

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16532
Y/kmg

_____AD3d_____

Argued - September 21, 2007

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
WILLIAM E. McCARTHY, JJ.

2007-00241

DECISION & ORDER

Elmo Mfg. Corp., appellant, v American
Innovations, Inc., respondent.

(Index No. 7742/04)

Anes Friedman Leventhal & Balistreri, PLLC, New York, N.Y. (Harvey L. Woll and Charles M. Bolistren of counsel), for appellant.

Lipsitz Green Scime Cambria, LLP, Buffalo, N.Y., and Richard A. Solomon, Esq., LLP, Lawrence, N.Y., for respondent (one brief filed).

In an action, inter alia, to recover payment for goods sold and delivered, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Rockland County (Nelson, J.), dated December 7, 2006, as denied those branches of its motion which were for summary judgment on the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Contrary to the plaintiff's contention, the Supreme Court properly denied that branch of its motion which was for summary judgment on the first cause of action to recover payment for goods sold and delivered. After the plaintiff made out a prima facie case for judgment as a matter of law, the affidavits submitted by the defendant in opposition to the motion, which contained evidence explaining and supplementing the written documents of the parties and supporting the defendant's counterclaims (*see* UCC 2-202[b]), raised triable issues of fact regarding the terms of the parties' agreement and the plaintiff's alleged breach thereof, thus warranting the denial of summary judgment on the first cause of action (*see Created Gemstones v Union Carbide Corp.*, 47 NY2d 250,

October 9, 2007

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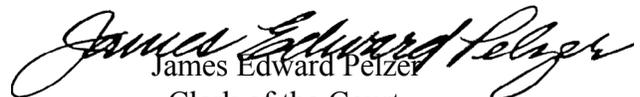
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255-256; *Buffalo Newspress Inc. v Coleman Communications Corp.*, 8 AD3d 969; *LaBarba v Morrell & Co.*, *Wine Emporium* 272 AD2d 165; *Panda Capital Corp. v Kopo Intl.*, 242 AD2d 690).

Furthermore, the denial of summary judgment on the plaintiff's second cause of action based on an account stated also was proper since, after the plaintiff made out a prima facie case for judgment as a matter of law, the defendant came forward with sufficiently specific allegations regarding its prompt oral objections to the account rendered (*see 1000 N. of N.Y. Co. v Great Neck Med. Assoc.*, 7 AD3d 592, 593; *Hornell Brewing Co. v High Grade Beverage*, 276 AD2d 593, 594; *Sandvoss v Dunkelberger*, 112 AD2d 278, 279; *Prudential Bldg. Maintenance Corp. v Siedman Assoc.*, 86 AD2d 519).

RIVERA, J.P., COVELLO, BALKIN and McCARTHY, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court