

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

D18844
W/hu

_____AD3d_____

Submitted - March 6, 2008

ROBERT A. SPOLZINO, J.P.
HOWARD MILLER
JOSEPH COVELLO
RUTH C. BALKIN, JJ.

2007-02142
2007-04519

DECISION & ORDER

Center Candy, Inc., respondent, v CJB Food Mart,
Inc., d/b/a CJB Food Mart, d/b/a Exxon Gas Station
& Convenience Store, appellant.

(Index No. 13023/06)

Stuart R. Shaw, New York, N.Y., for appellant.

Stephen M. Abrami, Jericho, N.Y., for respondent.

In an action, inter alia, to recover payment for goods sold and delivered, the defendant appeals from (1) an order of the Supreme Court, Nassau County (Parga, J.), entered January 29, 2007, which granted the plaintiff's motion for summary judgment on the complaint, and (2) a judgment of the same court entered March 12, 2007, which, upon the order, is in favor of the plaintiff and against it in the principal sum of \$41,335.81.

ORDERED that the appeal from the order entered January 29, 2007, is dismissed; and it is further,

ORDERED that the judgment is reversed, on the law, the plaintiff's motion for summary judgment on the complaint is denied, and the order entered January 29, 2007, is modified accordingly; and it is further,

ORDERED that one bill of costs is awarded to the defendant.

April 8, 2008

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CENTER CANDY, INC. v CJB FOOD MART, INC., d/b/a CJB FOOD MART,
d/b/a EXXON GAS STATION & CONVENIENCE STORE

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

In support of its motion for summary judgment on the complaint, the plaintiff submitted conflicting evidence and, therefore, did not make a prima facie showing of its entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Accordingly, the plaintiff's motion for summary judgment on the complaint should have been denied.

The defendant's remaining contention has been rendered academic in light of our determination.

SPOLZINO, J.P., MILLER, COVELLO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court