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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAILESH BARCHHA,

Plaintiff,

-against-

TAPIMMUNE INC., GYLNN WILSON, ISLAND CAPITAL MANAGEMENT, INC., and JOHN DOES 1-10,

Defendants.

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12 Civ. 8530 (PKC)

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge:

Plaintiff Sailesh Barchha moves for a preliminary injunction to enable his sale of 5,600,000 shares of common stock in defendant TapImmune, Inc. ("TapImmune") Plaintiff entered into a consulting arrangement with TapImmune wherein he received 9.9% of company stock in exchange for providing 18 months of consulting services. The agreed-upon percentage of common stock bears a restricted legend because the shares are not registered. Plaintiff contends that TapImmune experienced severe financial hardships and stopped availing itself of his consulting expertise, and that he is now left with shares that may become worthless. Plaintiff seeks an injunction directing the defendants "to remove any hold, freeze, restriction or other impediment" on plaintiff's ability to sell or transfer TapImmune shares. (Docket # 2.)

The record on the motion for a preliminary injunction does not satisfy plaintiff's high burden to obtain mandatory injunctive relief. Plaintiff also seeks an order compelling the parties to proceed to arbitration. (Docket # 2.) But plaintiff does not claim that he has attempted to initiate arbitration, and defendants acknowledge that the dispute is arbitrable. Plaintiff's motion is denied in its entirety, without prejudice to his right to commence and arbitration and seek further relief if defendants refused to arbitrate.

STANDARD FOR MANDATORY INJUNCTION.

A court may grant a preliminary injunction if the moving party establishes (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc., 696 F.3d 206, 215 (2d Cir. 2012). "The burden is even higher on a party . . . that seeks 'a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo.'" Cacchillo v. Insmed, Inc., 638 F.3d 401, 406 (2d Cir. 2011) (quoting Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 n.4 (2d Cir. 2010)). The movant must make "a clear showing" that it "is entitled to the relief requested," or that "extreme or very serious damage will result from a denial of preliminary relief." Id. (quotation marks omitted). The purpose of a preliminary injunction is to preserve "the court's power to render a meaningful decision after a trial on the merits," not to provide the movant with ultimate relief. WarnerVision Entm't, Inc. v. Empire of Carolina, Inc., 101 F.3d 259, 261-62 (2d Cir. 1996).

DISCUSSION

I. Plaintiff's Motion for Injunctive Relief that Would Permit Him to Sell TapImmune Shares Is Denied.

Plaintiff maintains that he is entitled to a mandatory injunction because the defendants have restricted his ability to sell or transfer his shares in TapImmune. According to the plaintiff, TapImmune is in troubled financial condition, and unless he is able to sell or transfer his shares in the near future, he will likely go uncompensated for his consulting work.

Pursuant to a consulting agreement dated May 8, 2012, plaintiff agreed to perform 18 months of consulting services in exchange for "a 9.9% interest in the company." (Barchha Dec. ¶ 3 & Ex. A.) The agreement provided that in the event he was terminated, plaintiff would not be required to refund any shares in the company, and that his shares would not be diluted in the future. (Barchha Dec. ¶¶ 5, 7.) On May 15, 2012, TapImmune issued 5,600,000 shares of common stock to plaintiff. (Barchha Dec. ¶ 8 & Ex. B.) The face of the share certificate included the following language:

> The shares represented by this certificate have not been registered under the Securities Act of 1933, as amended (the "Act"), or any state securities law. They may not be offered for sale, sold or otherwise transferred unless there is a registration statement in effect covering such securities or there is available an exemption from registration requirements of the Securities Act of 1933, as amended, and applicable state securities laws or an opinion of counsel in form and substance satisfactory to the company, to the effect that such registration is not required.

(Barchha Dec. Ex. B.) Near-identical language is repeated elsewhere on the certificate. (Barchha Dec. Ex. B.)

Plaintiff maintains that he thereafter performed the expected consulting services, and that TapImmune publicly identified him as an advisor to its board of directors. (Barchha Dec. ¶¶ 9-10.) The company then stopped conferring with plaintiff, informed him that it "was in dire financial straits" and stated that it could no longer cover his travel and accommodation expenses. (Barchha Dec. ¶¶ 11-14.) Plaintiff states that TapImmune's Form 10-Q filings from 2012 reflect that the company has incurred significant, ongoing losses, and that its liabilities far exceed its assets. (Barchha Dec. ¶¶ 22-29.) In his memorandum of law, plaintiff asserts that he has located a purchaser for his TapImmune shares, but "due to the freeze" that defendants have placed on his shares, he is unable to sell them. (Pl. Mem. at 8.) "Defendant's [sic] conduct has essentially made Plaintiff's shares worthless." (Pl. Mem. at 8.) He states that if the company

were solvent, he might someday be made whole by money damages, but that its perilous condition would likely make any money judgment worthless. (Pl. Mem. at 8.)

