

Cresco Labs N.Y., LLC v Fiorello Pharms., Inc.

2023 NY Slip Op 31211(U)

April 7, 2023

Supreme Court, New York County

Docket Number: Index No. 652343/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

CRESO LABS NEW YORK, LLC, CRESO LABS
LLC, AN ILLINOIS LIMITED LIABILITY COMPANY,

INDEX NO. 652343/2018

Plaintiff,

MOTION DATE N/A, N/A

- v -

MOTION SEQ. NO. 018 019

FIORIELLO PHARMACEUTICALS, INC., ERIC SIROTA,
SUSAN YOSS, JOHN DOES 1 - 10

DECISION + ORDER ON
MOTION

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 018) 771, 772, 773, 774,
775, 777, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888,
889, 890, 891, 892, 893, 894, 895, 896

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 019) 743, 744, 745, 746,
747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766,
767, 768, 769, 770, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795,
796, 797, 798

were read on this motion to/for STAY

Cresco Labs New York and Cresco Labs LLC's (collectively, Cresco) motion (Mtn. Seq. No.
018) to file a second amended complaint (SAC) must be granted because as discussed in great
detail in the Decision and Order of this Court (the Summary Judgment Decision; NYSCEF
Doc. No. 714), dated December 2, 2022 and Supplemental Order, (the Supplemental Order;
NYSCEF Doc. No. 717), dated December 5, 2022, both of which are incorporated into this
Decision and Order in their entirety, the fully developed record unequivocally establishes that
Eric Sirota and Susan Yoss orchestrated a brazen, unlawful, clandestine breach of the binding
LOI from the time such LOI was executed without the knowledge or authority of the Board of
Fiorello Pharmaceuticals, Inc. (Fiorello) for their own personal gain. Indeed, as previously

discussed, the fully developed record leaves no doubt whatsoever that Mr. Sirota and Ms. Yoss never had any intention of having Fiorello honor its obligations to Cresco and that they appear to have breached their fiduciary duties to their Board in that they never even told the Board's controlling shareholders that Fiorello and Cresco were even discussing doing a transaction let alone that they had signed a binding LOI until after the LOI had expired.

Fiorello's motion (Mtn. Seq. No. 019) for a stay pending an appeal of the Summary Judgment Decision is wholly without merit and must be denied.

By way of background, pursuant to a certain Amended Decision and Order, dated October 15, 2019, (the **2019 Decision**; NYSCEF Doc. No. 119), this Court dismissed Cresco's unjust enrichment claim asserted against Mr. Sirota and Ms. Yoss:

Here, the complaint fails to allege that Eric Sirota and Susan Yoss were enriched at Cresco's expense. The complaint asserts that, "[a]s substantial shareholders in Fiorello, Sirota and Yoss *stand to benefit* from Fiorello's breaches of contract by receiving a large proportion of the additional compensation that Fiorello would receive from selling itself to a third party rather than to Cresco" (Amended Complaint ¶ 66 [emphasis added]). Cresco has failed to allege that Eric Sirota and Susan Yoss actually benefited in any way at Cresco's expense, or that Cresco suffered any cognizable loss (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 251 [1st Dept 2009]). There is no allegation, for example, that Fiorello's deal with the John Doe defendant was ever approved by the Department of Health or that Eric Sirota and Susan Yoss personally profited from the transaction

(*id.*, at 11).

At that time, discovery had not yet occurred, no claim sounding in tortious interference was asserted against Mr. Sirota and Ms. Yoss and the record had not established, as discussed extensively in the Summary Judgment Decision and Supplemental Order, that Fiorello had done

a deal which was approved by the DOH which Cresco would have been able to consummate had Fiorello not breached the binding LOI (and, at a much lower price than Cresco paid for its acquisition). Indeed, the tortious interference with contract claim that was asserted was asserted against defendants John Doe 1-10 and that claim was not dismissed:

To the extent that this cause of action is premised on the LOI itself rather than a prospective Definitive Agreement, the allegations in the amended complaint are sufficient to withstand the Defendants' motion to dismiss. The amended complaint alleges that Fiorello and Cresco entered into a binding agreement, *i.e.*, the LOI, and that the John Doe defendants knew or should have known of the LOI's existence, including the no-shop provision calling for exclusive negotiations (Amended Complaint ¶¶ 59-60). The amended complaint further alleges that the John Doe defendants intentionally procured Fiorello's breach of the LOI by initiating negotiations with Fiorello, and that they did so without justification (*id.* ¶¶ 61-62). The amended complaint asserts that Cresco was ready, willing, and able to perform its obligations under the agreement and suffered monetary damages as a result of the conduct of the John Doe defendants (*id.* ¶¶ 63-64)

(*id.*, at 10-11).

As discussed **extensively** in the Summary Judgment Decision which is incorporated into this Decision and Order in its entirety, based on a now fully developed record, it is clear that Mr. Sirota and Ms. Yoss, acting as agents of Fiorello but without any authority, deviously and unlawfully schemed to shop the potential deal with Cresco from the moment of the LOI's execution and in violation of Fiorello's obligations under the LOI. Indeed, they did not even tell Jonathan Canarick who, together with Andrew Stone, controlled NYS Pharma (as such term is defined in the Summary Judgment Decision) and NYS Pharma controlled the Fiorello Board, that Fiorello and Cresco were even discussing a transaction until ***after the LOI expired***:

Now, following discovery, and based on the facts set forth in this Decision and Order, it appears that leave should be granted to file a second amended complaint (CPLR 3025; see *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014] ["a party may amend a pleading "at any time by leave of court"..., "before or

after judgment to conform the pleading to the evidence”) asserting an aiding and abetting breach of contract claim against Mr. Sirota and Ms. Yoss. While generally an officer or director cannot be held liable for a corporation’s breach of contract when they act in good faith, they can be held liable where they commit independent tortious conduct or where their action results in personal profit (*Stern v H. DiMarzo, Inc.*, 77 AD3d 730, 731 [2d Dept 2010]; see *Gottcherer v Viet-Hoa Co.*, 170 AD2d 648, 649 [2d Dept 1991]). Additionally, ***given Jonathan Canarick’s testimony that NYS Pharma (hereinafter defined) controlled Fiorello’s ability to do a deal (and that he and Andrew Stone controlled NYS Pharma) and that he was not even told that Fiorello and Cresco were talking about a transaction until after the LOI expired, Mr. Sirota and Ms. Yoss appear to have breached their fiduciary duties to Fiorello as Fiorello may well have been sold for a lot more money.*** To wit, Cresco paid over \$120 million for the alternative company, Valley, and had NYS Pharma been told of the flurry of activity as Mr. Sirota and Ms. Yoss had fiduciary obligations to do as part of the presentation of any offer to the board and shareholders of Fiorello, and had Cresco been told about the other offer as Fiorello was obligated to tell them as part of their good faith obligations pursuant to the LOI, a bidding war for Fiorello likely would have ensued. The fact that Cresco paid over \$120 million for the alternative company is proof positive of this result

(NYSCEF Doc. No. 715, at 5 n 1 [emphasis added]).

By supplemental order dated December 5, 2022 (the **Supplemental Order**; NYSCEF Doc. No. 717), the Court granted Cresco leave to move by order to show cause seeking leave to assert claims against Mr. Sirota and Ms. Yoss. This, they now have done.

Leave to amend should be freely given and should only be denied where the proposed pleading (i) is palpably improper or insufficient as a matter of law or (ii) there is prejudice or surprise resulting directly from the delay (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). The proposed SAC (NYSCEF Doc. No. 774) asserts claims against Mr. Sirota and Ms. Yoss for tortious interference with contract.

Tortious interference of contract requires (i) a valid contract between the plaintiff and another, (ii) the defendant's knowledge of that contract, (iii) intentional procurement of its breach without justification, and (iv) damages resulting therefrom (*Nostalgic Partners, LLC v New York Yankees Partnership*, 205 AD3d 426, 428 [1st Dept 2022]). As discussed in the the Summary Judgment Decision and the Supplemental Order, the fully developed record leave no doubt whatsoever that (i) there was a binding LOI between Cresco and Fiorello, (ii) Mr. Sirota and Ms. Yoss knew of the binding LOI, (iii) they intentionally schemed to cause Fiorello to breach it by actively shopping the proposed deal in violation of the LOI (and doing so without even informing the controlling shareholders of the Board of the binding LOI), and (iv) that Cresco suffered substantial cognizable damages. Thus, not only is it true that it can not be said that the claims set forth in the SAC are palpably insufficient (*McGhee*, 96 AD3d at 450), these claims have already been proved beyond all doubt, and Mr. Sirota or Ms. Yoss have not been in any way prejudiced or surprised by the assertion of these claims against them in the SAC. Indeed, had Mr. Sirota and Ms. Yoss not concealed their unlawful conduct and otherwise attempted to delay discovery, the SAC would undoubtedly been proffered sooner. They have participated fully in this lawsuit from inception including on behalf of Fiorello when Fiorello filed a motion seeking this Court to hold that Fiorello had not breached the LOI which this Court could not do because the opposite was true. Thus, the motion must be granted and Cresco shall upload the SAC to NYSCEF within seven (7) business days.

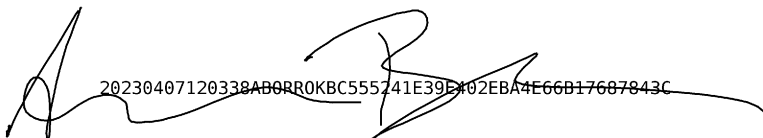
Fiorello's argument that this case should be stayed pending its appeal of the Summary Judgment Decision and Supplemental Order is wholly without merit. The decision to stay a case is left to the sound discretion of the trial court (*Uptown Healthcare Management, Inc. v Rivkin Radler*

LLP, 116 AD3d 631, 631 [1st Dept 2014]). A stay would not promote judicial economy and there is no other credible basis for a stay including CPLR 5519(c) which provides for a stay of enforcement of a judgment or order pending appeal (*Tax Equity Now NY LLC v City of New York*, 173 AD3d 464, 465 [1st Dept 2019]). Thus, the motion must be denied.

It is hereby ORDERED Cresco’s motion for leave to amend the complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc. No. 774) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Fiorello’s motion for a stay is denied.



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4/7/2023
DATE

ANDREW BORROK, 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: