PREPARED BY THE COURT

APR, LLC, Plaintiff, v. JOHN LOMANS, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-5000-12** Civil Action **OPINION**
JOHN LOMANS, Third-Party Plaintiff, v. CAMERON REID, DR. REDDY'S LABORATORIES LIMITED, DR. REDDY'S LABORATORIES, INC., DR. REDDY'S LABORATORIES NEW YORK, INC., Third-Party Defendants.	
DR. REDDY'S LABORATORIES LIMITED, DR. REDDY'S LABORATORIES, INC., DR. REDDY'S LABORATORIES NEW YORK, INC., Fourth-Party Plaintiffs, v. NIRMAL MULYE, NOSTRUM PHARMACEUTICALS, LLC, NOSTRUM TECHNOLOGIES, LLC, NOSTRUM LABORATORIES, INC., SARANG SEWATKAR, and KYMERA, LLC, Fourth-Party Defendants.	
CAMERON REID, Plaintiff, v. JOHN LOMANS, Defendant.	

Argued: **January 22, 2016**
Decided: **January 27, 2016**

Honorable Robert C. Wilson, J.S.C.

Roger B. Kaplan, Esq., appearing for Third Party Defendants/Fourth Party Plaintiffs Dr. Reddy's Laboratories, Ltd., Dr. Reddy's Laboratories, Inc., and Dr. Reddy's Laboratories New York, Inc. (Greenberg Traurig, LLP).

Evelyn Storch, Esq., appearing for Defendant/Third Party Plaintiff John Lomans and Fourth Party Defendant Kymera, LLC (Harwood Lloyd, LLC).

Gregory D. Miller, Esq., appearing for Fourth Party Defendants, Nostrum Pharmaceuticals LLC, Nostrum Technologies, LLC, Nostrum Laboratories, Inc., Nirmal Mulye, and Sarang Sewatkar (Rivkin Radler LLP).

FACTUAL BACKGROUND

THIS MATTER arises out of a contractual relationship between Defendant John Lomans (hereinafter "Lomans"), Plaintiff APR, LLC (hereinafter "APR") and Third Party-Defendant/Fourth Party-Plaintiffs Dr. Reddy's Laboratories, Limited, Dr. Reddy's Laboratories, Inc., and Dr. Reddy's Laboratories New York, Inc. (hereinafter referred to collectively as "Dr. Reddy's"). As part of the acquisition and sale of most or all of APR's assets, Lomans entered into a contract wherein he was promised certain remuneration by the Plaintiff, and was required to refrain from specific conduct pursuant to various restrictive covenants, including: a Confidentiality Covenant, a Non-Solicitation Covenant, and a Non-Compete Covenant (hereinafter the "Restrictive Covenants").

For some years, APR, Lomans, and Dr. Reddy's had worked jointly to develop a pharmaceutical product known as Premarin, which is a hormone replacement drug for women. The parties allege that the market for this drug is worth approximately $1.4 billion. The active pharmaceutical ingredient ("API") in Premarin is conjugated estrogens, which are derived from

the urine of pregnant mares. Premarin was first introduced to the marketplace in 1942, and has never been successfully replicated in an FDA approved-for-sale generic version of the drug, despite the fact that patent protections for the drug have not been in effect for some time.

Lomans had been involved in the development of the API in Premarin since the late 1990s. In 2004, pursuant to a Joint Development and Supply Agreement between Dr. Reddy's, APR (owned by a Cameron Reid and by Defendant Lomans), and PremGen (owned by Lomans), Dr. Reddy's and Cameron Reid financed the development efforts of Lomans, APR, and PremGen. APR acquired the assets of PremGen in 2004. By 2010, Dr. Reddy's had invested more than $6 million in APR's and Lomans' development of the API for the Product. Cameron Reid had also invested substantial sums of time and money into the development effort. On March 31, 2011, Dr. Reddy's filed an Abbreviated New Drug Application with the FDA, seeking approval of Premarin. Lomans was essential to the effort and research behind this effort to gain FDA approval.

On July 11, 2011, Dr. Reddy's acquired all of the physical assets and intellectual property and trade secrets of APR, and the parties terminated the aforementioned Joint Development Agreement. As part of this transaction, Dr. Reddy's and APR executed an "Asset Purchase Agreement," dated July 8, 2011, pursuant to which Dr. Reddy's acquired all of APR's assets for $350,000 in cash, the assumption of APR's liabilities (including more than $6 million invested by Dr. Reddy's in APR's development efforts), and the assumptions of APR's Lease with Lomans (as landlord) for a facility in use.

