Oheka Mgt., Inc. v Home Theatre Interiors, LLC
2007 NY Slip Op 33564(U)
October 29, 2007
Supreme Court, Nassau County
Docket Number: 0365-05/
Judge: Stephen A. Bucaria

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

OHEKA MANAGEMENT, INC.,

Plaintiff,

INDEX No.020365/05

MOTION DATE: Oct. 3, 2007
Motion Sequence # 001

-against-

HOME THEATRE INTERIORS, LLC, HOME THEATRE INTERIORS, INC., AUDIO VIDEO CREATIONS, INC. and STEVEN JAVAHERIAN a/k/a STEVEN JAVA,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Supplemental Affidavit in Support..... X
Reply Affirmation X
Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR §3212 (a) granting plaintiff summary judgment against defendants Home Theatre Interiors, LLC and Home Theatre Interiors, Inc. on the causes of action contained in the complaint, and (b) for such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

> the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action. (**Singer v. Neri**, 820 N.Y.S.2d 96, 97, 2nd Dept., 2006) (citations omitted).

Additionally, "issue-finding, rather than issue-determination, is the key to the procedure." (**Sillman v. Twentieth Century-Fox Film Corp.**, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 1957).

The party opposing summary judgment cannot successfully raise triable issue of fact based on "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. (**A.H.A. General Const., Inc. v. New York City Housing Authority**, 92 N.Y.2d 20, 33, 677 N.Y.S.2d 9, 1998, quoting **Zuckerman v. City of New York**, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 1980).

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this court, which includes the pertinent pleadings, deposition transcripts and other relevant data.

The defendant is the proper defendant in this action. The plaintiff has established, by documentary evidence, that the only entity, inactive or otherwise, with the name Home Theatre Interiors is defendant Home Theatre Interiors, LLC. Additionally, the contract lists the corporate address of defendant Home Theatre Interiors, LLC. Furthermore, the defendant never moved for a judgment on the ground that there was a lack of jurisdiction over the defendant within the sixty days, as prescribed by CPLR § 3211(e). As a result, defendant has waived their affirmative defense raised in their answer to the complaint. (see Siegel, New York Practice, 4th Ed., p.456).

Moreover, the defendant is the responsible party. The defendant has not submitted evidence relieving it of the duty of "reasonable care and competence owed generally by

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FACTS

On or about February 2004, with some additions in July 2004, Oheka Management, Inc. (hereinafter "Okeha") purchased an audiovisual system from Home Theatre Interiors (hereinafter "Home Theatre") for the purchase price of $86,000, which included installation of said audiovisual equipment.

The system was required to be operational for an event scheduled for July 18, 2004 at Oheka, although no mention of this date appears in the contract between Oheka and Home Theatre. Home Theatre does not dispute this date.

The plaintiff contends that the defendant breached the contract by not properly installing or maintaining the system. The plaintiff contends that because of this failure, it was left with no alternative but to hire other technicians to complete the set-up and to repair any and all alleged improper servicing and installations.

The defendant contends there are triable issues of fact regarding: whether plaintiff is suing the correct entity; whether the problems associated with the audiovisual equipment was in fact due to plaintiff's architect's, Richard Diller, choice in actual equipment; and also whether this contract was for just a sale of goods or whether it was the sale of design and engineering services, with the incidental sale of goods, summary judgment should be denied.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Department, in **Singer v. Neri**:

> A party moving for summary judgment must make a **prima facie** showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Once such a **prima facie** showing has been made, the burden shifts to

practitioners in the particular trade or profession ..." (**Milau Associates v. North Ave. Development Corp.**, 42 N.Y.2d 482, 486, 398 N.Y.S.2d 882, 1977). Also, the defendant shows no evidence that demonstrates that the plaintiff's architect was an expert in audiovisual systems and how his design could have led to malfunctioning equipment.

The defendant's last contention that the contract is not for simply a sale of goods but instead is for sale of design and engineering services, with the incidental sale of goods, is incorrect. Under case precedent though, if "there is nothing to indicate that defendant was to perform any services other than installing [the equipment] and making it operational[,]" then it "was a sale of goods, not a service-oriented transaction and therefore it is covered under the contract." (**Word Management Corp. v. AT & T Information Systems, Inc.**, 135 A.D.2d 317, 321, 525 N.Y.S.2d 433, 3rd Dept, 1988). As long as the services include installing and ensuring the goods sold are installed and operating properly, the contract is for sale of goods. (See **Back O'Beyond, Inc. v. Telephonic Enterprises, Inc.**, 76 A.D.2d 897, 2nd Dept, 1980).

Additionally, "[s]ince there was no formal written contract between the parties, only the order / bill is available to indicate how the parties saw their transaction." (**Villette v. Sheldorado Aluminum Products, Inc.**, 2001 WL 881055, N.Y. Sup., 2001). However, the contract discusses the variety of audiovisual equipment that Oheka purchased from Home Theatre, as well as the installation that Home Theatre will perform. Additionally, the defendant guaranteed a warranty for on-site parts and labor for this job was to be one year's time from date of purchase. This purchase date occurred on or about July 12, 2004 when the plaintiffs sent their initial payment to the defendant. The contract therefore covered the improperly installed and malfunctioning equipment at issue.

The defendant does not produce any evidence to show they complied with this contract, except for its unsubstantiated allegations about the malfunctions being the plaintiff's fault. As a result, it did not raise any triable issues of fact.

CONCLUSION

This court holds plaintiff has met its burden of proof establishing that defendant is liable herein. In return, the defendant has not set forth any material issues of fact that would defeat summary judgment. Plaintiff's motion for summary judgment is **granted** on the first cause of action for $150,000, the second cause of action for $86,000 and the third cause of action for $150,000, all with interest from July 12, 2004.

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This constitutes the Order and Judgment of this Court.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So ordered.

Dated OCT 29 2007

XXX J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE