Liptis Pharms. USA, Inc. v Liptis for Pharms. & Med. Prods., SAE
2023 NY Slip Op 35338(U)
February 14, 2023
Supreme Court, Rockland County
Docket Number: Index No. 035274/2021
Judge: Thomas P. Zugibe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
--X
LIPTIS PHARMACEUTICALS USA, INC.,

Plaintiff,

-against-

LIPTIS FOR PHARMACEUTICALS AND MEDICAL PRODUCTS, SAE

Defendant.
--X

DECISION AND ORDER
Index No.: 035274/2021

Mot. Seq.# 4

ZUGIBE, J.

PRELIMINARY STATEMENT AND BRIEF PROCEDURAL BACKGROUND

Plaintiff LIPTIS PHARMACEUTICALS USA, INC. (hereinafter "Plaintiff" or "Liptis USA") has filed a motion in this action against LIPTIS FOR PHARMACEUTICALS AND MEDICAL PRODUCTS, SAE (hereinafter "Defendant" or "Liptis Egypt") seeking an order: (i) for leave to amend their Complaint pursuant to N.Y. Civ. Prac. L&R ("CPLR") 3025(b); (ii) to stay discovery pending a presumably forthcoming motion to consolidate this action with another action pending in this Court, entitled "*Hesham Awad, et. al. v. Omar Holding Corp*.; Index No.: 030001/2020"; and (iii) to reset discovery schedules and deadlines once the proposed new parties are served. This motion is opposed by Defendant. The Court, upon its review and consideration of NYSCEF documents 85-111 hereby renders the following Decision and Order:

By way of brief procedural background, this Court has granted two of Plaintiff's motions, over objection of Defendant, seeking an extension of time to serve the Defendant with proper process pursuant to the Hague Convention. NYSCEF Docs. 52, 53 and 82. Plaintiff now contends that service has been effectuated pursuant to the Court's prior decision(s), and thus jurisdiction has been obtained. NYYSCEF Doc. 84. As per the Plaintiff, discovery is in its infancy stages only, and this case is fairly far from being able to be certified for trial. Plaintiff has now filed the instant motion seeking leave to amend file and serve a second amended complaint, and to join in an additional defendant pursuant to CPLR 1003. The Court, as detailed herein, grants the motion in part, and denies the motion in part.

CONTENTIONS OF THE PARTIES

In the instant matter, Plaintiff seeks to add new factual allegations that purportedly support the causes of action pled in the first amended complaint, as well as adding some additional theories of recovery that stem from the same series of transactions and occurrences that form the basis of the prior pleadings. Specifically, Plaintiff adds three new causes of action: tortious interference with a contract, intentional interference with a prospective business advantage, and breach of a 2008 agreement. NYSCEF Doc. 97. In addition, Plaintiff amends the breach of contract cause of action from the prior pleading and now references a 2016 agreement. *Id.*

Further, Plaintiff seeks join an additional defendant pursuant to CPLR 1003 who Plaintiff contends is a necessary party with respect specifically to the tortious interference with contract claim. Based on the fact this case is in only the early stages of discovery, Plaintiff contends that no surprise or prejudice will result from the amendment.

In opposition, Defendant contends that this case is well into discovery, as "hundreds" of pages of documents have already been exchanged, and this case has been pending since late 2021. This, according to Plaintiff, is prejudicial. Further, Defendant couches this motion as a "back-door" attempt to connect this case to the above refenced pending case by adding Lofti Omar as a new party to this action. NYSCEF Doc. 99, ¶9. Defendant argues that the proposed amended pleading is futile and devoid of merit, as there is a nearly identical case pending in the U.S. District Court, District of Puerto Rico (hereinafter the "Puerto Rico action"), regarding the same contract that is at issue in the instant litigation. The Court should not, therefore, allow Plaintiff to amend the pleading once again when there is a similar claim (or claims) already pending in another Court. This, as per Defendant, requires summary dismissal of the new claims sought to be alleged pursuant to CPLR 3211(a)(4). Finally, Defendant argues that the claims Plaintiff seeks to add have not been sufficiently stated and are therefore "palpably insufficient."

