonably relied on the defendant's misrepresentations (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017]). A plaintiff must also demonstrate its due diligence in ascertaining the facts and commencing the action (*id.*). A determination as to whether a plaintiff is entitled to equitable estoppel to toll its claims is generally not properly resolved on a motion to dismiss (*Statler v Dell, Inc.*, 775 F.Supp.2d 474, 483 [ED NY 2011]).

The Court misapprehended in the Prior Decision (i) that Hospira Inc. was not a part of the parties' agreement until 2017, and (ii) that Apotex was arguing that Hospira engaged in a series of wrongful acts to fraudulently conceal its alleged breaches of contract, such that Apotex may be entitled to tolling of the four-year statute of limitations based on equitable estoppel. On this record, Apotex has demonstrated that it may have been induced by fraud, misrepresentations, or deception to refrain from timely filing a lawsuit, that it reasonably relied on Hospira's

representations, and that it has done adequate due diligence to timely ascertain the facts or that it was prevented from doing further due diligence by Hospira based on their elaborate contuining fraud. While Apotex’s ultimate entitlement to tolling of the statute of limitations is not properly determined on this motion, Apotex is at a minimum entitled to discovery. For the avoidance of doubt, the fact that Apotex claimed contract damages does not change this conclusion.

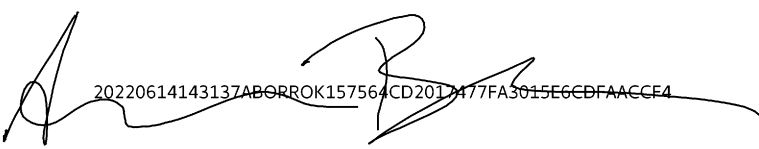
Therefore, it is hereby ORDERED that Apotex’s motion to reargue is granted; and it is further

ORDERED that the Prior Decision is amended to the extent of denying dismissal of Apotex’s breach of contract claims set forth in the 18<sup>th</sup> and 19<sup>th</sup> causes of action; and it is further

ORDERED that Apotex’s claims for breach of contract against Hospira Inc. are timely; and it is further

ORDERED that Apotex is entitled to additional discovery as set forth above.

6/14/2022  
DATE

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 ANDREW BORROK, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE