SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 20**
QK HEALTHCARE, INC.,	**NASSAU COUNTY**
Plaintiff,	**Index No: 012950-10**
	Motion Seq. No: 1
-against-	**Submission Date: 2/17/11**
INSOURCE, INC. and HENRY SCHEIN, INC.,	
Defendants.	
----------x	

The following papers having been read on this motion:

Notice of Motion, Affirmations in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibit.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law in Support.....x

This matter is before the Court for decision on the motion filed by Defendants Insource, Inc. and Henry Schein, Inc. on September 13, 2010. By prior Order dated December 17, 2010 ("Prior Order"), the Court directed oral argument on this motion. That oral argument has taken place and the motion was fully submitted by the Court on February 17, 2011. For the reasons set forth below, the Court denies Defendants' motion.

A. Relief Sought

Defendants InSource, Inc. ('InSource") and Henry Schein, Inc. ("Schein") (collectively "Defendants") move, pursuant to CPLR §§ 3211(a)(5) and (7), for an Order dismissing the Complaint.

Plaintiff QK Healthcare, Inc. ("QK" or "Plaintiff") opposes Defendants' motion.

B. The Parties' History

The Complaint (Ex. 1 to Leader Aff. in Supp.), dated July 6, 2010, alleges as follows:

QK, a Delaware corporation with its principal place of business in Bellport, New York, is a wholesaler of items including prescription drugs. Schein, a Delaware corporation with a principal place of business in Melville New York, is a company that distributes healthcare products and services to medical, dental and veterinary practitioners. InSource, a Virginia corporation registered to do business in New York, is an affiliate of Henry Schien. InSource is a specialty distributor of pharmaceutical products, many of which ware sold in New York.

In or about May and July of 2003, QK purchased over 36,000 units of Tubersol from InSource. In or about August of 2003, QK purchased 20,000 units of Tubersol from Schein ("August 2003 Order"). The August 2003 Order was filled by InSource, which shipped the merchandise to QK. InSource's shipping documentation describes the merchandise as "returnable."

The Tubersol sold by the Defendants was manufactured by Aventis. Aventis has a policy, which is standard in the industry, that merchandise that has expired or is about to expire and remains unsold may be returned for credit or refund. In addition, the standard practice in the wholesale pharmaceutical industry is that national wholesalers will, likewise, permit the return of merchandise that remains unsold and expired, or is about to expire.

At the time of the purchases in 2003 ("2003 Purchases"), and at all relevant times, Aventis had a return policy ("Aventis Return Policy") that products were returnable within six (6) months prior to their expiration date, or no more than twelve (12) months past their expiration date. The Aventis Return Policy (Ex. A to Compl.) specifically stated that refunds would be provided to those who had purchase the returned merchandise either directly from Aventis, or indirectly through a wholesaler.

At the time of the 2003 Purchases, and other relevant times, Defendants also had return policies. InSource's return policy was that products within six (6) months prior to their expiration date, or no more than six (6) months past their expiration date, could be returned for credit less a fifteen percent processing fee. Schein's return policy was that non-expired products were returnable if they could "be returned to the manufacturer for credit" (Compl. at ¶ 15). All returnable products would be subject to a fifteen percent handling fee if returned more than thirty (30) days after the date of the invoice.

The Tubersol that QK received from Defendants all had an expiration date of December 31, 2005 ("Expiration Date"). As of December of 2005, QK had been unable to sell some of the Tubersol purchased from Defendants. Prior to the Expiration Date, QK contacted Defendants to arrange for the return ("Return") of the unused portion and Defendants refused to accept the Return. Counsel for the parties exchanged correspondence, in which Alfred Paliani ("Paliani"), QK's General Counsel, submitted that Defendants' refusal to accept the Returns was unwarranted, and Michael Ettinger ("Ettinger"), General Counsel for Schein, responded by stating that the Return violated the return policy of a company called Sanofi Pasteur ("Sanofi") that had merged with Aventis in or about early 2006, after the Purchases and Return at issue.