Dr. Reddy's, APR, Lomans and Reid entered into a Development, Intellectual Property Transfer and Royalty Agreement dated July 8, 2011, wherein Dr. Reddy's acquired all of the intellectual property of APR, including all IP which Lomans had developed and transferred, first to PremGen and subsequently to ARP in exchange for $2.5 million, and an agreement to pay APR

royalties for 21 years of 30% of Dr. Reddy's net profits on the sale of the finished Product, and 50% of Dr. Reddy's net profits on the sale of the API.

Third, Dr. Reddy's, APR, Lomans and Reid entered into the Consulting and Transitional Services Agreement (hereinafter the "Consulting Agreement"), pursuant to which Lomans and Reid agreed to provide certain transition and consulting services for 3 years, and pursuant to which Lomans and Reid executed restrictive covenants therein. The Consulting Agreement obligated Lomans, *inter alia*, to provide certain consulting services to Dr. Reddy's as set forth in Schedule 2.1 per for a period of 3 years. Schedule 4 of the Consulting Agreement required Lomans to comply with certain restrictive covenants, including a Confidentiality Covenant, a Non-Solicitation Covenant, and a Non-Compete Covenant. For example, the Non-Compete Covenant provided that Lomans would not:

> engage, directly or indirectly, in any business or activity involving the development, manufacture, sale or marketing of any product containing conjugated estrogens (a "Competitive Business") [or] own an interest in, manage, operate, control or participate in or be connected with (as a partner, member, stockholder, lender, co-venturer, consultant or otherwise) any other Person that engages in a Competitive Business.

The consideration exchanged for or in support of the Restrictive Covenants is set forth in the Consulting Agreement, APA, and Royalty Agreement. Section 1 of Schedule 2.4 of the Consulting Agreement, enumerating the Restrictive Covenants, states that consideration of the Restrictive Covenants was Dr. Reddy's payments of the purchase price under Section 2.5 of the APA and Section 2.6 of the Royalty Agreement, as follows:

> 1. <u>Consideration for Restrictive Covenants</u>
>
> The parties hereto acknowledge and agree that the consideration for the agreement to make the payments provided in Section 2.5 of the Purchase Agreement and Section 2.6 of the Royalty Agreement from Buyer to the Consultants, in addition to the Consultant's willingness to provide services and advice during the Term, is the Consultant's compliance with the undertakings set forth in this Schedule 4.

Section 2.5 of the APA, entitled "Consideration", states:

> In consideration for the purchase of the Assets described herein the DR Parties shall (i) pay the Cash Consideration to APR at Closing [and] (ii) relinquish the Class B Unites.

Dr. Reddy's held the Class B Units in APR. Similarly, Section 2.6 of the Royalty Agreement, entitled "Consideration", states:

> In consideration of the purchase and/or transfer of the Transferred IP, the DR parties shall pay to APR (i) the Cash Consideration; and (ii) subject to the Set Aside, the Royalty on the sale of the Finished Product and Bulk [API] Product.

These provisions, read in conjunction with the language contained in Section 1 of Schedule 4 of the Consulting Agreement, demonstrates that the Restrictive Covenants were given in exchange for Dr. Reddy's payment of the purchase price under the APA and Dr. Reddy's payment of the purchase price under the Royalty Agreement (including the agreement to pay royalties for 21 years on the sale of the finished product and bulk APR product).

Furthermore, Section 8.10 of the Consulting Agreement provided:

> 8.10 Survival
>
> Sections 2.4, 4, 7.1-7.9, and 8, and Schedule 4 shall survive any termination or expiration of this Agreement.

This litigation arose after it was discovered that Lomans was independently developing a competing conjugated estrogen product. Lomans engaged with Nostrum Pharmaceuticals to discuss developing this competing product in May of 2012. Then in June and July of 2012, Lomans took concrete steps to begin development work. Lomans admits that he began to work independently from APR and Dr. Reddy's to develop a "new methodology" and met with Nostrum during the summer of 2012. Lomans contends that the Restrictive Covenants are invalid for lack of separate, independent consideration and as such, the alleged conduct was permissible.

By letter dated October 9, 2012, Lomans claimed that "Dr. Reddy's, APR and Reid have substantially breached their material obligations, and frustrated the purpose of the Agreement insofar as it relates to my consulting services thereunder… As a consequence of the foregoing, the Agreement is hereby terminated, and I have no further obligations to [Dr. Reddy's], APR and Reid thereunder." Dr. Reddy's argues that valid, independent consideration supported the Restrictive Covenants, and further that explicit survival language existed in the Consulting Agreement so as to make the Restrictive Covenants survive any termination of the agreement, even one caused by a material breach.

Fourth Party Plaintiff Dr. Reddy's has now upon the completion of discovery moved for summary judgment seeking to dismiss Count Ten of John Lomas' Third-Party Complaint against Dr. Reddy's. Previously on June 2014, Dr. Reddy's moved before the completion of discovery for summary judgment on the same issue present before the Court. Dr. Reddy's contended that the express statement in the contract – that the Restrictive Covenants were supported by separate, independent consideration – enabled this Court to declare that Restrictive Covenants remained in force irrespective of any alleged material breach of the Consulting Agreement. At that time, the Court declined to decide that issue on the basis that the issue of whether the Restrictive Covenants were supported by separate consideration was a question of intent, *i.e.*, a question of fact, as the issue may have been altered in discovery to the extent the parties developed any parol evidence that bore on the issue. Upon entry of the Court's prior Order and written decision, the parties exchanged extensive paper discovery and deposed all key witnesses. Dr. Reddy's contends and the Court finds that discovery did not reveal any extrinsic evidence outside the contract itself concerning the parties' intent relating to this issue.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

> "The determination whether there exists a genuine issue with respect to a material fact challenged requires the motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient

to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra at 523.

DECISION

Dr. Reddy's seeks summary judgment on Count Ten of John Lomans' Third Party Complaint against Dr. Reddy's. John Lomans' and the Nostrum Defendants filed opposition. The question presented to the Court is as follows: Whether the Restrictive Covenants contained in the Consulting Agreement between Lomans and Dr. Reddy's were separate, independent covenants divisible from the other obligations in the Consulting Agreement.

I. There is No Evidence that Contradicts the Plain Language of the Consulting Agreement, Which Unambiguously Provides that the Restrictive Covenants Are Supported by Independent Consideration.

Preliminarily, the Court disposes of the overarching issue of whether extrinsic evidence was revealed in the discovery process, and whether this purported extrinsic evidence has any bearing on this pending motion. At oral argument, there seemed to be some confusion as to what constitutes "extrinsic evidence". The New Jersey Supreme Court has defined extrinsic evidence as any evidence that "include[s] consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269-70 (2006). Courts in this jurisdiction may employ "a broad use of extrinsic evidence to achieve the ultimate goal of discovering the *intent of the parties*… [and] to uncover the true meaning of contractual terms." See id. at 270 (emphasis added). Extrinsic evidence assists in discerning the parties' intent; intent does not qualify as an independent form of extrinsic evidence.

In the instant matter, the Court previously found that Schedule 4 enumerated the agreed upon consideration to be given in exchange for the Restrictive Covenants. However, the Court

noted that whether the parties intended the consideration recited in Schedule 4 to serve as independent consideration for the Restrictive Covenants – thus rendering them severable from the rest of the Consulting Agreement – was a question of intent, which could present an issue of fact for the jury. The parties engaged in extensive discovery since the Court's previous Order and decision. The parties did not discover any evidence that the parties' intent differed from the plain language of the Restrictive Covenants. Upon thorough review of the parties' submissions, both written and oral, the Court finds that no discussions or negotiations regarding the Restrictive Covenants took place that would have any bearing on this issue. Additionally, the parties collectively acknowledged at oral argument that Mr. Lomans admitted that he simply did not read the Restrictive Covenants before signing them and had no understanding regarding whether the Restrictive Covenants were supported by separate consideration from the Consulting Agreement's other obligations. Therefore, the Court may interpret the terms of a contract as a matter of law, as there is no conflicting testimony or perceived uncertainty or ambiguity with respect to the meaning of the contract. See Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

II. There is No Genuine Issue of Fact Whether the Restrictive Covenants Are Supported by Separate, Independent Consideration.

Next, the Court disposes of John Lomans' contentions that the Restrictive Covenants were not supported by separate, independent consideration. "The interpretation or construction of a contract is generally a legal question, which is suitable for a decision on a motion for summary judgment." See Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 133 (App. Div. 2011) (internal citations omitted). It is well-established that the language of a contract should be construed by the Court – not a jury – and that it would be error to submit the question of the meaning of a contract to a jury unless there was some factual dispute regarding the meaning based on extrinsic evidence.

See, e.g., John S. Geiger Sons v. Edward M. Waldron, 100 N.J.L. 93, 94 (1924). In the instant matter, the contract was clear and unambiguous, and may be properly construed by the court as a question of law.

In interpreting a contract, a court generally turns first to a contract's plain language. See Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). A court's task is not to rewrite a contract better than or different from the one the parties wrote for themselves. See Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595, 775 A.2d 1262 (2001). A court should give contractual terms "their plain and ordinary meaning", *see* M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396, 794 A.2d 141 (2002), unless specialized language is used specific to a particular trade, profession, or industry, see VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 548, 641 A.2d 519 (1994). Additionally, in interpreting a contract, a court must consider it as a whole, without isolating certain provisions from others that pertain to the same subject. See Newark Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 425, 126 A.2d 348 (1956).

As a matter of law, independent covenants are enforceable against a non-breaching party even if the other party may have breached its obligations under the same contract. See Rothman Realty Corp. v. MacLain, 21 N.J. Super. 172, 174 (App. Div. 1952) (quoting Kinney v. Federal Laundry Co., 75 N.J.L. 497 (E. & A. 1907). In Rothman Realty Corp. v. MacLain, 21 N.J. Super. 172 (App. Div. 1952), the Appellate Division rejected the plaintiff's argument that it could avoid paying its former employees certain commissions by arguing that those employees breached their non-compete restrictive covenants, and the breach by one party did not relieve the other party from compliance with the terms of its contract. See Rothman Realty Corp., 21 N.J. Super. at 175. Therefore, any purported breach by Dr. Reddy's did not relieve Lomans of his contractual obligations under the Restrictive Covenants.

Contractual obligations are independent or divisible "when the part to be performed by one party consists of several distinct and separate items respecting which the consideration is apportioned to each item." Rothman Realty Corp. v. MacLain, 16 N.J. Super. 280, 284 (Ch. Div. 1951), aff'd, 21 N.J. Super. 172 (App. Div. 1952). Whether restrictive covenants are independent depends upon "the language and subject matter of the agreement." Riddlestorffer v. City of Rahway, 82 N.J. Super. 423, 428 (Ch. Div. 1964). The determination of whether independent consideration exists is "to be ascertained from the circumstances surrounding the agreement and contract itself." Studzinski v. Travelers Ins. Co., 180 N.J. Super. 416, 419-20 (Ch. Div. 1981). However, "[w]hether or not a contract is entire depends upon the intention of the parties. It is a mixed question of law and fact." Rothman Realty Corp., supra, at 283-84.

As previously held, by interpreting the plain language of the contractual agreements, the Court finds that the Restrictive Covenants were supported by separate consideration. Specifically, Section 1 of Schedule 4 provides:

> 1. Consideration for Restrictions and Covenants
>
> The parties hereto acknowledge and agree that the consideration for the agreement to make the payments provided in Section 2.5 of the Purchase Agreement and Section 2.6 of the Royalty Agreement from Buyer to the Consultants, in addition to the Consultant's willingness to provide services and advice during the Term, is the Consultants' compliance with the undertakings set forth in this Schedule 4.

The plain language of Section 1 of Schedule 4, inference to the restrictive covenants at issue, provides that payments were to be made in exchange for compliance with the covenants.

Additionally, by construing the contractual arrangement as a whole, the Court finds that the parties clearly intended that the Restrictive Covenants were independent and divisible covenants. See Newark Publishers Ass'n v, 22 N.J. at 425. The independence of the Restrictive Covenants from the Consulting Agreement is evidenced by the fact that the term of each Restrictive Covenant is tied expressly and directly to the duration of the Royalty Agreement, not

the Consulting Agreement. See Riddlestorffer v. City of Rahway, 82 N.J. Super. 423, 428 (Ch. Div. 1964). Each Restrictive Covenant expressly recites that it shall continue during the term of the Royalty Agreement plus a number of years thereafter. For example, the Confidentiality Restrictive Covenant in Section 2 of Schedule 4 prohibits Lomans from using and/or disclosing all Confidential Information during the term of the Royalty Agreement and any renewal thereof. Similarly, the Non-Compete Restrictive Covenant set forth in Section 4 of Schedule 4 prohibits Lomans from engaging in any activity, directly or indirectly, involving the development, manufacture, sale, or marketing of any product containing conjugated estrogrens during the term of the Royalty Agreement or until the Second anniversary of its termination. The parties agreed that the Royalty Agreement, including the Restrictive Covenants, could only be terminated if Dr. Reddy's breached its royalty payment obligations. Only non-payment of these payments would directly impact the terms of the Restrictive Covenants. There is no evidence in the record establishing that the Royalty Agreement has been terminated and, therefore, on their face, the Restrictive Covenants remain in effect during the term of the Royalty Agreement.

Moreover, the record shows that the parties intended that the Restrictive Covenants were integral and ancillary to the Royalty Agreement, and not the Consulting Agreement. See Rothman Realty Corp., supra, at 283-84. As previously held, the plain language of Dr. Reddy's agreement to make payments provided in Section 2.5 of the APA and Section 2.6 of the Royalty Agreement constitutes consideration recited for the Restrictive Covenants. Furthermore, there is no extrinsic evidence illuminating an ambiguity or differing interpretation among the parties. The Restrictive Covenants were executed as part of a larger transaction that included the APA, Royalty Agreement, and Consulting Agreement. Even if the Restrictive Covenants were executed in relation to or in

furtherance of this larger transaction, this fact would not render the Covenants indivisible from or subsumed by this transaction. The Restrictive Covenants stand alone, and are enforceable as such.

For the aforementioned reasons, Fourth Party Plaintiff Dr. Reddy's motion for summary judgment is **GRANTED**.