

DeBijou, Inc. v Bachouro

2008 NY Slip Op 32246(U)

August 4, 2008

Supreme Court, New York County

Docket Number: 0102625/2008

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

Justice

Index Number : 102625/2008

DEBIJOU, INC.

vs

BACHOURO, BERNARD

Sequence Number : 001

SUMMARY JUDGMENT

C

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 decided in accordance with accompanying memorandum decision and order.

FILED

AUG 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/14/08

HON. CHARLES E. RAMOS 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: COMMERCIAL DIVISION
-----X
DeBIJOU, INC.,

Plaintiff,

Index No.

-against-

102625/08

BERNARD BACHOURA and
ELBA JEWELRY, INC.,

Defendants

FILED
AUG 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Charles Edward Ramos, J.S.C.:

Plaintiff DeBijou, Inc. (hereinafter "Plaintiff") moves for partial summary judgment as to liability pursuant to CPLR § 3212 on its first cause of action for amounts due and owing under theories of account stated and breach of contract against Defendants Bernard Bachoura (hereinafter "Bachoura") and Elba Jewelry, Inc. (hereinafter "Elba") (collectively "Defendants").

BACKGROUND

Plaintiff is a seller of diamonds and jewelry. Bachoura is the Vice President of Elba, which is also a seller of diamonds and jewelry.

On or around January 21, 2008, at a trade show in Florida, Nitin Goenka (Goenka), President of DeBijou, met with Bachoura and negotiated the sale of diamonds to Elba. Plaintiff alleges that the agreement was for a sale of the diamonds to Elba. (see Affidavit of Nitin Goenka, ¶ 3). However, Defendants allege that the agreement was to accept Plaintiff's diamonds for review and inspection only. (see Affidavit of Bernard Bachoura, ¶ 2).

Plaintiff delivered the diamonds to Elba on January 24, and January 25, 2008, and issued three separate invoices. The three orders were shipped via Federal Express to Elba. The jewelry was worth a total of \$102,737. Elba received all three shipments on January 25, and January 28, 2008. Each invoice stated that payment for the jewelry was to be made "NET 90 days" from the date of order, and that Elba's payments to Plaintiff were to be made by April 23, and April 24, 2008.

Prior to the sale of the diamonds, Bachoura signed a Credit Application Form. The form stated, that Bachoura would personally guarantee and promise to pay any obligations to Plaintiff for any indebtedness of Elba. (Exhibit G, annexed to Affidavit of Nitin Goenka). This guarantee was a continuing and irrevocable guarantee and indemnity to Plaintiff. (*id.*). The form also provided that interest at 2 percent per month would be paid on any unpaid balance after 30 days of receipt of invoice. (*id.*).

Plaintiff alleges that Defendants received the diamonds but, to date, have not paid Plaintiff for them. Defendants, on the other hand, allege that after receipt of the jewelry, and upon inspection of the diamonds, they determined that the diamonds were not of satisfactory quality. Therefore, on February 1, 2008, Bachoura informed Plaintiff of this, and also informed them that he was returning the diamonds. (see Affidavit of Bernard Bachoura, ¶¶ 4-5). Defendants used Malca-Amit USA (Malca), a courier service, to return the diamonds. After a couple of unsuccessful attempts, Malca delivered the diamonds back to Elba

on February 6, 2008. (Exhibit 5, annexed to Affidavit of Bernard Bachoura). Plaintiff, however, alleges that Defendants "have kept the goods." (see Affidavit of Nitin Goenka, ¶ 14).

Plaintiff instituted this action against Defendants, and asserts two causes of action: first, for amounts due and owing under theories of account stated and breach of contract, and second, for return of goods after inspection. Plaintiff now moves for partial summary judgment on its first cause of action.

Discussion

Summary judgment shall be granted "if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]). In practice, only where there are no material and triable issues of fact will the court grant summary judgment. (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt about the credibility of any testimony, the court shall not grant summary judgment, unless it is obvious that the issues are not genuine but feigned. (see *Calabrese v Childs*, 149 AD2d 557, 558 [2d Dept 1989]). "[T]he court will accept as true on a summary judgment motion the opposing party's evidence and any evidence of the movant that favors the opposing party." (*O'Sullivan v Presbyt. Hosp. in City of New York at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 100 [1st Dept 1995]). Under this standard, Plaintiff's motion for partial summary judgment is denied.

Plaintiff argues that its agreement with Defendant is for an 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." (*Zanani v Schwimmer*, 50 AD3d 445 [1st Dept 2008]). An account stated may exist if a party receives a statement of account and does not object to it within a reasonable amount of time. (*id.*). However, there can be no account stated if there is any dispute about the account. (*Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]).

In this case, Plaintiff argues that an account stated exists because Defendants did not object within a reasonable time to the three separate invoices that they received and signed. (see Affidavit of Nitin Goenka, ¶ 14). Defendants received the diamonds on January 25 and January 28, 2008. Payment for each invoice was due net 90 days from date of order, in this case, April 23 and April 24, 2008. On January 31, 2008, Defendants returned the diamonds via Malca. (see Exhibit 4, annexed to Affidavit of Bernard Bachoura). Returning the diamonds merely two days after the receipt of the third invoice is an objection within a reasonable period of time. (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002] [holding that an objection two months after the receipt of an invoice is within a reasonable period of time]). Plaintiff, however, denies that Defendant returned the diamonds. (see Affidavit of Nitin Goenka,

¶ 14).

Furthermore, on February 1, Defendants sent a letter stating their dissatisfaction with the diamonds and their intent to return them. Disagreement about the quality of the good or service produced constitutes a dispute concerning the account. (*Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169, 170 [1st Dept 2004] [holding that no dispute regarding the quality of goods, timeliness of delivery, or the amounts listed in invoices establishes an account stated]). For these reasons, remaining issues of fact concerning whether Defendants rejected the diamonds by returning them to Plaintiff requires a denial of the motion for summary judgment, insofar as the claim for account stated.

Plaintiff also argues that Defendants breached their contract. Under UCC §2-201(1), "[A] contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the parties . . ." Moreover, UCC §2-606(1)(b) states that an acceptance of goods occurs when the buyer fails to make an effective rejection. "An effective rejection must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." (UCC 2-602[1]).

Assuming *arguendo* that a valid contract had been formed, Defendants' timely rejection of the goods would be sufficient to

demonstrate that they did not breach the contract. According to Defendants, once they determined that the diamonds were not of satisfactory quality, Bachoura wrote a letter to Plaintiff on February 1, four days after he had received the diamonds, stating Defendants' dissatisfaction, and their intention to return the diamonds. Defendants had, in fact, returned the diamonds via Malca on January 31. The letter, along with the return of the diamonds, would constitute an explicit and reasonable notice of rejection of the goods. Plaintiff disputes Defendants' claim that they returned the diamonds. Triable issues remain as to whether Defendants returned the diamonds, Plaintiff's motion for summary judgment based on its breach of contract cause of action is denied.

Finally, determining whether Bachoura is personally liable for the cost of the diamonds need not be addressed at this time, because there is an issue of material fact as to whether Elba is indebted to Plaintiff. The language of the credit application form makes evident that Bachoura is personally liable only if it is determined that Elba is liable for the cost of diamonds. (see Exhibit G, annexed to Affidavit of Nitin Goenka).

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment is denied, and it is further

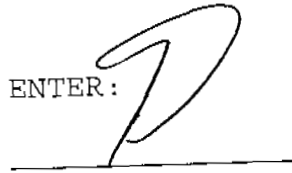
ORDERED that the action shall continue, and it is further

ORDERED that the parties shall contact the Part Clerk within 30 days of service of a copy of this order with Notice of Entry

for the purpose of scheduling a pre-trial conference.

Dated: August 4, 2008

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

HON. CHARLES E. RAMOS

FILED

AUG 12 2008

COUNTY CLERK'S OFFICE
NEW YORK