

Israel Discount Bank of N.Y., IDB Factors Div. v Marc Blackwell, Inc.
2007 NY Slip Op 32789(U)
September 4, 2007
Supreme Court, New York County
Docket Number: 0118360/2006
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**

PART 1

Index Number : 118360/2006 **J.S.C.**

ISRAEL DISCOUNT BANK OF

vs

MARC BLACKWELL INC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 118360/06

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision and order.*

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

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

SEP 4 2007

Dated: _____

MARTIN SHULMAN **J.S.C.**

Check if appropriate: DO NOT POST
Check one: FINAL DISPOSITION

REFERENCE **J.S.C.**
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
ISRAEL DISCOUNT BANK OF NEW YORK,
IDB FACTORS DIVISION,

Plaintiff,

Index No.: 118360/06

-against-

DECISION/ORDER

MARC BLACKWELL, INC. and MARCOL C.
BLACKWELL,

Defendants.

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Israel Discount Bank of New York, IDB Factors Division ("plaintiff" or "IDB"), moves for summary judgment on its complaint predicated upon defendant Marc Blackwell, Inc.'s ("MBI") alleged default under a factoring agreement dated May 28, 2004 (the "agreement" at Exh. C to motion) entered into between IDB and MBI and defendant Marcol C. Blackwell's ("Blackwell") guarantee of MBI's obligations thereunder. The first and second causes of action seek damages for breach of contract and account stated against MBI; the third cause of action seeks judgment against Blackwell under the terms of the guaranty; and the fourth cause of action seeks attorneys' fees in accordance with the agreement's terms against MBI and Blackwell (collectively "defendants"). Defendants oppose the motion.

Pursuant to the agreement, IDB purchased MBI's accounts receivable and advanced funds to MBI. IDB was to collect upon such receivables directly from MBI's customers and charged MBI a commission for its services. Under the agreement, plaintiff was to issue MBI monthly account statements reflecting all transactions under the agreement. Paragraph 9.1 of the agreement provides:

The Statement of Account shall be deemed correct and binding upon [MBI] and shall constitute an account stated between the parties unless IDB receives a written objection setting for specific exceptions, within thirty (30) days after the rendering of such Statement of Account. Such Statement of Account shall be deemed prima facie proof of the entries in each Statement of Account and may be admitted in evidence in any action relating hereto.

Plaintiff contends that MBI breached the agreement by wrongfully retaining proceeds in the amount of \$30,641.50 from a receivable that had been assigned to IDB (the "Cloisters invoice"). By letters dated June 27, 2006 and November 22, 2006, plaintiff declared a default and demanded that Blackwell, as guarantor, pay MBI's entire indebtedness. As reflected in IDB's statements of account for the period January 31, 2006 through November 30, 2006 (Exh. I to motion), as of November 30, 2006 a balance of \$77,908.75¹ was outstanding.

Defendants' answer essentially denies the complaint's allegations without asserting any affirmative defenses. In opposition to plaintiff's motion for summary judgment, defendants argue that: summary judgment is premature because no discovery has been conducted; MBI did not turn over the proceeds of the Cloisters invoice to IDB because IDB failed to advance funds to MBI on that invoice; as a result, there was no act of default to trigger acceleration of the debt owed to IDB; and the amount claimed is disputed.

¹ Plaintiff's complaint in this action was filed on December 12, 2006 and seeks \$78,158.75. In its reply to defendants' opposition, plaintiff acknowledges that the amount it seeks should be reduced to \$70,678.27 as a result of payments IDB received after it commenced this action. Marks Reply Aff. at ¶¶ 12-13.

Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986).

“An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other” [citations omitted]. *Shea & Gould v. Burr*, 194 A.D.2d 369, 370, 598 N.Y.S.2d 261 (1st Dept., 1993). Either retention of bills without objection or partial payment may give rise to an account stated. *Morrison Cohen Singer & Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52, 786 N.Y.S.2d 155 (1st Dept., 2004); *Rosenman Colin Freund Lewis & Cohen v. Edelman*, 160 A.D.2d 626, 559 N.Y.S.2d 249 (1st Dept., 1990), *app. den.* 77 N.Y.2d 802, 567 N.Y.S.2d 643 (1991)(summary judgment granted on account stated cause of action where defendants received and retained plaintiff’s accounts without objection within a reasonable period of time and agreed to pay a portion of the indebtedness).

Here, IDB alleges and defendants do not dispute that they made no written objections to IDB's statements of account. As provided in paragraph 9.1 of the agreement, any dispute concerning the monthly account statements was to be specifically objected to in writing within 30 days thereof, and the failure to so object would render the accounting fully binding on MBI. It is undisputed that MBI never made any such written objections to IDB's monthly account statements. Under these circumstances, defendants fail to establish any triable issue of fact and plaintiff's motion for summary judgment on its complaint is hereby granted. *See, e.g., Congress Talcott Corp. v. Damino Accessories, Inc.*, 166 A.D.2d 152, 560 N.Y.S.2d 289 (1st Dept., 1990); *George S. May Int'l Co. v. Thirsty Moose, Inc.*, 19 A.D.3d 721, 796 N.Y.S.2d 196 (3rd Dept., 2005).

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent of granting summary judgment in favor of plaintiff and against defendants Marc Blackwell, Inc. and Marcol C. Blackwell, jointly and severally, in the amount of \$70,678.27, plus interest at the statutory rate from the date hereof² as calculated by the Clerk of the Court, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

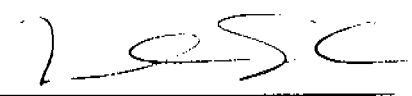
ORDERED that plaintiff's fourth cause of action seeking the recovery of attorney's fees is severed and an assessment thereof is directed; and it is further

² Plaintiff's motion does not indicate the manner in which interest due under the agreement is to be calculated.

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 300), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the proper fees, if any, to place this action on the appropriate trial calendar for the assessment directed herein.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
September 4, 2007



Hon. Martin Shulman, J.S.C.

FILED
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