Array Biopharma, Inc. v Astrazeneca PLC
2019 NY Slip Op 32345(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 657269/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

ARRAY BIOPHARMA, INC.,

Plaintiff,

-against-

ASTRAZENECA PLC and ASTRAZENECA AB,

Defendants.

----------X

DECISION AND ORDER
Index No.: 657269/2017

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

I. BACKGROUND

As this is a motion to dismiss, the facts are taken from the complaint, unless otherwise specified.

Plaintiff Array Biopharma Inc. ("Array") is a Delaware corporation, with its principal place of business in Colorado. Defendants Astrazeneca plc is a corporation organized under the laws of England Wales, with its principal place of business in the United Kingdom. Defendant Astrazeneca AB is a corporation organized under the laws of Sweden with its principal place of business also in Sweden. Astrazeneca AB is a wholly owned, indirect subsidiary of Astrazeneca plc.

On December 18, 2003, Array and Astrazeneca AB entered into a Collaboration and License Agreement (the "Agreement" or "2003 License") containing a forum selection clause whereby the parties agreed to submit to New York jurisdiction in the event of a dispute (Agreement [NYSCEF Doc No 17] § 12.3). By the Agreement, Array licensed to Astrazeneca the intellectual property associated with a chemical compound it discovered, known as ARRY-142886 , or selumetinib. Selumetinib is referred to as a "MEK inhibitor" because it acts to inhibit the activity of "MEK" enzymes, which regulate cell growth and metabolism. The purpose of the Agreement was to facilitate "the development and commercialization of [selumetinib] for the treatment of cancer" (Agreement, Recital C). The Agreement states that Array "believes that [selumetinib] has the potential to become an anti-cancer agent with significant worldwide sales" and that Astrazeneca "is interested in… develop[ing] and commercializing pharmaceutical products directed to MEK in the field of cancer treatment" (Agreement, Recitals A, D). The scope of the license is limited to development of drugs "for use in the Field" (Agreement §

5.2.1). The "Field" is further defined as "the diagnosis, treatment, palliation and/or prevention of cancer in humans" (Agreement § 1.28).

The Agreement further provides that, if Astrazeneca grants a sublicense to a third party, Astrazeneca "shall pay to Array a royalty of twelve percent (12%) of all Net Proceeds" (Agreement § 6.7). "Net Proceeds" is defined as "all gross amounts invoiced and all other consideration received by [Astrazeneca] under an agreement granting such rights to such Sublicensee, including without limitation, (i) up-front payments, (ii) milestone payments, (iii) running royalties and (iv) any sale of Candidate Drugs or Licensed Products by [Astrazeneca] or its Affiliates" (*id.*).

Array has had ongoing communications with representatives of Astrazeneca plc and its subsidiaries concerning drug development and related clinical trials, as well as coordination of external communications and press releases.

MEK inhibition has become recognized as an important strategy for enhancing the effects of immunotherapy in the treatment of cancer. At the time the complaint was filed, there were approximately 28 clinical trials of selumetinib in progress for various cancer indications. Selumetinib is also being tested for use in the treatment of plexiform neurofibromas ("pNFs"), which occur in patients with neurofibromatosis. pNFs are noncancerous, benign tumors. In December 2016, the New England Journal of Medicine published a study ("Dombi Study") indicating that selumetinib is effective in shrinking the size of pNFs in certain patients. The Dombi Study did not address the use of selumetinib in the context of treatment or prevention of cancer, having purposely excluded cancer patients from participating in the clinical trial (Dombi protocol § 2.1.2). In 2018, both the FDA and the European Medicines Agency ("EMA") granted selumetinib orphan drug designation for the treatment of neurofibromatosis Type 1 ("NF1"), meaning that the drug is qualified to treat that condiiton. The agencies have already granted separate orphan drugs designations to selumetinib for treatment of cancer.

On July 27, 2017, Astrazeneca announced that it would be collaborating with Merck to jointly develop and commercialize selumetinib, and another cancer-treating compound known as Lynparza ("Merck Collaboration Agreement"). Merck may pay up to $8 billion in total consideration. In its 6-K filed with the SEC on July 27, 2017, Astrazeneca plc stated that it had "entered a global strategic oncology collaboration" with Merck to "jointly develop and commercialize Astrazeneca's selumetinib". Array notified Astrazeneca before the announcement

of its position that use of selumetinib for treatment of pNFs was outside the scope of its license. After the announcement, Array indicated that it expected to discuss royalties owed under the sublicense to Merck. Array maintains that "[b]ecause (i) the Merck Agreement is an agreement by which Astrazeneca is granting Merck sublicense rights in selumetinib, and (ii) the Agreement's definition of 'Net Proceeds' in respect to sublicenses includes 'all gross amounts invoiced and all other consideration received by [Astrazeneca] under an agreement granting such rights… including without limitation… up-front payments'" it is entitled to royalties including 12% of the $1.6 billion up-front payment that Astrazeneca will receive. Astrazeneca argues that Array is entitled to only a de minimis portion of the up-front payment.

