

Quadrozzi, Inc. v Petrillo Bldrs. Supply Co., Inc.

2007 NY Slip Op 31002(U)

April 19, 2007

Supreme Court, Queens County

Docket Number: 0015714/2005

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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QUADROZZI, INC. d/b/a NYCEMCO.,

Index No.:15714/05

Plaintiff(s),

Motion Date: 2/20/07

-against-

Motion Cal. No.: 15

PETRILLO BUILDERS SUPPLY CO., INC.,

Motion Seq. No.: 1

Defendant(s).
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The following papers numbered 1 to 8 read on this motion for summary judgment pursuant to CPLR § 3212 for: (a) an order granting NYCEMCO summary judgment on its First Cause of Action for goods sold and received, or alternatively, on its Second Cause of Action for account stated; and (b) dismissing defendant’s counterclaims for breach of contract and fraud.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	1
Memorandum in Support.....	2
Supplemental Affirmation.....	3
Answering Affirmation	4
Answering Affidavit	5
Answering Memorandum.....	6
Exhibits.....	7
Reply Memorandum.....	8

Upon the foregoing papers, plaintiff’s motion for summary judgment is denied.

This is an action for the recovery of a sum of money plaintiff claims is due and owed to it by defendant for the purchase of cement in 2004.

In its verified complaint, as and for a first cause of action (goods sold and delivered), plaintiff alleges that between November 15, 2004 and January 31, 2005, plaintiff furnished certain materials to the defendant, upon the agreed price and reasonable value of one-hundred fifty-seven thousand two-hundred fifty-two dollars and eighty-six cents (\$157,252.86) that demand has been made for that sum, but only \$21,027.60 has been paid and there is due and owing the sum of one-hundred-six thousand two-hundred twenty-five dollar and twenty-six cents (\$136,225.26) with interest from November 15, 2004. As and for a second cause of action (account stated), plaintiff alleges that an account was taken and stated between the plaintiff and defendant which showed a balance of one-hundred thirty-six

thousand two-hundred twenty-five dollars and twenty-six cents (\$136, 225.26) due and owing by the defendant to the plaintiff. No part of that sum of one-hundred thirty-six thousand two-hundred twenty-five dollars and twenty-six cents (\$136,225.26) has been paid, although duly demanded. By reason of the foregoing, NYCEMCO has been damaged in the amount of \$136,225.26 plus interest allowable by law.

Defendant denies the allegations contained in plaintiff's complaint, except to admit that plaintiff supplied certain materials for which defendant made partial payment. Defendant claims, however, that the statement of account is false and erroneous. Further, defendant counterclaims against the plaintiff for refusing to sell cement to defendant in mid 2004, as it relied upon plaintiff's assurances that it would continue to sell cement to defendant in accepting orders from its customers for concrete, which required cement.

In support of its motion, plaintiff concedes that it misstated the price of the cement and improperly billed. Nevertheless, plaintiff contends that it has adjusted the amount it seeks to recover. It further contends that defendant's counterclaims are without merit, that there is no breach of an oral contract because no contract existed, and that the counterclaim for fraud is unenforceable.

In opposition to the motion, defendant asserts the parties carried on their business relationship by means of oral agreements for years. The defendant is in the ready mix concrete business. An essential element in the product it sells is cement, which the defendant for many years purchased from the plaintiff. During these years of doing business with the plaintiff, the defendant was not limited in the amount of cement it ordered. The defendant ordered cement according to the needs and requirements of its business.

Each order of cement was an offer which the plaintiff accepted and pursuant to which delivery was made. Thus there was full performance on the part of the plaintiff of a contract which by its terms could be performed within one year.

This was the customary practice of the parties in their everyday business. It was not varied until mid year 2004 when the plaintiff without prior notice announced that it would no longer sell cement to the defendant. After the defendant protested the sudden curtailment of a vital product the plaintiff promised to sell the defendant a minimum of 150 tons of cement per week. This was a significant reduction in the amount of cement required to keep the defendant's business viable. The plaintiff never kept that promise. Without the assurance of a steady and constant source of cement, the defendant was ultimately forced to close its business.

Summary judgment is a drastic remedy and should not be granted when there is any doubt of the existence of a triable issue or where the issue is even arguable (Andre v Pomeroy, 35 NY2d 361 [1974]).

A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557 [1980]), and has the heavy burden of demonstrating the absence of a genuine issue of material fact on every relevant issue raised (Simon v Wohl, 93 AD2d 811 [2d Dept. 1983]). Anything less requires

a denial of the motion for summary judgment, regardless of the sufficiency of the in opposing papers (Yates v Dow Chemical Co., 68 AD2d 907 [2d Dept. 1979]).

Plaintiff's concession, the affidavits of Louis Petrillo, Jr. And John J. Meglio, Esq., officer and counsel of the defendant, respectively, and the deposition testimony of Mr. Petrillo, Dorothy Greco and John Quadrozzi, Jr.; raise questions of fact regarding the extent of sums owed, the validity of and duties owed under any oral agreements, and whether defendant was defrauded.

Based on the foregoing, plaintiff's motion for summary judgment is denied.

Dated: April 19, 2007

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LAWRENCE V. CULLEN, J.S.C.