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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0991-14T2

JOSEPH GRAYZEL, M.D.,

Plaintiff-Appellant,

v.

BOSTON SCIENTIFIC CORPORATION,

Defendant-Respondent.

Argued November 2, 2015 - Decided January 11, 2016

Before Judges Sabatino, Accurso, and Suter.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1978-12.

Arthur M. Peslak argued the cause for appellant (Gertner, Mandel, & Peslak, LLC, attorneys; Mr. Peslak, on the brief).

Barbara K. Gotthelf argued the cause for respondent (McCarter & English, LLP, attorneys; David J. Cooner, of counsel; Mr. Cooner, Ms. Gotthelf, and Jean P. Patterson, on the brief).

PER CURIAM

This is a contract dispute. Plaintiff Joseph Grayzel, M.D., an interventional cardiologist, is the inventor of a balloon catheter device used for cardiac angioplasty. He holds

a patent for that device (the "'629" patent[1]) and also for variations of his invention that he subsequently created.

Dr. Grayzel brought a lawsuit in federal court against defendant Boston Scientific Corporation ("BSC") for patent infringement. The lawsuit was settled by the parties in 2003. They entered into three simultaneous related agreements (a Settlement Agreement and two Covenants Not to Sue)[2] to resolve the matter, essentially by licensing the '629 device to BSC with Dr. Grayzel receiving royalties. Much of the negotiations were conducted on Dr. Grayzel's side through his son Jeffrey.

BSC thereafter paid substantial royalties periodically to Dr. Grayzel consistent with the 2003 agreements. In 2005, BSC introduced a new cutting balloon product called the "Flextome," a product for which BSC paid Dr. Grayzel royalties under the Settlement Agreement while it was still in force.

In February 2010, a few years after the expiration of the '629 patent and the 2003 Settlement Agreement, Dr. Grayzel's patent application for improvements to the '629 device matured

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[1] The actual patent number is 4,786,629, the last three digits of which are 629.

[2] Although these documents were filed under seal within a confidential appendix, counsel have confirmed to the clerk's office that they have no objection to us quoting from legally relevant portions of those documents for purposes of this opinion.

into U.S. Patent No. 7,662,163 (the "'163" patent). Believing that the Flextome product now infringed on his newly-issued '163 patent and that the Covenants Not to Sue did not encompass this product, Dr. Grayzel wrote BSC and proposed a new license for it. BSC responded that it was not interested in obtaining a license from Dr. Grayzel for the '163 patent because, in BSC's view, the Flextome was covered by the 2003 Covenants Not to Sue.

Dissatisfied with BSC's refusal to enter into a new licensing agreement, Dr. Grayzel filed this declaratory judgment action in the Law Division in March 2012. Fundamentally, he sought a ruling that the Covenants Not to Sue do not prevent him from suing BSC for patent infringement under the '163 patent as to products developed by BSC, such as the Flextome, after the date in 2003 the Settlement Agreement and Covenants were signed.

The case was briefly removed to federal court, where BSC sought to have the complaint dismissed for failure to state a claim. The district court denied the motion. BSC then moved to dismiss the complaint for lack of subject matter jurisdiction in the federal court. That motion was granted and the case was remanded back to the Law Division.

After discovery was conducted, including several depositions, Dr. Grayzel moved and BSC cross-moved for summary judgment. The motions were heard by Judge Rachelle L. Harz, who

ruled in favor of BSC in a lengthy oral decision on September 17, 2014. Judge Harz concluded that BSC's current and future sales of cutting balloon products akin to the '163 patent such as the Flextome are within the scope of the 2003 Covenants Not to Sue. Consequently, the judge held that Dr. Grayzel is contractually precluded from suing BSC for patent infringement for sales generated by the Flextome.

Dr. Grayzel now appeals. He alleges that the trial court misconstrued the 2003 Settlement Agreement and Covenants Not to Sue in a manner contrary to the intent of the parties.

At the heart of this appeal is a dispute over the meaning of the following six underlined words found in paragraph 3.1 of both Covenant Not-to-Sue agreements:

> Grayzel, for himself and his successors and assigns, hereby covenants not to sue BSC, its Related Companies, and their officers, employees, agents, distributors, contract manufacturers, customers, purchasers, resellers, successors, authorized sublicensees and assigns for infringement by any <u>Cutting Balloon Product sold by BSC</u> or its Related Companies or their authorized sublicensees or assigns of any claim of any Grayzel Patent.
>
> [(Emphasis added).]