Plaintiff asserted two causes of action in the complaint, (i) breach of contract and (ii) declaratory judgment, but has since discontinued its claim for declaratory judgment (NYSCEF Doc. No. 146).

II. STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2d Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries,

McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS & DISCUSSION

a. Jurisdiction

i. Defendants' arguments

Defendants argue that the court lacks general jurisdiction over Astrazeneca plc as it is registered and has its principal place of business in the UK. The court does not have specific jurisdiction either, because plaintiff has not identified any transaction that would evidence Astrazeneca plc's purposeful availment of the New York forum. Ownership of a subsidiary that transacts business in the forum is insufficient to establish jurisdiction over the parent (*Moreau v RPM, Inc.*, 20 AD3d 456, 457 [2d Dept 2005]; *see also Gurvey v Cowan, Liebowitz & Latman, PC*, No. 06 Civ. 1202, 2009 WL 691056, at *5 [SD NY 2009]).

Defendants also argue that the claim should be dismissed against Astrazeneca plc because it is not a signatory to the 2003 License Agreement (*Crabtree v Tristar Auto. Grp., Inc.*, 776 FSupp 155, 166 [SD NY 1991] ["It is hornbook law that a non-signatory to a contract cannot be named as a defendant in a breach of contract action unless it has thereafter assumed or has been assigned the contract."]).

ii. Plaintiff's opposition

Plaintiff contends that defendants overlook the asserted basis for the court's jurisdiction, General Obligations Law 5-1402(1), which provides a basis for personal jurisdiction where the parties contractually consent to jurisdiction. Here, the statute's amount in controversy requirement is satisfied, and the Agreement contains a forum selection clause whereby the parties agree to submit to the exclusive jurisdiction of New York courts (NYSCEF Doc. No. 17 § 12.3).

Mandatory forum selection clauses bind non-signatories and confer jurisdiction over them where the nonsignatory defendant "has a significantly close relationship with the signatory and the dispute to which the forum selection clause applies" (*Tate & Lyle Ingredients Ams., Inc. v Whitefox Techs USA, Inc.*, 98 AD3d 401, 402 [1st Dept 2012] [nonsignatory defendant participated in negotiations]; *Metro-Goldwyn-Mayer Studios Inc. v Canal & Distribution S.A.S.*, No. 07-cv-02918, 2010 WL 537583, at *1 [SD NY 2010] [nonsignatory defendant owned 100% shares of signatory entity]). Here, Astrazeneca plc is sufficiently closely related to Astrazeneca AB in that, among other reasons, it is the signatory entity's 100% owner, it is an affiliate of the signatory entity as defined by the Agreement, and its Board specifically approved the transaction and reported it in SEC filings that made no distinction between the two entities (opp at 17-18, citing Kemp aff ¶ 13; Agreement [NYSCEF Doc. No. 17] at §§ 1.2, 6.7; Hemr aff, exhibit 1). Judge Castel's reasoning in remanding this case from SDNY to this court is persuasive:

> "Astrazeneca plc closely associated itself with Astrazeneca AB not merely based upon ownership, but through its involvement in approving the Merck collaboration and in making public announcements regarding the Merck collaboration that make no effort to distinguish its role from that of its subsidiary. Because of its role in approving and announcing the Merck collaboration, Astrazeneca plc is closely associated with the 'dispute' as it is defined in the PLC Action complaint. It became foreseeable to Astrazeneca plc, as a result of its own voluntary actions, that any dispute with Array over any licensing fees due to Array by reason of the Merck collaboration would implicate the Agreement which vests exclusive jurisdiction in the "courts of the State of New York"

(*Array BioPharma Inc. v Astrazeneca plc*, No. 18-cv-00235, 2018 WL 3769971, at *2 [SD NY 2018]). Astrazeneca plc cannot now attempt to distance itself from the pharmaceutical business.

A non-signatory can be held liable where it assumed the obligations thereunder (*see Crabtree*, 776 FSupp at 166; *Int'l Customs Assocs., Inc. v Ford Motor Co.*, 893 FSupp 1251, 1255 [SD NY 1995]). Here, the non-signatory has approved and taken credit for the transaction. It cannot now disavow liability (opp at 20-21).

iii. Discussion

The General Obligations Law states, in relevant part, that

> "any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state"

(General Obligations Law § 5-1402[1]). The parties do not dispute that there is a choice of forum clause in the contract, but because it was not signed by Astrazeneca plc, the issue is whether that entity is sufficiently "closely related" to the signatory, defendant Astrazeneca AB, such that the action may be maintained against it. "The general rule under New York law is that parent corporations may not enforce, or have enforced against them, terms of a contract, including forum selection clauses, signed by their separately existing subsidiaries" (*Tate & Lyle*, 98 AD3d at 401). "A nonparty that is 'closely related' to one of the signatories can enforce a forum selection clause" (*Freeford Ltd. v. Pendleton*, 53 AD3d 32, 39 [2008]). The nonsignatory defendant must have a "sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applies" (*Tate & Lyle*, 98 AD3d at 402). "A non-party is 'closely related' to a dispute if its interests are 'completely derivative' of and 'directly related to, if not predicated upon' the signatory party's interests or conduct" (*Cuno, Inc. v. Hayward Indus. Prods., Inc.*, 2005 WL 1123877, at *6 [SD NY May 10, 2005] [quoting *Lipcon v. Underwriters at Lloyd's, London*, 148 F3d 1285, 1299 [11th Cir 1998]).

The inquiry is fact-specific, and bare allegations of control are insufficient. For example, in *Project Cricket Acquisition*, the court dismissed the claims against the non-signatory entities

because "plaintiff fails to allege how each of the… Non-Signatory Parties were involved in… this dispute. The general allegations of control are entirely insufficient to disregard the separate legal identities of these corporations" (Index no. 652524/2015, 2017 WL 2797468, at *5 [Sup Ct NY County 2017]). In contrast, in *Tate & Lyle*, the claims were not dismissed against the nonsignatory entities. There, the court found that they were involved in "far more than a parent company's mere approval of a contract" (98 AD3d at 403). Rather, the "entities not only consulted with each other, but both were intimately involved in the decision making process from the inception of the licensing agreement through this litigation" *(id.)*. The signatory entity "could not sign the licensing agreement on its own authority; it needed approval [from the nonsignatory parent company]" (*id.*). The nonsignatory parent also directed the signatory entity to bring the lawsuit (*id.*). Similarly, in *Metro-Goldwyn-Mayer*, the court found that "the facts alleged provide a sufficient basis" to maintain the claims against the nonsignatory despite "the precise corporate relationships between the Defendants remain[ing] unclear at this early stage of the litigation, before any discovery has taken place" where the plaintiff alleged that after a merger, the nonsignatory entity was the successor-in-interest under the Agreement, and that the nonsignatory owned a majority of the signatory entity (No. 07-cv-02918, 2010 WL 537583, at *5 [SD NY 2010]).

Here, granting plaintiff the benefit of every positive inference, the allegations are insufficient to withstand a motion to dismiss. Although Array has alleged that Astrazeneca plc is the signatory entity's 100% owner and its Board specifically approved the transaction, it did not sign the agreement and had no involvement in the transaction. The court lacks jurisdiction over Astrazeneca plc.

b. Breach of contract

i. Defendants' memo in support

Defendants argue the breach of contract claim should be dismissed based on the plain language of the 2003 License. The Merck Agreement facilitates the development and commercialization of two compounds – selumetinib and Lynparza. Array does not, nor could it, allege any contractual right to Lynparza. With respect to selumetinib, the language of the 2003 License clearly states that Astrazeneca "may sublicense the rights granted under Section 5.2.1 above for a particular Candidate Drug or Licensed Product" (2003 License § 5.2.2). The 2003

License also allows for Astrazeneca to grant a sublicense, on the condition that it pays a 12% royalty on the sublicense to Array (2003 License § 6.7). Astrazeneca merely exercised that right in granting a sublicense to the selumetnib rights to Merck ("Array Selumetnib Sublicense"). Astrazeneca has already paid Array 12% of the up-front payment it received for the Array Selumetnib Sublicense (*see* Buchwald aff, exhibit 20 [payment receipt]), and the claim should be dismissed (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 243 [2014]).

ii. Plaintiff's opposition

In opposition, plaintiff argues that contrary to defendants' characterization of the dispute, it is not claiming any contractual right to Lynparza. Rather, it takes issue with defendants' self-serving position that for the purposes of calculating the percentage royalty that plaintiff is entitled to as a result of the Merck collaboration, "Net Proceeds" are only constituted of a portion of the up-front payment made under that agreement. The Agreement defines "Net Proceeds" at a transactional level to include all amounts paid to Astrazeneca under any sublicense. Specifically, the term "Net Proceeds" is defined as "all gross amounts invoiced and all other consideration received by [Astrazeneca] under an agreement granting such rights to such Sublicensee, including without limitation, (i) upfront payments…"

Array has alleged that Astrazeneca and Merck entered into a collaboration on July 26, 2017 to "jointly develop and commercialize… selumetnib,…currently being developed for multiple indications including thyroid cancer" (Hemr aff, exhibit 1). Astrazeneca reported to the SEC that "[a]s part of the agreement, Merck will pay Astrazeneca up to $8.5 billion in total consideration, including $1.6 billion upfront…" (*id.*). Array has further alleged that Astrazeneca takes the position that only 1.5% of that $1.6 billion up-front payment constitutes "Net Proceeds", and has paid Array 12% of that de minimis fraction of the up-front payment (amended consolidated complaint ¶¶ 49, 51, 53, 59-60). Array has sufficiently pled a claim for breach of contract pursuant to CPLR 3211(a)(7).

To the extent defendants argue the complaint should be dismissed on the basis of the documentary evidence – here, the documents composing Astrazeneca's agreement with Merck – the evidence is heavily excerpted and cannot be considered "essentially undeniable" for the purposes of CPLR 3211(a)(1) (*see e.g., Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004]). Defendants try to characterize the

Merck Collaboration Agreement (Buchwald aff, exhibit 10) and five sublicenses between Astrazeneca and Merck affiliates (Buchwald aff, exhibits 11-15) as various, separate agreements, when all of these instruments are part of a single agreement. Each of these documents states that they are inseparable from one another, were executed on the same date, and should be construed as part of a single agreement (*Bogart v Roven*, 8 AD3d 600, 601 [2d Dept 2004]). The branch of the motion seeking dismissal pursuant to CPLR 3211(a)(1) should therefore be denied.

iii. Discussion

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Plaintiff has alleged that there was a valid contract with defendants, under which it granted defendants limited rights to use its intellectual property in selumetnib. It also granted defendants the right to grant a sublicense in exchange for 12% royalties on any sublicense (amended complaint ¶ ¶ 25, 27, 29). There is no dispute as to plaintiff's performance (*id.* ¶ 67). Plaintiff alleges that defendants breached the Agreement by granting Merck a sublicense, and then failing to pay it sublicense royalties in accordance with section 6.7 of the Agreement (*id.* ¶¶ 53, 58-60). Instead of paying 12% of certain proceeds, defendants only paid plaintiff a de minimis fraction of the up-front payment that Merck made in connection with the sublicense (*id.* ¶ 60), and plaintiff has been damaged in the amount of sublicense royalties it is owed. (*id.* ¶¶ 62,

69). The claim may therefore not be dismissed for failure to state a claim pursuant to CPLR 3211(a)(7).

Defendants also attempt to show that the documentary evidence conclusively shows that the Merck collaboration consisted of several different licenses, and that plaintiff is therefore only entitled to 12% royalties on the Array Selumetnib Sublicense, and not all of the licenses granted pursuant to the Collabotation Agreement (Buchwald aff, exhibit 10). All of the licenses or sub-licenses state that the parties "are entering into the Collaboration Agreement to Develop and Commercialize the Compound and Products and Merck requires a sublicense under the Licensed intellectual property in order to carry out activities in accordance with the Collaboration Agreement" (Buchwald aff, exhibits 11-16). However, the rest of the license agreements, other than some of the definitions and signature pages, is largely missing from the evidence. As plaintiff points out, the evidence is inconclusive and does not rise to the level of utterly refuting the claims. The claim may therefore not be dismissed based on the documentary evidence pursuant to CPLR 3211(a)(1).

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendants is GRANTED to the extent that the complaint is DISMISSED as to defendants Astrazeneca, plc and is otherwise DENIED; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Astrazeneca, plc and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

OREDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption as follows:

----------X

ARRAY BIOPHARMA, INC.,

Plaintiff, **Index No.: 657269/2017**

-against-

ASTRAZENECA AB,

Defendant.

----------X

and it is further

ORDERED that counsel for the moving party serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

DATED: July 30, 2019

ENTER,

O. PETER SHERWOOD J.S.C.