

**QK Healthcare, Inc. v Cirrus Healthcare Products,
LLC**

2007 NY Slip Op 30055(U)

March 7, 2007

Supreme Court, Suffolk County

Docket Number: 0009283

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 6-28-06
SUBMITTED: 1-10-07
MOTION NO.: 003-MOT D

QK HEALTHCARE, INC.,

Plaintiff,

-against-

CIRRUS HEALTHCARE PRODUCTS, LLC,

Defendant.

EDWARDS ANGELL PALMER & DODGE, LLP
Attorneys for Plaintiff
750 Lexington Avenue
New York, New York 10022

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
Attorneys for Defendant
225 Old Country Road
Melville, New York 11747

Upon the following papers numbered 1 to 9 read on this motion to dismiss ; Notice of Motion and supporting papers 1-5 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6-8 ; Replying Affidavits and supporting papers 9 ; it is,

ORDERED that the motion by the defendant for an order dismissing the complaint is granted to the extent indicated below; and it is further

ORDERED that counsel for the parties are directed to appear for a preliminary conference which shall be held on April 13, 2007 at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez**, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see*, **Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the

pleading has a cause of action, not whether he has stated one (*see, Leon v Martinez, supra; Guggenheimer v Ginzburg, supra; Rovello v Orofino Realty Co., supra*).

Applying these principles to the case at bar, the court finds that the plaintiff has set forth sufficient factual allegations to survive dismissal of its breach-of-contract claim and that such claim is not defeated as a matter of law by the documentary evidence. Accordingly, the defendant's motion to dismiss is denied as to the plaintiff's first cause of action sounding in breach of contract.

The plaintiff's second cause of action sounds in unjust enrichment. A cause of action pursuant to a quasi contract theory only applies in the absence of an express agreement and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (*see, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388*). When, as here, there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract (*see, Alamo Contract Builders v CTF Hotel Co., 242 AD2d 643*). Accordingly, the second cause of action is dismissed.

A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. When, as here, the plaintiff alleges that it was induced to enter into a transaction because the defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and, therefore, involves a separate breach of duty (*see, First Bank of the Americas v Motor Car Funding, 257 AD2d 287, 291-292 [and cases cited therein]*). Accordingly, the defendant's motion to dismiss is denied as to the plaintiff's third and fourth causes of action sounding in fraud and negligent misrepresentation.

HON. ELIZABETH HAZLITT EMERSON

DATED: March 6, 2007

J. S.C.