

AmerisourceBergen Drug Corp. v Venkany, Inc.

2013 NY Slip Op 32101(U)

September 4, 2013

Sup Ct, New York County

Docket Number: 653155/2011

Judge: Shirley Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 653155/2011
AMERISOURCEBERGEN DRUG
vs.
VENKANY, INC. D/B/A
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 2/20/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 6-21
Answering Affidavits — Exhibits No(s) 78-87
Replying Affidavits No(s) 96-98
Upon the foregoing papers, it is ordered that this motion is and cross-motion No. 103

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/4/13

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS GRANTED (checked) DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

-----X
AMERISOURCEBERGEN DRUG CORPORATION
and BELCO DRUG CORP.,

Plaintiffs,

-against-

Index No. 653155/2011

DECISION & ORDER

VENKANY, INC., d/b/a, FREDERICK PHARMACY,
VICRAM PHARMACY INC., d/b/a, ROYAL
PHARMACY, SEVEN HILLS PHARMACY INC.,
d/b/a, JAYSON DRUGS and KARTHIK DHAMA,

Defendants.

-----X
SHIRLEY W. KORNREICH, J.:

Plaintiffs AmerisourceBergen Drug Corporation (ABDC) and Belco Drug Corp. (Belco) move, pursuant to CPLR 3212, for an order granting summary judgment on their causes of action for breach of credit agreements and guaranties, goods sold and delivered, unjust enrichment, and account stated against defendants Venkany, Inc., d/b/a, Frederick Pharmacy (Venkany), Vicram Pharmacy Inc., d/b/a, Royal Pharmacy (Vicram), and Seven Hills Pharmacy Inc., d/b/a, Jayson Drugs (Seven Hills). Further, plaintiffs seek summary judgment on their sixth, twelfth, and eighteenth causes of action against Karthik Dhama for breach of his personal guaranty with respect to the credit application and guarantees executed by the other defendants.

Defendants cross-move for leave to amend their answer to add an unjust enrichment counterclaim and an affirmative defense for fraudulent inducement to contract, and also seek summary judgment dismissing plaintiffs' third, ninth, and fifteenth causes of action for unjust enrichment. For the reasons stated below, both motions are granted in part and the court directs

judgment to be entered for plaintiffs.

I. Background

Plaintiffs ABDC and Bellco (a wholly-owned subsidiary of ABDC) are wholesale distributors of pharmaceutical, health, and beauty aid products. Defendant Dhama owns and operates retail pharmacies, including Venkany, Vicram, and Seven Hills. In his capacity as president of the pharmacies, Dhama entered into a contract for the purchase of goods from plaintiffs by executing a credit agreement on each pharmacy's behalf (affidavit of Debra Wertz, sworn to August 23, 2012 [Wertz moving affidavit], exhibits A, F, K). Each agreement stated that in the event that payment was not made by the due date plaintiffs could "assess a per-day late payment fee of the lower of 0.05% (18% / 360) or the maximum rate permitted by law on the outstanding balances until paid, beginning on the first (1st) business day after such due date" (*id.*). The agreements further provided for a dishonored check fee of \$50, and stated that any billing disputes had to be raised no later than thirty days after receiving the invoice in question (*id.*). Under each agreement, the pharmacy was obligated to pay plaintiffs' costs of collection, including attorney's fees (*id.*). Accompanying each credit agreement was a personal guaranty signed by Dhama, in which he guaranteed "the prompt and full payment ... and performance of all [o]bligations ... to [plaintiffs]" (*id.* at exhibits C, H, M). Both the credit agreements and the guaranties are governed by Pennsylvania law (*id.* at exhibits A, C, F, H, K, M).

In consideration of the execution of the credit agreements and guaranties, plaintiffs sold and delivered goods to defendants for varying periods of time. Each delivery was memorialized and accompanied by invoices, which detailed the specific goods ordered, the quantity ordered, the prices charged for the goods, and the dates that the payments were due (*id.* at ¶¶ 15, 25, 35).

Additionally, plaintiffs issued semi-monthly, computer-generated account statements to each pharmacy summarizing the open invoices, identifying the outstanding balance, and setting forth the dates that payments were due (*id.* at ¶¶ 16, 26, 36).

Plaintiffs commenced this action on November 14, 2011 by filing a summons and complaint, alleging that each pharmacy and Dhama had defaulted on their payment obligations. Defendants answered on January 31, 2012, denying the allegations but not asserting any affirmative defenses. On August 24, 2012, plaintiffs made the instant motion for summary judgment.

A. The Account Statements

In support of their motion, plaintiffs submitted the affidavit of Debra Wertz, one of their officers. Attached to Ms. Wertz's affidavit were copies of the last semi-monthly account statement that had been delivered to each of the three pharmacies, which reflected the outstanding balance for each. Ms. Wertz averred that as of the date of the motion, none of the pharmacies had objected to the amounts shown in the invoices or account statements (*id.* at ¶¶ 16, 26, 36). The statement for Venkany showed that four invoices, which had been due on January 13, 2011, January 28, 2011, February 9, 2011 and February 25, 2011, respectively, remained unpaid as of March 15, 2011, for a total of \$364,938.22 (*id.* at exhibit E; *see also* exhibit D [copies of said invoices]). The account statement also showed \$250 in charges for dishonored checks (*id.*). Ms. Wertz averred that subsequent to the date of the account, but prior to the commencement of the action, Venkany made a \$20,000 payment, but incurred an additional \$1,200 charge for failure to return certain computer equipment (*id.* at ¶ 17). Taking these credits and charges into account, plaintiffs maintained that the total amount owed by

Venkany was \$346,388.22; they began to assess late fees on this amount from March 1, 2011, at the rate of 18% per annum, for a per diem charge of \$170.82 (*id.* at exhibit S).¹ Ms. Wertz stated that Venkany made \$2,100 in payments in December 2011, and plaintiffs' records show that they credited Venkany for \$13,794.11 in June 2012, \$40,000 in July 2012, and \$30,000 in August 2012 (*id.* at ¶ 17 n 1; exhibit S). The late charges were adjusted to reflect these credits (*id.* at exhibit S). Thus, on the date of the motion, plaintiffs allege that Venkany owed \$351,171.29 in principal and late fees (*id.* at ¶ 43).

As for Vicram, plaintiffs submitted an account statement dated October 15, 2011 (*id.* at exhibit J). This statement showed sums due on numerous open invoices with due dates spanning June 25 through November 9, 2011, for a total of \$261,203.98 (*id.*; *see also id.* at exhibit I [copies of said invoices]). In addition, the statement included \$20,465.52 in late charges (at 18% per annum), and \$9,179.71 in credits, for a total outstanding balance of \$272,489.79, on which plaintiffs assessed a daily late fee of \$134.38 starting October 16, 2011 (*id.* at exhibits J and T). As of the date of the motion, plaintiffs contend that Vicram owed a total of \$308,771.99 (*id.* at ¶ 44).

Finally, plaintiffs submitted an account statement for defendant Seven Hills, showing that as of September 30, 2011, Seven Hills owed a total of \$166,155.59 on invoices with due dates from February 25 through October 25, 2011 (*id.* at exhibit O; *see also id.* at exhibit N [copies of said invoices]), and plaintiffs assessed a late fee of .05% on past due amounts beginning on

¹ This per diem rate is slightly less than the contractual per diem rate of .05%.

September 30, 2011 (*id.* at exhibit U).² Ms. Wertz averred that subsequent to the issuing of the account statement, Seven Hills paid off the principal balance but not the late charges that had accrued (*id.* at ¶ 45). Accordingly, plaintiffs claim that as of the date of the motion Seven Hills owed \$14,980.23 in late fees (*id.*; *id.* at exhibit U).

B. Defendants' Submissions and Plaintiffs' Reply Affidavit

In opposition, defendants submitted the affidavit of defendant Dhama (affidavit of Karthik Dhama, sworn to October 4, 2012). Dhama averred that plaintiffs led him to believe that he would be able to purchase goods from them on credit, an offer which plaintiffs thereafter refused to honor and that plaintiffs promised that they would waive certain late fees (*id.* at ¶¶ 6–9). In support, Dhama has submitted a series of emails from plaintiffs' representatives (affirmation of Sharmela Bachu, October 10, 2012, exhibits B & C). With respect to the issue of the late fees, an employee in ABDC's collections department wrote to an individual named Danny Gohari on March 3, 2011 that "ALL the late fees will be removed. Don't worry!" (*id.* at exhibit C). The subject line of that email was "Re: Acct# 100084598" (*id.*). In an email dated April 28, 2011, with a subject line reading "A/R Statement–afam pharmacy," a perturbed Mr. Gohari asked an ABDC employee named Brian Haley why the latest statement still showed late fees (*id.* at exhibit B). Mr. Gohari was assured that the late fees would be credited back to the account on May 2 (*id.*).

Defendants also submitted various emails discussing the extension of a credit line to

² As of that date, the final invoice on the Seven Hills account was not as yet due; only \$163,862.74 was past due as of September 30, 2011. For that day, plaintiffs charged a late fee of \$79.31. The court is uncertain as to the basis for the rate used to calculate this charge, but in any case, it is less than the contractual rate of .05%.

Dhama's pharmacies. In an email dated December 2, 2010, Jerry Cline, identified therein as a senior vice president of ABDC, told Dhama to "get [his] financial information to Kevin [Maloney, the ABDC sales representative] and we'll make sure you get the appropriate credit line established" (*id.* at exhibit B). Some months later, on March 17, 2011, Anthony Carino, an employee of ABDC's credit department wrote to Ms. Wertz regarding the Venkany account, reporting that Dhama had inquired about the status of a \$300,000 note that he had discussed with Mr. Maloney, his sales representative (*id.* at exhibit C). Mr. Carino inquired whether the company would proceed with the note (*id.*). In response, Ms. Wertz wrote to Mr. Maloney that there was nothing in the files of the Venkany account indicating that a loan was anticipated (*id.*). About two months later, Mr. Maloney wrote to Dhama urging him to immediately send a loan request to Ms. Wertz (*id.*). However, some days later Mr. Maloney was confronted with certain probing, unhappy questions from what seem to be more senior management figures at ABDC regarding the Venkany account; in response, Mr. Maloney again urged Dhama to submit the loan request information, noting that he was "getting heat on this" (*id.*). In the last email in this sequence, dated June 6, 2011, Mr. Maloney informed Dhama that Ms. Wertz had declined the loan for Venkany and Seven Hills (*id.*).

Dhama further averred that the amounts claimed by plaintiffs were not accurate, as plaintiffs had failed to take into account payments he had made to them both before and after the commencement of the action (*id.* at ¶ 12). To be precise, Dhama claimed that between December 10, 2010 and October 31, 2011, he paid \$716,024.74 to plaintiffs, and that since the filing of the complaint he has paid an additional \$330,000 (*id.*). Bank statements accompanying Dhama's statement show that defendants paid a total of \$706,024.74 to ABDC from December 10, 2010

and October 6, 2011 (Bachu affirmation, exhibit E). Another exhibit shows that defendants made regular payments of \$10,000 to Bellco from February 17, 2012 through October 5, 2012, for a total of approximately \$330,000 (*id.* at exhibit D).

In reply, plaintiffs submitted another affidavit by Ms. Wertz (affidavit of Debra Wertz, sworn to on January 9, 2013 [Wertz reply affidavit]). Ms. Wertz denied that plaintiffs had ever waived the right to charge late fees to defendants (*id.* at ¶¶ 21–24). According to Ms. Wertz, the emails discussing the removal of late fees did not concern any of the pharmacy accounts at issue, but rather pertained to another pharmacy named Afam, which is owned by a partnership between Dhama and Danny Gohari, the individual to whom the emails were addressed (*id.* at ¶ 22). Wertz noted that some of the emails refer to Afam in their subject line, while others refer to account number 100084598 (*id.* at ¶ 23). This, she averred, is the ABDC account number for Afam (*id.* at ¶ 23; *see id.* at exhibit G), and a review of the invoices and account statements confirms that it is not the account number for any of the three pharmacy defendants herein (*see* Wertz moving affidavit, exhibits D, E, I, J, N, O).

Ms. Wertz confirmed receiving the payments that Dhama claimed to have made both prior to and subsequent to the filing of the complaint (Wertz reply affidavit, ¶ 19). As for the payments remitted prior to the commencement of the action, she claimed that they had been properly applied to the accounts and that the outstanding balances on the final account statements presented to Dhama reflected those credits (*id.*). In particular, plaintiffs claimed that the majority of the pre-action payments, i.e., \$648,957.70, were allocated to the Vicram account, while the remainder, \$57,067.04 were attributed to the Venkany account (*see id.* at exhibits C & E). These payments had been allocated to outstanding invoices other than those shown on the account

statements presented (*id.* at ¶ 19, exhibits B & D).

As for payments made following the action, Ms. Wertz averred that these, too, were properly reflected on defendants' accounts (*id.*). These payments appear to have been applied to the Seven Hills account until the middle of June, when the principal balance there was paid off (*compare* Bachu affirmation, exhibit D *with* Wertz moving affidavit, exhibit U; *see also* Bachu affirmation, exhibit D [statement memoranda containing account number of Seven Hills]). Thereafter, the payments were applied to the Venkany account (*compare* Bachu affirmation, exhibit D *with* Wertz reply affidavit, exhibit D). Finally, the exhibits attached to Ms. Wertz's affidavit reveal that since the date of the motion, additional payments were received from defendants and applied to the Venkany account resulting in a reduced principal balance (*see* Wertz reply affidavit, ¶ 24, exhibits C & H). Plaintiffs have not applied any payments to the Vicram account since the commencement of the action.

II. *Standard*

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324;

Zuckerman, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

III. Discussion

Plaintiffs contend that they delivered goods to defendants for which defendants never paid. Plaintiffs further state that they sent defendants the account statements on which the instant motion is based, and that defendants did not object to the balance shown. The account statements have been provided to the court, along with copies of the invoices which plaintiffs claim were outstanding. Plaintiffs have also presented the guaranties signed by Dhama, in which he guaranteed payment of the defendant pharmacies' liabilities. Plaintiffs have thereby made out a *prima facie* case for an account stated (*see White Plains Cleaning Servs., Inc. v 901 Props., LLC*, 94 AD3d 1108, 1109 [2d Dept 2012] [agreement as to balance on account may be implied by retention of billing statements without objection]) and for judgment against both the defendant pharmacies and Dhama for any outstanding balance.

In opposition, defendants fail to raise any material issues of fact. Defendants do not dispute that the invoiced goods were delivered or that the prices on the invoices are accurate. The bank statements proffered by defendants merely show that the payments indicated therein

were made to plaintiffs. They do not show that those payments satisfied the outstanding principal balances on the account statements which form the basis of this action, and defendants have satisfactorily explained in their reply papers that the payments made prior to the action were applied to other outstanding invoices, mostly on the account of Vicram. Similarly, the proof of payments *after* the commencement of the action does not raise any issues of fact, as plaintiffs admit that payments have been received during the course of this litigation and have adjusted their claims accordingly. Defendants neither claim that they objected to the account statements when they received them nor do they specify which of the unpaid invoices listed have been paid. The presumption that necessarily follows, that those statements were accurate, is not rebutted by the proffered bank statements. The court also concludes on this record that there is no merit in defendants' allegation that they in fact have overpaid plaintiffs, and thus no basis for the defendants' proposed counterclaim of unjust enrichment.

In addition, defendants fail to show that plaintiffs promised to waive the late charges. As noted in plaintiffs' reply papers, the emails cited by defendants on the topic concern, on their face, a different pharmacy and a different account than the ones at issue here. Moreover, the emails date from March and April of 2011. As it does not appear that these defendants were being billed for late charges at that time, there is no reason to read those emails to apply to the defendant pharmacies' accounts. As for the supposed promise to provide a loan or credit line, the emails only show that Dhama was encouraged by defendants' officer Jerry Cline to apply, with the assurance that "we'll make sure you get the appropriate credit line established" (Bachu affirmation, exhibit B, email dated December 2, 2010). Even this statement, though optimistic,³

³ Perhaps unduly so.

treated the establishment of a credit line as a transaction to be consummated in the future, not an actual promise (*see Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976] *aff'd* 43 NY2d 778 [1977] [holding that statement of future intent not actionable as fraud absent allegations of present intent to deceive]; *see also Ira G. Steffy & Son, Inc. v Citizens Bank of Pennsylvania*, 7 A3d 278, 290 [Pa Sup Ct 2010] ["It is well-established that a breach of promise to do something in the future is not fraud"]). This is all the more true in light of the merger clauses of the various credit agreements, which provides that "[t]his Credit Agreement . . . represents the full and complete understanding of the parties with respect to the subject matter hereof and cannot be modified except by writing and signed by the party or parties to be bound" (Wertz moving affidavit, exhibits A, F, K; *see Yocca v Pittsburgh Steelers Sports, Inc.*, 478 Pa 479, 497–98, 854 A2d 425, 436 [2004]).

In sum, plaintiffs delivered goods to defendants, for which defendants had not fully paid as of this motion's return date. Summary judgment therefore is granted to plaintiffs on their causes of action for goods sold and delivered, account stated and breach of contract, and plaintiffs are also entitled to attorneys' fees.⁴ However, plaintiffs' papers contain certain curiosities which prevent the granting of the precise relief requested. The original schedule of late charges for Venkany show payments in July 2012 of \$20,000, \$10,000 and \$10,000 on the 9th, 13th and 31st of the month, respectively. In their reply papers, plaintiffs submit a spreadsheet of payments which Ms. Wertz averred represented a complete accounting of all

⁴ Plaintiffs do not seek summary judgment on their causes of action to take possession of the collateral designated in the various security agreements (plaintiffs' brief 6). Plaintiff's causes of action for unjust enrichment are duplicative of the breach of contract claim and are hereby dismissed (transcript, January 15, 2013, 10–11)

payments received on the Venkany account (Wertz affidavit, January 9, 2013, ¶ 19, exhibit C). This spreadsheet showed an additional payment of \$10,000 received on July 8, 2012, as well as another payment of the same amount received on August 10 of that year. Neither of these credits were included in the original late charge calculation (Wertz affidavit, August 23, 2012, exhibit S). The late charge calculation submitted with plaintiffs' reply papers includes the August 10 payment (without acknowledging the previous error), but continues to omit the July 8 payment (Wertz affidavit, January 9, 2013, exhibit H). Consequently, the amount sought by plaintiffs' on the Venkany account (\$161,492.26) is too high. Taking into account the July 8, 2012 payment (while following the late charge schedule annexed to Ms. Wertz's January affidavit in all other respects), it follows that the outstanding principal balance on the Venkany account as of January 7, 2013 was \$50,493.81.⁵ Using, as plaintiffs did, a late charge rate of 18% per annum, the court has determined that the late charges accruing on the account since March 1, 2011 through January 7, 2013 comes to \$100,091.29, for a total of \$150,585.10. Otherwise, the final amounts claimed by plaintiffs are correct. Accordingly it is

ORDERED that the motion of plaintiffs AmerisourceBergen Drug Corporation and Bellco Drug Corp. against defendants Venkany, Inc., d/b/a, Frederick Pharmacy, Vicram Pharmacy Inc., d/b/a, Royal Pharmacy, Seven Hills Pharmacy, Inc., d/b/a, Jayson Drugs, and Karthik Dhama is granted as to the first, second, fourth, sixth through eighth, tenth, twelfth through fourteenth, sixteenth and eighteenth causes of action and as to the request for attorneys'

⁵ The late charge schedule upon which plaintiffs' counsel urged the court to rely (transcript, January 15, 2013, 11:9–20) reports a final outstanding principal balance of \$60,493.81. In their final request for relief, plaintiffs apparently disavowed their own accounting and requested \$50,493.81, the sum the court believes is correct (Wertz reply affidavit, ¶24). Plaintiffs do not explain the discrepancy, nor did they adjust the late charges accordingly.

fees, and is otherwise denied; and it is further

ORDERED that the defendants' cross-motion for summary judgment dismissing the third, ninth and fifteenth causes of action is granted, and those causes of action are dismissed with prejudice; and it is further

ORDERED that the defendants's cross-motion to amend the answer is denied; and it is further

ORDERED that the issue of the amount of attorneys' fees due to plaintiffs from defendants is hereby severed and shall continue as a separate action, and plaintiffs are directed to serve a copy of this order upon the Clerks of the Court by email at cc-nyef@courts.state.ny.us and the Trial Support Office at trialsupport-nyef@courts.state.ny.us, who are directed to make note of the severance in their records; and it is further

ORDERED that the aforesaid claim for attorney's fees is hereby referred to a Special Referee to hear and determine, and within 60 days of the date of this order plaintiffs shall serve a copy of this order with notice of entry, together with a completed Information Sheet,⁶ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place the matter on the calendar of the Special Referee's Part for the earliest convenient date and notify all parties of the time and date of the hearing; and it is further

ORDERED that the Clerk is directed to enter judgment (i) in favor of plaintiff AmerisourceBergen Drug Corporation and against defendants Venkany, Inc., d/b/a, Frederick Pharmacy and Karthik Dhama, jointly and severally, in the amount of \$150,585.10, with interest

⁶ Copies are available on the Court's website at www.nycourts.gov/suptctmanh under the "References" option in the "Courthouse Procedures" section of the "Court Operations" menu.

thereon at the statutory rate from January 8, 2013; (ii) in favor of plaintiff AmerisourceBergen Drug Corporation and against defendants Vicram Pharmacy Inc., d/b/a, Royal Pharmacy and Karthik Dhama, jointly and severally, in the amount of \$332,960.13, with interest thereon at the statutory rate from January 8, 2013; (iii) in favor of plaintiff Bellco Drug Corp. and against defendants Seven Hills Pharmacy Inc., d/b/a, Jayson Drugs and Karthik Dhama, jointly and severally, in the amount of \$14,980.23, with interest thereon at the statutory rate from January 8, 2013; and (iv) with a single award of costs and disbursements in favor of all plaintiffs and against all defendants as taxed by the Clerk.

Dated:

ENTER:


J.S.C.