

Bennett v Atomic Products Corp.

2013 NY Slip Op 32377(U)

September 25, 2013

Sup Ct, Suffolk County

Docket Number: 29166-96

Judge: Hector D. LaSalle

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SHORT FORM ORDER

INDEX No. 29166-96
CAL. No. N/A

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY**

P R E S E N T :

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

DECISION AFTER TRIAL

_____ x

**GERALD W. BENNETT, ALAN M.
WUNDERLICH, Individually, and
ALAN M. WUNDERLICH d/b/a
NUCLEAR LABORATORY SERVICES,**

Plaintiffs,

-against-

**ATOMIC PRODUCTS CORPORATION
and BIODEX MEDICAL SYSTEMS,
INC.,**

Defendants.

_____ x

PLAINTIFF'S ATTORNEY:
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The above-referenced matter is a 1996 case assigned to this Court on November 1, 2012. The matter was tried before this Court as a non jury trial on a series of non-consecutive court dates between December 12, 2013 and February 4, 2013. The Court heard from numerous witnesses and admitted over fifty items of evidence. In the case before the Court, the resolution of various issues turned upon questions of credibility. The Court had ample opportunity to view each witness and adjudge their credibility. After the conclusion of the trial, the Court received memorandums of law from each attorney on behalf of their respective clients. The memorandums were received on May 29, 2013 and have been reviewed and considered by this Court.

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The underlying claims in this action stem from a professional relationship between Gerald W. Bennett (Bennett), Alan M. Wunderlich (Wunderlich) individually, Alan M. Wunderlich d/b/a Nuclear Laboratory Services (NLS) and Atomic Products Corporation/Biodex Medical Systems, Inc. (collectively Atomic). It is undisputed that Bennett and Wunderlich served as consultants for Atomic from the late 1970's through the early 1990's. At issue during the trial were three agreements that serve as the basis of plaintiffs' claim and defendants' counterclaim.

Plaintiffs Bennett and Wunderlich contend in their first cause of action that defendant Atomic agreed to pay them a percentage of sales of a rectilinear thyroid scanner pursuant to a written agreement dated July 22, 1988. Plaintiffs contend that these payments were to be made within thirty (30) days of the end of calendar quarter. Plaintiffs contend that the rectilinear thyroid scanner has been marketed and sold by defendant and to date plaintiffs haven't received any payments.

Plaintiffs Bennett and Wunderlich contend in their second cause of action that if defendant fails to sell any thyroid rectilinear scanners within a twelve month period, they are entitled to all rights in the scanner.

**I. DEVELOPMENT AND SALE OF RECTILINEAR THYROID SCANNER
(First and Second Cause of Action)**

On July 22, 1988 Bennett and Wunderlich entered into a written agreement (plaintiffs' Exhibit 18) with James Reiss, on behalf of Atomic to create a Rectilinear Thyroid Scanner (hereinafter Scanner). Specifically the agreement required Atomic to "design, develop and perfect the system, excluding software, on a best efforts basis." The agreement further required that the work on the scanner be conducted as expeditiously as possible. The agreement stated that plaintiffs were to receive payments of ten-thousand dollars (\$10,000.00) jointly upon completing three distinct tasks. First, plaintiffs were required to complete a prototype model available for presentation at the Society of Nuclear Medicine Show in June, 1988. The prototype model was required to be capable of displaying data. The prototype would share the exact physical appearance of the functional scanner. The prototype scanner need not be otherwise functional. This requirement had been met prior to the execution of the agreement as the show was in June 1988 and the agreement was executed in July 1988. The plaintiffs fulfilled their obligations under this prong of the contract. The parties do not dispute the plaintiffs were jointly paid ten-thousand dollars (\$10,000.00) for completing this work.

Next plaintiffs were required to develop "a complete pre-production prototype which can be installed for beta site testing." Upon completion of this prototype defendant was required to pay plaintiffs jointly ten-thousand dollars (\$10,000.00). This prong of the agreement was fulfilled by the plaintiffs and payment for services were made by Atomic.

The plaintiffs further agreed to provide defendants with drawings of the scanner in sufficient detail so that defendant could begin the commercial production of the Scanner. The plaintiffs satisfied this term of the agreement and in turn were jointly paid ten-thousand dollars (\$10,000.00) as set forth in the agreement.

In 1989 Wunderlich tested the scanner on "phantoms." These phantoms were used to mimic a human thyroid and real persons. Wunderlich determined after his testing that the images produced by his designed scanner were of a diagnostic quality. In September 1989, defendant submitted a premarketing notification form to the United States Food and Drug Administration (hereinafter FDA) seeking authority to market and sell the scanner in the United States. The form used to make such application has been referred to as a 510k form. This submission was made to the FDA by defendant based on information supplied by plaintiffs. In its application defendant represented to the FDA that the scanner it proposed to market was effective and clinically equivalent to similar products currently marketed by other manufactures. The FDA sought supplemental information from the defendant which was duly supplied. In February 1990 the FDA approved the defendant's 510k application.

In December 1989 defendant took several steps to prepare for the launch of the scanner.

Defendant wanted to have the scanner tested by two highly regarded medical institutions. It was defendant's belief that a positive review by these institutions would help propel sale of the scanners. In December 1989 plaintiffs made defendant aware that the scanner was "ready" and it was shipped to Mt. Sinai Hospital in Manhattan for their review inspection. The medical professionals at Mt. Sinai were not impressed with the scanner plaintiffs created. Adele Holl, defendant's nuclear medical technologist in charge of customer support at Mt. Sinai Hospital testified that the scanner "wasn't operating" and that the representatives at Mt. Sinai were "totally disgusted" with the scanner. Mt. Sinai Hospital rejected the scanner. In early 1990 a scanner was sent to NYU Hospital for their review and they found the scanner had problems and required too many service calls. They rejected the scanner as well.

In May 1990 defendant approached Sun Nuclear to correct the flaws in the scanner designed and created by plaintiffs. Mr. Bill Simon, the President of Sun Nuclear, testified that the scanner was functional but required modifications to make it a more marketable product. Simon testified that several problems existed with the scanner. He found that the scanner's multichannel analyzer needed to be calibrated and that the scanner itself had to be made lighter. Sun Nuclear agreed to work with defendant to fix the problems plaguing the scanner. Sun Nuclear made significant changes to the scanner including changing the motor on the XY table, adding a missing algorithm for acceleration and deceleration and increasing the scan area of the device from 10x10 cm to 20x20 cm.

After these corrections were made, Atomic began to ship the scanners redeveloped by Sun Nuclear to various customers. In time, Sun Nuclear became aware of a design flaw that proved fatal to the scanner as designed. The scanner was designed to use one collimator. In order for the scanner to be effective for clinicians it would need to be fitted with ten (10) to fifteen (15) collimators. This would require a major redesign and a significant capital investment into the scanner which Sun Nuclear was unwilling to make. As a result, Sun Nuclear informed Atomic it was no longer interested in manufacturing a scanner on their behalf.

Defendant's counterclaim is denied in its entirety as the credible facts adduced at trial have demonstrated by a preponderance of the evidence that plaintiffs satisfied their obligations to defendant under Paragraphs One, Two, Three, Four and the first sentence of Five of their agreement (Plaintiff Exhibit 18). Accordingly the Court finds that the Counterclaim has not been proven by defendant and as a result it is denied in its entirety.

The Court finds that plaintiffs failed to provide defendant with a thyroid scanning system which could be manufactured and sold on a profitable basis. The plaintiffs failed to prove by a preponderance of the evidence, that the scanner they created was sold or capable of being sold commercially for a profit. The trial evidence overwhelmingly demonstrated that the scanner plaintiffs created could not perform its contemplated task of producing accurate diagnostic images

of human thyroids. Plaintiffs rely heavily on the fact that “their” scanner satisfied the requirements of the FDA. Plaintiffs argue that defendant relied upon plaintiffs scanner to obtain its FDA premarketing clearance. Plaintiffs argue that the concerns raised by Sun Nuclear, Mt. Sinai Hospital and NYU Hospital were easily cured.

The Court found the testimony of Mr. Bill Simon of Sun Nuclear particularly illuminating. Mr. Simon detailed for the Court problems clinicians in the industry had with the scanner created by plaintiffs. He was able to effectively explain why the scanner created by plaintiffs was not marketable and the extensive efforts his company made to correct these deficits.

