

Kennedy Lewis Inv. Mgt., LLC v StimQ Med. LLC

2024 NY Slip Op 32132(U)

June 24, 2024

Supreme Court, New York County

Docket Number: Index No. 653767/2022

Judge: Arlene P. Bluth

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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

KENNEDY LEWIS INVESTMENT MANAGEMENT, LLC,

Plaintiff,

- v -

STIMQ MEDICAL LLC, LAURA TYLER PERRYMAN, LTP
LIMITED LLC,

Defendant.

-----X

INDEX NO. 653767/2022

MOTION DATE 06/10/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 166, 167, 168, 169, 170, 171, 172, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendant Laura Tyler Perryman (“Movant”) for summary judgment dismissing plaintiff’s second cause of action for malicious prosecution and the third cause of action for declaratory judgment is denied.

Background

Plaintiff is an investment advisory firm that provides investment services to pension plans and other entities. Plaintiff argues that Movant fraudulently induced it into extending \$20 million in financing (via a loan) and to invest \$10 million to purchase shares in an entity called Stimwave Technologies Inc. (“Stimwave”); Movant was CEO of Stimwave. Defendant StimQ Medical LLC (“StimQ”) is a subsidiary of Stimwave.

Plaintiff insists that Movant misrepresented Stimwave’s financial condition during the loan negotiations and that these alleged misrepresentations became the focus of a U.S.

Department of Justice investigation. Specifically, plaintiff claims that that Movant assured

plaintiff that a prior entity, called Micron (an entity of which Movant was the managing member), no longer had relevant intellectual property rights; apparently Stimwave allegedly acquired these IP rights from Micron. Plaintiff contends that Movant asserted that StimQ was a “disregarded entity” and that Stimwave owned 81% of StimQ equity. It argues that it learned in November 2019 that Movant was about to claim that these representations were false even though they were made to induce plaintiff to enter into the aforementioned financial transactions. Stimwave, a medical device company, later declared bankruptcy and plaintiff (and its successors) acquired a 100% ownership interest in the assets of Stimwave.

Plaintiff alleges that Stimwave’s board of directors placed Movant on administrative leave and she later resigned as CEO. However, plaintiff contends that Movant then brought a series of purportedly baseless claims against plaintiff.

In the second cause of action, plaintiff alleged a malicious prosecution claim based on claims raised by Movant in a Delaware case as well as a bankruptcy proceeding involving Micron. It contends that all of these proceedings were resolved in plaintiff’s favor and that the bankruptcy court found that Movant’s pleadings were baseless and even sanctioned her personally. The third cause of action seeks declaratory relief relating to various agreements, all of which purportedly implicate plaintiff’s investment and loan.

Movant seeks summary judgment on both the malicious prosecution and the declaratory judgment claims. She insists that there are no genuine issues of fact for these claims and that plaintiff was not harmed by the statements made in the other actions. With respect to the Delaware case, Movant claims that the cross-complaint filed by Micron is essentially moot as the case settled. She argues that none of the causes of action survived a settlement and that the entire complaint was subsequently dismissed. Movant argues that the bankruptcy court case was

voluntarily dismissed only 21 days after it began. She insists that plaintiff only made an appearance as an interested party in this case.

For the third cause of action—the declaratory relief claim—Movant argues that she does not own shares in StimQ and did not own shares when any proposed agreements were drafted by Stimwave’s legal counsel.

In opposition, plaintiff contends that the third-party claims against plaintiff in the Delaware claim were baseless and caused plaintiff to expend needless legal fees. This action involved causes of action asserted by Stimwave against the Perrymans (Movant and her husband). Plaintiff observes that Movant alleged that Micron (an entity where Movant was the managing member) owned certain of Stimwave’s intellectual property and that the StimQ shares had not been transferred, contrary to representations she made to plaintiff. As a result, Movant sought a declaratory judgment that any collateral covered by plaintiff’s loan did not include Micron’s IP rights. Plaintiff also sought an aiding and abetting claim for breach of fiduciary duty based on plaintiff’s purported involvement in negotiations over a forbearance related to plaintiff’s loan. Plaintiff says that this negotiation was necessitated by loan defaults caused by Movant’s misrepresentations.

Plaintiff maintains that while this Delaware action was pending, Movant caused Micron to file for bankruptcy in Florida in December 2020. While plaintiff acknowledges that this proceeding resulted in a settlement, it points out that prior to this settlement, Movant sat for a deposition at which she asserted her fifth amendment right against self-incrimination to nearly every question, including whether she was married and whether it was a Monday. Plaintiff observes that Movant filed an objection to the settlement motion after the bankruptcy court held

a two-day evidentiary hearing and that she later filed a motion for reconsideration, both of which were unsuccessful.

Plaintiff details that Movant then filed an adversary proceeding (a lawsuit in bankruptcy court) in May 2021 that named plaintiff as one of the defendants in which she complained about the settlement agreement. Plaintiff points out that contrary to Movant's papers, it participated in this case by filing a motion to dismiss this adversary complaint. It observes that Movant then filed a motion to withdraw the reference and sought to transfer the adversary proceeding to District Court as well as a motion to continue a hearing set on the pending motions. According to plaintiff, when the bankruptcy court noted that it would hear pre-trial matters, Movant asserted that she would end the case if it was not going to be moved to a different court. Movant then discontinued that matter and asserted a "judicial conflict of interest". The bankruptcy court then sanctioned Movant in November 2021 for filing a bad faith adversary proceeding and awarded plaintiff \$5,165.

Movant did not submit a reply.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Malicious Prosecution

“The elements of malicious prosecution consist of the initiation of a legal action by the defendant against the plaintiff, begun with malice and without probable cause to believe it can succeed, and ending in the accused's favor. Such legal action can even be civil in nature, as long as it interferes in some way with the plaintiff's person or property. A plaintiff asserting malicious prosecution must also allege and prove special damages” (*Purdue Frederick Co. v Steadfast Ins. Co.*, 40 AD3d 285, 286, 836 NYS2d 28 [1st Dept 2007] [internal quotations and citations omitted]).

The Court denies this branch of the motion as Movant did not meet her burden to explain what the probable cause for bringing the third-party action in the Delaware case or for her actions in the bankruptcy court. Nor did she establish as a matter of law that she acted without malice. That the bankruptcy case settled is of no moment because she was personally sanctioned in that case (*see* NYSCEF Doc. No. 205). And, as plaintiff points out, the fact that Movant may have dropped certain claims in the Delaware action months after plaintiff requested that she do

so does not establish that she is entitled to summary judgment on this claim (*McGuire v Epstein*, 167 AD2d 453, 453, 561 NYS2d 921 [2d Dept 1990] [finding that the abandonment of certain claims at the insistence of the opposing party states a cognizable claim for malicious prosecution]).

The Court also observes that to the extent that Movant argues this claim is time-barred, that claim was waived as it was not asserted in her pre-answer motion to dismiss (*see* CPLR 3221[e]).

There are numerous issues of fact that compel the Court to deny this branch of the motion. Plaintiff contends that Movant failed to dismiss her claims against plaintiff in the Delaware action until more than eight months after that action was remanded following the settlement and only after plaintiff expended money to re-file its motion to dismiss those claims. And, with respect to the bankruptcy case, plaintiff filed a motion to dismiss the adversary proceeding 11 days before Movant dismissed it. So, while Movant's assertion in her moving papers that the case was dismissed before responsive pleadings were filed might be true as plaintiff did not file an answer, the fact is that plaintiff expended resources to dismiss a case that it claims was filed in bad faith. In sum, there is no doubt that plaintiff successfully defeated Movant's litigation efforts and there are issues of fact surrounding her motivation for filing these cases, particularly given that she was sanctioned in one.

The fact is that plaintiff alleges that Movant engaged in actions for the sole purpose of getting plaintiff to expend financial resources even though she knew these claims lacked merit. On this record, the Court cannot find as a matter of law that Movant had sufficient probable cause for her litigation tactics in these proceedings. In other words, this Court cannot simply

accept Movant's version of events because the Court cannot make credibility determinations on a motion for summary judgment.

Declaratory Relief Cause of Action

The Court also denies this branch of the motion as Movant did not meet her burden on a motion for summary judgment to sufficiently identify why this claim should be dismissed as a matter of law.

As plaintiff pointed out in opposition, despite Movant's claim that she does not own any shares in StimQ and did not own shares when any agreements were drafted, the Security Exchange Agreement dated December 2018 identifies Movant as a shareholder of StimQ (NYSCEF Doc. No. 180). The Court observes that Movant did not attach any documents to support her contention that she did not own such shares nor did she submit a reply to address this issue.

Discovery

Another basis to deny the instant motion is that discovery remains pending (this is the subject of multiple motions). No depositions have occurred and there are remaining disputes about document discovery. That compels the Court to find that even if Movant had met her burden on this motion, it is premature given that essential facts remain outstanding in discovery (*Jeffrey v DeJesus*, 116 AD3d 574, 575, 984 NYS2d 325 [1st Dept 2014]).

Accordingly, it is hereby

ORDERED that defendant Perryman’s motion for summary judgment is denied.

6/24/2024

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: