

NBTY Acquisition LLC v Marlyn Nutraceuticals, Inc.
2014 NY Slip Op 31218(U)
April 7, 2014
Supreme Court, Suffolk County
Docket Number: 10-38959
Judge: Thomas F. Whelan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court
_____x

MOTION DATE: 11-22-13
ADJ. DATE: 1-24-14
Mot Seq. 008-MD

NBTY ACQUISITION LLC, d/b/a
LEINER HEALTH PRODUCTS

Plaintiffs,

-against-

FARRELL FRITZ, P.C.
Attorneys for Plaintiffs
1320 RXR Plaza
Uniondale, New York 11556

MARLYN NUTRACEUTICALS, INC.,
Defendant.
_____x

COZEN O'CONNOR
Attorneys for Defendant
45 Broadway - 16th Floor
New York, New York 10006

Upon the following papers numbered 1 to 73 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 39, 40 - 41; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 42 - 70, 71; Replying Affidavits and supporting papers 72 - 73; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the plaintiff's motion (#008) for partial summary judgment is denied; and it is further

ORDERED that the parties are directed to appear at a conference in Part 45 on Wednesday, **April 16, 2014** at 9:30 a.m., at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

In this breach of contract action, the plaintiff, NBTY Acquisition, LLC d/b/a Leiner Health Products¹ (hereinafter NBTY) seeks damages for improperly labeled dietary supplements

¹ NBTY purchased the assets of Leiner Health Products, Inc. through its affiliate, NBTY Acquisition Corp., in a bankruptcy sale in July, 2008.

PK

NBTY Acquisition, LLC v Marlyn Nutraceuticals, Inc.
Index No. 10-38959
Page 2

manufactured by the defendant, Marlyn Nutraceuticals, Inc. (hereinafter Marlyn). The plaintiff alleges that Marlyn sold NBTY goods which were not in compliance with the product specifications and contained soy, an allergen.

The record reveals that NBTY purchased its nutraceutical effervescent products for sale to consumers in retail stores under the label AirShield from Marlyn from 2005. In January of 2006, the Federal government passed legislation requiring the disclosure of eight major allergens on dietary supplement labels, if present. The allergens are: milk, egg, fish, crustacean shellfish, tree nuts, wheat, peanuts and soybeans. NBTY alleges that it specified to Marlyn that the product should not contain soy. Between 2005 and 2008, NBTY sent a purchase order to Marlyn for products. The purchase order stated, as follows: "Note: Acceptance of this order is limited solely to the terms stated on the face and reverse sides hereof, and any additional or different terms are rejected unless expressly assented to in writing by the buyer." NBTY alleges that Marlyn filled the orders without objection, delivered the products, and invoiced NBTY for payment, which NBTY paid in full.

In 2008, the purchase order incorporated the addition of a Vendor Compliance Guide, a Vendor Compliance Acknowledgment, and a Supplier's Warranty and Indemnification Agreement, among other things. The purchase order stated as follows:

We require a Certificate of Insurance for product liability, including broad form vendor coverage, naming NBTY as an additional insured.

This purchase order incorporates NBTY's Vendor Guidelines and NBTY's Standard Terms and Conditions, copies of which are available at www.vendornbty.com/terms or by written request to NBTY, Inc., 650 Hadley Road, South Plainfield, NJ 07080, Attn.: Vendor Compliance Department. The Terms comprise the entire agreement between Vendor and Purchaser regarding the goods or services sold hereunder. Purchaser specifically rejects all terms and conditions of sale regarding this purchase in Vendor's quotation, order, or sales acknowledgment, or in any document, except the Terms.

The Vendor Compliance Guide, dated May, 2009, in Paragraph VI, provides, in part:

b. Vendor represents and warrants that all goods furnished hereunder shall conform to the requirements of this Purchase Order and to any drawings, designs, samples, specifications and descriptions incorporated herein, or made or referred to in

negotiation or solicitation of this Purchase Order, and shall be free from defect in material and workmanship. ***

A separate Vendor Compliance Acknowledgment, dated May, 2009 provides:

We hereby acknowledge that we have received a copy of, read and understood the terms of the Vendor Compliance Guide. We also hereby agree to comply with NBTY, Inc. procedures and requirements regarding on-time delivery, purchase orders, receiving, invoicing, quality assurance, product liability, gifts and gratuities and all other provisions contained in the Vendor Compliance Guide.

Please sign, date and fax your acceptance of these terms and conditions to qualify for Approved Vendor status. If you require further clarification, direct your inquiries to ***.

A separate Supplier's Warranty and Indemnification Agreement was also attached to the Vendor Compliance Guide and required execution of the form by Marlyn to become an "approved" supplier, warranting that each shipment was not adulterated or misbranded, that Marlyn would indemnify NBTY, and maintain insurance, among other things. Business continued as usual until 2010.

NBTY relies upon the Vendor Guidelines to claim a breach of contract, which allegedly occurred in 2010, when NBTY received complaints from two customers about reactions to AirShield. Investigations by NBTY and Marlyn revealed that certain batches manufactured in 2009 did contain soy.² The ingredient selenium chelate, supplied to Marlyn by an outside vendor, Kelatron³, was made from soy. NBTY alleges that Marlyn misrepresented its warranties made on three Allergen Information Certifications in 2005 and 2008 which stated that the goods Marlyn manufactured for NBTY did not contain soy. However, Marlyn contends that it was unaware of the soy content and relied upon the representations made by Kelatron, a supplier approved by NBTY, in certifications made to Marlyn that its ingredient did not contain soy. Once Marlyn learned of the soy, it informed NBTY that it switched vendors to obtain a version of selenium that did not contain soy, and that new products did not contain soy.

² The purchase orders at issue are: 56306, dated September 25, 2009; 66316, dated October 12, 2009; 105230, dated October 27, 2009; 118786, dated November 16, 2009; and 202752, dated December 23, 2009.

³ By order dated April 26, 2012, this court granted Kelatron's motion to dismiss a third-party complaint as asserted against it.

NBTY Acquisition, LLC v Marlyn Nutraceuticals, Inc.

Index No. 10-38959

Page 4

Rather than accept Marlyn's offer to re-label the products to inform customers that the product did contain soy, NBTY notified the Food and Drug Administration (hereinafter FDA) and announced a nationwide recall of all versions of AirShield manufactured by Marlyn. This action was subsequently commenced.

The amended complaint contains six causes of action. The first cause of action alleges breach of contract; the second cause of action alleges a breach of express warranty, violating UCC §2-313; the third cause of action alleges breach of implied warranty of fitness for a particular purpose, violating UCC §315; the fourth cause of action alleges misrepresentation; the fifth cause of action seeks indemnification; and the sixth cause of action seeks reasonable attorney fees. The answer asserts a general denial and several affirmative defenses.

The plaintiff now moves for partial summary judgment on the first, second and sixth causes of action. In support, the plaintiff submits, among other things, the pleadings, copies of the Vendor Agreement, the aforementioned purchase orders, correspondence, portions of depositions of the parties, and the affidavits of Robert Arakelian, the plaintiff's Category Director of Raw Materials, Michael Chansilp, the plaintiff's Technical Services Manager, and Lisa Bonsignore, the plaintiff's Northeast Regional Director of Quality, in which each individual introduces exhibits. NBTY claims that Marlyn's proceeding in any way with the transactions or deliveries contemplated by the purchase order, including its partial or complete delivery of goods to NBTY constituted its automatic acceptance of the terms and conditions of the Vendor Guidelines. Therefore, as argued by NBTY, Marlyn manifested its assent to the terms of the purchase orders and Vendor Compliance Guidelines and entered into an enforceable contract with NBTY pursuant to those terms.

In opposition, Marlyn contends that the Vendor Compliance Guideline constitutes a material alteration to the purchase orders inasmuch as it did not confirm in writing its acknowledgment of the Guideline and other warranties. Marlyn submits, among other things, the affidavit of Joachim Lehman, the chief executive officer. He avers that in 2005 Leiner Health Products provided Marlyn with the formula for AirShield, which specifically called for the use of selenium amino acid chelate. Leiner instructed Marlyn to use certain suppliers, and to buy the selenium ingredient from Kelatron Corporation. Leiner made, designed and controlled the labels and packaging for AirShield. Although Leiner instructed Marlyn to have a third-party company test the product before shipping, which tests included vitamins, heavy metals, yeast and other microbiologicals, it never instructed Marlyn to test for allergens. In 2008, Leiner, now NBTY, instructed Marlyn to switch suppliers of the flavorings and to use Firmenich going forward. Firmenich sent its certificates of analysis directly to NBTY. Marlyn later learned that Firmenich ingredients contained soy. At the time of the FDA recall, the FDA conducted an on-site visit to Marlyn's facilities, and concluded that Marlyn acted properly, and that it was not necessary to conduct a full recall of the product.

Marlyn also submits the affidavit of Alexander G. Schauss, PhD, a Fellow of the American College of Nutrition, who avers that he monitors and supports the activities of the dietary supplement

NBTY Acquisition, LLC v Marlyn Nutraceuticals, Inc.

Index No. 10-38959

Page 5

industries. He states that with the enactment of the Food Allergen Labeling and Consumer Protection Act of 2004 (21 USC 343), which affected dietary supplement and other food labels on or after January 1, 2006, and other similar measures, many manufacturers and distributors attempted to shift away compliance responsibility via modifications and amendments to existing contracts. The custom and practice in the industry that followed as a result of attempted changes to contractual agreements was that both sides were properly notified that the terms of existing contracts might be modified, usually following review of legal counsel, by both sides, and subsequently upon agreement in writing and consummated by the parties. He opines that no reasonable vendor would have agreed to NBTY's Vendor Guidelines without express negotiations and an explicit mutual agreement.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (see *S.J. Capelin Assoc., Inc. v Glob Mfg. Corp.*, 34 NY2d 338, 341, 357 NYS2d 478 [1974]; *Cerniglia v Loza Rest. Corp.*, 98 AD3d 933, 935, 951 NYS2d 57 [2d Dept 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (see *Salino v IPT Trucking*, 203 AD2d 352, 610 NYS2d 77 [2d Dept 1994]).

In order to prove a breach of contract, the plaintiff must show (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach (see *JP Morgan Chase v J.H. Elec. of N. Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). An express warranty contained in a contract of sale is a bargained-for contractual term which is part of the purchase agreement, and the express warranty is as much a part of the contract as any other term (see *Danna Metro Heating Corp. v Mobil Oil Corp.*, 203 AD2d 231, 609 NYS2d 658 [2d Dept 1994], quoting *CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 554 NYS2d 449, 554 NYS2d 449 [1990]). "Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach *** depends only on establishing that the warranty was breached" (*CBS Inc. v Ziff-Davis Publ. Co.*, *supra*, at 503-504).

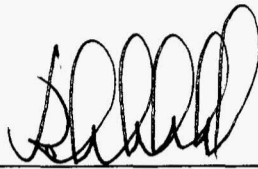
NBTY has failed to tender sufficient evidence to demonstrate its entitlement to judgment as a matter of law. Thus, NBTY failed to establish that Marlyn breached the contract, or breached an express warranty, or that it is entitled to attorney fees under these circumstances. The affidavits by both parties contain conflicting factual accounts and opinions on numerous issues. In addition, NBTY failed to submit admissible evidence that Marlyn received and acknowledged the Vendor Compliance Guide, or executed the Vendor Compliance Acknowledgment and the Warranty and Indemnification Agreement, which NBTY required of Marlyn to become an approved vendor. Issues of fact also exist regarding whether the alleged express warranties by Marlyn were part of the bargain between the parties and can be relied upon as express warranties (see *CBS Inc. v Ziff-Davis Pub.*

NBTY Acquisition,LLC v Marlyn Nutraceuticals, Inc.
Index No. 10-38959
Page 6

Co., *supra*, at 503). Thus, issues of fact exist, precluding the determination of partial summary judgment at this juncture.

Accordingly, NBTY's motion is denied.

Dated: 4/7/14



THOMAS F. WHELAN, J.S.C.