

4. All other aspects of the motion are denied.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AMERISOURCEBERGEN DRUG CORPORATION,	:	July Term 2006
	:	
Plaintiff,	:	No. 2272
v.	:	
CURASCRIP, INC. and PRIORITY HEALTHCARE CORPORATION,	:	COMMERCE PROGRAM
	:	
Defendants.	:	Control Number 041315

OPINION

This action was instituted by AmerisourceBergen (“Amerisource”), a wholesaler of prescription drugs, against CuraScript, Inc. (“CuraScript”) and Priority Healthcare Corporation (“Priority”), companies in the specialty pharmacy business, for breach of contract and unjust enrichment. Presently, before the court is CuraScript and Priority’s Motion for Partial Summary Judgment. For the reasons discussed below, the motion should be granted in part and denied in part.

Defendant CuraScript, Inc. is a specialty pharmacy and is in the business of providing pharmaceuticals to patients. CuraScript is a subsidiary of Express Scripts, Inc. Defendant Priority is a specialty pharmacy and a specialty distribution company. A specialty distribution company delivers pharmaceutical products to a doctor’s office or a clinic. Amerisource is engaged in the wholesale distribution and supply of pharmaceutical products to pharmacies and distributors.

On or about December 1, 2003, Amerisource and CuraScript entered into a Prime Vendor Agreement by which Amerisource agreed to provide and CuraScript agreed to purchase certain pharmaceutical products and services through November 30, 2008. Among other provisions, the CuraScript Agreement contains a provision mandating

liquidated damages in the event that CuraScript terminates the agreement before the end of its term. Section 7 of the Agreement expressly provides:

TERMINATION AMOUNT

Customer acknowledges that the Price of Goods and other terms of this Agreement are based on the length of the Agreement. In the event the Customer terminates this Agreement before the expiration of its initial Term, whether for any reason or no reason, Customer agrees to pay the amount as shown on the following table to AmerisourceBergen as liquidated damages and not as a penalty, in addition to any other amounts that may be owed to AmerisourceBergen as of the termination date. ...

As part of the terms of the Agreement, CuraScript agreed to participate in the Preferred Rx Options Program (“PRO Generics”) and purchase at least 3.5% of CuraScript’s total purchases. The Agreement further provides that if CuraScript fails to meet the 3.5% minimal annual, aggregate and PRO Generics Net Purchases, Amerisource may reasonably adjust the pricing to reflect the lower than expected volume of purchases.

On September 19, 2003, Amerisource and Priority entered into a Prime Vendor Agreement by which Amerisource agreed to provide and Priority agreed to purchase certain pharmaceutical products and services through September 30, 2006. The Priority Agreement is different from the CuraScript Agreement. Some of the differences include but are not limited to Priority maintaining a security deposit for the benefit of Amerisource in an amount equal to an estimated one month’s purchase and that the agreement does not contain a minimum requirement for PRO Generics purchases. Despite the differences the CuraScript and the Priority Agreements did contain the following provision:

...Facility means each of Customer’s (CuraScript/Priority) pharmacies, together with any other facilities Customer acquires, is affiliated with or operates during the Term in the United States. Newly acquired facilities with existing agreements with other distributors will become Facilities

under this Agreement upon the earlier of expiration of such existing agreement or the date Customer (CuraScript/Priority) may terminate such agreement, with or without cause, without breaching it or paying a material termination penalty, ...¹

In October 2005, Express Scripts Inc. acquired Priority and Priority became a subsidiary of CuraScript. From October 2005 until July 2006, Amerisource accepted and filled millions of dollars of orders from Priority under the Priority Agreement.

On June 2, 2006, Amerisource notified CuraScript that it was unilaterally increasing the price of goods for failing to comply with the generic requirement under the Agreement. On June 30, 2006, CuraScript notified Amerisource that the unilateral implementation of a price increase would constitute a constructive termination of the CuraScript Agreement by Amerisource. On July 6, 2006, CuraScript notified Amerisource that it was terminating the CuraScript Agreement effective July 17, 2006. In July 2006, Amerisource also took the position that all of Priority's purchases dating back to October 14, 2005 were governed retroactively by the CuraScript Agreement. Thereafter, Amerisource instituted the instant action against CuraScript and Priority for breach of contract and unjust enrichment.

DISCUSSION

I. Amerisource is not entitled to recover liquidated damages in the event it proves its claim for breach of contract against CuraScript.

One of the questions presented by defendant is whether Amerisource may recover its lost profits and other alleged damages from the early termination of this agreement by CurasScript even though the agreement contains a liquidated damage provision. On April 19, 2007, in response to defendants' motion for partial judgment on the pleadings,

¹ CuraScript Agreement ¶ 3; Priority Agreement ¶3.

the court ruled that “Plaintiff is not entitled to recover lost profits, cost of unsold special inventory and net present value of lost future profits. Plaintiff’s damages, if any, are limited to the liquidated damage provision set forth in the agreement as well as any amounts owed by defendants.” Consequently, defendants’ motion for partial summary judgment as it pertains to Amerisource’s damage claim is denied as moot.

II. Amerisource waived its right to bring a claim against Priority under the CuraScript Agreement.

Amerisource alleges that Priority breached the CuraScript Agreement by failing to make minimal required purchases in the Preferred Rx Options Program (“PRO Generics”). On the other hand, CuraScript argues that Priority is not required to make any minimum purchases in the PRO Generics program since it is not a party to the CuraScript Agreement and no such requirement exists within the Priority Agreement.

As set forth above, the CuraScript Agreement provides in part in Section Three entitled Customer Locations & Deliveries:

...Facility means each of Customer’s (CuraScript) pharmacies, together with any other facilities Customer acquires, is affiliated with or operates during the Term in the United States.

A review of the record in this matter clearly establishes that CuraScript is affiliated with and operates the Priority facilities.² As such, the Priority facilities should be covered by the CuraScript Agreement from October 14, 2005, the date of acquisition, to the date of termination. However, although Amerisource had the right to convert

² CuraScript and Priority held themselves out as a single company under the CuraScript banner, Exhibit 23 to Plaintiff’s response to defendant’s motion for summary judgment, wholesalers received orders for Priority facilities from CuraScript, Exhibit 16 to Plaintiff’s response to defendant’s motion for summary judgment pp. 30-31, CuraScript controlled the purchasing of inventory for the Priority facilities, Exhibit 12 p. 23, employees of Priority became CuraScript employees after Priority became a subsidiary of CuraScript, Exhibit 29 p. 24-30.

Priority to the CuraScript Agreement in October 2005 it waived its right to do so as demonstrated in its course of performance from the date Priority was acquired to the date the contractual relationship was terminated. Title 13 of the Commercial Code section 2208 (a) provides:

(a) Relevancy of Accepted Performance- Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Additionally subpart (c) provides

(c) Waiver or Modification of Terms Inconsistent with Performance- Subject to the provisions of section 2209 (relating to modification, rescission and waiver), such course of performance shall be relevant to show a waiver or modification of any term consistent with such course of performance.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right.³ Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.⁴ Here, the facts clearly demonstrate that Amerisource waived its right to apply the CuraScript Agreement to Priority. Amerisource chose not to convert Priority to the CuraScript Agreement and continued to perform under the Priority Agreement until the date of

³ Zitelli v. Dermatology Education & Research Foundation, 409 Pa. Super. 219, 240, 597 A.2d 1173, 1184 (1991).

⁴ Marranca General Contracting Co. Inc. v. Amerimar Cherry Hill Associates Limited Partnership, 416 Pa. Super. 45, 610 A.2d 499 (1992).

termination.⁵ It was not until several days **after** the termination of the CuraScript Agreement, that Amerisource decided to convert the Priority Agreement. By weighing its options and continuing to apply the Priority Agreement to Priority purchases, Amerisource waived its right to now assert that Priority is liable for breaches of the CuraScript Agreement from October 2005 forward. Consequently, defendants' motion for partial summary judgment is granted.

III. The Unjust Enrichment claim is dismissed.

Unjust enrichment is a quasi-contractual doctrine based in equity which requires plaintiffs to establish the following: (1) benefits conferred on defendants by plaintiffs; (2) appreciation of such benefits by defendants; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendants to retain the benefit without payment of value.⁶ However, unjust enrichment is inapplicable where the parties' relationship is founded upon a written agreement, regardless of how "harsh the provisions of such contracts may seem in light of the subsequent happenings."⁷ Since the relationship between Amerisource and CuraScript is based on an express written contract and since the allegations underlying the unjust enrichment claim are the same as those in the breach of contract claim, defendants' motion for partial summary judgment is granted and the unjust enrichment claim is dismissed.

⁵ See Exhibit 20 to Defendants' Motion for Summary Judgment, e mail from Rich Olyer (VP Alternative Care Sales for AmerisourceBergen) to Rick Riley (VP of National Accounts for AmerisourceBergen) dated July 22, 2005. See also Rick Olyer deposition p. 125-26; Jim Riley deposition pp. 167, 171-175.

⁶ Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa. Super. 1999), appeal denied, 561 Pa. 700, 751 A.2d 193 (2000).

⁷ Wilson Area Sch. Dist. v. Skepton, 586 Pa. 513, 895 A.2d 1250, 1254 (2006).

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted in part and denied in part as follows: Defendant's Motion for Summary Judgment pertaining to the liquidated damage provision is denied as moot. This court has already determined that the liquidated damage provision in paragraph 7 in the CuraScript Agreement is the exclusive remedy for Plaintiff. See Order dated April 19, 2007. Defendant's Motion for Summary Judgment on Amerisource's claims against Priority is Granted. Defendant's Motion for Summary Judgment on the Amerisource's unjust enrichment claim is granted. All other aspects of the motion are denied. An order consistent with this opinion will be filed of record.

BY THE COURT,

HOWLAND W. ABRAMSON, J.