General Welding Supply Corp. v L.I. Analytical Labs., Inc.

2008 NY Slip Op 32569(U)

September 11, 2008

Supreme Court, Nassau County

Docket Number: 9275-06/

Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

GENERAL WELDING SUPPLY CORPORATION,

Plaintiff(s),

-against-

L.I. ANALYTICAL LABORATORIES, INC.,

Defendant(s).

x

Index No. 19275/06

Motion Submitted: 5/5/08
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.......................XX
Answering Papers...X
Reply..
Briefs: Plaintiff's/Petitioner's.......................................X
Defendant's/Respondent's.................................

Defendant moves this Court pursuant to CPLR §3212, for an order granting summary judgment in its favor dismissing the complaint. Plaintiff opposes the requested relief, and cross-moves pursuant to CPLR § 3212 for an order granting partial summary judgment on the issue of Defendant's liability and pursuant to CPLR § 3211 for an order dismissing Defendant's counterclaim. Defendant opposes the requested relief.

The instant action was commenced on November 20, 2006 and involves a Sales Agreement between Plaintiff and Defendant. Plaintiff is a domestic corporation with a principal place of business in Westbury, Nassau County, New York. According to an affidavit by Ralph Cohan, Vice President of Plaintiff Corporation (hereinafter "Cohan"), Plaintiff is in the business of selling compressed industrial and medical gases. Defendant is

a New York State Department of Health certified environmental testing laboratory located in Holbrook, Suffolk County, New York. It is undisputed that Plaintiff and Defendant entered into the self-renewing Sales Agreement in question on September 11, 2000. From August 1998 through December 2004, Defendant purchased all of its specialty gases exclusively from Plaintiff.

According to "Rider A" attached to the contract, the sales agreement between Plaintiff and Defendant was for the following materials: Air Volatile Organic Compound Free, Argon Ultra High Purity, Carbon Dioxide Bone Dry, Helium Ultra High Purity, Hydrogen Ultra High Purity, Nitrogen Ultra High Purity, Nitrous Oxide Commercially Pure Grade, 50 lb. Carbon Dioxide, Liquid Argon, Liquid Nitrogen, Liquid Container Rentals, and High Pressure Cylinder Rentals. Cohan states in his affidavit that it is typical within this industry to deliver the compressed gases to customers in cylinders. The empty cylinders are then returned to Plaintiff by the customers. The term of the agreement was to be from August 8, 2000 to August 7, 2003 and thereafter from year to year unless notice of cancellation is given by either party in writing three months prior to commencement of any such year.

Plaintiff asserts in its complaint that Defendant never cancelled the Contract. Cohan's affidavit states that the first notice of cancellation of the 2004-2005 year of the contract was received in December 2004. He attests that at that time it was four months after the term commenced and seven months after the last date within which to provide notice of cancellation. Thus that notice would not have served to cancel the 2004-2005 year of the Contract. According to the Complaint, Plaintiff alleges that Defendant breached the Sales Agreement Contract on or about December 2004 because it ceased using Plaintiff as its exclusive supplier of gases and related products. It is undisputed that Defendant did not purchase any additional gases from Plaintiff at or about that time. Plaintiff further argues that it has, at all times, fully performed all of its obligations arising under and pursuant to the Contract. As a result of the breach, Plaintiff alleges that it has been damaged in an amount to be determined at trial, but in no event less than $15,000.

In its answer, Defendant provides an affirmative defense that the breach of contract action brought by Plaintiff is barred by General Obligation Law § 5-903. That statute provides that:

> No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the

> contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract. (***General Obligation Law § 5-903***)

Defendant argues that the contract entered into with Plaintiff was one for goods and services. Defendant further argues that Plaintiff failed to comply with § 5-903 because it did not receive notice of the automatic renewal provision before it went into effect, thereby making the provision unenforceable. Thus, Defendant asserts that it did not breach the contract and Plaintiff's action is barred. That affirmative defense is the basis for Defendant's motion for summary judgment.

As a second and third affirmative defense respectively, Defendant alleges that the Plaintiff's complaint fails to state a cause of action and that the Court lacks jurisdiction over it.

Additionally, Defendant sets forth a counterclaim in the answering papers that Plaintiff breached the contract. Defendant points to Paragraph 10 of the Sales Agreement which states:

> Cost increases may necessitate a revision of prices from time to time for gases or products sold under this agreement. Such increases shall become effective thirty days after written notice, the Purchaser furnishes evidence satisfactory to seller that such gases or products, in same quantities, of the same quality, under similar circumstances, can be purchased by Purchaser at prices lower than such revised prices, seller shall have fifteen days to either meet the lower price or revert to the Seller's price before the price increase (option of the seller). If the Seller does not exercise the option to so adjust the price, the Purchaser may terminate this agreement by giving the Seller thirty days written notice of such termination.

Defendant alleges that such a breach occurred when Plaintiff failed and refused to reduce the price, resulting in damage to the Defendant in the amount of $22,500.

Turning first to Defendant's summary judgment motion, it is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop University Hosp.,*** 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (***Makaj v. Metropolitan Transportation Authority,*** 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendant must in the first instance establish its prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. (***Sheppard-Mobley v. King,*** 10 A.D.3d 70, 778 N.Y.S.2d 98 [2d Dept., 2004] citing ***Alvarez v. Prospect Hospital,*** 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). This Court concludes that it has not done so. (***Furia v. Furia,*** 116 A.D.2d 694, 498 N.Y.S.2d 12 [2d Dept., 1986]).

In support of its motion for summary judgment, Defendant submits a sworn affidavit from Michael Veraldi, President and Laboratory Director of Defendant testing laboratory in which he alleges that the agreement entered into with Plaintiff was a contract for goods and services. Mr. Veraldi further states that since this was a contract involving services to personal property, the agreement falls under General Obligations Law § 5-903. In his affidavit, Mr. Veraldi asserts that under General Obligations Law, Plaintiff was required to provide defendant, as a recipient of services, with notice of an automatic renewal clause for such automatic renewal provision to be enforceable. It is undisputed that Plaintiff never provided Defendant with notice of the automatic renewal clause in the Sales Agreement.

In support of its position that the subject agreement is one for goods and services, Defendant cites to paragraph 8 of the Contract, which provides that:

> Services and deliveries by the Seller are subject to and contingent upon floods, strikes or other labor disturbances, fires, accidents, wars, delays of carriers, inability to obtain raw materials, failure of normal sources of supply, restraints of government, or any other similar or dissimilar cause beyond the Seller's reasonable control.

Defendant asserts that because the language of the contract distinguishes between "services" and "deliveries" they are two distinct components of the contract. Defendant argues that the contract must therefore be viewed as one for goods and services. This Court disagrees.

Defendant cites to *Mt. Vernon Amusement Co. v. Georgian Restaurant Corp.,* to support its argument that the contract between Plaintiff and Defendant was one for services. (See ***Mt. Vernon Amusement Co. v. Georgian Restaurant Corp.,*** 30 A.D.2d 823, 292 N.Y.S.2d 567 [2d Dept., 1968]). However, the *Mt. Vernon* case and the current matter are distinguishable. The *Mt. Vernon* contract involved the operation and servicing of a vending machine. Questions of fact exist as to the parties roles in actually providing services to the canisters as opposed to merely delivering same.

With respect to Defendant's third affirmative defense, that the Court does not have jurisdiction over it, Defendant did not provide the Court with a basis for this claim. There was no evidence provided to show that the Court lacks jurisdiction over Defendant in this matter.

With respect to Plaintiff's cross-motion pertaining to the issue of Defendant's liability, Plaintiff must in the first instance establish that there was a valid contract, performance of that contract, and a breach of the contract by the defendant. (See ***NJP Enterprises Inc. v. Shooze,*** 280 A.D.2d 533, 720 N.Y.S.2d 190 [2d Dept. 2001]). To establish the existence of a cause of action for breach of contract between the parties, Plaintiff must establish its performance and the Defendant's breach. (***Furia v. Furia***, 116 A.D.2d 694, 498 N.Y.S.2d 12 [2d Dept., 1986]).

This Court does not find Plaintiff has established a breach of contract as a matter of law. In light of Plaintiff rebidding the contract in question, questions of fact exist as to whether or not the contract was cancelled.

Defendant's motion for summary judgment is denied. Plaintiff's motion for summary judgment on the issue of liability is denied. Plaintiff's motion for dismissal of Defendant's counterclaim alleging lack of jurisdiction is granted.

The foregoing constitutes the Order of this Court.

Dated: September 11, 2008
Mineola, N.Y.

ENTERED V. Murphy
J. S. C.

SEP 18 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE