

**Old HB, Inc. v Bread Depo of N.Y. Inc.**

2016 NY Slip Op 31701(U)

August 23, 2016

Supreme Court, Kings County

Docket Number: 502918/14

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of August, 2016.

PRESENT:

HON. GENINE D. EDWARDS,  
Justice

-----X  
OLD HB, INC. F/K/A HOSTESS BRANDS INC.

PLAINTIFF,

DECISION, ORDER  
AND JUDGMENT

-against-

INDEX No. 502918/14

MOT. SEQ. No. 4-5

BREAD DEPO OF NEW YORK INC.

DEFENDANT.

-----X  
The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Memoranda of Law \_\_\_\_\_

Papers Numbered  
  
39-45, 46-53 \_\_\_\_\_  
47-53 \_\_\_\_\_  
56-57 59 \_\_\_\_\_  
  
58 \_\_\_\_\_

Upon the foregoing papers, plaintiff, Old HB, Inc. (plaintiff), moves for summary judgment pursuant to CPLR §3212, in Sequence (Seq.) No. 4, in this action to recover a debt for goods sold and shipped to defendant over several months in 2012. Defendant cross-moves in Seq. No. 5 to dismiss the complaint.

Mot Seq 4 - XMD  
Mot Seq 5 - XMB

### *Background*

Plaintiff, a Delaware corporation, presents records showing a principal place of business at 9801 Bluegrass Rd., Philadelphia, Pennsylvania, and that defendant operates from Brooklyn, New York.<sup>1</sup> Plaintiff engaged in manufacturing and distributing various well-known food brands before its 2012 bankruptcy filing. Plaintiff sold and delivered a selection of its retail bakery goods to defendant from July 5, 2012 through December 14, 2012. In the regular course of doing business with defendant, plaintiff maintained “Invoice(s)” and a “Statement of Account” that itemized amounts due and owed by defendant, and sent monthly statements to defendant that recited the outstanding debts incurred pursuant to the sales and shipment arrangement.

The “Invoice(s)” plaintiff proffered (annexed as Exhibit C to its motion papers) state its and defendant’s name and address, and indicates that for the “Week ending 9/22/12” that plaintiff generated \$12,409.90 in receivables for goods shipped to defendant. The document itemizes the quantity and costs of products and provides an overall total for the costs defendant incurred for goods it received. Several more identically-formatted invoices collectively show \$79,731.75 due overall for shipping plaintiff’s goods for the seven consecutive weeks ending 9/22/12 through 11/03/12. Plaintiff’s first cause of action for

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<sup>1</sup>The “Invoice[s]” plaintiff provided recite defendant’s business address as 256 48<sup>th</sup> Street, Brooklyn New York.

breach of contract, as subsequently limited by its Controller, avers that defendant owes \$79,731.75.<sup>2</sup>

Plaintiff's proffered June 7, 2013 "Statement of Account" (Exhibit D), provides additional support for the sales and shipment arrangement with defendant. Each line item of this proffered statement recites, inter alia, a "Document Date" and "Amount." The column titled "Ship to Customer Name" lists "Kenneth Grande," defendant's principal owner, each time.<sup>3</sup> The statement further shows a \$133,544.45 "Balance Due" for "Document Date(s)" beginning 7/6/2012 through 12/14/2012 that plaintiff avers is owed on its second cause of action for an account stated. However, this receivable statement, which identifies defendant as "Customer," omits plaintiff's name on its face.

Plaintiff filed its summons and verified complaint on April 4, 2014. The complaint alleges that defendant owes plaintiff for goods sold and accepted and/or for work, labor and services performed for and accepted by defendant. The complaint further alleges that an account was established between plaintiff and defendant and that defendant owes plaintiff

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<sup>2</sup>Plaintiff's March 17, 2014 verified complaint separately demanded relief of \$133,544.45 on its first and then again on its second cause of action (Exhibit A to Plaintiff's Summary Judgment Motion). However, a December 2, 2015 affidavit from Amy M. Pino, who describes herself as plaintiff's Controller, requests (in ¶9) judgment of \$133,544.45 for plaintiff upon just the second cause of action for an account stated, or, alternatively, \$79,731.75 upon just the first cause of action for breach of contract. No amended complaint accounting for this change to the claims at issue was submitted, but Ms. Pino explains (in her affidavit, ¶8) that "plaintiff only has invoices in its records totaling the sum of \$79,731.75 and therefore limits its first cause of action upon breach of contract accordingly."

<sup>3</sup>Defendant's "Affidavit In Opposition To Motion For Summary Judgment And In Support Of Cross-Motion for Summary Judgment" identifies Mr. Grande as defendant's principal owner.

an unpaid balance. Defendant interposed a July 6, 2015 verified answer, including two affirmative defenses; failure to state a cause of action and lack of capacity to sue.

Plaintiff, during this case's pendency, filed for Chapter 11 bankruptcy protection in the Southern District of New York (the Bankruptcy Court) in *In re Old HB, Inc. (f/k/a Hostess Brands, Inc.), et al.*, Chapter 11, Case No. 12-22052 (RDD) (Jointly Administered). A Notice of Sale and Transfer of Assets (the Notice) was filed on September 28, 2015 which listed plaintiff herein as one of the "Debtors" subject to the Chapter 11 filing, along with IBC Sales Corporation, IBC Services, LLC, IBC Trucking, LLC, Interstate Brands Corporation and MCF Legacy, Inc. The Bankruptcy Court via the Hon. Robert D. Drain's November 12, 2015 order authorized the sale of substantially all of the Debtors' remaining assets.

The order in part approved an annexed September 25, 2015 "ASSET PURCHASE AGREEMENT" (the Purchase Agreement), amended November 4, 2015, among Old HB, Inc., Interstate Brands Corporation, IBC Sales Corporation, IBC Services, LLC, IBC Trucking, LLC, MCF Legacy, Inc., Ostess, LLC, and Ostess Services LLC. The Purchase Agreement's preamble identifies Old HB, Inc. as a "Seller," and Article II therein specifies all "Purchased Assets," to include "all accounts receivable of any kind or nature, including those identified on Schedule 2.1(b)(v)." That schedule, as annexed to the Purchase Agreement, itemizes "OLD HB, INC. Account Receivable Lawsuits and Other - Contact Information," and clearly references the litigation herein. Defendant's name and the

\$133,544.45 at issue appears on the schedule as does the name of defendant's attorney, Jeff Morgenstern, Esq.<sup>4</sup>

The November 12, 2015 order approved the asset sale pursuant to the terms of the Purchase Agreement, and the November 25, 2015 and December 12, 2015 orders that Judge Drain issued (annexed as part of Exhibit B to Defendant's Cross-Moving papers) authorized plaintiff's corporate dissolution, specified that the dissolution would then terminate plaintiff's ability to prosecute and defend lawsuits and dismissed plaintiff's Chapter 11 case.<sup>5</sup> Plaintiff now seeks to recover based upon the aforementioned delinquent account. Plaintiff's motion and defendant's cross-motion ensued.

#### *Discussion*

Plaintiff's summary judgment motion proves unavailing. "[T]he proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

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<sup>4</sup>Defendant's Exhibit B plainly underscores that the instant litigation and the receivable at issue were sold subject to the terms of the Purchase Agreement and that plaintiff no longer owns the debt at issue as of the November 12, 2015 order approving the sale.

<sup>5</sup>No representation has been made on plaintiff's moving papers that plaintiff is aligned with any existing trustee of the bankrupt estate in prosecuting this action post dissolution.

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

Plaintiff’s first cause of action for breach of contract alleges that defendant owes \$133,544.45 for goods sold and accepted and/or for work, labor and services performed for and accepted by defendant starting July 5, 2012 through December 14, 2012. It further alleges that the parties agreed upon this sum before the goods were provided and/or the services were performed. New York law identifies the elements of a cause of action for breach of contract as including the existence of a contract, a plaintiff’s performance under the contract, a defendant’s breach of that contract and resulting damages (*Joseph W. Ryan, Jr., P.C. v Faibish*, 136 AD3d 984, 984 [2d Dept 2016]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

Plaintiff’s second cause of action for judgment on an account stated references the account between plaintiff and defendant, which showed a \$133,544.45 balance that defendant owes plaintiff. The complaint states that defendant received and accepted the account, made no objection to any item therein and has not paid despite demands. “An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them” (*Citibank (S.D.) N.A. v Cutler*, 112 AD3d 573,573-574 [2014]). A cause of action for “[a]n 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]).

Plaintiff supports these two claims by proffering the affidavit of Amy M. Pino (Pino), plaintiff’s Controller, who is fully familiar with plaintiff’s books and records and responsible for collecting delinquent accounts. Ms. Pino indicates that plaintiff invoiced sales and shipments to defendant for \$79,731.75, which both remains unpaid and serves as the basis of plaintiff’s breach of contract claim. She further states that \$133,544.45 is owed under plaintiff’s second cause of action upon an account stated.<sup>6</sup>

Granting a summary judgment motion requires the movant to establish the claim with evidentiary proof in admissible form (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Here, however, Ms. Pino submits a patently defective affidavit. Her signature page is affixed to the very end of the document absent any actual text. Nor does a stamp validating the Notary Public’s licensing credentials follow that signature.

Plaintiff’s Exhibit D, a “Statement of Account,” equally suffers as a purported business record. Plaintiff’s name appears nowhere on the face of the document, which negates its use to sustain plaintiff’s account stated claim. Moreover, the invoices (in the accompanying Exhibit C) only show obligations incurred from 9/22/2012 to 11/3/2012 despite plaintiff’s representation that the goods were delivered from July to December of

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<sup>6</sup> Ms. Pino explains in her affidavit, ¶8 (as set forth in n 2, above) that "plaintiff only has invoices in its records totaling the sum of \$79,731.75 and therefore limits its first cause of action upon breach of contract accordingly."



that same year. Plaintiff's proffered evidence fails to demonstrate the absence of any triable factual issues.

Defendant, in cross-moving to dismiss, asserts that plaintiff lacks standing to maintain the present action, or, as CPLR 3211 (a) (3) provides, "legal capacity to sue." That threshold issue, which could prove determinative, therefore warrants initial consideration. Defendant supports its dismissal application by stressing that plaintiff sold its assets in bankruptcy, before filing its summary judgment motion, and that the asset sale specifically included the receivable at issue. In other words, plaintiff no longer owned the debt it now seeks to recover. A review of the Bankruptcy Court filings herein, namely, the November 12, 2015 order with the annexed Purchase Agreement, validates defendant's assertion.

Plaintiff, in opposition, references CPLR 1018, which allows an action to continue by or against the original parties, upon any transfer of interest, unless the court directs a substitution or joinder. However, it is well settled that a plaintiff in the context of a bankruptcy dissolution loses the capacity to prosecute an action when the asset which is the subject of that action becomes part of the bankrupt estate (*Quinn v Guerra*, 26 AD3d 872, 873 [4th Dept 2006], *appeal dismissed* 7 NY3d 741 [2006]). Moreover, "a party with no capacity to sue cannot be replaced with one who has capacity" (*Reynolds v Blue Cross of Northeastern N.Y.*, 210 AD2d 219, 220 [3d Dept 1994]). "Substitution . . . is not an available mechanism for replacing a party petitioner who had no right to sue with one who has such a right" (*Matter of C & M Plastics, Inc.*, 168 AD2d 160, 162 [3d Dept 1991]). Hence, no

grounds exist to order substitution of plaintiff's successor into this litigation absent an intervenor motion by the party owning the debt at issue.

Overall, therefore, the Purchase Agreement is dispositive of whether plaintiff may maintain this action, and plaintiff has failed to present any indicia of its legal capacity to sue. Plaintiff may have held such capacity at the time it filed the summons and complaint but lost the entitlement to collect on the debt at issue through the subsequent Bankruptcy Court orders discussed above. Plaintiff's legal right has thus ceased, and this conclusion moots considering defendant's other argument for dismissing the complaint.

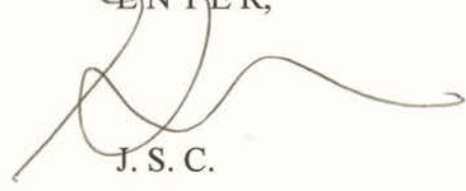
Accordingly it is ORDERED that plaintiff's summary judgment motion is denied in its entirety; and it is further

ORDERED that defendants's cross-motion to dismiss the complaint is granted; and it is further

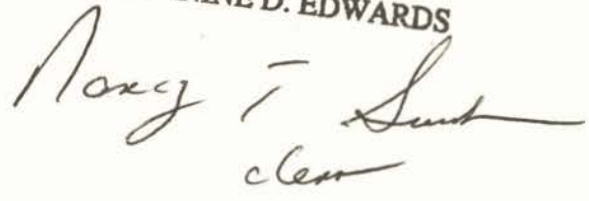
ORDERED that the action is hereby dismissed.

This constitutes the decision, order and judgment of this court.

ENTER,

  
J. S. C.

HON. GENINE D. EDWARDS

  
clerk

2016 SEP 12 AM 11:06  
FILED  
KINGS COUNTY CLERK