

Sonopress UK Ltd. v Xandron, Inc.

2008 NY Slip Op 31403(U)

May 15, 2008

Supreme Court, New York County

Docket Number: 0104763/2007

Judge: Carol R. Edmead

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

PRESENT.

CAROL EDMEAD

Justice

PART 35

Index Number : 104763/2007
SONOPRESS UK LTD
VS.
XANDROS, INC.,
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO.

104763-07

MOTION DATE

5/14/08

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

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

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of plaintiff Sonopress UK Ltd. for summary judgment in its favor as against defendant Xandros, Inc. is **granted**; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff as against defendant in the amount of \$52,301.00, with interest from December 28, 2006 and continuing on the unpaid principal balance at the rate of 9% per annum until the date of judgement, and statutory interest thereafter, plus costs for a total sum of \$ _____, to be calculated by the Clerk; and it is further

ORDERED that defendant's cross motion is **denied**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

Dated:

5/15/08

[Signature]

CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

PAPERS NUMBERED
FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

SONOPRESS UK LTD.,

Plaintiff,

-against-

XANDRON, INC.,

Defendant.

EDMEAD, J.S.C.

Index No. 104763/07

DECISION/ORDER

FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff Sonopress UK Ltd. ("plaintiff") moves for an order pursuant to CPLR 3212, granting summary judgment in its favor as against defendant Xandron, Inc. ("defendant"), on the basis of account stated.

Defendant cross moves for an order compelling plaintiff to respond to defendant's omnibus discovery demands.

Plaintiff's Contentions

Both plaintiff and defendant are foreign corporations authorized to do business in New York. Defendant is indebted to the plaintiff for the agreed and reasonable sum of \$52,301. plus interest from December 28, 2006, for goods sold and delivered through July 4, 2006, at the defendant's special instance and request.

On December 28, 2006, plaintiff mailed to the defendant a statement of account which statement was retained by the defendant, without objection thereto, thereby creating an account stated.

Defendant's Opposition and Cross Motion

Plaintiff has failed to respond to defendant's outstanding discovery demands. And, plaintiff has failed to appear for deposition. It is prejudicial to defendant for the court to consider plaintiff's discovery motion before defendant obtains responses to the outstanding discovery.

Further, there are material questions of fact with respect to defendant's fourth, sixth and seventh affirmative defenses.

Plaintiff is a packaging production company. Defendant is in the business of, among other things, developing software desktop server platforms, management tools and applications. Defendant engaged plaintiff to print retail boxes for the shipment of defendant's product.

In early 2006 defendant's representatives complained to plaintiff about the fact that plaintiff's production of boxes was delayed which, in turn, delayed defendant's production and launch schedule for its desktop computer, German edition. On numerous occasions plaintiff delayed delivery dates which caused severe problems between defendant and its clients.

Defendant has no record of receiving plaintiff's document captioned "statement of account" and the three invoices annexed thereto.

Plaintiff's Reply

Nowhere in defendant's affidavit does it state that defendant cannot oppose the motion for summary judgment due to the lack of discovery.

The defendant has not denied receiving and accepting delivery of the goods sold and delivered by plaintiff to defendant with the sum due and owing.

The defendant states that in early 2006, defendant's representative complained to plaintiff about delays in production. The representative who allegedly made the complaint is not

identified and the statement in the defendant's affidavit is clearly hearsay. Details of the alleged complaint are completely lacking.

And, defendant merely makes a conclusory statement that the deliveries were late, without raising material facts to establish late delivery.

Defendant claims to have no record of receiving the statement of account. That is not the same as a denial of receipt of the statement of account.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172

[1st Dept 1999)].

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562).

Account Stated

An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§ 5-7). In the case of an existing indebtedness, the agreement may be implied as well as express (*cf. Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, *revg* 62 AD2d 1165). An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167, 567 NYS2d 704, 705 [1st Dept 1991]). If he admits it to be correct it becomes a stated account and is

binding on both parties (*Rodkinson v Haecker*, 248 NY 480 [1928]). If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167; see *Rodkinson v Haecker*, 248 NY 480 [1928]). An agreement may also be implied if the debtor makes partial payment. The partial payment is considered acknowledgment of the correctness of the account (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 399 NYS2d 222 [1st Dept 1997] [where defendant made partial payment of this account, such payment constituted an acknowledgment of the validity of the bill, thereby establishing it as an account stated]; *Rik Shaw Assoc. v Bronzini Shops*, 22 AD2d 769, 253 NYS2d 596 [1st Dept 1964]). An attorney may contract with his client on the cost of his past or future services, of course, and an account stated may exist between them (*Rodkinson v Haecker*, *supra* at 485, 489; *Parker Chapin Flattau & Klimpl v Daelen Corp.*, *supra*).

It is well settled that where an account is made up and rendered, the one who receives it is bound to examine it, and, if the accounting is admitted as correct, it becomes a stated account and is binding on both parties, the balance being the debt which may be sued for and recovered by law (*Rosenman Colin Freund Lewis & Cohen v Neuma*, 93 AD2d 745 [1st Dept 1983]). Moreover, where an account is rendered showing a balance, if the party receiving the account fails to dispute its correctness or completeness, that party will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165 [1st Dept 1991]).

In the instant case, plaintiff has established entitlement to summary judgment based on account stated. Plaintiff has established that defendant is indebted to the plaintiff for the agreed

and reasonable sum of \$52,301. plus interest from December 28, 2006, for goods sold and delivered through July 4, 2006, at the defendant's special instance and request. Plaintiff has established notice of demand.

Defendant's conclusory, unsubstantiated denials are insufficient to overcome plaintiff's entitlement to summary judgment. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Defendant failed to submit the affidavit from the alleged employee who made complaints concerning the goods; failed to submit documentation of complaints such as e-mail or letters; failed to establish that its delivery schedule was delayed due to plaintiff's actions. This is information, if it exists, is in the possession, knowledge and control of defendant.

Although a motion for summary judgment may be denied if the facts essential to establish opposition "may exist but cannot then be stated" (CPLR 3212[f]), "[m]ere hope that somehow the [defendant] will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, NYLJ Jan. 18, 2005 p 26 col 3, citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [1987]).

And, the mere hope that evidence sufficient to refute defendant's liability may be obtained during discovery does not fulfill defendant's obligation to demonstrate the likelihood of such disclosure (*see Steinberg v Abdul*, 230 AD2d 633 [1966]; *Jones v Gamera*y, 153 AD2d 550 [1989]). Accordingly, that discovery has not been completed is insufficient reason to deny plaintiff's motion for summary judgment (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]).

Finally, the bald denial of a record of receipt of demand is wholly insufficient in the face of evidence of said demand having been made.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of plaintiff Sonopress UK Ltd. for summary judgment in its favor as against defendant Xandros, Inc. is **granted**; and it is further

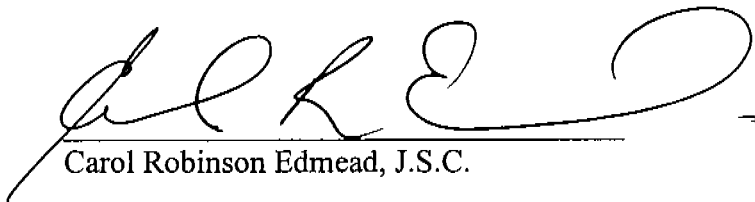
ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff as against defendant in the amount of \$52,301.00, with interest from December 28, 2006 and continuing on the unpaid principal balance at the rate of 9% per annum until the date of judgement, and statutory interest thereafter, plus costs for a total sum of \$ _____, to be calculated by the Clerk; and it is further

ORDERED that defendant's cross motion is **denied**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

This constitutes the decision and order of this court.

Dated: May 15, 2008



Carol Robinson Edmead, J.S.C.

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MAY 20 2008
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NEW YORK