

**Newbridge Global Sourcing LLC v Spirit
Pharms. LLC**

2020 NY Slip Op 32833(U)

August 28, 2020

Supreme Court, New York County

Docket Number: 657661/2019

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

NEWBRIDGE GLOBAL SOURCING LLC,

Plaintiff,

- v -

SPIRIT PHARMACEUTICALS LLC, AJAY JOSHI

Defendant.

-----X

INDEX NO. 657661/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, plaintiff's request for partial summary judgment is granted, and plaintiff's request to strike defendants' joint answer is denied, without prejudice, for the reasons stated hereinbelow.

Background

On December 21, 2018, plaintiff, Newbridge Global Sourcing LLC; and defendants, Spirit Pharmaceuticals LLC (the "entity defendant"), and Ajay Joshi (the "individual defendant" and Chief Executive Officer for the entity defendant), entered into a Supplier Credit Agreement (the "Sales Agreement," Exhibit A, NYSCEF Doc. 2). Pursuant to the Sales Agreement's Paragraph 24, the individual defendant guaranteed (the "First Guaranty") the entity defendant's obligations pursuant to the Agreement. (NYSCEF Doc. 1, at 4). The Sales Agreement also contains an attorney's fees provision (Exhibit A, NYSCEF Doc. 2). Simultaneously, the entity defendant executed an Affidavit of Confession of Judgment (Exhibit C, NYSCEF Doc. 4), pursuant to which the entity defendant confessed judgment in the amount of "4,000,000.00, plus interest and late fees on that sum from the date of default, less any sums paid in respect thereof" (NYSCEF Doc. 1, at 5). Also simultaneously, plaintiff and the entity defendant entered into a security agreement (the "Security Agreement," Exhibit D, NYSCEF Doc. 5), pursuant to which the entity defendant "hereby transfers, assigns, and pledges to [plaintiff] and grants [plaintiff] a security interests in" various items (collectively, the "Collateral") (NYSCEF Doc. 1, at 5). Also on December 21, 2018, the individual defendant entered into a separate document, the Continuing Guaranty (the "Second Guaranty," Exhibit 3, NYSCEF Doc. 3, together with the First Guaranty, the "Guarantees") (NYSCEF Doc. 1, at 4).

The Guarantees make the individual defendants liable to plaintiff for all amounts due and owing to plaintiff by the entity defendant "under and in connection with the Sales Agreement" (NYSCEF Doc. 1, at 5).

Between April 16 and August 28, 2019, plaintiff sold goods in the amount of \$4,418,629.91 to the entity defendant (NYSCEF Doc. 1, at 5). After said sale, defendants apparently failed to pay plaintiff pursuant to the Sales Agreement and the Guarantees (NYSCEF Doc. 1, at 5).

On or about October 18, 2019, plaintiff and defendants entered into a letter agreement (the “Letter Agreement,” Exhibit E, NYSCEF Doc. 6), pursuant to which defendants agreed to pay to plaintiff, according to a payment schedule, approximately \$4,813,909.92 (the “Open Balance”) “without any setoffs, defenses or counterclaims of any kind whatsoever, and which Open Balance continues to accrue late fees” under the Sales Agreement (NYSCEF Doc. 1, at 6).

On December 9, 2019, plaintiff notified the entity defendant that the Sales Agreement terminated, pursuant to the entity defendant’s default on the “Supplier Credit Agreement,” the “Continuing Guaranty... entered into in connection with the Sales Agreement,” and the Letter Agreement (Exhibit F, NYSCEF Doc. 7).

Plaintiff asserts that, pursuant to the terms of the Sales Agreement, the Affidavit of Confession of Judgment, and the Letter Agreement, the entity defendant owes plaintiff \$4,813,909.92, “which is inclusive of default fees as of November 30, 2019, plus interest, costs, and attorney fees” (NYSCEF Doc. 1, at 7 and Doc. 8).

On December 23, 2019, plaintiff commenced the instant action against defendants, asserting causes of action for [1] breach of contract (Sales Agreement); [2] account stated; [3] breach of contract (the Guarantees); [4] breach of contract (Letter Agreement); and [5] declaratory judgment (Affidavit of Confession of Judgment). Plaintiff seeks a judgment (1) on the first cause of action, against both defendants, in the amount of \$4,813,902.92, plus interest, costs, and attorney’s fees; (2) on the second cause of action, against both defendants, in the amount of \$4,813,902.92, plus interest, costs, and attorney’s fees; (3) on the third cause of action, as against the individual defendant, in the amount of \$4,813,902.92, plus interest, costs, and attorney’s fees; (4) on the fourth cause of action, against both defendants, in the amount of \$4,813,902.92, plus interest, costs, and attorney’s fees; and (5) on the fifth cause of action, as against the entity defendant, in the amount of \$4,000,000.00, plus interest and late fees.

