Hitachi High Tech. Am., Inc. v Riangle Elecs. Group Inc.
2007 NY Slip Op 33969(U)
November 27, 2007
Supreme Court, Suffolk County
Docket Number: 0004347/2005
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX # 04347-05
RETURN DATE: 11-8-06
MOT. SEQ. # 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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HITACHI HIGH TECHNOLOGIES AMERICA, INC.,

Plaintiff,

-against-

TRIANGLE ELECTRONICS GROUP INC.,

Defendant.
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CALENDAR DATE: May 2, 2007
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

ANES ,FRIEDMAN, LEVENTHAL & BALISTRERI
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Upon the following papers numbered 1 to ____ read on this motion for summary judgment _____; Notice of Motion/Order to Show Cause and supporting papers _____; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiff, Hitachi High Technologies America, Inc., for summary judgment pursuant to CPLR §3212 on its complaint seeking $49.020.00 for goods and services delivered to the defendant, Triangle Electronics Group, is, after careful consideration, hereby denied in its entirety as there are material issues of fact which preclude summary judgment as a matter of law.

The plaintiff instituted this action seeking damages in the amount of $49,020.00 plus interest from February 3, 2001 and costs and disbursements for goods sold and delivered to the defendant. The plaintiff is a foreign (Illinois) corporation doing business in New York and sold and delivered electronic components on January 4, 2001 to the defendant at its business located at 1900 Ocean Avenue in Ronkonkoma, Suffolk County on Long Island, New York.

The defendant interposed an answer and stated that it was a distributor of electronic components and ordered the parts in question through the plaintiff's authorized representative, Strategic Sales Incorporated (hereinafter "SSI"), on behalf of a client. The defendant claims that its client cancelled the order and it immediately contacted SSI and cancelled the order which was confirmed in a communication with a representative of SSI, Sheldon Lewis (hereinafter Mr. Lewis). The defendant was advised that it would receive a Return Merchandise Authorization form from the plaintiff to return the merchandise. The defendant claims that, notwithstanding repeated assurances from Mr. Lewis, the plaintiff's authorized sales representative, that the cancellation was effective, the plaintiff instituted the

present lawsuit. The defendant avers that the parts are still in their original packaging and awaiting pickup at the defendant's location. The plaintiff claims that the cancellation is ineffective and that the defendant is liable for the merchandise.

The plaintiff now moves for summary judgment pursuant to CPLR § CPLR §3212 on its complaint seeking $49.020.00 for the electronic goods and services delivered to the defendant, claiming, as a matter of law, there are no factual disputes to preclude summary judgment. The defendant argues that it cancelled the order and that this was confirmed by the plaintiff's authorized sales representative and, therefore, there are material issues of fact as to the debt, if any, owed to the plaintiff and that this warrants a denial of summary disposition and a trial of the action before a trier of fact.

For the following reasons, the plaintiff's motion for summary judgment, pursuant to CPLR §3212, is hereby denied in its entirety as there are readily identifiable issues of fact which preclude summary disposition.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, and after looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as

required, [***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact on the issue of cancellation and whether there is, in fact any monies owed since the order was cancelled and the merchandise is unopened and available for return but the plaintiff refuses to accept a return of the merchandise.

While the plaintiff attempts to assert a claim that the UCC §2-602(1) provides a purchaser seeking to reject merchandise must do so in a reasonable time after delivery, the plaintiff ignores the fact that the defendant argues that its customer cancelled its order on December 27, 2000 and that the defendant cancelled the order on that same day to Mr. Lewis of SSI, who was the authorised sales representative of the plaintiff. The plaintiff does not disavow that Mr. Lewis or SSI is an authorised sale representative of the plaintiff or that there was a cancellation but argues that once the defendant received the merchandise at its location, the defendant was liable to pay for it. The Court does not accept this analysis by the plaintiff since the defendant made clear in its averments that it was awaiting a Return Merchandise Authorization form from the plaintiff and that the merchandise remains unopened in its original packaging. The defendant also notes that the delay in all these proceedings with regard to the merchandise, its return and the lawsuit was a "foul up" by the plaintiff's collection agency which failed to note the phone area code changes from 516 to 631 for Suffolk County and the resultant delays.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, with the readily identifiable fact issues set forth above involving the cancellation, the failure to dispute the communications with SSI, disavow their actions or that they are the plaintiff's authorised sales rep, the defendant has set forth sufficient material factual issues requiring resolution by the trier of fact and the plaintiff's motion for summary judgment on this account stated lawsuit is denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: November 27, 2007

J.S.C.