The Complaint alleges that the Sanofi policy was not in place during the Purchases at issue. The Complaint alleges, further, that Defendants have inaccurately described that policy which would have permitted the Returns. Plaintiff alleges that Defendants' refusal to accept the Return constituted a breach and repudiation of their contracts with Plaintiff.

Plaintiff alleges that it attempted to mitigate its damages by returning certain units of the Tubersol to Aventis which granted Plaintiff a partial credit. Plaintiff attributes Aventis' decision to grant this credit to the fact that the Tubersol at issue was intended for sale outside the United States, or originally sold by Aventis outside of the United States, which would also constitute a breach of Defendants' contracts with Plaintiff, and a violation of the Uniform Commercial Code ("UCC").

The Complaint contains two causes of action. The first is based on the Defendants' alleged anticipatory breach and repudiation of the contracts between the parties by refusing to accept the Returns. The second is based on the Defendants' alleged breach of the implied warranty of merchantibility pursuant to UCC § 2-314 by selling merchandise that was not returnable. Plaintiff seeks damages of over $2 million. The Court was advised, at the oral argument on this motion, that Plaintiff has withdrawn the second cause of action, so that only the first cause of action remains.

In her Affirmation in Support, Marjorie Han ("Han"), Vice President and Senior Counsel, Litigation at Schein provides the following exhibits 1) a copy of the invoice for the sale of 20,004 units of Tubersol purchased by QK from Insource in July of 2003, 2) a copy of the invoice for the sale of 20,000 units of Tubersol purchased by QK from Schien in August of 2003, 3) a copy of the cover page and "Terms of Sale' from the 2003 Schein catalog, referred to

in Exhibit 2, 4) a copy of an e-mail exchange between QK and Schein dated December 23, 2005, 5) a copy of a letter dated December 30, 2005 from Paliani to Ettinger, 6) a copy of a responsive letter dated January 26, 2006 from Ettinger to Paliani, and 7) a copy of a responsive letter dated February 10, 2006 from Paliani to Ettinger.

In his Affirmation in Opposition, Paliani affirms as follows:

Between February 1, 2006 and November 7, 2006, QK returned over 20,000 units of Tubersol to Aventis through a returns processing company. Aventis accepted the first return, and issued a credit, through the returns processing company, for that return. Aventis issued either partial credit or no credit for the remaining units of Tubersol that QK returned as reflected by an e-mail dated May 9, 2007 (Ex. A to Paliani Aff. in Opp.). In that e-mail, Aventis stated that certain relevant lot numbers "do not exist in our database and are invalid" and that it was "unable to issue credit for this product and lot#(s)." Paliani affirms that this e-mail suggested that the merchandise at issue was not the product of the United States.

C. The Parties' Positions

Defendants submit, *inter alia*, that the Court should dismiss the Complaint on the grounds that 1) the facts alleged by Plaintiff amount to a claim for breach of contract, not an anticipatory breach, which is time barred under the applicable UCC four year statute of limitations given that the claim accrued on December 23, 2005, when Defendants initially advised Plaintiff that they would not accept the Returns; and 2) the Complaint fails to plead the necessary elements of an anticipatory breach claim, specifically that a) the alleged repudiation occurred before Defendants' time to perform; and b) at the time of repudiation, Plaintiff still had outstanding performance obligations. Defendants argue that Plaintiff treated the dispute as a breach, rather than an anticipatory breach, as demonstrated by the fact that Plaintiff sent the merchandise to Aventis which destroyed that merchandise.

Plaintiff opposes Defendants' motion submitting that where, as here, Defendants advised Plaintiff that they would not accept the Returns, Plaintiff had the option of suing immediately for breach or awaiting the time of performance, citing UCC § 2-610. Plaintiff submits, further, that the statute of limitations starts to run when performance is due under the contract, which was in May of 2007 when QK was notified that Aventis had given reduced, or no, credit for certain Returns. Plaintiff also argues that Defendants have failed to cite authority supporting their contention that the four-year statute of limitations of UCC § 2-725(a), rather than the six year

statute of limitations of CPLR § 213(2), is applicable to an anticipatory repudiation claim.

In reply, Defendants submit, *inter alia*, that the anticipatory repudiation doctrine is inapplicable to the matter at bar given that Plaintiff 1) had declared the time for Defendants' performance by demanding the Return; and 2) there was no performance for Plaintiff to suspend, as Plaintiff had already tendered the Return. Moreover, even assuming, *arguendo*, that Plaintiff had an anticipatory repudiation claim, the allegations in the Complaint establish that Plaintiff declared the contract breached and was not awaiting Defendants' future performance.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

CPLR § 3211(a)(5) authorizes dismissal where the cause of action may not be maintained, *inter alia*, because of the statute of limitations.

B. Breach of Contract

A cause of action for breach of contract requires allegations of the existence of a contract, plaintiff's performance under the contract, defendant's breach of the contract and resulting damages. *JPMorgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2d Dept. 2010).

Pursuant to CPLR § 213(2), the statute of limitations for breach of contract is 6 years. In New York, a breach of contract cause of action accrues at the time of the breach. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993), citing *Edlux Constr. Corp. v. State of New York*, 252 App. Div. 373, 374 (3d Dept. 1937), aff'd 277 N.Y. 635 (1938), and Kassner & Co. v. City of New York, 46 N.Y.2d 544, 550 (1979). UCC § 2-725 provides that a cause of action for breach of a contract of sale must be commenced within 4 years after it

accrues. *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 410 (1985). The action accrues when the breach occurs. *Id.*

C. Anticipatory Repudiation

New York UCC § 2-610, titled "Anticipatory Repudiation," provides as follows:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
>
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
>
> (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

To state a claim for anticipatory repudiation, the plaintiff must allege that the defendants expressed an unequivocal intent to forego performance. *Hospital Authority of Rockdale County v. GS Capital Partners V Fund, L.P.*, 2011 U.S. Dist LEXIS 5184, * 7 (S.D.N.Y. 2011), citing, *inter alia*, *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458 (1998) and *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145 (1998). When confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options, which are to 1) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties; or 2) continue to treat the contract as valid and await the designated time for performance before bringing suit. *Id.* at * 10, quoting *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) and citing *Rachmani Corp. v. 9 East 96th Street Apartment Corp.*, 211 A.D.2d 262 (1st Dept. 1995).

In *Rachmani Corp. v. East 96th Street Apartment Corp.*, *supra*, the First Department addressed, *inter alia*, the date from which the breach of contract is measured, holding as follows:

> The theory underlying the doctrine of anticipatory breach of contract received extensive discussion by the Court of Appeals in the case of *Ga Nun v Palmer* (202 NY 483 [1911]). The authority cited in that case leaves no doubt that the date from which the breach of a contract is measured is the date performance is required to be tendered according to its terms (supra, at 492-493). The Court held that, even where unequivocal notice of a party's intent to renounce a contractual obligation is given (*supra*, at 488), the injured party may elect to keep the contract in force and await the designated time for performance before bringing suit (*supra*, at 493). In

the event that the plaintiff's action is predicated on the renunciation of the obligation, the Court noted that he must accept it as an anticipatory breach and "'consider the contract at an end'" (*supra*, at 492, quoting *Foss-Schneider Brewing Co. v Bullock*, 59 F 83, 87 [6th Cir 1893]). In this event, the date the statutory period of limitation commences to run is logically the date of the act that constitutes repudiation, viz., the date the contract is terminated (*see*, *Ely-Cruikshank Co. v Bank of Montreal*, *supra*, at 403).

211 A.D.2d at 266

D. Application of these Principles to the Instant Action

The Court denies Defendants' motion to dismiss in light of the Court's conclusion that, accepting the facts alleged as true and affording Plaintiff every favorable inference, Plaintiff has alleged facts supporting its claim of the Defendants' breach, or anticipatory repudiation, of the parties' agreement by refusing the Returns. The Court also concludes, under the reasoning of the principles stated above, that there is support for Plaintiff's assertion that the statute of limitations did not begin to run until May of 2007, when Aventis denied QK credit for some of the Returns and, therefore, that the action was timely filed under both the 4 and 6 year statutes of limitations discussed herein. In light of the foregoing, the Court denies Defendants' motion to dismiss the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on May 18, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 12, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.