

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12  
Justice

- - - - - x

KABCO PHARMACEUTICALS, INC.,

Plaintiff,

Index No.: 3551/05

- against -

Motion Date: 1/23/08

INDEPENDENT CHEMICAL CORPORATION,

Motion No.: 10

Defendant.

Motion Seq. No. 1

- - - - - x

The following papers numbered 1 to 12 on this motion:

	<u>Papers Numbered</u>
Defendant's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s) & Memorandum of Law	1-5
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	6-9
Defendant's Reply Affirmation-Exhibit(s) & Memorandum of Law	10-12

By notice of motion, defendant seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of plaintiff's complaint and summary judgment on defendant's counterclaims.

Plaintiff files an affirmation in opposition and defendant files a reply.

Plaintiff, Kabco Pharmaceuticals, Inc. (Kabco), is a New York Corporation and a manufacturer and distributor of vitamins, herbal supplements and dietary supplements. Defendant, Independent Chemical Corp. (ICC), is a New York Corporation engaged in the wholesale distribution of chemical products.

Plaintiff files a complaint alleging five (5) causes of

action, including: (1) Breach of Warranty of Merchantability; (2) Breach of Implied Warranty of Fitness for a Particular Purpose; (3) Breach of Express Warranty; (4) Fraud in the Inducement; and, (5) Fraudulent Misrepresentation.

The underlying dispute involves plaintiff's purchase from defendant and defendant's supply of three particular chemical products, namely: (a) Saw Palmetto Powdered Extract with 40-45 percent Fatty Acid; (b) Dehydroepiandrosterone (DHEA); and, Chrysin Powder (Chrysin).

Plaintiff alleges that in violation of the parties' agreement, defendant provided chemicals with zero potency, rendering them useless for their intended purpose. Defendant denies this claim and still "stands by its products" and maintains, moreover, that plaintiff's claims regarding the product's unsuitability and plaintiff's subsequent rejection of the products was untimely.

Each side relies on the Uniform Commercial Code in support of their contentions.

Defendant maintains that pursuant to Uniform Commercial Code Provisions (UCC) §§ 2-602, 2-606, and § 2-607 concerning acceptance and rejection of goods, plaintiff failed to reject the goods offered, after they were accepted, in a reasonable time.

Defendant also relies on UCC provision 2-719 and the parties' purchase order agreement which they maintain required plaintiff to reject the goods, if at all, within fifteen (15) days of the date of delivery.

Plaintiff maintains that pursuant to UCC § 2-608 and UCC § 2-607(3)(a), their rejection of the delivered chemical products was reasonable under the circumstances and that such a determination is, moreover, a question of fact not susceptible to summary judgment.

In addition, plaintiff argues the difficulty of discovery of the defect and plaintiff's reliance on defendant's assurances of the quality of the product. Such reliance plaintiff argues, bars the defenses claimed by defendant and that defendant is in fact equitably estopped from asserting them.

Moreover, plaintiff maintains that defendant engaged in fraudulent practices by representing to plaintiff, by Certificates of Analysis with each delivery that the chemicals were of suitable quality.

It is undisputed that plaintiff received four (4) deliveries of Saw Palmetto from defendant between February 2, 2004 and April 1, 2004, for which they paid defendant \$83,750. Plaintiff received one (1) order of DHEA from defendant on June 1, 2004 for which they paid \$11,200. Between February 13, 2004 and July 14, 2004, plaintiff received five (5) deliveries of Chrysin for which they paid \$56,982. Finally, defendant sent plaintiff four (4) more orders of chemical products from April 4, 2004 to October 4, 2004, for the total sum of \$19,545.75, for which defendant has yet to receive payment.

Defendant maintains that plaintiff did not convey their rejection of the Saw Palmetto until September 2004, some seven (7) months after the first delivery. The Chrysin was not rejected by plaintiff until March of 2005, some eleven (11) months after the first delivery. Defendant argues further that although plaintiff has its own quality assurance department, they made no use of it.

