Southern Israel Bridging Fund Two, LP v Orgenesis Inc.
2024 NY Slip Op 34424(U)
December 5, 2024
Supreme Court, New York County
Docket Number: Index No. 655243/2023
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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SOUTHERN ISRAEL BRIDGING FUND TWO, LP, AMIR HASIDIM

Plaintiff,

- v -

ORGENESIS INC.,

Defendant.

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INDEX NO. 655243/2023

MOTION DATE 04/21/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, plaintiffs' motion for summary judgment is denied and defendant's cross-motion to dismiss the complaint and for summary judgment on their counterclaims is denied.

Background

In Feb of 2022, Orgenesis, Inc ("Defendant") wanted to raise an investment of approximately $15 million dollars in order to expand certain cell and gene therapy services. Shortly thereafter, Defendant was introduced to a partner at Southern Israel Bridging Fund Two, LP ("SIBF"). In the discussions between the parties that followed, Defendant alleges that they repeatedly stressed the importance of raising the full $15 million through a proposed PIPE Agreement. During these discussions, SIBF also disclosed to Defendant that they would like to see a merger between Defendant and another company in SIBF's portfolio, Beta 02 Therapeutics Ltd. ("Beta 02"). Defendant claims that they told SIBF that such a merger would take too long

and that there was an urgent need to raise the funding, and that they were told in return that there would be no issues closing the funding deal before March of 2022.

Defendant then began to take certain steps towards expanding their business, in reliance on the representations made by SIBF. Then SIBF told Defendant that there was some trouble raising the full amount, and that there would need to be an interim funding deal for $5 million dollars. In May of 2022, the parties entered into a Convertible Loan Agreement (the "CLA"), according to which SIBF would loan Defendant the $5 million. The maturity date was set for August 17, 2023, and the agreement had a provision that the loan would be prepayable upon demand of SIBF if Defendant raised more than $13,125,000 in financing. The CLA also contained a New York choice-of-law provision. Shortly after executing this agreement, SIBF assigned participation rights in the CLA to Amir Hasidim ("Hasidim", together with SIBF "Plaintiffs"), CEO of Beta 02, for the amount of $150,000.

The parties differ as to their characterization of what happened next. According to Plaintiffs, they then loaned Defendant $1,150,000 pursuant to the CLA. When Defendant raised more than $13,125,000, Plaintiffs informed Defendant that they were exercising their prepayable demand rights. Defendant did not pay, nor did they pay when the maturity date was reached. For their part, Defendant alleges that SIBF had failed to fund the original $5 million dollar loan. After much discussion they sent the sum of $1,150,000.00, but "did not specify what the sums were for nor terms of repayment." Defendant further alleges that after more conversations, SIBF termed the money an "investment" conditioned on a merger between Defendant and Beta 02, and that if such a merger did not take place SIBF would not fund the CLA. They also claim that after several rounds of discussion, the parties agreed to characterize the funds as an advance to Orgenesis for collaboration with Beta 02. Plaintiffs brought the underlying action in October of

2023, pleading breach of contract, account stated, and money loaned. Defendant has answered, pleading three counterclaims.

Standard of Review

Under CPLR § 3211(a)(8), a party may move to dismiss the action for lack of personal jurisdiction. It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

Under CPLR § 3212, a party may move for summary judgment and the motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016). The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

Plaintiffs brought the present motion for summary judgment on their claims. In response, Defendant cross-moves to dismiss the complaint pursuant to CPLR § 3211 for lack of personal jurisdiction and for summary judgment on their counterclaims.

At the outset, Defendant has raised the issue of Hasidim's standing in this case, as he was not a named party to the CLA. But Plaintiffs have submitted an Assignment Agreement wherein SIBF agreed to assign "all rights and obligations with respect to the loan in the amount of US$150,000 of the Loan Amount" to Hasidim. This agreement stated that it was "consented to by Orgenesis Inc." and contains a signature page for Orgenesis. Because Defendant has not disputed the validity of this assignment agreement, Hasidim has standing under the CLA.

The Complaint Is Not Dismissible for Lack of Personal Jurisdiction

The basis for New York jurisdiction in this case is the choice-of-law provision in the CLA. Defendant argues that because this agreement was never fully funded, it does not grant jurisdiction here. Under General Obligations Law § 5-1402(1), when a contract (dealing with one million dollars or more) contains a New York choice-of-law provision, there is personal jurisdiction for any action that "arises out of or relates" to said agreement. This provision allows parties lacking New York contacts to avail themselves of New York courts and New York law. *IRB-Brasil Resseguros, S.A. v. Inepar Inves., S.A.*, 20 N.Y.3d 310, 315 (2012). General Obligations Law § 5-1402 and CPLR § 327(b) operate together to "prevent a party that has agreed to jurisdiction in New York from later asserting that the New York courts are inconvenient or that they lack jurisdiction." *AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495,497 (1st Dept. 2011).

The issue becomes then whether or not the underlying suit arises out of or relates to the CLA. Here, the Plaintiff is suing for breach of the CLA, and the Defendant has opposed by

arguing that the CLA is not valid. They have also pled a counterclaim for breach of the same CLA. Clearly, this action arises out of and relates to the CLA and therefore Defendant has consented to New York jurisdiction and cannot now assert that this Court lacks personal jurisdiction. Furthermore, Defendant has pled fraud in the inducement. Generally, the phrase "arises out of or relates to" in an agreement includes claims that the agreement is voidable because of fraud in the inducement. *Weinrott v. Carp*, 32 N.Y.2d 190, 194-97 (1973). Because there is personal jurisdiction, the analysis now shifts to Plaintiffs' motion for summary judgment on their claims.

Summary Judgment on Plaintiffs' Breach of Contract Claim Would Be Improper as There are Disputed Material Issues of Fact Relating to Duress

Plaintiffs have moved for summary judgment on the breach of contract claim, alleging that Defendant's failure to repay the $1.15 million by the maturity date constitutes a straightforward breach of contract, and that any argument Defendant has about Plaintiffs' failure to fund the full amount described in the CLA is not a defense to liability on this claim. Defendant has also opposed the motion arguing that the contract was void and therefore they have no liability for a breach. Because this is a summary judgment motion, the relevant question will be if there are issues of material fact surrounding the enforceability of the CLA.

The main reasons that Defendant argues that the contract is void are duress, fraud, and that failure to fully fund the agreement rendered it null. Economic duress is found when there is "proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand." *805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y.2d 447, 451 (1983). When a contract is alleged to have been executed under duress, it is "voidable, not void, and a plaintiff must demonstrate his decision to challenge

that contract rather than to ratify it by accepting its benefits, even where he faces the hard choice of eschewing those benefits in order to pursue his legal rights." *David v. American Tel. & Tel. Co.*, 160 A.D.2d 632, 632 (1st Dept. 1990). Although a party must act in order to preserve the right to challenge the contract, the claim is not barred by waiting to challenge the voidable contract when there exist facts justifying a delay, such as when a party "faced an imminent threat of wrongful compulsion long after it was placed in a position of duress." *Beltway 7 & Props., Ltd. v. Blackrock Realty Advisers, Inc.*, 167 A.D.3d 100, 109 (1st Dept. 2018).

Here, Defendant alleges that they only agreed to the CLA because SIBF was unable to fund the $14 million dollar proposed PIPE agreement. Because Defendant had already signed other contracts in reliance on the PIPE agreement, they allege they were under severe financial distress and needed the funds. When SIBF failed to fully fund the $5 million CLA, Defendant claims that there followed a lengthy back and forth about this failure, and that Defendant made SIBF aware that they had committed to third parties based on SIBF's funding representations. Defendant goes on to allege that once they refused the proposed merger with Beta 02, SIBF threatened that there would be "dire consequences" if Defendant did not repay the $1.15 million dollars or merge with Beta 02. In her sworn affidavit, Defendant's President, Vered Caplan ("Caplan"), states that Defendant then went on to attempt to collaborate with Beta 02 on various projects. The $1.15 million paid to Defendant was agreed by the parties to be "money advanced to Orgenesis as payment for the work Orgenesis did in trying to help Beta 02" according to her. Caplan claims that relations between Defendant and Hasidim and Beta 02 then quickly broke down, and on advice of lawyers she stopped talking to him in July of 2023. In October of 2023 Plaintiff brought the underlying suit in which Defendant has argued that the contract is voidable due to duress.

Defendant here has alleged sufficient facts to raise a material issue as to whether the CLA was entered into under duress. They have submitted in support of their contentions Caplan's sworn affidavit as well as various emails and agreements between the parties. Plaintiffs for their part dispute many of the factual allegations in Caplan's affidavit. Summary judgment is a "drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). Because there are triable issues of fact as to whether the CLA was entered into under duress and whether or not Defendant ratified the agreement by their subsequent behavior, here summary judgment on Plaintiffs' breach of contract claim would not be proper.

Summary Judgment on Plaintiffs' Account Stated Claim and Their Alternative Money Loaned Claim Fails Because of Triable Issues of Material Fact

Plaintiffs have moved for summary judgment on their account stated claim, arguing that Defendant did not dispute that that the $1.15 million loan had been made or that it was due. In response to the demand letter Plaintiffs sent on August 20, Defendant's counsel responded by letter (the "Berkman Letter"). In this letter, Defendant's counsel outlined a collection of alleged wrongs done by Plaintiffs and stated that SIBF had repeatedly breached their obligations under the CLA. He also stated that Defendant would seek any appropriate remedy to recompense for damages caused by Plaintiffs' actions, "including but not limited to setting-off the Outstanding Amount", and that "[f]or the avoidance of doubt it is hereby clarified that Orgenesis rejects all claims and demands made in your above-referenced letter." Plaintiffs argue that the Berkman Letter does not constitute a rejection of the demand for payment, but rather an acknowledgement of the amount due by referring to it as the "Outstanding Amount". Defendant argues in response

that by stating clearly that they rejected all claims and demands made in the demand letter, they had adequately rejected the demand for repayment.

An account stated is "an agreement, *independent of the underlying agreement*, as to the amount due on past transactions." *Federated Fire Protection Sys. Corp. v. 56 Leonard St., LLC*, 170 A.D.3d 432, 433 (1st4 Dept. 2019) (emphasis in original). It relies on "an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." *Ryan Graphics, Inc. v. Bailin*, 39 A.D.3d 249, 250 (1st Dept. 2007). And when a "triable issue of fact is present regarding whether a basis exists for imposing liability" on a party for an account stated, summary judgment is improper. *Id.*, at 251. Furthermore, when the funds at issue have been used to offset other charges, it cannot support an account stated claim. *Cronos Group Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 74 (1st Dept. 2017). Here, where there are triable issues of material fact as to what the parties intended the $1.15 million sum to be, whether they renegotiated that understanding afterwards, and whether the CLA is valid and binding, summary judgment on an account stated claim for an amount allegedly loaned on behalf of the CLA would be improper at this stage.

Furthermore, because the very nature of the $1.15 million advanced is disputed with both parties offering evidence in their favor, Plaintiffs' alternative claim for Money Loaned would likewise not be a proper subject for summary judgment. A claim for Money Loaned requires "a loan, a promise to repay and nonpayment." *Le May v. Frankel*, 80 A.D.2d 665, 665 (3rd Dept. 1981). This is an equitable action that "can only be maintained when the defendant has received more than he has paid." *Berk v. Seaboard Surety Co.*, 266 A.D. 127, 128 (1st Dept. 1943). Liability for a claim of Money Loaned would necessarily rely on whether the $1.15 million was

a loan or an offset for Orgenesis to use towards their work with Beta 02. Therefore, summary judgment here would be improper.

Summary Judgment on Defendant's First Counterclaim

Defendants have also moved for summary judgment on their counterclaims. The first counterclaim is for breach of contract for failure to fully fund the CLA. Because, for the reasons given above, there are issues of material fact as to the validity and enforceability of the CLA, summary judgment on the first counterclaim would be improper.

Summary Judgment on Defendant's Second Counterclaim

The second counterclaim brought by Defendant is for fraudulent inducement. Plaintiffs characterize the fraudulent inducement claim as duplicative of the breach of contract claim and amounting to merely an insincere promise not to perform in their reply papers. But Defendant instead is claiming (although the pleading is sparse) that the allegedly fraudulent inducement was meant to use the CLA to put Defendant into a position where they would be forced to merge with Beta 02. A fraudulent inducement claim must state "knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury." *Genger v. Genger*, 144 A.D.3d 581, 582 (1st Dept. 2016). Normally, the intent element of fraudulent inducement is a question of fact that is not proper for summary judgment, outside of "a rare circumstance […] where there is simply no issue of fact as to either defendant's intent to defraud or plaintiff's justifiable reliance on the material misrepresentation." *DirecTV, LLC v. Nexstar Broadcasting, Inc.*, 230 A.D.3d 439, 441 (1st Dept. 2024). Here, there are clear issues of fact as to Plaintiffs' intent to defraud, and therefore summary judgment is improper at this stage.

Summary Judgment on Defendant's Third Counterclaim

Defendant's final counterclaim is confusingly pled, but it appears to be a defamation claim. A defamation claim must plead "the time, place and manner in which the alleged words were stated, or any specifics as to third persons to whom the words were communicated." Here, Defendant offers vague statements that Plaintiffs "engaged in a terror campaign of libelous and slanderous behavior" but fails to plead specifics. The burden for summary judgment on the third counterclaim has clearly not been met.

In conclusion, for the reasons stated above, both parties have failed to meet their burden as to summary judgment due to disputed and triable issues of material fact surrounding the nature of the $1.15 million dollars at issue. But it is clear that plaintiff Hasidim has standing under the CLA, and Defendant has consented to personal jurisdiction in New York. Accordingly, it is hereby

ADJUDGED that Plaintiffs' motion for summary judgment is denied; and it is further

ADJUDGED that Defendant's motion for summary judgment is denied; and it is further

ADJUDGED that Defendant's motion to dismiss the complaint for lack of personal jurisdiction is denied.

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12/5/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED	X	**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**