SHORT FORM ORDER

INDEX # 05266-10
RETURN DATE: **8-15-11 (003)**
9-23-11 (004)
MOT. SEQ. # **003 & 004**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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CARR BUSINESS SYSTEMS, INC.,

Plaintiff,

-against-

CSC LEASING COMPANY, A VIRGINIA CORPORATION,

Defendant.

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CALENDAR DATE: November 16, 2011
MNEMONIC: MG; XMD; C/Disp.

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 60 read on this motion and cross motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-18; Notice of Cross-Motion and supporting papers 19-41; Answering Affidavits and supporting papers 42-47; Replying Affidavits and supporting papers 48-50.; Other 51-57(D);58-60(P); and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, CSC Leasing Company, A Virginia Corporation (hereinafter CSC), for summary judgment pursuant to CPLR §3212 dismissing the complaint of the plaintiff, Carr Business Systems, Inc.'s (hereinafter Carr), is granted in its entirety and Carr's complaint is dismissed; the cross-motion by Carr for summary judgment pursuant to CPLR §3212 on its complaint is denied.

Carr instituted this action seeking to recover monies owed pursuant to an allegedly executed purchase order and an issued invoice in the amount of $235,650.00, dated June 1, 2009, to CSC with delivery of the purchased items to Oxford Management Services (hereinafter Oxford) pursuant to a master equipment lease agreement between CSC and Oxford. The invoice was provided to CSC who paid the invoice with a check made out to Carr but sent to Oxford instead who, it appears, fraudulently executed the check and retained the money from CSC. Carr is a New York Corporation which specializes in selling and servicing office equipment.

A number of business errors were compounded in this case. The facts show that CSC was in the business of leasing technology equipment to its customers and purchased this office equipment from vendors for direct delivery to its customers. On May 29, 2009, CSC executed a purchase order to Carr to send certain equipment to Oxford pursuant to a master equipment lease agreement between CSC and Oxford. Carr obtained its equipment from Dial Connections LLC (hereinafter Dial), a retailer in office equipment, and Dial was supposed to deliver such supplies ordered by Carr to CSC's customer Oxford pursuant to that leasing

agreement between CSC and Oxford. The parties agree that Dial never delivered the equipment to Oxford but it appears that Oxford acknowledged a delivery which resulted in Carr's issuance of a purchase bill to CSC. CSC issued a check to Carr which, through error, was rerouted and sent to Oxford which apparently cashed or negotiated the CSC check. There is a pending action in Virginia between CSC as a plaintiff against Oxford.

Notwithstanding this error, Carr confirms that it never fulfilled the purchase order, nor did it pay Dial for the equipment and therefore Dial never delivered the office equipment ordered by CSC through Carr and Dial to be delivered to Oxford. Compounding the errors, Carr apparently also issued a check in the amount of $150,000.00 payable to Dial for the equipment to be delivered to Oxford which Carr admits was erroneously sent to Oxford and was apparently fraudulently endorsed by Oxford in the name of Dial and deposited in the account of Oxford. Dial notes that it was never paid by either CSC or Carr but acknowledges being paid by Oxford directly for certain office equipment listed as 2 IPPBX servers, 5 Digium telephony cards and 250 licenses. However the Carr invoice to CSC, dated June 1, 2009, under Invoice # 053109 (CSC motion, exhibit 2) indicates a multitude of equipment, *inter alia*, 4 IP-PBX (ADMIN) Dial Connection IP PBX Cabinets, 9 IP-PBX Telephony Cards Quad Span Telephony Cards, 400 Port Licenses, 151 Polycom Soundpoint IP501 IP Phones, Codec Cards etc., with deliveries to three locations, Ft Pierce 250 Stations (Florida), Scranton, PA and Melville, NY. There is no evidence proffered that this invoice and/or inventory was ever delivered in these quantities to these locations.

Carr thereafter instituted this action seeking payment from CSC on the purchase order of the office equipment from Dial to Oxford, though no equipment was ever delivered. Carr previously made a motion for summary judgment in lieu of a complaint pursuant to CPLR §3213 claiming the unsigned purchase order and invoice qualified as "an instrument for the payment of money only", which motion was denied by this Court in an order, dated September 29, 2010.

CSC now moves for summary judgment and dismissal of Carr's action claiming that since the equipment was never delivered by Carr through Dial to Oxford, CSC has an absolute defense to Carr's action for payment on an invoice and order which was never delivered. Carr opposes the motion. In a cross-motion for summary judgment on its complaint it argues that material questions of fact exist requiring discovery and the denial of CSC's motion.

For the following reasons, CSC's motion for summary judgment and dismissal of Carr's complaint pursuant to CPLR §3212 is granted in its entirety and Carr's complaint is dismissed. Carr's cross- motion for summary judgment on its complaint pursuant to CPLR §3212 is denied.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

While summary judgment is a drastic remedy, depriving as it does a litigant of his day in Court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). Here, in the case at bar, CSC asserts in support of its request for summary judgment as a matter of law that Carr seeks payment under a purchase order with CSC which was never fulfilled or delivered by its supplier, Dial, to Oxford and therefore Carr is not entitled to be paid and CSC is under no legal obligation to pay for equipment which was never delivered.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion who, in order to defeat the motion must proffer evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). In the instant case, CSC has met its burden in support of its motion for summary judgment and dismissal of Carr's lawsuit that it never received the equipment ordered by it from Carr which was to have been delivered to Oxford by Dial. In fact Dial acknowledges that it was not paid by Carr so it never delivered the equipment to Oxford. In opposition, Carr has failed to assemble or bare its proof, or at least raise an issue of fact for resolution by a jury that the purchase order was fulfilled and that the equipment ordered by CSC from Carr for delivery to Oxford was in fact delivered by Dial.

In Carr's cross-motion for summary judgment on its complaint, and in opposition to CSC's motion, it states (Carr cross-motion p.2) that

> "Carr would buy equipment from Dial and simultaneously resell it to CSC, receiving a profit in the form of a commission. CSC would then lease the Equipment at a profit to Oxford. The parties did not contemplate that Carr or CSC would ever take delivery of the Equipment."

This statement suggests that because neither CSC or Carr would in actuality receive or inventory the equipment, CSC should still be liable for the equipment subject to a lease agreement between CSC and Oxford whether it was paid for and delivered or not. Carr's assertion attempts to "get around" or explain away the fact that no equipment was ever delivered by Carr that was ordered by CSC. Carr's failure to assert a delivery of the previously ordered equipment by CSC as reflected in the invoice and purchase order submitted to CSC is fatal to its attempt to bill CSC for equipment CSC ordered but was never provided by either Carr or Dial to the ultimate consumer, Oxford. In fact, Dial admits in an affidavit submitted by Michael Vesper, owner of Dial, that Dial never had an agreement with Carr or CSC to deliver any equipment to Oxford and never delivered any equipment to Oxford ordered by CSC or Carr. See, ***Motorola Communications & Electronics Inc. v. National Equipment Rental, LTD***, 74 AD2d 564, 424 NYS2d 285 (2nd Dept. 1980).

While it is clear that Oxford may have much to answer for with regard to the claims that it took and cashed a $235,650.00 check erroneously sent to it from CSC which was originally earmarked to pay the invoice from Carr and a $150,000.00 check from Carr made out to Dial for the equipment ordered by CSC which check was also erroneously sent to Oxford and endorsed in Dial's name by someone and deposited in an Oxford account, CSC cannot be held liable on a purchase order and invoice asserted by Carr when the subject equipment of the purchase order and invoice was never delivered. The cross-motion by Carr for summary judgment on its complaint is denied as it has failed to meet its burden to establish that the invoice and purchase order by CSC were filled and the equipment was delivered.

Finally, Carr argues that there are numerous material issues of fact which cannot be resolved without discovery but it fails to identify those issues of fact. Where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge of the party making the motion and the opposing party did not have reasonable opportunity for disclosure prior to the motion for summary judgment, the motion should be denied. ***Stevens v. Grody***, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); ***Urcan v. Cocarelli***, 234 AD2nd 537, 651 NYS2d 611 (2nd Dept. 1996); ***Campbell v. City of New York***, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); ***Baron v. Incorporated Village of Freeport***, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). However a party opposing a summary judgment motion may not complain of a lack of discovery without demonstrating some evidentiary basis or fact pattern to suggest that additional discovery might lead to some relevant evidence or facts to defeat the motion. ***Lambert v. Bracco***, 18 AD3d 619, 795 NYS2d 662 (2nd Dept. 2005); ***Romeo v. City of New York***, 261 AD2d 379, 689 NYS2d 517 (2nd Dept. 1999). In the instant case, all parties acknowledge that Dial never delivered the equipment ordered by CSC through Carr to be sent to Oxford and therefore the invoice and purchase order sued on by Carr in its complaint were never completed. While there may be issues of liability based upon who was paid and what sums must be returned, those issues do not involve this lawsuit which was commenced by Carr for payment of a purchase order and invoice on goods and equipment that all sides acknowledge was never purchased or delivered.

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (***Millerton***

> ***Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, CSC's motion for summary judgment and dismissal of Carr's complaint pursuant to CPLR §3212 is granted in its entirety and Carr's complaint is dismissed. Carr's cross-motion for summary judgment on its complaint pursuant to CPLR §3212 is denied.

The foregoing constitutes the decision of the Court.

Dated: May 25, 2012

J.S.C.

HON. PETER FOX COHALAN