

**McKesson Med.-Surgical Minnesota Supply  
Inc. v CareMed Supplies Inc.**

2017 NY Slip Op 30387(U)

January 4, 2017

Supreme Court, Queens County

Docket Number: 703411/15

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ROBERT J. McDONALD IAS PART 34  
Justice

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MCKESSON MEDICAL-SURGICAL MINNESOTA  
SUPPLY INC. and GULF SOUTH MEDICAL  
SUPPLY, INC.,

Index No.: 703411/15

Motion Date:  
March 29, 2016

Plaintiff(s),

-against-

Cal. No.:

CAREMED SUPPLIES INC.,

Mot. Seq. No.: 5

Defendant(s).  
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The following papers read on this motion by Plaintiffs for an Order, dismissing the Defendant's counterclaims pursuant to CPLR 3211(a)(5) and (a)(7).

PAPERS  
NUMBERED

Notice of Motion-Affidavits-Exhibits (Pltfs)..	EF 31-35
Memorandum of Law in Support (Pltfs).....	EF 36
Answering Affidavit in Opp (Deft).....	EF 38
Memorandum of Law in Reply (Pltfs).....	EF 39

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiffs commenced this action against Defendant to recover payments due and owing to Plaintiffs pursuant to an agreement whereby Plaintiffs supplied medical and surgical goods, wares, materials and merchandise to Defendant. In their Amended Verified Complaint, Plaintiffs claimed that they duly performed their obligations pursuant to the agreement. Plaintiffs alleged that \$1,144,630.79 with interest from February 27, 2015 is the amount due and owing by Defendant.

Plaintiffs alleged in their Complaint that on or about May 13, 2013, Defendant entered into a written agreement with Plaintiff GULF SOUTH MEDICAL SUPPLY, INC. ("GULF") (an affiliate company with Plaintiff MCKESSON MEDICAL-SURGICAL MINNESOTA SUPPLY INC.). Pursuant to said agreement, Plaintiff GULF supplied Defendant with

medical and surgical goods, wares, materials and merchandise at the request of Defendant.

On December 15, 2015, Defendant filed a Verified Answer with Counterclaims. In for its First Counterclaim, Defendant alleged that it performed its obligations under the parties' agreement pursuant to a Payment Schedule agreed upon by the parties. Defendant further claimed that it reasonably relied upon the Payment Schedule and that Plaintiff made unreasonable unilateral demands that materially deviated from the Payment Schedule. Defendant alleged that Plaintiffs breached the Payment Schedule agreement when they threatened to suspend shipment of goods unless Defendant executed a promissory note and complied with Plaintiffs' demands. The alleged breach by Plaintiffs, Defendant says, caused Defendant to sustain losses or expenses amounting to damages.

On its Second Counterclaim, Defendant alleged that Plaintiffs acted in bad faith which caused damages to Defendant amounting to \$2.5 million. And on its Third Counterclaim, Defendant claimed that Plaintiffs acted in bad faith and abused the legal process which compelled Defendant to incur legal fees to defend this lawsuit.

A. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the counterclaims against Defendant for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (Jacobs v. Macy's East, Inc., 262 A.D.2d 607, 608 [2d Dept. 1999] [internal citations omitted]; Leon v. Martinez, 84 N.Y.2d 83 [1994]) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 A.D.2d 770 [3d Dept. 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 N.Y.2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 [1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk,

187 A.D.2d 560 [2d Dep't. 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159 [2d Dep't. 1997]). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (Jericho Group, Ltd. v. Midtown Development, L.P., 32 A.D.3d 294 [1st Dep't. 2006] [internal citations omitted]).

Applying these principles in this case, the court finds that the First Counterclaim adequately states a cause of action for breach of contract. "The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendants's failure to perform, and resulting damages." (Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd., 801 N.Y.S.2d 243 [Sup. Ct., N.Y. County 2004] [internal citations omitted]). All such elements are pled in the First Counterclaim, as it is alleged that Plaintiffs breached a contract pursuant to a Payment Schedule that specified that Defendant was permitted to purchase goods on credit and make payments consistent with said Schedule.

Accordingly, this branch of the motion to dismiss the First Counterclaim for breach of contract is denied.

The branch of Plaintiffs' motion seeking to dismiss the Second Counterclaim is granted. The Second Counterclaim involves an action in tort for Plaintiffs' alleged bad faith resulting in alleged damages to Defendant. Defendant's Second Counterclaim appears to plead a cause of action for breach of the implied duty of good faith. However, there is no separate tort cause of action in New York State for breach of the implied duty of good faith and fair dealing as such a cause of action is duplicative of any breach of contract claim (see, McGowan v. Great North., Ins. Co., 78 A.D.3d 1137 [2d Dep't. 2010]; Johnson v. Allstate Ins. Co., 33 A.D.3d 665 [2d Dep't. 2006]).

In its Third Counterclaim, Defendant seemingly attempts to state a cause of action for abuse of process. Upon review, the court finds that the branch of the motion seeking dismissal of the Third Counterclaim for abuse of process is granted, as the Defendant fails to adequately state a cause of action for abuse of process.

In order to maintain an action for abuse of process, "[f]irst, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act.

Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification . . . Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process" (Bd. of Educ. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Assoc., Inc., 38 N.Y.2d 397 [1975]). Merely commencing a civil action, "without unlawful interference with person or property", is not sufficient to state a cause of action sounding in abuse of process (Artzt v. Greenburge, 555 N.Y.S.2d 127 [1st Dep't. 1990]; Mago v. Singh, 47 A.D.3d 772 [2d Dep't. 2008]). Also, commencing a civil action via summons and complaint is not legally considered process capable of abuse (see, Mago, supra at 773). In the instant case, Defendant has failed to allege that there was "regularly issued process", and as such, the Third Counterclaim is dismissed.

B. CPLR 3211(a) (5)

Dismissal is warranted under CPLR 3211(a) (5) on the grounds that:

"the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;"

To the extent this branch of the motion seeks dismissal of the counterclaims on this ground, Plaintiffs do not adequately state sufficient grounds to support dismissal pursuant to CPLR 3211(a) (5) at this juncture. Accordingly, that branch of the motion seeking to dismiss the counterclaims pursuant to CPLR 3211(a) (5) is denied.

This constitutes the decision and order of the Court.

Dated: Long Island City, N.Y.  
January 4, 2017




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ROBERT J. McDONALD  
J.S.C.

**FILED**  
**JAN 19 2017**  
**COUNTY CLERK**  
**QUEENS COUNTY**