

Andre Romanelli, Inc. v Amazon.com

2008 NY Slip Op 32283(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0115324/2007

Judge: Louis B. York

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

LOUIS B. YORK

DECEMENT.

PART 2

J.S.C.
Justice

Index Number : 115324/2007

ANDRE ROMANELLI, INC.

VS.

AMAZON.COM

SEQUENCE NUMBER : # 001

STRIKE

INDEX NO. 115324-07

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on 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

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

FILED

MOTION IS DECIDED IN AUG 15 2008

WITH ACCOMPANYING MEMORANDUM

COUNTY CLERK'S OFFICE

NEW YORK

DECISION.

Dated: 8/13/08

Luy

LOUIS B. YORK *c.*

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: IAS PART 2**

-----X
ANDRE ROMANELLI, INC.,

Plaintiff,

Index No. 115324/07

-against-

AMAZON.COM,

Defendant.

-----X
LOUIS B. YORK, J.:

This is a motion to strike defendant's first, second, third, and fourth affirmative defenses. Plaintiff Andre Romanelli, Inc. brought an action to recover its costs of manufacturing 2,448 shirts for which defendant Amazon.com did not issue a purchase order and did not pay plaintiff. Amazon.com instead issued a purchase order for 1,224 shirts and paid for that order. Plaintiff alleges that a Buy Sheet Summary reflects a binding commitment with Amazon.com to purchase 3,672 shirts. Defendant contends that the only binding agreement was the order for 1,224 shirts set forth in the purchase order issued to Amazon.com.

Background

On September 6, 2006 plaintiff, Andre Romanelli, Inc. (Romanelli), and defendant, Amazon.com (Amazon), entered into an arrangement relating to the sale of shirts. Defendant generated a Buy Sheet Summary, a spreadsheet containing information such as the estimated dates of future purchases, the units in each purchase, and the costs.

According to the Buy Sheet Agreement Romanelli was to produce 3,672 shirts for a total of \$41,004. Neither party signed the Buy Sheet Summary. On December 26, 2006 defendant generated Purchase Order No. 2298703. The Purchase Order was for 1,224 units of the shirts described in the Buy Sheet Summary. Plaintiff then generated a Bill of Lading for defendant's purchase order on February 6, 2007, listing the names and addresses of Romanelli and Amazon and registering the 1,224 shirts contained in the package. An Amazon representative signed the Bill of Lading. Romanelli then sent defendant an invoice for \$13,668 on February 7, 2007 that was stamped "PAID" and not signed by either party.

Prior to the above events, on March 26, 2006, Irwin Peters, the president of Romanelli, signed Amazon's Vendor Terms and Conditions on behalf of plaintiff's sister company, Andre Romanelli International, Inc. The terms stated: "ANY ESTIMATES OR FORECASTS OF AMAZON'S FUTURE NEEDS ARE NON-BINDING AND AMAZON IS NOT LIABLE FOR ANY ACTIONS TAKEN BY VENDOR BASED ON ANY ESTIMATES." (capitalization in the original). This agreement related to a prior transaction that is not at issue in this case.

Discussion

The first affirmative defense is that Romanelli Inc. should not be paid for the 2,448 shirts that were described in the Buy Sheet Summary. Amazon contends that it does not have to pay Romanelli Inc. for the shirts because it never issued a purchase order for them and there is no other document or agreement that binds Amazon to pay for a future shipment. The Vendor's Terms and Conditions that Peters signed on behalf of

Romanelli International Inc., although not binding on Romanelli Inc., is evidence that Peters, who also is a principal of Romanelli Inc., was aware of Amazon's standard terms. In particular, he knew that Amazon did not treat a Buy Sheet Summary as a binding agreement. Plaintiff argues that the Vendor's Terms and Conditions is a requirement imposed on Romanelli International, Inc., not Romanelli Inc. Thus, by asserting this argument, plaintiff claims, Amazon wrongfully attempts to bind plaintiff to the terms of the written agreement between Amazon and Romanelli International, Inc.

Although Romanelli Inc. and Romanelli International Inc. are sister companies, they are, nevertheless, distinct entities and one is not bound by contracts signed on behalf of the other. Amazon argues that its Vendor Terms and Conditions is evidence of the general course of dealings because Peters, as president of Romanelli, Inc, signed the agreement. "[E]vidence of a trade usage or of a prior course of dealings may normally be utilized to supplement the express terms of a contract for the sale of goods." Woodcrest Fabrics, Inc. v. B & R Textile Corp., 95 A.D.2d 656, 660, 464 N.Y.S.2d 359, 362 (1st Dep't 1983) aff'd, 61 N.Y.2d 887, 474 N.Y.S.2d 481 (1984). Based on Peters' prior communications with Amazon and on Amazon's Vendor Terms and Conditions, there is factual evidence that Peters was aware that the Buy Sheet Summary was not a binding commitment but merely an estimate. Thus, the Court denies plaintiff's motion to strike defendant's first affirmative defense.

The second affirmative defense is that parties irrevocably consented to the venue and exclusive jurisdiction of King County, Washington. This is based on Amazon's standard terms, which were incorporated into the purchase order Amazon issued to plaintiff. However, in its affirmation in opposition, Amazon withdraws this defense to allow the case to be resolved efficiently and expeditiously. Thus, this affirmative defense

is stricken.

The third affirmative defense is that plaintiff failed to mitigate its damages. The court does not strike affirmative defenses when the moving party failed to properly challenge the factual basis for the other party's affirmative defense. See Arriaga v. Michael Laub Co., 233 A.D.2d 244, 244, 649 N.Y.S.2d 707, 708 (1st Dep't 1996). Plaintiff's attorney argues that Romanelli contacted Amazon regarding resale of the shirts, but defendant did not consent to the sale. Defendant contends that plaintiff failed to sell 2,448 shirts to another buyer, which would have reduced damages. No evidence other than a letter dated January 30, 2008 is offered in support of the claim. This letter is written by plaintiff's attorney to defendant's attorney and mentions emails in which plaintiff allegedly offered to resell the shirts and defendant did not consent to the sale. Unless Amazon and Romanelli offer these emails as evidence or the emails are discussed in the affidavit of a party having knowledge of the facts, the court cannot accept an attorney's discussion of them as evidence. Arriaga, 233 A.D.2d at 244, 649 N.Y.S.2d at 708. Therefore, plaintiff does not set forth facts that would properly challenge the failure to mitigate damages defense. Thus, the Court denies plaintiff's motion to strike the third affirmative defense.

The fourth affirmative defense is that the cause of action asserted against Amazon is barred by the doctrines of waiver, estoppel, laches, and/or unclean hands. In moving to dismiss plaintiff argues that the defense is based on the Vendor's Terms and Conditions signed by Amazon and Romanelli International Inc. that is not binding on Romanelli Inc. Amazon asserts that Peters was fully aware of the fact that the Buy Sheet Summary was not a binding offer and that he improperly attempted to force Amazon to pay for the additional shirts anyway. Amazon further argues that the fact that Peters signed a copy of

the standard terms on behalf of a sister company is evidence of his inequitable nature of conduct.

In a motion to strike affirmative defenses, plaintiff has “the burden of showing on their motion that the defense ... is inadequate on its face” Bernstein v. Freudman, 180 A.D.2d 420, 421, 580 N.Y.S.2d 861, 861 (1st Dept. 1992). As discussed, plaintiff incorrectly contends that Amazon’s first, third, and fourth affirmative defenses are based on the contract between Romanelli International, Inc. and Amazon. As plaintiff does not challenge the factual allegations of this defense, the Court denies plaintiff’s motion to strike the fourth affirmative defense.

Furthermore, as the court denies the motion it also denies the request for attorney’s fees.

Accordingly, it is


ORDERED that plaintiff’s motion to strike affirmative defenses is denied in part, except as to the second affirmative defense; and it is further

ORDERED that the second affirmative defense is severed and stricken; and it is further

ORDERED that the action in all other respects continues.

Dated: August 13, 2008

ENTER:



LOUIS B. YORK
J.S.C.