

180 Life Sciences Corp. v Tyche Capital LLC

2021 NY Slip Op 32453(U)

November 23, 2021

Supreme Court, New York County

Docket Number: Index No. 652502/2021

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

180 LIFE SCIENCES CORP.,

Plaintiff,

- v -

TYCHE CAPITAL LLC,

Defendant.

-----X

INDEX NO. 652502/2021

MOTION DATE _____

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for ORDER OF ATTACHMENT

Upon the foregoing documents and for the reasons set forth on the record (11.23.21), 180 Life Sciences Corp.'s motion for an attachment must be granted. 180 Life Sciences has demonstrated that it is entitled to an attachment because it has demonstrated a likelihood of success on the merits based on the facts alleged in the complaint that the Net Tangible Assets of \$5,000,001 were not there at the time of closing and that such information was not and could not be known based on the inaccurate or missing information which they did receive, a statutory entitlement to an attachment pursuant to CPLR 6201 because they have made a demand for money judgment against Tyche Capital LLC (**Tyche**), a foreign company not registered to do business in New York, and an identifiable risk that Tyche would not be able to satisfy a judgment if one were entered against them. Thus, the motion must be granted, Tyche's escrowed shares must be certificated and then attached, and 180 Life Sciences must post a bond in the amount of \$50,000.

The Relevant Facts and Circumstances

Reference is made herein to (i) a Guaranty and Commitment Agreement (the **Guaranty**, NYSCEF Doc. No. 50), dated July 25, 2019, and made between KBL Merger Corp. IV (**KBL**), the predecessor of 180 Life Sciences, and Tyche, (ii) a Term Sheet for KBL Business Combination with CannBioRex (the **Term Sheet**, NYSCEF Doc. No. 48), dated April 10, 2019, and made between KBL Merger Corp. IV, KBL IV Sponsor, LLC as sponsor, CannBioRex Life Sciences Corp., Tyche, Katexco Pharmaceuticals Corp., CannBioRex Pharmaceuticals Corp., and 180 Therapeutics LLC, (iii) an Escrow Agreement dated April 10, 2019 (the **First Escrow Agreement**, NYSCEF Doc. No. 49) between KBL IV Sponsor, LLC as sponsor, KBL Merger Corp. IV, Tyche, and Continental Stock Transfer & Trust Company (**Continental**) as escrow agent, and (iv) an Escrow Agreement dated June 12, 2020 (the **Second Escrow Agreement**, NYSCEF Doc. No. 52) between KBL Merger Corp. IV, Dominion Capital (**Dominion**), LLC, Tyche, and Continental as escrow agent.

The Guaranty set forth that, as a condition to closing of a merger contemplated under a separate Business Combination Agreement, KBL would have at least \$5,000,001 of net tangible assets (*id.*). The parties agreed that pursuant to the Guaranty that if the Net Tangible Assets Closing Condition (*i.e.*, the \$5,000,001 of net tangible assets) was not otherwise satisfied at the Closing, Tyche shall fund an amount necessary such that KBL has the full Subscription Amount (*id.*, §4.1).

The Term Sheet stated that, upon its execution, the sponsor would deposit 1,906,250 of its founder promote shares into escrow (the **Escrowed Founder Shares**) and that, at the closing,

“the Sponsor and Tyche will cause such escrow agent to transfer (i) 1,656,250 of the Escrowed Founder Shares to Tyche...and (ii) 250,000 of the Escrowed Founder Shares to the Sponsor” (NYSCEF Doc. No. 48, §6). Shares were placed into escrow under both the First Escrow Agreement and the Second Escrow Agreement. The First Escrow Agreement provided that “the Escrow Agent shall hold the Escrow Property and shall deliver the Escrow Property...to either Tyche or to Sponsor, as applicable, in accordance with (i) a joint written instruction executed by both Sponsor and Tyche, or (ii) a copy of a final non-appealable judgment or order from a Specified Court...” (NYSCEF Doc. No. 49, §4). Under the Second Escrow Agreement, one of the conditions of releasing escrowed shares was proof or written receipt “that the Pledgors (*i.e.*, Tyche and Dominion) simultaneously served Dominion and the Company (*i.e.* KBL, or, subsequently, 180 Life Sciences) at least five (5) business days...written notice...” (NYSCEF Doc. No. 52, § 3).

The closing took place on November 6, 2020 (Complaint, NYSCEF Doc. No. 1, ¶ 13). 180 Life Sciences alleges that it subsequently discovered numerous financial discrepancies and that the net tangible assets were less than the \$5,000,001 required under the Guaranty. By letter dated January 15, 2021, counsel for 180 Life Sciences notified Tyche that there was a discrepancy and demanding payment under the Guaranty such that 180 Life Sciences would have had at least \$5,000,001 in net tangible assets at the time of closing (*id.*, ¶ 16). On April 12, 2021, 180 Life Sciences sent another demand letter, demanding payment of \$6,776,686 (*id.*, ¶ 17). Tyche rejected the demand by letter dated April 14, 2021 (*id.*).

When Tyche refused to fund the shortfall, 180 Life Sciences sued alleging four causes of action: for breach of the Guaranty (first cause of action), for breach of the implied covenant of good faith and fair dealing (second cause of action), for an account stated (third cause of action), for a declaratory judgment that Tyche is required to pay \$6,776,686 and is not entitled to transfer or receipt of any Escrowed Founder Shares until it pays (fourth cause of action). 180 Life Sciences now moves for an attachment on any property in which Tyche has an interest, up to \$6,776,686 (Order to Show Cause, NYSCEF Doc. No. 61).

180 Life Sciences asserts that the escrowed shares are the only assets owned by Tyche and that there is a risk of those assets being moved to the Cayman Islands. This court previously granted a temporary restraining order against the dissipation of the shares. Although the parties discussed the escrow agreements and the escrow instructions at the temporary restraining order hearing, the issue is whether an attachment should be granted pursuant to the money judgment demanded against a foreign company not registered to business in New York.

Discussion

Pursuant to CPLR 6201:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when: 1. the defendant is a nondomiciliary resident without the state, or is a foreign corporation not qualified to do business in the state; or...3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts

(CPLR 6201 [1], [3]). The movant seeking an order of attachment must demonstrate a probability of its success on the merits, that one or more grounds for attachment provided for in

CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff' (*Reed Smith LLP v LEED HR, LLC*, 156 AD3d 420, 420 [1st Dept 2017]). Additionally, the movant must demonstrate an identifiable risk that the non-movant would not be able to satisfy the judgment (*VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 60 [1st Dept 2013]).

180 Life Sciences has demonstrated a likelihood of success on the merits of its cause of actions. As discussed above, the Guaranty provides for \$5,000,001 of net tangible assets and that Tyche was required but refused to fund any shortfall. The Guaranty was absolute and did not provide that it did not survive closing. Additionally, and most significantly, on the record before the court, 180 Life Sciences has sufficiently established that certain costs and expenses were grossly understated and that as such they could not have been discovered prior to the closing. Thus, the total amount of net tangible assets at the time of closing was less than the required \$5,000,001 and Tyche refused upon demand to fund the shortfall. 180 Life Sciences set forth in its January 15, 2021 letter:

The Company has become aware that, at the Closing, the Company did not have or receive sufficient funds such that the Company had at least \$5,000,001.00 in Net Tangible Assets. Thus, Tyche was and is obligated to fund the Subscription Amount to the Company. Please be advised that, although detailed investigation is continuing, the Company believes that the following liabilities should have been, but were not, recorded on the Company's financial statements at Closing, with a resulting estimated understatement of accrued liabilities and net loss and an overstatement of net equity for the Company: (a) *Mintz legal fees for approximately \$1,454,000...*

(NYSCEF Doc. No. 41 [emphasis added]). While Tyche argues that 180 Life Sciences had notice of the categories of the liabilities, the argument fails. There is no reason to think that the

amounts disclosed as to certain liabilities were or would give rise to inquiry notice that they were grossly understated.

180 Life Sciences has a statutory basis for an attachment pursuant to CPLR 6201(1) because it is not disputed that Tyche is a nondomiciliary and is not licensed to conduct business in the state of New York.

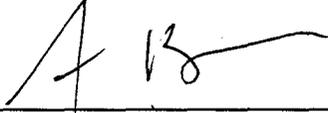
180 Life Sciences has also demonstrated that there is an identifiable risk that Tyche will not be able to satisfy the judgment, such that an attachment is warranted because the only assets Tyche appears to own are the escrowed shares which, if released from escrow without attachment, would leave Tyche with insufficient assets to satisfy a judgment. Thus, the attachment is appropriate. The shares are hereby ordered to be certificated and attached upon certification unless the parties stipulate either (i) as to the sale of the shares and that such proceeds are placed in escrow subject to release upon joint instruction of 180 Life Sciences and Tyche or (ii) to a different mutually acceptable arrangement.

It is accordingly hereby ORDERED that 180 Life Sciences' motion for an attachment is granted on the terms set forth above; and it is further

ORDERED that 180 Life Sciences shall post a \$50,000 bond on or before December 7, 2021; and it is further

ORDERED that document demands and written responses to document demands shall be served by December 7, 2021; and it is further

ORDERED that the parties shall appear for a conference on December 16, 2021 at 11:30 a.m.

<u>11/23/2021</u> DATE	 ANDREW BORROK, JSC			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE