

NBN Inc. v Loni-Jo Metal Indus., Inc.

2010 NY Slip Op 30816(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 10261/08

Judge: Roy S. Mahon

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SCA

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

NBN INC. d/b/a NBN TRADING,

TRIAL/IAS PART 7

INDEX NO. 10261/08

Plaintiff(s),

- against -

LONI-JO METAL INDUSTRIES, INC.,
d/b/a LONI-JO SCRAP METAL CORP.,

Defendant(s).

DECISION AFTER TRIAL

Plaintiff NBN, Inc. d/b/a NBN Trading alleges a cause of action for breach of contract seeking an award of money damages. The defendant Loni-Jo Metal Industries Inc. d/b/a Loni-Jo Scrap Metal Corp. denied the allegations. On October 21, 2009, the parties appeared before this Court to commence a bench trial. The trial continued intermittently until November 5, 2009. Post-trial memoranda were submitted on January 15, 2010.

Plaintiff's first witness was Alan Ren, the sole shareholder, employee and director of NBN Inc. d/b/a NBN Trading Corp (hereinafter NBN Inc.). He testified that NBN Inc. first began purchasing scrap metal from the defendant Loni-Jo Metal Industries Inc. d/b/a Loni-Jo Scrap Metal Corp (hereinafter Loni-Jo) in 2006 of over 10 separate sales, each sale followed an identical procedure first entailing a visit to the defendant's premises to inspect the scrap metal and to negotiate a purchase price. After a price was established, the plaintiff and defendant would execute a written contract which, in turn, was transmitted to Fu-Zhou Plastic, LLC (hereinafter Fu-Zhou), a Chinese company to whom the plaintiff intended to re-sell the scrap metal. Fu-Zhou would subsequently enter into a contract with the plaintiff to purchase the scrap metal. After plaintiff's contract with Fu-Zhou was executed, plaintiff would arrange for a representative of the People's Republic of China to visit the defendant's scrap yard to approve the items slated for shipment to China. Adam Decker, an employee of the defendant, would contact Mr. Ren to apprise him that the government representative was making his inspection and Mr. Ren would appear at the yard when the goods were actually loaded for shipment. According to Mr. Ren, a down payment was made by the plaintiff after its contract with Loni-Jo was executed and final payment made to Loni-Jo after the contained was loaded and shipped to Fu-Zhou. A contract dated April 18, 2007 was entered into evidence as illustrative of the form of agreement employed between the parties. (see Plaintiff's #1 in Evidence). A contract dated April 23, 2007 with Fu-Zhou was introduced into evidence as illustrative

of the form of agreement between the plaintiff and Fu-Zhou (see *Plaintiff's #2 in Evidence*).

On August 11, 2007, Mr. Ren testified that the plaintiff and defendant again entered into an agreement for the defendant to sell specified items of scrap metal at specified prices. Among the items allegedly purchased were 80,000 pounds of a commodity denominated as "regular stainless steel and 20,000 pounds of a commodity denominated as "turning" stainless steel.

On August 24, 2007, when the material were loaded into a container for shipment to Fu-Zhou, 50,000 pounds of the "regular" stainless steel was missing form the order. According to the witness, Mr. Dichter indicated that more stainless steel was slated for purchase by the defendant and could be supplied to the plaintiff in time to meet its obligation to Fu-Zhou, although no specific delivery date was specified. After admonishing the defendant for having sold the inventory which the plaintiff has inspected, the plaintiff paid for the balance of the August 11, 2007 purchase (see *Plaintiff's #26 in evidence*).

On October 17, 2007 the plaintiff executes another contract with the defendant and again contracted with Fu-Zhou to purchase the shipment (see *Plaintiff's #15, #16 in Evidence*). When the materials were loaded for shipment on November 9, 2007, Mr. Ren testified that the 50,000 pounds of missing steel from the August 24, 2007 shipment still had not been provided to the plaintiff, despite a continued promise to deliver the missing steel made in October, 2010. Moreover, according to the witness, materials purchased by the plaintiff on October 17, 2007 were also missing from the November 9, 2007.

Approximately one week after the November 9, 2007 shipment to China, Mr. Ren again inquired about the missing items from both the August and October 2007 purchases and was allegedly told by Mr. Decker that he was awaiting delivery of the plaintiff's missing items.

After repeated inquiries by Mr. Ren, some of the missing items were supplied to the plaintiff in January, 2008. Mr. Ren indicated, however, that 30,000 pounds of the "stainless" steel was still missing, together with 5000 pounds of missing tin plate, 7000 pounds of light copper and quantities of iron aluminum radiator, mixed motors and power switches. On January 22, 2008, the plaintiff paid the sum of \$120,000.00 to the defendant in the form of three bank checks (see *Plaintiff's 21A in Evidence*). According to Mr. Ren, the defendant afforded the plaintiff a credit for \$8,332.00 for incorrect materials delivered to the plaintiff and asked for payment of the balance due of \$20,000.00 (see *Exhibit 19 in Evidence*).

After paying the balance due of \$20,000.00 on January 23, 2008, Mr. Ren continued to inquire into the whereabouts of the missing items, telling Mr. Decker that the plaintiff was liable for a penalty from Fu-Zhou if the items were not timely delivered to China. Repeated inquiries until February 21, 2008 yielded promises from Mr. Decker to deliver the missing items.

The business relationship between the plaintiff and defendant now deteriorated, with the defendant refusing to do further business with the plaintiff. According to plaintiff's witness, the defendant refused to accept the plaintiff's bank check for \$20,000.00 toward newly ordered items and plaintiff claims to have instructed its attorney to write to the defendant threatening suit (see *Plaintiff's 21B in evidence, #22, #23 in Evidence*).

By reason of the defendant Loni-Jo's alleged failure to deliver items purchased by the plaintiff, Mr. Ren testified that plaintiff sustained the following lost profits and expenses.

<u>Undelivered Materials</u>	<u>Profit Per Pound From Sale To Fu-Zhou</u>	<u>Lost Profit</u>
1. Tin Plate - 4600 pounds	\$.76	\$ 3496.00
2. Light Cooper - 6330 pounds	\$.81	\$ 5127.30
3. Iron Aluminum Radiator - 600 pounds	\$.67	\$ 4020.00
4. Mixed Motor - 10,000 pounds	\$.63	\$ 6300.00
5. Power Switches - 5000 pounds	\$.88	\$ 4400.00
6. Stainless steel -32,035	\$.86	<u>\$27550.00</u>
	Total claimed lost profit	\$50893.40

Additional expenses incurred allegedly by plaintiff were:

1. Trucking fee for 1 container	\$ 550.00
2. Shipping company fees for 1 container	\$1500.00
3. CCIC Rep Fees	\$ 220.00
4. Chinese custom fees	<u>\$6500.00</u>
Total claimed fees	\$8770.00

Penalties claimed by the plaintiff allegedly not completing the contract	<u>\$58,571.83</u>
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Cross examination revealed that the use of an interpreter was not needed for the examination before trial of Mr. Ren. It further revealed that the plaintiff's witness, Mr. Ren, entered the scrap metal business in 2004 after owning a Chinese-Japanese restaurant. In 1997 and throughout 1998, Mr. Ren and Mr. Zhou, the principal of Fu-Zhou, met on a social basis. Together, they formed BJY Trading Corp. found to shred scrap metal with United States of America. BJY Trading Corp. conducted business for approximately one year, selling scrap metal to concerns in the People's Republic of China, with working capital supplied and profits divided equally between Mr. Zhou and Mr. Ren. Mr. Ren also owns 75% of shares in another business owned by Mr. Zhou and no interest in yet another business of Mr. Zhou's, each unrelated to Fu-Zhou.

Further cross-examination revealed that the plaintiff has had business relationships with other scrap yards in the Long Island area since 2006, but was unsuccessful in the past in locating certain commodities of scrap metal from them. Mr. Ren also admitted to certain business disputes arising between the plaintiff and defendant resulting in stopped payment on checks tendered by the plaintiff to defendant. The parties also stipulated that there is no entity known as NBN Inc. d/b/a as NBN Trading in New York State.

After Mr. Ren completed his testimony, plaintiff rested its case. The defendant moved to dismiss the plaintiff's case upon the grounds that the plaintiff which instituted the action does not exist, and therefore is an improper party and that the purported contract with Loni-Jo is not with the named defendant Loni-Jo Metal Industries, Inc. Defendant also moved to dismiss plaintiff's case upon the ground that no provisions making by delivery "of the essence" was proven by the plaintiff, rendering delivery of the scrap metal timely if delivered within a reasonable time.

Defendant also moved to dismiss plaintiff's case on the grounds that damages were not proven, and were speculative and that the plaintiff never made full payment, as a condition precedent, before delivery of the materials was to be made.

Plaintiff opposed defendant's motion to dismiss upon grounds of an improper party initiating the action and opposed the remaining grounds, contending they did not go to the sufficiency of the plaintiff's prima facie case.

The Court reserved decision in the defendant's motions. The defendant thereafter, elected to present a case. Its sole witness was Adam Decker, an employee of the defendant for over 4 years. He testified that scrap metal is bought by the defendant and then either baled or boxed and weighted before sale to its customer. "Stainless" steel is kept at different locations, owned by the defendant (see *Defendant's #1, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, 2, AA, AB, AC, AD, AE, AF, AG, AI, AK, AL, AM, AN, AO, AP, AQ in Evidence*).

The witness stated that Mr. Ren would be present at the defendant's scrap yards when the baled or box materials would be weighed and subsequently loaded for shipment to China. In his dealings with Mr. Ren, the witness stated that he always spoke in the English language.

According to Mr. Decker, the plaintiff would, at the time of loading, agree to substitutions of scrap metal originally purchased by the plaintiff. After the plaintiff was satisfied with the content and weight of the purchase, the balance of the payment due would be made to the defendant. In support of his testimony, Mr. Decker pointed to previous transactions when such substitutions were made at the request of the plaintiff (see *Defendants AR, AS, AT, AU, AV, AW, AX, AY in Evidence*).

During the course of the defendant's business dealings with the plaintiff, the defendant received bounced checks for payment, including one check in the amount of \$99,440.20. Plaintiff claimed to have been temporarily overdrawn and later made payment.

According to Mr. Decker, the plaintiff never received his 50,000 pounds of "stainless" steel because he did not pay for it or make arrangements to receive it. On December 11, 2007, the defendant received a \$20,000.00 check from the plaintiff which did not clear for payment which led to the defendant's refusing to do further business with the plaintiff.

Cross examination of the defendant's witness revealed that according to Mr. Decker, the "stainless" steel ordered by the plaintiff on August 11, 2007 was substituted at the plaintiff's election.

After Mr. Decker testified, the defendant rested its case. The defendant moved to dismiss in grounds that damages was speculative and that plaintiff failed to prove the allegations in the complaint. Plaintiff opposed the motions to dismiss.

After trial, the Court now makes the following findings of fact and conclusions of law. Defendant's motions to dismiss plaintiff's case for lack of capacity to institute the within action, is **denied**. Failure to raise the objection either by motion or in a response pleading results in waiver of the objection (see CPLR 321(a)(3), CPLR 3211(e)). Defendant's remaining motions to dismiss for failure to present a prima facie case, are **denied**.

Plaintiff's burden of proof in the instant action is to prove the allegations of the complaint by a fair preponderance of the credible evidence. Documents submitted by the plaintiff fail to establish date of deliver, or means of payment. Given the lack of documentary evidence to support the date and time of delivery, the terms and amount of payment and the terms and conditions of the acceptance of goods, the Court cannot credit the testimony of the plaintiff's witness over that of the defendant's witness.

Where the evidence is in equipoise so that it cannot be said that there is a fair preponderance of the credible evidence in favor of the plaintiff, the Court must find for the defendant.

Defendant's motion to dismiss the instant action for failure of the plaintiff to prove the allegations of the complaint by a fair preponderance of the credible evidence, is **granted**.

This constitutes the decision and Order of the Court.

Let Judgment enter accordingly.

DATED: 3/31/2010

..... Roy S. Madson
J.S.C.

ENTERED
APR 05 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE