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| Pourquoi M.P.S. Inc. v Worldstar Intl., L.t.d. |
| 2008 NY Slip Op 30251(U) |
| January 10, 2008 |
| Supreme Court, Queens County |
| Docket Number: 0004883/2005 |
| Judge: Orin R. Kitzes |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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| POURQUOI M.P.S. INC. d/b/a L.I.F.E. INTERNATIONAL | | Number <u>4883</u> | 2005 |
| | | Motion | |
| - against - | | Date <u>October 31,</u> | 2007 |
| | | Motion | |
| WORLDSTAR INTERNATIONAL, L.T.D., et al. | | Cal. Number <u>34</u> | |
| | x | Motion Seq. No. <u>4</u> | |

The following papers numbered 1 to 8 read on this motion by plaintiff Pourquoi M.P.S., Inc. d/b/a L.I.F.E. International for an order, inter alia, striking paragraphs 45-48 and 52-95 of the verified answer to the second amended complaint.

| | <u>Papers Numbered</u> |
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| Notice of Motion - Affidavits - Exhibits..... | 1-2 |
| Answering Affidavits - Exhibits..... | 3-4 |
| Reply Affidavits..... | 5 |
| Other (Memoranda of Law)..... | 6-8 |

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

From December 2003 to February 2004, the plaintiff, a California corporation, sold to the defendant garlic at a price of \$161,004.00. The defendant did not pay for the garlic, and the plaintiff began this action on March 3, 2005, asserting causes of action for breach of contract, unjust enrichment, and an account stated. Ana Chan, the plaintiff's President, swears that the garlic was "of conforming quality and condition" and that the defendant did not complain about or reject the garlic. On the other hand, the defendant alleges that the garlic shipped by the plaintiff had already begun to deteriorate. Sonya Chiang, the defendant's President, swears that the garlic "was completely unusable by us. We practically gave it away. We had to dump a good deal of it." She also alleges that she "consistently

complained about the condition of the garlic and other matters to my shipper in China who had engaged the corporate plaintiff as its importer ***."

Those branches of the motion which are for an order striking the eighth affirmative defense (paragraphs 45-47) raised by the defendants in their verified answer to the second amended complaint are denied. This court has previously denied a motion by the plaintiff to dismiss the affirmative defense of breach of warranty. (See decision dated May 24, 2007.) Although the fifth affirmative defense and the eighth affirmative defense in the verified answer to the second amended complaint both raise breach of warranty, they are not duplicative because the eighth affirmative defense also pertains to the giving of notice of the defective condition of the goods. See, UCC 2-607; Cafaro v Emergency Services Holding, Inc., 11 AD3d 496. Moreover, although the defendants did not earlier identify Sam Chan as one of the agents with whom they dealt, discovery in this case has not been completed, and the plaintiff will not be substantially prejudiced by the identification of Chan as the specific agent allegedly given notice of the defective condition of the goods.

Those branches of the motion which are for an order striking the ninth affirmative defense (paragraph 48) raised by the defendants in their verified answer to the second amended complaint are granted. The agreement sued upon by the plaintiff names itself and defendant Worldstar as the contracting parties. There are no other "indispensable" parties to this action. (See, Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals, 5 NY3d 452.)

That branch of the motion which is for an order striking the counterclaim asserted by the defendants (paragraphs 52-95 of the verified answer to the second amended complaint) is denied. The counterclaim alleges that the plaintiff breached the implied covenant of good faith and fair dealing. The counterclaim alleges, inter alia, that the plaintiff and others shipped garlic from China to the United States regardless of its condition or quality and that the plaintiff knew that defendant Worldstar would have problems arising from the condition of the garlic. A covenant of good faith and fair dealing is implied in all contracts. (See, Dalton v Educational Testing Service, 87 NY2d 384; 1-10 Industry Associates, LLC v Trim Corp. of America, 297 AD2d 630.) A party to a contract makes an implied promise that it will not do "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (Dalton v Educational Testing Service, supra, 389, quoting Kirke La Shelle Co. v Armstrong Co., 263 NY 79, 87; see, 1-10 Industry Associates, LLC v Trim Corp. of America, supra.) In the case at bar, the counterclaim adequately alleges that the plaintiff injured defendant Worldstar's right to receive the benefit of the contract

by, inter alia, shipping defective garlic. Since the defendants assert only the one counterclaim based on breach of the covenant of good faith and fair dealing, the plaintiff cannot obtain the dismissal of it based on the argument that it duplicates a cause of action for breach of contract. (See, New York University v Continental Ins. Co., 87 NY2d 308; Apfel v Prudential-Bache Securities, Inc., 183 AD2d 439.) Moreover, the condition of the garlic has been in issue since the inception of this lawsuit, and the plaintiff is not prejudiced by the assertion of the counterclaim in the amended answer.

That branch of the motion which is for an order dismissing the answer of defendant Worldstar is granted to the extent that the defendant is directed to comply with the plaintiff's discovery requests within twenty days of the service of a copy of this order with notice of entry.

That branch of the motion which is for an order permitting the plaintiff to serve a third amended complaint asserting a cause of action based on the Perishable Agricultural Commodities Act (7 USCA § 499a et seq.) ("PACA") is granted. The plaintiff shall serve its third amended complaint within twenty days after the service of a copy of this order with notice of entry. "Under § 2, 7 U.S.C. § 499b, it is unfair for a commission merchant, dealer or broker to engage in listed unfair practices, including in subsection (4) failure to 'make full payment promptly.' *** Under § 5 of the Act as amended, 7 U.S.C. § 499e, a violator of § 2 is liable for damages to the injured party which may be obtained in an action before the Secretary or by a separate lawsuit ***." (George Steinberg & Son, Inc. v Butz, 491 F2d 988, 990.) The plaintiff alleges that through its own efforts it recently discovered that Worldstar has a PACA license. CPLR 3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." (See, Holchandler v We Transport, Inc., 292 AD2d 568; St. Paul Fire & Marine Ins. Co. v Town of Hempstead, 291 AD2d 488; Whitney-Carrington v New York Methodist Hosp., 289 AD2d 326.) As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant. (See, Edenwald Contr. Co. v City of New York, 60 NY2d 957; Holchandler v We Transport, Inc., supra; Dal Youn Chung v Farberov, 285 AD2d 524.) In the case at bar, the proposed new cause of action merely alleges an additional theory of recovery, and the amendment will not prejudice the defendants. (See, Eng v DiCarlo, 79 AD2d 1018.) Finally, there is no merit in the defendants' contentions that there is no private right of action under PACA and that federal courts have exclusive jurisdiction over PACA claims. "Any party aggrieved by a produce dealer that fails to follow the statutory obligations set forth in 7 U.S.C. § 499b is entitled to bring suit in any court of competent jurisdiction and receive appropriate damages." (Schulz v Pataki, 137 F Supp 2d 80, 83; see, 7 USC § 499e.)

Dated: January 10, 2008

J.S.C.