Paragraph 16 of the agreement states:

Except as provided in paragraph 6, this Agreement shall continue and remain in effect until ATOMIC fails to make royalty payments for (12) consecutive months by reason of there being no sale of the System, at which time the agreement shall be deemed terminated and all rights in the System shall belong to BENNETT and WUNDERLICH, except for software and the patents. As to the patents, ATOMIC shall license them to BENNETT and WUNDERLICH at a royalty rate identical to that set forth in Paragraph 8.

There is no credible evidence to demonstrate defendant ever sold any scanners developed by plaintiffs. This is because plaintiffs failed to provide defendant with a marketable, profitable thyroid system available for commercial sale. Plaintiffs failed to “perfect” the scanner and at trial have failed to prove their first cause of action. Accordingly, the first cause of action is dismissed in its entirety.

In plaintiffs’ second cause of action plaintiffs contend that pursuant to Paragraph 16 of Exhibit 18 they are entitled to all rights in the scanner based upon the lack of sales for a twelve (12) month period. This Court finds that no sales of the scanner occurred and accordingly plaintiffs’ contention that all rights in the scanner they created are now theirs is satisfied. However this entitles them only to the rights to the scanner. This does not require defendant to turn over to plaintiffs any scanners it may have already built. Nothing in the agreement contemplates defendant relinquishing hard assets it has invested in the scanner. Paragraph 16 of Exhibit 18 of this agreement would bar defendant from selling or profiting from any scanners built to the exact specifications of plaintiffs’ plans. This paragraph does NOT require defendant to turn over any scanners which were built to plaintiffs’ specific plans. The agreement does not give plaintiffs the right to acquire any unsold inventory. They are simply entitled to the rights of the scanner they developed.

Plaintiffs have failed to demonstrate how they were harmed by defendant's failure to turn over rights to the scanner. The plaintiffs failed to provide any credible nonspeculative evidence demonstrating their damages as a result of defendant violating a portion of paragraph 16. Accordingly, this Court cannot grant any damages under the second cause of action.

II. BENNETT'S ROYALTY CLAIM (Third Cause of Action)

Plaintiff Bennett contends that during the 1980's he entered into an oral agreement with defendant to design a product capable of measuring the accuracy of a dose calibrator. A dose calibrator measures the amount of radioactivity a patient is administered while receiving a certain medical test. At the time a device which could perform this task existed. This device was called a "Cali-Check" but it was owned and marketed by a different company. Defendant wanted plaintiff Bennett to create a device which could provide the same results the Cali-Check provides without violating any of the Cali-Check patents. Plaintiff Bennett was an independent contractor for defendant at the time he began working on the product. Plaintiff Bennett alleges that on top of being paid an hourly rate to work on this and other products, he reached an agreement to be paid a five (5%) percent royalty on each Cali-Check device sold by defendant.

Plaintiff successfully developed a device which could achieve the results of the "Cali-Check" without violating its patent. The product was marketed and sold under the name the "Lineator." The Lineator developed by Plaintiff Bennett was assigned Item Number 086-507. The Lineator was different than the Cali-Check in that it reduced the amount of tubes used. The Lineator was both smaller and less expensive than the Cali-Check yet produced the exact results contemplated by defendant. Plaintiff Bennett was paid a five (5%) percent royalty on Lineator sales by defendant until the first quarter of 1992.

In 1992 the Nuclear Regulatory Commission (NRC) created new guidelines requiring devices similar to the Lineator to make structural changes. To comply with the new NRC requirements defendant changed the amount of lead in each tube. In addition the NRC requirements caused defendant to add a tube to the Lineator to allow the device to have a larger dynamic range for linearity. Plaintiff Bennett was not involved in redesigning the Lineator to comply with the NRC requirements. The redesigned Lineator was not sold until 1993. Defendant ended its relationship with Plaintiff Bennett in 1992 and ceased paying any royalty on sales of Lineator 086-507.

Plaintiff Bennett contends that he had an enforceable oral agreement with defendant to be paid a royalty of five (5%) percent on each Lineator (Item Number 086-507) by defendant, as long as they are sold by defendant. In addition plaintiff contends he is entitled to a five (5%) percent royalty on the redeveloped Lineator (Item Number 086-509) as it essentially the same product he created with minor changes.

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The Court finds that plaintiff Bennett has failed to prove the third cause of action by a preponderance of the evidence and as a result this cause of action is dismissed in its entirety.

The fact that the parties did not execute a written document embodying their agreement does not preclude the existence of a valid contract (*see, Songbird Jet Ltd. Inc. v. Amax, Inc.*, 581 F.Supp. 912, 921, 38 U.C.C. Rep. Serv. 431 [SDNY 1984]). If the parties intended to be bound by their oral agreement, there may be a binding contract even though the parties never set forth their agreement in a fully executed document (*see, Consare Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 575 [2d Cir. 1993]; *Shaftel v. Dadras*, 39 F.Supp. 2d 271, 224 [EDNY 1999]). What is at issue in the third cause of action is whether plaintiff Bennett and defendant had agreed royalty payments on Lineator (Item Number 086-507) sales would be made to plaintiff Bennett as long as the product was sold. The burden is on plaintiff Bennett to prove that his work in developing the Lineator (Item Number 086-507) was rendered in reliance on a promise by defendant to pay a royalty on the item as long as it is sold. Such a promise need not have been made in express language, it may be implied from the conduct of the parties. It is not enough that plaintiff Bennett hoped or expected to be paid the royalty forever it must be proven that defendant committed to this in express language or from the conduct of the parties. Plaintiff Bennett did not prove to this Court that defendant either made an express promise to pay the royalty forever or acted in such a way that demonstrated agreement.

Plaintiff Bennett testified that Reiss, on behalf of defendant, never had a conversation about the duration the percentage of sales of Lineator (Item Number 086-507) would be paid. Plaintiff Bennett admitted he was never told payments would continue after his relationship with defendant ended. Plaintiff Bennett did not proffer any credible evidence demonstrating defendant acted in a way that showed they agreed to continue to make royalty payments to plaintiff Bennett as long as Lineator (Item Number 086-507) was sold.

Plaintiff Bennett's contention that he should be paid five (5%) percent royalty on the redeveloped Lineator (Item Number 086-509) fails in its entirety. First, based on the aforementioned, plaintiff Bennett has failed to prove to the satisfaction of this Court that defendant's conduct implied he would be paid a royalty once his relationship with defendant ended. Second, plaintiff failed to prove to this Court's satisfaction that he had a substantial role in the development of the redeveloped Lineator (Item Number 086-509). The item developed by plaintiff Bennett did not comply with the requirements of the NRC in 1992. The device as developed by plaintiff Bennett was unmarketable. It could not be sold as a result of the regulations set forth by the NRC in 1992. A new consultant was retained to redevelop the product so it would comply with the NRC requirements. Plaintiff Bennett had nothing to do with this redevelopment. Plaintiff argued the changes made to the product he developed were essentially de minimus. This contention was not proven to this Court's satisfaction. Accordingly, this Court finds plaintiff Bennett's contention in the second prong of the third cause of action fails in its entirety.

III. WUNDERLICH'S APRIL 1979 AND OCTOBER 1984 ROYALTY CLAIM (FOURTH AND FIFTH CAUSE OF ACTION)

Plaintiff Wunderlich began working for defendant as a consultant sometime in 1978 or 1979. He was paid an hourly rate and weekly rate in 1979. In 1979 defendant agreed to pay plaintiff Wunderlich a percentage of sales on certain products detailed on a memo dated April 1979. There is no dispute that defendant intended to pay plaintiff Wunderlich a royalty on each of the items in the memo, Exhibit 1. The memo was signed by Mr. James Reiss on behalf of defendant and by plaintiff Wunderlich. Defendant paid plaintiff Wunderlich all royalties detailed in Exhibit 1 until the end of 1991. In 1984, plaintiff Wunderlich created a document naming additional products and detailing a percentage of royalty per product (Exhibit 9). This document was signed by plaintiff Wunderlich but was not signed by defendant. In August 1990 plaintiff Wunderlich stopped working as a consultant for defendant. Plaintiff Wunderlich contends defendant violated their 1979 agreement when defendant stopped making royalty payments to him in late 1991. Defendant contends plaintiff Wunderlich was not entitled to any royalty payments once plaintiff Wunderlich's consulting relationship was terminated. Defendant contends they never agreed to pay royalties to plaintiff Wunderlich indefinitely. Defendant contends it was their custom and practice to only pay royalties to consultants while consultants were working with them. Once those relationships terminated so did the royalty payments. Plaintiff Wunderlich contends he did not enter an agreement extinguishing his rights to royalties upon the termination of his consulting role to defendant.

As stated earlier an agreement need not be in writing to be enforceable. Here it is uncontroverted that defendant agreed to pay plaintiff Wunderlich a percentage of gross sales of certain items developed or designed by plaintiff Wunderlich. Between 1979 ad 1991 plaintiff Wunderlich developed and redesigned items detailed in Exhibit 1 and was paid a percentage of gross sales also detailed in Exhibit 1. Exhibit 1 is a memo signed by plaintiff Wunderlich and defendant and dated April 1979. The duration of the agreement is silent in the memo.

In determining the intentions of parties regarding agreements, PJI 4:1.1 states, "The intent of the parties is determined by considering the relationship of the parties, what they said and what they did and all of the surrounding circumstances. A person's secret intent has no bearing; only the intent indicated by his/her words and acts may be considered." The actions or conduct of the parties, in addition to the language of their purported contract, can objectively manifest their intent to be bound (*see, Maffea v. Ippolito*, 247 AD2d 366, 367, 668 NYS2d 653, 654 [2d Dept 1998]). A party may give their assent by conduct rather than words. Proof of performance of an agreement in accordance with its terms can constitute a showing of mutual assent by conduct.

In the case at bar there is no dispute that an agreement existed between the parties to pay plaintiff Wunderlich a percentage of gross sales per product as a royalty for his work in obtaining/creating/developing/improving various products sold by defendant. Plaintiff Wunderlich contends the agreement between the parties called for royalty payments to be made as long as the

specified products were sold by defendant. Defendant contends the royalty payments were scheduled to end when plaintiff Wunderlich's consulting relationship with defendant ended. The actions of defendant do not support defendant's purported understanding of the agreement.

Plaintiff Wunderlich was relieved of his hourly/weekly consulting responsibilities by defendant in August 1990. Yet in March 1992 he was still receiving royalty payments for items he developed for defendant. The last royalty payment made by defendant to plaintiff Wunderlich was in March 1992. That is over one full year from the date plaintiff Wunderlich left defendant's company. Defendant's conduct in the one year after the termination of plaintiff Wunderlich is consistent with plaintiff's Wunderlich's understanding of the duration of royalty payments.

Mr. James Reiss, President of the former Atomic Products Corporation, testified he had a distinct reason why consultants such as plaintiff Wunderlich received royalty payments on top of their hourly wage. He explained royalty payments created an incentive for consultants to finish their prospective projects quickly. Mr. Reiss testified, "...the consultants sometimes will drag out a project because they're getting paid by the hour." Accordingly, it is defendant's position the royalty payment was given to consultants who were paid an hourly wage, such as plaintiff Wunderlich.

Plaintiff Wunderlich stated he was terminated by defendant as an hourly wage consultant in August 1990. He admits he did some special projects for defendant after August 1990 but plaintiff Wunderlich was not a weekly wage or an hourly wage worker for defendant after August 1990. Despite plaintiff Wunderlich being dismissed as an hourly wage consultant defendant continued to pay plaintiff Wunderlich royalties on the gross sales of products plaintiff Wunderlich had worked on. Defendant continued making royalty payments to plaintiff Wunderlich until March 1992.

Defendant's actions in the immediate aftermath of plaintiff Wunderlich's dismissal in August 1990 directly contradict what he stated was his understanding and intention regarding royalty payments to plaintiff Wunderlich. While there is no written agreement between the parties regarding when royalty payments would terminate, defendant's actions in the year after plaintiff Wunderlich's termination have convinced this Court that defendant intended to make royalty payments to plaintiff Wunderlich for as long as the products at issue were sold. The Court has been persuaded that the actions and conduct of defendant in paying royalties to plaintiff Wunderlich after their hourly rate relationship was terminated is demonstrative that defendant did not pay royalties solely as an incentive to hourly workers. The Court is satisfied that plaintiff Wunderlich has proven that the agreement between the parties did not allow defendant to withhold properly earned royalty payments of the gross sales on products discovered, developed, improved or created by plaintiff Wunderlich. Accordingly, plaintiff Wunderlich has proven this fourth and fifth cause of action by a preponderance of the evidence.

