

**Meyer, Inc. v Delicious Milk Co., Inc.**

2008 NY Slip Op 32816(U)

October 9, 2008

Supreme Court, New York County

Docket Number: 106209/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris L. Eng - Cohen  
Justice

PART 36

Index Number : 106209/2007

WILLIAM B. MEYER, INC.

VS

DELICIOUS MILK COMPANY, INC.

Sequence Number : 001

SUMMARY JUDGMENT

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

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

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

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

Motion to/for Summary Judgment

PAPERS NUMBERED

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

1, 2

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

3

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is granted on the issue of liability, as provided in the attached memorandum decision.

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

**FILED**  
OCT 15 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/8/08

[Signature]  
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 36

-----X  
WILLIAM B. MEYER, INC.,

Plaintiff,

Index No.: 106209/07  
DECISION/ORDER

-against-

Motion Seq. No.: 001

DELICIOUS MILK COMPANY, INC.,

Defendant.

-----X  
HON. DORIS LING-COHAN, J.S.C.:

In this commercial breach of contract action, plaintiff moves for a partial summary judgment on the complaint (motion sequence number 001). For the following reasons, this motion is granted.

**FILED**  
OCT 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff William B. Meyer, Inc. (Meyer) is a Connecticut corporation, licensed to do business in New York, that provides storage facilities, inventory tracking and returns processing services for its clients. See Notice of Motion, Exhibit 1 (complaint), ¶ 1. Defendant Delicious Milk Company, Inc. (Delicious) is a New York corporation that produces and sells dairy products. Id., ¶¶ 2 & 4.

On January 15, 2006, Meyer and Delicious executed a contract for Meyer to provide the aforementioned services for Delicious's merchandise (the contract). See Notice of Motion, Keegan Affirmation, ¶ 5; Exhibit 5. Meyer claims that it discharged all of those services through the contract's expiration date on January 17, 2007, and that Delicious had never previously served any notice to cancel the contract. Id., ¶¶ 6-7. However, Meyer also claims that Delicious failed to make full payments during the months of November 2006 through January 2007, that Delicious owes total arrears of \$23,939.35 for that period, and that Delicious has failed to remit

[\* 3 ]  
payment after having received demands for same. Id., ¶ 7. Meyer has presented copies of the contract and of its own invoices to support its allegations. Id.; Exhibits 5, 7. In opposition, Delicious claims that Meyer has made “numerous invoice related errors,” and denies that it owes any arrears. See Pordy Affidavit in Opposition, ¶ 12. The court notes, however, that Delicious has failed to annex any documentary evidence to its opposition papers to support its position.

Meyer commenced this action on May 8, 2007, by serving a summons and complaint that sets forth a single cause of action for money damages for Delicious’ alleged breach of contract. See Notice of Motion, Exhibit 1 (complaint). Delicious answered on November 14, 2007, and discovery ensued. Id., Exhibit 2. Meyer now moves for summary judgment on the issue of liability on its sole cause of action, and Delicious opposes the motion.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557, 560 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy and should only be employed when there is no doubt as to the absence of such triable issues. See e.g. Andre v Pomeroy, 35 NY2d 361, 364 (1974); Pirrelli v Long Is. R.R., 226 AD2d 166 (1<sup>st</sup> Dept 1996). However, the court’s unfounded reluctance to employ summary judgment ““only serve[s] to

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swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.’” Blechman v I.J. Peiser’s and Sons, 186 AD2d 50, 51 (1<sup>st</sup> Dept 1992), quoting Andre v Pomeroy, 35 NY2d at 364. Here, the court finds that plaintiff is entitled to summary judgment on its sole cause of action for breach of contract.

Pursuant to Connecticut law, which governs the instant contract, “the elements of a cause of action founded on breach of contract [are:] (1) the formation of an agreement, (2) performance by one party, (3) breach of the agreement by the opposing party and (4) damages.” See McCann Real Equities Series XXII, LLC v David McDermott Chevrolet, Inc., 93 Conn App 486, 503-04 (2006), cert denied, 277 Conn 928 (2006), citing Rosato v Mascardo, 82 Conn App 396, 411 (2004). In support of the within motion for summary judgment, Meyer has presented both the contract and its invoices for payment due pursuant to same. See Notice of Motion, Exhibits 5, 7. Delicious does not deny either the validity or the terms of the contract, nor does it assert that it has paid any of the claimed arrears. Rather, it argues that Meyer’s calculation of those purported arrears is incorrect. See Pordy Affidavit in Opposition, ¶¶ 6-12. Accordingly, under these circumstances, the court finds that Meyer has borne its burden of proof on this motion by presenting a prima facie case of breach of contract. See e.g. Eden Temporary Servs. v House of Excellence, 270 AD2d 66 (1<sup>st</sup> Dept 2000).

Delicious, however, has failed to meet its corresponding burden of proof. As previously noted, there is no documentary evidence annexed to Delicious’s opposition papers that would support its claim that Meyer had overbilled for storage services or labor, billed for items that it never ordered, overcharged for postage or delivery services, or billed for work performed after the contract’s expiration date. See Pordy Affidavit in Opposition, ¶¶ 6-12. Absence of such

[\* 5 ]

proof is fatal to Delicious's opposition to this motion. See Zuckerman v City of New York, 49 NY2d at 560; Pemberton v New York City Tr. Auth., 304 AD2d at 342. However, insofar as this motion seeks only a summary judgment on the issue of liability, Delicious will have an opportunity to present any evidence to mitigate the calculation of any proved damages. Therefore, the court rejects Delicious's opposition arguments and finds that Meyer is entitled to summary judgment on the issue of liability on its sole cause of action, and grants Meyer's motion to the extent set forth below.

Accordingly, base upon the above, it is

ORDERED that plaintiff's motion, pursuant to CPLR 3212 is granted solely to the extent of awarding plaintiff summary judgment on the issue of liability, with damages to be calculated at a hearing after the completion of discovery and the filing of a note of issue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry; and it is further

ORDERED that the October 17, 2008 court appearance is cancelled.

Dated: New York, New York  
October 9, 2008

**FILED**  
OCT 15 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
Hon. Denis Ling-Cohan, J.S.C.

J:\Summary Judgment\meyervdelicious.wpd