The Covenant defines "Cutting Balloon Product" as "any product, device, kit, or assembly that includes a balloon catheter and one or more axially extending cutting blades . . . . Cutting

Balloon Product shall include, but not be limited to, the products that are listed in Exhibit A hereto."

Exhibit A lists five BSC products. "Grayzel Patent" is defined as "PCT Application No. PCT/US01/23284, and U.S. Patent Application No. 09/912,008" and "any patents issuing from any of the foregoing applications[.]" These application numbers refer to what later resulted in the '163 patent.

Similar, although not identical, wording appears in the Settlement Agreement. The Settlement Agreement uses the now-disputed phrase "Cutting Balloon Products sold by BSC" in a provision governing the payment of royalties to Dr. Grayzel:

> Commencing as of July 1, 2003, BSC will pay to Grayzel a royalty of [a specified percentage of] Net Sales of <u>Cutting Balloon Products sold by BSC</u> or its Related Companies in the United States . . . and sold outside the United States.
>
> [(Emphasis added).]

The Settlement Agreement defines "Cutting Balloon Product" in exactly the same way as the Covenants, including the reference to an "Exhibit A." The "Exhibit A" attached to the Settlement Agreement is identical to the ones attached to the Covenants.

Both the Covenants and the Settlement Agreement share identical provisions allowing Dr. Grayzel to request a "good faith list of all Cutting Balloon Products then being sold by BSC" annually.

All three documents include separate but nearly identical[3] integration clauses, reading as follows:

> This Agreement constitutes the entire agreement and understanding of the parties with regard to the subject matter hereof and merges and supersedes all prior discussions, negotiations, understandings and agreements between the parties concerning the subject matter hereof. Neither party shall be bound by any definition, condition, warranty, right, duty or covenant other than as expressly stated in this Agreement or as subsequently set forth in a written document signed by both parties. Each party expressly waives any implied right or obligation regarding the subject matter hereof.

Finally, each document specifies its own consideration. In the Settlement Agreement, the consideration includes a lump-sum payment along with a schedule for royalties. Consideration for the covenant between BSC and Dr. Grayzel involved a one-time payment. Consideration for the covenant between BSC and Jeffrey involved a separate one-time payment.

Dr. Grayzel argues that the plain meaning of the contested words "Cutting Balloon Product sold by BSC" can only refer to products "sold" in the past tense, i.e., products that were currently in production and being sold at the time the agreement was executed on September 19, 2003. In essence, Dr. Grayzel asserts that the phrase has a temporal limitation, tied to the

[3] The Settlement Agreement does not contain the last sentence.

September 19, 2003 contract execution date. Conversely, BSC contends that the phrase encompasses not only products "sold" in the past, but also products to be "sold" in the future.

None of the witnesses who were deposed were able to provide specific and definitive recollections of any conversations between the parties' negotiating representatives about the phrase. However, the parties did furnish the court with various drafts and "term sheets" that were exchanged during negotiations, which shed light on the evolution of the contested provision.

After studying this drafting history, the text of the documents, and the other evidence, Judge Harz ruled that BSC's interpretation of the phrase was the most probable one intended by the parties. Hence, she concluded that the words "Cutting Balloon Product sold by BSC" did not have a temporal limitation and that the Covenants, which extend to future sales, thus preclude a new patent infringement suit against BSC by Dr. Grayzel.

Judge Harz observed that Dr. Grayzel's interpretation would require that the disputed term mean different things in the three instruments. Under the terms of the Settlement Agreement, those words encompass future products with regard to the payment of royalties. However, under the Covenants, Dr. Grayzel

contends that those words only refer to products being sold as of the date the documents were executed.

The judge also observed that Dr. Grayzel was making a similar argument with regard to other provisions shared by the three documents. In the Settlement Agreement, Dr. Grayzel's interpretation would require that the "Exhibit A" referenced in the definition of "Cutting Balloon Product" be a non-exhaustive list to be supplemented by BSC. However, the identical exhibit and language under the Covenant would represent a fixed list that could not be changed.

Similarly, Judge Harz found that the identical provisions granting Dr. Grayzel the right to request a "good faith list" of cutting balloon products sold by BSC annually would also require differing meanings under the doctor's interpretation: Under the Settlement Agreement it would be a way for Dr. Grayzel to determine whether he was owed additional royalty payments, while under the Covenants it would be a way for determining if BSC was potentially infringing on Dr. Grayzel's patents. The judge also found relevant that "the parties were consistently and personally involved in the negotiation process" and that the agreements were only signed after "an additional four months of drafting and negotiation between counsel."

Ultimately, Judge Harz observed that although "[i]n a grammatical vacuum, the phrase [']sold by BSC[''] is susceptible to [multiple] interpretations[,]" the Settlement Agreement and Covenants must be read as a single agreement. That is because they were "negotiated and executed in tandem" and formed "essentially a single transaction[.]"

When the documents are thus read together, the judge found that there was no ambiguity and that the words encompassed both "existing and prospective cutting balloon products." She also noted that to rule otherwise "would mean there's ambiguity in the other document which is the [']629 settlement, rendering all the settlement documents unenforceable."

Judge Harz found significant that Jeffrey attempted to incorporate temporal language and dates into the Covenants, but that those revisions were "flatly rejected" by BSC. Moreover, subsequent drafts by both parties did not attempt to reincorporate any temporal restrictions.

Dr. Grayzel argues that the trial court's construction deviated from the intended meaning of the parties; that the court improperly subjected him to a "de facto" licensing agreement for no new compensation; that the court unjustifiably disregarded the documents' integration clauses; and that the

court improperly relied on a chain of e-mails containing double hearsay.

We have carefully considered these and the other points raised by Dr. Grayzel in light of the record and the applicable law. Having done so, we affirm the trial court's decision, substantially for the cogent reasons expressed by Judge Harz in her detailed September 17, 2014 oral opinion.

We add only a few comments as amplification. It is well settled that "[t]he polestar of construction is the intention of the parties to the contract[.]" Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006) (quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953)). Here, the trial court had ample reason to regard the six-word phrase "Cutting Balloon Product Sold By BSC" as ambiguous insofar as whether it connotes a temporal limitation. The word "sold" in this context can grammatically convey the past tense only or, conversely, may also embrace the future.

Because there is an ambiguity in the contract language, the court was entitled to look to extrinsic evidence to divine its intended meaning. This examination includes "the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain." Celanese Ltd.

v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009).

The court was not rigidly barred by the integration clauses in the Settlement Agreement and the two Covenants Not to Sue from looking to extrinsic aids to interpret the contested ambiguous language. The three instruments were all drafted concurrently and executed on the same day. The record suggests that the documents were drafted as three separate agreements at the behest of Dr. Grayzel for tax reasons or other personal purposes.

"[U]nder New Jersey law, two or more writings may constitute a single contract even though they do not refer to each other. Whether two writings are to be construed as a single contract, however, depends on the intent of the parties." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009) (alteration in original) (quoting Van Orman v. Am. Ins. Co., 680 F.2d 301, 306 (3d Cir. 1982)), certif. denied, 203 N.J. 93 (2010); see also Lawrence v. Tandy & Allen, Inc., 14 N.J. 1, 6-9 (1953) (finding that a series of separate documents arising from a single transaction should be considered a single contract because that was the intent of the parties).

As Judge Harz, citing Celanese Ltd., supra, 404 N.J. Super. at 528-29, aptly noted, "[w]here a contract repeats the same terms, such terms should be given the same meaning, particularly when the contract under consideration is clearly the product of careful lawyering on both sides." We agree with her that the disputed six-word phrase should be accorded the same meaning in all three instruments.

Here, as Judge Harz recognized, the drafting history of the instruments favors BSC's interpretation that the common phrase "Cutting Balloon Product Sold by BSC" referred not only to past sales but also to future sales. At several points in the negotiations, Dr. Grayzel, through his son Jeffrey, attempted to insert temporal limitations in the documents, but BSC repeatedly struck such proposed express limitations. The drafting and revision history therefore provide substantial support for the judge's interpretation. Dr. Grayzel has not offered a persuasive reason to set that interpretation aside.

As a final point, we note that we have considered whether the trial court should have conducted a trial or some other form of evidentiary hearing with witness testimony before reaching a final conclusion about the intended meaning of the contested phrase. We conclude that no evidentiary hearing was necessary. For one thing, both parties urged the court in their cross-

motions to rule on the meaning of the contract language based on the written submissions, without taking testimony. In addition, Dr. Grayzel's position was readily negated, both by a common-sense analysis of the text and purposes of the instruments, as well as the actual chronology of the parties' exchange of drafts.

The trial judge soundly concluded at the end of her opinion that "[a] trial of this declaratory judgment action would advance no further information or resolve any disputed fact." See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (stating the well-settled proposition that summary judgment should be granted where there are no genuine issues of material fact).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION