

<b>Paramount Textiles Inc. v Party Rental Enters., Inc.</b>
2005 NY Slip Op 30481(U)
September 21, 2005
Sup Ct, NY County
Docket Number: 106895/2005
Judge: Karen S. Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

KAREN SMITH

J.S.C.

Index Number : 106895/2005

PART 44

PARAMOUNT TEXTILES INC

vs

PARTY RENTAL ENTERPRISES INC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 7/19/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*Memoranda of law*

*2-3*

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided as

*accordance with the annexed memorandum decisions and order*

**FILED**

**OCT -4 2005**

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/21/05

*KSS*  
**KAREN SMITH J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 44

-----X  
PARAMOUNT TEXTILES, INC.,

Plaintiff,  
-against-

Index no.: 106895/2005  
Motion seq.: 001  
Motion date: July 19, 2005

PARTY RENTAL ENTERPRISES, INC. d/b/a  
ABLE LINEN SERVICE and d/b/a ABLE LINEN  
Defendants.

**DECISION AND ORDER**

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Plaintiff Paramount Textiles, Inc.'s motion, pursuant to CPLR § 3212, for summary judgment on its complaint against defendant Party Rental Enterprises Inc. d/b/a Able Linen Service and d/b/a Able Linen is granted to the extent set forth below.

In this action, plaintiff seeks to recover \$52,495.67, plus interest, from defendant for various textiles ordered by and delivered to defendant. Plaintiff asserts three separate causes of action, breach of contract, account stated, and unjust enrichment. Plaintiff now moves for summary judgment on all of its causes of action.

The facts are contained in plaintiff's moving papers and are not in dispute except where otherwise noted. Between September of 2004 and April of 2005, defendant ordered various textiles totaling \$52,755.15 in value from plaintiff, a textile merchant. Plaintiff timely delivered all the ordered textiles. After it received an order from defendant, plaintiff would prepare and send defendant an invoice, stating the amount defendant owed for the order. Each invoice contained the notation "Terms Net 30". Defendant retained all the textiles it received and never objected to the amounts given in the invoices. Apart from a payment of \$269.48 in April of 2005, defendant made no payments on the amount it owed and, as of the date plaintiff filed the instant motion, had an outstanding balance of \$52,495.67. Plaintiff alleges that it continued to fill defendant's orders despite defendant's non-payment because defendant had previously paid it accounts with plaintiff in full.

On May 13, 2005, plaintiff's attorney sent defendant a letter demanding payment in full on

its debt in the amount of \$52,495.67. On May 16, 2005, plaintiff served defendant with a statement of account. The statement of account listed the amount due and a due date for each invoice. The due date listed was roughly thirty days from the date on each invoice. The statement also listed the portions of the principal past due, some portions marked as between 1 and 30 days past due, some as between 30 and 60 days, some as more than 90 days past due. On the same day, defendant sent plaintiff a letter acknowledging the debt and offering to pay the entire amount no later than July 30, 2005. However, defendant had not made any payment by May 18, 2005, the date plaintiff filed this lawsuit.

Plaintiff filed the motion on June 23, 2005, seeking summary judgment on all its causes of action against defendant. In the motion, plaintiff seeks judgment for the principal amount of \$52,495.67 and interest on the principal, to be calculated from the date of each invoice for the amount on that invoice. For instance, the first invoice, which is dated September 14, 2004, is in the amount of \$9,269.48. The second invoice, which bears the date September 21, 2004, is for \$5,336.41. Thus, plaintiff seeks interest on \$9,269.48 of the principal from September 14, 2004, interest on \$5,336.41 from September 21, 2004, and so on.

On June 30, 2005, before the original return date on the motion, defendant's attorney tendered a check for \$52,495.67 to plaintiff's attorney, accompanied by a letter stating that the check was tendered "in full satisfaction of the amount owed". Plaintiff's attorney deposited the check, but sent defendant's attorney a letter stating the check was not accepted in full satisfaction of the debt owed, as plaintiff was entitled to interest on the principal. Defendant's attorney then responded to the instant motion, not with a formal opposition, but with a letter addressed the Motion Support Clerk. The letter contained copies of the canceled check and the correspondence between the attorneys discussed above. The letter states that plaintiff is only entitled to interest from the date of the formal demand, as plaintiff was not in the custom of charging defendant interest prior to the transactions at issue in this case.

In its reply, plaintiff argues that the court must ignore defendant's letter, as it is in a form insufficient to oppose a summary judgment motion. Plaintiff further argues that it is entitled to interest from the due dates on its invoices, and that the "Terms Net 30" notation indicates that the due date for each invoice is 30 days from the date of the invoice. Alternatively, plaintiff argues that

it is entitled to interest on the basis of account stated.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Id.*). CPLR § 5001 provides that, in an action arising from the breach of performance of a contract, interest shall be recoverable from the earliest ascertainable date the cause of action existed. When a debt exists with no fixed date for its payment, interest begins to run thereon from the date of the demand for payment (*Moody v. Continental Casualty Corp.*, 48 AD2d 184, 187 [4<sup>th</sup> Dept. 1975]). Absent the showing of some provision or custom to the contrary, a seller may obtain prejudgment interest on claims arising from invoices only from the date of its demand for payment (*Music Sales Corp. v. Mark Music Service, Ltd.*, 194 AD2d 470, 471 [1<sup>st</sup> Dept., 1993]).

As defendant has paid the principal, the only question before the court is the date from which plaintiff is entitled to interest on that principal. Setting aside whether defendant's opposition is in a proper form, plaintiff has failed to make a *prima facie* showing of entitlement to interest from a date earlier than the date of its demand for payment. Plaintiff has not alleged any express agreement between itself and defendant that held that the interest was due 30 days from the dates on the invoices. Plaintiff's own conduct indicates that it did not expect payment within thirty days on its invoices. Plaintiff has admitted that it continued to fill defendant's orders for approximately five months after payment on the first invoice allegedly became due, without having received any payment from defendant. The only evidence in the record concerning the date from which plaintiff's claim accrued is the demand for payment, dated May 13, 2005. Accordingly, that is the date from which interest will be calculated.


Plaintiff's argument that it is entitled to interest on the basis of account stated is without merit. An account stated is an account balanced and rendered, with an assent to the balance expressed or implied; so that the demand is essentially the same as if a promissory note had been given for the balance (*Parker Chapin Flattau & Kimpl v. Daelen Corp.*, 59 AD2d 375, 377 [1<sup>st</sup>

Dept., 1977][internal citations omitted]). Plaintiff has set forth the elements of an account stated for the principal amount of the debt, namely the invoices retained and not objected to by defendant. However, neither the invoices nor the formal accounting rendered on May 16, 2005 make any reference to interest due on the principal. Accordingly, plaintiff has not demonstrated an account stated for interest owed.

Since defendant has satisfied the principal amount of the debt owed, and plaintiff has only set forth evidence sufficient to support the accrual of interest from May 13, 2005, the court will only award plaintiff interest on the principal from that date. Accordingly, it is hereby

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant for interest on the principal amount of \$52,495.67 at the statutory rate from the date of May 13, 2005, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: September 21, 2005  
New York, New York

ENTER:  
  
\_\_\_\_\_  
Karen S. Smith, J.S.C.

**FILED**  
**OCT - 4 2005**  
NEW YORK  
COUNTY CLERK'S OFFICE