

RJM2, Ltd. v Gordon & Ferguson, Inc.

2008 NY Slip Op 30130(U)

January 4, 2008

Supreme Court, New York County

Docket Number: 0600699/2007

Judge: Marcy S. Friedman

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

PRESENT: Hon. Marcy S. Friedman

PART 57

Justice

RJM2, LTD

INDEX NO. 600699/07

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Gordon + Ferguson

The following papers, numbered 1 to _____ were read on this motion ~~is~~ for summary judgment

Notice of Motion / and cross motion ~~Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~ ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 2a, 2b
3, 4
5, 6
M1, M2

Cross-Motion: Yes No

Memorandum of Law

Upon the foregoing papers, it is ordered that this motion & cross motion are determined pursuant to decision/order dated 1-4-08

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

FILED

JAN 16 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1-4-08

[Signature]
Hon. Marcy S. Friedman *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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

RJM2, LTD.,

Plaintiff,

- against -

GORDON & FERGUSON, INC., et al.,

Defendants.

Index No.: 600699/07

DECISION/ORDER

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

_____ x
This action arises out of a contract for a sale of goods by plaintiff RJM2, Ltd. ("RJM") to defendant Gordon & Ferguson, Inc. ("Gordon"). Gordon's factor, defendant Capital Business Credit LLC ("Capital"), moves for summary judgment dismissing the complaint against it. Plaintiff cross-moves for summary judgment against Gordon for the relief sought in the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman v City of New York, *supra*, at 562.)

As to Capital, the complaint pleads a sole cause of action for tortious interference with

contract. Interference with contractual relations “consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff.” (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993].)

The complaint alleges that Capital may have induced Gordon to alert the Bank of America to refuse to pay a letter of credit based on a discrepancy between the bill of lading and the letter of credit, and thereby to have caused Gordon to avoid its obligation to pay RJM for the goods. (Complaint, ¶¶ 10-11.) It is undisputed that the goods were delivered to California, although the letter of credit conditioned payment on delivery to New Jersey. Thus, even if Capital were involved in the decision not to waive the discrepancy – a fact it denies – it would have been entitled to insist on strict enforcement of the terms of the letter of credit. Moreover, “[a]s long as the bank dishonored the letter [of credit], the reason for dishonor is irrelevant to defendant’s obligation to pay.” (Samsung Am., Inc. v Yugoslav-Korean Consulting & Trading Co., 248 AD2d 290, 291 [1st Dept 1998].) Capital’s alleged interference with the payment of the letter of credit therefore cannot support the claim of tortious interference with contract.

Plaintiff also fails to make any showing that discovery may lead to evidence necessary to oppose Capital’s motion (see e.g. Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338 [1st Dept 1987]; Simpson v Term Indus., Inc., 126 AD2d 484 [1st Dept 1987]), or that Capital’s motion should otherwise be denied.

Plaintiff does, however, demonstrate its entitlement to partial summary judgment as to liability against defendant Gordon. The purchase orders provided for delivery “FOB: China.” Gordon does not dispute that this term required plaintiff to deliver the goods to a port in China or that the goods were delivered to Gordon’s carrier in China. While Gordon seeks to avoid

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summary judgment based on its assertion that it never took delivery of the goods once they reached the United States, Gordon ignores settled law that, based on the FOB term, title passed to it upon delivery of the goods to its carrier in China. (See Chase Manhattan Bank v Nissho Pac. Corp., 22 AD2d 215, 221 [1st Dept 1964], affd 16 NY2d 999 [1965] [“The general rule is that upon a sale ‘f.o.b the point of shipment,’ title passes from the seller at the moment of delivery to the carrier.”][internal quotation marks omitted].) Nor does Gordon dispute that RJM promptly demanded payment directly from it after the letter of credit was dishonored, as permitted by Uniform Commercial Code § 2-325(2). Under these circumstances, Gordon fails to raise a triable issue of fact as to its liability for payment for the goods.

While plaintiff thus demonstrates its entitlement to summary judgment as to liability, its allegations as to its damages are conclusory. A hearing will therefore be necessary to ascertain plaintiff's damages.

It is accordingly hereby ORDERED that Capital's motion for summary judgment is granted to the extent of dismissing the complaint against it; and it is further


ORDERED that RJM's motion is granted to the extent of awarding RJM summary judgment against Gordon as to liability, and directing an assessment of damages; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment herein above directed.

This constitutes the decision and order of the court.

Dated: New York, New York
January 4, 2008

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE


MARCY FRIEDMAN, J.S.C.