Gelwan v Rising Pharms., Inc.
2026 NY Slip Op 31577(U)
April 15, 2026
Supreme Court, New York County
Docket Number: Index No. 151719/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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LLOYD GELWAN

Plaintiff,

- v -

RISING PHARMACEUTICALS, INC., RISING PHARMA HOLDINGS, INC., PACK PHARMACEUTICALS, LLC, ACETO CORPORATION, NEW MOUNTAIN CAPITAL LLC, XYZ CORPORATION, MEMORIAL SLOAN KETTERING CANCER CENTER

Defendants.

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INDEX NO. 151719/2020

MOTION DATE 10/03/2023

MOTION SEQ. NO. 001

ORDER - AMENDED (MOTION RELATED)

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56

were read on this motion to/for DISMISSAL.

The Court's prior decision and order is recalled and vacated, upon the Court's own motion, to correct an error in footnote number 1, correct the procedural status of the case, and schedule a preliminary conference, and the following order and judgment is substituted therefore:

On February 14, 2020, *pro se* plaintiff Lloyd Gelwan commenced this products liability and negligence action against defendants Rising Pharmaceuticals, Inc., Pack Pharmaceuticals, LLC, Aceto Corporation (hereinafter, together, "Cipro" or "debtor" defendants), Rising Pharma Holdings, Inc. ("Rising Pharma"), Memorial Sloan Kettering Cancer Center, and other corporations unknown to plaintiff. (*See generally* NYSCEF docs. no. 20, verified complaint.)[1] Plaintiff alleges that he suffered significant physical injuries after having been prescribed ciprofloxacin ("Cipro") while undergoing treatment for prostate cancer as a patient at Memorial Sloan Kettering. As against Rising Pharma, specifically, he alleges that it purchased the assets of the Cipro-debtor defendants following their 2019 bankruptcy and, in doing so, succeeded in interest to an insurance policy covering the predecessors' liabilities for claims arising out of the manufacture, marketing, distribution, and labelling of Cipro. In this pre-answer motion to dismiss, Rising Pharma moves pursuant to CPLR 3211 (a) (1), (a) (2), and (a) (7). Plaintiff opposes the motion in its entirety. In addition, he interposes a cross-motion for discovery

[1] Rising Pharma and Memorial Sloan Kettering Cancer Center are the remaining defendants in this action. As discussed below, Rising Pharma is the same entity as Rising Pharmaceuticals Inc.

pursuant to CPLR 3211 (d)[2], which is also opposed. For the following reasons, the motion to dismiss is granted, the complaint is dismissed, and the cross-motion denied as moot.

BACKGROUND

In or around February 2017, plaintiff was admitted to Memorial Sloan Kettering for treatment for prostate cancer. As part of this treatment, his physicians advised that a biopsy may be necessary for further diagnosis. Ultimately, plaintiff consented and underwent the procedure around this same time. Post-biopsy, his physicians prescribed Cipro, a broad-spectrum antibiotic, whose alleged side effects include the weaking or damaging of tendons and other muscles. After taking the medication, plaintiff "experienced the sudden complete rupture of his peroneus brevis tendon and significant damage to his peroneus longus tendon controlling his ankle motion and stability," which required in-patient surgery to correct but did not lead to full recovery of motion. (NYSCEF doc. no. 20 at ¶¶10-17.)

On February 19, 2019, debtor defendants Rising Pharmaceuticals, Inc., Pack Pharmaceuticals, LLC, and Aceto Corporation filed Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of New Jersey and moved for joint administration of their bankruptcies. (*See* NYSCEF doc. no. 37, February 22, 2019, Bankruptcy Court Order.) On February 22, 2019, the court entered an automatic stay pursuant to 11 USC § 362(a), and, on March 8, 2019, defendants moved under 11 USC § 363(f) for an order "Authorizing and Approving the Sale of Substantially All Assets Comprising the Debtors' Pharma Business Free and Clear of All Claims, Liens, Rights, Interests, and Encumbrances" to Shore Suven Pharma, Inc., a Delaware corporation that subsequently changed its name to (defendant) Rising Pharma Holdings.

The sale was subsequently approved on April 10, 2019. (*See* NYSCEF doc. no. 39, March 22, 2023, Bankruptcy Court Order.) As of the date of entry of this order, the consolidated bankruptcies are still active, no bankruptcy discharge order has been entered, and the debtor defendants are still operational.

As described above, while plaintiff initially asserted negligence and products liability causes of action against the developers, marketers, and distributors of Cipro—i.e., Rising Pharmaceuticals, Inc., Pack Pharmaceuticals, LLC, and Aceto Corporation—his claims against Rising Pharma arise out of its purchase of the bankruptcy assets and, more specifically, it having a possible successorship interest in an insurance policy covering product liability claims. On October 3, 2023, Rising Pharma filed the instant motion to dismiss, raising two principal arguments. First, it asserts that the automatic bankruptcy stay covers it—even though it is a non-debtor—because plaintiff's claims necessarily implicate the debtor defendants' bankruptcy estates. Second, it contends that plaintiff's negligence and product liability causes of action are based upon a successor liability theory (again, since the debtor defendant's alleged tortious conduct is at issue) and plaintiff has not plead any of the conditions under which such a theory could attach.

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[2] The cross-motion all sought an extension of time to file an opposition. In considering his opposition herein, the Court implicitly granted the motion.

In opposition, plaintiff notes that the automatic stay entered in the bankruptcy actions does not address Rising Pharma as purchaser of the assets. Further, in his view, this action does not affect the debtor defendants' assets or the administration of the estate. In support, he cites language in the Bankruptcy Approval Order that requires debtor-defendants to maintain an insurance fund, at Rising Pharma's sole expense, at "conditions no less advantageous than the current products liability insurance policies with respect to claims arising from or related to facts or events that occurred at or before the Closing." (NYSCEF doc. no. 41 at 47, asset purchase agreement.) In the alternative, plaintiff cross-moves to hold the motion in abeyance while permitting him to conduct limited discovery related to the insurance policies that may cover Rising Pharma.

DISCUSSION

Dismissal Under CPLR 3211 (a) (1)

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishing a defense as a matter of law. (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002].) The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019].) The factual allegations in the complaint must be definitively contradicted by the evidence. (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

As a general rule, a corporation that purchases the assets of another corporation is not responsible for the torts of its predecessor unless (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of the seller and purchaser, (3) the purchaser corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations. (*Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158, 158 [1st Dept 2005]; *see also Zinbarg v Professional Bus. Coll. Inc.*, 179 AD3d 607, 607 [1st Dept 2020].)

Here, Rising Pharma argues that the Bankruptcy Sale Approval Order (NYSCEF doc. no. 40, Bankruptcy Court Sale Approval Order), which incorporates the Asset Purchase Agreement ("APA"), constitutes documentary evidence because it conclusively establishes that it did not assume tort liability based on the debtor defendants' conduct, thus precluding plaintiff from asserting claims based upon successor liability. It relies on § 3 ("Good Faith of Buyer"), which provides that the agreement was negotiated at arm's length without collusion, in which Rising Pharma purchased the assets for the "reasonably equivalent value and fair consideration under the Bankruptcy Code," and free and clear of all liens, claims, and interests. (*Id.* at 9-11.) The Approval Order further provides that Rising Pharma "shall not be deemed to…be a legal successor, or otherwise be deemed a successor to the debtors (other than, for the Buyer, with respect to any Assumed Liabilities), [to] have… merged with or into the Debtors, or be an alter ego or a mere continuation or substantial continuation of the Debtors." (*Id.* at 24) Moreover, §1.3 of the APA, which contains a series of provisions under which Rising Pharma *does* assume

certain liabilities, is silent with respect to tort claims based upon the debtor defendants' tortious conduct prior to their bankruptcies.

Plaintiff's opposition appears grounded on two arguments. First, he suggests that, irrespective of the Bankruptcy Sale Order, this Court has jurisdiction to determine whether Rising Pharma and the debtor defendants merged or consolidated or whether Rising Pharma constitutes a continuation of them. To this end, plaintiff maintains the motion to dismiss is premature as discovery is required to assess factors that might sustain a finding of a "de-facto merger." (*See* NYSCEF doc. no. 51 at 21, plaintiff's memo of law) In his view, without discovery, he has no way of addressing factors "such as continuity of ownership, cessation of the seller's business operations, buyer's assumption of certain liabilities necessary for continued operation, continuity of management, personnel, physical location and business operations." (*Id.*) This argument is unpersuasive, however. The Bankruptcy Court's findings of fact within the Sale Approval Order and the terms of the purchase agreement are binding on him. Were this Court to hold otherwise, not only would it impinge on the Bankruptcy Court's exclusive jurisdiction to manage the debtor defendants' estates, it would directly risk having the "immediate adverse economic consequence" on these estates that the automatic stay prevents against. (*See Queenie, Ltd. v Nygard Intl.*, 321 F3d 282, 287 [2d Cir 2003].) The proper forum for plaintiff's argument, then, is the Bankruptcy Proceeding itself. Accordingly, Rising Pharma has demonstrated that successor liability cannot be grounded on the second, third, and fourth enumerated exceptions in *Kretzmer*.

Plaintiff's second argument is that Rising Pharma either expressly or impliedly assumed its predecessors' tort liability—the first *Kretzmer* exception—based on § 6.15 of the APA, which appears to require the debtor defendants to either purchase product liability insurance at Rising Pharma's expense or add it to its existing policies. The relevant provisions are reproduced in full:

> "(a) Contemporaneously with the Closing, Sellers shall purchase, at Buyer's sole expense, "run-off" coverage for their respective product liability insurance policies for a period of six (6) years from the date of Closing with terms and conditions that are no less advantageous than the current product liability insurance policies with respect to claims arising from or related to facts or events that occurred at or before the Closing.
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> [...]
>
> (b) Sellers shall use commercially reasonable efforts to cause their product liability insurance carriers, to expressly name Buyer as additional insured on their respective product liability insurance policies, with respect to any matters or claims arising from or related to the Purchased Assets and the Acquired Business to the extent arising from or related to facts or events that occurred at or prior to the Closing. Buyer shall be solely and fully responsible for any (i) deductibles, retentions, or coinsurance in such product liability insurance policies with respect to any claims made by Buyer under such policies and (ii) any additional premium charged by the product liability insurance carriers to add Buyer as an additional insured to the product liability insurance policies.

> (c) If Buyer is not named as an additional insured on Sellers' product liability insurance policy, then to the extent that the Purchased Assets were insured under product liability insurance policies of Sellers prior to the Closing date, for a period not to exceed six (6) months following the Closing, (i) at Buyer's written request Sellers shall make claims under such product liability policies with respect to any occurrence, event, condition, or circumstance relating to the Purchased Assets that occurred or existed prior to the Closing, for which Buyer is held liable, Sellers shall promptly forward such amounts to Buyer (net reasonable costs of recovery of Sellers or their respective Affiliates.) In the event of any disputes regarding the date of any loss or occurrence, the terms of the applicable insurance policies shall govern." (NYSCEF doc. no. 41 at 47, Asset Purchase Agreement)

In other words, if Rising Pharma did not expressly or impliedly assume tort liability for claims brought while its predecessors were manufacturing, marketing, and distributing Cipro, there would be no need for including this insurance requirement in the purchase agreement. As he sees it, this action is "not grounded in the debtors' liabilities before or after the bankruptcy but on Rising Pharma's continuing entitlement to insurance proceeds carved out by the Bankruptcy Court." (NYSCEF doc. no. 51 at 22.) This argument is unavailing as well.

Rising Pharma has established that the purchase agreement is one between it and the debtor defendants; as such, the insurance provisions in §6.15 create obligations on the debtor defendants that run to Rising Pharma and it alone. This explains, then, paragraph 38 of the Approval Order, in which the Bankruptcy Court modified the automatic stay such that it could not be construed to interfere with Rising Pharma's ability to enforce the agreement and the debtor defendants' obligation to obtain insurance covering it. As Rising Pharma's counsel noted, after approval of the purchase agreement, it opted not to require the debtor defendants to obtain said insurance, which would have been at Rising Pharma's expense. (NYSCEF doc. no. 42.) Plaintiff contends that the Bankruptcy Court conditioned its approval of the purchase agreement on Rising Pharma's having insurance coverage for products liability, but there is no evidence for this assertion. In this light, Rising Pharma has demonstrated that it is not a beneficiary of any insurance policy obtained by the debtor defendants, which, plaintiff concedes if true, means that this action and any favorable judgment he obtains would have "immediate adverse economic consequence" on the debtors' estates. (*See Queenie, Ltd. v Nygard Intl.*, 321 F3d 282, 287 [2d Cir 2003]; *Joyner v City Carter Leasing Inc.*, 211 AD3d 406, 407 [1st Dept 2022].)

In addition to refuting plaintiff's argument that the Approval Order requires it maintain product liability insurance, Rising Pharma points to any number of provisions in the Sale Approval Order that expressly disclaim successor liability. Under a provision entitled "Section 363(f) is Satisfied," the Order states, "the terms of the Purchase Agreement meets the applicable provisions of § 363 (f)…such that the Sale of the Purchased Assets will be free and clear of all Liens, Claims and Interests, and will not subject any Buyer Party to any liability for any Liens, Claims or Interests whatsoever (including, without limitation, under any theory of equitable law, antitrust, or *successor or transferee* liability), except as expressly provided for in the Purchase Agreement." (NYSCEF doc. no. 40 at 13, subsection [R].) To reiterate, the Purchase

Agreement's list of assumed liability does not include a provision for product liability claims. In subsection (T), it states, "The Buyer would not have entered into the Purchase Agreement and would not consummate the transactions…if the transfer of the Purchase Assets to the Buyer and the assumption of the Assumed Liabilities were not…free and clear of all interests of any kind…including (8) any theories of successor liability." (*Id.* at 15-16, subsection [T].) The Order also has a provision entitled "No Successor Transferee Liability," which provides for exactly that:

> "Other than as expressly set forth in the Purchase agreement, no Buyer Party shall have responsibility for any responsibility for any liability or other obligation of the Debtors or any claims against the Debtors or any of their predecessors or affiliates…No Buyer Party shall have any liability whatsoever with respect to… any of the Debtors' (or their predecessors' or affiliates') obligations ("Successor or Transferee Liability") based, in whole or part, directly or indirectly, on any theory of successor or vicarious liability of any kind or character." (*Id.* at 24-24.)

Each of these provisions refutes any notion that Rising Pharma expressly or impliedly assumed tort liability based on its predecessors' conduct. *Doktor v Werner Co.* (762 F Supp 2d 494, 499 [ED NY 2011]) is directly on point. There, the Eastern District of New York recognized that the entity Werner Co. PA filed for bankruptcy, renamed itself Old Ladder, and sold its assets, as Old Ladder, to Werner Co. Given that the express language of the purchase agreement disclaimed any successor liability, however, the court found that the terms of the parties' purchase agreement was dispositive as to whether the plaintiff could assert products liability claims against the new Werner Co. In fact, the plaintiff in *Doktor* made similar arguments as Gelwan does here, namely that the corporate realities of the asset sale suggest a "de facto merger" and that successor liability should be imposed based upon its continued marketing of the predecessor's product. Yet each of these arguments were rejected. The Court noted that *Semenetz v Sherling & Walden, Inc.* (7 NY3d 194, 201 [2006]) rejected the idea of extending liability to the corporate successor for a defective product that it did not place in the stream of commerce.

Since the Bankruptcy Approval Order and the purchase agreement affirmatively demonstrate that Rising Pharma did not succeed to the debtor defendants' tort liabilities, it is of no consequence that insurance policies obtained by the debtor defendants may or may not have named Rising Pharma as an additional insured for product liability claims.

Accordingly, it is hereby,

ORDERED that defendant Rising Pharma Holdings LLC's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is granted and the complaint is dismissed; and it is further

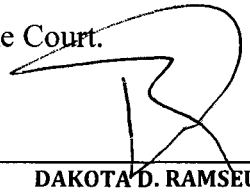
ORDERED that *pro se* plaintiff Lloyd Gelwan's cross-motion is denied as moot; and it is further

ORDERED the action is restored to active status; and it is further

ORDERED that all remaining parties in this action shall appear for a preliminary conference in Room 341, 60 Centre Street, New York, New York, on April 28, 2026, at 9:30 AM; and it is further

ORDERED that within ten (10) days of entry, counsel for defendant Rising Pharma shall serve a copy of this Order, with notice of entry, upon all parties to this action via NYSCEF.

This constitutes the Amended Decision and Order of the Court.



04/15/2026
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE