

**Intertex USA v Abaete' by Laura Poretzky, Ltd.**

2008 NY Slip Op 32310(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0601139/2008

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 601139/2008

INTERTEX, U.S.A., INC.

vs

ABAETE' BY LAURA PORETZKY LTD.

Sequence Number : 001

DISMISS DEFENSE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is denied.

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/18/08

**WALTER B. TOLUB** 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
INTERTEX USA d/b/a BC AMERICA

Plaintiff,

Index No. 601139/08  
Mtn Seq. 001

-against-

ABAETE' BY LAURA PORETZKY, LTD.,

Defendant.

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
WALTER B. TOLUB, J.:

This is Plaintiff's motion to reject Defendant's Answer and dismiss Defendant's Affirmative Defenses. Defendant cross-moves for an order compelling Plaintiff to accept its Verified Answer.

Facts

This action arises out of a dispute over certain goods sold and shipped by Plaintiff to the Defendant. Plaintiff corporation, claiming that it does business as BC America, served the Defendant by delivering the Summons and Complaint to the Secretary of State on April 17, 2008. Pursuant to CPLR §320(a), the Defendant had to appear by serving an answer or a notice of appearance, by May 17, 2008. Defendant claims that it inadvertently calendered the date for answering as May 18, 2008. Since May 18, 2008 was a Sunday, Defendant served its Answer by mail on Monday May 19, 2008. The Answer included six affirmative defenses, two of which raise the issue of Plaintiff's standing to commence an action based on invoices made by BC America.

Plaintiff argues that the rules set forth in the CPLR must be strictly adhered to and therefore the Answer and Affirmative Defenses should be dismissed. Defendant argues that Plaintiff should be compelled to accept its Answer because any delay in service was *de minimis* and Plaintiff is in no way prejudiced by the delay.

#### Discussion

CPLR §3012 covers service of pleadings and demands for complaints. CPLR § 3012[d] provides for extensions of time to appear, plead or to compel the acceptance of a pleading untimely served. The statute was meant both to recognize a distinction between delays in the service of pleadings and defaults that have resulted in an order or judgment, and to endow the courts with discretion and flexibility in dealing with the former (Guzetti v. City of New York, 32 AD3d 820 [1<sup>st</sup> Dept 2006] citing Sponsor's Mem, 1983 NY Legis Ann, at 144; see also Report of Advisory Comm on Civ Prac, 1983 McKinney's Session Laws of NY, at 2879; Mem of Office of Ct Admin, 1983 McKinney's Session Laws of NY, at 3015). The legislative history behind CPLR §3012[d], establishes that the potential merits of a defense are one factor in the court's discretionary determination. The length of delay, the excuse offered, the absence or presence of willfulness and the possibility of prejudice to other parties to the action must also be considered and balanced in determining whether relief is

appropriate (Guzetti v. City of New York, 32 AD3d 820 [1<sup>st</sup> Dept 2006] citing Report of Advisory Comm on Civ Prac, 1983 McKinney's Session Laws of NY, at 2878-2879; Mem of Office of Ct Admin, 1983 McKinney's Session Laws of NY, at 3014-3015; Sponsor's Mem, 1983 NY Legis Ann, at 142, 143).

In this matter, there was a minimal delay in service and no prejudice to the Plaintiff. In such circumstances, the delay should be excused (Guzetti v. City of New York, 32 AD3d 820 [1<sup>st</sup> Dept 2006]). It follows that Plaintiff's motion strike or dismiss Defendant's Answer is denied in its entirety and Defendant's cross-motion to compel Plaintiff to accept the Answer previously served is granted.

Plaintiff also seeks the dismissal of Defendant's first two affirmative defenses, pursuant to CPLR §3211, which are to dismiss the Complaint for lack of standing and to dismiss the Complaint because Plaintiff is not authorized to bring this action. In considering a motion to dismiss, the court must accept the allegations as true and give the Defendant the benefit of all inferences (Matter of Ideal Mutual Insurance Co., 140 AD2d 62 [1<sup>st</sup> Dept 1988]). Judged by this standard, the mere fact that there is a factual dispute about the seller's performance or about the seller's actual corporate identity, does not rise to the level of establishing a basis to dismiss Defendant's affirmative defenses. It follows that Plaintiff's motion to

dismiss Defendant's first to affirmative defenses is also denied.

Accordingly, it is

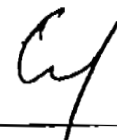
ORDERED that Plaintiff's motion is denied in its entirety;  
and it is further

ORDERED that Defendant's motion is granted in its entirety  
and the Plaintiff is ordered to accept the Answer with which it  
was served.

Counsel for the parties are directed to appear for a  
Preliminary Conference on September 26, 2008 at 11:00 AM in Room  
335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order  
of the Court.

Dated: 8/18/08



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HON. WALTER B. TOLUB, J.S.C.

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK