

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AXCAN SCANDIPHARM, INC.,	:	OCTOBER TERM, 2002
Plaintiff,	:	No. 2167
v.	:	Commerce Program
AMERICAN HOME PRODUCTS, and	:	Control No. 032864
EURAND INTERNATIONAL, S.p.A.	:	
Defendant.	:	

O R D E R

AND NOW, this 22nd day of July 2003, upon consideration of defendants' Preliminary Objections to plaintiff's Amended Complaint, the response in opposition, the respective memoranda, all other matters of record, after oral argument and in accord with the contemporaneous Opinion being filed of record, it is **ORDERED** that defendants' Preliminary Objections are **Sustained**, in part, and **Overruled**, in part. Count III and Count V of the Amended Complaint, and plaintiff's demand for punitive damages and for attorneys' fees (as compensatory damages for breach of contract) are dismissed.

It is further **ORDERED** that the plaintiffs' Motion to Compel discovery is **Granted**. The requested depositions may be taken.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. July 22, 2003

Presently before the court are the Preliminary Objections of defendants, American Home Products and Eurand International, S.p.A. (collectively “AHP”), to the Amended Complaint of plaintiff, Axcandipharma, Inc. (“Scandipharma”).

I. STATEMENT OF FACTS¹

Pursuant to several written agreements, Scandipharma was licensed to distribute certain pharmaceuticals manufactured by AHP (the “License Agreement”). In earlier federal court litigation Scandipharma was sued by third parties for patent infringement for distributing AHP’s pharmaceuticals (“Patent Litigation”). In accordance with the provisions of the License Agreement, AHP assumed responsibility for defense of the Patent Litigation and eventually entered into a settlement agreement resolving it (“Settlement Agreement”). AHP paid some \$24 million in legal fees and settlement costs in the

¹ The following facts are either undisputed or, where disputed, are taken from plaintiff’s Amended Complaint.

Patent Litigation (“Patent Settlement Amounts”). In the Settlement Agreement, AHP agreed not to seek contribution or reimbursement from Scandipharm for the Patent Settlement Amounts.²

In unrelated actions, other third parties brought product liability claims against Scandipharm and AHP with respect to AHP’s pharmaceuticals. As a result, AHP brought claims against Scandipharm for indemnification based on the provisions of the Licensing Agreement. The indemnification claims were filed in this court in a separate action, and AHP and Scandipharm agreed to arbitrate them before Judge Gafni (“Indemnification Arbitration”) pursuant to a written arbitration agreement (“Arbitration Agreement”). In the Indemnification Arbitration, AHP opposed the dismissal of its promissory estoppel claim by asserting that the Patent Settlement Amounts are part of its reliance damages with respect to that claim.

Scandipharm brought the present action claiming, among other things, that under the express terms of the Settlement Agreement, AHP is not entitled to recover the Patent Settlement Amounts from Scandipharm. AHP filed Preliminary Objections claiming that all of Scandipharm’s claims should be arbitrated, and that the fraud and abuse of process claims and requests for punitive damages and attorneys fees should be dismissed.

Subsequent to the filing of the Preliminary Objections in this action, Judge Gafni ruled that he does not have jurisdiction in the Indemnification Arbitration to decide AHP’s claim to recover the Patent Settlement Amounts. AHP represented at oral argument before this court that it does not intend to appeal Judge Gafni’s ruling; thus, this court may treat that ruling as a final order.

² There may be grounds for treating the legal fees and settlement amounts differently under the terms of the Settlement Agreement, but for purposes of deciding these Preliminary Objections the Court can view them as one.

II. PRELIMINARY OBJECTIONS

A. Scandipharm's Claims Are Not Arbitrable.

AHP argues that all of Scandipharm's claims should be heard by Judge Gafni in the Indemnification Arbitration contending that they are covered by the Arbitration Agreement. AHP also argues that the issues raised in this action are so intertwined with the issues raised in the Indemnification Arbitration that all claims should be heard by Judge Gafni in order to avoid inconsistent findings. This court does not agree.

The issue before Judge Gafni was whether the Arbitration Agreement covered AHP's claim for the Patent Settlement Amounts. Judge Gafni ruled that the Arbitration Agreement did not give him jurisdiction over that claim. The central issue before this Court is whether AHP violated the Settlement Agreement by bringing the claim for the Patent Settlement Amounts before Judge Gafni. Now that Judge Gafni has ruled on the issue and AHP has represented that it does not intend to appeal, that ruling constitutes a final order, which has preclusive effect with respect to the issue before Judge Gafni. *See Ottaviano v. SEPTA*, 239 Pa. Super. 363, 361 A.2d 810 (1976) (applying doctrine of collateral estoppel to arbitration award). Since this court is bound by Judge Gafni's decision, there cannot now be an inconsistent judgment.

Just as the Arbitration Agreement does not give Judge Gafni jurisdiction over AHP's claim for the Patent Settlement Amounts, it does not give him jurisdiction over Scandipharm's related claims raised in this action. The parties do not dispute that the Arbitration Agreement covers those claims raised in AHP's Amended Complaint in the Indemnification Arbitration. Scandipharm's claim that AHP breached the Settlement Agreement is, therefore, not one of those claims that the parties agreed to submit to arbitration. Furthermore, under the terms of the Settlement Agreement, the parties are entitled to bring an action in

court to enforce its terms. This is what Scandipharm is doing here. *See* Settlement Agreement, ¶ 13.³ This court, and no other forum, has jurisdiction to hear Scandipharm’s claims involving the Settlement Agreement.

B. Scandipharm’s Fraud Claim Must Be Dismissed.

AHP urges that Scandipharm’s fraud claim is duplicative of its breach of contract claims. In order to distinguish its fraud claim from its breach of contract claim, Scandipharm argues that the alleged fraud was in the inducement (of the Settlement Agreement and the Arbitration Agreement) rather than in their performance. In addition, Scandipharm contends that its breach of contract claim is based on the Settlement Agreement only. Therefore, there is no bar to a fraud claim involving the Arbitration Agreement. However, this court does not find that Scandipharm’s position has merit.

1. Scandipharm Does Not Have a Claim For Fraud In The Inducement With Respect To The Settlement Agreement.

Scandipharm’s claim that the Settlement Agreement was fraudulently induced by AHP is barred by the gist of the action doctrine. This doctrine “precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.” Etol, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14

³ The Settlement Agreement requires that any such action be brought in the United States District Court for the Eastern District of Pennsylvania. Settlement Agreement, ¶ 13. In its first set of Preliminary Objections, AHP maintained that this action should have been brought in the District Court rather than before this court. However, AHP has not renewed this objection, no doubt because it recognizes that the District Court no longer has jurisdiction over Scandipharm’s claims. *See* U.S. Dist. Ct. Local Rules E.D. Pa., Civil Rule 41.1 (District Court retains jurisdiction over settlements for only 90 days).

(Pa. Super. 2002). A tort claim is barred “where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract.” *Id.* at 19 (dismissing claims for fraud in performance of contract against defendants.)

Scandipharm claims that AHP represented that it would not seek to recover the Patent Settlement Amounts from Scandipharm, which was one of the inducements for Scandipharm to enter into the Settlement Agreement. Since AHP is now trying to recover those amounts, Scandipharm avers that AHP’s representation must have been false when made. However, Scandipharm also claims that AHP’s representation is expressly set forth in the Settlement Agreement. *See* Amended Complaint, ¶ 5. Therefore, AHP’s alleged failure to live up to its representation is a breach of that contract, if anything. Clearly, the gist of Scandipharm’s action against AHP with respect to the Settlement Agreement is in contract, not in tort. Accordingly, Scandipharm’s claim for fraud with respect to the Settlement Agreement should be dismissed.

2. Scandipharm Does Not Have A Claim For Fraud In The Inducement of The Arbitration Agreement.

Scandipharm claims that AHP represented that the Arbitration Agreement covered only those claims set forth in the Amended Complaint in the Indemnification Arbitration. Notwithstanding this, AHP attempted to arbitrate an additional claim for the Patent Settlement Amounts. However, Judge Gafni has ruled that the Arbitration Agreement does not encompass those claims. Since Judge Gafni has held that the Arbitration Agreement says what Scandipharm believed it did, Scandipharm cannot claim to have been misled by AHP as to the Arbitration Agreement’s coverage. Therefore, Scandipharm’s claim that

Arbitration Agreement was fraudulently induced by AHP must be dismissed as moot.

In addition, Scandipharm asserts that the Arbitration Agreement, by its own terms, was limited to the dispute outlined in the Amended Complaint in the Indemnification Arbitration. *See* Amended Complaint, ¶ 63. Thus, AHP's alleged misrepresentation regarding the reach of the Arbitration Agreement is set forth in the Arbitration Agreement itself. Therefore, Scandipharm's claim for fraud in the inducement of the Arbitration Agreement is, in reality, merely a claim for breach of the Arbitration Agreement. Although Scandipharm did not bring a claim entitled "breach of contract" with respect to the Arbitration Agreement, it did bring a claim for breach of the duty of good faith and fair dealing with respect to the Arbitration Agreement. "The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself." JHE, Inc. v. SEPTA, 2002 WL 1018941 (Phila. Com. Pl. May 17, 2002). Since Scandipharm has in effect pled a claim for breach of the Arbitration Agreement, Scandipharm's claim for fraud based on AHP's alleged misrepresentation with respect to the Arbitration Agreement should also be dismissed under the gist of the action doctrine.

C. Scandipharm's Claim for Abuse of Process Must Be Dismissed.

Abuse of process is "the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." McGee v. Feege, 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987).

In order to state a cause of action for abuse of process it must be alleged that the defendant used a legal process to accomplish a purpose for which the process was not designed. . . . It is not enough that the defendant had bad or malicious intentions or that the

defendant acted from spite or with an ulterior motive. Rather there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim, such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action. There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 644 A.2d 188, 191 (1994).

Scandipharm claims that AHP caused delay in the legal proceedings between the parties by making an unjustified demand for the Patent Settlement Amounts and that AHP made inconsistent statements to this court and Judge Gafni regarding its claim for the Patent Settlement Amounts. In essence, Scandipharm is complaining that AHP attempted (unsuccessfully) to enlarge its claims in the Indemnification Arbitration and to defend against an attack on such enlargement in this case. These actions constitute, at worst, overzealous representation of AHP by its counsel. They do not make out a claim for abuse of process.⁴

D. Scandipharm's Demand for Punitive Damages Must Be Dismissed.

Punitive damages are not available for a mere breach of contract. See Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 370 Pa. Super. 461, 469-70, 536 A.2d 1357, 1367 (1987), *aff'd* 522 Pa. 80, 559 A.2d 914 (1989). Since Scandipharm's tort claims have been dismissed, leaving only claims for breach of contract, the request for punitive damages must be dismissed.

E. Scandipharm Cannot Recover Its Attorneys Fees' as Damages

Scandipharm claims that it is entitled to recover attorneys' fees as its compensatory damages flowing from AHP's breach of the Settlement Agreement and/or Arbitration Agreement. In doing so,

⁴ It could be argued that, in continuing to pursue this action, Scandipharm's counsel is being equally overzealous.

Scandipharm is not seeking to recover its attorneys' fees incurred in this action,⁵ but rather those incurred in the Indemnification Arbitration in defending against AHP's claim that it is entitled to recover the Patent Settlement Amounts. However, under "the American Rule," a party may not recover attorneys fees from its adversary absent an express statutory or contractual provision allowing for the recovery of such attorneys' fees. *See Mosaica Academy Charter School v. Comm. Dept. of Educ.*, ___ Pa. ___, 813 A.2d 813, 822 (2002). *See also Bunnett v. Smallwood*, 793 P.2d 157, 162 (Colo. Sup. 1990) ("In our view, attorneys fees and costs should not be awarded for breach of a release unless (1) the agreement expressly provides that remedy or (2) such an award is permitted by statute or court rule.").

Scandipharm has not cited to any statute authorizing it to recover its attorneys fees from AHP. Furthermore, Scandipharm does not claim that either the Settlement Agreement or the Arbitration Agreement provides for its recovery of its attorneys' fees, although the parties could have included such a provision in either agreement. Therefore, Scandipharm may not recover the attorneys fees it incurred in the Indemnification Arbitration as damages for AHP's alleged breach of the Settlement Agreement or Arbitration Agreement.

However, since Scandipharm claimed at oral argument that, in attempting to raise additional capital, it suffered damages other than attorneys fees as a result of AHP's claim for recovery of the Patent Settlement Amounts, Scandipharm's contract claims will not be dismissed at this juncture for failure to

⁵ Scandipharm, like many other plaintiffs, also demands its attorneys fees incurred in this action, presumably based on the statute that allows the court to award such fees as a penalty for certain forms of improper conduct (in this litigation.) *See* 42 Pa. C. S. § 2503. The court does not at this time rule on whether such fees are recoverable in this action, although the court notes that it is the rare case where such fees are recovered.

allege damages.

CONCLUSION

For all the foregoing reasons, defendants' Preliminary Objections to plaintiff's Amended Complaint are sustained, in part, and overruled, in part. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.