

180 Life Sciences Corp. v Tyche Capital LLC

2022 NY Slip Op 32843(U)

August 22, 2022

Supreme Court, New York County

Docket Number: Index No. 652502/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

180 LIFE SCIENCES CORP.,

Plaintiff,

- v -

TYCHE CAPITAL LLC,

Defendant.

INDEX NO. 652502/2021

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 007

**DECISION + ORDER ON
MOTION**

-----X

TYCHE CAPITAL LLC

Plaintiff,

-against-

SIR MARC FELDMANN, DR. JAMES WOODY, OZAN PAMIR,
DR. MARLENE KRAUSS, CONTINENTAL STOCK
TRANSFER & TRUST COMPANY, KBL IV SPONSOR LLC

Defendant.

Third-Party
Index No. 595459/2021

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 118, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 207, 210, 211, 212

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 136, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 208, 209

were read on this motion to/for DISMISSAL.

180 Life Sciences Corp.'s (**180 Life Sciences**) motion to dismiss Tyche Capital LLC's (**Tyche**) counterclaims (Mtn. Seq. No. 006) must be granted to the extent of dismissing the counterclaim sounding in breach of contract for failure to deliver the Founder Shares because they had no

contractual obligation to deliver the shares. KBL IV Sponsor LLC (the **Sponsor**) did. They are also entitled to dismissal of the counterclaim sounding in breach of the covenant of good faith and fair dealing (*Duration Mun. Fund, L.P. v J.P. Morgan Sec., Inc.*, 77 AD3d 474, 474 [1st Dept 2010]).

On the record (8.22.22), the parties discussed whether, if the lawsuit is frivolous (as Tyche claims), a claim for tortious interference with contract would be appropriate. To state a claim for tortious interference, a plaintiff must demonstrate the existence of a valid contract between the plaintiff and another, the defendant's knowledge of the contract, intentional procurement of its breach without justification, and damages resulting therefrom (*Nostalgic Partners, LLC v New York Yankees Partnership*, 205 AD3d 426, 428 [1st Dept 2022]). In addition, a tortious interference claim can only be brought against a stranger to the contract (*Bradbury v Israel*, 204 AD3d 563, 564 [1st Dept 2022]). There are therefore two problems that doom this claim. First, inasmuch as the shares were in fact delivered to Tyche, the only predicate for the claim would be the attachment granted by this Court. Second, 180 Life Sciences' predecessor-in-interest was a party to the Escrow Agreement, the very agreement that the defendant would be claiming that 180 Life Sciences allegedly tortiously interfered with. Thus, the claim is not viable.

The counterclaim for breach of contract based on the failure to raise the \$10 million as contemplated by Section 1.1 of the Guaranty (hereinafter defined) must also be dismissed. There simply are no damages here. If true that Life Sciences did not meet its obligation, Tyche would be relieved of its obligation to fund the Guaranty. That is all. Thus, dismissal as a counterclaim is required.

As to the declaratory judgment, however, dismissal is not appropriate. There is a judiciable controversy as to whether Tyche's obligations under the Guaranty were triggered. The counterclaim for a declaratory judgment is not duplicative of any of the other counterclaims.

The Moving Third-Party Defendants' (hereinafter defined) motion to dismiss the third-party complaint (Mtn. Seq. No. 007) must be granted because the Moving Third-Party Defendants owed no fiduciary duty to Tyche.

The Relevant Facts and Circumstances

Reference is made to a certain (i) Business Combination Agreement (the **BCA**), dated as of July 25, 2019, by and among KBL Merger Corp. IV, KBL Merger Sub, Inc., Cannibiorx Life Sciences Corp., Katexco Pharmaceuticals Corp., Cannbriorex Pharmaceuticals Corp., 180 Therapeutics L.P., and in his capacity as the Shareholder Representative, Lawrence Pemble, (ii) Guarantee and Commitment Agreement (the **Guaranty**; NYSCEF Doc. No. 104), dated July 25, 2019, by and among, KBL Merger Corp. IV and Tyche Capital LLC, and (iii) Escrow Agreement (the **Escrow Agreement**; NYSCEF Doc. No. 105), made as of April 10, 2019, by and among KBL IV Sponsor, LLC, KBL Merger Corp. IV, Tyche Capital LLC and Continental Stock Transfer & Trust Company, as escrow agent.

The BCA, Guaranty and Escrow Agreement are the transaction deal documents (**Deal Documents**) pursuant to which (i) 180 Life Sciences merged into KBL Merger Corp. VI, (ii) Tyche Capital agreed that it would backstop the requirement that KBL Merger Corp. VI have

\$5,000,001 in net tangible assets and (iii) Tyche Capital would receive certain stock known as the **Founders Shares** upon fulfillment of its obligations. The Founders Shares were put in escrow pursuant to the terms of the Escrow Agreement. Pursuant to Section 4 of the Escrow Agreement, the Escrow Agent is required to hold the Founders Shares until it receives (i) a joint written instruction from the Sponsor¹ and Tyche or (ii) a copy of a final non-appealable judgment or order from a state or federal court located in New York County, New York establishing the rights of a party in accordance with the Term Sheet. This occurred and the shares were delivered to Tyche.

Subsequent to the closing, 180 Life Sciences (i) claimed certain irregularities in the books that were allegedly concealed such that KBL Merger Corp. VI did not have \$5,000,001 in net tangible assets as was required and (ii) demanded that Tyche fulfill its obligations under the backstop guarantee. When this did not occur, 180 Life Sciences brought this lawsuit and sought and obtained an attachment of the shares.

In their answer, Tyche claims that this lawsuit is a sham. Tyche disputes that net tangible assets were below \$5,000,001, to the extent that 180 Life Sciences asserts that net tangible assets were below this amount, they well knew of the liabilities that they now claim were irregular and concealed and they waived the requirement that Tyche fund the backstop guarantee. In addition, Tyche alleges that 180 Life Sciences did not meet their obligations to raise \$10 million which if raised would have made net tangible assets in excess of \$5,000,001. They have brought counterclaims sounding in (i) breach of contract (first counterclaim) based on Life Science's

¹ The Sponsor is an affiliate of KBL Merger Corp. VI (the predecessor-in-interest to 180 Life Sciences).

alleged communications to the escrow agent frustrating the delivery of their shares and by causing the Sponsor to fail to execute the necessary documents to cause the delivery of the shares, (ii) breach of the covenant of good faith and fair dealing (second counterclaim) because they brought this lawsuit knowing it was utter nonsense, (iii) declaratory judgment that they met their obligations under the Deal Documents and (iv) breach of contract based on the failure to go out and raise \$10 million.

Tyche also asserted a third-party complaint as against Sir. Marc Feldmann, Dr. James Woody, Ozan Pamir (hereinafter, collectively, the **Moving Third-Party Defendants**), Dr. Marlene Krauss, KBL IV Sponsor LLC, and Continental Stock Transfer & Trust Company. The Moving Third-Party Defendants are shareholders of 180 Life Sciences and held management positions during the time period at issue in this action. The only cause of action in the third-party complaint asserted as against the Moving Third-Party Defendants is for breach of fiduciary duty.

Discussion

On a motion to dismiss, the Court must afford the pleading a liberal construction and accept the facts as alleged as true, accord the non-moving party the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Tyche's counterclaim for breach of contract for failure to deliver the Founder Shares must be dismissed. Pursuant to the Escrow Agreement, upon execution of the Escrow Agreement, the Sponsor, not 180 Life Sciences, was required to instruct KBL Merger Corp. IV's transfer agent

to deliver the Founder Shares into escrow and to sign the joint instruction to have the shares delivered to Tyche (NYSCEF Doc. No. 105, § 2). This was not 180 Life Sciences' obligation and the shares have been delivered to Tyche. It does not matter or give rise to a claim sounding in breach based on 180 Life Science successfully seeking an attachment. Thus, the counterclaim for breach of contract for failing to deliver the Founders Shares or frustrating the same must be dismissed.

Tyche's counterclaim for breach of the applied covenant of good faith and fair dealing must also be dismissed. Inasmuch as there was no contractual obligation, 180 Life Sciences can not be said to have breached the covenant of good faith and fair dealing (*Duration Mun. Fund, L.P.*, 77 AD3d at 474).

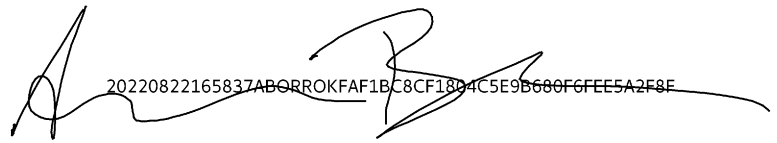
The fourth counterclaim for breach of contract in connection with Section 1.1 of the Guaranty must also be dismissed at this stage. The only damages that Tyche has alleged in connection with this counterclaim is that 180 Life Sciences failure to raise the \$10 million ultimately gave rise to the allegations asserted in this lawsuit. This is an affirmative defense, not a counterclaim. Thus, dismissal is required.

The counterclaim for declaratory judgment (third counterclaim) however is not properly dismissed. There is a justiciable controversy and issues of fact as to whether KBL Merger Corp. IV had \$5,000,001 of net tangible assets, whether 180 Life Sciences was aware of the liabilities that it now claims were concealed and whether it waived Tyche's obligations under the Guaranty.

Finally, the Moving Third-Party Defendants’ motion to dismiss the cause of action for breach of fiduciary duty must be granted. The Moving Third-Party Defendants are shareholders of 180 Life Sciences and held management positions at various times during the relevant time period. As discussed above, Tyche was the guarantor under the Guaranty. The Third-Party Defendants simply owed no fiduciary duties to Tyche. Thus, dismissal is required.

It is hereby ORDERED that 180 Life Sciences’ motion to dismiss Tyche’s counterclaims is granted to the extent of dismissing the first and second counterclaims; and it is further

ORDERED that the Moving Third-Party Defendants’ motion to dismiss the first cause of action asserted in the third-party complaint is granted.



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8/22/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED		