

**Maersk Customs Servs., Inc. v Design America  
Import Corp.**

2007 NY Slip Op 32926(U)

September 18, 2007

Supreme Court, New York County

Docket Number: 0601867/2006

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Index Number : 601867/2006  
MAERSK CUSTOMS SERVICES  
vs  
DESIGN AMERICA IMPORT  
Sequence Number : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. 601867/2006  
MOTION DATE 6-27-07  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

TI \_\_\_\_\_ were read on this motion to/for (Carque/sj)

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAGES NUMBERED
<u>1-3</u>
<u>4-8</u>
<u>9-11</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in  
accordance with the annexed memorandum decision  
and order.

*NB id) 22/07 Paetreal Corp at 28th  
see end of decision.*

**FILED**

SEP 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/18/07

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

MAERSK CUSTOMS SERVICES, INC.,

Plaintiff,

INDEX NO. 601867/2006

-against-

DESIGN AMERICA IMPORT CORP.  
d/b/a PARADIGM EXCLUSIVE,

DECISION and ORDER

Defendant.

**FILED**

-----X

JANE S. SOLOMON, J.

SEP 19 2007

NEW YORK  
COUNTY CLERK'S OFFICE

This is an action to collect fees for customs brokerage and freight forwarding services provided by Maersk Customs Services, Inc. ("Plaintiff") to Design America Import Corp. d/b/a Paradigm Exclusive ("Defendant"). Defendant moves to vacate this Court's March 9, 2007 Order that struck its Answer. Plaintiff cross-moves for summary judgment. For the reasons described herein, the motion is granted and the cross-motion is denied.

Plaintiff provided customs clearance services for Defendant, which sells table top items, many of which are imported. Plaintiff alleges that Defendant owes \$60,725.81 for such services as evidenced by 17 invoices dated between February

10, 2005 and May 26, 2005. Plaintiff also contends that on or about May 26, 2005 it rendered an account stated to Defendant.

On or around May 26, 2006 Plaintiff commenced this action demanding payment for its services with interest from May 26, 2005. In its Verified Answer, Defendant alleged that it paid all sums owed to Plaintiff and counterclaimed for breach of contract, negligence and Plaintiff not honoring certain credits allegedly granted.

After Defendant failed to respond to discovery requests, Plaintiff moved to preclude on or around January 10, 2007 under motion sequence 001. The motion was submitted on March 6, 2007, and on March 9, 2007, I granted it "on Defendant's default after 2 stipulated adjournments," struck Defendant's Answer and precluded Defendant from offering evidence at trial or inquest. I further ordered Plaintiff to serve the Note of Issue within 30 days of entry or make a properly supported motion for dispositive relief within a further 30 days. Pursuant to that Order, Plaintiff filed the Note of Issue and an inquest was scheduled for May 7, 2007.

On or around April 27, 2007 Defendant served a Motion for Reconsideration returnable on May 11, 2007, which is, in essence, a motion to vacate its default in opposing Plaintiff's discovery motion. Defendant's counsel takes responsibility for

defaulting on Plaintiff's motion, contending that his son experienced a serious injury and that "extraordinary traffic" delayed his arrival in court. With Defendant's motion, the discovery responses are provided as is a copy of a March 5, 2007 affidavit seeking a further adjournment of motion 001. The discovery responses include contemporaneous writings objecting to Plaintiff's bills, including a response for Plaintiff's audit.

On May 7, 2007, I adjourned the inquest *sine die*, and entered an Order that (1) adjourned Defendant's motion to June 20, 2007; (2) provided that Plaintiff would cross-move for dispositive relief; (3) allowed Defendant to respond on the merits notwithstanding the March 9, 2007 Order; and (4) allowed each side to reply to each other's motions, all of which had to be submitted by June 20, 2007. In the event, both motions were submitted on June 27.

In his Affidavit opposing the cross-motion, Seth Lissak, a director and manager of Defendant, alleges that Defendant paid some of the claimed amounts and that the parties made numerous agreements over improper charges, so that the amount outstanding is \$18,315.87, before being offset by any counterclaims. He itemizes his contentions and also submits email correspondence wherein Plaintiff apologizes for delays and agrees to not bill Defendant for problems caused by Plaintiff.

In the response to the auditing inquiry in January 2006, Defendant claimed that it owed Plaintiff nothing because of "delinquent service, mismanagement of accounting, [and] failure to provide proper service."

#### Discussion

"A defendant seeking to vacate a default judgment on the ground of excusable default bears the burden of demonstrating both a justifiable excuse for the default and a meritorious defense." Long Island Minimally Invasive Surgery, P.C. v. Lester, 12 Misc.3d 1183A (App. Term, NY County, 2006). Although "extraordinary traffic" in and of itself normally would not qualify as a justifiable excuse, given Defendant's counsel's extraordinary circumstances, it is clear that the default was not intentional. In addition, Defendant has demonstrated a meritorious defense. Accordingly, the March 9, 2007 Order is vacated, Motion 001 is restored and denied. In the normal course, the Note of Issue would be vacated, but it appears that no discovery remains so that the inquest should be converted to a full trial. If either party seeks a deposition of the other, same shall be arranged forthwith.

A motion for summary judgment "shall be granted if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as

a matter of law in directing judgment in favor of any party." CPLR § 3212(b). The test is whether there are any remaining issues of fact to be resolved. Hartford Accident & Indemnity Co. v. Wesolowski, 33 N.Y.2d 169 (1973).

Plaintiff's first cause of action is for payment for services rendered. Although Defendant admits that it owes some amount, it has submitted evidence calling into question the amount owed, and whether there are offsets to it. As a result, Plaintiff is not entitled to summary judgment on this cause of action.

Plaintiff would be entitled to recover on its second cause of action for an account stated if the evidence demonstrated that "Defendant received plaintiff's invoices for service rendered, and retained them without objecting in a reasonable amount of time." Federal Express Corp. v. Federal Jeans, Inc., 14 A.D.3d 424 (1<sup>st</sup> Dep't 2005). An objection made five months after receipt of an invoice has been held to be untimely. See Spectra Audio Research, Inc. v. 60-86 Madison Ave. Dist. Mgmt. Ass'n, 267 A.D.2d 23 (1<sup>st</sup> Dep't 1999).

However, the rendition of an account after a history of disputes is not binding on the disputing party and Seth Lissak's Affidavit supports such a history. Although Defendant may have not objected to the account stated rendered on May 26, 2005 for several months, the repeated objections provided over

the course of the parties' relationship defeat Plaintiff's motion for summary judgment on this cause of action.

Accordingly, it hereby is

ORDERED that Defendant's motion is granted, the Order of March 9, 2007 is vacated and Motion 001 is denied; and it further is

ORDERED that Plaintiff's cross-motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY on October 22, 2007 at 2:00 PM for a pre-trial conference.

Dated: September 18, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

**FILED**  
SEP 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE