

Idexx Laboratories, Inc., et al.,

Plaintiffs

v.

ORDER
(Motion to Dismiss)

Virbac Corporation,

Defendant

This matter was heard on August 11, 2009, on Plaintiffs' motion to dismiss Defendant's counterclaim. Through its motion, Plaintiffs first contend that Defendant's counterclaim is barred by the applicable statute of limitations. Alternatively, Plaintiffs argue that Defendant previously released the claim asserted in the counterclaim.

Factual Background

In their Complaint, Plaintiffs allege that Defendant breached the parties' Product Transfer Agreement (the Agreement), which required Defendant to make royalty payments to Plaintiff Idexx Pharmaceuticals based on Defendant's net sales of four different types of products used to treat hookworms and roundworms, and to prevent heartworms in dogs. According to Plaintiffs, Defendant made the royalty payments from the inception of the Agreement on December 13, 2001 until the fourth quarter of 2008, but has failed to make any subsequent payments.

As part of its response to Plaintiffs' complaint, Defendant filed a counterclaim in which it asserted that Plaintiffs breached the Agreement. More particularly, Defendant maintains the Plaintiffs disclosed confidential information to a third party (Chanelle Pharmaceuticals Manufacturing, Ltd.) in violation of the representations and warranties in Section 6(a)(viii) of the Agreement. Pursuant to M.R. Civ. P. 12(b)(6), Plaintiffs seek dismissal of Defendant's counterclaim on the grounds that it is time barred and that Defendant previously released any claim for breach of the Agreement in connection with a lawsuit that it filed against Chanelle.

Discussion

I. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) “tests the legal sufficiency of the complaint and, on such a challenge, ‘the material allegations of the complaint must be taken as admitted.’” *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, the court examines “the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law.” *Bean v. Cummings*, 2008 ME 18, ¶7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

II. Statute of Limitations

Plaintiffs argue that Delaware’s 3-year statute of limitations applies to, and bars, Defendant’s counterclaim. Plaintiffs also contend that to the extent that Maine’s six-year limitations period applies, Defendant’s counterclaim is untimely. In particular, Plaintiffs maintain in part that the breach allegedly occurred in 2001, more than 6 years before the assertion of the counterclaim.

The parties to the Agreement are Delaware corporations. According to Plaintiffs’ Complaint, the Agreement provides that it is to “be governed by and construed under the laws of Delaware.” The parties agree, however, that “[u]nder traditional choice of law rules, the forum state generally applies its own statute of limitations to a cause of action, even though it may apply the substantive law of another state.” *Tornesello v. Tisdale*, 2008 ME 84, ¶ 14, 948 A.2d 1244, 1249 (quoting *Johanson v. Dunnington*, 2001 ME 169, ¶ 6, 785 A.2d 1244, 1246).

Because Plaintiffs commenced this action in Maine, Maine’s statute of limitations would generally apply. However, as the court in *Tornesello* recognized and as the parties acknowledge, there are two exceptions to the general rule that the limitations period of the forum state governs:

“(1) where Maine’s borrowing statute applies; and (2) where the claim is predicated on a foreign statutory enactment.” *Id.* (citations omitted). In this case, Plaintiffs contend that Maine’s borrowing statute applies such that the Delaware limitations period, rather than Maine’s limitations period, governs.

Maine’s “borrowing statute,” 14 M.R.S. § 866, provides in pertinent part that “[n]o action shall be brought by any person whose cause of action has been barred by the laws of any state, territory or country while all the parties have resided therein.” *Id.* In this case, Plaintiffs argue that section 866 applies to Defendant’s counterclaim because Plaintiffs and Defendant are Delaware residents¹, and Defendants are precluded from pursuing the claim in Delaware due to Delaware’s 3-year statute of limitations for breach of contract. *See* DEL. CODE ANN. tit. 10 § 8106. Plaintiffs argue, therefore, that Defendant’s counterclaim is barred by Delaware’s 3-year statute of limitations.

Without 14 M.R.S. § 865, the Court might find Plaintiffs’ argument persuasive. Under section 865:

All the provisions hereof respecting limitations apply to any counterclaim by the defendant except a counterclaim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim to the extent of the demand in the plaintiff’s claim. The time of such limitation shall be computed as if an action had been commenced therefor at the time the plaintiff’s action was commenced.

Id. As one noted Maine authority explains, “[c]laims that might have been pleaded in recoupment at common law are . . . exempt from the bar of the statute of limitations” by virtue of section 865. 1 Field, McKusick & Wroth, *Maine Civil Practice* § 13.8(a) at 279 (2d ed. 1970). “Such a claim is timely even when an independent action thereon would have been barred, as long as the plaintiff’s suit is timely.” *Id.* The policy behind § 865 and “for excluding recoupment from the bar of the statute of limitations is that, although recoupment is cast in terms of a monetary reduction or offset of plaintiff’s claim, it is basically a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff’s claim in equity and good conscience should be reduced.” *Id.* at 280 (internal citations and quotation marks omitted).

Nevertheless, Plaintiffs contend that § 865 does not save Defendant’s counterclaim because § 865 applies only to Maine statute of limitation periods. According to Plaintiffs, because under § 866 the three-year Delaware statute of limitations period (i.e., not a Maine limitation period) governs, §

¹ There is no dispute, nor could there be, that “a corporation is a resident of that state in which it is incorporated.” *Ouellette v. Sturm, Ruger & Co.*, 466 A.2d 478, 481 (Me. 1983) (citations omitted).

865 does not apply to Defendant's counterclaim. The Court disagrees. Section 865 applies to "all the provisions [in Maine law] respecting limitations." 14 M.R.S. § 865 (2008). Section 866, Maine's borrowing statute, is a provision "respecting limitations." Accordingly, § 865 authorizes the filing of a counterclaim regardless of the statute of limitations period that Maine "borrows" in a particular case. Therefore, the statute of limitations does not bar Defendant's counterclaim. By the terms of § 865, however, Defendant's recovery on the counterclaim is limited to the amount, if any, of Plaintiffs' recovery.

III. Release

Plaintiffs also argue that Defendant's counterclaim is barred by the terms of a Mutual General Release to which the parties in this action are parties. Plaintiffs attached a copy of the Mutual General Release to their Complaint.

Defendant contends that the Court cannot, on Plaintiffs' motion to dismiss, consider the terms of the release. More specifically, Defendant argues that generally the court cannot consider matters outside the pleadings without converting a motion to dismiss for failure to state a claim into a motion for summary judgment. In support of its contention, Defendant relies upon the Law Court's decision in *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47.

In *Moody*, the Law Court concluded that "a court [may] consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged." *Moody*, ¶ 8, 843 A.2d at 47. According to Defendant, while under *Moody* the Court can consider documents that are attached to the pleading by which a claim is asserted (i.e., complaint or counterclaim), the Court cannot consider the release in this case because it was attached to Plaintiffs' complaint, and not the counterclaim. In other words, Defendant argues that in its assessment of whether the counterclaim sets forth a claim upon which relief can be granted, the Court's examination is limited to the counterclaim and any attachments thereto. If the Court considers documents other than those attached to the counterclaim (e.g., the release attached to Plaintiffs' complaint), the motion would be converted to a motion for summary judgment.

Plaintiffs maintain that Defendant reads *Moody* too narrowly, and that the Court can consider the release because it is attached to Plaintiffs' complaint. Contrary to Plaintiffs' argument, the


Court's focus when considering a 12(b)(6) motion to dismiss is the pleading by which the claim is asserted. Consistent with that focus, in *Moody*, the Law Court recognized the logic of allowing courts to consider documents attached to the complaint when assessing the sufficiency of the complaint. The same logic does not support the Court's consideration of documents attached to all of the pleadings in a case when it assesses the merit of a motion to dismiss. Indeed, under Plaintiffs' interpretation of *Moody*, the Court would be permitted to consider documents attached to a responsive pleading when assessing the sufficiency of the complaint. In the Court's view, such a rule would greatly expand the exception recognized in *Moody*, and would be inconsistent with the logic of the exception. Accordingly, the Court concludes that it cannot consider the substance of the release in its assessment of Plaintiffs' motion to dismiss.

Conclusion

Based on the foregoing analysis, the Court denies Plaintiffs' Motion to Dismiss.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Order into the docket by reference.

Date: 8/17/09



Justice, Maine Business & Consumer Docket

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