

**Drexel Distrib. Inc. v Prophase Labs, Inc.**

2023 NY Slip Op 31677(U)

May 16, 2023

Supreme Court, New York County

Docket Number: Index No. 653503/2022

Judge: Barry Ostrager

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

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X  
 DREXEL DISTRIBUTION INC., and DREXEL DISTRIBUTION INC, d/b/a EZ TEST NY

Plaintiff,

- v -

PROPHASE LABS, INC., PROPHASE DIAGNOSTICS, INC., and PROPHASE DX,

Defendants.

INDEX NO.	653503/2022
MOTION DATE	
MOTION SEQ. NO.	001, 002

**DECISION & ORDER ON MOTIONS**

-----X  
 HON. BARRY R. OSTRAGER

On May 16, 2023, the Court heard oral argument via Microsoft Teams on Motion Sequence 001 by plaintiff Drexel Distribution Inc d/b/a EZ TEST NY (“EZ Test”) to dismiss defendant’s counterclaims and Motion Sequence 002 by defendant Prophase Diagnostics, Inc. (“Prophase”) to dismiss plaintiff’s Amended Complaint. The action is dismissed against defendants Prophase Labs, Inc. and Prophase DX on consent of the parties, as reflected in the Transcript of Proceedings of May 16, 2023. In accordance with the Transcript of Proceedings of May 16, 2023, the motions are resolved as follows.

Plaintiff’s Motion Sequence 001 to dismiss defendant’s counterclaims is denied in all respects. Regarding the motion seeking to dismiss defendant’s counterclaims on the basis of an election of remedy, that claim is denied. There are questions of fact as to whether the doctrine applies such that dismissal of the action on this basis would inappropriate.

To the extent the motion seeks to strike defendant’s Counterclaims on other grounds, those portions of the motion are also denied. The allegations in the Answer with Counterclaims are relevant and plaintiff has failed to establish how the material in the Counterclaims is scandalous or prejudicial. *See New York Health and Hospitals Corp. v. St. Barnabas Community*

*Health Plan*, 22 A.D.3d 391, 391 (1st Dept. 2005). The motion to dismiss the Counterclaim for punitive damages is denied. Broadly construing and treating the allegations in the Answer and Counterclaims as true, plaintiff has adequately plead the elements for a punitive damages claim. The application for an undertaking as security for costs against the defendant pursuant to CPLR §8503 is also denied. Plaintiff does not dispute the defendant's assertion that defendant is a New York resident. Finally, the portion of the motion seeking to impose a non-disparagement injunction against defendant is denied as plaintiff has failed to establish any of the elements for a preliminary injunction and also fails to establish any legal basis for such an injunction.

Defendant's Motion Sequence 002 to dismiss plaintiff's Amended Complaint is granted in part. Defendant's motion to dismiss the second, third, fourth, fifth and sixth causes of action for declaratory judgment is granted because the relief sought in those causes of action is duplicative of the claims asserted under the Independent Contractor Agreement ("ICA"). NYSCEF Doc. No. 10. Thus, the claims are duplicative of the first cause of action for breach of contract.

Defendant's motion to dismiss the seventh cause of action is granted in part. The motion is granted to the extent of dismissing the causes of action for an account stated and breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claim. *See, e.g., Vanpoy Corp., S.R.L. v. Soleil Chartered Bank*, 204 A.D.3d 486, 487–88 (1<sup>st</sup> Dept. 2022). Regarding the breach of the implied covenant of good faith and fair dealing claim, plaintiff may pursue its theory that defendant breached the covenant in conjunction with its breach of contract claim "because a breach of the covenant of good faith and fair dealing is a breach of the contract itself." *Parlux Fragrances, LLC v. S. Carter Enterprises*, 204 A.D.3d 72, 92 (1st Dept. 2022).

To the extent the seventh cause of action asserts a claim for unjust enrichment and/or quantum meruit, the motion to dismiss is denied. The quasi-contract claims are asserted alternatively to the first cause of action for breach of contract. In light of defendant's assertions in its Answer that the ICA was amended, it is premature to dismiss these claims at this stage of the litigation.

In light of the parties' stipulation on the Transcript of Proceedings of May 16, 2023 regarding the discontinuance/withdrawal of claims against defendants Prophase Labs, Inc. and Prophase DX, the parties are directed to promptly submit a stipulation to amend the caption, reflecting the changes to the named parties, with a request to be So Ordered.

A preliminary conference is scheduled for June 2, 2023 at 11:00 a.m. The parties are directed to e-file a letter with dial-in access to this conference no later than May 26, 2023. To that end, the parties are directed to meet and confer and agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline no later than 22 months after the date the Amended Complaint was filed with interim deadlines agreed to by the parties. The proposed Preliminary Conference Order must be filed with a request to So Order by May 26, 2023 in this 2022 case. If the proposed Preliminary Conference Order is acceptable, it will be So Ordered and no appearance will be necessary on June 2, 2023. If the parties cannot agree on discovery deadlines, the parties are directed to efile no later than May 26, 2023 a brief letter summarizing the discovery disputes. No motion for discovery or protective order shall be filed prior to the filing of a Preliminary Conference Order.


Accordingly, it is hereby

ORDERED that the claims asserted against defendants Prophase Labs, Inc. and Prophase DX are severed and dismissed on consent of the parties;

ORDERED that the motion to dismiss defendant Prophase Diagnostics, Inc.'s counterclaims is denied in its entirety; and it is further

ORDERED that the motion to dismiss plaintiff's Amended Complaint is granted as to the second, third, fourth, fifth, and sixth causes of action, and granted in part as to the seventh cause of action, and those causes of action are dismissed to the extent provided herein.

Dated: May 16, 2023

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: