SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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S1 SPINE, LLC,

Plaintiff,

- v -

IMPLANET AMERICA, INC.,

Defendant.

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INDEX NO. 651958/2020

MOTION DATE 09/04/2020

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, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint pursuant to CPLR 3211 is granted based on the following memorandum decision.

Background

In this action for breach of contract, plaintiff S1 Spine, LLC ("S1"), asserts four causes of action: breach of contract (first cause of action); breach of the implied covenant of good faith and fair dealing (second cause of action); account stated (third cause of action); and unjust enrichment (fourth cause of action). Defendant Implanet America, Inc. ("Implanet"), now moves to dismiss the complaint in its entirety based on documentary evidence and for failure to state a cause of action.

On May 13, 2015, the parties entered into a Representative Agreement, pursuant to which S1 would "market and promote the sale of [Implanet]'s products, in exchange for various fees and other incentives" (NYSCEF Doc. No. 1 ¶ 12, *see* NYSCEF Doc. No. 8). In furtherance of this agreement, the parties entered into a Letter of Understanding dated June 29, 2016 (the

"Original Letter") (NYSCEF Doc. No. 9). The third provision of the Original Letter (the "Credit Provision") stipulates that, should S1 return products purchased from Implanet, S1 can receive a credit for the returned products: "S1 shall have the right to return product for credit at any time. The credit shall be issued at purchase price net of the commissions paid by Implanet to S1. The credit cannot be used for a cash refund but can be utilized for the purchase of any Implanet product that has been fully released" (NYSCEF Doc. No. 9 ¶ 3).

A few hours after signing the Original Letter, the parties underwent negotiations and amended it (the "Amended Letter") (NYSCEF Doc. No. 11). Specifically, the third provision of the Amended Letter (the "Exchange Provision") stipulates that, should S1 return products purchased from Implanet, S1 can exchange them for new Implanet products: "S1 shall have the right to exchange product for fully released products within the Implanet product line at any time" (NYSCEF Doc. No. 11 ¶ 4). Both parties signed the Amended Letter (NYSCEF Doc. No 11, Exh. 4).

The court also notes that the first provision of the Amended Letter (the "Breach Provision") – i.e., Implanet's obligation to issue S1 a cash refund for returned products if Implanet terminates the agreement without cause or undergoes a change of control – is identical to that of the Original Letter. Specifically, "[s]hould Implanet terminate the relationship without cause, or in the event that IMPLANET experiences a Change of Control that represents >50% of the Capital, and New Management[1] decides to sever relations at any time with S1 or Materially Breach, S1 would be allowed to return the existing inventory for a cash refund at the purchase

[1] The contractual reference to "New Management," while not specifically defined in the Original Letter or the Amended Letter, is logically understood by the court to refer to the corporate iteration of Implanet subsequent to the "Change of Control" referred to in the Breach Provision.

price net of the commissions paid by IMPLANET to S1" (NYSCEF Doc. No 11 ¶ 2; NYSCEF Doc. No 33 ¶ 2).

In August of 2018, S1 returned multiple product shipments to Implanet, and both parties communicated about these returns over several months. S1 alleges that in January of 2019, Implanet agreed to issue S1 a cash refund of $257,799.93 for these returned products, rather than a credit to purchase fully released Implanet products per the Credit Provision, or allow them to be exchanged for new Implanet products per the Exchange Provision. To date, S1 has not received a cash refund from Implanet for this return, nor a response from Implanet to S1's demands for it.

S1 commenced this action by filling a summons and complaint on May 26, 2020 (NYSCEF Doc. No. 1). Implanet appeared, and now makes this pre-answer motion to dismiss pursuant to CPLR 3211.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly

contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

CPLR 3211(a)(1) provides that a complaint may be dismissed if "a defense is founded upon documentary evidence." A complaint may also be dismissed if "the pleading fails to state a cause of action" (CPLR 3211 [a] [7]). To bring a breach of contract action, a plaintiff must allege "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Maspeth Fed. Sav. & Loan Assn. v Elizer*, 197 AD3d 1253, 1254 [2d Dept 2021] [internal citations omitted]).

Here, Implanet provided the Amended Letter – which was signed by executives from both parties and only entitles S1 to exchange returned products for newly released Implanet products – as documentary evidence in defense of S1's claim (NYSCEF Doc. No 11). S1 argues that the Original Letter, which only entitles S1 to full credit for returned products to be used for purchasing fully released Implanet products, governs the parties' relationship (NYSCEF Doc. No 33). However, it is settled law that "where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement" (*Northville Indus. Corp. v Fort Neck Oil Terms. Corp.*, 100 AD2d 865, 867 [2d Dept 1984] [internal citations omitted], *affd* 64 NY2d 930 [1985]). Since both parties signed the Amended Letter, the parties clearly expressed their intent for it to supersede the Original Letter.

Moreover, even if the Original Letter would have governed the parties' relationship (although, as indicated, it does not), it still would not entitle S1 to the $257,799.93 cash refund it seeks. The only way S1 would be entitled to a cash refund is if Implanet, as stipulated in the Breach Provision in both the Original Letter and the Amended Letter, "terminate[d] the relationship without cause, or . . . experience[d] a Change of Control that represent[ed] >50% of the Capital, and New Management decide[d] to sever relations at any time with S1 or Materially Breach" (NYSCEF Doc. No 33 ¶ 2; NYSCEF Doc. No 11 ¶ 2). Since Implanet did not violate this provision, S1 is not entitled to a cash refund for the products it returned to Implanet, nor did Implanet breach its contractual obligations to S1 by not giving them one.

With respect to the claim for breach of the implied covenant of good faith and fair dealing, "[t]he covenant is breached only where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other" (*Collard v Incorporated Village of Flower Hill*, 75 AD2d 631, 632 [2d Dept 1980], *affd* 52 NY2d 594 [1981]). However, a claim for breach of the implied covenant of good faith and fair dealing can be dismissed as duplicative of a breach of contract claim if both "arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

S1 alleges that Implanet breached the implied covenant of good faith and fair dealing by refusing to credit S1's return of products, particularly by Implanet not issuing S1 a cash refund of $257,799.93. Despite that, S1 was never entitled to a cash refund upon returning products to Implanet in the Credit Provision (NYSCEF Doc. No 33 ¶ 3), or the Exchange Provision (NYSCEF Doc. No 11 ¶ 4), so Implanet did not withhold any benefit due S1. Furthermore, S1's breach of the implied covenant of good faith and fair dealing claim is duplicative of its breach of contract claim. Both arise out of Implanet's alleged failure to issue S1 a cash refund that it is not

entitled to unless Implanet violates the Breach Provision (NYSCEF Doc. No 33 ¶ 2; NYSCEF Doc. No 11 ¶ 2), or a full credit per the Credit Provision in the Original Letter, which was superseded by the Exchange Provision of the Amended Letter (NYSCEF Doc. No. 33 ¶ 3 [Original Letter]; NYSCEF Doc. No. 11 [Amended Letter] ¶ 4).

With respect to the account stated claim, "[a]n essential element of an account stated is an agreement with respect to the amount of the balance due" (*Erdman Anthony & Assocs. v Barkstrom*, 298 AD2d 981, 981 [4th Dept], *rearg denied* 751 NYS2d 430 [4th Dept 2002]). "An account stated [also] assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists" (*M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.*, 247 AD2d 515, 516 [2d Dept 1998]). Here, S1 alleges that Implanet accepted its return of inventory and that Implanet agreed to pay S1 an agreed-upon amount of cash to the tune of $257,799.93. Implanet has not made this cash payment to S1 for this return, nor is Implanet under any obligation to do so for returns, regardless of whether the Original Letter or Amended Letter governs the parties' relationship (although, as indicated, the Amended Letter governs) (*see* NYSCEF Doc. No 33 ¶ 3; NYSCEF Doc. No 11 ¶ 4). Only if Implanet violated the Breach Provision (, by terminating its relationship with S1 without cause or undergoing a significant change of control, would S1 be entitled to a cash payment from Implanet (*see* NYSCEF Doc. No 33 ¶ 2; NYSCEF Doc. No 11 ¶ 2). Neither of these scenarios has occurred in this case. Therefore, the account stated claim fails.

Finally, regarding the unjust enrichment claim, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Goel v*

Ramachandran, 111 AD3d 783, 791 [2d Dept 2013] [internal citations omitted]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

S1 alleges that Implanet was unjustly enriched at S1's expense because Implanet did not remit full payment to S1 for products S1 returned to Implanet. However, the Amended Letter governs S1's reimbursement options for returning products to Implanet. As stipulated in the Exchange Provision of the Amended Letter, S1 can only exchange returned products for newly released Implanet products (*see* NYSCEF Doc. No 11 ¶ 4). Even if the Credit Provision of the Original Letter applied here (and, as indicated, it does not), S1 could receive credit for returning products, only to purchase fully released Implanet products, but not to get a cash refund (*see* NYSCEF Doc. No. 33 ¶ 3). Since S1 is not entitled to a cash refund upon returning products to Implanet under the Original Letter or the Amended Letter, S1 cannot claim that Implanet was unjustly enriched at S1's expense by not remitting a cash payment to S1.

Accordingly, it is hereby

ORDERED that the motion of defendant Implanet America, Inc., to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

This constitutes the decision and order of the court.

ENTER:

6/22/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE