

H.D. Smith Wholesale Drug Co. v Custom LTC, LLC
2009 NY Slip Op 30399(U)
February 9, 2009
Supreme Court, New York County
Docket Number: 650090/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 650090/2007

H.D.SMITH WHOLE SALE DRUG CO.

VS.

CUSTOM LTC.LLC.

SEQUENCE NUMBER : 002

COMPEL

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decision Attached.

is decided w/memo

FILED

FEB 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated:

2/9/09

HON. JUDITH J. GISCHE

J.S.G.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

H.D. SMITH WHOLESALE DRUG CO.,

Plaintiff,

-against-

CUSTOM LTC, LLC,

Defendant.

DECISION/ORDER

Index No.: 650090/07

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers

	Number
Pltff n/m (compel), w/BK affirm, exhs	1
JF affid in opp, MIS affirm, exhs	2
Pltff BK reply affirm, exhs	3

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NEW YORK

Upon the foregoing papers the court's decision is as follows:

Plaintiff moves for an order compelling defendant to respond to plaintiff's discovery demands or alternatively, for an order deeming certain disputed issues of fact resolved because defendant has not complied with such discovery demands. Defendant opposes the motion. For the reasons that following, the motion is denied in its entirety.

This is an action for goods sold and delivered, breach of contract and account stated. Each cause of action arises out of the same set of operative facts, namely, the plaintiff's sale of certain Accu-Check strips ("strips") manufactured by Roche Diagnostics Corporation ("Roche") to defendant, a non-retail pharmacy. In the complaint, plaintiff

alleges that pursuant to contract, plaintiff was entitled to collect overcharges calculated by Roche when Roche determined that the strips ordered and accepted by defendant were not eligible for certain lowered pricing because defendant ordered and accepted retail versions of the strips as opposed to strips designated "not for resale." Plaintiff then issued an invoice for the overcharges which plaintiff now seeks to collect on under its goods sold and delivered cause of action. As for the breach of contract claim, plaintiff alleges that defendant breached its obligations to plaintiff by failing to pay all sums due under a Group Purchase Organization and Contract Designation Form and New Account Credit Application (the "Contracts"), each signed by the parties on July 13, 2006.

Plaintiff previously moved for summary judgment (motion sequence number 001). By decision and order of the court dated April 4, 2008, that motion was denied by the court, which held, *inter alia*:

A reasonable trier of fact could conclude, based on the record before this court, that plaintiff merely sent the wrong products to defendant and that plaintiff is responsible for the overcharges calculated by Roche as a result thereof.

Moreover, while plaintiff factually maintains and seeks to impute to defendant knowledge that the products it received should have been "prominently labeled 'Not for Sale in Retail Outlets' ", plaintiff has not submitted any proof to support this claim.

Based on the invoices with number corresponding to both retail and non-retail products, the testimony of Fogel that plaintiff's representatives made errors in processing defendant's orders, and other documents and emails submitted to the court, there are issues of fact as to whether defendant ordered the non-retail products, or rather, just the products themselves, or whether plaintiff erred in shipping the retail products to defendant, and, therefore, whether plaintiff or defendant should be responsible for the overcharge calculated by Roche.

Plaintiff now claims that defendant has refused to respond to certain

interrogatories numbered 4, 7, and 8, contained in Plaintiff's First Set of Interrogatories dated June 19, 2008. Interrogatory number 4 seeks the, *inter alia*, the identity of "each and every person to whom [defendant] sold strips to during the relevant time period..." Interrogatory number 7 calls for the identity of "[a]ll agreements, both written and oral, entered into at any time between [defendant] and any person to whom [defendant] sold strips..." Interrogatory number 8 requests defendant to identify each Group Purchasing Agreement entered into by defendant at any time.

Plaintiff also maintains that defendant has wrongfully failed to produce certain documents requested in Plaintiff's First Set of Document Demands dated June 19, 2007, to wit: [1] defendant's operating agreement, membership agreement, by-laws and amendments thereto; [2] correspondence exchanged between any Group Purchasing Organization and defendant; and [3] all documents concerning all business transactions entered into between defendant and any other person concerning the strips. Plaintiff maintains that the discovery sought is relevant because whether defendant used the strips for its "own use" or redistributed is germane to the instant dispute.

Based on the affidavit of Jordan Fogel, Vice-President of defendant, defendant makes the following arguments. Defendant objects to plaintiff's request for any information that would require defendant to disclose to whom it sold the strips because defendant claims that such information is confidential and proprietary. Mr. Fogel maintains that defendant cannot produce any correspondence between another group purchasing organization related to the strips because this was defendant's first purchase of strips and therefore, no prior purchasing history exists. Finally, defendant maintains

that any other outstanding discovery requests are irrelevant and immaterial to the dispute at issue.

Discussion

CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id. The burden of showing that the disclosure sought is improper is upon the party seeking the protective order. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1st Dept 1994).

Leaving aside defendant's argument that the identity of its customers constitutes a trade secret, plaintiff's application for information pertaining to defendant's customers is a fishing expedition. Plaintiff claims that defendant's sale of the strips to "resale pharmacies would constitute a breach of its covenant to H.D. Smith, Roche and MedAssets." However, plaintiff has failed to establish that defendant made a covenant to plaintiff that it would not sell the strips to resale pharmacies. Rather, plaintiff has alleged that defendant breached the Contracts when it failed to pay plaintiff what plaintiff claims is due and owing. Therefore, in the context of this action, it is of no moment whether defendant sold the strips to resale pharmacies, or not. Furthermore, plaintiff has provided a copy of its contract with Roche, however this contract is irrelevant because

plaintiff's claims are not based on enforcing this contract against defendant, who is not even a party to that contract. Accordingly, plaintiff's motion to compel defendant to respond to Interrogatories numbered 4 and 7 as well as the document request concerning all business transactions entered into between defendant and any other person concerning the strips.

Plaintiff has also failed to demonstrate a basis for its claimed entitlement to the identification of every Group Purchase Agreement entered into by defendant as well as all correspondence exchanged between any Group Purchasing Organization and defendant. Moreover, Mr. Fogel has stated in his affidavit that this is the first time that defendant has purchased the strips. Similarly, plaintiff has also failed to articulate any basis for why defendant's operating agreement, membership agreement, and by-laws should be discoverable. Based on the foregoing, the court finds that these discovery demands are overbroad and burdensome, and are unlikely to lead to information that would shed light on any of plaintiff's claims in this action. Accordingly, plaintiff's motion to compel is denied in its entirety.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 9, 2009

So Ordered:

Hon. Judith J. Gisch

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