Pursuant to a January 23, 2020 stipulation, plaintiff extended defendants’ time to answer the complaint up to and including February 17, 2020, and defendants waived and agreed not to assert defenses arising out of improper service of process (NYSCEF Doc. 11).

On February 13, 2020, defendants, timely, jointly answered the complaint with various admissions, denials, and ten Affirmative Defenses (NYSCEF Doc. 13).

Plaintiff now moves, pursuant to CPLR 3212, for a judgment (1) striking defendants’ joint answer; and (2) granting partial summary judgment, on its first through fourth causes of action set forth in its complaint, against defendants (NYSCEF Doc. 14).

In opposition, defendants assert that plaintiff’s motion is “premature, seeks recovery of amounts that are in dispute without proper evidentiary support, and contains incorrectly calculated fees”

(NYSCEF Doc. 29). They argue that plaintiff has failed to support its claims that defendants owe \$4,813,909.92 under the Sales Agreement, the Continuing Guaranty, the Security Agreement, and the Letter Agreement (collectively, the “Agreements”).

More specifically, defendants argue that plaintiff falsely claims in its complaint that defendants *acknowledged* that they owe \$4,813,909.92 to plaintiff in the Letter Agreement. Defendants assert that the Letter Agreement (NYSCEF Doc. 21) references only “the approximate amount of \$4,716,00.00.” Additionally, defendants claim that “an acknowledgment of an approximate amount of debt simply is not a proper acknowledgment of the debt” (NYSCEF Doc. 29, at 3).

Defendants also assert that only twenty-four of the forty-three invoices that plaintiff lists on its “aging report” have due dates prior to October 18, 2019 (NYSCEF Doc. 23). Pursuant to the “aging report” defendants thus agree that they owed plaintiff only \$2,845,385.86, plus late fees, as of October 18, 2019 (NYSCEF Doc. 29, at 3). They assert, “either the Letter Agreement contains an incorrect amount due, or the plaintiff’s report is inaccurate. Discovery is warranted to determine what is actually owed...” (NYSCEF Doc. 29, at 3).

Additionally, defendants assert that plaintiff’s “aging report” contains multiple identical invoice amounts dated October 22, 2019 (NYSCEF Doc. 29, at 4).

In reply, plaintiff asserts that defendants fail to “account for the portion of the month that did not reach a full 30-day period, whereas plaintiff did account for that portion of the month in its calculation, pursuant to the Sales Agreement” (NYSCEF Doc. 33, at 2). Additionally, plaintiff asserts that, as defendants assert in their joint opposition papers, “in fact that actual balance due [plaintiff] on October 18, 2019 was \$4,700,219.96” (NYSCEF Doc. 33, at 3). Plaintiff asserts that it arrived at the requested balance of \$4,813,909.92 by taking that balance as of October 18, 2019 and (1) subtracting the October 24, 2019 payment; (2) adding an invoice; and (3) adding accrued late fees (NYSCEF Doc. 33, at 3).

Discussion

Request for Partial Summary Judgment

To obtain summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). Once the movant’s initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

Here, plaintiff has met its burden of establishing entitlement to summary judgment against defendants by submitting, inter alia, (1) the Sales Agreement; (2) the Continuing Guaranty; (3) the Affidavit of Confession of Judgment; (4) the Security Agreement; (5) the Letter Agreement; (6) the Termination Letter; (6) the “aging report;” and (7) the March 16, 2020 affidavit of Saba

Ahmad, the entity defendant's authorized representative. Thus, plaintiff has made out a prima facie case for breach of contract against defendants, jointly and severally.

In opposition, defendant has failed to raise an issue of fact, as plaintiff clearly outlined the calculations that it made to arrive at the \$4,813,909.92 balance due in its reply papers.

Request to Strike Defendants' Joint Answer

This Court finds defendants' joint answer, dated February 13, 2020, to be timely.

Attorney's Fees

Plaintiff is entitled to attorney's fees pursuant to Paragraph 27 of the Sales Agreement (Exhibit A, NYSCEF Doc. 2).

This Court has considered defendants' other arguments and finds them to be unavailing and non-dispositive.

Conclusion

Thus, for the reasons stated herein, the request of plaintiff, Newbridge Global Sourcing LLC, for partial summary judgment against defendants, Spirit Pharmaceuticals LLC; and Ajoy Joshi, jointly and severally, is hereby granted on plaintiff's first and third causes of action, for breach of contract and breach of the guarantees, in the amount of \$4,813,902.92, plus statutory interest thereon from October 25, 2019, plus costs and disbursements. This Court hereby dismisses, without prejudice, plaintiff's second and fourth causes of action, solely as duplicative. This Court hereby denies plaintiff's request to strike defendants' joint February 13, 2020 answer. The Clerk is hereby directed to enter judgment accordingly. Plaintiff's request for attorney's fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision, and payment of any necessary fees.

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<u>8/28/2020</u> DATE			<u>ARTHUR F. ENGORN, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE