RODRÍGUEZ v. PEP BOYS CORPORATION

2004 | Cited 0 times | D. Puerto Rico | February 2, 2004

REPORT AND RECOMMENDATION

The Court has referred to this Magistrate Judge Defendants' Motionfor Summary Judgment(D.E. #138)and Plaintiffs' Motion for Partial SummaryJudgment (D.E. #67, 77). Oppositions and replies to both motions werefiled (D.E. #97, 98, 102 and 103).

Considering the averments submitted and the attachments to thepetitions for summary judgment, it is appropriate to DENY Plaintiffs'Motion for Partial Summary Judgment and to GRANT Defendants' Motion forSummary Judgment upon absence of any genuine issue of material fact thatpreclude same.

PROCEDURAL BACKGROUND

On March 19, 2002, Plaintiffs Tomás Díaz Rodríguez ("Díaz") and EnergyTech Corporation ("ETC") filed a complaint in the Court of First Instanceof Puerto Rico, Bayamón Judicial Center, Superior Division (Civil NumberDAC2000-1017 (503)), against Defendants The Pep Boys — Manny Moe & Jack("The Pep Boys") and Pep Boys — Manny Moe & Jack of Puerto Rico, Inc.("Pep Boys PR"). Plaintiffs' claim is grounded on a contract withDefendants for Pep Boys' exclusive distribution in Puerto Rico of aproduct called Super FuelMax, under the terms and conditions establishedin a Memorandum,Page 2attached to the Complaint as Exhibit A. Plaintiffs claimed thatDefendants breached the memorandum agreement because Defendants had notpaid for 8,950 Super FuelMax units that Defendants' had ordered andbecause Defendants decided not to purchase any additional product.Plaintiffs claimed Defendants had no right to cease purchasing theproduct.

On April 9, 2002, Defendants removed the case to this Court. (D.E. #1).Defendants filed an answer to the Complaint on May 8, 2002. (D.E. #6).

On February 28, 2003, Defendants' moved for summary judgment requestingthat the Court dismiss Plaintiffs' breach of contract claims. (D.E. #67).Defendants argued that because the agreement between Plaintiffs andDefendants was terminable at will, Defendants were under no obligation topurchase any specific amount of Super FuelMax units or for any specificperiod of time. Plaintiffs opposed the motion on April 8, 2003, andDefendants replied on April 30, 2003. (D.E. #102).

On March 11, 2003, Plaintiffs moved for partial summary judgmentagainst Defendants to collect payment for 8,950 Super FuelMax units whichDefendants had ordered from Plaintiffs. Plaintiffs argued that partialsummary judgment should be entered against Defendants for the amount

of$554,900.00 plus interest, payable in part to ETC and in part to AnchorFunding, Inc. ("Anchor Funding")[1], which had provided financing toETC for the purchase ofPage 3SuperFuel Max units. According to Plaintiffs, Anchor Funding was entitledto payment for 3,876 units of the 8,950 units for which Plaintiffs hadoriginally demanded payment. Defendants opposed Plaintiffs' motion forpartial summary judgment on April 8, 2003, (D.E. #93) and Plaintiffsreplied on April 30, 2003 (D.E. #103).[2]

Earlier in the case, on September 25, 2002, Plaintiffs had moved toamend the complaint (D.E. #27). The Court allowed Plaintiffs' AmendedComplaint on July 18, 2003 (D.E. #129). On July 31, 2003, Defendantsanswered the Amended Complaint (D.E. #132), supplemented the statement ofmaterial facts submitted with the motion for summary judgment which hadalready been filed and moved for summary judgment on the AmendedComplaint (D.E. #133) on the same grounds as those set forth already inthe motion for summary judgment already filed (D.E. #67,#102). Plaintiffsdid not oppose or contest Defendants' Supplemental Statement of MaterialFacts.[3]

SUMMARY JUDGMENT STANDARD

The court's discretion to grant summary judgment is governed byRule 56 of the Federal Rules of Civil Procedure. Rule 56Page 4states, where pertinent, that the court may grant summary judgmentonly if "the pleadings, depositions, answers to interrogatories, andadmissions on file, together with the affidavits, if any, show that thereis no genuine issue as to any material fact and that the moving party isentitled to judgment as a matter of law. " Fed.R.Civ.P. 56(c); seeSantiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52.(1st Cir. 2000).

Summary judgment is appropriate if "there is no genuine issue as to anymaterial fact and . . . the moving party is entitled to a judgment as amatter of law." See Fed.R.Civ.P. 56(c). The party moving for summaryjudgment bears the burden to demonstrate the absence of a genuine issueof material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct.2548 (1986). Once a properly supported motion has been presented, theopposing party has the burden of demonstrating that a trial-worthy issueexists that would warrant the court's denial of the motion for summaryjudgment. For issues where the opposing party bears the ultimate burdenof proof, that party may not merely rely on the absence of competentevidence, but must affirmatively point to specific facts that demonstratethe existence of an authentic dispute. Suarez v. Pueblo Int'l, Inc.,229 F.3d 49 (1st Cir. 2000).

In this case, the record demonstrates that Defendants are entitled tosummary judgment. The August 9th memorandum is the agreement between theparties (hereinafter the "Agreement"). The Agreement is clear andunambiguous. The Agreement does not require Defendants to continuepurchasing product in perpetuity or for anyPage 5fixed period of time. Thus, Defendants could not have breached theAgreement by refusing to purchase any additional product, sell itthroughout Puerto Rico, and expand distribution to the United States.

On the other hand, the record shows that Plaintiffs are not entitled topartial summary judgment as

requested. Of the 8,950 units for whichPlaintiffs demand payment, there is no evidence that Plaintiffs ordered,received, or paid for 4,306 of the units or that they had an obligationto continue purchasing the product from the manufacturer, so Plaintiffshave no claim for these 4,306 units. The record shows that Defendantshave already paid or settled the claim for payment for 4,432 of the unitsactually purchased by Plaintiffs from the manufacturer (of which 3,014units are, in fact, still in Plaintiffs' possession).

FACTUAL BACKGROUND

Plaintiff ETC is the exclusive distributor in Puerto Rico for SuperFuelMax, advertised as a magnetic fuel saving device. Diaz dep. at28-32. ETC does not have distribution rights in the United States forSuper FuelMax. Id. at 71-73. ETC and its President, Plaintiff Díaz,recruited Attorney Marco Antonio Rigau to help sell Super FuelMax. Díazdep. at 48; Rigau dep. at 15-19.

Rigau suggested that ETC contact an automotive retailer to sell theproduct. Diaz dep. at 51; Rigau dep. at 19-24. Rigau and Plaintiffs choseto approach Pep Boys and met with Pep Boys PR's Regional Fleet AccountsManager, Gabriel Marrero. Rigau dep. at 19.Page 6Marrero brought the product to the attention of Guillermo Alvarez, PepBoys Vice President in charge of operations in Puerto Rico. Marrero dep.(1st sess.) at 93; Alvarez dep. at 67-68.

Alvarez agreed to negotiate an agreement with ETC, through Rigau, forPep Boys PR to purchase Super FuelMax and sell it in Puerto Rico. Alvarezand Rigau negotiated the terms of the agreement. Rigau dep. at 36-38;Alvarez dep. at 100-102.

After the negotiations, "the parties to this action agreed to acontract whereby Plaintiffs delivered the exclusive distribution of theSuper FuelMax Product in Puerto Rico to Pep Boys-PR under the terms andconditions established in a Memorandum signed by the representatives ofthe parties." Complaint ¶ 6, Amended Complaint ¶ 11, and Exh. A toboth. Rigau drafted the Memorandum and sent it to Alvarez for hissignature. Rigau dep. at 35; Alvarez dep. at 94-95. Rigau signed on behalfof Plaintiffs and Alvarez signed on behalf of Defendants. Exh. A toComplaint and Amended Complaint. The Memorandum reads: "I summarize below the agreement reached by us yesterday, August 8, 2001, at the meeting we held at your office. 1. The Energy Tech Corp. company (hereinafter "ETC") and/or the corporation organized for this purpose, will supply Pep Boys the "Super Fuel Max" product to sell the same in Puerto Rico and elsewhere where Pep Boys has operations.

2. Pep Boys will only purchase said product through ETC, and ETC will distribute said product through Pep Boys.Page 7

3. Pep Boys will pay ETC $62.00 for each unit within a period of not more than 60 days after delivery of said merchandise. 4. ETC will maintain this contract in effect insofar as Pep Boys orders from ETC 27,000 units annually. 5. The suggested retail sale price is $99.99."(Exhibit A to Amended

Complaint.)

On September 25, 2001, Pep Boys PR issued a purchase order to ETC for8,950 units. Pl's Statement of Uncontested Facts (D.E. No. 77) ¶ 6. Ofthe 8,950 units, 4,644 units were scheduled for delivery (Id. at ¶ 7)and 4,306 units were never ordered or received by ETC from themanufacturer nor has ETC been billed for or been required to pay forthem. Diaz dep. at 154-156. Of the 4,644 units scheduled for delivery,1,630 units were actually delivered to and received by Defendants and3,014 are stored by Plaintiffs even though they were "signed for" by PepBoys PR. Diaz dep. at 154-162. Defendants have already paid for 4,432units of the 4,644 scheduled for delivery. (D.E. #109, 111, 113, 117,118, 153 and 159).[4]

After Defendants informed Plaintiffs that they had decided not tocontinue selling Super FuelMax, Defendants' counsel later wrote a letterto Plaintiffs' counsel to make it completely clear that Defendants didnot want any additional product delivered to it, and that ETC was free tosell the product to whomever theyPage 8wished. Defendants' counsel letter to Plaintiffs' counsels-Defendants'Statement of Contested Facts, par; 36. (D.E. #67) Plaintiffs have made noeffort to sell this product to anyone else. Diaz dep. at page 211.

DISCUSSION

A. Defendants' Motion for Summary Judgment

Plaintiffs claim that Defendants had no right to stop purchasing theSuper FuelMax product from them. They claimed that Defendants breachedtheir agreement with Plaintiffs when in December 2001 they decided tostop purchasing the Super FuelMax product. As for damages, Plaintiffsclaim that had Defendants decided not to stop purchasing the SuperFuelMax product, they would have purchased millions of units, and wouldhave sold them, not only in Puerto Rico, but also in the ContinentalUnited States.

In its Motion for Summary Judgment, Defendants argue that the August9th memorandum is the agreement between the parties and that, under theclear terms of the agreement and the law of Puerto Rico, Pep Boys PRcould stop purchasing Super FuelMax whenever it wanted. As such, therewas no breach of contract. Plaintiffs opposed, arguing that the August9th memorandum was not the agreement but rather a collateral documentwhich only summarized the agreement between the parties. Plaintiffs arguethat the real agreement was some oral agreement reached the day beforethe memorandum was signed and that parol evidence demonstrates that theparties' intention was to keep the agreement in effect indefinitely or atleast for five years.Page 9

This Magistrate considers that the August 9, 2001, Memorandum, andnothing else, is the contract between the parties. Plaintiffsaffirmatively pleaded in the Complaint and in the Amended Complaint thatPep Boys PR agreed to purchase a product called Super FuelMax fromplaintiff ETC under the

terms and conditions established in a Memorandumsigned by the representatives of the parties. See ¶ 11 of the AmendedComplaint. As such, they are now precluded from making the argument thatthe memorandum is not the agreement in order to avoid summary judgment."A party's assertion of fact in a pleading is a judicial admission bywhich it normally is bound throughout the course of the proceeding."Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528 (2d Cir.1985). As held in Schott Motorcycle Supply. Inc. v. American Honda Mot.Co., Inc., 976 F.2d 58 (1st Cir. 1992), a plaintiff cannot avoid summaryjudgment by claiming that it was a party to a contract different than theone attached to, and pleaded in, the complaint. Plaintiffs cannot nowallege that some other oral agreement, rather than the agreement attachedas Exhibit A to the Complaint and Amended Complaint, governs therelationship between the parties in order to avoid summary judgment.

Moreover, as matter of law and as Defendants argued, Plaintiffs cannotassert that some other oral agreement between the parties contains afive-year term where that term was not reduced to writing. The agreementin this case "is a commercial contract, and is thereby regulated by therelevant provisions of the Commerce Code of Puerto Rico. . . ." VulcanTools of Puerto Rico v. MakitaPage 10USA. Inc., 23 F.3d 564, 567 n.4 (1st Cir. 1994.) Pursuant to the CommerceCode, a plaintiff cannot simply allege that an oral agreement existsbased on nothing more than testimony. See P.R. Laws Ann. tit. 10, § 1302("the testimony of witnesses shall not in itself be sufficient to provethe existence of a contract the amount of which exceeds three hundreddollars, unless such testimony concurs with other evidence."). "UnderPuerto Rico law, a commercial contract must be corroborated, and thisrequirement extends not just to the existence of an agreement but also toits essential terms." Garita Hotel Ltd. Partnership v. Ponce FederalBank, 122 F.3d 88, 89 (1st Cir. 1997) (emphasis supplied). Because thefive-year term which Plaintiffs allege exists "is undoubtedly anessential covenant of the agreement and there is no written corroborationof said clause" any testimony, including Plaintiffs', is inadmissible toestablish that the Agreement had a five-year term. Innovation Marketingv. Tuffcare Inc., 31 F. Supp.2d 218, 223 (D.P.R. 1998) ("The CommerceCode requires that essential elements of a contract be confirmed inwriting.").

Plaintiffs cannot avoid summary judgment by now arguing, against theirown judicial admissions, that the real agreement between the parties wassome oral agreement which would happen to contain the provisions not inthe Agreement but which the plaintiffs need to avoid summary judgment.Under the clear terms of the contract, Pep Boys PR was under noobligation to purchase any amount of Super FuelMax nor to keep thecontract in effect for any particular period of time. The contract had nofixed term andPage 11as such was terminable at will. As this Court held in Castillo v. SmartProducts. Inc., 289 F. Supp. 138 (D.P.R. 1968): Obviously, if no specific length of time was stipulated for the duration of the distribution agreement, the two parties to the same remained at liberty to rescind the agreement and bring to an end the commercial relationship established thereunder at any time that they might wish to do so.

Just because the contract does not contain a specific term stating thatit is not for any particular length of time, it cannot be argued, asPlaintiffs attempt to do, that the contract is ambiguous as to

thatparticular term. The principles of Puerto Rico contract law do not allow"a party to defeat a motion for summary judgment by the mere invocationof the parties' intention to introduce an interpretation of a contracttotally inconsistent with its clear terms." Caribbean Ins. Services,Inc. v. American Bankers Life Assurance Co. of Fla., 754 F.2d 2, 7 n.6(1st Cir. 1985). "The law of Puerto Rico is clear that no oral extrinsicevidence may be admitted to add to, alter, or modify a written agreementexcept when fraud or surprise is alleged. P.R. Laws Ann. tit. 32 App.IV, R. 69(B)." Vulcan Tools, 23 F.3d at 567. Where a contract is "clear"— in that it can "be understood in one sense alone, without leaving anyroom for doubt" — the court may not consider parol evidence to alter oradd terms to an agreement. Executive Leasing Corp. v. Banco Popular dePuerto Rico, 48 F.3d 66, 69 (1st Cir. 1995). The First Circuit Court ofAppeals has strongly put it this way: "For the third time, we mean what wesay, and say what we mean: extrinsic evidence of the parties' intent isPage 12inadmissible in the face of a clear and unambiguous contract term underPuerto Rico Law". Borschow Hosp. v. Castillo, 96 F.3d 10, 16 (1st Cir.1996)

Even if parol evidence were admissible, Plaintiffs have offered noevidence that the parties intended to include any term, let alone afive-year term, as part of their Agreement.

As Mr. Rigau, Plaintiffs' attorney, put it: "Q (by Mr. Robles, Plaintiffs' counsel): Where, either in the meeting or in the (Agreement), you established (sic) the term, or the period of time to which this contract will (sic) be in force, in any time? . . . A (by Mr. Rigau): We expected this to be forever, you know; . . . this was a mutual agreement forever . . . Now, as I told you, the contract was for an undefined period of time. . . ." (Emphasis supplied.)Rigau Dep., pp. 91-92

The only evidence that Plaintiffs could allude is that they hoped tosell as much product as possible which, of course, is what any reasonablebusiness person would want. That "hope" certainly does not createcontractual obligations.

Similarly, just because the Memorandum contains the term "summarize"does not mean that the document is not a contract subject to the parolevidence rule. In Vulcan Tools, the First Circuit Court of Appealsconsidered a letter which began: "This letter will summarize our phoneconversation today regarding a nonexclusive distributorship for Makita'stool order program." Vulcan Tools, 23 F.3d at 566 (emphasis supplied).There the Court found that the letter was an agreement subject to theparol evidencePage 13rule, regardless of the use of the word summarize. Id. at 566-67. Thesame analysis applies here. Because almost exactly the same language wasused by Mr. Rigau in drafting the contract in this case, Vulcan Tools iscontrolling, especially because Mr. Rigau, the attorney who negotiatedand drafted the contract for plaintiffs, stated in the deposition to justthat: "Q: Well, I am asking you, were there any other points that you do not consider a main point that were not written down? A: Well, I think the basic —, the basic things for this agreement are here".Rigau Dep., pp. 35-36.

It is therefore recommended that Defendants' motion for SummaryJudgment BE GRANTED.

B. Plaintiffs' Motion for Partial Summary Judgment

In their motion for partial summary judgment, Plaintiffs demandedpayment for the 8,950 units for which Pep Boys issued a purchase order onSeptember 25, 2002. Plaintiffs assert as an uncontested fact thatpursuant to the memorandum executed by the parties Pep Boys was bound topay $62.00 per unit within the period of not more than 60 days afterdelivery of the merchandise, and that although more than 60 days hadelapsed, Pep Boys did not pay for the units delivered to it.

The 8,950 units were divided in two groups: (1) 4,644 units which hadbeen scheduled for delivery by Plaintiffs and which had been signed foras accepted, although in fact Pep Boys had only received 1,630 units(Plaintiffs admit still to have in theirPage 14possession the remaining 3,014 units); and (2) 4,306 units which Plaintiffsnever ordered or received from, or have had to pay to, the manufacturer.

Plaintiffs are not entitled to payment for the latter group of 4,306units. There is no evidence in the record that these 4,306 units were (1)ever ordered by ETC from the manufacturer; (2) ever delivered to ETC bythe manufacturer; (3) ever paid for by ETC to the manufacturer; or (4)ever delivered by ETC to Pep Boys PR. As such, the claim for payment ofthese 4,306 units must be dismissed. Plaintiffs have offered no evidencethat they even ordered this product from the manufacturer. In fact,plaintiffs admit they have not been required to pay for these 4,306because they were never ordered or delivered and only assume thatPlaintiffs "could be responsible for full payment of those 4,306 units tothe manufacturer".

Under the terms of the Agreement, Pep Boys PR was required to pay forproduct "within a period of not more than 60 days after delivery of saidmerchandise." See Exh. A to Amended Complaint. Under no reasonableconstruction of the Agreement could the term "delivery" be said toinclude merchandise which was never ordered by ETC from themanufacturer, never received by ETC, or never placed at Pep Boys PR'sdisposition. See Article 1351 of the Civil Code, 31 P.R. Laws Ann. § 3811("A thing sold shall be considered delivered, when it is placed in thehands and possession of the vendee"). Thus, there can be no breach ofcontract for the Defendants' non-payment of product which was not orderedbyPage 15Plaintiffs, not received by Plaintiffs, and not delivered to PepBoys-PR. Plaintiffs are therefore not entitled to payment for these 4,306units.

As for the first group of 4,644 units, Defendants have already paid forand/or settled claims for payment for 4,432 of those units. First,Defendants deposited in Court payment for 1,630 units actually deliveredto Pep Boys PR, for which Plaintiffs received payment for 556 units andAnchor Funding received payment for 1,074 units. (D.E. #109, 111, 113,117, 118). Then, Defendants settled Anchor Funding's additional claim for2,802 units. (D.E. #153 and 159). This means that only 226 units of thisgroup are still at issue.

These remaining 226 units belong to the group that was scheduled fordelivery, signed for as received by Pep Boys PR, but stored byPlaintiffs, and currently remain in Plaintiffs possession. In theirmotion

for partial summary judgment, Plaintiffs demand payment for theseunits because, even though the units were stored by Plaintiffs and arecurrently in Plaintiffs possession, signing the invoices for these unitsconstitutes "delivery" pursuant to Puerto Rico law. Defendants opposedbecause factual issues remain as to whether Plaintiffs mitigated theirdamages upon learning of Pep Boys-PR's decision to no longer purchase theSuper FuelMax product.

Factual issues in this case regarding mitigation of damages, however,do not preclude summary judgment in this case. In order for a factualcontroversy to prevent summary judgment the contestedPage 16fact must be "material" and the dispute over it must be "genuine". Id."Material" means that a contested fact has the potential to change theoutcome of the suit under the governing law. Blackie v. State of Maine,75 F.3d 716, 721 (1st Cir. 1996); United States v. One Parcel of RealProperty, 960 F.2d 200, 204 (1st Cir. 1992). "Genuine" means that theevidence presented is such that a reasonable fact finder, drawingfavorable inferences, could resolve the fact in the manner urged by thenon-moving party. Blackie v. State of Maine, 75 F.3d. at 721.

It is well-settled that a plaintiff in a breach of contract case musttake the necessary steps to mitigate its damages. Soc. de Gan. v.Gerónimo Corp., 103 P.R. Dec. 127, 134 (1974); Aponte v. Cortes Express,101 P.R. Dec. 31, 36 (1973). After Defendants decided to stop selling theSuper FuelMax product, Pep Boys PR counsel wrote to the Plaintiffs'counsel to make clear that Defendants did not want the units being"stored" by the plaintiffs and the plaintiff was free to sell the productto whomever they wished. Defendants' counsel letter to Plaintiffs'counsel, Defendants' Statement of Uncontested Facts, ¶ 36 (D.E. #67).Plaintiffs, however, made no effort whatsoever to sell this product toanyone else. Diaz dep. at page 211. There is no evidence in the record tothat fact.

Because Plaintiffs still have in their possession 3,014 units, of whichDefendants have paid for all except 226 units, this Magistrate Judge isof the opinion that there are no damages associated with the failure topay for the 226 units still atPage 17issue. Defendants paid for the vast majority of the units still inPlaintiffs' possession and Defendants have indicated to Plaintiffs thatthey can keep the units to sell. Additionally, it is clear thatPlaintiffs have not mitigated their damages, preferring to keep the unitseven after Pep Boys PR clearly told Plaintiffs to sell the units towhomever would purchase them.

It is recommended, therefore, that Plaintiffs' Motion for PartialSummary Judgment be DENIED.

The parties have ten (10) days to file any objections to this reportand recommendation. Failure to file same within the specified time waivesthe right to appeal this order. Henley Drilling; Co. v. McGee, 36 F.3d 143,150-151 (1st Cir. 1994); United States v. Valencia, 792 F.2d 4 (1st Cir.1986). See Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.,840 F.2d 985, 991 (1st Cir. 1988) ("Systemic efficiencies would befrustrated and the magistrate's role reduced to that a mere dressrehearser if a party were allowed to feint and weave at the initialhearing, and save its knockout punch for the second round").

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1. On September 27, 2002, Defendants filed a Counterclaim inInterpleader against Plaintiffs and joining Anchor Funding, Inc. (D.E.No. 29). Defendants alleged that if the Court found that Defendants owedany amount to Plaintiffs, Plaintiffs and Anchor Funding should berequired to interplead and settle between themselves their rights to anymoney due by Defendants under the terms of its agreement withPlaintiffs.

2. Since then, Defendants have settled and/or paid Anchor Funding'sdemand for payment for 3,876 units and have paid Plaintiffs for 566units, a total of 4,432 units. (D.E. Nos. 109, 111, 113, 117, 118, 153and 159).

3. On August 29, 2003, however, Plaintiffs moved to amend thecomplaint for a second time (D.E. No. 142). On September 3, 2003,Plaintiffs then moved to supplement their opposition to Defendants'Motion for Summary Judgment relying on the new allegations contained inthe tendered Amended Complaint (D.E. No. 143). Defendants opposed both.(D.E. No. 146 and 147). Although this Magistrate Judge initially allowedthe second amended complaint (D.E. #149), the Order was set aside by theCourt and leave to file a second amended complaint was denied. (D.E.#161). Plaintiffs' Supplemental opposition to Defendants' Motion forSummary Judgment is therefore disregarded for purposes of disposing ofthe motions for summary judgment.

4. Anchor Funding claimed to be entitled to payment for 3,876 unitsdue to its financing. Anchor Funding and Pep Boys have settled theirclaims. (D.E. #153-159). Plaintiffs have also collected on 556 units.(D.E. #109, 111, 113, 117, 118).