

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Andrew Borrok
Justice

PART 57

Gmc mercantile corp.
-v-
Bon Worth, Inc.

INDEX NO. 653931/2016
MOTION DATE 7/25/18
MOTION SEQ. NO. 1+2

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

See attached order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/30/18

AR
Hon. Andrew Borrok, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57**

-----x
GMC MERCANTILE CORP.

Plaintiff(s)

Index no. 653931/2016

-against-

**DECISION/ORDER
Motion Sequence Nos. 1 and 2**

BON WORTH, INC.

Defendant(s)
-----x

Recitation, as required by CPLR §2219(a), of the papers considered on the review of Bon Worth, Inc.'s motion (Motion Sequence No. 1) for summary judgment and dismissal and GMC Mercantile Corp.'s motion (Motion Sequence No. 2) for summary judgment and dismissing the counter-claims

PAPERS

NUMBERED

Notice of Motion and Affidavits and Exhibits Annexed	1
Affidavit in Opposition with Exhibits Annexed	2
Memorandum of Law in Support	3
Memorandum of Law in Opposition	4
Notice of Motion and Affidavits and Exhibits Annexed	5
Affirmation in Opposition	7
Memorandum of Law in Support	8
Memorandum of Law in Opposition	9

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Bon Worth, Inc. (the Defendant)'s motion for summary judgment dismissing the action is granted solely with respect to the Plaintiff's claims for fraudulent

misrepresentation and unjust enrichment but is otherwise denied. GMC Mercantile Corp. (the **Plaintiff**)'s motion for summary judgment, alleging a breach of contract and account stated is granted, Defendant's counter-claims are dismissed, and judgment is entered in the amount set forth below.

The Relevant Facts and Circumstances

The Plaintiff is a wholesaler of women's clothing. The Defendant is a retailer of women's clothing. The Defendant ordered clothing from the Plaintiff pursuant to Purchase Orders Nos. 1964, 1965, 1978, 1981, 1984, 1985 (hereinafter the **Accepted Goods**). Other goods were ordered pursuant to Purchase Orders Nos. 2082, 2086, 2100, 2173, 2174, and 2272 (hereinafter collectively the **Cancelled Goods**). The total amount of the Purchase Orders for the Accepted Goods was \$245,731.89 and the total amount of the Purchase Orders for the Cancelled Goods was \$920,000.

The goods purchased pursuant to Purchase Orders Nos. 1978, 1981 and 1984 were delivered on September 4, 2015 and the goods sold pursuant to Purchase Orders Nos. 1964, 1965 and 1985 were delivered on September 15, 2015. Significantly, the Defendant did not communicate that it rejected the Accepted Goods within a reasonable time period after they were delivered, nor did it send any rejection of the charges listed on the invoices for the Accepted Goods¹ beyond what was agreed to in the August 25, 2015 Email (hereinafter defined) or hold them with reasonable care at the Plaintiff's disposition for a time sufficient for the Plaintiff to remove them. The Purchase Orders for the Cancelled Goods, on the other hand, were cancelled by email, dated October 19, 2015, from the Defendant to the Plaintiff.²

Inasmuch as delivery of the Accepted Goods was late, pursuant to an email (the **August 25, 2015 Email**), dated August 25, 2015, from Marie Roach (the Defendant's buyer) to Garrick Chan, Sherman and cc'ing Sherman, Guru, Nick Dmytryszyn, Joyce and Abdul, the Defendant and the Plaintiff agreed to settle the outstanding purchase orders for the Accepted Goods for a total of \$170,208.61 and an additional \$29,032.57 subject to review of the relevant selling reports to ensure that the Defendant achieved agreed-upon gross margins, with payment in full no

¹ Exhibit 4 to Affirmation in Support of Plaintiff's Motion for Summary Judgment, Deposition of Marie Roach, July 17, 2017, Pg. 45, lines 22-25.

² Answer, ¶43.

later than November, 2015.³ To date, only \$22,599 has been paid in respect of Purchase Order No. 1981.

In addition, the Plaintiff alleges that the Defendant improperly debited a 10% agreed upon discount for late deliveries in the amount of \$5,148 for other goods delivered pursuant to Purchase Order No. 1963 (invoice 10937) which goods were in fact timely delivered on July 9, 2015 per signed “POD” and with a “CXL” date that was July 10, 2015.⁴

The Plaintiff brings this lawsuit alleging breach of contract, unjust enrichment, fraudulent misrepresentation and account stated, requesting \$181,790.18 in damages.⁵

The Defendant answered the Complaint, and based on the August 25th Email asserts that the Purchase Orders for the Accepted Goods were delivered in an untimely fashion and that timely delivery was a “condition precedent” in the contract.⁶ The Defendant further alleges that Purchase Orders for the Cancelled Goods were cancelled because of late delivery of the Accepted Goods and asserted counterclaims of breach of contract/loss of profit, breach of the implied covenant of good faith and fair dealing, breach of the implied covenant of merchantability and fraud, claiming damages with respect to both the Accepted Goods and the Cancelled Goods in the amount of \$5,000,000.

Following the completion of discovery, the Defendant moved for summary judgment dismissing the action in its entirety and the Plaintiff also moved for summary judgment on its claims and to dismiss the Defendant’s counter-claims.

I. Defendant’s Motion for Summary Judgment Dismissing the Complaint

It is settled law that summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of

³ Per Emails, dated February 18, 2016 and again on February 25, 2016, from Garrick Chan to Abdul Abdul cc’ing Marie Roach, Joyce Flessig-Album and Christine Tse, the selling report had not yet been delivered, the \$170,208.61 was due within 45 days from late September (i.e., November 15, 2015) and \$29,032.57 was to be withheld and settled 120 days after ROG to ensure that the Defendant achieved its agreed-upon Gross-Margin.

⁴ Affidavit of Garrick Chan in Opposition of Defendant’s Motion for Summary Judgment, Exhibit 1, Email, dated October 7, 2015, from Christine Tse to Marie Roach, cc’ing Laura F Long, Abdul and Garrick Chan.

⁵ Complaint ¶34.

⁶ Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, Pgs. 4-8.

material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Failure to make such a prima facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]. Once the showing has been made, the burden of going forward shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980].

The Defendant argues that it is entitled to summary judgment and dismissal of the breach of contract cause of action because the Plaintiff failed to meet the terms and conditions set forth in the August 25, 2015 Email in that Plaintiff failed to deliver Purchase Order Nos. 1978, 1981 and 1986 on time as required by the August 25, 2015 Email, and that on time delivery was a condition precedent in the contract. The Defendant further argues that it is entitled to summary judgment and dismissal of the unjust enrichment claim because it is indistinguishable from the breach of contract claim. The Defendant also argues that the court must grant summary judgment and dismiss the fraudulent misrepresentation claim because both (x) the claim is based on a breach of contract claim and therefore must be dismissed and (y) the Plaintiff fails to show any misrepresentation by the Defendant and fraud requires a misrepresentation which was false which the defendant knew to be false made for the purpose of inducing reliance upon which the plaintiff justifiably relied and injury. Finally, the Defendant argues that the account stated claim must also be dismissed because there was never an agreement with respect to the amounts due.

In its opposition papers, the Plaintiff argues that it fulfilled its obligations pursuant to the August 25, 2015 Email in that it delivered the Accepted Goods which were accepted by the Defendant (i.e., as opposed to being rejected as non-conforming pursuant to NY UCC § 2-602) and were in fact sold in the Defendant's stores.⁷

NY UCC § 2-602 Manner and Effect of Rightful Rejection provides:

⁷ Plaintiff's Memorandum in Support of the Motion For Summary Judgment Against Defendant, ¶13.

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (Section 2-603 and 2-604).
 - (a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful against the seller; and
 - (b) If the buyer has before rejection taken physical possession of the goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 7-211), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
 - (c) The buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general (Section 2-703).

