

180 Life Sciences Corp. v Tyche Capital LLC
2023 NY Slip Op 30009(U)
January 3, 2023
Supreme Court, New York County
Docket Number: Index No. 652502/2021
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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180 LIFE SCIENCES CORP.,	INDEX NO.	652502/2021
Plaintiff,	MOTION DATE	08/26/2022, 12/14/2022
- v -	MOTION SEQ. NO.	010 011
TYCHE CAPITAL LLC,		
Defendant.	DECISION + ORDER ON MOTION	

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TYCHE CAPITAL LLC	Third-Party Index No. 595459/2021
Plaintiff,	
-against-	
SIR MARC FELDMANN, DR. JAMES WOODY, OZAN PAMIR, DR. MARLENE KRAUSS, CONTINENTAL STOCK TRANSFER & TRUST COMPANY, KBL IV SPONSOR LLC	
Defendant.	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 276, 277, 279, 280, 281, 282, 283, 284
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 285, 286, 287, 288
were read on this motion to/for ATTORNEY - DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW.

Upon the foregoing documents, Tyche Capital LLC's (**Tyche**) motion (Mtn. Seq. No. 010) to vacate or modify the Order of Attachment dated November 23, 2021 (the **Order of Attachment**; NYSCEF Doc. No. 80) is denied because there are no valid grounds for vacating the Order of Attachment. Arnold & Porter Kaye Scholer LLP's (**Arnold & Porter**) motion (Mtn. Seq. No. 011) to withdraw as counsel for third-party defendants Dr. Marlene Krauss and KBL IV Sponsor

LLC (the **Sponsor**) must be granted without opposition because Dr. Krauss and the Sponsor discharged Arnold & Porter as their attorneys. The branch of the motion seeking a stay is denied.

An order of attachment may be vacated pursuant to CPLR 6223 only upon a determination that it was illegally or improperly issued (*Henry Stuart [Fabrics] Ltd. v. Jules Moskowitz & Co. Inc.*, 44 AD2d 798, 798 [1st Dept 1974]). Pursuant to CPLR 6201(1), an order of attachment may be granted in any action where the plaintiff has demanded and would be entitled to a money judgment against one or more defendants when the defendant is a nondomiciliary residing without the state or is a foreign corporation not qualified to do business in the state.

Tyche is a foreign corporation not qualified to do business in the state and the Plaintiff seeks money damages against Tyche. Tyche's only asset is the stock that is the subject of the attachment which Tyche's sole member, who resides in London, England, transferred to his own Cayman Islands company, Thesus. At the attachment hearing, the Plaintiff firmly established its probability of success on the merits (*Deutsche Anlagen-Leasing GMBH v. Kuehl*, 111 AD2d 69, 71 [1st Dept 1985]). To wit, it is undisputed that Tyche provided a written Guarantee of at least \$5,000,001 in Net Tangible Assets at the time of the Closing, there were substantially less Net Tangible Assets as of the Closing than such amount, KBL's audited financial statements and proformas filed with the SEC represented that the company had more than \$5,000,001 in Net Tangible Assets and such financial statements did not include the Subject Liabilities, Plaintiff made written demand to fund the shortfall, and Tyche refused to pay. Period. Full stop. This is sufficient to warrant the attachment. For the avoidance of doubt, at this stage of the proceeding,

it simply can not be said that there was a knowing, intentional and voluntary waiver. Indeed, from the emails – including an email, dated December 2, 2020 (i.e., approximately one month after the closing), Ozan Pamir asked the auditors if the Tyche backstop had kicked in to restore equity to \$5 million given the redemptions at the closing and Dr. Kraus testified that she was unaware of any action that the Board or anyone took to waive the Guaranty. To the extent that anything may have been known about a potential shortfall, the Plaintiff may well have expected the shortfall to be funded and that until such time the Plaintiff would have earned 12% per year pursuant to Section 4.2 of the Guaranty. Finally, under the circumstances, Tyche is also not entitled to an increase in the undertaking based on the fact that the Plaintiff's stock has declined (*see e.g. 7th Sense, Inc. v. Liu*, 220 AD2d 215, 217 [1st Dept 1995]).

The Court has considered the defendant's remaining arguments and finds them unavailing.

It is hereby ORDERED that Tyche Capital LLC's motion (Mtn. Seq. No. 010) to vacate or modify the Order of Attachment dated November 23, 2021 (NYSCEF Doc. No. 80) is denied; and it is further

ORDERED that, Arnold & Porter Kaye Scholer LLP's motion (Mtn. Seq. No. 011) to withdraw as counsel for third-party defendants Dr. Marlene Krauss and KBL IV Sponsor LLC is granted without opposition upon filing of proof of compliance with the following conditions; and it is further

ORDERED that, within 10 days from entry, said attorney shall serve a copy of this order with notice of entry upon the former clients at their last known addresses by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; and it is further

ORDERED that, together with the copy of this order with notice of entry served upon the former client, moving counsel shall forward a notice directing the former client to appoint a substitute attorney within 30 days from the date of the mailing of the notice and the client shall comply therewith, except that, in the event the third-party defendants intend instead to represent themselves, they shall notify the Clerk of the Part of this decision in writing within said 30-day period; and it is further

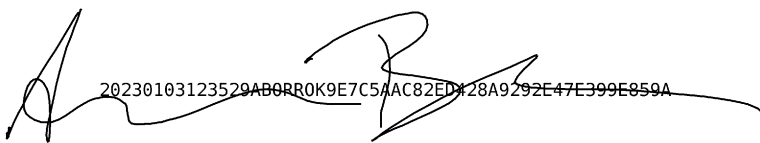
ORDERED that any new attorney retained by third-party defendants shall file a notice of appearance with the Clerk of the General Clerk's Office and the Clerk of the Part within 40 days from the date the notice to retain new counsel is mailed; and it is further

ORDERED that the departing attorney shall, within 10 days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office, the filing of a notice of appearance as provided herein, and the filing of papers as aforesaid shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that the branch of the motion seeking a stay is denied.

1/3/2023 _____ DATE	 20230103123529A80RR0K9E7C5AAC82ED428A9292E47E399E859A _____ ANDREW BORROK, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION
APPLICATION:	☐ GRANTED	☒ GRANTED IN PART
CHECK IF APPROPRIATE:	☐ SETTLE ORDER	☐ SUBMIT ORDER
	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT
	☐ DENIED	☐ OTHER
		☐ REFERENCE