

| |
|--|
| H.D. Smith Wholesale Drug Co. v Custom LTC, LLC |
| 2009 NY Slip Op 31156(U) |
| May 22, 2009 |
| Supreme Court, New York County |
| Docket Number: 650090/07 |
| Judge: Judith J. Gische |
| 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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 650090/2007

H.D.SMITH WHOLE SALE DRUG CO.

vs

CUSTOM LTC.LLC.

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED

MAY 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/22/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X

H.D. SMITH WHOLESALE DRUG CO.,

Plaintiff,

-against-

CUSTOM LTC, LLC,

Defendant.

DECISION/ORDER

Index No.: 650090/07

Seq. No.: 003

Present:

Hon. Judith J. Gische

J.S.C.

-----X

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

Papers

| | | |
|--|----------|---|
| Pltff n/m (reargue), w/BK affirm, exhs | Numbered | 1 |
| MIS affirm in opp, exhs | | 2 |
| Pltff BK reply affirm, exhs | | 3 |

FILED
MAY 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff moves to reargue it prior motion 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. The motion is limited to that portion of the court's prior Decision/Order dated February 9, 2009, which denied plaintiff's motion to compel defendant to respond to Interrogatories Nos. 4 and 7. Defendant opposes the motion. For the reasons that follow, the motion to reargue is denied.

A motion to reargue is addressed to the discretion of the court and is intended to

afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law (CPLR § 2221 [d] [2]). Its purpose is not, however, to enable the unsuccessful party to argue once again the very questions decided against him or her (Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]). Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application (id.).

Plaintiff argues that the court overlooked and/or misapprehended a two-page document annexed as Exhibit "F" to the October 24, 2008 Kobroff Affidavit submitted on the prior motion. The first page of this document is on defendant's letterhead, pertinent portions of which are as follows:

To: Vendors/Manufacturers/Distributors

From: MedAssets Supply Chain Systems, Inc. Member

This document serves as written confirmation of a primary group purchasing relationship between MedAssets Supply Chain Systems, Inc. ("MedAssets") and [defendant]. Any and all previous correspondence regarding this customer is superceded by this declaration.

Customer acknowledges that all purchases made through MedAssets' agreements are for "Own Use" as provided in the Robinson Patman Act and the Supreme Court's ruling in Abbott Laboratories vs. Portland Retail Druggist Association.

The first page of the document shall be hereafter referred to by the court as the "Member Memo." The Member Memo is signed by Jordan Fogel, Vice President of the defendant. The second page of the document is entitled Participation Agreement, dated July 24, 2006, and is an agreement entered into by MedAssets and defendant, by which MedAssets agreed to provide defendant access to MedAssets' portfolio of vendor contracts for the procurement of supplies, services and equipment.

Plaintiff claims that by virtue of the Member Memo, defendant covenanted to plaintiff that it would not re-sell the strips it purchased from plaintiff to pharmacies, but rather, would purchase strips for its "Own Use" only. Based on these claims, plaintiff argues that it is relevant and discoverable for defendant to know if defendant used the strips for its own use, and/or if defendant resold the strips in violation of its "covenant" to plaintiff contained in the Member Memo.

The motion to reargue must be denied because plaintiff has failed to establish that the court overlooked the Member Memo or the Participation Agreement. In the complaint, plaintiff has alleged three causes of action, to wit: goods sold and delivered, account stated and breach of contract. Neither the Member Memo, nor the Participation Agreement form the basis for plaintiff's breach of contract cause of action, and therefore, plaintiff's argument that these documents establish the relevancy of the discovery sought is unavailing. Plaintiff's breach of contract claim is premised upon a "Credit Application" "GPO and Contract Designation Form" signed by Mr. Fogel on July 13, 2006 (the "GPO").

The GPO provides, in pertinent part:

[Defendant] understand[s] that if a pricing discrepancy is identified by [plaintiff], a partnering buying group, [a plaintiff] supplier or a customer, [plaintiff] will credit and/or rebill [defendant] upon verification of the discrepancy subject to [plaintiff's] Return Goods Policy. Since [plaintiff], under contractual pricing, often sells merchandise to [defendant] at a price below its wholesale acquisition cost and must receive supplier chargebacks to recover its cost for merchandise, supplier determinations of group or item eligibility for [defendant] are binding on both [plaintiff] and [defendant] Adjustments of any pricing extended to [defendant] for which [defendant] is subsequently determined to be ineligible is the responsibility of [defendant].

Plaintiff alleges in the complaint that defendant breached the GPO by failing to pay back price adjustments levied by Roche based upon defendant's ineligibility for

discounted pricing originally extended to defendant. The Member Memo, Participation Agreement, and whether defendant used the strips for its own use, or resold the same, is not material or relevant to plaintiff's claim that defendant is responsible for paying Roche's higher pricing pursuant to the terms of the GPO.

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
May 22, 2009

So Ordered:


Hon. Judith J. Gische, J.S.C.

FILED
MAY 27 2009
COUNTY CLERK'S OFFICE
NEW YORK