In this case, it is undisputed that the Defendant did not seasonably communicate a rejection of the Accepted Goods (NY UCC § 2-602(a)), did not hold them with reasonable care at the Plaintiff's disposition for a time sufficient to permit the Plaintiff to remove them (NY UCC § 2-602(b)) and has not paid for them. Therefore, the branch of the Defendant's motion for summary judgment dismissing the Plaintiff's claim for breach of contract is denied.⁸

With respect to the Plaintiff's claim for unjust enrichment, inasmuch as the Plaintiff's claim is covered by a written agreement, the Defendant's motion for summary judgment is granted and the Plaintiff's claim for unjust enrichment is

⁸ In addition, the court notes that the argument that on time delivery of the Accepted Orders was a condition precedent is simply not supported by the August 25th Email or the other correspondence submitted by both Plaintiff and Defendant. In discussing the purchase orders for the Accepted Goods and reaching agreement for the reduced price of \$170,208.61, Marie Roach indicated that "all **other** (emphasis added) POs must be received on time", meaning all other POs than the ones discussed in the August 25th Email.

Additionally, per Email, dated September 23, 2015, from Marie Roach to Garrick Chan; Christine Tse, cc'ing Laura F. Long and Abdul, in response to an inquiry as to why \$5,348 was deducted in respect of invoice #G10947, Ms. Chan wrote that "[t]he due date was 9/1 not 9/10/15. Our system automatically adds a late fee when the goods are passed the cancel date." For the avoidance of doubt, meaning that when goods are delivered late and accepted past the cancel date, per NY UCC § 2-714, the Defendant, as buyer, claims a 10% discount as damages and that the delivery date is not in fact a condition precedent which entitles the Defendant to keep the goods without paying for them.

dismissed. *See Cronos Grp. Ltd. V. CXomLP, LLC*, 156 A.D.3d 54 (1st Dep't. 2017).

With respect to Plaintiff's claim of fraudulent misrepresentation, the Plaintiff alleges that Marie Roach's statement that "you can look at the past records and decide for yourself if it is a fact that you will get paid" constituted a fraudulent misrepresentation which the Defendant knew was not true and which misrepresentation was designed to induce justifiable reliance and which did induce such justifiable reliance for which the Plaintiff was injured. The court however does not agree. The plain language that the Plaintiff relies on is neither false, nor a misrepresentation. In addition, Plaintiff's claim for fraudulent misrepresentation is duplicative of the claim for breach of contract. *See Cronos Grp. Ltd. V. CXomLP, LLC*, 156 A.D.3d 54 (1st Dep't. 2017). Therefore, Plaintiff's claim for fraudulent misrepresentation is dismissed.

Finally, with respect to the Plaintiff's claim for an account stated, an action for account stated requires receipt and retention of an invoice without objection within a reasonable period of time. In this case, the Plaintiff argues that an agreement was reached as to the amounts due in the August 25, 2015 Email, an invoice was delivered with each of the deliveries and no objection was made to the amounts stated in the invoices delivered with the Accepted Goods.⁹ Accordingly, the branch of the Defendant's motion for summary judgment dismissing Plaintiff's cause of action for account stated is denied.

II. Plaintiff's Motion for Summary Judgment Based on Breach of Contract, Unjust Enrichment, Fraudulent Misrepresentation and Account Stated and Dismissing the Defendant's Counterclaims

A. Summary Judgment is Granted for Breach of Contract and Account Stated

The Plaintiff argues that it is entitled to summary judgment because (i) the Accepted Goods were delivered and accepted by the Defendant, (ii) the Defendant did not within a reasonable time period reject the goods following acceptance, (iii) where appropriate the Defendant on other purchases applied its agreed upon 10% discount for late deliveries, (iv) the Plaintiff complied with the terms and conditions of the August 25th Email with respect to the Accepted Goods, and (v)

⁹ See Fn. 1 supra.

other than a payment of \$22,599 that was made by the Defendant, the Accepted Goods were not paid for and the invoices remain unpaid.

NY UCC § 2-607(3) provides that where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. NY UCC § 2-607(4) provides that the burden is on the buyer to establish any breach with respect to the goods accepted.

As discussed above, the Defendant did not (i) seasonably reject the Accepted Goods pursuant to NY UCC § 2-602, (ii) timely give notice of the alleged defect as it related to non-compliance with the August 25, 2015 Email or timely dispute the invoices, (iii) did not hold the goods with reasonable care at the Plaintiff's disposition for a time sufficient for the Plaintiff to remove them in accordance with UCC § 2-607(3) and (iv) it is not disputed that the Defendant in fact sold the Accepted Goods in its stores. *See* NY UCC § 2-602(a).

Further, with respect to the Plaintiff's breach of contract claim for \$5,148 as it relates to an alleged improper 10% late penalty for the goods delivered pursuant to Purchase Order No. 1963, the Defendant has failed to raise a triable issue of fact or dispute that the goods delivered pursuant to Purchase Order No. 1963 were not delivered untimely.¹⁰

Accordingly, the Plaintiff's motion for summary judgment is granted with respect to the breach of contract and account stated claims for \$175,356.61 (170,208.61 + \$5148.00), plus the additional \$29,032.57 or a total amount of \$204,389.18 less the amount of \$22,599 already paid or \$181,790.18.

With respect to the date of the breach, for the avoidance of doubt, the statutory interest of nine percent (9%) shall run from (x) October 30, 2015 with respect to \$152,757.61 (\$175,356.61- \$22,599 already paid) which was due pursuant to the 45 day standard payment agreement for the Accepted Goods and the goods delivered in respect of Purchase Order No. 1963, all of which goods were delivered by September 15, 2015, and (y) from January 5, 2016 with respect to \$29,032.57 for the hold back amount to ensure that the agreed upon gross margin was met.¹¹

¹⁰ *See* Fn. 4 *supra*.

¹¹ *See* Fn. 1 *supra*. According to Ms. Roach's deposition testimony of July 17, 2017, the gross margin guarantee deduction was routinely calculated on transactions 16 weeks after delivery of the goods and payments would be made accordingly soon thereafter. In this case, the gross margin guarantee deduction should have been calculated in early January, 2016 (i.e., approximately 16 weeks after the September deliveries).

Inasmuch as the court dismissed the Plaintiff's claims of unjust enrichment and fraudulent misrepresentation, this branch of the Plaintiff's motion is denied as moot.

B. Plaintiff's Motion to Dismiss the Counter-Claims is Granted

1. Breach of Contract/Lost Profits

The Plaintiff argues that the Defendant's counterclaim for breach of contract/lost profits is speculative and therefore must be dismissed. Under New York law, it is well established that when the complaint and the supporting documents do not establish that lost profits were part of the parties' final negotiation of the contract, a motion to dismiss a lost profits claim should be granted. See *Kantor v. 75 Worth St., LLC*, 95 A.D.3d 718 (App. Div. 1st Dep't. 2012). (quoting *Ashland Mgt. v. Janien*, 82 N.Y.2d 305 (1993); see also NY UCC § 2-715 (2) (a). In the instant case, the BonWorth, Inc. Purchasing Procedures, Policies & Agreements provide that the remedy for late delivery is cancellation of the order if it does not have prior approval. See Exhibit B to Gurumoorthy Affidavit in Support of Defendant's Motion for Summary Judgment, ¶ Delivery. This is exactly what the Defendant did with respect to the Purchase Orders for the Cancelled Goods.

In addition, NY UCC § 2-714 Buyer's Damages for Breach in Regard to Accepted Goods provides:

- (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
- (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Inasmuch, as the Defendant failed to provide the notice required by NY UCC § 2-607(3), the Defendant is not entitled to recover under NY UCC § 2-714 beyond the amounts contemplated by the August 25, 2105 Email. *See* NY UCC § 2-607(3).

Accordingly, the counterclaim for breach of contract/loss profits is dismissed.

2. Breach of Implied Covenant of Good Faith and Fair Dealing

The Plaintiff argues that the counterclaim for breach of the implied covenant of good faith and fair dealing must be dismissed because there simply are no credible allegations that the Plaintiff did not exercise good faith. The court agrees. In this case, the Plaintiff disclosed by email as early as in July, 2015¹², that there were problems with the factor. Plaintiff remained willing to fulfill all of the Defendant's orders including the orders for the Cancelled Goods and the Plaintiff properly communicated the issues regarding delivery with respect to the Cancelled Goods. To wit, on February 18, 2016, Mr. Chan emailed Mr. Abdul detailing problems that the Plaintiff was having with its factor and financing due to the Defendant's failure to pay for the prior Purchase Orders¹³ or provide financial information or proper assurances of payment and it was the Defendant who cancelled the Purchase Orders for the Cancelled Goods. Moreover, and most importantly, inasmuch as the Defendant failed to comply with NY UCC § 2-607(3), the Defendant is barred from recovery. Accordingly, the counterclaim for breach of the implied covenant of good faith and fair dealing is dismissed.

3. Breach of Implied Covenant of Merchantability

The Plaintiff argues that the Defendant (i) waived the defense of implied covenant of merchantability by accepting the goods and agreeing by email with Plaintiff to pay a reduced amount to settle all non-conformity claims for lateness, (ii) offers no support for the claim of breach of implied covenant of merchantability and (iii) would need to allege that the goods delivered failed to be merchantable in accordance with NY UCC §2-314 which it does not do. Inasmuch as the Defendant fails to allege how the Accepted Goods are not fit for the ordinary purpose for which such goods are used (NY UCC §2-314(2)(c)) or otherwise does

¹² *See, e.g.*, email, dated July 29, 2015, from Joyce to Abdul, cc'ing Sherman, Marie R., Guru, and Indiah.

¹³ *See* Exhibit I to Gurumoorthy Affidavit.

not meet the requirements of NY UCC § 2-314, the Defendant never communicated any failure to comply with NY UCC § 2-314, the Defendant had a holdback of \$29,032.57 for the Accepted Goods to ensure that the agreed upon gross margins were met, and the Defendant claims a late penalty of 10% for goods which are accepted past their cancelation date, and the Defendant sold the Accepted Goods, the Defendant has not made out a claim for breach of the implied covenant of merchantability. In addition, as indicated above, because the Defendant failed to comply with NY UCC § 2-607(3), the Defendant is barred from recovery. Accordingly, the counterclaim for breach of implied covenant of merchantability is dismissed. NY UCC § 2-314.

4. Unjust Enrichment Fraud and Recession Based on Fraud

Finally, the Plaintiff argues that the Defendant's counterclaim for unjust enrichment fraud and recession based on fraud must be dismissed because the Defendant failed to meet the CPLR § 3016(b) Particularity Requirement. CPLR § 3016(b) requires that the circumstances underlying a cause of action based on fraud be stated "in detail." *Stein v. Doukas*, 951 N.Y.S2d 173 (2nd Dep't 2012); CPLR § 3016(b). In this case, the Defendant's fraud counterclaims only contain bare and conclusory allegations without any supporting detail of misstatements or misrepresentations made to Defendant by the Plaintiff. More specifically, the Defendant alleges only that Plaintiff made misstatements as set forth in the complaint without specifying what the alleged misstatements were, how they were known to be untruthful by the Defendant when made, or how they induced justifiable reliance and injury. *See Answer ¶¶67-72*. In addition, as indicated above, because the Defendant's failed to comply with NY UCC § 2-607, the Defendant is barred from recovery. Accordingly, the counterclaim based on unjust enrichment fraud and recession based on fraud are dismissed.

CONCLUSION

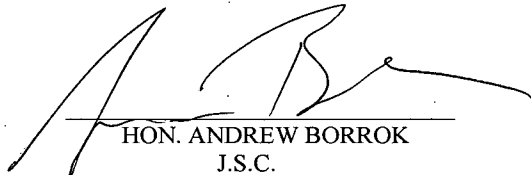
It is hereby ordered that (i) the Defendant's motion for summary judgment dismissing the action is granted with respect to the Plaintiff's claims for fraudulent misrepresentation and unjust enrichment but is otherwise denied, (ii) the Plaintiff's motion for summary judgment is granted for Breach of Contract and Account Stated and the Defendants counter-claims are dismissed, (iii) Judgment is entered

NYSCEF DOC. NO. 60

RECEIVED NYSCEF: 07/30/2018

in favor of the Plaintiff in the amount of \$181,790.18 plus costs and statutory interest of nine percent (9%) shall run from (x) October 30, 2015 with respect to \$152,757.61 and (y) from January 5, 2016 with respect to \$29,032.57.

July 30, 2018


HON. ANDREW BORROK
J.S.C.

Hon. Andrew Borrok