In reply, Plaintiff avers that CPLR 3211(a)(4) is inapplicable here because the Puerto Rico action and this action are not between the same parties as is required by the statute. In this action, Liptis USA is suing Liptis Egypt, and, if the instant motion is granted, Lofti Omar. In the Puerto Rico action, Liptis USA is suing the Ingraham Group and Sami Omar. Further, Plaintiff contends that this action concerns agreements from 2008 and 2016, unlike the Puerto Rico action which only pertains to the 2018 agreement. Plaintiff also asserts that there is no basis for the Court in Puerto Rico to exercise personal jurisdiction over Lofti Omar, who resides in the State of New York, and thus complete relief cannot be accorded to Plaintiff if this motion is not granted. Plaintiff also argues that the claims now sought to be added are sufficiently stated to survive the instant motion.

MOTION FOR LEAVE TO AMEND THE COMPLAINT

Generally, speaking leave to amend a pleading shall be freely given by the Court "absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Etzion v. Etzion*, 112 A.D.3d 782, 978 N.Y.S.2d 57 (2d Dept. 2013). When evaluating whether a motion to amend a pleading should be granted, the court "'shall not examine the legal sufficiency or merits of [the] pleading unless such insufficiency or lack of merit is clear and free from doubt'" *Id.* (internal citations omitted).

In the instant matter, Defendant argues insufficiency of each of the prospective newly added claims, and therefore the Court will examine each of the claims in further detail, *infra*.

A. Tortious Interference with Contract and Intentional Interference with Prospective Economic Advantage- Causes of Action 8 and 9

For purpose of evaluating these causes of action, the Court will afford the facts as alleged by Plaintiff the presumption of truth.

Lofti Omar is, as per the Plaintiff, the CEO of Liptis Egypt, and is "responsible for creating and maintaining the contractual and/or business relationship between Liptis Egypt and the Ingraham Group." NYSCEF Doc. 97, ¶15. Sami Omar, an alleged resident of Puerto Rico, is Liptis Egypt's COO, and is "responsible for creating and maintaining the contractual and/or business relationship between Liptis Egypt and the Ingraham Group." *Id.* at ¶16. Plaintiff alleges that both Lofti Omar and Sami Omar, among others, used the Ingraham Group to:

> tortiously interfere with the contractual and business relations of Liptis USA and Liptis Egypt; they have conspired to tortiously interfere with such relations; with knowledge of such relations, they created, operate and use the cover of the corporate shield to funnel funds from Liptis Egypt to the Individual Defendants to permit them to operate Liptis Egypt and cut off the exclusive supply arrangement with Liptis USA; and, as a result of these actions Liptis USA has and will continue to incur millions of dollars in damages.

Id. at ¶82. The proposed amended pleading continues on to detail the conduct of Sami Omar and Lofti Omar in perpetuating an alleged fraud as against Liptis USA, said actions all intimately involving the Ingraham Group. In fact, Plaintiff alleges that the decision to conduct Liptis Egypt's business through the Ingraham Group was Sami and Lofti Omar's decision. *Id.* at ¶93.

According to the amended complaint in the Puerto Rico action, the Ingraham Group is an LLC formed under the laws of Puerto Rico. NYSCEF Doc. 105, ¶8. As per the Puerto Rico Department of State Corporate Registry, the only person authorized to presumably act for the entity is Sami Omar, who is also the COO of Liptis Egypt. *Id.* at ¶8, 10. As per the Plaintiff, the Ingraham Group was established "for the sole purpose of maliciously interfering with the Liptis Egypt-Liptis USA agreement[.]" *Id.* at ¶9. Essentially, it is alleged that the Ingraham Group is nothing more than an "alter ego" being used by Mr. Omar for malintent. *Id.* at ¶11, 14. In the amended complaint that is the subject of the pending Puerto Rico action, Plaintiff asserts the cause of action of tortious interference with a contractual relationship.

In the proposed amended pleading in the case pending before this Court, the crux of the tortious interference and intentional interference with a prospective economic advantage claims is that Sami and Lofti Omar have intentionally interfered with Plaintiff's business opportunities, causing the business to suffer severe loses. NYSCEF Doc. 97, ¶174-206. Further, it is alleged that these individuals intentionally incorporated the Ingraham Group and/or used the Ingraham Group for the purpose of funneling funds from Defendant Liptis Egypt to the Ingraham Group and Sami and Lofti Omar, among others, in order to ultimately replace Plaintiff Liptis USA as the exclusive provider of certain active pharmaceutical ingredients. *Id.* These actions allegedly interfered with both current and prospective business opportunities of the Plaintiff. *Id.* Though not pled with the same level of detail, these are the exact same facts that form the basis of the tortious interference with a contractual relationship claim being pursued in the Puerto Rico action as against the Ingraham Group and Sami Omar, the COO of Liptis Egypt.

"'[A] court has broad discretion in determining whether an action should be dismissed [pursuant to CPLR 3211(a)(4)] on the ground that there is another action pending between the same parties for the same cause of action[.]'" *Feldman v. Harari*, 183 A.D.3d 629, 122 N.Y.S.3d 664, 666 (2d Dept. 2020) (internal citations omitted). Generally, a court may dismiss an action where there is a "substantial identity of the parties and causes of action." *Id.* In making the determination dismissal is warranted, "'[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action'" *Id.* (internal citations omitted). It is sufficient if the two actions are "'sufficiently similar' . . . and that the relief sought is 'the same or substantially the same'" *Id.* (internal citations omitted). "Similarly, while a complete identity of parties is not a necessity for dismissal . . . there must at least be a 'substantial identity of parties … which generally is present when at least one plaintiff and one defendant is common in each action[.]'" *Jaber v. Elayyan*, 168 A.D.3d 693, 694, 93 N.Y.S.3d 315 (2d Dept. 2019) (internal citation omitted).

Here, the same Plaintiff is suing based on the same legal theory of intentional interference with a contractual relationship in two courts. In one court, Liptis Egypt, of which Lofti Omar is the CEO, is the defendant. In the other, the COO of Liptis Egypt, Sami Omar, and his "alter ego" corporation, the Ingraham Group, which Sami and Lofti are allegedly using to interfere with Plaintiff's business relationships to benefit Liptis Egypt, are defendants. The Court acknowledges that the defendants are not identical. However, they are alleged to all be united in interest, conspiring together, and committing nearly the exact same conduct, acting essentially in concert to benefit Liptis Egypt, and themselves individually. The Plaintiff, who is identical in both actions, is seeking damages in each Court based on the same conduct. The Plaintiff does not explain why it is necessary to add Lofti Omar as a party in this proceeding when the identical relief is sought against Sami Omar in the nearly identical proceeding pending in Puerto Rico.

Based on the foregoing, this Court determines the parties and tortious/intentional interference causes of action are sufficiently similar to determine that the proposed amended causes of action are without merit, as they are pending in another court, and it is without a doubt prejudicial to have these claims and legal theories being litigated in two forums. The Court therefore denies the prong of the Plaintiff's motion seeking leave to amend the complaint to add these two claims. As Plaintiff admittedly only seeks to add Lofti Omar as a necessary party to afford complete relief on the tortious interference claims, the request is denied based on this Court's denying the motion to add these claims.

B. Breach of Contract- Causes of Action 3 and 4

Defendant contends that the Plaintiff has not set forth the requisite elements of these causes of action, thus rendering them patently insufficient. Defendant argues that Plaintiff has not established the specific provisions of the contracts that have purportedly been breached, and that the breach claims must fail as a matter of law. The premise of the breach causes of action is that the Defendant is refusing to purchase supplies of raw materials for certain designated products from Plaintiff, refusing to manufacture certain brands for Plaintiff, and illegally using these brands to compete with Plaintiff. NYSCEF Doc. 97, ¶140, 151-53. Plaintiff, in reply, argues that the proposed amended pleading gives sufficient detail about the provisions of the relevant contacts that have been breached.

In any event, the Court notes that the breach causes of action existed in the first amended complaint. The proposed amended pleading adds facts and details to the prior version of the complaint, and references additional agreements, but the general premise of the alleged breach is still the same. The Court determines that the proposed amended breach claims are stated with enough detail such that they cannot be determined as patently devoid of merit at this stage in the litigation. Whether the elements as stated can ultimately be proven at trial, or survive a summary judgment motion, is not the issue presently before this Court.

Although the Defendant asserts that it would be prejudiced should the Court allow any of the proposed newly added cause of action to proceed, the Court disagrees. The burden of establishing the prejudice resulting from an application for leave to file an amended pleading rests on the party opposing the application. *Ditech Financial, LLC*, 189 A.D.3d 1360, 139 N.Y.S.3d 293, 296 (2d Dept. 2020). "'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very element of the laches doctrine[.]'" *Id.* (internal citation omitted). Further, to establish such prejudice, there must be a showing that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position. *See*, *Redd v. Village of Freeport*, 150 A.D.3d 780781, 53 N.Y.S.3d 692, 693 (2d Dept. 2017).

The Court acknowledges that this case was commenced in September of 2021. However, the Defendant would be remiss not to recall that a significant amount of time between the filing of the original complaint and the filing of the instant motion to amend was spent litigating over extensions of time to serve process pursuant to the Hague Convention. Paper discovery has commenced. Depositions are, upon information and belief, still in the process of taking place. The facts upon which the breach theories are premised all stem from the facts and series of transactions and occurrences that were alleged in the first amended complaint, and therefore cannot be said to cause surprise to the Defendant. Defendant has not established that allowing the pleading of the amended causes of action will somehow hinder or interfere with its ability to interpose a defense or litigate this case.

Therefore, this Court determines that the Defendant has not met its burden of establishing prejudice such that would militate against this Court granting the motion for leave to amend the aforementioned amended breach claims.

The Court therefore grants the prong of the Plaintiff's motion seeking leave to amend the complaint to add new breach claims and/or amend the breach claims already set forth in the prior pleading.

STAY OF DISCOVERY

Based on the Court's decision, *supra*, there is no need to stay discovery. In addition, the Court already informed counsel on the record on January 5, 2023 that the request to stay discovery is denied. NYSCEF Doc. 111. All discovery deadlines Ordered by the undersigned on January 5, 2023 remain the Order of this Court.

CONCLUSION

Now, therefore, it is hereby

ORDERED, that Plaintiff's motion seeking leave to amend the complaint is granted in part, and denied in part, as detailed above; and it is further

ORDERED, that Plaintiff's request to add/join a new party is denied; and it is further

ORDERED, that Plaintiff shall revise the proposed Second Amended Complaint to conform with this Decision, and shall file and serve same upon Defendant via NYSCEF, on or before February 28, 2023; and it is further

ORDERED, that Defendant shall have thirty (30) days from the date of filing of the conformed Second Amended Complaint to Answer the allegations and claims set forth therein; and it is further

ORDERED, that the compliance conference previously scheduled for **Wednesday, March 1, 2023, at 11:00 a.m**. shall remain as scheduled.

The foregoing shall constitute the Decision and Order of this Court.

Dated: New City, New York
February 14, 2023

Hon. Thomas P. Zugibe, J.S.C.

To: *All counsel of record with NYSCEF*