

Bokara Rug Co. v Mashih

2008 NY Slip Op 30876(U)

March 18, 2008

Supreme Court, New York County

Docket Number: 0117804/2006

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 : 117804/2006

BOKARA RUG

VS.

MASHIHI, VICTOR

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 11780406

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits

3

Replying Affidavits

4

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, granted as to liability only.*

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

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NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/08

[Signature]
HON. DORIS LING-COHAN

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: PART 36

-----X

BOKARA RUG CO., INC.,

Plaintiff,

-against-

Index No. 117804/06

Motion Seq. No.: 001

VICTOR MASHIHI AND SUPER CARGO, INC.,

Defendants.

-----X

Doris Ling-Cohan, J.:

Plaintiff Bokara Rug Co., Inc. moves, pursuant to CPLR § 3212, for summary judgment against both defendants, in this action to recover sums allegedly due following a sale of oriental rugs and carpets. Plaintiff also moves to strike all of defendants' nine affirmative defenses.

Plaintiff claims that, on February 22, 2006, the parties entered into a contract whereby plaintiff provided rugs to defendants to sell. It is not disputed that defendants took rugs from plaintiff, and that defendants have failed to pay for at least some part of the sale price of the rugs. Plaintiff's first cause of action seeks \$56,671.23, and its second cause of action seeks \$51,885.71.

In an affidavit in opposition, defendant Victor Mashihi (Mashihi), defendant Super Cargo Inc.'s (Super Cargo) president, claims that he met with plaintiff's principal, John Soleimani,

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for the purpose of obtaining rugs from plaintiff for sale on consignment at a Going Out of Business Sale. Mashihi claims that at plaintiff's recommendation, defendants hired non-party Frank Asef (Asef) to manage the sale. Mashihi claims that Asef pressured him into accepting some rugs on consignment from plaintiff for inclusion in the sale, and that those rugs were included in the sale.

According to Mashihi, the parties agreed that plaintiff would give Super Cargo a 25% discount on all rugs it sold. Mashihi alleges that the agreement was later revised, with plaintiff agreeing to give defendants a discount of 10% discount on invoices paid monthly until the conclusion of the sale, and a final 15% at the end of the sale, after all the rugs had been sold.

Mashihi claims that Super Cargo sold \$151,791.91 worth of rugs. Of this total, defendants allegedly paid plaintiff \$97,253.24, which took into account the 10% discount. Then, applying the 15% discount, Mashihi claims that the total amount due to plaintiff was \$29,000 (apparently a rounded figure). Of this amount, Mashihi claims to have made a final payment to plaintiff of \$27,000 (a figure rounded down from the check attached, which is for \$27,058.33). Mashihi Aff., attachment. As a result, Mashihi declares that this final payment "leav[es] at best a sum due plaintiff of \$2,000." Mashihi Aff., at

unnumbered page 3. Mashihi claims that, looking at the complaint, the amount that plaintiff claims defendants owe plaintiff fails to credit defendant for the 15%, and that plaintiff has apparently rescinded the agreed-upon 10% as well. Thus, defendants argue that there are questions of fact concerning how much, if anything, defendants owe plaintiff, and that the motion is premature, since discovery is not yet complete. In opposition, defendants do not address the issue of their affirmative defenses.

In response, Asef vigorously denies that the payment of \$27,058.33 was made to plaintiff, claiming instead that the check represented money due to him personally for his services in managing the sale. He claims to be an independent contractor who assists businesses in financial difficulty to liquidate their wares. Asef stresses that he did not act as an agent of plaintiff to receive monies due plaintiff, and that "[n]ot one penny of the \$27,058.33 was for goods of any kind." Asef Aff., at unnumbered page 2. It is noted that the check for \$27,058.33 is made out to Asef Co., while the other checks produced by defendants are made out to Bokura Rug Co. Mashihi Aff., attachments.

Further, and more pointedly, plaintiff claims that "[a]ll of the calculations set forth in the Mashihi Affidavit are nothing more than a figment of Mashihi's active imagination," and that

"[t]here was absolutely no agreement to provide Defendants any discounts for monies due and owing." Asef Aff., unnumbered page 3. Plaintiff does suggest that it should receive judgment for the "at best" \$2,000 that defendants admit they may owe plaintiff. Mashihi Aff., unnumbered page 3.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See *Alvarez v Prospect Hotel*, 68 NY2d 320 (1986); *Kesselman, supra*.

There are clear questions of fact in this case with respect to the amount of damages barring the granting of summary judgment to plaintiff, in its entirety. There is a question as to whether defendants were entitled to any discounts, and the amount of money due plaintiff following the sale is also disputed. The role Asef played in the matter is in dispute as well. The court declines to grant summary judgment at this time for \$2,000, as this figure is based on disputed sums allegedly due plaintiff, and it would be best that these sums, if any, be reconciled at

trial rather than awarded in a piecemeal fashion. However, as it is undisputed that defendants owe some amount of money to plaintiff, summary judgment is granted to plaintiff on the issue of liability; the amount of damages shall be determined at a hearing on damages, after discovery, upon the filing of a note of issue.

Defendants do not dispute plaintiff's right to an order striking defendants' affirmative defenses. The defenses are (1) payment in full; (2) failure to state a cause of action; (3) failure of consideration; (4) waiver; (5) estoppel; (6) failure to mitigate damages; (7) laches; and (9) accord and satisfaction.

Defendants have offered no argument as to the validity of any of these defenses. Payment in full is not an affirmative defense; it is a denial made in response to an allegation. Failure to state a cause of action is "mere surplusage which serves no purpose in an answer" *Tache-Haddad Enterprises v Melohn*, 224 AD2d 213, 214 (1st Dept 1996). There is no support or explanation for the defenses of failure of consideration, waiver, estoppel, failure to mitigate damages or laches, which all seem to have been included in the amended answer without thought as to the application of these defenses to the particular action at hand. An accord and satisfaction is effected when "the parties have made a new contract discharging all or part of their obligations under the original contract." *Narendra v Thieriot*,

[*7]
41 AD3d 442, 443 (2d Dept 2007). Certainly, no such discharge has taken place in the action at hand.

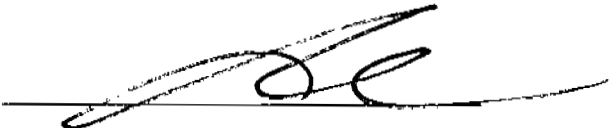
Accordingly, it is

ORDERED that the part of plaintiff Bokara Rug Co., Inc.'s motion seeking summary judgment on the complaint is granted on the issue of liability; and it is further

ORDERED that the part of plaintiff's motion seeking to strike defendants' affirmative defenses is granted, and the defenses are hereby stricken from the answer; it is further

ORDERED that the parties shall complete discovery as to damages, expeditiously; plaintiff shall file a note of issue prior to May 26, 2008.

Dated: 3/18/08


Hon. Doris Ling-Cohan

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