Damages (Fourth and Fifth Causes of Action)

Plaintiff Wunderlich is entitled to unpaid royalty amounts on the following items:

A. Waste Barrel Shield aka Shielded Decay Drum

Plaintiff Wunderlich designed this product by placing a lead shielding inside a steel drum which is designed to be mobile. It was designed to be set on coasters or rollers and was developed to store radioactive waste. Its was assigned Item number 039-284. Defendant then marketed another waste barrel shield that was given an additional .125 inch of lead lining. Defendant admitted the items were nearly identical except for the increased lead shield amount. The adjusted item was assigned Item number 039-244. Wunderlich is entitled to royalties of five (5%) percent of gross sales of these items.

B. Lead Vial Shields

Wunderlich invented a product to store vials containing radioactive materials. Lead Vial Shield Item numbers: 053-601, 053-602, 053-603, 053-604, 053-605, 053-606, 053-701, 053-702, 053-703, 053-704, 053-705 and 053-706. Plaintiff Wunderlich is entitled to royalties of five (5%) percent of gross sales of these items.

C. Tungsten Vial Shields

Plaintiff Wunderlich developed a vial container which was more durable than the lead vial shields he had previously created. It was sold as item numbers: 053-910, 053-920 and 053-805. Item numbers 053-805, 053-910 and 053-910 are all substantially identical and differ only in size. Plaintiff Wunderlich testified defendant agreed to pay a five (5%) percent per gross sale royalty on this item and the Court found him credible. Accordingly, plaintiff Wunderlich is entitled to royalties of five (5%) percent of gross sales on this item.

D. Cut Films Holders

Plaintiff Wunderlich helped defendant find a supplier of film holder that were suitable for use in nuclear medicine. He arranged for Atomic to purchase these products. Atomic paid royalties on Item numbers: 218-570 and 218-810. Atomic went on to sell additional items which were similar to Items numbers: 218-570 and 218-810. It is unclear whether defendant is purchasing these items from the same company plaintiff Wunderlich found. Therefore plaintiff Wunderlich is not entitled to additional royalties beyond Items numbers: 218-570 and 218-810.

E. Nose Clips

Plaintiff Wunderlich helped defendant find a disposable nose clip which could be safely used by medical professionals. This was sold by defendant and royalties were paid under Item number 130-100. The item sold under 130-100 and 130-939 are essentially the same. Plaintiff Wunderlich is entitled to a five (5%) percent royalty of gross sales on these items.

F. Tourniquets

Plaintiff Wunderlich was instrumental in influencing medical supplies to create a tourniquet with velcro which would allow medical professionals to more effectively introduce radio tracers into patients. He was paid a royalty of five (5%) percent on gross sales on this item. This item was sold by defendant under Item numbers: 196-001, 196-002 and 196-003.

G. Used (shielded) syringe holder also described as lead lined storage container

Plaintiff Wunderlich created a syringe holder which was lined with lead shielding. The product was designed to contain any radioactive materials which may be on a used syringe. This product was marketed as item number 050-200. Defendant sold two other products which were identical to the shielded syringe holder created by plaintiff Wunderlich except for their size. They were sold under Item numbers: 050-205 and 050-250. Plaintiff Wunderlich is entitled to royalties of five (5%) percent of gross sales of these items.

H. Thallium Injection Shields

Plaintiff Wunderlich created these shields to help protect medical practitioners and other medical personal from receiving unnecessary radiation when treating patients receiving imaging stress tests. The product was marketed as Item numbers: 007-850 and 007-855. Item number 007-860 is identical to the shields created by plaintiff Wunderlich except it is slightly larger. Plaintiff Wunderlich is entitled to royalties of five (5%) percent of gross sales of these items.

I. Department Toll Kit

Plaintiff Wunderlich conceived of a tool kit comprised of tools commonly and frequently used by nuclear medicine professionals. He put these together and created a single kit which was sold as Item number 066-750. Plaintiff Wunderlich was paid a two and half (2½%) percent royalty on gross sales of the product. Plaintiff Wunderlich is entitled to a royalty of two and half (2½%) percent of gross sales of this item.

J. Saline (NaCl) Solution

Plaintiff Wunderlich came up with an idea to sell saline in smaller quantity packets. It would limit waste by medical professionals. Plaintiff Wunderlich conceived the saline packet in a small, 10ml size packet. Defendant marketed the product and sold it under Item number 123-281. Plaintiff Wunderlich is entitled to a royalty of two and half (2½%) percent of gross sales of this item.

CALCULATION MOENTARY DAMAGES TO PLAINTIFF WUNDERLICH

<u>Item#</u>	<u>Description</u>	<u>Amount Due</u>
039-244	30 Gallon Shield decay Drum .25' lead	\$41,190.16
039-284	30 Gallon Decay Drum	\$90,309.83
050-200	Used Syringe Container	\$29,519.79
050-205	Shielded Storage Container Small .250 lead liner	\$2,502.14
050-250	Shielded Storage Container Large .125 lead liner	\$12,794.04
053-601	Glucoscan w/o glass r	\$16,479.72
053-602	Osteolite w/o glass pur	\$13,122.26
053-603	Pulmolite w/o glass or	\$10,607.45
053-604	Pyrolite w/o glass Blue	\$10,789.29
053-605	Hepatology Vial w/o G1 B	\$8,051.02
053-606	Microlite Via w/o glass	\$8,072.04
053-701	Glucoscan w/glass re	\$13,312.50
053-702	Osteolite w/glass Purpl	\$9,226.01
053-703	Pulmolite w/glass ora	\$8,567.39

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053-704	Pulmolite w/glass blue	\$9,178.32
053-705	Hepatology Via w/glass	\$6,467.40
053-706	Microlite Vial w/glass	\$7,025.67
130-100	Disposable Nose Clip	\$8,949.76
130-939	Disposable Nose Clip	\$39.09
195.294	Safety Shield 14" dia	\$24.50
196-001	Tourniquet - Child	\$165.85
196-002	Adult Size Tourniquet	\$1,295.19
196-003	Adult Thigh Tourniquet	\$149.43

<u>Item#</u>	<u>Description</u>	<u>Amount Due</u>
218-570	Cassette, Film, Std. Plastic, 8x10	\$36.28
218-810	Cassette, Film, Std. Plastic, 8x10	\$11,180.47
007-850	Thallium Inj Shield (no viewpoint)	\$273.87
077-855	Thallium Shield with glass	\$8,761.00
007-860	Thallium Inj. Shields 5cc	\$1,048.32
053-805	Tungsten Vial Shield	\$37,943.23
053-910	Tungsten Vial Shield Pet 10cc	\$6,292.22
053-920	Tungsten Vial Shield Pet 20cc	\$3,597.03
066-750	Dept. Tool Kit	\$920.67
123-281	10ML Saline Sol. 25/pkg	\$4,155.13

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The total damages including pre-judgment interest accrued through December 31, 2012 is \$382,047.07. CPLR §5001 requires prejudgment interest be paid on damages for breach of contract claims. Accordingly, interest at the statutory rate from January 1, 2013 to the date of entry of judgment will be added to the calculated damages. This judgment will be supplied to the Court after the decision and order have been entered and filed with the Suffolk County Clerk.

The Court has granted plaintiff Wunderlich's application to conform the pleadings served by plaintiff Wunderlich to the evidence adduced at trial. CPLR 3017(a) allows the Court to grant "any type of relief....appropriate to the proof whether or not demanded," and CPLR 3025(c) permits an amendment to conform the pleadings to the proof. As long as the pleading embraces the elements of the claim which was proven, the fact that the pleading theorized it as something else is immaterial [§209 New York Practice (4th Edition), David Siegel].

In the instant matter defendant was clearly on notice as to the additional items plaintiff Wunderlich referenced at trial as they were referenced during the pretrial discovery process. In addition defendant has not demonstrated in what manner it would be prejudiced by granting plaintiff Wunderlich's application under CPLR 3025(c).

Submit Judgment.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 25, 2013
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.