NCP-EAS, LP v Abbott Labs.
2006 NY Slip Op 30809(U)
June 29, 2006
Supreme Court, New York County
Docket Number: 116246/05
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[*1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

APPLICATION of NCP-EAS, L.P.

Petitioner,

for an ORDER pursuant to Article 75 of the CPLR Compelling Arbitration of a Certain Controversy,

-v-

ABBOTT LABORATORIES,

Respondent.

Index No.: 116246/05
Motion Date: 01/12/06
Motion Seq. No.: 01
Motion Cal. No.: 118

The following papers, numbered 1 to 75 were read on this motion to compel arbitration and cross-motion to dismiss petition

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1-50
Cross-Motion/Answering Affidavits - Exhibits	51-75
Replying Affidavits - Exhibits	

Cross-Motion: ☒ Yes ☐ No

RECEIVED JUL - 7 2006 IAS MOTION SUPPORT OFFICE

FILED JUL 10 2006 COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers,

Petitioner's application pursuant to CPLR 7503 (a) to compel arbitration by "the Accountant" pursuant to the Stock Purchase Agreement on the grounds that the parties to such Agreement therein agreed to submit a certain dispute to such arbitration shall be GRANTED. Respondent's cross-motion to dismiss the petition and for an Order that compels arbitration pursuant to the Escrow Agreement shall be DENIED.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Petitioner NCP-EAS, LP ("Petitioner") is a Delaware limited partnership formed for the purpose of investing in the common stock of Natural Supplement Association, Inc., doing business as Experimental Applied Science ("EAS"). Respondent Abbott Laboratories ("Respondent") is an Illinois corporation, which develops and manufactures pharmaceuticals and other medical products globally.

Petitioner seeks to compel arbitration of a dispute with respect to a stock purchase agreement (the "SPA") entered into on October 8, 2004 by Petitioner, Respondent; Aspen Acquisition I, Inc.; Natural Supplement Association, Inc. d/b/a EAS; NCP Co-Investment Fund, L.P.; Augustine Nieto; and Douglas Hickey. Pursuant to the SPA, Petitioner, NCP Co-Investment Co-Investment Fund, L.P., Augustine Nieto and Douglas Hickey (the "Sellers") agreed to sell their shares in EAS to Aspen Acquisition I, Inc., which is wholly owned by Respondent.

In essence, by the SPA, Respondent purchased Natural Supplement Association, Inc. d/b/a EAS for $320 million from Petitioner and the other shareholders. Respondent did not purchase the accounts receivable from EAS, but was charged with collecting any receivables for six months after the purchase, and was required "to use all commercially reasonable efforts to collect all accounts receivable in a manner consistent with past practice." Under the SPA, to resolve various accounting issues,

the parties placed $45 million of the $320 million purchase price into an Escrow Account. The Escrow Account is governed by the Escrow Agreement, which contains various procedures that describe how to apportion the $45 million after the resolution of accounts payable and accounts receivable issues.

As part of the SPA transaction, the parties set up a mechanism to adjust the consideration paid by Abbott based on accounts payable paid and accounts receivable collected by EAS in the 180 day period following the closing. Section 4.13, the SPA's pertinent provision provides:

> Fifteen days after each calendar month-end following the Closing Date, [Abbott] shall cause to be paid to Sellers and each holder of Company Options, Company Warrants and Convertible Notes...the amount by which the aggregate Net Cash Proceeds received by [EAS] during the preceding month exceeded the aggregate amount of the Final Accounts Payable paid during such month...If the Accounts Payable paid during any month exceed the aggregate Net Cash Proceeds received by [EAS] in such month, the amount of such excess will be offset against the future payments due under this Section 4.13. In the event that the aggregate amount of Final Accounts Payable paid during the period from Closing Date to the date that is 180 days after the Closing Date (the "Post-Closing AR/AP Period") exceeds the aggregate Net Cash Proceeds received by [EAS] during the Post-Closing AR/AP Period (an "AP Excess"), [EAS] shall deliver prompt written notice for the amount of the AP Excess to NCP-EAS and Buyer Indemnities shall be permitted to deliver a claim in respect thereof pursuant to Section 3(a)(vi) of the Escrow Agreement.

Thus, under section 4.13 of the SPA, each month during the 180-day period Abbott was to determine and pay to NCP-EAS and the other Sellers the amount by which that month's "Net Cash Proceeds"- that is cash received by EAS that month for payment of

"Final Accounts Receivable"- exceeded the month's "Final Accounts Payable." At the end of the 180 day period, if the aggregate Final Accounts Payable exceed the aggregate Net Cash Proceeds collected by EAS, then Respondent and the other "Buyer Indemnities" were to receive the difference. Under SPA § 4.13 (c), (d), (e), the monthly assessments and final determinations of accounts payable and accounts receivable required periodic analyses of a variety of remittances and disbursements including, among other things, returns, discounts, short shipment deductions, co-op deductions, credits, rebates, allowances, adjustments, rejections, recalls, price reductions, charge backs, service fees unpaid interest accrued, and vendor rebates.

At the end of the 180-day period, Respondent notified Petitioner that, by Respondent's calculations, the accounts payable paid by EAS exceeded the accounts receivable collected by $21,697,163. Thus, Respondent claimed that it was entitled to the payment of that amount from NCP-EAS. Under the SPA, if the parties had agreed that this amount was correct, the amount would have been paid to Abbott from funds set aside in an Escrow Account.

Petitioner, however, disagreed with Respondent's calculations and proposed purchase price adjustment. It found that Respondent's monthly determinations had understated the

amounts by which accounts receivable exceeded accounts payable, and that as a result that it is owed $20,021,008 by Respondent.

Despite efforts since the closing of the stock sale, the parties were unable to resolve their dispute.

SPA § 4.13(g) states that "[i]n the event that NCP-EAS disputes any determination made pursuant to Section 4.13, dispute resolution procedures analogous to those contained in Section 4.14 shall apply." The parties stipulated in Section 4.14(e) that "disputes will be submitted to the Accountant for resolution."

Petitioner has requested that an Accountant arbitrator be appointed. Respondent refuses to participate and contends that the disputes over accounts payable and accounts receivables arising out of the application of section 4.13 of the SPA should be resolved pursuant to the dispute resolution procedures set forth in the Escrow Agreement.

This court concurs with Petitioner that Respondent's position is entirely incorrect. The issues in dispute are accounting issues and the parties in the SPA intended that any such dispute be resolved under the dispute resolution procedures set forth in Section 4.14 of the SPA.

In contrast, the dispute resolution procedures provided in paragraph 12(e) of the Escrow Agreement pertain to disputes "relating to either Party's rights and obligations under this

Escrow Agreement." The Escrow Agreement covers only the disposition of the proceeds of the Escrow Account, which, for examples, secures any liability that the Petitioner has to the Respondent in the amount of any AP Excess.

As Petitioner correctly points out, the SPA expressly provides for claims for specific performance of certain of its covenants. The purpose of such provision is to effectuate covenants such as the making of adjustments for accounts payable and accounts receivable under SPA Section 4.13. It is illogical that the parties intended to look beyond the provisions of the SPA for dispute resolution procedures, when the remedy itself is set forth in the SPA.

Respondent's argument that the incorporation by reference of SPA Section 4.14 and its provisions for an Accountant arbitrator in the provisions of SPA Section 4.13 govern solely disputes over access to financial records is unavailing. SPA § 9.10 captioned "Headings" provides that "The headings contained in this Agreement are for purposes of convenience only and shall not affect he meaning or interpretation of this Agreement." Therefore, the "Access" caption of Section 4.13(g) does not affect the plain meaning of that section that states "In the event that NCP-EAS disputes any determination made pursuant to Section 4.13, dispute resolution procedures analogous to those contained in Section 4.14 shall apply." Had the parties intended

Respondent's interpretation, they would have limited the application of Section 4.14 to issues regarding access to financial statements by the delimiting language "any determination made pursuant to Section 4.13(g)."

SPA § 4.13(g) calls for procedures "analogous" to those contained in Section 4.14. This court finds that the letters of August 11 and 29, 2005 from Petitioner to Respondent were analogous to the "Inventory Dispute Notice" referred to in SPA § 4.14. Such letters triggered the requirement that the parties submit their dispute to the Accountant for resolution and for a determination of the amounts payable pursuant to SPA Section 4.13. SPA § 8.1 provides that the Accountant is KPMG, unless KPMG is unable to serve as arbitrator, in which case the SPA requires the parties to agree to arbitration by an alternative Accountant.

Petitioner is entitled to enforce its contractual right to arbitration as set forth in the SPA. Lovisa Const. Co., Inc. v Metropolitan Transp. Authority, 225 AD2d 740, 741 (2d Dept 1996).

Accordingly, it is

ORDERED and ADJUDGED that the Petitioner's motion pursuant to CPLR 7503 (a) to compel arbitration by Accountant of the determination and resolution of the amounts payable under Section 4.13 of the Stock Purchase Agreement dated October 8, 2004 is GRANTED, and is further;

ORDERED that Respondent's cross-motion to dismiss the Petition and to compel arbitration under the Escrow Agreement dated November 9, 2004 is DENIED.

This is the decision and order of the court.

Dated: June 29, 2006 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.