Bellco Drug Corp. v Interactive Health Pharm. Serv. Inc.
2013 NY Slip Op 32327(U)
September 25, 2013
Sup Ct, New York County
Docket Number: 651230/2011
Judge: branste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. **PART** 3

Justice

Index Number : 651230/2011
BELLCO DRUG CORP., A WHOLLY
vs.
INTERACTIVE HEALTH PHARMACY
SEQUENCE NUMBER : 005
SUMMARY JUDGEMENT

INDEX NO. 651230/11
MOTION DATE 6/18/13
MOTION SEQ. NO. 005

The following papers, numbered 1 to 3 **, were read on this motion to/for** summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9-25-13

HON. EILEEN BRANSTEN J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ **GRANTED** ☐ **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 3

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BELLCO DRUG CORP., a wholly owned subsidiary of AMERISOURCEBERGEN DRUG CORP.,

Plaintiff,

-against-

Index No. 651230/2011
Motion Date: 6/18/2013
Motion Seq. No. 005

INTERACTIVE HEALTH PHARMACY SERVICES, INC., GERALD RICH and MARVIN SIROTA,

Defendants.

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BRANSTEN, J.:

Presently before the Court is Plaintiff Bellco Drug Corp.'s ("Bellco") motion for summary judgment on its claims in the amount of $1,082,302.72 plus late charges, interest, costs and disbursements, including reasonable attorneys' fees.

In this action for goods sold and delivered, Bellco is seeking recovery under various credit agreements and personal guarantees entered into by Defendants. Bellco contends that Defendant Interactive Health Pharmacy Services, Inc. ("IHPS") ordered, received and accepted various pharmaceutical products, and failed to pay for them. In addition, Bellco argues that the personal guaranty entered into by Defendant Marvin Sirota is enforceable. IHPS opposes, arguing that there are triable issues as to whether it owes Bellco any money because Bellco was overcharging it for the goods purchased. IPHS also urges that the guaranty was unconscionable, and there was a novation of the debt and guaranty. For the following reasons, Plaintiff's motion is granted.

I. Background[1]

Bellco is a wholesale distributor of pharmaceutical, health and beauty aids products (the "Goods"). (Affidavit of Debra L. Wertz ("Wertz Aff.") ¶ 2; Defendants' Rule 19-a St. ¶ 2.) Through November 11, 2011, IHPS operated a specialty pharmacy. (Defendants' Rule 19-a St. ¶ 4.) Defendant Marvin Sirota is the president and majority shareholder of IHPS, *id.* ¶ 6.[2]

To obtain credit from Bellco for IHPS's purchase of the Goods, IHPS executed credit applications to Bellco (the Credit Application) on July 23, 2002 and August 12, 2009. (Defendants' Rule 19-a St. ¶ 7.) Under the terms of the Credit Applications, IHPS agreed to timely remit payments to Bellco for Goods purchased. (Ex. B to Order to Show Cause ("Credit Application") ¶ 1.) IHPS also agreed that if its payment was delinquent, Bellco had the right to a per-day late payment fee of the lower of 0.05% (1.5% per month or 18% per year), or the maximum rate permitted by law. *Id.* In the August 12, 2009 Credit Application, IHPS agreed to pay Bellco's costs and expenses, including reasonable attorneys' fees, in connection with its collection or the enforcement of any of its rights, if IHPS defaulted thereunder. *Id.* ¶ 6. The Credit Application also provided that billing

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[1]The facts as described herein that are drawn from the parties' Rule 19-a Statements of Material Facts filed in connection with this motion are unopposed, unless otherwise noted.

[2] Defendant Rich was dismissed from this action pursuant to stipulations of partial dismissal, filed on March 16, 2012 and on June 25, 2012. *See* Affidavit of Marvin Sirota ("Sirota Aff.") ¶ 5 & n.2.

disputes must be filed with Bellco's accounts receivable department the earlier of 30 days after of receipt of the first statement containing the amount in dispute, or the period set by a manufacturer for chargebacks, otherwise IHPS would be deemed to have accepted the accuracy of the statements and to waive its right to dispute the amounts. *Id.* ¶ 1.

On October 1, 2003, IHPS executed a separate security agreement, *see* Ex. C to Order to Show Cause. This October 1, 2003 Agreement, together with the August 12, 2009 Credit Application, *see* Credit Application ¶ 2 (collectively, the Security Agreement), provided Bellco with a blanket lien on IHPS's assets, including but not limited to its inventory, accounts receivable, prescription files, fixtures, equipment, and the proceeds thereon. (Defendants' Rule 19-a St. ¶ 13.)

Also in connection with, and as an inducement for, the extension of credit to IHPS, Defendant Sirota executed and delivered a personal guaranty to Bellco on August 12, 2009. (Ex. E to Order to Show Cause.) In the guaranty, Sirota irrevocably and unconditionally guaranteed the performance of all obligations as defined in the Credit Agreement of IHPS. *Id.* Sirota agreed that his obligations thereunder were "primary, absolute, unconditional, irrespective" of the "enforceability or any future amendment or change in this guaranty, any agreement between and/or among Vendors and [IHPS] or any other agreement to which any undersigned or [IHPS] is or may become a party . . . or any other action or circumstance that might otherwise constitute a legal or equitable

discharge or defense of a surety or a guarantor." *Id.* He further agreed that he waived "any other rights and defenses that are or may be available to" him. *Id.*.

In consideration of the credit applications and the guaranty, Bellco sold and delivered Goods to IHPS on credit through to March 10, 2011. (Defendants' Rule 19-a St. ¶ 19; Wertz Aff. ¶ 12.) The Goods ordered from Bellco and delivered to IHPS were memorialized in invoices also delivered to IHPS. (Ex. F to Order to Show Cause.) These invoices set forth the quantity of Goods ordered, the price charged for the Goods, and the date payment was due. *Id.*; *see* Wertz Aff. ¶ 13. Bellco also issued monthly computer-generated account statements to IHPS ("Account Statements"). *See* Ex. G to Order to Show Cause (April 30, 2011 account statement); Wertz Aff. ¶ 14.) These Account Statements summarized the open invoices, the outstanding balance, and the payment due date. *Id.*

IHPS and Sirota did not object to either the invoices or the Account Statements. (Wertz Aff. ¶ 14.) IHPS failed to remit payments in a timely manner. (Defendants' Rule 19-a St. ¶ 25.) As of April 29, 2011, the reasonable value of the Goods sold and delivered to IHPS, but not paid for, inclusive of the late charges through April 27, 2011, was $1,082,302.72. (Wertz Aff. ¶ 15; Defendants' Rule 19-a St. ¶ 27.) This includes the April 30, 2011 invoiced amount of $1,068,691.30, plus late charges of $13,611.42 incurred between March 28, 2011 and April 27, 2011, which were not reflected in the

April 30, 2011 Account Statement, for a total amount of $1,082,302.72. (Wertz Aff. ¶ 15.)

On November 11, 2011, IHPS sold the majority of its assets, including its inventory and customer lists, to non-party Value Pharmacy, Inc., but specifically excluded its accounts receivable, and terminated operations (the "Closing"). (Wertz Aff. ¶¶ 3, 18.) Pursuant to that Closing, Bellco recovered $489,000.00. *Id.* ¶ 20. In addition, shortly following the Closing, Bellco recovered an additional $15,000.00 for inventory which had been included in the transferred assets but was not initially accounted for, so the Closing resulted in Bellco's recovery of $504,000.00. *Id.* ¶ 21.

Also on November 11, 2011, IHPS assigned all of its right, title, and interest in it's accounts receivable to Bellco ("Assignment of Accounts Receivable"). *Id.* ¶ 22 & Ex. K. Within several weeks after the Closing, Bellco collected a total of $285,197.99 in accounts receivable. (Wertz Aff. ¶ 23.)

After the Closing, IHPS made several loans to former employees Defendant Gerald Rich and non-party Alan Fertmann. On December 15, 2011, IHPS assigned its claims against these employees to Bellco, and Bellco agreed to pursue collection of the loans and credit IHPS for any amounts recovered to IHPS's obligations ("Loan Assignment"). *Id.* ¶ 25 & Ex. L. On March 6 and 19, 2012, Bellco recovered $20,000.00 from Fertmann and $19,039.51 from Rich, and these amounts have been credited to

IHPS's account. *Id.* ¶ 26; Defendants' Rule 19-a St. ¶ 49). Since the Closing, Bellco has recovered a total of $828,664.86 from and on behalf of IHPS. (Wertz Aff. ¶ 27 & Ex. M.)

In both the Assignment of Accounts Receivable and the Loan Assignment, IHPS admitted that the outstanding amount due was $1,082,302.72. *Id.* Exs. K & L. Specifically, in the Assignment of Accounts Receivable, IHPS admitted that the value of the goods sold but not paid for by IHPS "is One Million Eighty-Two Thousand Three Hundred Two Dollars and 72/00 ($1,082,302.72) plus late charges at eighteen percent (18%) per annum from March 28, 2011." *Id.* Ex. K at 2.[3] The Loan Assignment similarly contains an acknowledgment that IHPS was indebted to Bellco in that same principal amount of "($1,082,302.72) plus late charges at eighteen percent (18%) per annum from March 28, 2011, costs and attorneys' fees." *Id.* Ex. L at 2.

Bellco commenced this action asserting six causes of action including: goods sold and delivered; breach of the Credit Application; unjust enrichment; account stated; default under the Security Agreement; and recovery under the personal guaranties by the individual Defendants Rich and Sirota. The complaint seeks a judgment in the amount of $1,082,302.72 plus late charges and interest on all the claims, and it seeks a judgment in

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[3]According to Plaintiff, the Assignment of Accounts Receivable and the Complaint contain a typographical error in that the balance reflected therein includes late charges through April 27, 2011, not March 27, 2011. (Plaintiff's Rule 19-a St.¶ 53 & n.1.)

accordance with the Security Agreement directing that certain Collateral be delivered to it or seized by the sheriff to satisfy the indebtedness, all together with costs and disbursements of this action including reasonable attorneys' fees.

II. **Discussion**

For the reasons that follow, the motion for summary judgment is granted in the amount of $465,162.46 as of April 22, 2013, and the issues concerning the amount of the late charges due from April 23, 2013 through to the date of judgment, and the amount of Bellco's costs and reasonable attorneys' fees in enforcing IHPS's obligations under the Credit Applications are severed and referred to a Special Referee to hear and report.

A. *Bellco's Prima Facie Proof of Account Stated and Goods Sold and Delivered*

Bellco has established a prima facie case for recovery under various theories for goods sold and delivered, account stated and IHPS's breach of the Credit Applications and default under the Security Agreement, and on the guaranty by Sirota. To make a prima facie case on an account stated claim, the Plaintiff must show it generated detailed monthly invoices, mailed them to the Defendant on a regular basis, and that Defendant received them and failed to object to them within a reasonable time. *Stephanie R. Cooper, P.C. v. Robert*, 78 A.D.3d 572, 573 (1st Dep't 2010).

Here, Bellco demonstrates that it sold the various Goods to IHPS, and that Bellco sent and IHPS received the various invoices and monthly account statements for the Goods. Further, Bellco shows that IHPS did not object to any invoice or account statement, but nevertheless failed to pay. The invoices identify the quantity and type of Goods ordered and delivered, the amounts charged for the Goods, and the dates payments were due. *See* Ex. F to Order to Show Cause. The final Account Statement of April 30, 2011, summarized the open invoices, the balance due and owing, and the due date. *See* Ex. G to Order to Show Cause. Bellco presents proof of the initial outstanding amount due ($1,082,302.72), proof of the payments and credits, and the late charges of 18% per annum, with the total balance due from Defendants of $465,162.46 as of April 22, 2013. *See* Ex. M to Order to Show Cause.

Debra L. Wertz, Bellco's Regional Director of Credit, attests that IHPS and Sirota defaulted on their obligations under the Credit Applications and Guaranty. (Wertz Aff. ¶¶ 15-17.) Bellco further submits proof of the Loan Assignment and the Accounts Receivable Assignment in which IHPS acknowledged the debt and the amount due. *See* Ex. K to Order to Show Cause at 2; *see also* Ex. L to Order to Show Cause at 2 & § 3.2. These assignment agreements were executed following the commencement of this action, and were negotiated with Defendants' counsel. On the guaranty claim, Bellco

demonstrates that Sirota executed the guaranty, but failed to pay thereunder when Bellco demanded such payment upon IHPS's default.

B. *Defendants Fail to Raise Triable Issues on Plaintiff's Claims*

In opposition to the motion, IHPS and Sirota fail to raise triable issues of fact. Defendants did not deny the extension of credit, receipt of the Goods, or receipt of the monthly account statements, and did not challenge the accuracy of the invoices and statements until this motion. Instead, Defendants contend that Bellco agreed to invoice the Goods at "Cost" minus 1.5%, with "Cost" meaning Bellco's cost. Defendants further argue that the invoices indicate that Bellco was charging IHPS "list" price, but fail to identify how that "list" price was calculated, and what the actual "Cost" of the products to Bellco was, making it impossible for Defendants to verify that they were being charged Cost plus or minus a percentage. *See* Defs.' Opp. Br. at 3-4.

This contention, however, fails to raise a triable issue. As Bellco points out, the time for Defendants to object to the invoices and account statements, the last of which was received by them over two years ago, has long expired. In addition, IHPS clearly acknowledged the amount of the debt in both the Accounts Receivable Assignment and the Loan Assignment. *See* Exs. K & L to Order to Show Cause. Contrary to Defendants' argument, the acknowledgment of the specific amount of the debt did not just occur in the

"whereas" recitals, but also in section 3.2, entitled "Default," which provided that Bellco may, upon IHPS's default, enter judgment against IHPS

> for the full amount of the debt, to wit, One Million Eighty-Two Thousand Three Hundred Two Dollars and 72/100 ($1,082,302.72) plus late charges at eighteen percent (18%) per annum from March 28, 2011 (the "Claim") (with credit given for payments made) ...

Ex. K to Order to Show Cause at § 3.2. Further, Defendants fail to actually point to any item for which they were invoiced at an amount greater than the agreed upon discount structure. Finally, their argument that the assignment agreements were executed by Sirota only in his representative capacity as principal of IHPS, and therefore, he is not individually liable thereon, misses the point that Sirota is being held liable on his personal guaranty, not under the assignment agreements.

C. *Defendants' Affirmative Defense of Unconscionability*

Next, Defendants' argument that the Credit Applications and Guaranty are unconscionable and, therefore, unenforceable, is rejected. "An unconscionable contract has been defined as one which 'is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible [sic] according to its literal terms.'" *Gillman v .Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (citations omitted). The contract must be shown to be both procedurally and substantively unconscionable when made, that is, one of the parties lacked meaningful

choice, and the terms unreasonably favored the other party. *Id.* In considering procedural unconscionability, the court should consider the size, the commercial setting, whether high pressure or deceptive tactics were used, the use of fine print, the education and experience of the party and "whether there was disparity in bargaining power." *Id.* (citation omitted). It is a matter of law for the court to determine, particularly where the facts germane to unconscionability are essentially undisputed. *Emigrant Mortg. Co., Inc. v. Fitzpatrick*, 95 A.D.3d 1169, 1170-1171 (2d Dep't 2012); *Simar Holding Corp. v. GSC*, 87 A.D.3d 688, 690 (2d Dep't 2011).

In challenging the unconscionability of the Credit Application, IHPS points to its obligation to provide Bellco with a lien on IHPS's assets, Bellco's right to accelerate the debt upon IHPS's default, and IHPS's obligation to pay costs and attorneys' fees in event of default. (Sirota Aff. ¶ 33. With respect to the Guaranty, Defendants challenge that it is irrevocable, absolute, and unconditional, and includes a waiver of defenses. *Id.* ¶ 34.

It is beyond dispute that Defendants are sophisticated and experienced in business. This presumption is supported by the fact that Defendants had been operating a profitable business for a number of years, first establishing a business relationship with Bellco in 2002, which was continued and renewed through to 2011. There is no showing of inequality in bargaining, or that Defendants had no meaningful choice. They could have used other suppliers of the drugs, or used one of their existing suppliers. *See Dabriel,*

Inc. v. First Paradise Theaters Corp., 99 A.D.3d 517, 521 (1st Dep't 2012) (no lack of meaningful choice because Defendants were sophisticated business persons and were free to walk away from negotiations and rent space elsewhere). Defendants fail to show that high pressure tactics were used. Both the Credit Application (two pages long) and Guaranty (two paragraphs) were short, fairly basic and straightforward without fine print.

As to substantive unconscionability, the provisions challenged are standard in credit agreements and guarantees, and there is nothing in the Credit Application or Guaranty to suggest that the terms were unreasonably favorable to Bellco or overly oppressive to Defendants. *Id.*

Accordingly, the court finds as a matter of law that neither the Credit Application nor the Guaranty are unconscionable, and, therefore, this defense is dismissed.

D. *Defendants' Novation Defense*

Defendants' contention that the Assignment of the Accounts Receivable and Loan Assignment constituted a novation also is unavailing. A new obligor or another contract will not discharge obligations created under a previous contract unless the parties clearly intended to effect a novation substituting the new agreement for the original obligation. *See Ventricelli v. DeGennaro*, 221 A.D.2d 231, 232 (1st Dep't 1995), *lv denied* 87 N.Y.2d 808 (1996). To establish a novation, the Defendants must present documentary

evidence which unequivocally states that Defendants were released from their obligation to pay for the goods sold and delivered or pay on the guaranty which obligations were replaced with the new obligation. *See Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010) (need explicit expression that intend to extinguish first obligation); *Kleet Lumber Co., Inc. v. Saw Horse Remodelers, Inc.*, 13 A.D.3d 414, 415 (2d Dep't 2004); *Kaloidis v. Petrakis*, 274 A.D.2d 502, 502 (2d Dep't 2000). The subsequent contract must contain language indicating that it "either revoked, cancelled, extinguished, superceded or otherwise satisfied defendants' obligations to Plaintiff" under the original contract. *Ventricelli v. DeGennaro*, 221 A.D.2d at 232; *Schloss Bros. & Co. v Bennett*, 260 N.Y. 243, 248 (1932); *see also Cont'l Stock Transfer & Trust Co. v Sher-Del Transfer & Relocation Servs., Inc.*, 298 A.D.2d 336 (1st Dep't 2002).

Here, there is no evidence in the two assignment agreements that the parties intended to extinguish IHPS's obligation under the Credit Application, or Sirota's obligation under the Guaranty. The assignment agreements addressed the transfer of IHPS's claims against third parties to Bellco. They do not mention, or provide for the termination, cancellation, or extinguishment of either the Credit Application or the Guaranty. In fact, Section 8.7 of both the Assignment of the Accounts Receivable and the Loan Assignment, provides only that "[t]his Assignment Agreement supercedes any and all prior discussions and agreements, written or oral, between Assignor and Assignee with

respect to the assignment of the Accounts Receivable and other matters contained herein." (Exs. K & L to Order to Show Cause § 8.7.) In Section 8.10, both agreements further provide that "[n]o person, organization or association other than Assignor or Assignee shall have any rights or claims under this Assignment Agreement." *Id.* § 8.10. The two assignment agreements fail to mention the Guaranty or Sirota, and he is not a party to them. It is clear that they were not intended to, and did not replace, extinguish, or supercede Sirota's personal guaranty.

Sirota's claim that Bellco orally agreed to terminate the Guaranty upon execution of the Assignments also fails to present a triable issue. The Guaranty contained a waiver of all defenses, precluding him from asserting a claim of release. *See United Orient Bank v. Lee*, 223 A.D.2d 500, 500 (1st Dep't 1996). In addition, the terms of the Guaranty are unambiguous so this claim is barred by the parol evidence rule. *Id.* Moreover, the Guaranty provided that

> "Paragraphs 7(Consent to Jurisdiction), 8 (Limitation on Damages), 9 (Governing Law) and 12 (Complete Agreement) of the Credit Agreement are hereby incorporated in this guaranty as if set forth at length and, in each case, all references . . . to the Credit Agreement will be deemed to include this guaranty."

(Ex. E to Order to Show Cause.)

Further Paragraph 12 of the Credit Agreement, captioned "Complete Agreement," provided 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." (Ex. B to Order to Show Cause ¶ 12.) Thus, even if there was some oral agreement to terminate the Guaranty, the Guaranty prohibits oral modification, and there was no writing evidencing a discharge of Sirota's obligation.

The court has considered the Defendants' remaining arguments and finds them to be without merit.

III. Conclusion

Therefore, summary judgment is granted to Bellco is the amount of $465,162.46, which constitutes the principal amount due, plus late charges, minus payments, up to the date of April 22, 2013, *see* Ex. M to Order to Show Cause, and the issues of the amount of the late charges due from April 23, 2013 through to the date of judgment, as well as the amount of Bellco's costs and attorneys' fees in enforcing IHPS's obligations under the Credit Applications are severed and are referred to a Special Referee to hear and report.

Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of Plaintiff and against Defendants Interactive Health Pharmacy Services, Inc. and Marvin Sirota in the amount of $465,162.46,

together with interest at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount of the late charges due from April 23, 2013 through to the date of judgment, as well as the amount of Bellco's costs and attorneys' fees in enforcing IHPS's obligations under the Credit Agreement are severed and are referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the Plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[4] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: New York, New York
September 25, 2013

ENTER,

Hon. Eileen Bransten, J.S.C.

[4]Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).