Finally, defendant relies on the language on the back of the purchase order agreement which indicates that although the seller warrants that their products will meet the specifications agreed to, in writing, they provide no warranty of merchantability or fitness for the purpose (intended).

The purchase order also includes language stating that the buyer shall report damages or defects within fifteen (15) days of delivery. Any legal action regarding purchases is to be commenced within one (1) year of the date of purchase.

Plaintiff responds that each delivery of product was accompanied by a Certificate of Analysis prepared by the defendant seller averring a certain potency. The Saw Palmetto, for instance, included a Certificate of Analysis identifying the lot number, indicating that the product had the requisite potency and was produced in the United States in September 2003.

In August of 2004, after plaintiff used the Saw Palmetto in the production of a vitamin they then sold, their customer notified them that the product they received contained Saw Palmetto with zero potency.

Plaintiff complained to defendant. In response defendant sent plaintiff additional Certificates of Analysis purporting to be for the same Saw Palmetto delivery which stated that the product was produced in India, not the United States, in May 2004, not September 2003.

Following this exchange, plaintiff had the Saw Palmetto tested three (3) times by an independent lab, with the same result of zero potency. Plaintiff also asked defendant to test the Saw Palmetto by "dual sample," that is by taking two (2) samples at the same time, from the same batch, labeling them and sending them to a lab for testing. Defendant refused to proceed in this manner and maintained instead that they sent the sample themselves resulting in a showing of the requisite 45 percent fatty acid potency. Plaintiff maintains that the lab in question said they never received a separate sample from defendant.

Finally, in March of 2005, another of plaintiff's customers complained that their product contained DHEA with zero potency. Following that, plaintiff decided to test the Chrysin they had received and found that it also registered zero potency.

Part 6 of the Uniform Commercial Code entitled Breach, Repudiation, and Excuse provides in general terms that "partial acceptance in good faith is recognized and the buyer's remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred." Official Comment, McKinney's § 2-601, Uniform Commercial Code, p. 68.

It is apparent under the facts and circumstances presented that there remains numerous material questions of fact as to whether plaintiff effectively "accepted" the products with a reasonable opportunity to reject them, pursuant to UCC § 2-606; or that if plaintiff effectively accepted the goods provided by defendant, rejected the same as nonconforming. UCC § 2-607(3)(a); or whether plaintiff's revocation of their acceptance because the goods' nonconformity constituted an impairment of its value was reasonably induced by the seller's assurances. UCC § 2-608(b).

As the courts have consistently held, "...timely rejection is generally a question of fact..." New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc., 28 AD3d 175, 178, 809 NYS2d 70, and will be considered in light of the reasonableness of the notice after discovering the nonconformity (Suraleb, Inc. v. International Trade Club, Inc., 13 AD3d 612, 613, 788 NYS2d 403; whether or not there was "fraudulent inducement..." on the part of the seller (Gem Source Intern, Ltd v. Gem Works, NS, LLC, 258 AD2d 373, 375, 685 NYS2d 682; whether plaintiff reasonably relied on the seller's assurances, UCC § 2-608(b), thereby delaying the discovery of the nonconformity, DC Leathers v. Gelmart Indus., 125 AD2d 738, 740, 509 NYS2d 161; or finally, whether the alleged nonconformity in this instance "...substantially impaired its value to the plaintiff." Urquhart

v. Philbor Motors Inc., 9 AD3d 458, 459, 780 NYS2d 176.

In this instance it is apparent that summary judgment is not warranted as there are numerous issues of fact which must be tried. (See Alvarez v. Prospect Hospital, 68 NY2d 320).

Accordingly, upon all of the foregoing, defendant's motion is denied.

Dated: Jamaica, New York  
April 8, 2008

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**JOSEPH P. DORSA**  
**J.S.C.**