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Case No. 2022-0982-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER KAUFMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2022-0982-KSJM
	)	
DNARx LLC,	)	
	)	
Defendant.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: November 16, 2023
Date Decided: December 29, 2023

Kevin G. Abrams, J. Peter Shindel, Jr., Christopher F. Cannataro, ABRAMS & BAYLISS LLP, Wilmington, Delaware; *Counsel for Plaintiff Christopher Kaufman*.

Sean J. Bellew, BELLEW LLC, Wilmington, Delaware; *Counsel for Defendant DNARx LLC*.

McCORMICK, C.

This case arises from a dispute between two brothers—John and Bob Debs.[1] John loaned $1.8 million to Bob's startup, DNARx LLC, under the belief that the company's medical research would earn Bob the Nobel Prize. The company defaulted on the loan. John assigned the loan to his childhood friend, Christopher Kaufman, who filed this suit seeking declaratory judgments concerning the existence and terms of the loan. Over the course of this lawsuit, Bob lied, cheated, destroyed evidence, and repeatedly ignored court orders. He sanctimoniously proclaimed this conduct justified given his efforts to save "everyone . . . on earth."[2] He then resorted to a scorched-earth strategy, causing the company to euthanize the animal subjects of his supposedly life-saving research. Bob declined the court's invitation to appear at trial and defend his litigation conduct. That meant that Kaufman was the only trial witness. Kaufman proved the facts of his case and easily overcame the company's makeweight legal defenses. This post-trial decision enters judgment for Kaufman. The court addresses the company's deplorable litigation conduct in a separate order entering sanctions.

I. FACTUAL BACKGROUND

The record comprises 313 joint trial exhibits, trial testimony from one fact witness, deposition testimony from seven fact witnesses, and nine stipulations of fact

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[1] This decision refers to the brothers by their first names to distinguish them; the court intends no familiarity or disrespect.

[2] C.A. No. 2022-0982-KSJM, Docket ("Loans Action Dkt.") 36 at 23:2–7 (Bob) (Feb. 17, 2023 oral argument on Kaufman's motion for contempt and discovery sanctions). Preceding the plenary action, Kaufman filed a books and records action, C.A. No. 2022-0986-KSJM (the "Documents Action Dkt.").

in the amended pre-trial order.[3] These are the facts as the court finds them after trial.

A. The Parties

Defendant DNARx is a Delaware limited liability company formed to develop a high-level extended duration gene expression system.[4] Dr. Robert Debs (Bob) is DNARx's CEO and sole manager.[5] Bob's brother Jerome Debs II (John) is a member of DNARx and a former manager.[6] Prior to 2018, John, through his trust—the Jerome H. Debs Trust—invested $4 million into DNARx.[7]

Plaintiff Kaufman is an experienced corporate lawyer, formerly a partner at Latham & Watkins LLP.[8] He has known Bob and John for over 70 years.[9] The three were childhood friends.[10] While at Latham & Watkins, Kaufman helped Bob and

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[3] This decision cites to: docket entries in the Loans Action and Documents Actions (by Dkt. number); the Amended Pre-trial Stipulation and Order ("Am. PTO"), Loans Action Dkt. 86; trial exhibits (by "JX" number); the trial transcript ("Trial Tr."), Loans Action Dkt. 93; and the deposition transcripts ("Dep. Tr.") of Paul L. Chan (Feb. 10, 2023, JX-149; Oct. 24, 2023, JX-247), Robert Debs (Bob) (Feb. 10, 2023, JX-148; Oct. 24, 2023, JX-248), Jerome H. Debs II (John) (JX-251), Chak Hamdumdrunkul (JX-244), Ryan Ice (JX-239), Christopher Kaufman (JX-237), Alice Ye (JX-241). The parties presented their post-trial arguments on the same day as trial. Loans Action Dkt. 93. Accordingly, the parties' post-trial argument is found in the trial transcript and the court will denote when it is citing to those arguments.

[4] Am. PTO ¶¶ 1–2.

[5] *Id.* ¶ 3.

[6] JX-128 ¶ 1 (John Aff.).

[7] *Id.* ¶ 5 (John Aff.).

[8] Trial Tr. at 4:7–16 (Kaufman).

[9] *Id.* at 4:17–23 (Kaufman).

[10] *Id.* (Kaufman).

John form DNARx and structured its initial equity financing.[11] After his retirement from Latham & Watkins in 2017, Kaufman continued his association with DNARx as its chief administrative officer.[12] For his service, Kaufman was paid an 2.5% equity interest in DNARx.[13] He has been a member of DNARx since January 5, 2018.[14]

B. The Loans

In 2018, DNARx needed additional funding to continue operating while it was attempting to secure long-term funding.[15] John was reticent to inject more money into the company, but an outside medical consultant convinced John that Bob was developing a Nobel Prize-worthy gene therapy.[16] After that, John agreed to loan the company $1.8 million in tranches (the "Loans").[17] John, again through his trust, loaned DNARx: $600,000 on June 1, 2018; $600,000 on September 18, 2018; $100,000 on January 30, 2019; $100,000 on March 6, 2019; $100,000 on April 16, 2019; $100,000 on June 5, 2019; $100,000 on July 18, 2019; and $100,000 on August 27, 2019.[18]

The parties dispute the terms of the Loans. Initially, DNARx went so far as to deny that the Loans were in fact loans. By the time of trial, however, DNARx had

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[11] *Id*. at 5:6–10 (Kaufman).

[12] *Id*. at 5:11–13, 6:5–24 (Kaufman).

[13] *Id*. at 16:14–17:2 (Kaufman).

[14] Am. PTO ¶ 4.

[15] JX-128 ¶ 6; John Dep. Tr. at 8:10–20.

[16] *See* JX-128 ¶¶ 7–8.

[17] *See* Am. PTO ¶ 6.

[18] JX-128 ¶¶ 10–17.

conceded this point, and the only disputed terms concerned whether the Loans were subject to immediate repayment and, if so, at what interest rate.[19]

According to Kaufman and John, the Loans were intended to cover eighteen months of operations, assuming a burn rate of $100,000 per month.[20] DNARx agreed to repay the Loans after eighteen months, on December 1, 2019.[21] There was no discussion about the interest rate.[22]

In December 2018, Kaufman prepared a year-end "Book Up/Book Down" memo providing background concerning the effect of capital adjustments on the value of the company.[23] In the memo, Kaufman described the Loans as "bridge loans."[24] This was also reflected on DNARx's balance sheets.[25] DNARx has not paid back the Loans.[26]

In the Fall of 2020, Bob decided to terminate Kaufman.[27] According to Kaufman, he was terminated for pretextual reasons so that Bob could avoid providing

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[19] *See* Loans Action Dkt. 81 ("DNARx's Pre-trial Br.") at 4 ("Thus, the only questions remaining to be tried are whether the $1.8 million in bridge loans are 'subject to immediate repayment,' and if so, at what interest rate, if any.").

[20] John Dep. Tr. at 8:14–9:1; Kaufman Dep. Tr. at 15:3–10.

[21] John Dep. Tr. at 11:18–23; Kaufman Dep. Tr. at 15:3–10.

[22] John Dep. Tr. at 14:5–8; Kaufman Dep. Tr. at 19:12–16.

[23] JX-14.

[24] *Id.*

[25] JX-46 at 2 (listing $1.8 million "Bridge Loans – John" as a "Long-Term Liability" on DNARx's December 31, 2020 balance sheet); JX-68 at 2 (listing $1.83 million "Bridge Loans – John" as a "Long-Term Liability" on DNARx's December 31, 2021 balance sheet 1); JX-125 (listing $1.83 million "Bridge Loans – John" as a "Long-Term Liability" on DNARx's December 31, 2022 balance sheet).

[26] Loans Action Dkt. 6 ¶ 21 (DNARx's Answer).

[27] *See* Trial Tr. at 55:18–23 (Kaufman).

Kaufman with the balance sheets and financial statements Kaufman had requested in his capacity as DNARx's chief administrative officer.[28]

C. The Documents Action

Kaufman did not receive any information about the company other than K-1 statements for over two years after his termination.[29] On October 17, 2022, Kaufman served an inspection demand on DNARx (the "Demand").[30] The next day, Debs forwarded the Demand to DNARX's chief operating officer Paul Chan with a cover email stating "[w]e will ignore this until and if they institute legal action[.]"[31] When Kaufman received no response, he filed suit in this court to enforce his inspection rights (the "Documents Action").[32]

D. The Loans Action

On October 26, 2023, Kaufman and John entered into an agreement (the "Assignment Agreement") through which John unconditionally assigned the Loans to Kaufman.[33] Kaufman filed this action that same day (the "Loans Action").

E. DNARx's Litigation Conduct

In both the Documents Action and the Loans Action, Bob caused DNARx to engage in extreme litigation misconduct prompting multiple motions to compel and

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[28] *Id.* at 54:15–21, 55:18–23 (Kaufman).

[29] *Id.* at 16:16–17:2 (Kaufman).

[30] JX-98.

[31] JX-99 at 2.

[32] Documents Action Dkt. 1.

[33] JX-100 (Assignment Agreement) ¶ 2.

motions for sanctions.[34] In the Documents Action, the court appointed a Receiver.[35] The court scheduled trial on Kaufman's claims for declaratory judgment in the Loans Action and his newest requests for sanctions in both actions. Bob and Chan refused to testify at trial.[36] This decision addresses Kaufman's requests for declarations concerning the Loans. The court addresses the motions for sanctions in a separate order.

II. LEGAL ANALYSIS

Kaufman seeks declarations that: John loaned the company $1.8 million between June 1, 2018 and August 27, 2019; the Loans became due and payable on December 1, 2019; and the Loans bear interest at the statutory rate from December 1, 2019, compounded annually, until they are repaid. DNARx does not dispute most of this. It concedes that the Loans exist in the amount of $1.8 million.[37] DNARx does not mount a legal defense to Kaufman's argument that the statutory rate is the applicable interest rate. DNARx concedes that if the parties did not discuss the interest rate, then it is the statutory rate. At trial, DNARx's sole defense was to attack the Assignment Agreement as champertous and unsupported by consideration.[38]

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[34] Documents Action Dkts. 51, 82, 114.

[35] Documents Action Dkt. 71 ¶¶ 18–20.

[36] Loans Action Dkt. 91 at 8:24–9:14 (Nov. 9, 2023 pre-trial conference).

[37] Loans Action Dkt. 6 ¶¶ 13–20 (DNARx's answer).

[38] DNARx's rotating cast of counsel and failure to adhere to the rules and orders of this court meant that it waived most of its defenses and left its trial attorney at a disadvantage.

A. The Champerty Defense

Champerty applies to "an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor to carry on the suit at his own expense."[39] If the assignment of a claim is "tainted with champerty" then the claim must be dismissed.[40] "In a champertous assignment, an assignee of a cause of action initiates litigation at his or her own risk and expense in consideration of receiving a portion of the proceeds if successful."[41]

DNARx argues that the Assignment Agreement is champertous because Kaufman initiated litigation at his own risk and expense to receive a portion of the proceeds.[42] DNARx, relying on the Assignment Agreement, states that "'Kaufman intends to undertake multiple actions to secure from DNARx payment on the unpaid principal and interest owed by DNARx based on the Debs loans to DNARx' and that 'Kaufman promises to pay [John] Debs fifty percent (50%) of Kaufman's net recovery

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[39] *Gibson v. Gillespie*, 152 A. 589, 593 (Del. Super. Ct. 1928) (citation and internal quotation marks omitted); *see also Humanigen, Inc. v. Savant Neglected Diseases, LLC,* 238 A.3d 194, 204 (Del. Super. Ct. 2020) ("[A] party is generally free to privately contract or assign the proceeds of a judgment or a portion thereof, as distinct from the suit itself." (citation omitted)).

[40] *Hall v. State*, 655 A.2d 827, 830 (Del. Super. Ct. 1994) (citations omitted).

[41] *Id.* (citations omitted).

[42] DNARX's Pre-trial Br. at 7–9.

from the Loans.'"[43] On this basis, DNARx argues that the assignment was actually the transfer of a "claim" related to the Loans.[44]

In response, Kaufman argues that champerty is an affirmative defense that DNARx failed to assert and thus is waived.[45] Kaufman is correct. Champerty is an affirmative defense.[46] "Generally, an affirmative defense must be pled or the defense is waived."[47] DNARx never pled champerty as a defense, never attempted to amend its answering brief, never disclosed a champerty defense in its discovery responses, and failed to identify its purported "champerty" argument in the pre-trial order. DNARx argues that it could not have asserted its champerty defense before it received the Assignment Agreement,[48] which was not produced until shortly before trial. This argument, however, is difficult to credit, especially given that DNARx is to fault for all the discovery delays. At a minimum, DNARx could have moved to amend the pleadings during or prior to the pre-trial conference to assert this defense. It failed to do so. Accordingly, the defense is waived.

Kaufman also argues that the defense fails as a factual matter because John did not assign Kaufman claims.[49] Kaufman is correct again. Champerty requires the

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[43] *Id.* at 5 (alteration in original) (quoting JX-100).

[44] *Id.* at 7–9.

[45] Trial Tr. at 98:21–99:6 (Kaufman's post-trial argument).

[46] *In re Tex. E. Overseas, Inc.*, 2009 WL 4270799, at *6 n.52 (Del. Ch. Nov. 30, 2009).

[47] *James v. Glazer*, 570 A.2d 1150, 1153 (Del. 1990) (citations omitted).

[48] Loans Action Dkt. 91 at 22:23–23:3 (Nov. 9, 2023 pre-trial conference).

[49] *See* Trial Tr. at 102:2–5 (Kaufman's post-trial argument) (explaining Kaufman "acquire[d] a debt instrument for the purpose of enforcing it[]").

assignment of a legal claim, which is not what John assigned to Kaufman. Rather, John assigned the Loans to Kaufman.[50] The Assignment Agreement states that "Debs hereby absolutely, irrevocably and unconditionally sells, assigns, transfers, conveys and sets over to Kaufman all of Deb's rights, title, and interests in the DNARx Loans[.]"[51] On this basis, the assignment was not champertous.[52]

B. Lack Of Consideration

DNARx raised a new issue for the first time at trial, arguing that the Assignment Agreement is invalid as a matter of law for lack of consideration.[53] This argument is waived because it was raised too late.[54] The argument also fails on the merits because there was consideration. The Assignment Agreement states that the consideration was 50% of the net recovery from the Loans.[55] Kaufman confirmed that

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[50] JX-100 ¶ 2.

[51] *Id.*

[52] *Kingsland Hldgs., Inc. v. Bracco*, 1996 WL 104257, at *5 n.2 (Del. Ch. Mar. 5, 1996) ("Assigning a judgment for valuable consideration is more akin to assigning a contract, note or financial instrument than it is to assigning an underlying claim. Courts clearly may recognize these types of assignments[.]").

[53] Trial Tr. at 115:3–5 (DNARx's post-trial argument).

[54] *Alexander v. Cahill*, 829 A.2d 117, 128–29 (Del. 2003) (instructing that a "trial judge's focus should be on whether the issue could have been, but was not, raised pretrial in some form and whether or not the failure to do so caused prejudice to a party without notice of the defense by making it difficult, if not impossible, to fairly face the issue for the first time during trial").

[55] JX-100 ¶ 2.

this was, in fact, the agreement.[56] Accordingly, the court finds that the Assignment Agreement was supported by consideration.

C. The Maturity Date

Kaufman argues that the Loans became due and payable on December 1, 2019. All credible testimony and cotemporaneous evidence supports this position. According to Kaufman and John, DNARx agreed to repay the Loans after eighteen months, on December 1, 2019.[57] Kaufman's year-end "Book Up/Book Down" memo described them as "bridge loans," which are generally considered short-term loans.[58]

DNARx points to an email from Mori to John's attorney, Craig Ritchey, for the position that the Loans were not due until new equity financing was secured.[59] But that email is an inadmissible settlement communication reflecting DNARx's later-developed position concerning the terms of the Loans, which the court does not credit.[60] Were the court to consider settlement communications from that time

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[56] Trial Tr. at 19:17–20 (Kaufman) ("The consideration. . . was that in the event that I had recovery, net of attorneys and other fees and expenses, I would share them with John Debs on a 50/50 basis.").

[57] John Dep. Tr. at 11:18–23; Kaufman Dep. Tr. at 15:3–10.

[58] Stuart R. Cohn, 1 *Sec. Counseling for Small & Emerging Companies* § 3:3 (Dec. 2023 update) ("Bridge loans are generally short-term loans to companies planning to raise capital in the near future through a public or exempt securities offering. Companies often need capital to prepare for and engage in the offering itself, and to stay afloat until the offering is completed. Bridge loans cover the company's capital needs during the interim preceding the securities sales, the proceeds of which will be used in part to repay the loans.").

[59] DNRAx's Pre-trial Br. at 4–5 (citing JX-42).

[60] *See* D.R.E. 408.

period, then Bob's October 20, 2020 email to DNARx's former counsel stating that John was "owed[]" $1.8 million at that time would be equally probative.[61]

D. The Interest Rate

Kaufman argues that the Loans bear interest at the statutory rate. Kaufman and John did not discuss the interest rate of the Loans.[62] Neither did Bob or Chan.[63] Where a contract is silent as to the interest rate, the interest rate is charged at the statutory rate.[64] DNARx does not dispute this position legally or factually.

III. CONCLUSION

For the forgoing reasons, judgment is entered in favor of Kaufman. John Debs, through the John Debs Trust, loaned DNARx: $600,000 on June 1, 2018; $600,000 on September 18, 2018; $100,000 on January 30, 2019; $100,000 on March 6, 2019; $100,000 on April 16, 2019; $100,000 on June 5, 2019; $100,000 on July 18, 2019; and $100,000 on August 27, 2019. John (on behalf of his trust) and DNARx agreed and understood that the DNARx Loans were bridge loans to be in place for a period of 18 months from the date of the first installment payment and would become due and

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[61] JX-43. DNARx asserted privileged over this document, but the court found that DNARx waived any privilege by failing to take reasonable precautions to preserve privilege or clawback inadvertently produced materials. *See* Documents Action, Dkt. 111 (Magistrate David's Final Report) ¶¶ 21–29; Documents Action, Dkt. 113 (adopting order).

[62] John Dep. Tr. at 14:5–8; Kaufman Dep. Tr. at 19:12–16.

[63] Oct. 24, 2023 Bob Dep. Tr. at 108:10–24; Oct. 23, 2023 Chan Dep. Tr. at 68:19–21.

[64] *Watkins v. Beatrice Cos., Inc.*, 560 A.2d 1016, 1023 (Del. 1989) ("Delaware law provides that if a contract is silent as to an interest rate, interest must nonetheless be paid." (citing 6 *Del. C.* § 2301(a) (providing that "[w]here there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate. . . .")).

payable at the end of that 18-month period. The Loans became due and payable on December 1, 2019. The parties to the Loans did not discuss the interest rate, and so the Loans shall bear interest at the statutory rate from December 1, 2019, compounded annually, until they are repaid. The Loans were validly assigned to Kaufman by John Debs and the John Debs Trust, for valuable consideration, on October 26, 2022. Kaufman's counsel shall submit a form of final order implementing this decision.