Xaleron Pharms., Inc. v Actavis, Inc.
2016 NY Slip Op 31708(U)
September 12, 2016
Supreme Court, New York County
Docket Number: 150587/2016
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

XALERON PHARMACEUTICALS, INC.,

Plaintiff,

-against-

ACTAVIS, INC. and ALLERGAN, INC.,

Defendants.

X

INDEX NO. 150587/2016

Motion Seq. No. 001

OSTRAGER, J:

The defendants pre-answer motion to dismiss the complaint for failure to state claims upon which relief can be granted pursuant to CPLR 3211(a)(7) is supported exclusively by a memorandum of law challenging the legal sufficiency of the complaint. The complaint pleads claims for (1) unfair competition, (2) tortious interference with economic advantage, and (3) unjust enrichment predicated upon the following allegations.

Plaintiff Xaleron Pharmaceuticals, Inc. ("Xaleron"), is a pharmaceutical company, co-owned and co-founded by Messrs. Simon and Kreisler who are alleged to have a reputation for developing successful and marketable pharmaceutical products (Complaint ¶20). Defendants are Actavis, Inc. ("Actavis") and Allergan, Inc. ("Allergan"), two pharmaceutical companies. Actavis and Allergan merged in 2014, and through this merger, Actavis acquired Allergan and its Botox product (MOL in support at 1, footnote 1) (*see also* Complaint ¶9, 12).

Xaleron was approached by a representative of Dr. Ira Sanders ("Sanders"), the owner of a patent (the "340 Patent") described in part as a "method of blocking or reducing allergic rhinitis" utilizing a neurotoxin (Complaint ¶27), to explore with Xaleron the potential exploitation of the patent to treat symptoms of allergic rhinitis with an active toxin known as

botulinum toxin (Complaint ¶ 26-28). Although there are multiple pharmaceutical suppliers of this toxin, the most well-known producer and supplier of the *botulinum toxin* is Allergan which uses it in Botox (¶ 28). According to the complaint, Sanders chose to collaborate with Xaleron because Sanders had prior intellectual property disputes with the Allergan (¶ 32).

Xaleron alleges that it spent approximately a year between late 2014 and late 2015 in developing a plan to commercialize the 340 Patent utilizing the *botulinum toxin*, including plans for product development, clinical studies for Food and Drug Administration ("FDA") approval, and related matters (the "Strategy") (¶ 33-34). Xaleron further alleges that because Messrs. Simon and Kreisler had longstanding relationships with William Meury, a senior Allergan executive with "direct responsibility over the therapeutic uses of Allergan's 'Botox' brand," (¶ 47) they approached the defendants with their Strategy on condition that the defendants would treat the Strategy confidential and not circumvent Xaleron in its plans to commercialize and license the 340 Patent from Dr. Sanders (¶ 54-58). The complaint further alleges that in July 2015, the defendants offered to purchase Xaleron with its Strategy to develop the 340 Patent for $75 million in recognition of the potential commercial success of the Strategy (¶ 60).

Ultimately, the defendants notified Xaleron on October 23, 2015 that the defendants "elected to go in a different direction" (¶ 64-65). Sanders refused to license the 340 Patent and related intellectual property to Xaleron and it is alleged that defendants surreptitiously interfered with Xaleron's prospective business relationship with Sanders and initiated direct and secret discussions with Sanders to license the 340 Patent (*id.*).

Xaleron alleges the existence of various meetings and correspondences relating to the facts alleged in the complaint, but, in connection with the motion to dismiss, neither party has presented any documentary evidence. Accepting all of the allegations of the complaint as true

and liberally construing these allegations in favor of the plaintiff, as the Court must on a pre-answer motion to dismiss the complaint, the issue is whether these allegations, without more, state claims upon which relief can be granted.

The First Cause of Action: Unfair Competition/Misappropriation of Investment

In the first cause of action for unfair competition/misappropriation of investment, the plaintiff Xaleron asserts that it has property rights in its labor, skill, expenditure, name, and reputation in developing the Strategy, which the defendants falsely agreed to treat as confidential and to refrain from circumventing Xaleron's right to implement the Strategy. The plaintiff further asserts that the defendants schemed to appropriate information related to the Strategy to either further develop the defendants' existing products or to alienate Sanders from Xaleron in bad faith to prevent Xaleron from implementing its Strategy (Complaint ¶68-76).

