

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 651710/2013
SINA DRUG CORP D/B/A ONCOMED
vs
ALI MOHYUDDIN, MOHAMMAD
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO.
MOTION DATE 11/7/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits
Answering Affidavits -- Exhibits
Replying Affidavits

No(s) 19-33, 35-40
No(s) 44-56
No(s) 59-60

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/25/13

SHIRLEY WERNER KORNREICH J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE
[X] Cross-Motion Granted

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SINA DRUG CORP., d/b/a, ONCOMED
PHARMACEUTICAL SERVICES &
KAVESH ASKARI,

Index No: 651710/2013

DECISION & ORDER

Plaintiffs,
-against-

MOHAMMAD ALI MOHYUDDIN &
SORKIN'S RX LTD.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Sina Drug Corp., d/b/a, Oncomed Pharmaceutical Services (Oncomed) and Kavesh Askari (collectively, the Oncomed Parties) move for summary judgment pursuant to CPLR 3212. Defendants Mohammad Ali Mohyuddin and Sorkin's RX Ltd. (collectively, the Mohyuddin Parties) cross-move for summary judgment. For the reasons that follow, summary judgment is granted to the Mohyuddin Parties and this case is dismissed.

I. Factual Background and Procedural History

The facts are undisputed. Between 2006 and 2011, the parties litigated in Nassau County Supreme Court. Mohyuddin, a former employee of Oncomed, alleged he was to receive equity in the company as part of his compensation but was never granted it. In an order dated February 11, 2010, the court granted summary judgment to Mohyuddin, holding that he owned 18% of Oncomed. The Oncomed Parties appealed. In May 2011, while the appeal was pending, the parties entered into a settlement agreement, in which Mohyuddin relinquished his equity in

Oncomed in exchange for \$3.8 million. Mohyuddin paid \$567,075 in federal capital gains taxes on the settlement. The parties also exchanged mutual releases for all disputes arising from that litigation. Moreover, and at issue in the instant case, the parties agreed not to sue each other for any claims that they “ever had” relating to their dispute in that litigation. The settlement agreement further provides that if any party sues another in violation of this promise, such party shall pay the other’s attorneys’ fees. The subject provision provides:

the Mohyuddin Parties shall indemnify and hold harmless each of the Oncomed Parties from and against all [losses arising from or relating to the claims in the lawsuit being settled] or other masters] released pursuant to this Release [defined as the claims in the lawsuit and claims “arising out of and/or otherwise relating to Oncomed or claims that were or could have been asserted” in the lawsuit”].

Shortly after Mohyuddin received his settlement money, on July 15, 2011, Oncomed amended its tax returns for the years between 2007 and 2010. Oncomed also issued K-1 Statements to Mohyuddin, which claimed that Mohyuddin received “ordinary income” for such years, totaling approximately \$1.27 million. Mohyuddin never received such money. In order to challenge Oncomed’s new tax filings, Mohyuddin commenced a new action in Nassau County Supreme Court on October 22, 2012. The Oncomed Parties removed the case to federal court in the Eastern District of New York, purportedly based on federal subject matter jurisdiction. However, the federal court, *sua sponte*, held that federal question jurisdiction was lacking because the case was really about the interpretation of the parties’ settlement agreement; the mere relevance of federal tax law did not create federal jurisdiction.

On May 10, 2013, the Oncomed Parties commenced this action. They seek to compel the Mohyuddin Parties to pay their costs in the new lawsuit, a substantial portion of which was incurred in the federal court. Regardless, the Mohyuddin Parties argue that this action is

frivolous because their new lawsuit only concerns the Oncomed Parties' bad acts taken after the settlement agreement was entered into – that is, filing false tax returns out of spite. The court will not reach the merits of such allegations because, as discussed below, the subject indemnity provision does not cover the Oncomed Parties' bad acts subsequent to execution of the settlement agreement.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

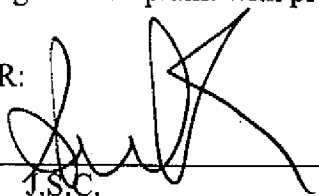
The Mohyuddin Parties' lawsuit alleges retaliatory action on the part of the Oncomed Parties *after payment under the settlement agreement was made*, by illegally filing false tax returns. This claim is not covered under the settlement agreement, since the conduct at issue occurred subsequent to it and, therefore, was not the subject of the first lawsuit. Nonetheless, the Oncomed Parties maintain they are entitled to be reimbursed for their legal fees in the new lawsuit because the purpose of the subject indemnity was to ensure that the parties would not engage in further litigation. The Oncomed Parties' position is misguided at best and severely disingenuous at worst.

To be sure, it was the Oncomed Parties' own post-settlement conduct that caused the new lawsuit. Exacerbating the problem, the Oncomed Parties' improper removal to federal court caused all parties to incur significant and unnecessary legal expenses. That being said, the determination of the legality of the Oncomed Parties' actions is not before this court. The subject of the Mohyuddin Parties' new lawsuit, thus, is not covered by the indemnity, and the Oncomed Parties' cannot recover their attorneys' fees from the Mohyuddin Parties. Accordingly, it is

ORDERED that the summary judgment motion by plaintiffs Sina Drug Corp. d/b/a Oncomed Pharmaceutical Services and Kavesh Askari is denied and the cross-motion for summary judgment by defendants Mohammad Ali Mohyuddin and Sorkin's RX Ltd. is granted, and the Clerk is directed to enter judgment dismissing the Complaint with prejudice.

Dated: November 25, 2013

ENTER:



J.S.C.