

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION**

EMERY SMITH,

CASE NO. 15-CA-001620

Petitioner/Counter-Respondent,

-v-

EMCYTE CORP.,

Respondent/Counter-Petitioner

And

PATRICK PENNIE,

Respondent/Counter-Petitioner.

**EMCYTE CORP.'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON PETITIONER/COUNTER-RESPONDENT'S
COUNT I CONCERNING ACCESS TO CORPORATE BOOKS AND RECORDS**

Respondent/Counter-Petitioner, EMCYTE CORP., (“EmCyte”) by and through its undersigned counsel, and pursuant to Rule 1.510, Florida Rules of Civil Procedure, moves this Court for the entry of a partial summary judgment in favor of EmCyte and against Emery Smith (“Smith” or “Petitioner”) on Count I of Petitioner/Counter-Respondent’s Amended Petition wherein Petitioner seeks access to the corporate books and records of EmCyte pursuant to Florida Statutes § 607.1602(1), (2) and (3) and §§ 607.1604 and 607.1605. As grounds for this Motion, EmCyte states that the disputes involved are strictly legal issues only and there are no genuine issues of material fact in dispute as to Count I. EmCyte is therefore entitled to a partial summary judgment on these issues as a matter of law. In support of its Motion, EmCyte alleges and states as follows:

STATEMENT OF UNDISPUTED FACTS

1. Prior to Petitioner’s filing of his Petition, via correspondence from his former counsel dated May 22, 2015, a true and correct copy of which is attached hereto as Exhibit A,

Petitioner demanded access to records of EmCyte, purportedly under the auspices of § 607.1602, Fla. Stat. (the “Demand Letter”).

2. Section 607.1602(1) provides that a shareholder is entitled to inspect and copy the limited corporate information set forth in § 607.1601(5).

3. Petitioner’s Demand Letter sought access to more documents than he would be entitled to inspect pursuant to §§ 607.1602(1) and 607.1601(5).

4. Section 607.1602(2) provides that a shareholder is entitled to inspect and copy additional corporate records upon complying with the provisions of § 607.1602(3).

5. Section 607.1602(3) required Petitioner to show that his demand was made in good faith and for a proper purpose. It also required him to describe with reasonable particularity both his purpose and the records he required. Finally, he was required to show that the demanded records were directly connected with the stated “proper purpose.” “Proper purpose” is defined at § 607.1602(9).

6. Petitioner’s Demand Letter failed to comply with the requirements of § 607.1602(3).

7. Section 607.1602(6) grants EmCyte the right to deny Petitioner’s demand for good cause.

8. EmCyte denied Petitioner’s demand for good cause by written correspondence date June 5, 2015, a true and correct copy of which is attached hereto as Exhibit B, because Petitioner’s demand was made for an improper purpose. Section 607.1602(6) specifically includes the following example of an improper purpose, which is directly applicable to Petitioner and it states “. . . has improperly used any information procured through any prior examination of the records of the corporation or any other corporation.”

9. Petitioner's improper activities with respect to the unauthorized use of EmCyte's confidential information in connection with his undisclosed business activities in competition with, and to the detriment of, EmCyte, are detailed in previously filed materials, including but not limited to, the affidavits and other materials filed in support of EmCyte's Motion for Partial Summary Judgment as to Liability on Counterclaim Counts I, IV, V and VI, on which EmCyte relies in support of this motion.

10. Subsequently, through the discovery process in the instant litigation, EmCyte has produced to Petitioner all documents which a shareholder would be entitled to inspect pursuant to §§ 607.1602(1) and (2), including those enumerated in § 607.1601(5).

STANDARD ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Rule 1.510(b), Florida Rules of Civil Procedure, provides that a "party against whom a ... counterclaim ... is asserted ... may move for summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." Fla. R. Civ. P. 1.510(b). Plainly, "summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents." *Ball v. Florida Podiatrist Trust*, 620 So.2d 1018, 1022 (Fla. 1st DCA 1993); *see also Robobar, Inc. v. Hilton Int'l Co.*, 870 So.2d 864 (Fla. 3d DCA 2004) (affirming summary judgment and trial court's interpretation of contract as a matter of law).

ARGUMENT

In Count I, Petitioner seeks two-fold relief: (a) an order compelling EmCyte to immediately produce its "books and records, including its past financial statements, account records, tax returns, meeting minutes, records of actions without meetings, notices, and communications with shareholders"; and (b) an award of costs and attorneys' fees "incurred reasonably by Smith in pursuit of these corporate records."

As to the first element of the relief requested, the undisputed material facts establish that Petitioner is not entitled to an order compelling production of corporate records. A condition precedent to Petitioner obtaining records under § 607.1602(2) required his compliance with the requirements of §607.1602(3)(a)-(c) and (9). However, Petitioner failed to comply with §1607.1602(3) and (9) and EmCyte was statutorily authorized to deny the demand for inspection under §607.1602(2) by establishing that Petitioner “...has improperly used any information procured through any prior examination of the records of the corporation or any other corporation” pursuant to §607.1602(6).¹ Nevertheless, EmCyte has subsequently produced all responsive documents through discovery in the instant case. Based upon EmCyte’s compliance with § 607.1601(5) and § 607.1602(1) and (2), EmCyte is entitled to a partial summary judgment finding that it has complied with and produced all records to which Petitioner would be entitled to under § 607.1601(5) and § 607.1602(1) and (2), despite Petitioner’s complete lack of compliance with § 607.1602(3).²

As to the second element of relief requested, the undisputed material facts establish that Petitioner is not entitled to an award of attorneys’ fees and costs. First, recoverability of attorneys’ fees and costs is conditioned upon entry of an order compelling the production of the records requested, to which Petitioner is not entitled (as discussed above). Second, Section 607.1604(3) provides that attorneys’ fees and costs should not be awarded where the corporation provides that it had a “reasonable basis for doubt about the right of the shareholder to inspect or copy the records demanded.” The undisputed material facts establish that EmCyte had such

¹ EmCyte retains the right to claim that Petitioner has improperly used, and continues to improperly use information of EmCyte for his sole and secret business enterprises and to the detriment of EmCyte in violation of §607.1602(6).

² In Count I, Petitioner also references § 607.1620 (governing the annual financial statements to be furnished to shareholders) and § 607.1605 (governing the access to corporate books and records by a director), as well as the corresponding fee provisions in each. However, no presuit demand was made for inspection under either of these sections, and the substance of Petitioner’s claim makes it clear that he seeks relief pursuant to § 607.1602. In any event, the financial discovery produced by EmCyte to date also encompasses all records which could be deemed subject to inspection pursuant to § 607.1620 or § 607.1605 as well.

“reasonable basis for doubt” at the time it denied Petitioner’s request. Therefore, Petitioner is not entitled to recover his attorneys’ fees.

In sum, the undisputed material facts establish that EmCyte is entitled to judgment in its favor on Count I of the Amended Petition.

WHEREFORE, EmCyte Corp. respectfully requests that this Court grant its Motion for Partial Summary Judgment as to Petitioner’s Count I of his Amended Petition, award EmCyte its attorneys’ fees and costs, and grant EmCyte such other equitable relief as this Court may allow.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed through the Court’s E-portal filing system and furnished by electronic mail to Emery Smith, P.O. Box 21767, El Sobrante, CA 94820 and 936 30th Street, Richmond, CA 94804; Andrew W. Lennox, Esq., and Casey R. Lennox, Esq., of Lennox Law, P.A., 5100 W. Kennedy Blvd., Ste. 120, Tampa, FL 33609 at alennox@lennoxlaw.com, clennox@lennoxlaw.com, and eservice@lennoxlaw.com; on this 26th day of March, 2018.

Respectfully Submitted,

GUNSTER, YOAKLEY & STEWART, P.A.
401 East Jackson Street
Suite 2500
Tampa, Florida 33602
Phone: (813) 222-6630
Fax: (813) 228-6739

By: s/ Kenneth G. M. Mather
KENNETH G.M. MATHER
Florida Bar #: 619647
Primary Email: KMather@gunster.com
Secondary Email: MWeaver@gunster.com
TKennedy@gunster.com
eservice@gunster.com

*Attorneys for Respondent/Counter-Petitioner,
EmCyte Corp.*

May 22, 2015

VIA U.S. Mail & EMAIL: kmather@gunster.com

Kenneth G. Mather, Esq.
Gunster Yoakley & Stewart P.A.
401 East Jackson Street, Suite 2500
Tampa, FL 33602

Re: Breaches by Patrick Pennie and the Corporation and Request for
Books and Records

Dear Mr. Mather:

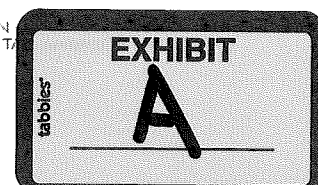
We represent Emery Smith who is the inventor of the Emcyte genesis system, and who first registered the patent for this product. He is also a founder and a shareholder of record of fifty percent of the common stock of Emcyte Corp. (the "Corporation"). We understand that you represent the Corporation, and that the Corporation's other fifty percent shareholder, Patrick Pennie, has not retained individual counsel.

Mr. Pennie attempted to freeze Mr. Smith out of the Corporation and to seize control of the Corporation for himself. His wrongful actions in that regard include unilaterally attempting to terminate Mr. Smith as an employee; locking Mr. Smith out of the Corporation's offices, publishing defamatory statements on the Corporation's website and making slanderous statements about Mr. Smith that affected the Corporation's client relationships.

Mr. Pennie also removed Mr. Smith from the Corporation's bank accounts, caused the Corporation to cease paying distributions to which Mr. Smith is entitled, and falsified corporate records to grant himself sole control over the Corporation's business affairs and to dilute Mr. Smith's ownership interest in the Corporation.

We also have reason to believe that Mr. Pennie transferred income and assets belonging to the Corporation to himself or other entities under his ownership or control. These egregious actions constitute gross shareholder oppression, a breach of fiduciary duty, and a serious violation of our client's rights as a shareholder.

On behalf of Mr. Smith we demand that the Corporation immediately: 1) reinstate Mr. Smith as an officer of the Corporation; 2) pay "back pay" to Mr. Smith from the date of his



purported termination through the date of his reinstatement; 3) restore Mr. Smith's access to the Corporation's offices and bank accounts; 4) remove the defamatory statements about Mr. Smith that are published on the Corporation's website and in any other published materials by Mr. Pennie or the Corporation; 5) post a retraction of the defamatory statement with simultaneous efforts to retract slanderous statements about Mr. Smith; and 6) rescind any purported transfers or issuances of shares of the Corporation's voting or non-voting stock. Failure to do so will result in immediate legal action being taken against the Corporation and Mr. Pennie.

Additionally, pursuant to section 607.1602 of the Florida Statute, we request that the Corporation make the following records available for our inspection and copying within fourteen (14) days following receipt of this letter:

1. The articles of incorporation and by-laws of the Corporation, together with amendments;
2. All agreements among the shareholders of the Corporation, together with amendments;
3. All minutes of regular or special meetings of the board of directors and corporate resolutions of the Corporation;
4. Records of any action taken by the shareholders or the board of directors without a meeting during the past three years;
5. Copies of all stock certificates of the Corporation;
6. The stock certificate ledger for the Corporation;
7. A current list of the shareholders of the Corporation, which reflects the shares owned, by each shareholder, including all voting and non-voting shares;
8. The current rate of compensation, including benefits and bonuses paid to the officers, directors or shareholders of the Corporation;
9. The current rate of compensation, including benefits and bonuses paid to any relatives of the officers, directors or shareholders of the Corporation;
10. Copies of all contracts or agreements between the Corporation and any officers, directors, shareholders or affiliates of such parties entered into at any time during the past three years;
11. A description of any offer to purchase the stock or assets of the Corporation, including the name of the prospective purchaser, proposed purchase price and terms of the offer received by the Corporation, within the past three (3) calendar years;

12. All tax returns and any tax reports filed by the Corporation during the past three years, including payroll tax returns;

13. All payroll tax returns for the Corporation from January 1, 2013 to date;

14. The complete financial statements and accounting records of the Corporation for the past three years, including, but not limited to, all balance sheets, income statements, statements of operations, and general ledgers;

15. All statements for any and all bank accounts maintained by the Corporation during the past three years, including persons granted signatory authority to those accounts;

16. All documents evidencing any trademarks, patents or licensing agreements, or applications for any trademarks, patents or licensing agreements, or assignments of any trademarks, patents, or licenses, for the Corporation, together with any assignments of any such rights;

17. Records of sums received from any distributor or customer of the Corporation for the period from January 1, 2013 to the present date;

18. Records of accounts receivable of the Corporation from January 1, 2013 to the present date;

19. All agreements between the Corporation and any distributor or customer, including any amendments;

20. All communications between you and Mr. Pennie regarding the wrongful unilateral termination of Mr. Smith, the drafting or amendment of any shareholders' agreements, or the issuance of any additional shares of stock in the Corporation;

21. All invoices for services or communications regarding retainers of services rendered by you and your firm to the Corporation or to Mr. Pennie since January 1, 2013; and

22. Any other documents and communications relating to this matter.

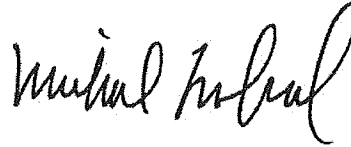
The purposes of the inspection are to enable us to ascertain the value of Mr. Smith's interest in the Corporation, to obtain information on the details of the Corporation's business and status of its affairs, and to determine the extent of all possible and continuing improprieties in the management or operation of the Corporation.

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Please note that our investigation of this matter is ongoing. Accordingly, this letter of demand does not waive or abandon any rights for Mr. Smith to assert any claims or remedies available to him under the law.

Very truly yours,

ROETZEL & ANDRESS, LPA

A handwritten signature in black ink, appearing to read "Michael J. Furbush". The signature is written in a cursive style with a large, looping initial "M".

Michael J. Furbush

MJF/js



GUNSTER
FLORIDA'S LAW FIRM FOR BUSINESS

Pending Number: P37320
Writer's Direct Dial: (813) 222-6630
Writer's E-Mail Address: KMaffner@gunster.com

June 5, 2015

Via U.S. Mail & Email: mfurtbush@ralaw.com

Michael J. Furbush, Esq.
Roetzel & Andress, LPA
420 South Orange Avenue
CNL Center II, 7th Floor
Orlando, FL 32801

Re: *EmCyte Corporation/Emery Smith*

Dear Mr. Furbush:

I understand that you and the other members of your Firm are fine attorneys and I hope that we can establish a working relationship as to the matters raised in your May 22, 2015 letter. It has happened to us all that we have had clients who have provided stories that sound very believable, but upon deeper examination prove to be otherwise. Based upon the statements, assertions, comments and tone of your letter, which I ascribe to Mr. Smith, this appears to be what has happened here.

For these purposes, suffice it to say that the underpinnings of your letter provided to you by Mr. Smith are fundamentally false. Just as importantly, you should be aware that Mr. Smith is engaging in a course of conduct and a pattern of performance that breaches both his fiduciary and contractual duties owed to EmCyte, its related entities and Patrick Pennie. His activities include, but are certainly not limited to usurpation of corporate opportunities, breach of contracts, and defamation. You do not need to take my word for it. You should ask Mr. Smith to disclose all of his business relationships and activities to you. Once you understand what he is really doing, then I believe that you will appreciate the true nature and circumstances involved herein.

As a quick example of Mr. Smith's disregard of his corporate duties, you should inquire of him as to what he has disclosed to non-EmCyte personnel, including a Jill Lynch who has been representing to people that she is Mr. Smith's counsel. Ms. Lynch and a woman cohort recently engaged in a raid of the EmCyte offices, accompanied by a Fort Myers police officer. Ms. Lynch represented to Mr. Pennie upon her gaining entry to the offices that she and the other woman were lawyers. They are not. At least the Bar for the State of Florida has no record of them being lawyers. We must assume that they likely misrepresented the same to the police officer. This is just one example of Mr. Smith's tactics and why he cannot be trusted with confidential information of EmCyte or any other of the entities.

EXHIBIT

B

tabbles

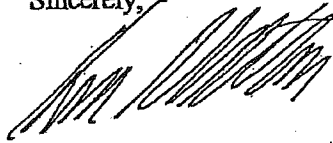
EmCyte Corporation
June 5, 2015
Page 2

Due to Mr. Smith's unfettered usurpation of corporate opportunities, breaches of his fiduciary and contractual duties and his defamation of EmCyte, its related entities, its products and the personnel, including Mr. Pennie, there is just and sufficient cause to prohibit Mr. Smith from having access to any of the corporate information.

Please be advised that Mr. Smith is hereby demanded to cease and desist from engaging in his continuing breaches of his fiduciary and contractual duties, of which he has clearly not informed you.

Please be further advised that Mr. Pennie is represented by Andrew Lennox, who I am copying on this correspondence. I am going to be out of the country from June 11, 2015 until June 22, 2015. Out of respect to you and your Firm, we are willing to engage in further discussions with you about resolving these matters upon my return. However, if Mr. Smith fails to cease in his continuing breaches of his fiduciary and contractual duties, which are causing ongoing and continuing damages to EmCyte, then we can expect any such further communications to be pointless.

Sincerely,



Kenneth G.M. Mather

KGM/mw

cc: Andrew W. Lenox, Esq.
Lennox Law, P.A.
4905 S. Westshore Blvd.
Tampa, Florida 33611
(813) 831-3800