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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 601031/2010

SIERRA DESIGNS INC

VS.

NATIONAL CONVENTION SERVICES

SEQUENCE NUMBER : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/22/11

HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

SIERRA DESIGNS, INC.,

Plaintiff,

- against -

NATIONAL CONVENTION SERVICES, LLC,

Defendant.

Index No.
601031/10

DECISION and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER

Sierra Designs, Inc. ("Plaintiff") brings this action to recover $35,388.66 plus interest for services rendered to National Convention Services, LLC ("Defendant"). Plaintiff asserts causes of action sounding in breach of contract and account stated.

Plaintiff now moves for summary judgment pursuant to CPLR §3212. Plaintiff provides a copy of its summons and complaint, verified by Richard Walsh, Plaintiff's President. The complaint states that, on or around October 8, 2008, "Plaintiff, at the express or implied request of Defendant(s), rendered services and/or delivered and sold goods that were/was accepted by the Defendant(s)." Plaintiff further alleges that Defendant failed to pay Plaintiff for its services when they were due on July 28, 2009, and despite due demand being made. Annexed as an exhibit to the complaint are copies of Plaintiff's statement and individual invoices which Plaintiff alleges were sent to Defendant, and were received and retained without objection.

Plaintiff also annexes an affidavit from Walsh in support of its motion. In it, Walsh states that starting on February 19, 2009, Plaintiff wrote via e-mail to Defendant demanding payment for services rendered. Further e-mails demanding payment were sent on March 2, 2009 and March 26, 2009. On June 20, 2009, Carmela Catalano, Event Service Manager of Defendant, e-mailed Plaintiff, "I will work on payment this week." Copies of these e-mails are annexed to Plaintiff's motion. Plaintiff further states that, on or around September 22, 2009, Plaintiff's counsel sent a letter to Defendant demanding payment, as well as a statement

indicating the balance owed to Plaintiff. Plaintiff states that this was retained by Defendant without objection. A copy of the letter is attached to Plaintiff's motion.

In opposition to the motion, Defendant provides an attorney's affirmation, a memorandum of law, and the affidavit of James Angellino, Defendant's President. Angellino states that, "[i]n or around 2008, pursuant to an oral agreement ... Defendant contracted with Plaintiff to store certain trade show exhibits for a clothing company called Block Corporation ('Block')." Angellino states that the oral agreement made no mention of any interest to be charged, and contained indefinite terms. Angellino further states that Block was affiliated with two other clothing lines: Hobie Brands International, LLC ("Hobie") and Play Fair Kidswear Corp. ("Playfair"). Per the parties' agreement, "Plaintiff was to store Block's, Hobie's and Playfair's trade show displays, and Defendant agreed to pay for such storage. Defendant has paid Plaintiff for storage under this agreement, but Plaintiff claims that more sums are due...."

Defendant states that, in or around February 2009 at a trade show in Las Vegas, Defendant instructed Plaintiff to dispose of all Block and Playfair merchandise it was storing because those companies were going out of business and would be unable to pay Defendant the money they owed it. Defendant also "specifically requested that Plaintiff not release any merchandise being held for Hobie." Defendant states that it "was hoping to use the Hobie merchandise as leverage to receive payment owed from Hobie, either from Block, its successors, or from Hobie's new owners." However, disregarding these instructions, Plaintiff continued to store Block and Playfair's merchandise, and released Hobie's merchandise back to Hobie. Defendant contends that Plaintiff was compensated by Hobie for release of the merchandise.

Angellino further states that, prior to commencement of this action, he personally requested itemized bills from Plaintiff, and that, in the course of numerous conversations with Plaintiff, he "made absolutely clear that [he] disputed the amounts being billed to [Defendant]." He claims that Defendant "was first presented with such invoices when it was served with the Complaint in this matter."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). Plaintiff commenced this action on April 21, 2010. Defendant joined issue on or around September 24, 2010.

"An account stated has long been defined as an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance" (*Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 355-56 [1st Dept. 2001]) (citation and internal quotes omitted). A plaintiff may recover for an account stated when it demonstrates that the defendant received invoices for services rendered, and retained them without objection within a reasonable time (*see Fed. Express Corp. v. Fed. Jeans, Inc.*, 14 A.D.3d 424 [1st Dept. 2005]).

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment on its cause of action for an account stated, based on it's verified complaint, affidavit of Richard Walsh, as well as documentary evidence showing that Plaintiff's statement and individual invoices were sent to and received by Defendant, and that Plaintiff made numerous and repeated demands for payment. The June 20, 2009 e-mails from Defendant's Event Service Manager evidence Defendant's receipt of the invoices, and contain no indication that Defendant objected to them. Indeed, Ms. Catalano advises that she "will work on payment this week." Accordingly, the burden shifted to Defendant to demonstrate, through admissible evidence, that an issue of fact exists which precludes summary judgment. Defendant fails to make such a showing. Defendant produces no documentary evidence demonstrating that it objected to Plaintiff's statement and invoices, and vaguely states, through the Angellino affidavit, that it voiced its objection to the amounts it was being billed. No time frame is given as to when these conversations took place, nor does Angellino specify which person or persons he spoke with (*see Shea & Gould v. Burr*, 194 A.D.2d 369, 371 [1st Dept. 1993]) ("While evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount, defendants' allegations of protest are merely conclusory, as Supreme Court determined, and failed to relate

when and to whom the alleged telephone calls were made or to specify the substance of the alleged conversations.") (citations and internal quotes omitted).

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $35,388.66, together with interest at the rate of 9% per annum from the date of March 11, 2010 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.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 22, 2011

EILEEN A. RAKOWER, J.S.C.