

**CPL Furs N.Y., Inc. v Milano Studio Furs, Inc.**

2008 NY Slip Op 30229(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0600587/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Justice

Index Number : 600587/2007

CPL FURS NEW YORK

VS.

MILANO STUDIO FURS

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 600587-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

are read on this motion to/for Summary judgment

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 by plaintiff for summary judgment is decided in accordance with the attached memorandum decision.

**FILED**

JAN 28 2008

NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 1/22/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----X

CPL FURS NEW YORK, INC.,

Plaintiff,

INDEX NO.  
600587/07

-against-

Motion Seq: 001

MILANO STUDIO FURS, INC.,

Defendants.

-----X

**DORIS LING-COHAN , J.:**

Plaintiff CPL Furs New York, Inc. (CPL) moves pursuant to CPLR 3212 (a), for summary judgment on 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 "succinctly 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 a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 [1985]). To grant summary judgment it must be clear that no material and triable issue of fact is presented (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility (*Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 [1<sup>st</sup> Dept 1990]).

CPL is engaged in the business of selling fur and leather

garments, and defendant Milano Studio Furs, Inc. (Milano) is engaged in the business of buying and selling fur and leather garments. It is undisputed that, from 2000 to 2006, pursuant to contracts between them, CPL shipped fur and leather goods to Milano. Some of those shipments were outright sales to Milano; others provided goods on consignment. It is also undisputed that, between December 2003 and December 2006, CPL shipped goods to Milano and that Milano has neither paid for those goods nor returned any of them. CPL claims that the amount of \$94,022.31, is currently outstanding.

In an affidavit submitted in opposition to plaintiff's motion, Zvi Lamberti, a principal of Milano, avers that "Milano conducted business with CPL from 2000 to 2006. During that time, Milano customarily received an 8% discount off the price of the merchandise." [¶4, Affidavit, Exh. A, Affirmation in Opposition]. Mr. Lamberti further avers that he made that pricing agreement with George Papageorgiou, the president of CPL, and Alexandros Lykouriotis, the former manager thereof, and that, but for that agreement, he would not have entered into a contract with CPL. Mr. Lamberti also indicates that Milano "never received any statements regarding the outstanding balances" and thus disputes plaintiff's claim based upon an account stated. [¶¶7 & 8, Affidavit, Exh. A, Affirmation in Opposition].

In reply, plaintiff has submitted two unnotarized affidavits; one from Mr. Papageorgiou and the other from Milana Yampolsky, the executive secretary and comptroller of CPL. Plaintiff's counsel

explains that Ms. Yampolsky was travelling in Russia at the time that reply papers were due and that she could not have her affidavit notarized by that time, and that Mr. Papageorgiou, who lives in Greece, could not get to a United States consulate to obtain an apostille in time, but that properly notarized affidavits from both Ms. Yampolsky and Mr. Papageorgiou will be forthcoming; to date, however, properly notarized affidavits have not been supplied to the Court. Since the reply papers are not in proper form, they have not been considered. Moreover, even if such reply papers were considered, as explained below, such papers do nothing more than confirm that there is a factual dispute between the parties as to whether Milano was to receive a discount on its purchases; this factual issue goes to the credibility of the parties, which cannot be determined on a motion for summary judgment (*Dauman Displays, Inc. v. Masturzo*, 168 AD2d at 205).

In her unnotarized affidavit, Ms. Yampolsky states that, while CPL did, at times, give Milano discounts, no discounts were agreed to in connection to the goods at issue here, and that discounts could not be a material term of the contract because, when CPL had approved discounts to Milano, it had done so only after payment for goods was already due. Mr. Papageorgiou states in his unnotarized affidavit that, while he had entered into pricing agreements with Mr. Lamberti in the past, neither he nor any other employee or agent of CPL agreed to give Milano a discount for the goods delivered between December 2003 and December 2006. Mr. Papageorgiou further states that, in the course of negotiations

with Mr. Lamberti in December 2006, he discussed a discount in connection with an immediate payment by Milano of the sum to be agreed upon, but that no agreement was reached, and the settlement discussions were abandoned. According to Ms. Yampolsky, Mr. Lykouriotis ended his employment with CPL before any of the goods, payment for which is at issue here, were shipped.

However, as it is not disputed by Milano that goods were in fact delivered by CPL which remain unpaid for, and as Milano is only disputing the amount of money claimed by CPL, plaintiff's motion for summary judgment is granted as to liability, and the issue of damages shall be determined at a hearing, upon the filing of a note of issue.

**FILED**

JAN 28 2008

Accordingly, it is hereby

NEW YORK  
COUNTY CLERK'S OFFICE

ORDERED that the motion for summary judgment is granted as to liability, and the issue of damages shall be determined at a hearing to be held on March 11, 2008 at 10 AM, Part 36, Room 279, 80 Centre Street, provided that plaintiff files a note of issue, courtesy copy to be sent to Part 36 Clerk with copy of this order attached on top; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: January 22, 2008



Hon. Doris Ling-Cohan, J.S.C.