

**K.G.K. Diamonds L.L.C. v Slane & Slane Designs,
L.L.C.**

2011 NY Slip Op 32132(U)

August 2, 2011

Sup Ct, NY County

Docket Number: 101530/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

K.G.K. DIAMONDS L.L.C.,

Plaintiff,

-v-

SLANE & SLANE DESIGNS, L.L.C.,
Defendant.

INDEX No. 101530/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED .

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

AUG 04 2011

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM

NEW YORK COUNTY CLERK'S OFFICE

Dated:

8/2/11

Donna M. Mills
J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
K.G.K. DIAMONDS L.L.C.,

Plaintiff,

-against-

Index No.
101530/11

SLANE & SLANE DESIGNS, L.L.C.,

Defendant.

FILED

AUG 04 2011

-----X
DONNA MILLS, J. :

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves to dismiss defendant's counterclaim and for summary judgment on its complaint. Defendant cross-moves for dismissal of the first and third causes of action in the complaint.

Plaintiff brings this action in order to recover what it claims is money to which it is entitled as a result of various transactions conducted by the parties. Plaintiff asserts that it sold and delivered to defendant quantities of loose polished diamonds, and seeks an unpaid balance of \$65,435.00. According to plaintiff, defendant's representative inspected and approved the diamonds, and at no time raised any objections to the quality or price of said diamonds.

Plaintiff's first cause of action in its complaint is based on breach of contract. The second cause of action is based on goods sold and delivered. The third cause of action is based on an account stated. The fourth cause of action is based on unjust enrichment. The fifth cause of action is based on quantum valebant. The sixth cause of action seeks attorney's fees. In its answer, defendant brings a counterclaim based on breach of the covenant of good faith and fair dealing.

Plaintiff moves to dismiss the counterclaim on the ground of failure to state a claim. In

its counterclaim, defendant states that in a letter, dated January 7, 2011, it proposed to pay plaintiff \$3,000 per month against its obligations. According to defendant, plaintiff failed to adhere to this installment plan. Plaintiff denies agreeing to any installment plan, and avers that it sought the full balance according to the terms of the original sale. Plaintiff asserts that after delivering the diamonds, it made several demands for payment to defendant prior to the commencement of this action. Since plaintiff maintains that it fulfilled its obligations to defendant, it asserts that it did not deprive defendant of its contractual rights. Therefore, plaintiff seeks dismissal of the counterclaim.

Plaintiff also seeks summary judgment on the ground of a lack of material issues of fact concerning the facts alleged in the complaint. Plaintiff argues that defendant has acknowledged its failure to render full payment, thus breaching the contract. Plaintiff submits copies of invoices, memoranda and other documents that allegedly relate to the transactions at bar. Elsewhere in the complaint, plaintiff raises different legal theories, such as unjust enrichment and quantum valebant, which would indicate a lack of an express contract and a claim based on principles of equity. Behind these equitable causes of action is the assertion that plaintiff delivered goods to defendant, and defendant accepted the goods without objection, subsequently making only a partial payment.

Defendant opposes the motion to dismiss the counterclaim as being premature, as there is allegedly a question of plaintiff's good will in its alleged negotiations with defendant. The summary judgment motion is also opposed as being premature, as defendant claims that there is a need for substantial discovery. Defendant contends that issues of fact preclude judgment, such as whether a contract existed to justify a breach of contract claim, whether there were terms of

repayment not disclosed by plaintiff, and how much is actually owed. Defendant argues that the documents submitted by plaintiff are hearsay and not shown to be business records kept in the ordinary course of business.

Defendant cross-moves for the dismissal of the breach of contract and account stated causes of action. Defendant states that there is no proof of an express contract and no contract was annexed to the complaint or the moving papers. As for the claim for an account stated, defendant contends that there is no proof of a demand from plaintiff, despite plaintiff's assertions.

In its reply papers, plaintiff argues that the evidence submitted in the moving papers are obviously business records, as confirmed by Vinamra Kothari, plaintiff's supervisor of financial operations, in his affidavit. Plaintiff asserts that the memoranda submitted are proof of an agreement, because the documents set forth in detail the quality, quantity and agreed-upon prices with respect to the diamonds.

Plaintiff states that defendant failed to properly dispute the goods sold and delivered, offering no evidence of specific objections. Finally, plaintiff argues that there is no need for discovery in the absence of material disputes as to the facts in this case.

In response to the cross motion, plaintiff asserts that there is no need to allege a formal or written demand as an element of an account stated claim. Plaintiff contends that case law confirms that an account stated is merely an express or implied agreement with respect to the correctness of account items and the balance due.

The court shall first determine the validity of the motion to dismiss the counterclaim. The court takes the allegations as true and resolves all inferences reasonably flowing from those

allegations in the pleader's favor. *See Residence on Madison Condominium v W.T. Gallagher & Associates, Inc.*, 271 AD2d 209 (1st Dept 2000). A determination will be made as to whether the facts as alleged fit within any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83,87-88 (1994).

A copy of the January 7, 2011 letter is the only evidence submitted which indicates an installment plan. There is no evidence submitted that shows the parties reaching an accord as to how the balance was to be repaid. An e-mail from plaintiff's representative states that plaintiff's bankers sought repayment in two or three monthly installments. However, plaintiff contends that this e-mail does not constitute any acceptance of defendant's plan, and when no meeting of the minds occurred as to the proposed installment plan, plaintiff instructed its counsel to proceed with the filing and service of the summons and complaint.

The court shall dismiss the counterclaim, as there is no proof that plaintiff conveyed a willingness to accept defendant's installment proposal, of which it had no obligation to accept. Therefore, plaintiff did not breach any duty of good faith and fair dealing.

It is well settled that proponents of motions of summary judgment must establish the cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in their favor (CPLR 3212 [b]), and by establishing proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]); *Bush v St. Claire's Hospital*, 82 NY2d 738, 739 (1993).

Plaintiff argues that no disputed issues of fact exist in this case. While defendant asserts a lack of an express contract, invoices in the form of memoranda submitted by plaintiff provide, proof of an agreement or agreements that include pertinent terms. Apparently, defendant found validity in the contract, as defendant proceeded to render at least partial payment for the

diamonds.

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages. *See JP Morgan Chase v J.H. Electric of New York, Inc.*, 69 AD3d 802, 803 (2d Dept 2010). Whether writings exchanged by parties constitute a contract is a question of law for determination by the court. *See New Hampshire Ins. Co. v Wellesley Capital Partners, Inc.*, 200 AD2d 143, 146 (1st Dept 1994).

The court finds that plaintiff has provided instruments representing a binding agreement in the memoranda, and has demonstrated an adequate claim for breach of contract here, and defendant's cross motion for dismissal of the claim shall be denied.

Defendant also seeks dismissal of the account stated claim. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due [citations omitted]." *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 (1st Dept 2007). An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time. *Bartning v Bartning*, 16 AD3d 249, 250 (1st Dept 2005).

With respect to this claim, the evidence submitted indicates an acceptance of the terms of the memoranda. There is no proof of defendant's objection to these terms in any way. There is no dispute as to the amount of the balance owed, although there was an effort on defendant's part to decide on a method of future repayment by defendant. Such an effort never reached fulfillment.

The court shall grant summary judgment on this claim, and deny the cross motion to

dismiss.

The other claims in the complaint are based on quasi-contract elements. That is, goods sold and delivered, unjust enrichment and quantum valebant. The existence of a valid contract governing the subject matter of the dispute generally precludes recovery in quasi-contract for events arising out of the same subject matter. *See EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 (2005). For example, an unjust enrichment cause of action is barred by the existence of a contract between parties. *See Schultz v Gershman*, 68 AD3d 426, 427 (1st Dept 2009).

Since plaintiff has demonstrated the existence of a contract between the parties, there is no reason to provide relief for plaintiff under the second, fourth and fifth causes of action, which are based on quasi-contract.

In its papers, plaintiff has stated that it shall not move on its last cause of action, which is a claim for attorney's fees.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the complaint herein is granted with respect to the first and third causes of action and these causes of action are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$ 65,435.00, together with interest at the rate of 9% per annum from the date of _____ until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment with respect to the second, fourth, fifth and sixth causes of action is denied; and it is further

ORDERED that plaintiff's motion to dismiss the counterclaim in the answer is granted and the counterclaim is dismissed in its entirety as against plaintiff; and it is further

ORDERED that defendant's cross motion to dismiss the first and third causes of action in the complaint is denied.

DATED: 8 / 2 / 11

ENTER:



^{J.S.C.}
DONNA M. MILLS, J.S.C.

FILED

AUG 04 2011

NEW YORK
COUNTY CLERK'S OFFICE