The plaintiff has not satisfied the high burden required for a mandatory injunction to issue. An injunction ordering defendants to facilitate plaintiff's sale of shares would not be a limited measure to preserve the status quo, but instead equivalent to a final adjudication of the merits of plaintiff's claims. Plaintiff's five causes of action include claims for breach of contract, "cloud on title" and breach of an implied duty of good faith and fair dealing. (Compl't ¶¶ 36-50.) As relief on those claims, the Complaint seeks a declaration that the plaintiff's shares are freely transferable, and "temporary and permanent injunctive relief" that would remove share restrictions or require "the issuance of unrestricted shares." (Compl't ¶¶ 41, 46, 50.) However, if the Court were to grant plaintiff's motion, he asserts that he would be immediately free to sell all TapImmune shares. A preliminary injunction "provides relief which is 'interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.'" Diversified Mortg. Investors v. U.S. Life Ins. Co. of N.Y., 544 F.2d 571, 576 (2d Cir. 1976) (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953)). "It is not an adjudication on the merits, and it should not grant relief properly awarded only in a final judgment." Id.[1] The injunction sought here would be final relief, rendering certain of plaintiff's claims functionally moot.

The consulting agreement contains an arbitration provision and the parties appear to agree that this dispute must be determined in arbitration. While plaintiff asserts that he merely seeks an injunction in aid of arbitration, see, e.g., Blumenthal v. Merrill Lynch, Pierce, Fenner &

[1] Plaintiff's contention that an injunction is necessary because TapImmune's likely insolvency would render his shares worthless is rejected because he has not demonstrated the likelihood of insolvency in the immediate future. See, e.g., Meringolo v. Power2ship, 2003 WL 21750009, at *5 (S.D.N.Y. July 28, 2003) ("The plaintiff has, at most, shown that there is a possibility that the company may be insolvent by the time this case is fully litigated, however, that mere possibility is speculative and cannot satisfy his burden to show that plaintiff is likely to suffer irreparable harm if equitable relief is denied.") (quotation marks omitted).

Smith, Inc., 910 F.2d 1049, 1051-52 (2d Cir. 1990), the injunction that he proposes would amount to the principal relief to which he would be entitled if he prevailed in arbitration.

Plaintiff's motion suffers from other infirmities. On their face, the restricted shares, which trade over the counter, recite that they are unregistered and either must be registered under the Securities Act of 1933 (the "'33 Act") or sold pursuant to an exemption from regulation. (Barchha Dec. Ex. B.) Plaintiff asserts that he "had agreed and understood that those shares were to be restricted for a period of 6 months, or until November 15, 2012." (Barchha Dec. ¶ 8.) This language does not appear in the agreement of May 8, 2012, and the Barchha Declaration offers no further explanation or evidence to support this assertion. Plaintiff has neither sought an order requiring registration of the shares nor provided a basis for the Court to order such relief. He has not demonstrated any basis for a claimed exemption from the registration. The relief sought by plaintiff would be tantamount to a judicially-created exemption from the registration requirements of the '33 Act.

Lastly, defendants have come forward with evidence that undermines plaintiff's claim of likelihood of success on the merits and his claim of irreparable harm. Defendants assert that plaintiff overstates the company's financial peril. (Wilson Dec. ¶¶ 12-13, 85-86.) They note that plaintiff's claims must be adjudicated in arbitration, but that plaintiff has failed to commence an arbitration proceeding. (Opp. Mem. at 15-16.) They argue that plaintiff made misrepresentations that unlawfully induced them into entering the consulting agreement, and that if the contract is enforceable, plaintiff has breached it by failing to provide meaningful consulting services, including locating capital investments, and that plaintiff failed to provide consideration for his shares. (Opp. Mem. at 16-18; Wilson Dec. ¶¶ 48-65.)

In light of the foregoing, plaintiff has failed to make a clear showing that he is entitled to relief, or that extreme or very serious damage would result from the denial of his motion.

II. Plaintiff's Request to Compel Arbitration Is Denied.

Plaintiff separately seeks to compel the defendants to proceed to arbitration on all disputes arising out of the consulting agreement. Plaintiff's memorandum of law and the Barchha Declaration omit any discussion of arbitration. There is no assertion that the defendants have refused to arbitrate or that the plaintiff has attempted to commence an arbitration. See, e.g., LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194, 198 (2d Cir. 2004) ("[A]n action to compel arbitration accrues only when the respondent unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise unambiguously manifesting an intention not to arbitrate the subject matter of the dispute.") (quotation marks omitted). Indeed, defendants expressly acknowledge that plaintiff's claims are subject to arbitration. (Opp. Mem. at 24-25.)

CONCLUSION

Plaintiff's motion for a preliminary injunction and to compel arbitration is denied.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
January 7, 2013