

VM Petro Inc. v 185 East Lincoln Corp.

2012 NY Slip Op 32272(U)

August 2, 2012

Sup Ct, Nassau County

Docket Number: 598/12

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

VM PETRO INC.,

Plaintiff,

- against -

185 EAST LINCOLN CORP. and ERKUT AKSOY,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 598/12
Motion Seq. No.: 01
Motion Date: 06/27/12
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits	1

Plaintiff moves, pursuant to CPLR § 3212, for an order granting it summary judgment. Defendants failed to submit any opposition to plaintiff's motion.

Plaintiff submits that, "[t]his is a simple sale of goods action wherein the Defendant 185 East Lincoln Corp. ordered gasoline from VM. VM delivered the gasoline to 185 East Lincoln Corp. 185 East Lincoln Corp. accepted the gasoline from VM. 185 East Lincoln Corp. failed to pay VM for the gasoline. Nothing more." Plaintiff commenced the instant action with the filing of a Summons and Complaint on or about January 17, 2012. *See* Plaintiff's Affirmation in Support Exhibit G. Issue was joined on or about March 23, 2012. *See* Plaintiff's Affirmation in Support Exhibit H.

Plaintiff is a gasoline wholesaler with its principal place of business in Syosset, County of

Nassau, State of New York. As a gasoline wholesaler, plaintiff purchases gasoline in bulk from various companies and then sells said gasoline to its customers consisting of gasoline stations primarily throughout Long Island and New York City. Defendants operated a gasoline station in Pelham, New York.

Plaintiff submits that, on sixty-two (62) occasions from December 29, 2010 through September 4, 2011, defendants purchased gasoline from plaintiff for an amount totaling \$814,628.85. Defendants paid plaintiff \$778,897.01. Plaintiff contends that defendants have failed and refused to pay plaintiff the remaining balance of \$35,731.84, which was due on or before September 9, 2011. *See* Plaintiff's Affidavit in Support Exhibit F. By failing to make said payment, defendants breached the Credit Application and Distributor/Supply Application and Agreement. *See* Plaintiff's Affidavit in Support Exhibits A and B. Each of these agreements provides that defendants shall pay interest for any past due balances. Paragraph 3 of the Distributor/Supply Application and Agreement provides that, "all such delinquent payments shall accrue interest from their respective due days to the date of actual receipt of payment at the rate of two (*sic*) (2%) per month." *See* Plaintiff's Affidavit in Support Exhibit B ¶ 3.

Plaintiff adds that defendant Erkut Aksoy personally guaranteed the debt of defendant 185 East Lincoln Corp. by signing the Credit Application, Distributor/Supply Application and Agreement and Personal Guaranty. *See* Plaintiff's Affidavit in Support Exhibits A, B and C.

Plaintiff contends that, at no time, did defendants dispute the balance it owed to plaintiff, nor did defendants proffer any reason for not paying the balance due other than financial difficulties. Defendants accepted each delivery of gasoline and, in turn, sold said gasoline to their customers.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve

issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Based upon the evidence and legal argument provided in its motion as detailed above, the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law.

Plaintiff has established its *prima facie* entitlement to summary judgment on its “goods sold and delivered” claims by submitting invoices with supporting documentation and the Affidavit of its President, Manoj Narand, who has described the transactions and defendants’ receipt of the goods. *See Castle Oil Corp. v. Bokhari*, 52 A.D.3d 762, 861 N.Y.S.2d 730 (2d Dept. 2008); *Boise Cascade Office Products Corp. v. Gilman & Ciocia, Inc.*, 30 A.D.3d 454, 816 N.Y.S.2d 374 (2d Dept. 2006); *Becker v. Shore Drugs*, 296 A.D.2d 515, 745 N.Y.S.2d 492 (2d Dept. 2002).

Since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendants to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*.

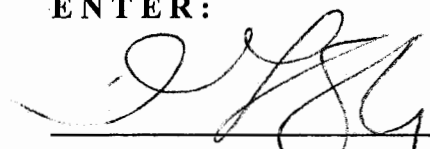
As previously stated, defendants have failed to submit any opposition to defeat the motion for summary judgment.

Accordingly, plaintiff’s motion, pursuant to CPLR § 3212, for an order granting it summary judgment is hereby **GRANTED**. And it is further

ORDERED, that plaintiff is directed to submit judgment to the clerk in the sum of \$35,731.84, plus interest at the agreed upon rate of two percent (2%) per month from September 9, 2011, through the date of entry of judgment, plus costs and disbursements.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
August 2, 2012

ENTERED
AUG 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE