

Everyday Group LLC v GW Supermarket of N. Blvd., Inc.
2011 NY Slip Op 31196(U)
April 25, 2011
Sup Ct, Queens County
Docket Number: 34162/09
Judge: Orin R. Kitzes
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Short Form Order**NEW YORK SUPREME COURT -QUEENS COUNTY****PRESENT: ORIN R. KITZES****PART 17****Justice**

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**EVERYDAY GROUP LLC,
Plaintiff,****Index No.: 34162/09
Motion Date: 4/20/11
Calendar Number: 13****-against-****GW SUPERMARKET OF NORTHERN BLVD., INC.,
GREAT WALL SUPERMARKET OF N.Y., INC.,
GW OF FLUSHING I, INC, GW SUPERMARKET, INC.,
C-MART HERALD STREET, INC.,
C-MART SUPERMARKET II, INC.,
C-MART SUPERMARKET, INC.,
GREAT WALL SUPERMARKET OF VA, INC.,
Defendants.**

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The following papers numbered 1 to12 read on this motion by plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in its favor and granting it judgments against the defendants in sums certain.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum in Support.....	5
Affirmation in Opposition-Exhibits.....	6-8
Memorandum in Opposition.....	9
Affidavit in Support-Affirmation in Reply.....	10-11
Reply Memorandum of Law.....	8-9

Upon the foregoing papers it is ordered that the motion by plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in its favor and granting it judgments against the defendants GW SUPERMARKET OF NORTHERN BLVD. INC., a/k/a FLUSHING SUPERMARKET, INC., in the amount of Fourteen Thousand Three Hundred and Fifty Four Dollars and Ninety One Cents (\$14, 353.91); GREAT WALL SUPERMARKET OF NEW YORK INC., a/k/a GREAT WALL SUPERMARKET OF ELMHURST, in the amount of Seventeen Thousand One Hundred Eighty Nine Dollars and Thirty Three Cents (\$17,189.33); GW OF FLUSHING I, INC. in the amount of Thirty Thousand Seven Hundred Seventy Five Dollars and Ninety Cents (\$30,755.90); GW SUPERMARKET, INC., in the amount of Thirty One Thousand Five Hundred Sixty Two Dollars and Twenty Severed Cents (\$31,562.27); C-MART HERALD STREET, INC., in the amount of Eleven Thousand Five Hundred Forty Five Dollars and Fifty Five Cents (\$11,545.55); C-MART SUPERMARKET II,

INC., a/k/a C-MART SUPERMARKET OF BOSTON, in the amount of Three Thousand Nine Hundred Twelve Dollars (\$3,912.00); C-MART SUPERMARKET, INC., a/k/a C-MART I OF BOSTON, in the amount of Six Thousand Six Hundred Eighty Four Dollars and Sixty Eight Cents (\$6,684.68) GREAT WALL SUPERMARKET OF VA. INC., in the amount of Fourteen Thousand Four Hundred Twenty Six Dollars and Five Cents (\$14,426.05), is denied, for the following reasons:

This is an action to recover amounts due to plaintiff from defendants for goods sold and delivered. According to the complaint, between the dates of April 2009 and June 2009 defendants ordered certain goods, wares and merchandise from Plaintiff. Such goods, wares and merchandise were delivered and accepted by the following defendants who were then billed by Plaintiff as follows: GW SUPERMARKET OF NORTHERN BLVD. INC., a/k/a FLUSHING SUPERMARKET, INC., in the amount of Fourteen Thousand Three Hundred and Fifty Four Dollars and Ninety One Cents (\$14,353.91); GREAT WALL SUPERMARKET OF NEW YORK INC., a/k/a GREAT WALL SUPERMARKET OF ELMHURST, in the amount of Seventeen Thousand One Hundred Eighty Nine Dollars and Thirty Three Cents (\$17,189.33); GW OF FLUSHING I, INC. in the amount of Thirty Thousand Seven Hundred Seventy Five Dollars and Ninety Cents (\$30,755.90); GW SUPERMARKET, INC., in the amount of Thirty One Thousand Five Hundred Sixty Two Dollars and Twenty Seven Cents (\$31,562.27); C-MART HERALD STREET, INC., in the amount of Eleven Thousand Five Hundred Forty Five Dollars and Fifty Five Cents (\$11,545.55); C-MART SUPERMARKET II, INC., a/k/a C-MART SUPERMARKET OF BOSTON, in the amount of Three Thousand Nine Hundred Twelve Dollars (\$3,912.00); C-MART SUPERMARKET, INC., a/k/a C-MART I OF BOSTON, in the amount of Six Thousand Six Hundred Eighty Four Dollars and Sixty Eight Cents (\$6,684.68) GREAT WALL SUPERMARKET OF VA. INC., in the amount of Fourteen Thousand Four Hundred Twenty Six Dollars and Five Cents (\$14,426.05) According to plaintiff, defendants accepted the goods, wares and merchandise and have not returned them nor have any goods been effectively rejected, nor has a revocation of acceptance occurred under the definitions of UCC 2-602 and 2-608 and no payments have been made by the defendants in satisfaction of the amounts invoiced to them at the time of sale and delivery to date.

Plaintiff brought the present action for recovery in connection with nonpayment for the aforementioned goods sold and delivered. There are eight causes of action, each sounding in breach of contract and set forth as against each defendant in the amount set forth above. In their Answer, defendants denied generally the allegations of the complaint and alleged multiple affirmative defenses including contributory negligence, alleging mainly that plaintiff violated laws in mislabeling, altering, changing and/or deleting the expiration dates from the goods sold and delivered to defendants.

Plaintiff has now moved for an order granting summary judgment in its favor and against defendant, in the sums set forth above as against each defendant. In support of its motion, plaintiff has submitted, *inter alia*, an affidavit of Lisa Xui Qing Su, President of Plaintiff EVERYDAY GROUP, LLC, (“Everyday”). She states that Plaintiff sold goods to the defendants between April 2009 and July 2009, as set forth in the invoices which have been submitted to this Court, which defendants agreed to pay but have failed to do so. Plaintiff provided defendants, along with the goods, invoices, with the total amounts as set forth above. Ms. Xui also claims that there was no revocation of the acceptance of goods delivered to defendants and the goods delivered conformed with the contracts. She does acknowledge that, as some of the invoices reflect, certain goods were rejected by defendants upon delivery, however, these were accepted by Everyday and the amount was deducted from the invoice total. She also denies that any goods were expired, and if defendants believed such goods did exist, they could have returned them to Everyday and received a credit. She notes that defendants were unable to provide access to the goods claimed to be defective, claiming such was impossible since the goods were mixed with non-defective goods and sent to a different facility outside of New York State. Moreover, she states that during discovery, defendants produced for inspection some 80 items they claimed were defective and these constitute a very small percentage of the thousands of items sold and delivered to the defendants. Finally, she claims that even if goods were non-conforming, plaintiff did not receive adequate, timely or *seasonable* notice of rejection or revocation of acceptance, and due to this plaintiff was granted no opportunity to remedy the situation. This proof is sufficient to establish plaintiff's initial burden of demonstrating its entitlement to judgment as a matter of law. Sacco v Sutera, 266 AD2d 446, (2d Dept 1999.)

Therefore, it became incumbent upon the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact with respect to a bona fide defense, which must be tried. *See, Alvarez v Prospect Hospital*, 68 NY2d 320.) Defendants have submitted an affidavit of Sai Lu Pan, the defendants principal, who claims that after delivery, the goods were discovered to be non-conforming, in that the labels and packaging on several goods were either unlawfully “altered” or “changed” by plaintiff. Specifically, she claims the goods had their expiration dates changed or deleted or did not have an expiration date. According to her, the changes were made to hide the fact that the goods expiration dates had passed prior to the delivery date. She also claims that some of the goods were counterfeit or unlicensed. The defects were not discovered until after goods were sent to various locations and customer complaints were made. Ms. Sai investigated the complaints and thereafter, on June 15 and 16, 2009, spoke with plaintiff's principal, Lisa, about the “altered” products, who informed her that plaintiff would not accept the returned goods and demanded payment. In a letter, dated August 12, 2009, submitted by defendants to this Court, defendants informed plaintiff of the defective goods and their attempt to return those goods, but such was not accepted by plaintiff. Ms. Sai

also mentions that after her June telephone conversations with plaintiff's principal, the principal commenced a criminal action against Ms. Sai for harassment and Ms. Sai was arrested. This action was dismissed by the Queens District Attorney's Office on August 14, 2009, prior to arraignment on the charges.

Defendants have successfully carried their burden in regard to raising an issue of fact that prevents the granting of this motion. UCC 2-314, "Implied Warranty: Merchantability; Usage of Trade," provides in relevant part: "(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." (See, Pai v Springs Industries, Inc., 18 AD3d 529; Fung-Yee Ng v. Barnes and Noble, Inc., 308 AD2d 340.) In the case at bar, defendants have submitted sufficient evidence to raise a triable issue of fact concerning whether the plaintiff sold it defective goods, i.e., goods not "fit for the ordinary purposes for which such goods are used." (UCC 2-314[2][c]; see, Slater v Sears, Roebuck & Co., 280 AD2d 950; Fisons Corp. v Sweeteners Plus, Inc., 258 AD2d 872.)

There is also a genuine issue of fact pertaining to whether the defendants timely notified the plaintiff of the alleged non-conformity of the goods. UCC 2-607, "Effect of Acceptance; Notice of Breach, provides in relevant part: "(3) Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." (See, Cafaro v Emergency Services Holding, Inc., 11 AD3d 496.) While the plaintiff, on the one hand, alleges that the defendants did not timely object to the quality of the goods, the defendants, on the other hand, allege that it gave timely notice to the plaintiff. On the issue of the timeliness of plaintiff's rejection of the goods, UCC 2-602 (1) provides that such rejection must be made within a "reasonable time" after the buyer discovers or should have discovered the defect, and "any act inconsistent with the seller's ownership of the goods constitutes an acceptance (UCC 2-606 [1] [c]), including their retention without a seasonable notice of revocation of acceptance" (Tobron Off. Furniture Corp. v King World Prods., 161 AD2d 355, 356, 555 NYS2d 315 [1990]). UCC 2-606 (1) (b) provides that an "[a]cceptance of goods occurs when the buyer ... fails to make an effective rejection". Here, defendants have presented evidence that supports its claim that it effectively rejected the goods pursuant to the UCC. Defendants claim that its principal discussed the non-conforming goods with plaintiff's principal shortly after discovering the problem and thereafter sent a letter regarding such is sufficient evidence to raise an issue of fact. Compare, Robert Hunt Co. v. S & R Coachworks, 215 A.D.2d 361 (2d Dept. 1995.) Accordingly, the motion is denied.

DATED : April 25, 2011

ORIN R. KITZES, J.S.C.

