

Core Mark Intl. v World Confections Inc.

2008 NY Slip Op 32157(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0101500/2006

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUE

PART 15

Index Number : 101500/2006
CORE MARK INTERNATIONAL
vs.
WORLD CONFECTIONS
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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 *is denied on account*
with the accompanying renewal papers.

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

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/21/08

WALTER B. TOLUE 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
NEW YORK COUNTY - - PART 15

CORE MARK INTERNATIONAL,
Plaintiff,

Index No.: 101500/06

- against -

DECISION/ORDER

WORLD CONFECTIONS INC.,
Defendant.

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER J. TOLUB, J.:

In this action, plaintiff Core Mark International seeks to recover approximately \$70,000, which it claims it paid in error to defendant World Confections Inc. More particularly, plaintiff, a wholesale distributor of items such as groceries, candy and tobacco products to convenience stores, alleges that it mistakenly made payments to defendant, a supplier of candy, that were intended as payment for purchase orders to another supplier, Alpha Baking Company (Alpha), a company unrelated to defendant. The complaint asserts causes of action for breach of contract and account stated. Defendant now moves to dismiss the complaint pursuant to CPLR 3126, based on plaintiff's failure to comply with court-ordered discovery. In the alternative, defendant seeks an order compelling plaintiff to provide additional discovery, and to strike the note of issue. Plaintiff cross-moves for summary judgment for the relief sought in the complaint.

In support of its motion, defendant claims that plaintiff failed to fully respond to defendant's document request and

failed to comply with a court order dated September 21, 2007. Defendant annexes a copy of a compliance conference order dated September 21, 2007, which states, in pertinent part: "Plaintiff to produce documents responsive to 9/10/07 letter from Defendant on or before 11/02/07." Marx Aff. in Support of Motion to Dismiss, Ex. F. In the September 10, 2007 letter, defendant requests "a ledger sheet showing the full record of billings by and payments to our client." Id., Ex. E. Defendant asserts that plaintiff failed to produce any documents in response to that letter or the September 21, 2007 court order.

However, a compliance conference order dated November 30, 2007 states that "[p]laintiff has produced all documents demanded." Id., Ex. I. A compliance conference order dated January 11, 2008 further provides: "The Court has determined that the Court's Case Management Order of Nov. 30, 2007 has been complied with. However, Defendant seeks additional documents and shall file a motion to compel same by January 31, 2008."

Thus, to the extent that defendant moves to dismiss or for other sanctions based on a failure to comply with court orders, the motion is denied. Although defendant argues that the compliance conference orders of November 30, 2007, and January 11, 2008, were based on misrepresentations by plaintiff, it makes no showing that it raised any issues about plaintiff's production of documents at the November 30, 2007 conference, or that it

otherwise objected to anything contained in the two court orders. Further, to the extent that defendant seeks to challenge the court's orders, its remedy was, as it suggests to plaintiff (Marx Aff. in Further Support of Motion to Dismiss and in Opp. to Cross-Motion, ¶ 3), to seek to have the orders vacated.

Defendant also moves to compel the production of documents requested at plaintiff's deposition, which are categorized by defendant as: 1) documents evidencing that plaintiff is qualified to do business in New York; 2) documents evidencing a contract between the parties; 3) documents showing all billings by and payments to defendant during the entire period of the parties' business relationship; and 4) records showing that the claims in this action belong to plaintiff. Marx Aff. in Support, ¶ 18(b).

CPLR 3101(a) provides that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action." It is well settled that the words "material and necessary" are to be interpreted liberally to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 406 (1968).

Here, the documents identified above in items 2 and 3 are

documents that were also the subject of the above-referenced court orders, notably, documents showing all billing by and payments to defendant. Although it is not disputed that plaintiff's claim rests on five payments made to defendant in April and May 2003 which, plaintiff asserts, were not made in response to any invoices or bills from defendant, but were in response to bills from Alpha, defendant argues that it needs to see all billing and payment records to ascertain whether there are amounts due on invoices from defendant which would offset the erroneous payments made by plaintiff.

Contrary to plaintiff's contention, the fact that defendant did not include set-off as a defense in its answer does not preclude defendant from opposing the motion or seeking discovery based on that defense, where, as here, plaintiff has shown no prejudice from defendant's failure to plead the defense. See Bank of New York v River Terrace Assocs., LLC, 23 AD3d 308 (1st Dept 2005). In September 2007, defendant sent to plaintiff a list of invoices which it claimed were unpaid. Marx Aff. In Support, Ex. E. In its opposition to plaintiff's cross motion for summary judgment, defendant also submits copies of numerous invoices issued to plaintiff, totaling approximately \$85,000, for which defendant claims it did not receive payment. In reply, plaintiff correctly points out that the invoices attached to defendant's opposition papers contain a number of duplicate

invoices, and thus the total amount of the annexed invoices is approximately \$44,000. While plaintiff claims that it paid the invoices, plaintiff acknowledges that it was unable to provide copies of cancelled checks or other proof of payment. In view of the dispute over payment of the subject invoices, defendant's request for documents evidencing proof of payment is material and relevant to its defense, and the motion to compel with respect to these documents should be granted.

As to the demand for documents showing that plaintiff is authorized to do business in New York, and that the claims in this action belong to plaintiff, defendant argues that this information is relevant to whether plaintiff has a legal right to bring the instant lawsuit. In the absence of any opposition by plaintiff to these requests, the motion to compel with respect to these document requests also should be granted. In view of the de minimus amount of discovery outstanding, the branch of the motion which seeks to strike the note of issue is denied.

Turning to plaintiff's cross motion, 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 the 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, 49 NY2d at 562. If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226, (1st Dept 2002).

In support of the cross-motion, plaintiff submits an affidavit from Jutta Bryant, plaintiff's accounts payable manager, who attests that in April and May 2003, plaintiff made five payments in error to defendant in the amount of \$70,600.28, that these payments should have been paid to Alpha, and that she contacted defendant in an effort to have the money returned. Bryant Aff. In Support, ¶¶ 4-9. Ms. Bryant also states that all invoices from defendant were paid except a few in the total amount of \$4,697.77, and that her "understanding is that these are still part of the bankruptcy proceeding." Id., ¶ 10. Ms. Bryant adds that plaintiff is also seeking to recover \$1,463.24 for "overpayments on goods ordered or refunds due for goods which arrived damaged." Id., ¶ 12.

Defendant, in opposition, does not dispute that plaintiff may have mistakenly made some payments to it. Rather, as noted

above, defendant claims that it is entitled to a set-off based on unpaid invoices.

In reply, plaintiff claims that the invoices submitted by defendant were all paid, and plaintiff provides a list of check numbers which purportedly correspond to payments for the invoices in question. By its own admission, however, plaintiff did not submit copies of the checks or other proof of payment. In view of plaintiff's acknowledgment that some payment may be due to defendant, and in the absence of proof of payment, plaintiff fails to eliminate triable issues of fact as to whether there are outstanding amounts due to defendant which would constitute a set-off to the amount claimed by plaintiff. Further, although plaintiff also seeks reimbursement of payment made for allegedly damaged goods received from defendant, it submits no evidence to support that claim.

In addition, both sides make claims that some or all of the other party's claims were resolved as the result of a settlement agreement entered into by the parties in April 2005, during plaintiff's Chapter 11 bankruptcy proceedings. See Settlement Agreement and Mutual Release, Ex. A to Marx Aff. In Further Support of Motion to Dismiss and In Opposition to Cross-Motion. While defendant argues that plaintiff's claims were settled, plaintiff argues that its claims post-date its bankruptcy petition, and therefore are not part of the April 2005 settlement

with defendant. Plaintiff also argues that defendant's claims for unpaid invoices were part of the settlement. However, neither side has adequately addressed its respective claims with respect to plaintiff's bankruptcy proceedings, so as to eliminate triable issues of fact as to which of the instant claims, if any, were settled during plaintiff's bankruptcy proceedings.

Accordingly, it is

ORDERED that defendant's motion is granted to the extent that, within 20 days from the date of service of a copy of this order with notice of entry, plaintiff shall produce the following: documents, including checks, showing payments made to defendant for the invoices identified in defendant's opposition to the cross motion (see Aff. of Matthew Cohen, Ex. A); documents showing that plaintiff is qualified to do business in New York; and documents evidencing that the claims in the instant action belong to plaintiff; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: 7/31/08



WALTER B. TOLUB, J.S.C.

FILED
AUG 01 2008
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