

<b>Sabby Healthcare Master Fund Ltd. v Microbot Med. Inc</b>
2018 NY Slip Op 32429(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 654581/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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SABBY HEALTHCARE MASTER FUND LTD., SABBY VOLATILITY WARRANT MASTER FUND LTD	INDEX NO. <u>654581/2017</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- V -	MOTION SEQ. NO. <u>001</u>
MICROBOT MEDICAL INC,	
Defendant.	

**DECISION AND ORDER**

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 81, 82, 83, 84, 85, 86  
were read on this motion to/for JUDGMENT - SUMMARY

HON. BARRY R. OSTRAGER:

Plaintiffs, Sabby Healthcare Master Fund Ltd. and Sabby Volatility Warrant Master Fund Ltd. (together, “Sabby”), seek rescission of a stock purchase agreement (“SPA”) entered into with Defendant Microbot Medical Inc. (“Microbot”). Both parties moved for summary judgment following discovery. Sabby’s motion for summary judgment was denied, on the record, during oral argument on September 27, 2018. The Court reserved decision on Microbot’s motion for summary judgment. For the reasons stated herein, Microbot’s motion for summary judgment is granted in part.

On June 5, 2017, Sabby entered the SPA with Microbot to acquire 1,250,000 shares of Microbot stock. Sabby’s complaint alleges that it entered the SPA based upon a purported representation in the SPA’s Disclosure Schedule that an existing holder of Microbot preferred stock, non-party Alpha Capital Anstalt (“Alpha”), was an “affiliate” of Microbot. Sabby argues

that this purported representation was significant because Alpha, as an affiliate, would necessarily be subject to certain trading volume restrictions under SEC Rule 144(e)(1). Specifically, the first footnote of Disclosure Schedule 3.1(g) states: “Each share of Series A Preferred Stock is convertible into 1,000 shares of common stock. It is a ‘toothless’ preferred stock that converts into 11,916,000 shares of common stock subject to conversion limitations, and is held by Alpha Capital Anstalt, an affiliate of [Microbot].” (Sefick Aff. Ex. 9 [NYSCEF Doc. 35]).

Sabby contends that Alpha was not an affiliate and, shortly after Sabby executed the SPA, began converting its preferred stock into common stock and selling shares in large enough volume to cause Microbot’s share price to decline significantly, thereby causing injury to Sabby.

On a motion for summary judgment, the movant bears the initial burden to “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.*

Microbot seeks to dismiss Sabby’s claim for breach of contract and rescission. Rescission “should be granted only when a party’s breach is material and willful, or if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract. More specifically, to warrant rescission, a party must allege fraud in the inducement of the contract; failure of consideration; an ability to perform the contract after it is made; *or a breach in the contract which substantially defeats the purpose thereof.*” *Premiere Acquisition Corp. v. Blue Jade Enterprises, Inc.*, 2015 WL 1307203, at \*2 (S.D.N.Y. Mar. 23, 2015)

(emphasis added) (internal quotations and citations omitted). Further, “the equitable remedy is to be invoked only when there is lacking complete and adequate remedy at law.” *Id.*

Here, the record shows a material issue of fact as to whether the breach was so fundamental as to defeat the object of the SPA. Sabby submits testimony from its principals suggesting that they would not have entered the SPA, without additional lock-up restrictions on Alpha, but for the representation that Alpha was an affiliate and thus subject to certain other restrictions based on SEC rules. (*See* Grundstein Dep. at 32:22-33:03 [NYSCEF Doc. 30]). However, the record also contains email exchanges among Sabby principals that tend to suggest an awareness by Sabby that Alpha was not subject to any restrictions—including restrictions that an affiliate would be subject to under SEC rules. (*See* Sefick Aff. Ex. 11 [NYSCEF Doc. 37]). Further, while it is clear to the Court that the SPA’s Disclosure Schedule does represent that Alpha was an affiliate, it is unclear whether such a contractual representation—made in a footnote—was so central to the parties’ purpose in executing the SPA that a breach thereof warrants rescission.

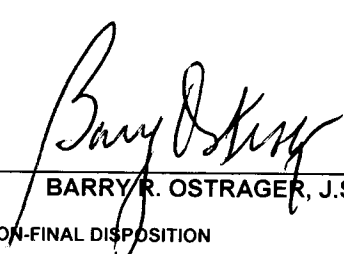
Therefore, Microbot, as the moving party, has not met its burden of proving as a matter of law that the SPA’s representation of Alpha as a Microbot affiliate was not central to Sabby’s decision to consummate the transaction. Further, Microbot has not established, and has submitted no evidence tending to show, that Sabby has an adequate remedy at law or that the parties cannot be restored to the status quo *ante*.

Accordingly, it is hereby

ORDERED that Defendant’s motion for summary judgment is granted to the extent of dismissing Plaintiffs’ second cause of action for breach of contract and denied to the extent of

dismissing Plaintiffs' first cause of action seeking rescission. The Clerk is directed to dismiss and sever the second cause of action; and it is further

ORDERED that the parties are directed to contact the Court on October 23, 2018 to discuss a schedule for trial.

<u>9/28/2018</u>			
DATE		BARRY R. OSTRAGER, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE