

Delta Apparel, Inc. v Nuvo Group, Inc.

2006 NY Slip Op 30236(U)

August 4, 2006

Supreme Court, New York County

Docket Number: 0601531/2005

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 601531/2005

DELTA APPAREL INC

vs

NUVO GROUP INC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied with costs

with the attached

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

FILED
AUG 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/4/06

[Signature]

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
DELTA APPAREL, INC.,

Plaintiff,

Index No. 601531/2005

-against-

NUVO GROUP, INC.,

Defendant.
-----X

GOODMAN, EMILY, J.:

Plaintiff, Delta Apparel, Inc. (Delta), moves, pursuant to CPLR 3212, for an order granting summary judgment against defendant, Nuvo Group, Inc. (Nuvo), and granting plaintiff damages in the amount of \$1,110,437.08 on its breach of contract claim. Delta argues that Nuvo breached a contract between the parties, when it refused to pay invoices for goods which Nuvo ordered and received. Delta contends that there exist no material issues of fact with respect to Delta's right to recover and no viable defenses to its complaint. Nuvo maintains that Delta's motion for summary judgment should be denied, as the goods delivered by Delta were not in compliance with the parties' purchase orders.

FACTS

Delta is a Georgia corporation, authorized to do business in New York, with a place of business at 350 Fifth Avenue, Suite 6911, New York, New York. Delta is in the business of manufacturing knitwear products. Nuvo is a New York corporation with its principal place of business at 822 Niagra Street, Niagra Falls, New York. Nuvo has been engaged in the business

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NEW YORK

of marketing apparel, including Delta knitwear products, for wholesale and/or retail sale.

Prior to December 8, 2004, the parties entered into a relationship whereby Delta sold to Nuvo knitwear products which were ordered by Nuvo. The terms of the agreement were reflected by the invoices rendered by Delta to Nuvo. Between December 8, 2004, and January 10, 2005, Delta allegedly provided Nuvo with goods totaling \$1,110,437.08. Delta contends that the invoices for the goods required Nuvo to pay each invoice within 45 days of the date of the invoice. Nuvo failed to pay for the goods when the amount became due or thereafter.

By letter dated April 11, 2005, Delta made final demand for the payment of all outstanding and overdue invoices. The letter placed Nuvo on notice that if the payment of \$1,110,437.08 was not made by April 21, 2005, Delta would institute proceedings to collect the indebtedness. Delta filed a complaint on April 28, 2005, alleging breach of contract, promissory estoppel and unjust enrichment. Delta now seeks summary judgment against Nuvo in the amount of \$1,110,437.08 with interest from June 2, 2005,¹ plus costs and disbursements of this action, and for such other relief which the court deems proper.

DISCUSSION

Summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361 (1974). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact... ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853

¹ Delta does not explain why it specifies June 2, 2005, as the date from which interest should accrue. Given that the summons and complaint is dated April 27, 2005, the court accepts the date indicated by Delta.

(1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Although Delta has not specified on which cause of action it seeks summary judgment, it appears from Delta's arguments that this motion is based upon the claim for breach of contract. Delta argues that summary judgment must be granted, as Nuvo breached the contract between the parties when it refused to pay for the supplied goods. Nuvo alleges that the delivered goods did not comply with the specifications agreed upon. Specifically, Nuvo argues that it had objections to the pricing, country of origin, size of scale, and shipment of partial orders.

In order to state a cause of action for breach of contract, the pleadings must specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant." *Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986). There is no dispute that an agreement was entered into between plaintiff and Nuvo in which Delta was to supply goods to Nuvo, and that Delta did, in fact, deliver goods to Nuvo. Instead, the dispute centers on whether Nuvo properly rejected the goods.

The Uniform Commercial Code (UCC) states that once goods are delivered by the seller to the buyer, the buyer may accept or reject the goods. UCC 2-601. Pursuant to UCC 2-513, the buyer has the right to inspect the goods and this inspection may take place after the arrival of the goods. Acceptance takes place when the buyer informs the seller that the goods are conforming, or that in spite of their nonconformity the goods will be retained. UCC 2-606 (1). Acceptance also takes place when a buyer fails to reject the goods after a reasonable opportunity to inspect

them or acts inconsistently with the seller's ownership. *Id.* If a buyer chooses to reject goods, the rejection, "must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." UCC 2-602 (1). UCC 2-605 provides that a "buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach."

Delta contends that Nuvo failed to reject the goods. In response, Nuvo argues that the goods which it received were not in compliance with Nuvo's purchase order specifications as to the country of origin, size mix, type of yarn and non partial shipment policy. Nuvo further argues that Delta was aware that objections were made to the goods. John Tuli, the vice president of Nuvo states in his affidavit, "Timely objection regarding the defects in plaintiff's shipments, including objections to price, country of origin, size scale and shipment of partial orders, were made by Nuvo to the plaintiff via telephone calls and written and e-mail communications to the plaintiff." *See* Affidavit of Tuli, at 3.² However, Tuli does not state that he made the phone calls personally, nor when the calls were made and to whom. Accordingly, his claim of timely objection is based upon conclusory hearsay. In the first department, hearsay may be used to oppose a motion for summary judgment, so long as the evidence is not the only evidence used to oppose the motion. *Candela v City of New York*, 8 Ad3d 45 (1st Dept 2004). However, where

² Plaintiff argues that the submitted affidavit of John Tuli, is virtually identical to the affidavits which Nuvo submitted in two other actions filed in the state of New York. Plaintiff includes with its reply affirmation, copies of the affidavits of Tuli which Nuvo submitted in *NES Clothing v Nuvo Group, Inc. and Daljit Tuli*, and *TSC Apparel, LLC v Nuvo Group, Inc.* Raising the same boilerplate, unsubstantiated, claims in other actions sheds doubt on the validity of the claims, although the court does not base its decision on this.

such hearsay is conclusory and alleges that unnamed individuals stated certain things, that hearsay is insufficient to raise an issue of fact. *Elsky v Hearst Corp.*, 232 AD2d 310 (1st Dept 1996); *see also Landisi v Beacon Community Dev. Agency*, 180 AD2d 1000 (3d Dept 1992) (conclusory hearsay from unidentified sources is inadequate to defeat a motion for summary judgment).

The only evidence of communications between the parties which Nuvo includes with its affidavit is a copy of an e-mail addressed to Harvey Spector of Delta Apparel.³ The text of the email does not specifically reject past or present shipments of the goods. The e-mail also does not include the date that it is was sent or created, making it impossible to deduce if the letter was sent after Nuvo received the goods in question. Nuvo has failed to submit any other copies of e-mails and/or written communications which include objections to and/or rejections of the plaintiff's goods, or any other evidence that the goods were rejected.

In its opposition to Delta's motion, Nuvo also maintains that upon receipt of shipments from plaintiff, Delta's agents inspected the products and found that they did not meet specifications agreed to by the parties. The allegations concerning the inspection process are conclusory and based on unsubstantiated hearsay from a source which defendant failed to identify. As previously noted, conclusory hearsay is insufficient to raise a triable issue of fact.

Nuvo also asserts that Delta made misrepresentations and false declarations concerning the country of origin of the goods and that this misrepresentation was a substantial breach of

³ The e-mail was not reproduced in its entirety, nor was the identification of the e-mail's sender clearly specified.

performance by the plaintiff that could result in violations of federal customs regulations.⁴

Specifically, Nuvo claims that by agreement, the goods were suppose to originate from Mexico and that the yarn used to manufacture the goods was suppose to be yarn made in the United States. CPLR 3018 (b) states, “A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading... .” Fraud or misrepresentation is an affirmative defense. However, Nuvo did not include fraud or misrepresentation as an affirmative defense in its answer, nor has it move to amend its answer. In any event, these allegations are of no import given that Nuvo kept the goods and proffered no evidence that it rejected the goods in accordance with the UCC.

Nuvo further argues that, as Delta was not complying with purchase orders, Nuvo was unable to comprehend which orders were being filled and what money was owed. However, Delta submitted copies of invoices sent to Nuvo which specifically detail the quantity, size, color, product identification number, and cost of the goods. Delta’s motion for summary judgment, ex. B.

Nuvo avers that summary judgment must not be granted, as discovery is still necessary. Nuvo does not state that discovery requests have been denied or are outstanding, but instead argues that, in order to limit legal expenses, discovery was not commenced while the parties were engaged in settlement negotiations. Unlike instances where summary judgment is denied as being premature due to outstanding discovery requests, the fact that Nuvo has not yet conducted

⁴Nuvo’s speculation that Delta’s purported false declaration of the origin of the goods could result in customs fines and the confiscation of the goods would only be grounds for finding that a breach of performance occurred.

* 8]
discovery, does not serve as a bar to summary judgment, where such failure is the result of its own inactions. *See Meath v Mishrick*, 68 NY2d 992 (1986); *Milea v Ames Dept. Store, Inc.*, 219 AD2d 798 (4th Dept 1995).

Additionally, Nuvo does not assert that Delta is in exclusive control of documents or information pertaining to the goods or why it does not have access to the information. Indeed, if Nuvo did not have information regarding the country of origin and the details regarding other alleged noncompliance, there would be no basis upon which it could have rejected the goods. *See Abbenante v Larry E. Tyree Co.*, 228 AD2d 529 (2d Dept 1996). Therefore, Nuvo's contention that further discovery is necessary to oppose this motion is unpersuasive.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and defendant, Nuvo Group, Inc. is found liable to plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,110,437.08, together with interest as prayed for allowable by law at the statutory rate from June 2, 2005, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This Constitutes the Decision and Order of the Court.

DATED: August 4, 2006

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J.S.C.

EMILY JANE GOODMAN