In their motion to dismiss, the defendants argue that the complaint falls short of stating a claim for unfair competition on the misappropriation theory for four reasons. First, the complaint does not allege that the defendants engaged in any cognizable act of misappropriation. The complaint merely alleges that Allergan "privately schemed" to appropriate Xaleron's Strategy (MOL in support at 7). Second, even if the plaintiff's allegations are interpreted to suggest that Allergan competed unfairly by communicating with Sanders and inducing him not to license the 340 Patent to Xaleron, the claim fails because it does not allege the misappropriation of any property to which the plaintiff had an exclusive right, and "the law does not penalize the use of publicly available information" (*id.* at 7-8). Third, the complaint does not allege facts to show that Allergan realized a profit or other tangible benefit directly connected to the defendants' alleged misappropriation of the plaintiff's "labor, skill, expenditure, name, and

reputation" (*id.* at 8). Fourth, the complaint does not allege facts showing that the defendants acted in bad faith, as required to state a claim for unfair competition (*id.*).

A claim for unfair competition on the theory of misappropriation involves the "taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." *Roy Export Co. Establishment v Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir.1982). "It has been broadly described as encompassing any form of commercial immorality, or simply as endeavoring to reap where one has not sown; it is taking the skill, expenditures and labors of a competitor, and misappropriati(ng) for the commercial advantage of one person ... a benefit or property right belonging to another." *Id.* at 1105. An unfair competition claim must also involve "allegations of an external competitive act" and some degree of bad faith. *Id.*; *Ritani, LLC v Aghjayan*, 970 F.Supp.2d 232, 258 (S.D.N.Y. 2013).

The plaintiff's allegations that the defendants engaged in unfair competition involving misappropriation state a viable claim for the following reasons. The plaintiff alleges that Xaleron spent approximately one year in developing its Strategy for the exploitation of the 340 Patent, which included product development, clinical studies, regulatory approvals, and a business plan for the marketing and sale of the end product. Furthermore, the allegations in paragraph 64 of the complaint that the defendants "elected to go in a different direction," coupled with the allegations in paragraph 65 of the complaint that Sanders's representative indicated to the plaintiff that "Sanders would no longer agree to license the 340 Patent and related IP to Xaleron in connection with the Strategy," sufficiently meet, at the pleadings stage, the "external competitive act" required under *Ritani,* beyond mere internal dissemination and review, and is indicative of some degree of alleged bad faith. What is more, the defendants' assertion that the Strategy was publicly available or in the "public domain" is not supported by anything other than

the defendants' conclusory statements to that effect in the defendants' memorandum of law. And, as the plaintiff asserts, it is unlikely Allergan would offer $75 million for a Strategy that is publicly available (*see* MOL in opposition at 15-16). Finally, whether or not Xaleron possessed "property right" in its Strategy is an issue of fact that should be more fully developed through discovery and documentary evidence.

The Second Cause of Action: Tortious Interference with Prospective Economic Advantage

In the second cause of action for tortious interference with prospective economic advantage, the plaintiff asserts that the defendants knew of the plaintiff's prospective negotiations with Sanders for the exclusive licensing of the 340 Patent and related IP in connection with the Strategy (¶ 77-83). The plaintiff further asserts that Xaleron was unable to execute its plan due to the defendants' malicious, deceitful, and intentional misconduct that tortiously interfered in the relationship between Xaleron and Sanders (¶ 80).

In their motion to dismiss, the defendants argue that the plaintiff's claim for tortious interference fails as a matter of law because the complaint alleges no facts showing that Allergan acted by use of wrongful means or solely with malice. Instead, defendants assert, the complaint alleges Allergan sought to maximize its own economic self-interest, "which defeats a tortious interference claim." (MOL in support at 12). In addition, defendants claim that even if such allegations were true, the claim for tortious interference fails as a matter of law because the alleged conduct was directed at Sanders, as opposed to the plaintiff (*id.* at 12-13).

To prevail on a tortious interference claim under New York law, a plaintiff must prove that (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or

used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship. *Carvel Corp. v Noonan*, 350 F.3d 6, 17 (2nd Cir. 2003).[1] In addition, the Appellate Division, First Department has held that "conduct constituting tortious interference with business relations is ... conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship," citing *Carvel Corp v Noonan*, 3 NY3d 182, 192 (2004). *See RXR WWP Owner, LLC v WWP Sponsor, LLC*, 132 AD3d 467, 469 (1st Dep't 2015).

The plaintiff's allegations that the defendants tortiously interfered with the plaintiff's prospective economic relationship with Sanders state a claim upon which relief could be granted. The plaintiff has alleged in paragraph 65 of the complaint that "Langloss [Sanders's representative] informed Xaleron that Sanders had been contacted by another party – which, upon information and belief, was Defendants – with an offer of a substantial upfront payment by (upon information and belief) Defendants if Sanders did not agree to license the 340 Patent and related IP to Xaleron and instead would license the 340 Patent and related IP to (upon information and belief) Defendants." Further, it is alleged that "due to the malicious, deceitful, and intentional misconduct of Defendants and their *interference directed at Sanders*, Xaleron and Sanders did not enter into an exclusive license for the 340 Patent and related IP" (¶ 80) (emphasis added). Hence, the plaintiff plead sufficient factual allegations to meet the standards enunciated in *Carvel Corp.* and *RXR WWP Owner LLC* to assert a claim for tortious interference.

[1] "The tort of intentional interference with prospective economic relations is relatively simple to understand in theory—but notoriously complicated in practice. The idea behind the tort is that A claims that C interfered with A's prospective economic relationship with B. Often, C is a market competitor of A, and thus C's actions are aimed at luring B away from A, so that C, itself, can enter into an economic relationship with B. But sometimes C is simply an interloper in the affairs of A and B, acting with the primary purpose of injuring A. Thus, the central tension in such cases is in drawing the line between permissible market behavior and impermissible predatory behavior" (*id.* at 18).

The Third Cause of Action: Unjust Enrichment

In the third cause of action for unjust enrichment, the plaintiff asserts that the defendants were enriched by acquiring and using knowledge about the Strategy to "cripple" Xaleron's ability to implement it (¶ 85). The plaintiff further alleges that the defendants were unjustly enriched at Xaleron's expense, the plaintiff and defendants had a relationship of trust, and the defendants caused or induced Xaleron to rely on the defendants' good faith (¶ 86-88).

In their motion to dismiss, the defendants argue that the plaintiff's claim for unjust enrichment fails as a matter of law because the plaintiff does not plead facts showing the defendants reaped a "benefit which in 'equity and good conscience' should be paid to the plaintiff" (MOL in support at 16). "Rather, Plaintiff alleges only that Allergan received information from Plaintiff that Allergan did not monetize," and defendants cannot disgorge their alleged knowledge of the plaintiff's strategy. "There is thus nothing to be returned." (*id.*).

To state a claim for unjust enrichment, a plaintiff must allege that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 (1st Dep't 2015) (*quoting Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Further, a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party that "could have caused reliance or inducement." *Id.*; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011). The basis of a claim for unjust enrichment is that the defendant has obtained a *benefit* which in "equity and good conscience" should be paid to the plaintiff. *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 (2012).

The plaintiff's allegations that the defendants were unjustly enriched state a viable claim at the pleading stage. The plaintiff has alleged that, by reason of the plaintiff's relationship with Meury, a senior executive at Allergan, the defendants acquired knowledge of the Strategy, which the defendants allegedly valued at $75 million. Although it is presently unknown whether a transaction between the plaintiff and Sanders will come to fruition, the plaintiff has made sufficient factual allegations to sustain a claim for unjust enrichment based on the "*use* of unjustly received information that creates an unjust benefit" (*see* MOL in opposition at 25).

For all the foregoing reasons, it is hereby

ORDERED that the defendant's pre-answer motion to dismiss is denied. Defendants shall file an answer by October 11, 2016. The parties shall appear for a preliminary conference on Tuesday, October 18, 2016 at 10 a.m. in Room 341.

Dated: September 12, 2016

BARRY R. OSTRAGER J.S.C.
JSC