

Sunquest Enter., Inc. v Zar

2013 NY Slip Op 33358(U)

March 29, 2013

Sup Ct, New York County

Docket Number: 650035/2012

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

SUNQUEST ENTERPRISE, INC.

INDEX NO. 650035/12

MONSIEUR ZAR et al

MOTION DATE _____

MOTION SEQ. NO. 002

001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *disposed of per the attached Decision and Order.*

A Preliminary Conference is scheduled for 5-13-13 at 11AM at 26 Broadway 10th Floor

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

Dated: March 29, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
SUNQUEST ENTERPRISE, INC.,

Plaintiff,

-against-

MONSOUR ZAR, BOBBY ZAR, and BRUCE BOND,
individually and d/b/a STUDIO I,

Defendants.
-----X

Index No. 650035/2012

DECISION AND ORDER

Motion Sequence No. ~~002~~

001

MELVIN L. SCHWEITZER, J.:

Sunquest Enterprise, Inc. (Sunquest) brings this action against Monsour Zar, Bobby Zar, and Bruce Bond, individually and ostensibly d/b/a Studio I, to recover damages suffered by Sunquest as a result of defendants' failure to pay amounts billed and demanded by Sunquest after the individual defendants ordered and accepted goods sold to them by Sunquest. Sunquest moves for summary judgment.

Background

Sunquest is a New York corporation engaged in the sale of clothing apparel.

Studio I New York, Inc.(Studio I) was a New York corporation that was dissolved by tax proclamation on June 24, 1992. Its current status is in dispute. Unlike plaintiff who alleges that the individual defendants were doing business under the Studio I name, defendants contend Studio I is a division of another corporation, Shazdeh Fashions, Inc. (Shazdeh).

According to plaintiff, Monsour Zar (M. Zar) and Bobby Zar (B. Zar) allegedly held themselves out as principals of Studio I. Bruce Bond (B. Bond) was held out by M. Zar as president of Studio I. He had contact with Sunquest on behalf of Studio I, concerning delivery

of goods for resale to customers by Studio I. He allegedly held himself out as having authority to act on behalf of Studio I.

Commencing in May 2010, and continuing through May 2011, allegedly on behalf of Studio I, B. Zar and M. Zar contracted with Sunquest to purchase garments (Goods Sold) which Studio I then resold to retail businesses. During that time and allegedly on behalf of Studio I, B. Zar placed orders with Sunquest for particular quantities of Goods Sold. Sunquest caused the Goods Sold to be delivered to Studio I. The agreed upon price was \$377,769.36. Despite Sunquest's demand for payment of the amount due for the Goods Sold as well as for shipping costs, defendants have not paid. Additionally, Sunquest has made a demand for the return of the Goods Sold, which defendants have ignored.

Discussion

CPLR 3212 (b) provides that summary judgment shall only be granted if, "upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... the motion shall be denied if any party shall show facts sufficient to require a trial of any issues of fact." *Int'l Shared Services, Inc. v McCoy*, 259 AD2d 668, 669 (2d Dept 1999). To satisfy its heavy burden of proving entitlement to judgment as a matter of law, the movant must tender evidentiary proof in admissible form. Summary judgment should not be granted where there is any doubt as to the existence of material and triable issues of fact, or where the issue is "arguable." *Glick & Dolleck v Tic-Pac Export Corp.*, 22 NY2d 439, 441 (1968). All inferences should be resolved in favor of the non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 521, 544 (1st Dept 1989).

Sunquest states three causes of action: (1) goods sold and delivered; (2) accounts stated; and (3) conversion. Sunquest contends it is entitled to summary judgment on its first and second causes of action as defendants have answered generally and without the specificity required by CPLR 3016 (f). Second, it contends it is entitled to summary judgment on its first and second causes of action as Sunquest submitted invoices in an amount totaling a balance due of \$377,679.36, which defendants have not paid. Third, Sunquest contends it is entitled to summary judgment for conversion as Sunquest has demanded the return of the Goods Sold for which it has not been paid and defendants have refused. Fourth, Sunquest argues that it is entitled to summary judgment on the issue of liability of the individual defendants in that defendants operated as principals of a corporation which had been dissolved by tax proclamation.

Summary Judgment on each cause of action is denied.

Defendants have plead with the specificity required under CPLR 3016 (f)

“Where a complaint complies with CPLR 3016 (f) and the defendant fails to respond with the same specificity, on a motion by the plaintiff for summary judgment, the defendant may supply the missing information in his opposing papers.” *Slavenburg Corp. v Rudes*, 86 AD2d 517, 518 (1st Dept 1982). Here, the defendants supplied additional information in an affidavit of B. Zar. The defendants denied that they personally purchased the specific goods listed in Exhibit A to the complaint, denied that they purchased the goods that are the subject of the invoices attached as Exhibit B to the complaint, and denied that they agreed to pay the air freight invoices attached as Exhibit D to the complaint. Defendants have plead with the requisite specificity under CPLR 3016 (f).

Account Stated and for Goods Sold

“It is well settled that under New York Law, [a] claim for account stated must demonstrate that (1) an account was presented, (2) the account was accepted as correct and (3) the debtor promised to pay the amount stated.” *Corporate Serv. Bur., Inc. v Law Firm of Hall & Hall, LLP*, 36 Misc 3d 1220 (NY Civ Ct 2012) (internal citations and quotation marks omitted). A plaintiff is entitled to summary judgment where it has shown that it has produced to a defendant documentary evidence of an amount due and that the amount is not objected to within a reasonable time. *Miller v Nadler*, 60 AD3d 499, 499 (1st Dept 2009) (Plaintiff law firm established entitlement to summary judgment on its claim for an account stated by production of documentary evidence showing that defendant received and retained the invoice without objection); *see also Neuman Distributors, Inc. v Jacobi Med. Ctr.*, 298 AD2d 568, 568 (2d Dept 2002) (in an action to recover for goods sold and delivered and on an account stated plaintiff was entitled to judgment as a matter of law based upon documentary evidence); and *Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424 (1st Dept 2005) (defendant received plaintiff’s invoices . . . and retained them without properly objecting in a reasonable time and defendant’s failure to pay those invoices entitled plaintiff to judgment on an account stated).

Here, numerous invoices indicating an amount due on the goods sold and delivered were submitted to Studio I. The invoices have not yet been paid. Nor have the goods been returned. The problem with plaintiff’s claim is that it did not submit the subject invoices to the individual defendants. The invoices indicated that they were addressed to Studio I, not M. Zar, B. Zar, and B. Bond. As the invoices were not sent to the individual defendants, plaintiff’s motion for summary judgment on its account stated claim must fail. *See Savitt Law Firm PLLC v Minichiello*, 2010 NY Misc LEXIS 2378, 4-5 (NY Sup Ct 2010) (granting summary judgment to the defendants on an account stated cause of action when the invoices proffered by plaintiff were

addressed to different defendant and there was “no evidence that plaintiff addressed any bills or other accounts to the [moving] defendants[.]”); *Sound Communication, Inc. v Rack & Roll, Inc.*, 88 AD3d 523 (1st Dept 2011) (Holding that “the complaint fails to state an account stated cause of action against the moving defendants” because “[a]ll of plaintiff’s underlying invoices, which are annexed to the complaint, are addressed to defendant Rack and Roll, LLC only”).

Sunquest is not entitled to summary judgment for its cause of action for goods sold and delivered as defendants have denied the goods were ordered by the them, nor were they delivered to them. Consistent with the invoices, the goods were sold to Studio I, which, as previously explained, is alleged to be a division of another corporation, Shazdeh.

Conversion

A plaintiff establishes a prima facie case of conversion when he proves evidence of the delivery of goods and the refusal to return them after plaintiff has demanded their return. *See I.C.C. Metals, Inc. v Mun. Warehouse Co.*, 50 NY2d 657, 662 (1980) (finding that plaintiff had made out a prima facie case of conversion by proffering undisputed proof that the [goods] had been delivered to defendant and that defendant had failed to return it upon a proper demand); *Tokio Marine and Fire Ins. Co., Ltd. v Fed. Marine, Inc.*, 397 F Supp 2d 530, 536 (SDNY 2005) citing *I.C.C. Metals, Inc.* (in granting summary judgment for plaintiff using New York law of conversion and stating in New York a plaintiff establishes a prima facie case when plaintiff proves delivery of the stored property to the warehouse and the warehouse’s failure to return the property upon proper demand.)

Sunquest delivered the goods sold to Studio I. In order to establish conversion, Sunquest must show that it delivered the goods to the individual defendants or that the individual

defendants were in possession of the goods. As Sunquest failed to show it delivered the goods to the individual defendants, summary judgment is denied.

Status of Studio I

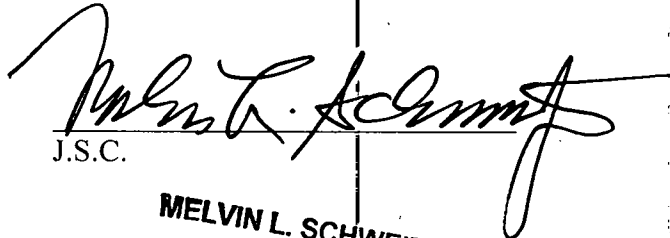
Sunquest contends that Studio I was a New York corporation that was dissolved by tax proclamation on June 24, 1992. It contends that the individual defendants negotiated the price of, ordered, received and accepted delivery of the Goods Sold by doing business under the name of this dissolved entity. Individuals are liable for their acts purportedly done under a corporation's name when that corporation has been dissolved by tax proclamation. *Portitsky v Wachtel*, 176 Misc 633, 634 (Sup Ct 1941 Putnam County); *See Keystone Mechanical Corp. v Conde*, 309 AD2d 627 (1st Dept 2003).

But here defendants argue that Studio I is a division of Shazdeh, and that Sunquest knew Studio I was a division of that corporation. They present chargeback memorandums and checks received by Sunquest as evidence of this. Material questions of fact thus exist regarding the status of Studio I in this case, and this precludes granting summary judgment.

ORDERED that Sunquest's motion for summary judgment is denied.

Dated: March 27, 2013

ENTER:



J.S.C.

MELVIN L. SCHWEITZER