

**Rochester Drug Coop., Inc. v Drug Mart Solutions,  
LLC**

2021 NY Slip Op 30586(U)

February 28, 2021

Supreme Court, New York County

Docket Number: 652109/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

*Justice*

-----X

ROCHESTER DRUG COOPERATIVE, INC.,

Plaintiff,

- v -

DRUG MART SOLUTIONS, LLC, YEVGENY ELYASH,  
JULIA FISHMAN, EUGENE BABENKO

Defendant.

-----X

**INDEX NO.** 652109/2020

**MOTION DATE** 08/12/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Drug Mart Solutions LLC d/b/a Quality RX Pharmacy, Yevgeny J. Elyash, Julia Fishman, and Eugene Babenko's (collectively, the **Defendants**) motion to dismiss is granted solely to the extent of the claims for goods sold and delivered (first), unjust enrichment (third), and an account stated (fourth) because these claims are duplicative of the claim for breach of contract.

**The Relevant Facts and Circumstances**

Reference is made to a Credit Application dated July 19, 2010 (the **Agreement**; NYSCEF Doc. No. 11), by and between Rochester Drug Cooperative, Inc. (the **Plaintiff**) and Drug Mart Solutions LLC d/b/a Quality RX Pharmacy (**Drug Mart**), pursuant to which Drug Mart applied for credit to purchase certain goods and services from the Plaintiff and Drug Mart agreed to provide timely payment for the same. As part of the Agreement, Drug Mart granted the Plaintiff

a security interest in its personal property, including, among other things, accounts receivable, insurance proceeds, prescription records, inventory, and equipment (*id.* at 2). The Agreement also included a provision wherein Mr. Elyash, Ms. Fishman, and Mr. Babenko each provided a personal guaranty of “the prompt and full performance and payment” of Drug Mart’s obligations to the Plaintiff pursuant to the Agreement (*id.* at 2-5).

By letter dated April 9, 2020, Plaintiff’s counsel issued a demand to the Defendants for the sum of \$3,006,390.99 (NYSCEF Doc. No. 16). The Plaintiff then commenced this action, alleging claims for (1) goods sold and delivered, (2) breach of contract, (3) unjust enrichment, (4) account stated, (5) breach of guaranty, and (6) foreclosure of security interest. The Defendants responded with the instant motion to dismiss all causes of action other than the second cause of action for breach of contract.

### **Discussion**

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

The well plead complaint alleges a valid and enforceable Agreement that requires Drug Mart to remit timely payment (NYSCEF Doc. No. 2, ¶¶ 13-20; NYSCEF Doc. No. 11). As the second cause of action for goods sold and delivered seeks to recover identical damages it is dismissed as duplicative (*see Suverant LLC v Brainchild, Inc.*, 2019 NY Slip Op 31154[U], \*8 [Sup Ct, NY

County 2019] [dismissing claim for goods sold and delivered as duplicative of breach of contract]).

The claim for breach of the Agreement also renders the third cause of action for unjust enrichment and the fourth cause of action for an account stated impermissibly duplicative (*see Suverant LLC v Brainchild, Inc.*, 2021 NY Slip Op 00918, \*2 [1st Dept 2021] [dismissing account stated and unjust enrichment claims because there was a valid contract]; *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]; *Hagman v Swenson*, 149 AD3d 1, 7 [1st Dept 2017] [dismissing account stated claim as another means to collect under a disputed contract]). Therefore, these causes of action are also dismissed.

With regard to the fifth cause of action for breach of guaranty, however, the Plaintiff has adequately pled that Mr. Elyash, Ms. Fishman, and Mr. Babenko have guaranteed Drug Mart's obligations which guaranty they have breached (NYSCEF Doc. No. 2, ¶¶ 28-32). This claim is not duplicative. Accordingly, the branch of the Defendants' motion to dismiss the fifth cause of action for breach of guaranty is denied.

The sixth cause of action also can not be dismissed at this stage of the lawsuit. The Plaintiff alleges a perfected security interest in certain property of Drug Mart. To wit, pursuant to the Agreement, the Plaintiff was granted a security interest in an enumerated list of Drug Mart's personal property (NYSCEF Doc. No. 11). The Plaintiff alleges that it filed valid UCC financing statements with respect to the collateral and has produced such financing statements in

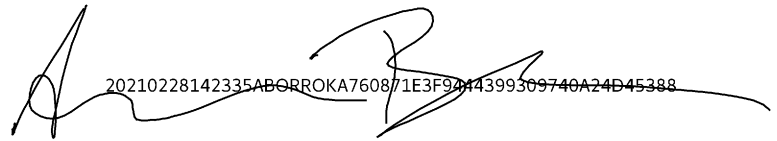
opposition to this motion (NYSCEF Doc. No. 12). Therefore, the sixth cause of action can not be dismissed.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is granted to the extent of the claims for goods sold and delivered (first), unjust enrichment (third), and an account stated (fourth) but otherwise denied; and it is further

ORDERED that the Defendants shall file an answer within 20 days of the date of this decision and order; and it is further

ORDERED that the parties shall appear for a remote preliminary conference by MS Teams on March 19, 2021 at 12 pm.



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2/28/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE