

RedHill Biopharma Ltd. v Kukbo Co., Ltd.

2024 NY Slip Op 34203(U)

November 21, 2024

Supreme Court, New York County

Docket Number: Index No. 653200/2022

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

REDHILL BIOPHARMA LTD.,

Plaintiff,

- v -

KUKBO CO., LTD.,

Defendant.

-----X

INDEX NO. 653200/2022

MOTION DATE 07/02/2024,
07/30/2024

MOTION SEQ. NO. 010 013

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 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, 175, 176, 177, 178, 179, 180, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 448

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 449, 450, 454

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

I. INTRODUCTION

In this breach of contract action, the plaintiff, RedHill Biopharma Ltd, moves pursuant to CPLR 3212 for summary judgment on all three causes of action in the complaint and to dismiss the remaining counterclaims of the defendant, Kukbo Co. Ltd. (MOT SEQ 010). Kukbo moves separately for summary judgment on three of its remaining counterclaims and to dismiss all of RedHill's causes of action (MOT SEQ 013). MOT SEQ 010 is granted to the extent that RedHill is granted summary judgment on its first two causes of action and dismissal of Kukbo's counterclaims. MOT SEQ 013 is granted to the extent that RedHill's third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

II. BACKGROUND

On October 25, 2021, RedHill, a pharmaceutical company based in Israel, and Kukbo, a logistics company based in South Korea, entered into the Subscription Agreement (the “SA”), whereby Kukbo agreed to purchase shares of RedHill’s American Depositary Shares (ADS) (shares in foreign companies held by American banks and traded in American exchanges) in two installments of \$5,000,000.00, to secure a license to distribute Opaganib, a treatment for COVID-19, in South Korea. The first installment was due at the time of execution, and the second installment was conditioned on the parties executing a license agreement by the sixth month anniversary of the Subscription Agreement.

On March 14, 2022, the parties entered in the Exclusive License Agreement, (the “ELA”) (collectively, with the SA, “the Agreements”) which, *inter alia*, granted Kukbo an exclusive license for Opaganib in return for an upfront payment of \$1,500,000.00, which was due within fifteen days of execution of the ELA. The Exclusive License Agreement also triggered Kukbo’s obligation to pay the second \$5,000,000.00 owed under the Subscription Agreement. After Kukbo failed to make both payments, RedHill wrote to Kukbo on May 26, 2022, stating that RedHill would be forced to adopt steps to protect its’ rights if Kukbo failed to make both payments. The parties entered into the Letter Agreement on June 8, 2022, which reaffirmed Kukbo’s obligation to pay the \$5,000,000.00 owed under the Subscription Agreement and \$1,500,000.00 owed under the Exclusive License Agreement.

When Kukbo once again failed to make both payments, RedHill commenced this action, alleging: (i) breach of the Subscription Agreement; (ii) breach of the Exclusive License Agreement; and (iii) breach of the implied covenant of good faith and fair dealing. Kukbo answered, asserting counterclaims for anticipatory repudiation, fraudulent inducement, fraudulent misrepresentation, and breach of the Agreements.¹ Kukbo alleges, *inter alia*, that RedHill failed to conduct the appropriate studies needed for Opaganib to gain regulatory approval, omitted material information regarding its financial condition and that it would issue ADS only a few weeks after the parties entered into the Subscription Agreement, and that RedHill breached the agreements by failing to get regulatory approval for Opaganib in any country.

¹ By order dated May 8, 2024, the court (Ostrager, J. [Ret.]), dismissed Kukbo’s counterclaims seeking rescission of the Subscription Agreement and Exclusive License Agreements, negligent misrepresentation, and breach of the covenant of good faith and fair dealing (MOT SEQ 004).

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In support of its MOT SEQ 010 and in opposition to MOT SEQ 013, RedHill submits, *inter alia*, an affirmation of Adi Frish, Chief Corporate and Business Development Officer for RedHill, the subject Agreements, emails between Frish and Kukbo employees including James Ahn, and emails between RedHill employees regarding information requested by Kukbo. RedHill also submits an affirmation of Gilead Raday, RedHill's Chief Operating Officer, who maintains records of RedHill's letters and applications with various regulatory agencies, including the Federal Drug Administration and European Medicines Agency, from 2021 to 2022. RedHill also submits SEC filings made before the parties executed the SA. In support of its MOT 013 and in opposition to MOT SEQ 010, Kukbo submits, *inter alia*, an affirmation of Young Seok Kim, as well as an affirmation of attorney Somin Jun, emails from RedHill CEO Dror Ben-Asher to RedHill employees, emails between RedHill and third-party company Meiji Seika Pharma Co., Ltd., and an excel sheet of the price per share of RedHill ADS from October 2021 to March 2023.

A. Breach of Contract Claims

To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

I. RedHill's First and Second Causes of Action: Breach of the Agreements

RedHill's submissions establish that the SA required Kukbo to pay \$5 million to RedHill once the parties entered into a license agreement within six months of the SA's execution, that

the ELA required Kukbo to pay \$1.5 million within fifteen days of its execution, that Kukbo failed to pay, and that, therefore, Kukbo owes RedHill a total of \$6.5 million.

Kukbo does not dispute that it did not make these payments. Instead, Kukbo argues its' failure to make the payments was excused due to RedHill's failure to secure regulatory approval for Opaganib, and that the purpose of the Agreements was frustrated. Kukbo's reliance on the frustration of purpose doctrine is misplaced, however, as this doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an *unforeseeable event* which destroys the reasons for performing the contract." Structure Tone, Inc. v Univ. Svcs. Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011) (emphasis added). Frustration of purpose is unavailable "where the event which prevented performance was foreseeable and provision could have been made for its occurrence". Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 43 (1st Dept. 2020). Here, Kukbo, in moving to dismiss this cause of action on that ground, provides no evidence that it was unforeseeable that Opaganib would not obtain regulatory approval in South Korea. Indeed, the ELA explicitly contains a disclaimer clause in Section 9.3, which states, in pertinent part, that RedHill makes no representation and warranties and disclaims any guarantee that Opaganib will gain approval in South Korea. Furthermore, under a plain reading of the Agreements, Section 1(c) of the SA states that the second \$5 million payment is due no later than the sixth month anniversary of the SA, which occurred when the parties entered into the ELA. Under Section 7.1 of the ELA, Kukbo was obligated to pay to RedHill \$1.5 million in an upfront payment within fifteen business days of execution of the ELA. Kukbo does not point to any provision in the Agreements making these owed payments conditional on Opaganib gaining regulatory approval in South Korea.

II. Kukbo's Eighth and Ninth Counterclaims: Breach of the Agreements

RedHill's submissions establish that it did not breach the Agreements, and thus, must be granted summary judgment dismissing Kukbo's Eighth and Ninth Counterclaims. As an initial matter, Kukbo's argument that RedHill breached the Agreements by failing to gain regulatory approval or conduct confirmatory studies for Opaganib is unfounded, as there are no terms in any of the Agreements that obligated RedHill to obtain regulatory approval. Indeed, as stated earlier, Section 9.3 of the ELA disclaims any guaranty that Opaganib will gain regulatory approval in South Korea. Kukbo attempts to rely on Section 9.1.2 of the ELA, which states that each party has all necessary to authorizations from government authorities to enter into the ELA as proof that RedHill was obligated to gain regulatory approval for Opaganib. However, such a

reading of this boilerplate provision conflicts with the plain and specific language of Section 9.3, which disclaims any guaranty that Opaganib will be approved in South Korea. “A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties’ intent is what they express in their written contract.” Goldman v White Plains Ctr. For Nursing Care, LLC, 11 NY3d 173, 176 (2008). Furthermore, RedHill’s submissions, including Raday’s affirmation, establish that RedHill consistently worked with various regulatory agencies for Opaganib to gain approval in several countries, including the United States and the European Union, from 2021 to 2022. Kukbo fails to provide any evidence to rebut these submissions.

Specifically, in regard to the SA, Kukbo argues that RedHill breached Section 1(d)(ii)(B), because RedHill no longer traded its ADS on the NASDAQ Global Market. However, Section 1(d)(ii)(B) states that RedHill ADS were required to be traded on the NASDAQ Global market “at or before the... Second Closing Date”. Section 1(c) of the SA defines the “Second Closing Date” as being “no later than the sixth month anniversary of this agreement”, which would be March 25, 2022. Kukbo’s own submissions, including a, excel chart showing the price of RedHill ADS, show that RedHill ADS were traded on the NASDAQ Global Exchange as of March 25, 2022. Kukbo’s also argues that RedHill breached Section 6(a) of the SA by not offering Kukbo a right of first offer after allegedly soliciting a third party offer to license and distribute Opaganib in Japan. However, Section 6(a) allows RedHill to negotiate with a third party if that third party solicits RedHill first. Section 6(a) only obligates to RedHill to give notice to Kukbo if RedHill and the third party enter into a transaction or term sheet. The evidence submitted by Kukbo, which includes emails between RedHill and third-party Meiji Seika Pharma Co., Ltd. does not support a finding either that RedHill solicited Meiji, or that these communications went beyond negotiation. Kukbo argues that RedHill breached Sections 4.1 and 4.2 of the ELA by not reasonably replying to Kukbo’s inquiries. However, Kukbo submits no evidence of RedHill withholding information in violation of the ELA. Indeed, RedHill’s own submissions, including emails between Frish and Ahn, show that RedHill routinely provided detailed analyses of studies related to Opaganib, as well as Opaganib’s planned production quantity and schedule, whenever requested by Kukbo.

B. RedHill’s Third Cause of Action: Breach of Implied Covenant of Good Faith

Kukbo’s motion is granted to the extent that RedHill’s third claim for breach of the implied covenant of good faith and fair dealing is dismissed as duplicative, the allegations in

support being essentially that the defendant breached the contract. It is well settled that “New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.” Harris v Provident Life and Acc. Ins. Co., 310 F3d 73, 81 (2nd Cir. 2002); see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486 (1st Dept. 2018); Cambridge Capital Real Estate Invest., LLC v Archstone Enterp. LP, 137 AD3d 593 (1st Dept. 2016). That is because “implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.” Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995); see 511 W. 232nd Owners Corp. v Jennifer Realty, Co., 98 NY2d 144 (2002). Stated otherwise, “a breach of the covenant of good faith and fair dealing is a breach of the contract itself” (Parlux v Carter Enterp., LLC, 204 AD3d 72, 92 [1st Dept. 2022]) such that a breach of the implied covenant of good faith and fair dealing claim must be dismissed as duplicative if it arises out of the same facts as a breach of contract claim. See MDRN Intelligence Living Wolfhove v Hartford Fin. Svcs. Group, Inc., 216 AD3d 409 (1st Dept. 2023); Ahsanuddin v Addo, 175 AD3d 1213 (1st Dept. 2019).

C. Kukbo’s Third Counterclaim: Anticipatory Repudiation

Kukbo’s third counterclaim for anticipatory repudiation must be dismissed for similar reasons as its breach of contract counterclaims. The doctrine of anticipatory repudiation applies “when a party repudiates contractual duties ‘prior to the time designated for performance and before’ all of the consideration has been fulfilled.” Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, 462-463 (1998), quoting Long Is. R. R. Co. v Northville Indus. Corp., 41 NY2d 455, 463 (1977). Under such circumstances, the “repudiation entitles the nonrepudiating party to claim damages for total breach.” Norcon Power Partners, supra, at 463, quoting Long Is. R. R. Co. v Northville Indus. Corp., supra, at 463. “A repudiation can be either ‘a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach’ or ‘a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.’” Norcon Power Partners, supra, at 463 (internal citations omitted). In regard to this claim, Kukbo alleges that RedHill failed to conduct confirmatory studies for Opaganib, and thus, made it impossible for Opaganib to gain approval in South Korea. However, as previously discussed, the Agreements do not obligate RedHill to conduct confirmatory studies. Nor do they guaranty that Opaganib would be approved in South Korea. In any event, Kukbo provides no evidence

that RedHill indicated in any way that it intended to breach the Agreements, nor any affirmative act by RedHill to render Kukbo unable to perform.

D. Kukbo's Fraud Counterclaims: Fourth, Fifth, and Sixth Counterclaims

A plaintiff in a contract action states a cause of action sounding in fraudulent inducement where she pleads that the defendant misrepresented a present fact extraneous to the contract with knowledge of its falsity, the plaintiff justifiably relied on the misrepresentation, and the plaintiff suffered damages. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999); see generally Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009).

In its fourth counterclaim, Kukbo alleges that RedHill fraudulently induced it to enter into the SA by omitting material information, namely that RedHill had planned to offer issue new ADS in a public offering one month after executing the SA on October 25, 2021. However, Kukbo fails to support its bare allegations with any proof. RedHill, on the other hand, submits reports publicly filed with the SEC on March 18, 2021, and July 29, 2021, before executing the SA, in which RedHill states that it may need to issue new shares which may dilute the value of current shares held by shareholders. Moreover, pursuant to Section 3(b)(i) of the SA, Kukbo acknowledged that it had the opportunity to review RedHill's SEC filings and to ask questions about them, including "the terms and conditions of the offering of the ADSs and the merits and risks of investing in the ADS". Thus, Kukbo cannot claim that it reasonably relied upon any alleged omission by RedHill when, as a sophisticated entity, it had the opportunity to review market data or other publicly available information. See HSH Nordbank AG v UBS AG, 95 AD3d 185 (1st Dept. 2012).

In its fifth counterclaim, Kukbo alleges that Redhill fraudulently induced it to enter into the ELA. In the sixth counterclaim, Kikbo alleges that RedHill made material misrepresentations about the likelihood of Opaganib gaining regulatory approval, as RedHill knew that without conducting confirmatory studies, Opaganib would never gain approval in South Korea. Both counterclaims must be dismissed. Kukbo's submissions fail to raise an issue of fact as to what, if any, misrepresentations were made by RedHill on this issue. Indeed, Kukbo's submissions, which include emails from RedHill CEO Dror Ben-Asher to RedHill employees, show that RedHill employees were told to provide Kukbo with regulatory documents on Opaganib, even if they were technical in nature. Furthermore, as stated earlier, in Section 9.3 of the ELA ,the

parties disclaim any guarantees that Opaganib will gain regulatory approval in South Korea. Since Kukbo agreed in the ELA that it was not relying on representations made by RedHill “as to the very matter as to which it now claims it was defrauded” (Mahn Real Estate Corp. v Shapolsky, 178 AD2d 383, 385 [1st Dept. 1991]).

E. Attorney’s Fees

It is well settled that attorneys’ fees are recoverable where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). Section 14.1 of the ELA provides for such relief. However, Redhill has not submitted any proof of the amount of fees and costs incurred, such as an affirmation and billing records. RedHill may submit such supplemental proof within 30 days.

F. Punitive Damages

The plaintiff’s request for punitive damages is denied as improper. Punitive damages may be awarded only “where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future.” Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). For that reason, “punitive damages are not recoverable for an ordinary breach of contract.” Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994).

G. Interest Calculation

RedHill seeks pre-judgment and post-judgment interest on its first and second causes of action. Generally, interest is computed “from the earliest ascertainable date the cause of action existed”. CPLR 5001(b). In a breach of contract action, interest “accrues from the time of an actionable breach.” Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). Here, the SA required Kukbo to pay \$5,000,000.00 by the time the parties execute license agreement, which occurred on March 14, 2022, when the parties executed the ELA. The terms of the ELA require Kukbo to pay \$1,500,000.00 within fifteen days of its execution, which was March 29, 2022. Section 7.11 of the ELA provides that interest on late payments is to be calculated at 1% per month from when payment was due, or if lower, the highest rate permitted by law. CPLR 5004(a) provides that statutory interest on judgments shall be 9% per annum. Therefore, under the ELA, RedHill is entitled to statutory interest under the

CPLR from March 29, 2022, as it is lower than the interest calculated under Section 7.11 of the ELA. The court also directs the same interest calculation on the SA from March 29, 2022.

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is,

ORDERED that the plaintiff’s motion pursuant to CPLR 3212 (MOT SEQ 010) is granted to the extent it is awarded summary judgment on its first and second causes of action and dismissal of the defendant’s counterclaims, and the motion is otherwise denied, and it is further,

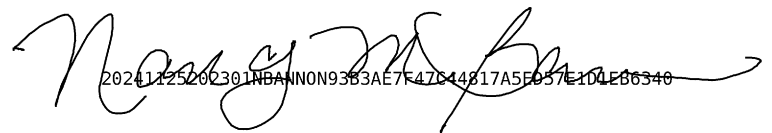
ORDERED that the defendant’s motion for partial summary judgment (MOT SEQ 013) is granted to the extent that the plaintiff’ third cause of action, implied covenant of good faith and fair dealing, is dismissed, and the motion is otherwise denied, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, RedHill Biopharma Ltd., and against the defendant, Kukbo Co. Ltd., in the principal sum of \$6,500,000.00, plus costs and statutory interest from March 29, 2022, and it is further,

ORDERED that the plaintiff may file supplemental papers, within 30 days of the date of this order, to establish the amount of its attorneys’ fees and costs incurred, and the plaintiff shall provide notice to the court of any such filing by emailing the Part 61 Clerk at SFC-Part61-Clerk@nycourts.gov; and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


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11/21/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER