

RedHill Biopharma Ltd. v Kukbo Co., Ltd.

2024 NY Slip Op 33768(U)

October 3, 2024

Supreme Court, New York County

Docket Number: Index No. 653200/2022

Judge: Nancy M. Bannon

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. NANCY M. BANNON PART 61M

Justice

-----X

REDHILL BIOPHARMA LTD.,

Plaintiff,

- v -

KUKBO CO., LTD.,

Defendant.

-----X

INDEX NO. 653200/2022

MOTION DATE 06/11/2024

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 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, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 372, 373, 374

were read on this motion to/for SANCTIONS.

I. INTRODUCTION

In this breach of contract action, the plaintiff, RedHill Biopharma Ltd., ("RedHill") moves pursuant to CPLR 3126 to strike the answer and counterclaims of defendant, Kukbo Co., Ltd. ("Kukbo"), on the ground of spoliation of evidence. In the alternative, RedHill seeks an order precluding Kukbo from introducing certain evidence at trial or for an adverse inference charge. Kukbo opposes the motion, and cross moves pursuant to 22 NYCRR § 130-1.1 for sanctions against RedHill for frivolous conduct in filing this motion. Redhill's motion is granted in part to the extent that Kukbo is precluded from adducing at trial or on a dispositive motion any evidence of communications between Kukbo and nonparty LSK Global Pharma Services, Co., Ltd ("LSK"). regarding the approval of Opaganib in South Korea, and Kukbo's cross-motion is denied.

II. BACKGROUND

On October 25, 2021 the parties entered into the Subscription Agreement, whereby Kukbo agreed to purchase shares in RedHill in two installments of \$5,000,000.00. The first installment was due at the time of execution, and the second installment was conditioned on the parties executing a license agreement by the sixth month anniversary of the Subscription

Agreement. During this time, Kukbo hired a contract research organization, nonparty LSK, to assist Kukbo in Opaganib's application for approval for use in South Korea. In December 2021, Kukbo delivered to RedHill a list of documents requested by LSK for the Korean approval process. After RedHill uploaded the requested documents, LSK found that the documents insufficient to apply for approval in South Korea.

On March 14, 2022, the parties entered into the Exclusive License Agreement, under which RedHill granted Kukbo an exclusive license to distribute Opaganib in South Korea. In return, Kukbo agreed to pay RedHill \$1,500,000.00. The Exclusive License Agreement also triggered Kukbo's obligation to pay the second \$5,000,000.00 owed under the Subscription Agreement.

After Kukbo failed to make both payments, RedHill wrote to Kukbo on May 26, 2022, warning that RedHill would take steps to protect its' rights if Kukbo failed to make both payments.

When Kukbo once again failed to make both payments, RedHill commenced this action, alleging breach of the Subscription Agreement and Exclusive License Agreement, as well as breach of the covenant of good faith and fair dealing. Kukbo answered, asserting nine affirmative defenses and ten counterclaims. Kukbo's third (anticipatory repudiation), fourth (fraudulent inducement to enter into the Subscription Agreement), fifth (fraudulent inducement to enter into the Exclusive License Agreement), sixth (fraudulent misrepresentation), eighth (breach of the Exclusive License Agreement), and ninth (breach of the Subception Agreement), remain in this matter.

During discovery, after the parties served their initial productions, RedHill noted that its initial productions included 1,159 documents, while Kukbo only produced 50 documents. On July 13, 2023, RedHill wrote to Kukbo, expressing RedHill's concerns that Kukbo's productions failed to include: (1) communications between the parties; (2) Kukbo's internal economic evaluations of Opaganib prior to execution of the Exclusive License Agreement; (3) drafts or redlines of the Subscription Agreement and Exclusive License Agreement; and (4) communications between Kukbo and LSK regarding Opaganib's approval application in South Korea. Kukbo replied that it would undertake a reasonable effort to search for resources responsive to these requests for supplemental production. Kukbo identified James K. Ahn, Ken

Choi, and Young Seok Kim served as custodians for the documents it produced, and that these custodians produced 600 documents for Kukbo to review. Kukbo's counsel later wrote to Kukbo's counsel, stating that Ahn and Choi left Kukbo on May 31, 2023, and March 18, 2022, respectively.

On October 19, 2023, Kukbo made a supplemental production of 212 documents, stating that these were emails excluded from its first production that constitutes parts of various email chains already produced by Kukbo. However, RedHill identified 81 documents from this supplemental production that were not duplicates from emails that Kukbo had produced earlier. Furthermore, Redhill identified 114 documents of communications between the parties that RedHill produced, but that Kukbo failed to produce. By the end of discovery, RedHill produced 15,292 documents, while Kukbo produced 262 documents. The instant motion and cross-motion ensued.

III. DISCUSSION

A party seeking sanctions for spoliation of evidence must show (1) that the party having control over the evidence possessed an obligation to preserve it at the time of destruction; (2) that the evidence was destroyed with a culpable state of mind, and (3) that the destroyed evidence was relevant to the party's claims or defense. Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 547-48 (2015); VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 45 (1st Dept. 2012). In determining culpable state of mind, courts consider whether the opposing party failed to issue a written litigation hold when appropriate, failed to identify the key players and to ensure that their electronic or other records are preserved, failed to cease the deletion of these records. Id. If the evidence is determined to have been destroyed intentionally or willfully, the relevancy of the destroyed documents is presumed, but if the evidence was destroyed negligently, the party seeking spoliation sanctions must demonstrate relevance. Pegasus Aviation I, Inc. v Varig Logistica S.A., supra.

A party's obligation to preserve evidence begins when a party "reasonably anticipates litigation", and "must, at a minimum, institute an appropriate 'litigation hold' to prevent the routine destruction of electronic data." VOOM HD Holdings LLC v EchoStar Satellite L.L.C., supra at 41. "[T]he reasonable anticipation of litigation, as discussed by Zubukale v UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003), and its progeny, is a time when a party is on notice of a credible probability that it will become involved in litigation...seriously contemplates

initiating litigation, or when it takes specific actions to commence litigation”. Id. at 43 (internal citations omitted).

Here, Kukbo should have reasonably anticipated litigation on November 23, 2021, when Kukbo first learned of RedHill its shares to the public that “blindsided” Kukbo. Kukbo argues that it did not plan to initiate litigation at that time, and only anticipated litigation on May 26, 2022, when RedHill threatened to adopt steps to enforce its rights under the Subscription Agreement and Exclusive License Agreement. However, a party does not require notice of pending litigation or a specific claim in order to reasonably anticipate litigation. Indeed, as the First Department has held, “sides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes”. Id. To allow a party to fail to preserve documents when they should have anticipated litigation simply because there was no actual litigation commenced at the time would allow a party to destroy documents without impunity. Id.

In any event, Kukbo’s own motion papers state that it instituted a litigation hold on December 14, 2022, seven months after the time it says it first reasonably anticipated litigation. Kukbo does not detail the nature of the litigation hold allegedly put in place. Kukbo also allegedly issued this litigation hold long after Choi, a key player in the negotiations with RedHill and the only English speaker at Kukbo, left the company on March 18, 2022. Furthermore, RedHill submits the deposition testimony of Young Seok Kim, a representative of Kukbo who was worked on the transactions with RedHill. Kim testified that he, along with James K. Ahn and Ken Choi, were the Kukbo employees, or key players, involved with the RedHill transactions. Kim went on to state that Kukbo employees were allowed to use their personal emails for work related communications, but personal emails were not automatically served on Kukbo’s servers. Instead, Kim stated that he was CC’d on all Kukbo emails, and that he would personally store the last email of an email chain on Kukbo’s servers. However, Kim conceded that if he was not copied on an email, it was unlikely that another Kukbo employee would save the email on the server. Kim also stated that Kukbo’s policy is to retain documents for three years.

RedHill has demonstrated that Kukbo failed to preserve emails through its retention policy. If Kim was not CC’d on an email, then it was unlikely that the email would be stored. Furthermore, Kukbo failed to institute a litigation hold when it should have reasonably anticipated litigation in November 2021, or even May 2022. RedHill’s list of 114 communications

between the parties that were not produced by Kukbo shows that Kukbo failed to properly preserve documents in anticipation of this litigation. Of these 114 documents, Kukbo claims it already produced 12 of them, and 7 of them were not produced because they were not responsive to RedHill's demands. However, Kukbo does not specify which documents were already produced. Furthermore, all of these documents are less than three years old, meaning that Kukbo may have failed to follow its own policy to store emails for three years.

Despite Kukbo's inadequate email retention policy and lack of a proper litigation hold, RedHill's submissions do not provide an inference that Kukbo intentionally or willfully destroyed these documents. Furthermore, even though RedHill does establish a disparity in document production between the parties and that Kukbo's email retention policy was deficient, RedHill does not identify any specific documents that were or may have been destroyed or that were relevant to its claims or defenses. RedHill claims that it expected Kukbo to produce (1) communications between the parties; (2) Kukbo's internal economic evaluations of Opaganib prior to execution of the Exclusive License Agreement; (3) drafts or redlines of the Subscription Agreement and Exclusive License Agreement; and (4) communications between Kukbo and LSK regarding Opaganib's approval application in South Korea. The first three categories include documents that RedHill produced during discovery, so it is not prejudiced by Kukbo's failure to produce them in return. The fourth category, communications between Kukbo and LSK, is the only category of documents that RedHill does not have in its possession and is relevant to RedHill's defenses.

"Striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct." Iannucci v Rose, 8 AD3d 437, 438 (2nd Dept. 2004); see Melcher v Apollo Medical Fund Mgt. LLC, 105 AD3d 15 (1st Dept. 2013); Russo v BMW of North America, LLC, 82 AD3d 643 (1st Dept. 2011). The imposition of such a sanction is only appropriate where the evidence was destroyed with a "culpable state of mind" VOOM HD Holdings LLC v Echostar Satellite, LLC, supra, at 45; see Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543 (2015). The sanction of the striking of a pleading is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (see Bach v City of New York, 33 AD3d 544 [1st Dept. 2006]; Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc., 221 AD2d 243 [1st Dept. 1995]), or has left the movant "'prejudicially bereft' of the means of presenting their claim." Kirkland v New York City Housing Auth., supra at 174, quoting Hoenig, Products Liability, Impeachment

Exception: Spoliation Update, NYLJ, Apr. 12, 1993, at 6, col 5; see Canaan v Costco Wholesale Membership, Inc., 49 AD3d 583 (2nd Dept. 2008). No such showing has been made by RedHill here.

However, Kukbo's email retention policy was certainly negligent. Thus, while the striking of Kukbo's answer is not warranted, the spoliation sanction of preclusion of evidence (see Baldwin v Gerard Ave., LLC, 58 AD3d 484 [1st Dept. 2009]), which here, specifically includes the fourth category of documents sought by RedHill: communications between Kukbo and LSK regarding Opananib's approval application in South Korea, is appropriate. Kukbo's poor email retention policy and failure to properly store emails precludes Kukbo from introducing any communications between itself and LSK regarding Opananib's application status in South Korea into evidence. See Harry Winston, Inc. v Eclipse Jewelry, Corp., 215 AD3d 421, 423 (1st Dept. 2023), Harry Weiss, Inc. v Moskowitz, 106 AD3d 668 (1st Dept. 2013), Palakawong v Lalli, 88 AD3d 541 (1st Dept. 2011).

RedHill also requests the court grant it all costs incurred in bringing this motion, including attorney's fees. Under the circumstances, that application is denied without prejudice.

In light of the court granting RedHill's motion to the extent of issuing an adverse inference, Kukbo's cross motion seeking to sanction RedHill for filing a frivolous motion is denied. As RedHill's motion is granted to the extent of precluding Kukbo from introducing certain evidence, logic dictates that there is no frivolous conduct on RedHill's warranting sanctions. See 22 NYCRR § 130-1.1.


IV. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3126 is granted to the extent that the defendant is precluded from presenting at trial or on a dispositive motion any evidence of communications between defendant and nonparty LSK Global Pharma Services, Co., Ltd., and the motion is otherwise denied, without prejudice for the plaintiff to request an adverse inference charge at trial, and it is further,

ORDERED that the defendant's cross motion for sanctions is denied.

This constitutes the Decision and Order of the Court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/3/2024
DATE

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