

**General Vision Services, LLC v Lensmasters, Inc.**

2006 NY Slip Op 30313(U)

April 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
Index Number: 600861/2005

PART 56

GENERAL VISION SERVICES, LLC.,

vs

LENSTMASTERS, INC.

Sequence Number : 002  
DISMISS

INDEX NO.	_____
MOTION DATE	2/14/06
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 IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
 APR 28 2006  
 COUNTY CLERK'S OFFICE  
 NEW YORK

HON. RICHARD B. LOWE, III

Dated: 4/21/06

J.S.C.

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

-----X  
GENERAL VISION SERVICES, LLC,

Plaintiff,

-against-

INDEX NO. 600861/05

LENSMASTERS, INC. and  
LENSMASTERS II, INC.,

Defendants.

-----X  
**HON. RICHARD B. LOWE, III:**

Plaintiff General Vision Services, LLC (“GVS”) moves for an order pursuant to CPLR 3211(a)(7) dismissing the second (breach of the implied covenant of good faith and fair dealing), fourth(unjust enrichment), and fifth (fraud) counterclaims asserted by the defendants Lensmasters, Inc., and Lensmasters II, Inc. (collectively “Lensmasters”). Lensmasters cross-moves to amend the answer and the counterclaims.

**Background**

Lensmasters and GVS entered into several Provider Agreements (“agreements”), pursuant to which Lensmasters became an authorized GVS provider in order to provide vision care services and related eye care products to qualified members of certain third-party organizations at two Lensmasters’ retail optical stores. Pursuant to the agreement, Lensmasters would receive a fee from GVS in connection with the rendering of vision care services to these certain third parties. The agreements expired by their own terms in or about January 2004 and they were not renewed by the defendants.

GVS brought suit alleging that Lensmasters defaulted under the terms of the agreements by failing to submit all claims to GVS as provided by the agreements. GVS alleges that as a result, it has not been paid all administrative fees and other charges due to GVS under the agreements. GVS also alleges in the complaint that one of the agreements is being violated because one of defendants stores continues to improperly use GVS's name, trademarks, service marks, commercial symbols and signs even though the agreement expired in or about January 2004.

In the answer defendants assert counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, accounting, unjust enrichment and fraud.

Plaintiff moves to dismiss the counterclaims for breach of the covenant of good faith and fair dealing and unjust enrichment alleging that they are merely duplicative of the breach of contract cause of action. Plaintiff also moves to dismiss the cause of action for fraud arguing the defendants fail to plead the counterclaim with specificity.

Defendants cross-moves to amend the answer to include additional allegations in support of the counterclaims.

**Discussion**

Motion to Dismiss

*Breach of the Implied Covenant of Good Faith and Fair Dealing*

GVS argues that defendants' second counterclaim alleging a breach of the implied covenant of good faith and fair dealing is merely duplicative of the breach of contract claim and therefore should be dismissed (*Cerberus Int'l Ltd. v Banctec, Inc.*, 16 AD3d 126 [1st Dept 2005]).

In the defendants' answer with counterclaims, it is alleged that GVS "has an obligation to

\* 4 ]  
act in good faith and deal fairly with Defendants” which required GVS to “timely pay Defendants amounts due in full and to process vouchers submitted by Defendants in a timely and efficient manner.” More specifically, defendants allege that GVS breached this duty by withholding amounts due to the defendants under the agreements.

Defendants assert no argument in their papers in opposition to plaintiffs motion to dismiss this second counterclaim.

Therefore, where breach of the implied covenant of good faith and fair dealing is a tort claim and because defendants have failed to plead plaintiff has “engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations”, the second counterclaim is dismissed (*See New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]).

#### *Fraud*

In order to state a counterclaim for fraud, the defendants must show (1) GVS made material representations that were false, (2) GVS knew that the representations were false, and made them with the intent to deceive the plaintiff, (3) Lensmasters justifiably relied on the defendants representations, and (4) Lensmasters were injured as a result of the representations (*Cerbono v Price*, 7 AD3d 479, 480 [2nd Dept 2004]).

In opposition to the motion to dismiss and in support of the cross-motion to amend the answer, Lensmasters alleges the allegations in the counterclaims contain all of the elements of fraud. Defendants argue it has plead that GVS made false representations to both Lensmasters and third parties in that they required two vouchers, that they did not disclose monies to Lensmaster for which they were paid, and that they used Lensmasters’ doctors credentials to seek double recovery for all claims. Defendants argue that they sufficiently plead that GVS knew they

were making false representations, that Lensmasters relied on the false representations, and that Lensmasters reputation and credentials were put into jeopardy therefore causing damage.

CPLR 3016(b) requires a cause of action for fraud to be stated in particular detail. Defendants fail to state a cause of action for fraud because they have failed to allege an injury to Lensmasters. The injury, if any, clearly belongs to third parties, in this case Lensmasters' physicians. Furthermore, the injury alleged is speculative, at best. The possibility of injury to a third party is not sufficient to sustain a cause of action for fraud.

Accordingly, the counterclaim for fraud is dismissed.

#### *Unjust Enrichment*

Any claim based on a theory of unjust enrichment is precluded when there is a valid and enforceable contract between the parties (*Seargent's Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 [1st Dept 2005]). Defendants allege that GVS has been unjustly enriched based upon its purported failure to pay the Defendants. Specifically, they allege "GVS has received monies due to the Defendants and has failed to remit same" (*Exhibit G* ¶ 49) and "as a result of GVS' unjust enrichment, Defendants have been injured in an amount to be determined, but believed to be no less that \$30,000" (*Exhibit G* ¶ 50). These allegations are simply duplicative of the breach of contract claim in this action. Therefore, the fourth counterclaim alleging unjust enrichment is dismissed.

#### Cross-Motion to Amend the Answer and Counterclaims

Defendant argues in support of its motion to amend the answer that the allegations contained therein cure any pleading defects in the original complaint and therefore, the cross-motion should be granted.

Specifically, defendant seeks to amend the complaint to add the following allegations: that GVS required Defendants to submit two vouchers for every patient seen by Defendants, when only one voucher is necessary for GVS to be compensated by the Plans. Therefore, plaintiffs recovered twice when the defendants only performed services one time. Defendant alleges, as a result, plaintiff was using the forms to defraud Lensmasters, as well as Lensmasters' doctors by using their license to bill for services not performed. However, GVS would make payments to defendants for only one of the claim forms submitted.

Although courts generally grant leave to amend a pleading in the absence of prejudice or surprise, "in order to conserve judicial resources, examination of the merit of the proposed amendment is mandated" (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). Leave will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

The amended answer with counterclaims does little to cure the defects in the original pleading and therefore the cross-motion to amend is denied. Even assuming the allegations as plead are true, the defendants' counterclaims for breach of the implied covenant of good faith and fair dealing and for unjust enrichment, continue to be merely duplicative of the breach of contract claim. Furthermore, as already discussed, any harm as a result of the purported fraud engaged in by the plaintiffs is to the third parties and not the defendants. Lastly, the purported harm to the reputation of the defendants is speculative at best and they have failed to plead this element with specificity. Therefore, the cross motion to amend is denied.

### **Conclusion**

Accordingly, based on the foregoing,

ORDERED that the motion to dismiss the defendants second, fourth, and fifth counterclaims is granted and it is further


ORDERED that the defendants' motion to amend the answer is denied and it is further

ORDERED that a copy of this order with notice of entry be served upon the trial support office which is directed to restore this action to the calendar as it is presently marked disposed.

This shall constitute the order and decision of the court.

Dated: April 21, 2006

ENTER:

  
HON. RICHARD B. LOWE, III  
J.S.C.

**FILED**  
APR 28 2006  
COUNTY CLERK'S OFFICE  
NEW YORK