

Airweld, Inc. v Williams & Sons Erectors, Inc.

2007 NY Slip Op 30338(U)

March 15, 2007

Supreme Court, Suffolk County

Docket Number: 0017478

Judge: Emily Pines

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**Supreme Court - State of New York
J.A.S. Term, Part 23, Suffolk County**

Present:

Hon. Emily Pines

Justice Supreme Court

Original Motion Date: 12-01-2006

Motion Submit Date: 02-08-2007

Motion Sequence No.: 001 MG *CDISPSUBJ*

AIRWELD, INC.,

Plaintiff,

-against-

**WILLIAMS & SONS ERECTORS, INC., and
VERONICA SIMONE,**

Defendants.

_____X

Attorney of Plaintiff

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Attorney of Defendant

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ORDERED, that the motion (motion sequence number 001) by Plaintiff for summary judgment is granted.

This is an action by Plaintiff for recovery of amounts due for goods sold and delivered pursuant to a contract between Plaintiff and Defendant WILLIAMS & SONS ERECTORS, INC. ("WILLIAMS"). Defendant VERONICA SIMONE ("SIMONE") signed a personal guarantee of the contract. Plaintiff commenced this action by filing a Summons and Complaint on or about June 21, 2006 and issue was joined by Defendants' service of an Answer on or about September 22, 2006. The complaint sets forth four (4) causes of action - goods sold and delivered; account stated; counsel fees and recovery under personal guarantee and seeks the amount of \$29,813.26 with interest on the first, second and fourth causes of action and \$5,962.65 as and for attorney's fees on the third cause of action. The Verified Answer essentially contained general denials of the allegations of the Complaint.

Plaintiff now moves for summary judgment on the ground that no issue of fact exists regarding the payment of the monies owed. Plaintiff has annexed an Affidavit by Elizabeth Zak ("Zak"), Secretary of the Plaintiff, setting forth the relevant facts. Essentially, Defendant

WILLIAMS, which is in the business of the erection of structural steel and metal decks, applied to Plaintiff for sales on credit for the purchase of certain gases used for welding and cutting of steel. WILLIAMS executed a "Credit Application", in August of 2005 in which Defendant SIMONE, executed a personal guarantee at the bottom of the form. The guarantee stated that SIMONE "personally guarantees the payment of all bills incurred by the above mentioned company." The personal guarantee also provided that the purchaser would be liable for reasonable attorney's fees (not to exceed 20%), plus costs, in addition to the amount owed.

Thereafter, according to Zak, between August 2005 and February 2006, Plaintiff provided goods, services and materials with a value of \$29,813.26 to WILLIAMS, and that at no time did WILLIAMS complain about the quality of said services and materials. Plaintiff submitted invoices to WILLIAMS, copies of which are also annexed to the moving papers. WILLIAMS did not pay the invoices, nor, according to Zak, did they dispute the amount of the payments due.

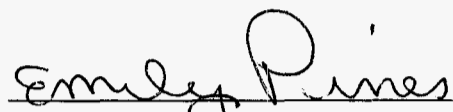
Plaintiff has thus demonstrated its *prima facie* entitlement to summary judgment on the first cause of action for goods sold and delivered, the second cause of action for an account stated, and the third cause of action for counsel fees, by the submission of invoices and billing statements and the Affidavit of the Secretary describing the transaction between the parties and the outstanding balance of \$29,813.26. *See, Eagle Work Clothes, Inc., v. Gent Uniform Rental Corp.*, 30 A.D.2d 562, 817 N.Y.S.2d 144 (2d Dept. 2006); *Becker v. Shore Drugs, Inc.*, 296 A.D.2d 515, 745 N.Y.S.2d 492 (2d Dept. 2002).

In opposition to the motion, Defendant submits an affidavit by Matthew Williams, president of the corporate Defendant. MR. WILLIAMS explains that WILLIAMS was the steel erection subcontractor to another corporate entity, Supermetal, Inc. ("Supermetal") and that Supermetal failed to pay WILLIAMS its subcontract balance. Since WILLIAMS was not paid by Supermetal, it is unable to pay Plaintiff. Although Mr. Williams claims Williams is "in the process of commencing an action against Supermetal", there is no evidence before the Court of the commencement of any third-party action or separate action on WILLIAMS' behalf. Clearly, failure of payment by the general contractor is not a defense to WILLIAMS' failure to pay for the goods sold and delivered by Plaintiff. Thus, WILLIAMS has failed to demonstrate any material issue of fact necessitating a trial and Plaintiff is entitled to judgment on these causes of action.

On the fourth cause of action on the personal guarantee, Plaintiff has also met its *prima facie* burden. The guarantee contained in the "Credit Application" is clear and unambiguous on its face, absolute and unconditional. Defendant Simone has failed to interpose any opposition to the motion and thus has failed to show fraud, duress or other wrongful act in its inducement as would be necessary to vitiate the agreement. *See, National Westminster Bank v. Sardi's Inc.*, 174 A.D.2d 470, 571 N.Y.S.2d 712 (1st Dept. 1991). Thus, Simone is liable under the personal guarantee for the amount due and owing Plaintiff plus attorneys' fees.

Submit judgment on ten (10) days notice of settlement.

Dated: March 15, 2007
Riverhead, New York



Emily Pines
J. S. C.