

<b>Conca D'Oro Importers Inc. v Latto 317 LLC</b>
2020 NY Slip Op 33248(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 652446/2018
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

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**INDEX NO. 652446/2018**

CONCA D'ORO IMPORTERS INC.,  
Plaintiff,

**MOTION DATE 09/18/2020**

**MOTION SEQ. NO. 002**

- v -

LATTO 317 LLC, 675 NINTH AVENUE CORP.  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56  
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by the filing of a Summons and Complaint on May 16, 2018, seeking to recover \$135,373.12., representing goods sold and delivered to defendants between 2014 and 2017. Defendant, Latto 317 LLC appeared by the filing of an Answer on August 13, 2018. Said Answer includes as an eighth affirmative defense that “Defendant Latto 317 LLC has never operated Scarlatto and, therefore, was not a party to any of the transactions on which Plaintiff’s claims are based and is not liable therefor.” In a decision entered August 28, 2019, plaintiff was granted a default judgment against 675 Ninth Avenue Corp. for the full amount demanded in the complaint. Plaintiff now moves for summary judgment against defendant, Latto 317, LLC.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of

issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1<sup>st</sup> Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

To prevail on a claim for "Goods Sold and Delivered" under New York Uniform Commercial Code 2-709(1)(b), a plaintiff must offer proof of purchase, sale and delivery of goods at an established price and non-payment therefor. See *Sunkyong Am v. Beta Sound of Music Corp.*, 199 A.D.2d 100, 100-01 (1st Dep't 1993).

A prima facie case for "Breach of Contract" is made where a plaintiff demonstrates the existence of a valid contract, plaintiff's performance under the contract, defendant's failure to perform and resulting damages. See *VisionChina Media Inc. v. Shareholder Representative Services. LLC*. 109 A.D.3d 49,58 (1st Dep't 2013).

To prevail on a claim for an "Account Stated," a plaintiff must offer proof of defendant's receipt and retention of invoices without objection within a reasonable amount of time. See, *Abyssinian Dev. Corp. Bistricher*, 133 A.D.3d 435, 436 (1st Dep't 2015)

In support of its motion, plaintiff submits the Affidavit of Ciro Salvia, owner of Conca D'Oro Importers Inc., together with the relevant invoices. The affidavit alleges that defendant, Latto “was plaintiff's customer and between November 2014 and December 2017 placed orders with plaintiff for quantities of food products at agreed-upon prices for its restaurant located initially at 250 West 47th street, New York, New York 10036 and then at 317 West 46th Street, New York, New York 10036.” The affidavit further alleges that a New York State liquor license search for the trade name “Scarlatto,” reveals that defendant has a liquor license for the restaurant located initially at 250 West 47th Street, New York, NY 10036 and then located at 317 West 46th Street, New York, NY 10036. A New York Department of State search for “Latto 317 LLC” reveals that its address is 317 West 46th Street, New York, NY 10036. Plaintiff further alleges that Latto accepted, signed for and retained food products without objection and accepted, signed for and retained the invoices without objection. however, Latto failed to remit payment in full owes a sum of \$135,373.12.

A review of the submitted invoices reveals that the goods were sold to and delivered to Scarlatto, 675 Ninth Avenue Corp, 250 West 47<sup>th</sup> Street, New York, NY 10036. None of the goods were delivered to 317 West 46th Street, New York, NY 10036. As noted above, Plaintiff has been granted a default judgment against 675 Ninth Avenue Corp.

In opposition, defendant, Latto 317, LLC submits the affidavit of Thomas Bifulco, the owner of Latto, and also a Partner in 675 Ninth Avenue Corp, which establishes that Latto 317, LLC and 675 Ninth Avenue Corp. are legally distinct entities. The affidavit also establishes that Latto 317, LLC was not in business until 2018 and that none of the invoices were served on Latto at 317 West 46<sup>th</sup> Street. As such, defendant has established an issue of fact precluding summary judgment.

Plaintiff's motion is hereby denied in its entirety.

9/30/2020

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE