

material fact exists and the moving party is entitled to judgment as a matter of law.”¹ For a dispute to be “genuine,” the evidence must be such that a reasonable jury could return a verdict for the nonmoving party.² If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.”³ The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions.⁴

From the Court’s review of the record, it appears that the following basic facts are not in dispute: Between December 18, 2003 and May 13, 2005, Defendant purchased from Plaintiff approximately 60,000 two-pound and four-pound bags of a product known commercially as Canada Green Grass Seed (“Canada Green”). Defendant marketed and sold the two-pound and four-pound bags through its direct response television programming and on its website using performance claims that had been substantiated by Plaintiff and

¹Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990).

²Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

³Matsushita Elec.Indus.Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

⁴Fireman’s Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

approved by Defendant's quality assurance and legal departments. Defendant enjoyed tremendous success in marketing and selling the two-pound and four-pound bags. Because of this success, Defendant approached Plaintiff in August 2004 about creating a special-order six-pound bag of Canada Green so that Defendant could promote the product on television as a Today's Special Value ("TSV") item.

Plaintiff alleges that Defendant entered into an oral agreement with Plaintiff to purchase 80,000 units of the six-pound bag of Canada Green. Plaintiff alleges that as a result of the agreement, it entered into a non-cancelable special order with its supplier to purchase 80,000 six-pound bags for sale to Defendant.

On September 21, 2004 and September 30, 2004, Defendant sent two purchase orders to Plaintiff for 42,000 and 29,500 units of the custom six-pound bags of Canada Green at a price of \$14.00 per bag, with delivery to be made between March 3, 2005 and March 29, 2005, respectively. The purchase orders contained an integration clause which appears on the reverse side and states: "This Order and any other written warranties and specifications, the Regulations and Standards, and the terms, conditions, and agreements herein and therein, constitute the full understanding of the parties hereto and a complete and exclusive statement of the terms of the parties' agreement

concerning the Merchandise furnished hereunder.”⁵ The purchase orders also contained a provision for the return of goods by Defendant. Plaintiff alleges that it never assented to any of the terms that appeared on the reverse side of the purchase orders.

The TSV promotion failed, allegedly because Defendant unilaterally changed the performance claims for the six-pound bag. As a result of the failed promotion, Defendant canceled its order for 29,000 units of the six-pound bags. Additionally, Defendant refused to pay for and sought to return approximately 24,000 of the units previously delivered. Plaintiff refused to accept any of the units Defendant attempted to return, and claims that Defendant thus breached the parties’ contract.

In the fraud count, Plaintiff alleges that Defendant fraudulently induced it to enter into a purchase agreement for six-pound bags of Canada Green by representing to Plaintiff that the six-pound bags would be sold using the same performance claims that were used with the successful four-pound bags. In fact, plaintiff alleges Defendant subjected the six-pound bags to more restrictive performance claims. Plaintiff alleges that it relied on Defendant’s misrepresentations and

⁵ Purchase Orders attached to Defendant’s Motion for Summary judgment as Exhibit A at paragraph 18.

was induced into entering into a non-cancelable order with its supplier for 80,000 units of the six-pound bags.

Defendant argues that it is entitled to summary judgment on the fraud claim because any fraudulent misrepresentations on which Plaintiff allegedly relied constitute inadmissible parol evidence. Specifically, the Defendant, citing a Third Circuit decision,⁶ contends that the only contract between the parties is contained in the two written purchase orders it submitted to Plaintiff for the purchase of the six-pound bags and that the integration clause contained in those purchase orders bars claims of differing prior representations, even those alleged to have been made fraudulently.

Plaintiff responds that the two written purchase orders did not constitute the parties' agreement, but merely served to confirm the terms of the parties' alleged prior oral agreement with regard to quantity, price and delivery requirements.

Based on Dayhoff, Defendant may very well be correct. However, the current state of the record is such that there are simply too many disputes as to genuine issues of material fact for the Court to grant summary judgment at this time. These factual disputes include:

⁶ Dayhoff, Inc v. H.J.Heinz, Co., 86 F.3d 1287, 1300 (3d Cir. 1996).

1) Whether or not the parties entered into an oral agreement and what the terms of that agreement are.

In an affidavit attached to Plaintiff's response to Defendant's motion for summary judgment, Seymour Shapiro ("Shapiro"), the Executive Vice-President for Plaintiff, avers that Defendant's buyer, Pamela Voelker, orally "agreed to purchase 80,000 units of the custom-six-pound bags of the Canada Green product on a non-cancelable, non-returnable basis at a price of \$14.00 per bag, with delivery to be made between February and March 2005." ⁷

In a counter-affidavit attached to Defendant's Reply Brief, Voelker avers that there was "no oral agreement between [Defendant] and [Plaintiff] concerning the purchase of any six-pound bags of grass seed prior to the issuance of the Grass Seed Purchase Orders." ⁸

2) Whether or not the purchase orders are confirmations of the parties' prior oral agreement, or whether the purchase orders represent the entire agreement between the parties.

In his affidavit, Shapiro avers that on "September 21, 2004 and September 30, 2004, [Defendant] confirmed the business points of the oral agreement we made with Ms. Voelker (quantity, price, and delivery requirements) by sending two purchase orders to [Plaintiff] for 42,000 and 29,500 units of the custom six-pound bags of Canada

⁷ Shapiro Affidavit at paragraph 11

⁸ Voelker Affidavit at paragraph 4.

Green at a price of \$14.00 per bag, with delivery to be made before a March 3, 2005 and March 29, 2005 respectively. The purchase orders also contained a provision for the return of goods by [Defendant] which is part of the printed form and which was contrary to our prior oral agreement with [Defendant]....[A]s part of our oral agreement with [Defendant], we never agreed to allow the cancellation or return of any of the goods [Defendant] agreed to purchase.”⁹

In her counter-affidavit, Voelker avers that “[t]he Grass Seed Purchase Orders were not confirmations of any prior oral agreement, since none existed, but were offers by [Defendant] to purchase products from [Plaintiff] in accordance with the terms set forth therein.”¹⁰

3) What terms, if any, contained in the confirmations did the parties intend to incorporate into their agreement. ¹¹

The Court cannot resolve these issues without the benefit of discovery and a fuller record. Accordingly, the motion for summary judgment is denied. The parties are allowed a period of 45 days from the date of this Memorandum Opinion and Order within which to complete discovery. Following completion of discovery, the parties are

⁹ Shapiro Affidavit at paragraphs 12, 20

¹⁰ Voelker Affidavit at paragraph 4.

¹¹ Shapiro Affidavit at paragraphs 12,20; Voelker Affidavit at paragraph 4.

directed to arrange with the Court for a status conference to discuss the disposition of this matter.

