UBS Sec. LLC v Angioblast Sys., Inc.
2013 NY Slip Op 33359(U)
March 14, 2013
Sup Ct, New York County
Docket Number: 650062/11
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN, Justice

PART 3

Index Number : 650062/2011
UBS SECURITIES LLC, A
vs.
ANGIOBLAST SYSTEMS, INC., A
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 650062/11
MOTION DATE 8/20/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to/for reargument and leave to amend

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits | No(s). 2
Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3-14-13

, J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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UBS SECURITIES LLC,

Plaintiff,

-against-

ANGIOBLAST SYSTEMS, INC.,

Defendant.

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Index No. 650062/11
Motion Date: 8/20/12
Motion Seq. No.: 003

BRANSTEN, J.

Defendant Angioblast Systems, Inc. ("Angioblast") moves to reargue its opposition to plaintiff UBS Securities LLC's ("UBS") motion to dismiss on the grounds that the court committed error by dismissing its fraudulent inducement affirmative defense. Angioblast also moves to amend its answer and counterclaims in order to conform to this Court's January 30, 2012 Decision and Order (the "January 30, 2012 Order"). UBS opposes the Angioblast's motion.

I. Background[1]

A. Factual Background

From 2001-2007, Angioblast, a biotechnology company specializing in therapeutic products for the treatment of cardiovascular diseases, conducted pre-clinical and Phase 1

[1] Unless otherwise stated, all facts are taken from this court's Decision and Order dated January 30, 2012.

clinical studies of adult stem cell treatments. In May 2007, the United States Food and Drug Administration ("FDA") gave Angioblast permission to commence Phase 2 clinical trials. Angioblast sought out an investment bank to assist with raising capital to fund the Phase 2 trials.

UBS and several other investment banks were interested in competing for Angioblast's business.

In June 2007, Angioblast executives met several times with Graig Suvvanavejh ("Suvvanavejh") and Steve Yoo ("Yoo"), key members of the UBS healthcare investment banking research department.

UBS eventually introduced Angioblast to Steven Meehan ("Meehan"), a UBS Managing Director with twenty years of healthcare investment banking experience. Angioblast executives met with Meehan and UBS Associate Director Nabeel Kaukab ("Kaukab") several times in October 2007.

Angioblast alleges that, during these meetings, Meehan assured senior members of Angioblast management that, if UBS were engaged to serve as Angioblast's exclusive investment bank, he would personally lead the UBS banking team.

By November 2007, Angioblast had narrowed its investment bank candidates to UBS and a smaller investment ("Bank B"). Bank B represented to Angioblast that it was confident that Bank B's already-identified investors could provide at least $30 million to fund Angioblast.

On November 7, 2007, at a meeting with Meehan and Kaukab, chairman of the Angioblast board, Carter Eckert ("Eckert"), stated that Angioblast would retain UBS only if UBS were willing to make an unconditional promise that Meehan and Kaukab would be, and remain, personally engaged as the leaders of the UBS team throughout the engagement and would personally supervise other junior members of the UBS team. Eckert specifically admonished Meehan that unless UBS made this commitment, Angioblast would hire one of UBS's competitors. Meehan promised to lead the team. Angioblast alleges that, at the time Meehan made this promise, he knew he would soon become CEO of UBS Russia and would be unable to fulfill his promise.

On December 20, 2007, Angioblast and UBS executed the Engagement Letter. The Engagement Letter appointed UBS as Angioblast's exclusive financial advisor but did not require that Meehan lead the advisory team.

On March 11, 2008, UBS announced that Meehan had been appointed CEO of UBS Russia and UBS did not thereafter replace Meehan on the Angioblast team with a senior healthcare banker. UBS next terminated Kaukab and Suvvanavejh without adequately replacing either of them as well. Thereafter, Angioblast alleges that the only UBS employee who attempted to maintain contact with Angioblast was Peter Francis, a recent college graduate with no significant healthcare investment banking experience.

On June 25, 2008, Angioblast received clearance from the FDA to commence Phase 2 clinical trials of its stem cell treatment of CHF, but Angioblast contends that it was forced to put the project on hold because UBS had failed to raise any capital for the trial.

After several more UBS employees were assigned to the Angioblast team and then promptly left UBS, UBS introduced a new team of UBS Life Sciences investment bankers, led by Managing Director Aradhana Sarin and Executive Director Christina Bresani.

At this point, having considered the engagement letter terminated,[2] Angioblast invited UBS to propose terms for a "new formal relationship" between UBS and Angioblast in a "new engagement letter." Ultimately, the parties did not enter into a new agreement.

In August 2009, Angioblast succeeded in raising a portion of the money it needed to fund its clinical trials, allegedly without assistance from UBS. On August 25, 2009, Angioblast publicly announced that it had raised $10 million in equity-based financing and it began Phase 2 clinical trials. Once it exhausted the $10 million, it negotiated a merger and ultimately merged with its Australian sister company, Mesoblast Limited ("Mesoblast"). Angioblast contends UBS did not assist with these merger negotiations.

On January 10, 2011, approximately two weeks after the merger closed, the interim results from the ongoing Phase 2 clinical trials were publicly announced. During the week following the public announcement of the interim results, the aggregate market capitalization of Mesoblast increased by more than $300 million U.S. dollars.

B. Procedural History

On January 10, 2011, UBS filed its Complaint asserting two causes of action against Angioblast: breach of contract and indemnification. In its answer, Angioblast asserted two

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[2] Although Itescu considered the engagement letter terminated, he had not provided proper notice of termination as per the Engagement Letter. *See* January 30, 2012 Order, p. 21.

counterclaims against UBS: fraudulent inducement and breach of contract. Angioblast also alleged nine affirmative defenses: (1) failure to state a cause of action; (2) fraudulent inducement; (3) abrogation and abandonment; (4) termination; (5) estoppel, waiver and consent; (6) unjust enrichment; (7) unclean hands; (8) plaintiff's breach; and (9) additional defenses.

In the January 30, 2012 Order, this Court dismissed each of Angioblast's counterclaims and most of Angioblast's affirmative defenses. The affirmative defenses of failure to state a cause of action and abrogation and abandonment remain.

Angioblast now seeks leave to amend its Answer and Counterclaims by inserting the language "UBS breached its implied obligation to exercise good faith in its performance" to the allegations in Counterclaim paragraphs 2, 37, 54 and 130. Angioblast contends that this insertion cures the pleading deficiency this Court found in its January 30, 2012 Order and thereby proposes to reinstate its breach of contract counterclaim and affirmative defense in its proposed amended complaint. (Angioblast's Reargument Memo,[3] p. 5.)

Angioblast also argues that the court erred in dismissing Angioblast's fraudulent inducement affirmative defense and seeks reargument of that portion of its opposition to UBS's motion to dismiss. *Id.* at p. 6.

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[3] Memorandum of Law in Support of Angioblast Systems, Inc.'s Motion for Leave to Reargue its Opposition to UBS Securities LLC's Motion to Dismiss and to Amend Answer and Counterclaims ("Angioblast Reargument Memo")

II. Motion to Amend

A. Standard of Law

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. *See* CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice).

"Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources." *360 W. 11th LLC v. ACG Credit Co. II, LLC*, 90 A.D.3d 552, 553 (1st Dep't 2011). Where the proposed amendment of the complaint would be futile, leave to amend is properly denied. *Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 322 (2d Dep't 2004).

B. Proposed Amendment

In the January 30, 2012 Order, this Court found that "Angioblast has not pleaded that UBS took any action that would have the effect of destroying or injuring the right of Angioblast to receive the fruits of the contract." (January 30, 2012 Order, p. 18.) The Court went on to hold that "UBS may not have acted as Angioblast preferred, but Angioblast has not sufficiently alleged that UBS breached its implied obligation to exercise good faith in its performance." *Id.*

Plaintiff now purports to remedy this pleading defect by adding the conclusory language that "UBS breached its implied obligation to exercise good faith in its

performance[]" to paragraphs 2, 37, 45 and 130 of its Proposed Amended Answer and Counterclaims. (Affirmation of Robert Gold, Ex. 6 ("Proposed Amended Counterclaims"), ¶¶ 2, 37, 45, 130.)

Plaintiff does not, however, insert any additional factual allegations that remedy Angioblast's failure to plead that UBS took any action that would have the effect of destroying or injuring the right of Angioblast to receive the fruits of the contract.

Angioblast has misconstrued the reason for this Court's dismissal of Angioblast's breach of contract claim and affirmative defense. The Court did not dismiss the claims merely because the pleading did not include the explicit language that UBS had breached its implied obligation to exercise good faith in its performance. Rather, this court examined the Counterclaims in their entirety[4] and found that the pleadings failed to allege that UBS took any action that would have the effect of destroying or injuring the right of Angioblast to receive the fruits of the contract. As a result, the court held that Angioblast had not sufficiently alleged that UBS breached its implied obligation to exercise good faith in its performance. (January 30, 2012 Order, p. 18.)

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[4] Angioblast's attempt to move *in haec verba* the factual allegations previously set forth in paragraphs 50 through 120 of the Answer and Counterclaims to paragraphs 5 through 75 of the Proposed Amended Answer "to make it clear that those allegations are incorporated throughout the entire pleading" is also unavailing. *See* Angioblast's Reargument Memo, p. 5. The court considered the entirety of the Answer and Counterclaims in examining the pleading sufficiency of Angioblast's breach of contract Counterclaim and affirmative defense in its January 30, 2012 Order. Additionally, paragraphs 50 through 120 of the original Answer and Counterclaims were indeed "repeated and realleged" in Angioblast's breach of contract counterclaim. *See* Answer and Counterclaims, ¶ 127.

Because the proposed amendment is devoid of any new factual allegations regarding UBS's conduct and this Court has already held that Angioblast's factual allegations were insufficient to state a claim or defense in breach of contract, Angioblast's proposed amendment would be futile. *Castillo*, 4 A.D.3d at 322. Accordingly, Angioblast's motion to amend its Complaint is denied.

III. Motion to Reargue

A. *Standard of Law*

"A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2). The purpose of a motion for reargument is not "to serve as a vehicle for an unsuccessful party to argue once again the very questions decided." *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984).

B. Fraudulent Inducement Affirmative Defense

In the January 30, 2012 Order, this Court dismissed Angioblast's fraudulent inducement counterclaim holding that "Angioblast alleges the loss of an alternative contractual bargain which is too speculative [under a fraud claim] for relief to be granted." January 30, 2012 Order, p. 15. In so holding, the court cited to the "out-of-pocket" rule from the Court of Appeals holding in *Lama Holding Co. v. Smith Barney* that a loss as a result of fraud is computed by ascertaining the "difference between the value of the bargain which a

plaintiff was induced by fraud to make and the amount of value of the consideration exacted as the price of the bargain." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996). Under the out-of-pocket rule there can be no recovery of profits which would have been realized in the absence of fraud. *Id.*

This Court dismissed Angioblast's fraudulent inducement affirmative defense noting that "CPLR 3016(b) requires that where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail." (January 30, 2012 Order, p. 19.) This Court went on to state that "as discussed above [regarding the fraudulent inducement counterclaim], Angioblast has not pled a legally cognizable injury sufficient to support a claim for fraudulent inducement. For the same reasons this court must dismiss Angioblast's counterclaim [] it must also dismiss this affirmative defense." *Id.* at 20.

Angioblast now contends that this court should grant it leave to reargue its opposition to UBS's motion to dismiss its fraud defense, because it contends that pecuniary injury is not a necessary element thereof. (Angioblast's Reargument Memo, p. 6.)

In its brief in opposition to UBS's motion to dismiss, Angioblast cited to cases in which a party asserted a claim for equitable rescission based on alleged fraudulent inducement to enter the contract. (Angioblast's Dismissal Opp.,[5] p. 19) In those cases, a party that sought rescission based on fraud was not required to plead pecuniary damages.

[5] Memorandum of Law in Opposition to UBS Securities LLC's Motion to Dismiss Angioblas Systems, Inc.'s Counterclaims and Affirmative Defenses ("Angioblast's Dismissal Opp."), p. 19.

Notably, Angioblast does not seek equitable rescission in this case. Nonetheless, in further support of its motion to reargue, Angioblast cited to older New York case law holding that, where a defendant is simply resisting enforcement of a contract alleged by defendant to have been procured through fraud, it is not necessary to show the precise amount of pecuniary loss they have suffered." *See Maybee v. Sullivan*, 171 A.D. 111, 113 (3d Dep't 1916) (where defendants are resisting the enforcement of an obligation alleged by them to be procured by deceit and fraud "[i]t is not necessary . . . for [] defendants to show . . . that they have suffered pecuniary loss in any particular sum[.]"); *see also Stuart v. Lester*, 1 N.Y.S. 699, 702 (N.Y. Sup. Ct. 1888) (where a defendant asserts a fraud defense "[i]f any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury.")

UBS contends that the court did not err in dismissing Angioblast's fraudulent inducement affirmative defense because it maintains that injury is indeed an element of a fraud defense, and this Court properly held that Angioblast failed to plead "a legally cognizable injury." (UBS's Memo,[6] p. 4.) The court agrees.

The cases cited by Angioblast do not stand for the proposition that injury is not an element of a fraud claim or defense. To the contrary, New York courts have held that injury *is* an element of a fraud defense. *See WEXA1 HBV v. 6 W. 37th St. Realty LLC*, 2012 N.Y.

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[6] UBS Securities LLC's Memorandum of Law in Opposition to Angioblast Systems, Inc.'s Motion for Leave to Reargue and to Amend its Answer and Counterclaims ("UBS's Memo")

Misc. LEXIS 234 at *11-17 (Sup. Ct. N.Y. Cty. 2012); *Citibank N.A. v. NIB Assoc., LLC*, 2011 N.Y. Misc. LEXIS 1931 at *9 (Sup. Ct. Queens Cty. 2011).

The court agrees with Angioblast that the amount of pecuniary damages need not be alleged where a defendant asserts a fraud defense and does not seek monetary damages. However, in the Court's January 30, 2012 Order, the court found that Angioblast's damages allegation that it would have entered into a contract with a different investment bank that would have been more successful at raising funds is too speculative to satisfy the particularity requirements of CPLR 3016(b). The court therefore held that Angioblast had not pled a legally cognizable injury, even under a relaxed pleading standard, with regard to affirmative fraud defenses.

Accordingly, Angioblast's motion to reargue the opposition to UBS's motion to dismiss its fraudulent inducement affirmative defense is denied. Because the court has denied the motion to dismiss on these grounds the court does not herein address UBS's other arguments.

The order of the Court follows on the next page.

Order

Accordingly, it is hereby

ORDERED that defendant Angioblast Systems, Inc.'s motion to amend its Answer and Counterclaims is denied; and it is further

ORDERED that defendant Angioblast Systems, Inc.'s motion to reargue its opposition to plaintiff UBS Securities LLC's motion to dismiss Angioblast's fraudulent inducement affirmative defense is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 14, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.