

**H.D. Smith Wholesale Drug Co. v Custom Ltc. LLC**

2008 NY Slip Op 31044(U)

April 4, 2008

Supreme Court, New York County

Docket Number: 0650090/2007

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. GISCHÉ, J.S.C.

PART 10

*Justice*

Index Number : 650090/2007  
H.D.SMITH WHOLE SALE DRUG CO.  
vs  
CUSTOM LTC.LLC.  
Sequence Number : 001  
SUMMARY JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_  
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**  
APR 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/4/08

JUDITH J. GISCHÉ, J.S.C. 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: PART 10

-----X  
H.D. SMITH WHOLESALE DRUG CO.,

Plaintiff,

-against-

CUSTOM LTC, LLC,

Defendant.

**DECISION/ORDER**

Index No.: 650090/07

Seq. No.: 001

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 (§3212), w/DB affid, exhs .....

Def JF affid, exhs .....

Pltff DB reply affid .....

**FILED**  
Numbered  
1  
2  
APR 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Plaintiff, a pharmaceutical and related merchandise supplier, seeks to recover on accounts allegedly due and owing. Defendant is a non-retail pharmacy. Plaintiff now moves for partial summary judgment on the first and third causes of action asserted in the complaint, to wit, for goods sold and delivered and breach of contract, respectively. CPLR § 3212. Defendant opposes the motion on the grounds that there are material issues of fact which would preclude judgment in plaintiff's favor.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212; Brill v. City of New York, 2 NY3d

648 (2004).

On July 13, 2006, plaintiff and defendant executed a written agreement titled "GPO and Contract Designation Form" (the "Agreement"). Also on July 13, 2006, defendant executed a "New Account Credit Application." Pursuant to the Agreement, plaintiff supplied products from manufacturers to defendant.

Central to the dispute between plaintiff is the distinction between non-retail products, i.e., products which were not for sale in retail outlets and "prominently labeled 'Not for Sale in Retail Outlets' ", as opposed to products not containing such a label, but otherwise identical (the "retail products"), which may be sold in retail outlets. There is no dispute that the non-retail products were discounted below the price of the otherwise identical retail products, the former being approximately half the price of the latter.

It is undisputed that on or about October 31, 2006, defendant began placing orders for packages of 50 and 100 Accu-Chek strips for testing glucose in whole blood (the "products") manufactured by Roche Diagnostics Corporation ("Roche"). Plaintiff contends that defendant ordered non-retail products. Plaintiff has provided copies of invoices which do not indicate retail or non-retail, but contain other codes such as a "National Drug Code" ("NDC") and "Item Number" ("Item No."). Plaintiff states that the NDC for the retail and non-retail products differ; i.e., 50924-881-10 (50 strips, non-retail) and 50924-381-10 (50 strips, retail). The NDC on the invoices correspond to the retail products, but the unit price corresponds with the non-retail products.

Defendant claims that via plaintiff's website, it ordered the products according to plaintiff's Item No., which was 101-1600." Jordan Fogel, a Member, Manager and Vice-

President of defendant who is responsible for purchasing and sales, states: "I had no knowledge of the NDC numbers for [the] products, much less that there were two different varieties, retail and non-retail."

Plaintiff claims that it notified defendant, in late November, that Roche had determined that defendant was ineligible for the lower pricing on the products defendant received, and that defendant "was responsible for paying Roche's higher pricing" pursuant to the terms of the Agreement. The Agreement provides that: "[a]djustments of any pricing extended to [defendant] for which [defendant] is subsequently determined to be ineligible is the responsibility of [defendant]".

Fogel contends that on December 8, 2006, he received an email from Tiffany Meyer ("Meyer"), a representative of plaintiff "requesting that [he] contact [the representative]." Defendant has provided a copy of this email. Fogel claims that Tiffany Meyer informed him, via telephone, "that the pricing for the 50 and 100 Roche test strips was wrong because Ms. Meyer inputted '0381' instead of '0881' ". Fogel claims that when he was advised of the new pricing, he informed Meyer that no more purchases would be made at that price.

Fogel maintains that

"[a]bout a week or two after [his] initial and only conversation with Ms. Meyer, [defendant] started receiving credit memos, new invoices and statements from [plaintiff], seeking to change the price of the merchandise previously purchased, delivered and paid for."

Fogel thereafter claims that he was contacted by another representative of plaintiff, via telephone, and told that:

"Roche had rejected [plaintiff's] request for a rebate on [defendant's]

[\* 5 ]

purchases and that under the terms of the credit agreement, [defendant] was responsible for paying the higher price, since [plaintiff] was now out the money.”

On March 12, 2007, plaintiff sent defendant a “credit memo and re-bill invoice for a price adjustment”. Plaintiff indicated that the reason for the correction was “product not eligible for contract pricing”.

#### Summary of the Relevant Arguments of the Parties

Based on the affidavit of Dale Bergman, the Manager of Financial Services of plaintiff, plaintiff claims that defendant knew the products it received should have been “prominently labeled ‘Not for Sale in Retail Outlets’ ”. Plaintiff further claims that rather than advise plaintiff that it had received incorrect products, defendant “immediately proceeded to place additional orders for [the Retail products] between October 31, 2005 and December 7, 2006.”

Plaintiff now seeks to recover from defendant \$86,573.95, which it claims represents the full account balance due and owing as of April 25, 2007. In support of its claimed damages, plaintiff has provided a one-page statement of account. Plaintiff also seeks interest at the rate of 1.5 % per month from April 25, 2007, pursuant to the terms of the Agreement.

Defendant claims that it is a small non-retail pharmacy just formed in April 2005. Defendant argues that Bergman has no personal knowledge of the facts herein and that, therefore, this court should summarily deny plaintiff’s motion for summary judgment as unsupported by admissible proof.

Defendant alternatively contends that there are numerous material issues of fact which preclude judgment in plaintiff’s favor. Specifically, defendant claims that it acted

6 ]

in good faith and did not know there were retail and non-retail versions of the products. Defendant contends that plaintiff should be responsible for any overcharge calculated by Roche, because such overcharge is as a result of plaintiff's negligence by failing to advise defendant that there were two types of products and by shipping to defendant retail products when it should have shipped non-retail products for the price at which defendant agreed to pay.

### **Discussion**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957).

7 ]

When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> dept. 2003).

Plaintiff is not entitled to summary judgment, as a matter of law, because there are many material issues of fact. For example, plaintiff has failed to show that the defendant ordered non-retail products. Fogel states that "the posting" he recalls from plaintiff's website from which defendant ordered the products "contained nothing about the number of the Roche contract or the NDC number", whereas Bergman claims that plaintiff did in fact make this information available to defendant.

Plaintiff has not submitted any proof of its claim, aside from demonstrative depictions of the products which defendant ordered and received. Defendant has submitted email exchanges whereby defendant ordered the products - these emails do not indicate retail or non-retail, nor do they indicate the relevant codes which plaintiff claims were available to defendant. Further, the invoices themselves are inconsistent, where they contain NDCs corresponding to retail products but a unit price which corresponds to the non-retail products. A reasonable trier of fact could conclude, based on the record before this court, that plaintiff merely sent the wrong products to defendant and that plaintiff is responsible for the overcharges calculated by Roche as a result thereof.

Moreover, while plaintiff factually maintains and seeks to impute to defendant knowledge that the products it received should have been "prominently labeled 'Not for Sale in Retail Outlets' ", plaintiff has not submitted any proof to support this claim.

Based on the invoices with number corresponding to both retail and non-retail

[\* 8 ]

products, the testimony of Fogel that plaintiff's representatives made errors in processing defendant's orders, and other documents and emails submitted to the court, there are issues of fact as to whether defendant ordered the non-retail products, or rather, just the products themselves, or whether plaintiff erred in shipping the retail products to defendant, and, therefore, whether plaintiff or defendant should be responsible for the overcharge calculated by Roche.

Accordingly, plaintiff's motion for summary judgment is denied in its entirety.

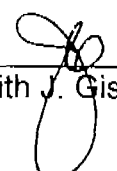
Both parties in this action are hereby directed to appear before this court on May 29, 2008 for a preliminary conference at 9:30 a.m. at 80 Centre Street, Room 122.

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  
April 4, 2008

So Ordered:

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

**FILED**  
APR 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK