

Ideal Cut Melee Corp. v Janmark, Inc.

2007 NY Slip Op 33774(U)

November 11, 2007

Supreme Court, New York County

Docket Number: 0603324/2006

Judge: Louis B. York

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

PRESENT: YORK

PART 2

Justice

Index Number : 603324/2006

IDEAL CUT MELEE CORP.

vs.

JANMARK INC.

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO. 603324-06

MOTION DATE 10/19/07

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

re read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED BY THE COURT WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

NOV 26 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 11/19/07

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----X
IDEAL CUT MELEE CORP.,

Plaintiff,

Index No. 603324/2006

-against-

DECISION/ORDER

JANMARK, INC.,

Defendant.
-----X

Louis B. York, J.S.C.:

In this case, plaintiff seeks money allegedly due to it from defendant for the delivery of diamonds to defendant. In the complaint, plaintiff also asks for contractual interest of 1.5% per month (18% per annum); \$1,000,000 based on defendant's alleged fraud (fourth cause of action); late fees; and, reasonable attorney's fees allegedly awardable under the contract (sixth cause of action).

Defendant's answer challenges the contentions in the complaint. Defendant alleges that plaintiff agreed to accept \$201,709.15 as full payment of its claim against defendant. As a first counterclaim, defendant asserts that the parties had agreed to create a line of jewelry as a joint venture, and to share the profits. Moreover, defendant counterclaims for \$100,000 for work and labor, in both quantum meruit and unjust enrichment grounds (second and third counterclaims).

In its decision on an earlier motion in this case, the Court granted summary judgment to plaintiff on its contractual claim, awarding judgment of \$62,341.10 with interest from August 7, 2006. Included in this award were the late fees as well. However, the court found that issues of fact precluded judgment on defendant's joint venture counterclaim. The court also found a

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question of fact as to what, if any, costs are awardable to defendant. In addition, the court found an issue of fact as to whether attorney's fees were recoverable here.

Now, both parties move for summary judgment on the remaining claims and counterclaims. Both motions are denied. "On a motion for summary judgment, the court's function is to determine whether material factual issues exist, not to resolve such issues A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." Baker v. D.J. Stapleton, Inc., 43 A.D.3d 839, -, 841 N.Y.S.2d 382, 383 (2nd Dept. 2007)(citations and internal quotations omitted). To prevail, therefore, the proponent of the motion must show that it is entitled to judgment as a matter of law. Carpenter v. Morrette, 36 A.D.3d 1115, 1116, 829 N.Y.S.2d 246, 247 (3rd Dept. 2007).

Here, no one has satisfied this burden. Plaintiff argues that it is entitled to judgment because there is no documentary evidence of the joint venture agreement. However, in the Court's experience with such lawsuits, in the jewelry business parties often operate without written contracts, billing each other upon the delivery and/or sales of goods. The evidence before the Court here is in keeping with this standard practice. That is, plaintiff has not provided evidence of a contract for the sale and delivery of the diamonds, and has not produced any signed document here showing the terms of the understanding between the parties. Instead, plaintiff has provided copies of invoices, which comports with the Court's above-stated understanding of the jewelry business. Moreover, the conflicting affidavits of the parties provide evidence that supports each parties' claim. Thus, there are credibility issues which should be determined by the fact finder, see Auble v. Doyle, 38 A.D.3d 1264, 1265-1266, 832 N.Y.S.2d 715,716 (4th Dept. 2007), and the absence of

a written contract does not, by itself, require dismissal of the counterclaim.

As for the other evidence, it is inconclusive. The Court also notes that the parties' use of exclamation points and upper case, and their negative comments about each other, has absolutely no persuasive value at all. Instead, the Court admonishes counsel for both sides to keep the tenor of the lawsuit more professional and courteous.

Finally, part of the cross-motion seeks an order of preclusion based on alleged discovery failures. However, it is not clear from the papers whether this issue was outstanding at the time this motion and cross-motion were submitted to the Court. This prong of the cross-motion therefore is resolved to the extent of ordering both sides to provide all outstanding discovery within 45 days of entry of this order. In the event that either party fails to comply, a new motion to preclude may be brought, annexing a copy of this order with notice of entry and all other pertinent materials.


Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is denied except to the extent that both sides must provide all outstanding discovery within 45 days of entry of this order, or risk preclusion.

Dated: 11/19/07

ENTER:



LOUIS B. YORK
J.S.C.

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NOV 26 2007
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