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Re: Paradise Produce Company, Inc. v. Allan Collins, Jr., D/B/A The Pit Restaurant
Civil Action No.: 2006-05-069

DECISION AFTER TRIAL

Dear Counsel:

This is the Court's decision after trial in the above referenced matter.

BACKGROUND

Plaintiff, Paradise Produce Company, Inc., a Delaware Corporation ("Plaintiff"), was a wholesale distributor of certain food commodities, beef, chicken, produce, etc. Defendant, Allan Collins, Jr., D/B/A The Pit Restaurant ("Defendant") is a restaurant located in Laurel, Delaware. Plaintiff and Defendant began doing business in September of 2002 and continued until January of 2005. Plaintiff ceased doing business on October 5, 2006. Plaintiff filed this civil action seeking payment for goods sold and delivered to Defendant that remain unpaid. Trial was held on New Castle County on August 20, 2007.

FACTS

Plaintiff filed its Complaint on May 3, 2006, asking for damages for unpaid goods in the amount of \$5,678.51. In support of that amount Plaintiff attached its "Statement" to defendant dated October 3, 2005. It indicated an "Amount" of \$7,383.41 with an Invoice date of April 23, 2005, a "Finance Charge" of \$92.29, and "Balance Due" of \$5,678.51.

However, in Plaintiff's opening statement at trial Plaintiff told the Court it was seeking judgment in the amount of \$4,501.76. This amount is reflected in a more recent Statement to Defendant dated December 6, 2006. This document was stipulated to by Plaintiff just prior to the start of trial as Defendant's Exhibit 1. It indicates the exact same balance as the October 2005 Statement, \$7,383.41, and further indicates: 1) a payment dated July 7, 2005, in the amount of \$991.66; 2) a payment dated June 12, 2006, number 014695, in the amount of \$1,176.75; 3) a credit memo dated April 5, 2005, in the amount of \$805.53; 4) a finance charge, dated May 3, 2005, in the amount of \$92.29; and 5) a Balance Due of \$4,501.76.

John Allen, President of Paradise Produce and Foods, Inc., testified for Plaintiff. He indicated that a business relationship began with Defendant in September of 2002. Goods ordered were to be delivered to Defendant's place of business by refrigerated truck. Terms of sale were "net 14 days" as indicated in a credit application signed by Alan Collins, Jr., admitted by stipulation as Plaintiff's Exhibit 1.

Mr. Allen testified that, while the original agreement was that goods purchased be delivered by truck to Defendant, over time this arrangement was modified and

occasionally goods would be picked up by Defendant at Plaintiff's place of business or goods would be dropped off at the rear of Defendant's place of business at the request of Defendant.

Also admitted into evidence by stipulation was Plaintiff's Exhibit 2, consisting of thirty four Invoices, dated between October 3, 2004 and January 5, 2005, totaling \$5,685.19. Of these thirty four invoices, twenty showed a signature of Bill Gray, acknowledged by Defendant as an employee authorized to take delivery of goods, one was acknowledged to be signed by Alan Collins, Jr., four were marked "Back Door", one was marked "Angie Collins", two were marked "Fay" and others were marked "picked up on Sat", "pick up @ Paradise", "pick up at office", "dropped 8:30/AM JR", "pick up @ office Mr. Bill No Signature!". One invoice had no marking whatsoever.

Mr. Allen acknowledged receipt of a check from Defendant in the amount of \$991.66 and admitted to the credit memo of \$805.53.

Alan Collins Jr., owner of the Pit Restaurant testified for Defendant. He said he had known John Allen personally all of his life and had begun doing business with Mr. Allen's company when he purchased the restaurant in 2002.

Mr. Collins testified that all invoices received from Plaintiff had been paid in full. In support, Mr. Collins referred to Defendant's Exhibit 2. The exhibit is a ten page report produced with a "Quick Books" software package. The first page is entitled "Broad Creek Enterprises Inc. Vendor Quick Report, October 1, 2004 through August 16, 2007". It was downloaded on August 16, 2007, four days prior to trial. It is a compilation of entries from October 1, 2004 until February 21, 2005 showing invoice numbers and payment dates and check numbers with amounts regarding "pit03". The next nine pages

are also a "Broad Creek Enterprises Inc. Quick Report, All Transactions" with entries from April 10, 2001 until October 30, 2004 for "pit03". However, the date of the download for these nine pages was December 5, 2006. No testimony was offered as to the connection of Broad Creek Enterprises, Inc. to Defendant, but it is apparent that these are records pertaining to transactions between Plaintiff and Defendant

Defendant did not produce any additional evidence such as cancelled checks and/or bank statements as proof of payment. When asked about the failure to produce cancelled checks and/or bank statements as proof Mr. Collins stated, "I don't know if my accountant has them. I haven't been able to find them".

It should be noted that the nine page section of Defendant's Exhibit 2, downloaded December 5, 2006 indicates only three checks in payment, i.e., check numbers 14477, 14509 and 14539. When asked which invoices were covered by check number 14477, Mr. Collins stated that they were "not listed". The one page section downloaded August 16, 2007 shows eleven payment checks, including the three checks already mentioned by number.

CONCLUSION

During trial there was conflicting testimony regarding whether the commodities listed in certain invoices were actually received by Defendant, i.e., the invoices not signed by Defendant's employee Bill Gray. Plaintiff testified that, over time, Defendant requested to be allowed to pick up certain orders and have others left at Defendant's back door without a signature acknowledging receipt. The court finds that these additional arrangements are reasonable and very likely necessary in a food supplier-restaurant relationship. The Court further finds that Plaintiff has established that it delivered

products to the Defendant in the amount of \$5,685.19, the amount represented by the total of the thirty four invoices in Plaintiff's Exhibit 2.

The evidence presented to the Court by Defendant in their Exhibit 2 is troubling to the Court. While it purports to list invoice numbers and amounts together with dates of payment, check numbers and amounts, nowhere in the approximately two and one half years of listed transactions is there any indication of a current balance due and owing to the Plaintiff. More troubling is the fact that the nine page section of Defendant's Exhibit 2 was downloaded on December 5, 2006, yet it does not indicate any transactions between October 30, 2004 and February 21, 2005. Why the transactions for that time period were not included in the December 5, 2006 download was not explained to the Court. The first page of Defendant's Exhibit 2 shows transactions until February 21, 2005. Clearly those transactions could have been included in the report downloaded December 5, 2006. The first page also shows a download date of August 16, 2007, four days prior to trial. The Court finds this information unusual and confusing and affords the reports little evidentiary weight.

Equally as troubling is Defendant's inability to produce cancelled checks and/or bank statements as evidence of payment. As stated earlier, Defendant testified that: "I don't know if my accountant has them. I haven't been able to find them." Defendant had more than one year to locate them between the filing of this action and the day of trial. These documents would clearly be the best evidence of payment and their absence is without a reasonable explanation.

However, Defendant's Exhibit 1, Plaintiff's Statement of Defendant's account dated December 6, 2006 provides the clearest evidence of the status of Defendant's

indebtedness to Plaintiff. It indicates a beginning balance of \$7,383.41, with credits of \$991.66 and \$805.53, both of which were acknowledged by Plaintiff. There is also a credit of \$1,176.75 on June 6, 2006 with the indication "014695". This coincides with Defendant's records showing check number 14695, dated November 22, 2004, in the amount of \$1,176.75. This Statement indicates a balance due Plaintiff of \$4,501.76 as of December 6, 2006.

In conclusion, the Court finds that Plaintiff has established, by a preponderance of the evidence, that Defendant owes Plaintiff \$4,501.76 for goods purchased and unpaid. The Court hereby directs the Clerk of the Court to enter judgment in favor of Plaintiff, and against Defendant, in the amount of \$4,501.76, plus attorney's fees of \$900.00, plus pre-judgment interest at the legal rate beginning December 5, 2006, plus post judgment interest at the legal rate until paid, plus costs.

SO ORDERED

Joseph F. Flickinger III
Judge

P.S. The Court wishes to apologize to the parties and counsel for the inordinate delay in issuing this opinion. While there can be no excuse, surgery and family illness were the reasons, and the Court appreciates your indulgence.

JFF/cr
cc: Karen Gallagher, CCP Civil Department

