

**Hart Systems, Inc. v Tommy Hilfiger Retail, Inc.**

2007 NY Slip Op 34333(U)

December 31, 2007

Supreme Court, Suffolk County

Docket Number: 0000339/2007

Judge: Martin J. Kerins

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 07-11-07  
ADJ. DATE: 08-16-07  
MOT. SEQ: 002-Mot D

**PRESENT:**

Hon. MARTIN J. KERINS  
J.S.C.

-----X	
HART SYSTEMS, INC.,	: ADAM L. BROWSER, ESQ.
	: Ruskin, Moscou, Faltischek, P.C.
	: Attorneys for Plaintiff
Plaintiff(s),	: <b>Hart Systems, Inc.</b>
	: 1425 Rex Corp Plaza
	: East Tower, 15 <sup>th</sup> Floor
- against -	: Uniondale, New York 11556
	:
TOMMY HILFIGER RETAIL, INC.,	: <b>IRA S. SACKS, ESQ.</b>
	: Dreier, LLP
Defendant(s).	: <b>Mark S. Lafayette, Esq.</b>
-----X	: <b>Melanie J. Sacks, Esq.</b>
	: Attorneys for Defendant
	: <b>Tommy Hilfiger Retail, Inc.</b>
	: 499 Park Avenue
	: New York, New York 10038

Upon the following papers numbered 1 to 28 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 13-24; Replying Affidavits and supporting papers 25-28; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (seq 002) by defendant, Tommy Hilfiger Retail, Inc., to dismiss part of the complaint by plaintiff, Hart Systems, Inc., pursuant to CPLR 3211(a)(1) and (7), is decided herein; and it is further

**ORDERED** that movant shall serve a copy of this Order with Notice of Entry upon counsel for the plaintiff, pursuant to CPLR 2103(b)(1), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

*Hart Systems, Inc. v Tommy Hilfiger Retail, Inc.*

Index No: 0039-2007

Page two of four

Plaintiff, Hart Systems, Inc., and defendant, Tommy Hilfiger Retail, Inc., entered into a written agreement on October 29, 1996. Pursuant to the contract plaintiff was to provide defendant with scanning equipment, software and hardware, procedures and supplies in order to enable defendant to conduct a physical inventory two times a year. Plaintiff would provide between 408 and 550 scanning devices at an initial rate of \$115.90 for the first day of use and \$16.35 for each day thereafter. The contract also set out the rates for other equipment and supplies that would be provided by plaintiff. Plaintiff provided equipment and services for defendant's inventories that were conducted in March and September of 1997. The contract further provided that it would be automatically renewed annually unless it was canceled in writing by June 30<sup>th</sup>. The parties executed an addendum to the contract in May 2001.

The addendum increased the number and cost of the scanning devices plaintiff was to provide. It also extended the period of automatic renewal of the contract to two years unless canceled in writing by either party by June 30<sup>th</sup> of the year immediately prior to the contract's expiration. It is undisputed that plaintiff provided services to defendant through September 2006.

However, by letter dated June 23, 2006, defendant notified plaintiff that it was terminating the agreement. Plaintiff contends that this purported termination was not timely since the contract was not scheduled to expire until December 31, 2007. In fact, plaintiff argues that pursuant to the terms of the contract and addendum, defendant's notification would have to have been sent by June 30, 2005, in order to be effective for the 2007 inventories. Since it was not sent until June 23, 2006, defendant was responsible for the contractual minimum commitment for the March and September 2007 inventories.

Upon receiving the notice of termination, plaintiff then reviewed all its accounts with defendant. This review revealed errors in its prior billings. In January 2007, Plaintiff sent defendant corrected invoices for prior services rendered from June 2001 through September 2006. Plaintiff also sent invoices for what it alleged was the contractual minimum commitment for the March and September 2007 inventories.

Plaintiff thereafter commenced this action alleging breach of contract. Defendant now moves to dismiss that portion of the plaintiff's complaint pursuant to CPLR 3211(a)(1), i.e., on the ground that a "defense is founded upon documentary evidence". Defendant's motion first addresses plaintiff's claim regarding the correction invoices. Defendant argues that such claim is barred by the doctrine of account stated.

Defendant also seeks to dismiss that portion of the complaint regarding invoices for the September 2007 inventory. It acknowledges that the addendum was clear in its terms providing for renewal of the contract in two year terms. However, Defendant notes that the first term in the addendum expressly included the Fall 2001, Spring 2002, Fall 2002 and Spring 2003 inventories. Accordingly, defendant argues that the renewal terms ended on June 30, 2005 and on June 30, 2007,

**Hart Systems, Inc. v Tommy Hilfiger Retail, Inc.**

Index No: 0039-2007

Page three of four

respectively. Therefore, its June 23, 2006 written termination letter, effectively ended defendant's contractual obligations with plaintiff on June 30, 2007.

Plaintiff counters that defendant's termination notice was not timely and, therefore, was ineffective regarding either the Fall or Spring of 2007 inventories. Therefore, it submitted invoices to defendant for what it alleged to be the contractual minimum commitment for the March and September 2007 inventories. Plaintiff also sent defendant corrected invoices for its prior inventories.

The defendant's motion to dismiss plaintiff's claim with respect to the "correction invoices" presented to defendant in January 2007 is granted. These correction invoices included approximately \$775,007.63 additional charges for the time period of June 2001 through September 2006. Defendant contends that these were items and services previously billed by plaintiff, Hart Systems, Inc., and fully paid by defendant. Defendants argue that these additional sums are barred by the doctrine of account stated.

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869, lv denied 82 N.Y.2d 660). Such an agreement, in turn, "may be express or . . . implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (*Jim-Mar Corp. v Aquatic Constr.*, *supra* at 869). Although a cause of action for account stated will fail "[w]here either no account has been presented or there is any dispute regarding the correctness of the account" (*M & A Constr. Corp. v McTague*, 21 AD3d 610, 611-612), "[s]ilence is deemed acquiescence and warrants enforcement of the implied agreement to pay" (*Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431).

An account stated, even when pleaded as a defense or proved on the trial, is not conclusive as a settlement, if mistake or other equitable considerations are shown to impeach it (*Hopwood Plays v Kemper*, 263 N.Y. 380, 385). The burden of impeaching an account for fraud or mistake rests upon the party who seeks to repudiate it. However, it is clear that an account rendered becomes an account stated, enforceable as a contractual agreement between the parties, when its correctness is assented to by the receiving party. (*see, Little v McClain*, 134 AD197). Moreover, any objection must be made within a reasonable period of time to the invoices or statement being received. A retention of them without objection gives rise to an enforceable account stated.

Under the facts presented here, plaintiff had the obligation to correct any error in the billing invoices it sent within a reasonable time of their receipt and retention by defendant. Yet, it was not until January 2007 that plaintiff sent the "correction invoices" for billings it had sent between June 2001 through September 2006. It is undisputed that those invoices were accepted and paid by defendant. Clearly, plaintiff did not correct its mistake in a reasonably diligent manner or period of time

**Hart Systems, Inc. v Tommy Hilfiger Retail, Inc.**

Index No: 0039-2007

Page four of four

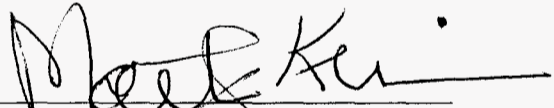
Further, plaintiff's assertion that relief can not be granted because defendant seeks to dismiss only a portion of plaintiff's single cause of action is unavailing. It is undisputed that plaintiff's complaint asserts one cause of action for breach of contract. However, that cause of action consists of three separate and distinct parts, i.e., the correction invoices for the years 2001 to 2006, the claim for the March 2007 inventory, and the claim for the September 2007 inventory. In that regard, when a portion of a single cause of action is logically severable, a motion to dismiss may be directed to that portion alone (*see, Myer v. Myer*, 271 AD 465; *Forse v Turner*, 55 Misc.2d 810).

The second portion of defendant's motion seeks a dismissal of the cause of action regarding the claim for the September 2007 inventory. As defendant asserts, the clear and unambiguous interpretation of the Addendum executed by the parties demonstrates that plaintiff's claim for the September 2007 inventory must be dismissed.

The Addendum provided for the renewal of the 1996 contract in two year terms commencing with the Fall 2001 inventory. Further, the first term of the Addendum expressly included the Fall 2001, Spring 2002, Fall 2002 and Spring 2003 inventories. Pursuant to Paragraph 4(f) of the Addendum, the first day of the extension of the contract was July 1, 2003. Obviously therefore, any further renewals would be on July 1, 2005 and July 1, 2007. Furthermore, the Addendum provided that its terms would prevail if a conflict arose between the Addendum and original agreement. Under these circumstances, defendant's notice of termination on June 23, 2006, was effective in ending its obligations to plaintiff after the March 2007 inventory as of July 30, 2007, i.e., prior to the July 1, 2007 renewal which would include the Spring 2007 inventory.

In light of the foregoing, defendant's motion which is based on CPLR 3211(a)(1) is granted as to those portions of the single cause of action in plaintiff's complaint. The remaining portion of the complaint dealing with the March 2007 inventory is severed and shall continue

Dated: December 31, 2007  
RIVERHEAD, NY

  
\_\_\_\_\_  
Martin J. Kerins, J. S. C.

FINAL DISPOSITION \_\_\_\_\_

NON-FINAL DISPOSITION   i