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Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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OLYMPUS AMERICA INC.,

Plaintiff,

-against-

GREENE HOUSE SURGICARE, GREENHOUSE MEDICAL P.C., EVANS CREVECOEUR, and JEAN VAVAL,

Defendants.

x----------x

INDEX NO.:017224/2013

MOT. SEQ. NO. 001 Mot D

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Upon the following papers numbered 1 to 28 read on this motion for Partial Summary Judgment and to Dismiss the Affirmative Defenses; Notice of Motion/Order to Show Cause and supporting papers 1-18; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 19-26 ; Replying Affidavits and supporting papers 27-28 ; ~~Other 0~~; and upon due deliberation; it is,

ORDERED that Plaintiff's motion is granted to the extent that partial summary judgment is granted as against Greenhouse Medical, P.C. and the individual Defendants on behalf of Greene House Surgicare; and the affirmative defenses are dismissed; and it is further

ORDERED that the parties are directed to appear for a conference at One Court Street, Riverhead, New York, Part XLVI on **Monday, December 3rd, 2018 at 10:00 AM.**

In this breach of contract action, Plaintiff Olympus America, Inc. ("Plaintiff" or "Olympus") seeks money damages in the amount of $282,504.71 for Defendants' failure to purchase the minimum commitment pursuant to an Endo-Therapy Advantage Loan Agreement ("the Agreement"). On November 28th, 2006, the Parties executed the Agreement. Defendants executed the Agreement in their corporate capacities. Greene House Surgicare was the customer. In exchange for this loan, Defendants obtained the use of capital

equipment and agreed to purchase a required minimum of certain quantities of accessory equipment (also known as the "minimum commitment") as listed in Schedule A. The term of the Agreement was for five years and commenced on November 28th, 2006. There is no dispute that Defendants failed to order the required minimum commitment each month. Plaintiff sent an invoice on December 29th, 2011 for the outstanding balance due. Although the Agreement expired by its terms on November 28th, 2011, Plaintiff formally terminated the Agreement with Defendants by letter dated December 31st, 2011. No payment was allegedly made by Defendants and the capital equipment was not returned. This action was commenced on July 2nd, 2013.

The complaint contains four causes of action: breach of contract as against all Defendants; 1) breach of contract as against Defendants Greenhouse Medical, P.C., Crevecoeur, and Vaval; 2) account stated as against all Defendants; 3) *quantum meruit* as against Greenhouse Medical, P.C., Crevecoeur and Vaval; and 4) replevin as against all Defendants.

Defendants' answer contained general denials and nine affirmative defenses: 1) lack of jurisdiction over Defendant Crevecoeur; 2) Plaintiff breached the Agreement by failing to repair the subject equipment; 3) Defendants Crevecoeur and Vaval are not proper Defendants; 4) Plaintiff failed to pick up the subject equipment despite Defendants' repeated offers to return same; 5) Defendants' signatures were procured by fraud; 6) Plaintiff intentionally misrepresented the terms of the Agreement; 7) improper venue; 8) Plaintiff overcharged Defendants; and 9) Plaintiff breached the Agreement by failing to repair the equipment.

Plaintiff now moves for partial summary judgment against Defendants pursuant to CPLR 3212 and to dismiss Defendants' affirmative defenses.

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, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

In support of the motion, Plaintiff submits, *inter alia*, the pleadings, a copy of the

Agreement, a copy of the Amendment to Endo-Therapy Advantage Loan Agreement, a copy of Schedule A, a copy of the Terms and Conditions, a copy of the ET Advantage Compliance Detail, and the personal affidavit of John Repko.

The Agreement provides, *inter alia*, that if Customer failed to satisfy a minimum commitment of accessories identified in Schedule A, Olympus may at its discretion, increase the prices to be paid by Customer for the accessories or require the purchase of the capital equipment at the equipment valuation price. The Agreement also provides that the minimum commitments shall constitute binding purchase commitments by Customer and Customer shall be liable to Olympus, consistent with the terms of the Agreement, in the event the minimum commitments are not satisfied. In addition, the Agreement required that the equipment location stay the same as the delivery location, and that Customer shall not move the equipment from that location without the prior written consent of Olympus. The Agreement also provided that the Customer's signature acknowledges that Customer have read, understood, and accept the terms and conditions of the Agreement. A plain reading of the Agreement reveals that Evans Crevecoeur executed the Agreement as President, and Jean Vaval executed the Agreement as Secretary. Plaintiff's agent, Eric Halvorson, executed the Agreement as Vice President and General Manager of Endo Therapy.

The Amendment to the Agreement, dated December 4th, 2006, provides that the Agreement is modified to the extent that a new Schedule A was attached. Otherwise, the terms of the Agreement remained in full force and effect.

Pursuant to Paragraph 6e of the Terms and Conditions:

> ...customer represents, warrants, and covenants to Olympus that: (e) customer shall, at customer's cost and expense, maintain the capital equipment in good repair, operating condition, and working order, including but not limited to the performance of reprocessing, cleaning, and maintenance procedures described in the instruction manuals.

Paragraph 12 of the Terms and Conditions provides that:

> ...a default under the November 2006 Agreement occurs if, *inter alia*, Customer (a) does not make payment of an invoice within 10 days after its due date, (b) attempts to remove the capital equipment from the equipment location, or does not comply with each term and condition of this Agreement, including

> without limitation the purchase of any minimum commitment... if Customer fails to satisfy a minimum commitment, Olympus may terminate this Agreement while requiring Customer to return all capital equipment in good condition, repair and working order to a location to be specified by Olympus, and take any other steps and/or pursue any other remedies available at law or in equity. Paragraph 13 of the Terms and Conditions requires that Customer return the capital equipment to Olympus, at Customer's expense, at the end of the November 2006 Agreement.

Paragraph 15 of the Terms and Conditions, entitled "Complete Agreement," expressly states:

> ...this Agreement constitutes the sole and entire agreement between Olympus and Customer with respect to the subject matter of this Agreement...All previous and contemporaneous agreements and understandings relating to the subject matter of this Agreement are hereby superseded." Paragraph 16 provides, "all disputes shall be adjudicated exclusively by a court of competent jurisdiction within the County of Suffolk, State of New York or the Federal District Court in the Eastern District of New York. Customer irrevocably consents to the jurisdiction and venue of the state and federal courts of New York and waives any rights to seek a transfer of venue for any reason or to claim that the forum is inconvenient.

John Repko avers in his personal affidavit that he is the Senior Manager of Collections and Deductions for Plaintiff. He reviewed the business records maintained by Plaintiff relating to this matter. He states that as set forth on the second page of Schedule A of the November 2006 Agreement, Greene House Surgicare was required to purchase $534,420 of accessories during the term of the November 2006 Agreement, which amount constituted the minimum commitments. Plaintiff's document entitled ET Advantage Compliance Detail by Customer sets forth what accessories Greene House Surgicare purchased from Plaintiff under the Agreement through August 4, 2011. The document indicates that Greene House Surgicare had purchased less than 25% of its minimum commitments. To date, the invoice has not been paid, nor has the capital equipment been returned. Repko further states that Defendant Crevecoeur admitted in his deposition that Defendants moved the capital equipment from the original equipment location and are still

using the equipment despite Plaintiff's demand in the termination letter that the capital equipment be returned. The movement of the capital equipment and the failure to return the equipment at the termination of the Agreement constitute additional defaults under the Agreement. Repko also states that Defendant Crevecoeur's deposition testimony confirmed Defendants' earlier admission that Greene House Surgicare is not a legally-recognized entity of any kind. Therefore, Repko states that Defendants Crevecoeur and Vaval are now personally responsible for Greene House Surgicare's admitted defaults. Plaintiff has demonstrated, prima facie, its entitlement to judgment as a matter of law with regard to liability ***(Giufredda v Citibank Corp.***, *supra*).

The burden then shifted to Defendants to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, *supra*). In opposition, Defendants submit the personal affidavit of Defendant Crevecoeur, portions of Crevecoeur's deposition testimony, and the deposition transcript of John Repko. Crevecoeur avers in his affidavit that he is a physician duly licensed to practice medicine in the State of New York. He and Defendant Vaval are the principals of the Defendants Greene House Surgicare and Greenhouse Medical P.C. He states that when he and Vaval decided to enter into the Agreement with Plaintiff, they were told by Plaintiff's representative that Plaintiff would maintain and repair the equipment at its expense. They executed the Agreement in their capacities as corporate officers and, therefore, should not be held personally liable. Crevecoeur states that he and Vaval relied upon the representations by Plaintiff's agent, however they subsequently learned that Plaintiff's representative had lied to Defendants because when the equipment needed repair, Plaintiff refused to send anyone to examine or repair it unless Defendants paid a repair fee. In addition, Crevecoeur states that Plaintiff was charging them an exorbitant sum if they did not purchase what was considered to be a sufficient amount of supplies. Crevecoeur also objects to Mr. Repko's affidavit and deposition testimony since he has no knowledge of the incident which led to the current situation.

Defendant Crevecoeur testified at his deposition that he and Defendant Vaval felt pressured to sign the Agreement and that the sales representative made promises which they learned were not included in the Agreement. Defendant conceded that he did take the time to adequately read the Agreement prior to executing it. He acknowledged that he did not order the minimum number of accessories throughout the term of the Agreement. Defendant stated that after approximately three years the endoscopic equipment and computer were not working properly. Plaintiff refused to repair the equipment unless Defendants paid a large sum of money. Subsequently, Defendants realized that the program was not working for them and notified Plaintiff. However, another representative came to their office and advised them to pay $14,000.00 per month, which Crevecoeur did for six months. Defendant also

stated that Greene House Surgicare is a trade name for Greene House Medical, P.C. and is not a registered entity. However, Defendant stated that Greene House Medical, P.C. continues to do business.

John Repko stated at his deposition that he is employed by Plaintiff as senior manager of collections and deductions. He stated that he recalls this matter from approximately three years ago when the complaint was filed. He also received the documents in a fax prior to his deposition. He had no involvement in the initial transaction and had no contact with Defendants. The individual who negotiated the contract is no longer working for Plaintiff. Defendants' counsel objected to the production of Mr. Repko since he had no personal knowledge of the facts. The deposition was terminated and Plaintiff's counsel stipulated that he would find the address for that individual or someone with personal knowledge of the facts relating to this lawsuit. The record reveals that counsel subsequently stipulated to a deposition of the former employee if he was called to testify at trial.

The Court finds that Defendants have failed to raise a triable issue of fact with regard to liability against Greenhouse Medical, P.C. and the individual Defendants (***Alvarado v Prospect Hosp.***, *supra*). Crevecoeur's statement that he failed to read the agreement does not relieve him of his obligation of performing under the Agreement.

> "A party is under an obligation to read a document before accepting its terms and cannot avoid the effect of the document by asserting [that] he or she did not read or understand [its] contents . . . .An individual who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of the other contracting party, is conclusively presumed to know its contents and to assent to them" (***Fiore v Oakwood Plaza Shopping Center, Inc.***, 78 NY2d 572, 591, 578 NYS2d 115 [1991]; ***Metzger v Aetna Ins. Co.***, 227 NY 411, 416; 1920 NY LEXIS 852 [1920]).

Defendants' unsupported allegation that Repko's affidavit was not based on personal knowledge is insufficient to prove otherwise. Repko, as Plaintiff's senior manager of collections and deductions, may offer evidence in his affidavit based on personal knowledge obtained from a review of Plaintiff's records. A business record will be admissible if that record "was made in the regular course of any business and . . . it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (***One Step Up, Ltd. v Webster Bus. Credit Corp.***, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518 [a]). In any event, the lack of personal knowledge goes to the weight and not the admissibility of the records (***Pencom Sys., Inc. v Shapiro***, 237 AD2d 144, 658 NYS2d 258 [1st Dept 1997]). Therefore, Repko's affidavit is admissible.

Under well-established agency law, a contract between individuals purporting to act on behalf of a nonexistent principal enter into a contract with a third party, the contract does not for that reason alone become void or voidable (***Metro Kitchenworks Sales, LLC v Continental Cabinets***, LLC, 31 AD3d 722, 820 NYS2d 79 [2d Dept 2006]). Liability is based on the rule that one who assumes to act as agent for a nonexistent principal is himself or herself liable on the contract in the absence of an agreement to the contrary and on the theory of a breach of an implied warranty of authority (***Id.***). Thus, courts have determined that the individual who signed the contract may be liable where there was no existing corporation under any name because, under those circumstances, the Plaintiff has "no remedy except against the individuals who acted as agents of those purported corporations" (***Animazing Entertainment, Inc. v Louis Lofredo Assocs.***, 88 F. Supp. 2d 265, 271, 2000 us Dist LEXIS 3575 [SD NY 2000]). Applying these principles, the Court finds that Plaintiff demonstrated, *prima facie*, its entitlement to judgment as a matter of law that the individual Defendants were liable under this theory. The Court further finds that since Green House Surgicare had neither *de facto* nor *de jure* existence at the time the contract was entered into, it cannot be bound by the terms thereof "unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying, or accepting it" (***Metro Kitchenworks Sales, LLC v Continental Cabinets***, LLC, *supra* at 81; 14 NY Jur 2d, Business Relationships § 97). Having submitted no facts which demonstrate that Greene House Surgicare had *de facto* nor *de jure* existence, Defendants failed to meet their burden of raising a triable issue of fact (***Alvarez v Prospect Hosp.***, *supra*). Therefore, that branch of the motion is granted to the extent that partial summary judgment is granted as against Greenhouse Medical P.C. and the individual Defendants on behalf of Greene House Surgicare.

Plaintiff also demonstrated its *prima facie* entitlement to dismissing the affirmative defenses as a matter of law (***Giuffrida v Citibank Corp.***, *supra*). The first affirmative defense is dismissed inasmuch as Crevecoeur appeared in the action and failed to move to dismiss on this ground within 60 (sixty) days of serving an answer (CPLR 3211 [e]). The second and ninth affirmative defenses are dismissed since the Agreement provides that the customer is responsible for repair and maintenance of the capital equipment. The third affirmative defense is without merit, since, as discussed above, Defendants executed a contract on behalf of a non-entity and are consequently personally liable. The fourth affirmative defense is also dismissed pursuant to Paragraph 13 of the Terms and Conditions which provides that the customer must return the capital equipment to Plaintiff upon the expiration of the Agreement.

The fifth and sixth affirmative defenses are dismissed for the reasons stated above. Although Defendant testified that the promises made verbally by Plaintiff's representative prior to executing the Agreement, Defendant Crevecoeur conceded that he did not read the Agreement to verify these promises. In any event, the merger clause at Paragraph 15 of the Terms and Conditions precludes any oral agreements which were not memorialized in writing. Moreover, Defendants failed to submit admissible evidence of fraud on Plaintiff's part. The seventh affirmative defense is without merit, inasmuch as pursuant to Paragraph 16 of the Terms and Conditions, Defendants agreed to the venue of this action in the state and federal courts of New York. Finally, the eighth affirmative defense is also without merit. This defense is belied by Defendant Crevecoeur's deposition testimony wherein he stated that he had no idea how many accessories were purchased, and had no reason to believe that Plaintiff's own figures were mistaken. Defendants have failed to raise a triable issue of fact in opposition (***Alvarez v Prospect Hosp.***, *supra*).

Accordingly, Plaintiff's motion is granted to the extent that partial summary judgment is granted as against Greenhouse Medical, P.C. and the individual Defendants on behalf of Greene House Surgicare; and the affirmative defenses are dismissed.

The foregoing decision constitutes the Order of the Court.

DATED: OCTOBER 30th, 2018
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court