

Federal Court



Cour fédérale

Date: 20161114

Docket: T-1056-16

Citation: 2016 FC 1267

Ottawa, Ontario, November 14, 2016

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

APOTEX INC.

Plaintiff

and

**SHIRE LLC AND
SHIRE PHARMA CANADA ULC**

Defendants

ORDER AND REASONS

[1] In the context of this patent impeachment action, I am seized of a motion by the Defendants Shire LLC and Shire Pharma Canada ULC (“Shire”) to strike portions of the Reply of Apotex Inc.

[2] Paragraph 20 and the impugned portions of paragraph 42 of the Reply purport to raise s 53 of the *Patent Act*, RSC 1985, c. P-4 as a new ground of invalidity. It is plain and obvious that they fail to plead sufficient material facts to disclose a reasonable cause of action.

[3] Section 53 allegations are essentially allegations of fraud and of a state of mind. As per Rule 181 of the *Federal Courts Rules*, such allegations require full particulars. The pleadings fail to identify exactly who made what statements to the Patent Office. They are further bereft of particulars as to the factual basis upon which the Court might be able to conclude that this person or persons knew, at the time, that the statements were false or that these persons intended to mislead the Patent Office by making the statements. The allegations of the Reply amount only to a vague allegation that “Shire” made “assertions” as to the utility of the invention, and that Shire now allegedly denies that these assertions amount to utility. The allegations of the Reply, taken alone or in conjunction with those of the Statement of Claim, are insufficient to be taken as implicitly pleading that the person who made the “assertions” knew them to be false or misleading at the time, especially given that Shire was not the original applicant for the patent at issue. Implicit allegations of fraud are not, of course, proper pleadings. However, where the material facts can be inferred from the pleadings or the representations of the party on a motion to strike, the defective pleading is amenable to being saved by ordering particulars or granting leave to amend. That is not the case here.

[4] The impugned portions of paragraphs 20 and 42 will be struck without leave to amend. If Apotex wishes to amend its pleadings to raise a new ground of invalidity pursuant to s 53 of the *Patent Act*, it will have to move to amend its Statement of Claim, not its Reply.

[5] With respect to the impugned portion of paragraph 48 of the Reply, the allegation Shire wishes to strike is purely a statement of the legal conclusions to be drawn from the facts already pleaded in the Statement of Claim. Apotex agreed and recognized at the hearing that the two sentences at issue do not open the door for Apotex to rely on, or have discovery with respect to,

any fact that is not already specifically pleaded in paragraphs 104 to 116 of its Statement of Claim as a basis for arguing ambiguity of any or all claims of the Patent.

[6] The parties may, but are not required to raise points of law in their pleadings. Even if they do, neither the parties nor the Court are bound by the legal result or legal label pleaded. The party is free to argue and the Court is free to rule on any legal consequence supported by the facts pleaded (*Conahan v Cooperators*, 2002 FCA 60 at para 15). For this reason, it is a waste of the Court's time to move to strike a legal conclusion, especially where, as here, the presence of the allegation is unlikely to have any consequence on the pleadings, the conduct of discoveries or the length of trial. That portion of Shire's motion will be dismissed.

[7] Success on this motion is divided, but Shire at the hearing sought costs on an elevated scale. The parties agreed that a "normal" award of costs on this motion should be \$1500 plus disbursements. Shire asked for \$3000 plus disbursements, relying on the decision of this Court in *Eli Lilly Canada Inc. v Apotex Inc.*, 2008 FC 142 at para 63, to the effect that failure to follow through or to prove a s 53 type of fraud after raising it should have serious consequences in costs. Apotex's allegation of s 53 fraud has for the moment been nipped in the bud early by Shire's motion, but it did require a motion. Further, Apotex's allegations of s 53 fraud were made casually and thoughtlessly, as a throwaway line or an inchoate defence. Allegations of a fraud, including pursuant to s 53 of the *Patent Act* are serious; where a party chooses to raise them, they should do so seriously and thoughtfully. Elevated costs are appropriate here, even though Shire was only partially successful on this motion. The award is also a further warning to the parties that the Court disapproves of procedural gamesmanship and will not hesitate to sanction such behaviour by cost awards.

ORDER

THIS COURT ORDERS that:

1. Shire's motion is granted in part.
2. Paragraphs 20 and the second and third sentences of paragraph 42 are hereby struck, without leave to amend. If Apotex wishes to raise section 53 of the Patent Act as a ground of invalidity of the patent at issue, it must seek to do so by way of amendment to its Statement of Claim.
3. Costs, in the amount of \$2000 plus disbursements, shall be payable by Apotex to Shire.

"Mireille Tabib"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1056-16

STYLE OF CAUSE: APOTEX INC. v SHIRE LLC AND SHIRE PHARMA
CANADA ULC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 9, 2016

**REASONS FOR ORDER AND
ORDER:** TABIB P.

DATED: NOVEMBER 14, 2016

APPEARANCES:

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FOR THE PLAINTIFF

Mr. Alex Gloor
Ms. Jennifer Wilkie

FOR THE DEFENDANTS

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