

**Quebecor World (USA) Inc. v Roth Dev. &  
Mgt. Co., Inc.**

2008 NY Slip Op 32804(U)

October 3, 2008

Supreme Court, New York County

Docket Number: 600275/08

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

*Justice*

Index Number : 600275/2008

QUEBECOR WORLD (USA)

vs.

ROTH DEVELOPMENT & MANAGEMENT

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 600275-08

MOTION DATE 6/5/08

MOTION SEQ. NO. #001

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

were read on this motion to/for Dismiss

PAPERS NUMBERED

1,2

3

4,5

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

**FILED**

OCT 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 10/3/08

HON. SHIRLEY WERNER KORNREICH

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: PART 54

----- X  
QUEBECOR WORLD (USA) INC.,

Plaintiff,

Index No.: 600275/08

-against-

DECISION  
and ORDER

ROTH DEVELOPMENT & MANAGEMENT CO., INC.  
and JUSTIN MITCHELL,

Defendants.

----- X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

This action arises out of defendant Roth Development & Management Co., Inc.'s (RDM) failure to pay plaintiff Quebecor World (USA) Inc. (Quebecor World) in full for magazine materials it purchased in 2005 and 2006. Defendant Justin Mitchell now moves to dismiss the complaint against him, pursuant to CPLR § 3211(a)(1), on the ground that it fails to state a cause of action. Plaintiff opposes and cross-moves for default and/or summary judgment stemming from defendants failure to answer its amended verified complaint.

*I. Background*

On or about May 5, 2005, RDM executed a business credit application (the Application) seeking a line of credit from plaintiff to purchase magazine supplies. Defendant Justin Mitchell, RDM's President, signed on behalf of RDM. Mr. Mitchell also personally guaranteed all payments due under the Application. Plaintiff approved the Application and RDM began purchasing supplies against its line of credit on or around June 1, 2005. Plaintiff billed RDM in monthly invoices. Each invoice called for RDM to remit payment within 90 days.

In four invoices dated June 1, July 7, August 16 and September 9, 2005, RDM was billed

\$45,798.39 for supplies it purchased. RDM made two separate payments on May 23 and June 23, 2005 totaling \$12,817. RDM did not pay off its remaining balance and, thus, plaintiff sent a letter to RDM dated November 23, 2005, demanding payment of the remaining balance of \$32,981.39. RDM failed to cure its default and plaintiff commenced the instant action on or about February 21, 2008 alleging causes of action for breach of contract, an account stated and unjust enrichment. RDM filed an answer on or about March 7, 2008, alleging seven affirmative defenses. On March 10, 2008, defendant Mitchell filed the instant motion to dismiss. On or about March 14, 2008, plaintiff served its amended verified complaint on counsel for both defendants to include language indicating that Mr. Mitchell was individually responsible for the amount due pursuant to the guarantee he signed on May 5, 2005.

## II. *Conclusions of Law*

### A. *Defendant Mitchell's Motion to Dismiss*

On a motion to dismiss for a failure to state a cause of action, the pleading is to be given a liberal construction. *McRedmond v. Sutton Place Restaurant and Bar, Inc.*, 48 A.D.3d 258 (1<sup>st</sup> Dept 2008). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and only determine whether the facts as alleged fit within any cognizable legal theory. *Id.* quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Here, defendant Mitchell's motion to dismiss is denied. The Application shows that on May 5, 2005, Mr. Mitchell signed a guarantee making him personally responsible for RDM's obligations in the event of default. Plaintiff amended its complaint on or about March 14, 2008 to include language indicating that Mr. Mitchell was individually responsible for the amount due pursuant to the guarantee. Mr. Mitchell argues that plaintiff was not permitted to amend its

compliant without leave of the court. *See* CPLR 3025(b). However, where a defendant makes a motion to dismiss without serving an answer and the plaintiff serves an amended complaint within 20 days of service of the defendant's motion to dismiss, a plaintiff may serve his amended complaint as a matter of right without seeking leave of the court. *Badger v. Lehigh Valley Railroad Co.*, 45 A.D.2d 601, 602 (4<sup>th</sup> Dept 1974). Here, Mr. Mitchell made his motion to dismiss, without filing an answer, on or around March 10, 2008. Plaintiff served its amended complaint on or about March 14, 2008. Therefore, Quebecor World was permitted to amend its complaint as of right. *Id.*

*B. Plaintiff's Cross Motion for Summary Judgment & Default Judgment*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1<sup>st</sup> Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion.

[\* 5 ]

*Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

In support of its motion, plaintiff failed to address any of the seven affirmative defenses alleged by RDM in its answer. As such, issues of fact exist at this juncture warranting a denial of summary judgment. In addition, plaintiff's motion for a default judgment lacks any merit. RDM answered plaintiff's original complaint on or about March 7, 2008. Quebecor World served its amended complaint on both defendants on or about March 14, 2008, four days after Mr. Mitchell filed his pre-answer motion to dismiss. As such, since the court has now denied his motion, Mr. Mitchell will be given sufficient time to file an answer in this action. Accordingly, it is

ORDERED that defendant Justin Mitchell's motion to dismiss is denied; and it is further

ORDERED that defendant Justin Mitchell is directed to serve an answer to plaintiff's amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for a default judgment is denied; and it is further

ORDERED that all parties are to appear before the Court for a preliminary conference, as scheduled at 9:30 a.m. on November 13, 2008 at 111 Centre Street, Room 1227, New York, NY 10013.

Date: October 3, 2008  
New York, New York

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

