

**Cowen & Co., LLC v ReShape Lifesciences, Inc.**

2022 NY Slip Op 34118(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No. 654817/2021

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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

Justice

COWEN AND COMPANY, LLC,

Plaintiff,

- v -

RESHAPE LIFESCIENCES, INC., as successor-in-interest to Obalon Therapeutics, Inc.,

Defendant.

Table with 2 columns: Field Name, Value. INDEX NO. 654817/2021, MOTION DATE, MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

On November 30, 2022, the Court heard oral argument via Microsoft teams with counsel for all parties on the motion by plaintiff Cowen and Company, LLC ("Cowen") for summary judgment in this breach of contract action, in which a Note of Issue was filed on June 7, 2022. During the November 30, 2022 oral argument, the Court reserved decision. For the reasons that follow, the motion is granted.

The following facts are undisputed. On April 5, 2019, plaintiff Cowen was retained by non-party Obalon Therapeutics, Inc. ("Obalon") as an independent financial advisor. The parties entered into a letter agreement detailing the terms of Cowen's retention and engagement (the "Agreement"). NYSCEF Doc. No. 2. Under section 4(e) of the Agreement, Cowen could be entitled to payment of a Sale Fee in the event that a transaction such as a sale or merger of Obalon was consummated during Cowen's engagement. The definition of "Sale" in the Agreement explicitly excludes from its definition any transaction consummated between Obalon and one of the six entities listed in Schedule II of the Agreement. On June 24, 2019, the parties

extended Cowen's engagement indefinitely through an Amendment to the Agreement (the "Amendment") which also adjusted certain terms of Cowen's engagement. NYSCEF Doc. No. 3.

In January of 2021, a merger was executed between Obalon and defendant ReShape Lifesciences, Inc. ("ReShape") which was publicly announced on June 15, 2021. NYSCEF Doc. No. 139. Pursuant to section 12 of the Agreement, defendant ReShape became bound to the Agreement as Obalon's successor-in-interest. Plaintiff did not perform any services in connection with the Obalon/ReShape merger but claims that the merger triggered plaintiff's entitlement to a Sale Fee in the amount of \$1,350,000.00, for which plaintiff invoiced ReShape on June 16, 2021. NYSCEF Doc. No. 118. It is undisputed that ReShape never paid the Sale Fee. NYSCEF Doc. No. 139. The amount of the purported Sale Fee is undisputed.

To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010). The moving party has the burden to establish "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 734 (2012). A contract should be read as a whole to give meaning and effect to each of its provisions. *See Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 117 A.D.3d 551, 553 (1st Dept. 2014). The court is not required to find contract language ambiguous where the interpretation urged by one party would strain the contract language beyond its reasonable and ordinary meaning. *See Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 D.2d 1274, 1277 (2d Cir. 1989).

Defendant disputes plaintiff's interpretation of several provisions of the Agreement which would entitle plaintiff to payment of a Sale Fee in connection with the consummation of

the Obalon/ReShape merger. Notably, defendant claims that, under the Agreement, plaintiff was only entitled to a Sale Fee for transactions in which plaintiff specifically provided services. Defendant also claims that there are genuine issues of material fact as to whether plaintiff's performance of services under section 2(B) of the Agreement was satisfactory.

Read as a whole, the Agreement is unambiguous. The language in section 4(e) indicating that plaintiff is entitled to a Sale Fee "payable upon consummation of any Sale" establishes that plaintiff did not have to be specifically involved with any particular transaction in order to be entitled to a Sale Fee. The language in section 2(B) is also unambiguous and contains no language suggesting that the parties intended to impose any condition for the payment of any Fee under the Agreement. The inclusion of the Schedule II exception to the Sale Fee, as well as the existence of the Tail Period provision (which entitles plaintiff to a Sale Fee for up to 18 months after any termination of plaintiff's engagement) also support the interpretation that plaintiff is generally entitled to payment of a Sale Fee.

There is likewise no genuine issue of material fact regarding plaintiff's performance under the Agreement. As indicated above, the plain language of the Agreement does not condition plaintiff's entitlement to any form of compensation, much less the Sale Fee, upon defendant's satisfaction of plaintiff's performance. The record irrefutably establishes that plaintiff performed the required services under the Agreement. The deposition transcripts of various Obalon principals demonstrate that plaintiff performed the services enumerated in section 2(B) of the Agreement. NYSCEF Doc. No. 48, 81–85. Whether defendant was satisfied with plaintiff's performance is of no import under the terms of the Agreement as defendant failed to exercise its right to terminate the Agreement. Plaintiff also provided a series of emails

demonstrating some level of engagement and work done pursuant to the Agreement between April 2019 and March 2020. NYSCEF Doc. Nos. 61–117.

Because the Agreement is unambiguous and there is no genuine issue of material fact as to plaintiff's performance under the Agreement, and because it is undisputed that defendant did not pay the Sale Fee, the motion for summary judgment is granted. Plaintiff's request for attorney's fees is granted pursuant to section 19 of the Agreement, which entitles plaintiff as the prevailing party to recover attorney's fees from defendant.


Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the complaint herein is granted. The Clerk is directed to enter judgment in favor of plaintiff Cowen & Company against defendant ReShape Lifesciences Inc. in the principal sum of 1,350,000.00, plus interest at the statutory rate of 9% per annum from June 16, 2021 through the entry of judgment, as calculated by the Clerk of the Court, with interest accruing thereafter at the statutory rate of 9% per annum until the judgment is paid in full, upon plaintiff's e-filing of a Proposed Judgment directed to the County Clerk; and it is further

ORDERED that plaintiff is granted a judgment against defendant on liability for attorney's fees. Plaintiff shall provide to defense counsel an affirmation of services rendered and a copy of attorney invoices for the fees incurred, and counsel shall thereafter meet and confer in an attempt to agree upon an amount of fees that shall be due and payable. If counsel cannot agree, plaintiff shall move within sixty days of the date of this Order by Notice of Motion

returnable in the Submissions Part for a determination by the Court, and the affirmation of services rendered and the invoices shall be attached to the moving papers.

Dated: December 6, 2022

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE