

**J. Kings Food Serv. Professionals, Inc. v Long
Is. Rests. 1, LLC**

2007 NY Slip Op 30871(U)

April 11, 2007

Supreme Court, Suffolk County

Docket Number: 0013932/2006

Judge: Peter Fox Cohalan

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 MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x	CALENDAR DATE: December 20, 2006
J. KINGS FOOD SERVICE PROFESSIONALS, INC.,	MNEMONIC: Mot D; XMD
Plaintiff,	<u>PLTF'S/PET'S ATTORNEY:</u>
-against-	HARRY BLOCK, ESQ.
LONG ISLAND RESTAURANTS 1, LLC, individually	305 Madison Ave.
and d/b/a DAMON'S GRILL and NAVINCHANDRA R.	New York, NY 10165
PATEL,	<u>DEFT'S/RESP ATTORNEY:</u>
Defendants.	MANMOHAN K. BAKSHI, P.C.
-----x	2 Mason Dr.
	Manhasset, NY 11030

Upon the following papers numbered 1 to 21 read on this motion for summary judgment and dismissal ; Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross-Motion and supporting papers 9-14 ; Answering Affidavits and supporting papers 15-18 ; Replying Affidavits and supporting papers 19-20 ; Other 21 ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiff, J. Kings Food Service Professionals Inc., for summary judgment pursuant to CPLR §3212 as against the corporate defendant, Long Island Restaurants 1, LLC d/b/a Damon's Grill (hereinafter Damon's) and the individual defendant as guarantor, Navinchandra R. Patel, is after due consideration by the Court granted as to the corporate defendant Damon's and judgment is awarded in the amount of \$51,876.81 with interest from May 9, 2006 along with costs and disbursements associated with this action; and denied as to the individual defendant and guarantor of the corporate debt, Navinchandra R. Patel, as there are readily identifiable factual issues raised which preclude summary disposition on the alleged guarantee signed by defendant, Navinchandra R. Patel. The cross-motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 on the grounds of jurisdiction is denied as untimely.

Plaintiff instituted this action against the defendants, for restaurant goods sold and delivered to the defendant Damon's between March 2006 and May 2006. Plaintiff claims that the defendant restaurant never complained about the deliveries or the quality of the merchandise until the institution of this lawsuit. Plaintiff now moves for summary judgment on its complaint seeking the amount of \$51,876.81 representing thirty (30) unpaid invoices from March 31 to May 9, 2006. Plaintiff's complaint alleges the first (1st) cause of action as against the corporate defendant and the second (2nd) cause of action against the individual defendant on his guarantee of the corporate debt.

Defendants oppose the motion arguing that the goods were of inferior quality and they were charged for “**goods that were out of stock, short, not delivered, defective or damaged**” yet provides no documentation to substantiate the claims or paperwork alleging complaints on the orders delivered. Defendant, Navinchandra R. Patel, also claims he never signed the guarantee of the corporate defendant’s debt and the signatory is a forgery. Defendants also cross-move for dismissal of the plaintiff’s complaint pursuant to CPLR §3211 (a) (8) on jurisdiction grounds and §3211 (a) (1) on documentary evidence grounds.

For the following reasons, plaintiff’s motion for summary judgment pursuant to CPLR §3212 is granted as to the corporate defendant Damon’s in the amount of \$51,876.81 with interest from May 9, 2006 along with costs and disbursements associated with this action and denied as to the individual defendant and guarantor of the corporate debt, Navinchandra R. Patel as there are readily identifiable issues of fact. Defendants’ cross-motion for dismissal pursuant to CPLR §3211 (a) (8) on jurisdiction grounds is denied as untimely pursuant to CPLR §3211 (e) and denied as to CPLR §3211 (a) (1) as there is no documentary evidence submitted by defendant to support the motion.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [VanNoy v. Corinth Central School, District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. DiSabato v. Soffee, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); Usefof v. Yamali, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). Here, in the case at bar, the corporate defendant has set forth the proof necessary to establish their entitlement to judgment as a matter of law on the account stated, the monies owed on the account and the failure to pay.

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 to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); Barrett v. General Electric Company, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); McCormack v. Graphic Machinery Services, Inc., 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). Here, in the instant case, the corporate defendant has failed to assemble or bare its proof to support a bare allegation or conclusion that the charges were for “**goods that were out of stock, short, not delivered, defective or damaged.**” The corporate defendant's failure to set forth any evidence to support these bare conclusions is fatal to its request to deny summary disposition to plaintiff on its first (1st) cause of action.

As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. V. Savino Oil and Heating Co. Inc. v. Rana Management Corp., 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); Dabney v. Ayre, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, Marine Midland Bank N.A. v. Idar Gem Distributors, Inc., 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). Accordingly, for the reasons set forth herein, plaintiff's motion for summary judgment pursuant to CPLR §3212 is granted as to the corporate defendant in the amount of \$51,876.81 with interest from May 9, 2006 along with costs and disbursements associated with this action and judgment is awarded in that amount.

As to that aspect of plaintiff's motion for summary disposition as to the individual defendant, that motion is denied. The individual defendant claims that he never signed a

guarantee of the corporate debt and that the signature appearing on the credit application is a forgery. Navinchandra R. Patel points out that under the proprietary information on the credit application his home address is listed as 150 Express Street in Plainview, Nassau County, New York, yet he has never resided at that location. He further states he is identified on the credit application as President of the corporate defendant Damon's, but he does not hold that position because the company is an LLC without a designation for president. There are sufficient factual issues raised by defendants' opposition and cross-motion to require a trier of fact to determine issues involving the circumstances around the affixing of the defendant's signature to the credit application as a guarantor of the corporate defendant's debt. Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. VanNoy v. Corinth Central School District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR §3212 on its second (2nd) cause of action as against the individual defendant is denied as there are readily identifiable factual issues raised which preclude summary disposition on the alleged guarantee signed by defendant, Navinchandra R. Patel.

The defendant's cross-motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(8) is denied as untimely. The defendants in their responsive pleading, i.e., answer dated and served on June 21, 2006, raised jurisdiction as a defense to the plaintiff's summons and verified complaint. Defendants did not move to dismiss based on jurisdictional grounds within the sixty (60) day requirement imposed by CPLR §3211 (e) and only cross-moved in response to the plaintiff's motion for summary judgment on the sixty-eighth (68th) day. Defendants assert no claim or excuse except to seek the Court's intervention to extend the time to assert the claim. There is no basis to excuse the defendants' delay, nor does there appear to be a legal basis within the papers submitted to find a lack of jurisdiction. The motion to dismiss on jurisdictional grounds is denied. As to the motion to dismiss under 3211 (a)(1) of documentary evidence, there is no documentary evidence submitted by the defendants to support the motion.

Accordingly, the defendants' cross-motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(1) and (a)(8) is denied in its entirety.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: April 11, 2007



J.S.C.