

Performance Apparels, PVT, Ltd. v Excellmodes, Inc.
2008 NY Slip Op 33269(U)
December 3, 2008
Supreme Court, New York County
Docket Number: 600563/04
Judge: Marilyn Shafer
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Judge SHAFER

PART 8

Index Number : 600563/2004
PERFORMANCE APPARELS, PVT, LTD
vs.
EXCELLMODES, INC.,
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

Justice

INDEX NO. 600563-04
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

ere read on this motion to/for _____

PAPERS NUMBERED

1, 2
3, 4
5

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

Notice of Cross Motion
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

for summary judgment is granted and the cross motion is denied in accord with the annexed memorandum.

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

FILED
DEC 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER

Dated: 12/3/08

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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 8
Justice

PERFORMANCE APPARELS, PVT., LTD., INDEX NO. 600563/04

Plaintiff, MOTION DATE

-against- MOTION SEQ. NO. 001

EXCELLMODES, INC., SUK KYOON SHIN and
VINCE RAIMO,
Defendants.

The following papers, numbered 1 to 5, were read on this motion for a new trial:

Notice of Motion, Affirmation – Exhibits

PAPERS NUMBERED
1, 2

Notice of Cross Motion – Affirmation — Exhibits

3,4

Affirmation in Reply — Exhibits

FILED
DEC 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is granted and the cross-motion by defendant for summary judgment is denied.

This is an action to recover moneys due and owing by an importer of men's clothing to a clothing manufacturer. Defendant importer cross-moves for summary judgment and for sanctions.

Plaintiff manufacturer moves for summary judgment on the following undisputed facts. The parties entered into an agreement, dated April 19, 2002, for the payment of "all outstanding

invoices” totaling \$80,040.00. The agreement specified the unpaid invoice numbers and agreed to settle the debt for \$53,000 in two payments. Defendant importer made only one payment of \$3000 pursuant to the agreement. The parties entered into a second agreement, dated February 12, 2003, referencing the unpaid April 19 agreement, and agreeing to a new payment schedule for the remaining obligation, specified as \$50,000. The February agreement provided that \$14,000 would be paid to plaintiff’s agent and an additional \$5000, over and above the \$50,000, would be paid to the plaintiff by a defendant “Vince Raimo”, who is not a party to these motions.

The February agreement provides:

In case any of the above payments are not collected due to insufficient funds or any other reason what so ever (sic), the whole balance sum shall become due and payable with interest immediately.

Defendants made payments to the plaintiff, pursuant to the February agreement, of \$35,000: (1) \$21,000 to the plaintiff; and (2) \$14,000 to the agent, who initiated legal proceedings against them and prevailed on a motion for summary judgment.

Plaintiff argues that defendant’s failure to comply with the February agreement triggers the original debt, \$80,040.00. Deducting \$35,000 paid pursuant to the February agreement and \$3000 paid pursuant to the April agreement, plaintiff claims a balance due of \$42,040.00. Additionally, plaintiff claims there are unpaid invoices not covered by the agreements, for an additional balance due of \$108,218.00. These invoices, which are not enumerated in the April agreement, are all dated prior to that agreement,

Defendant opposes the motion and cross-moves for summary judgment and sanctions. Submitting virtually the same affidavit submitted in its unsuccessful opposition to the agent’s motion for summary judgment, defendant alleges that improper “Documents against Payment”

were presented to its bank by the plaintiff's bank.¹ Defendant claims it entered into the agreements on the "understanding" that plaintiff would recall these "DP's" and stopped making payments on both agreements when it discovered they had not been withdrawn. Defendant recalculated the parties' transactions and discovered it had, in fact, overpaid. It cross-moves for a refund of \$13,536.00 plus past and future legal fees for the defense of this action and the agent's action.²

Discussion

The law is well settled that summary judgment is the procedural equivalent of a trial. (*Capelin Assoc, Inc v Globe Mfg Corp.*, 34 N.Y.2d 338, 341 [1974]). The party seeking summary judgment must establish entitlement as a matter of law. (*Alvarez v Prospect Hosp*, 68 N.Y.2d 320 [1986]). Once the party seeking summary judgment makes a *prima facie* showing of entitlement as a matter of law, the party opposing the motion must come forward with proof in evidentiary form to establish the existence of triable issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557 [1980])

Plaintiff has submitted two agreements in which the defendant agreed to make payments which it has failed to make. Defendant does not deny these allegations but seeks to modify the agreements with an additional claim regarding improperly served "DP's".

The most basic rule in construing contracts is that when parties set down their agreement

¹ "Documents against Payment", customary in international trade, are a request for payment submitted by one bank to another. The receiver bank generally will not make payments absent customer authorization.

² Defendant states legal fees of \$18,120.25 for its unsuccessful resistance to the agent's action for \$12,000.00.

in a clear, complete document, their writing should be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is inadmissible to add to or vary the writing. (*Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256 [1990]) If the language of the agreement is unambiguous, there will be no resort to extraneous evidence. (*WWW Assocs, Inc v Giancontieri*, 77 N.Y.2d 157 [1990]). Whether a document is ambiguous is a question of law for the court. (*Innophos, Inc v Rhodia, SA*, 10 NY3d 25) [2008])

This Court finds the two agreements to be clear and unambiguous. Defendant's claim that its payments were contingent upon the withdrawal of the DP's is not supported by the agreements, neither of which make any mention of DP's. Defendant has failed to provide a valid excuse for its non-payment or raise a triable issue of fact. Plaintiff is entitled to summary judgment as a matter of law.

However, plaintiff may not modify the clear terms of the agreements either. The April agreement enumerates 5 invoices and states, in relevant part, that the parties "agreed to settle the payment of all outstanding invoices issues by Performance Apparels Pvt. with US \$53,000 in full payment from Excellmodes, Inc." The February agreement states, "Balance Owed by Buyer to Seller is \$50,000." Plaintiff's claims for any invoices other than those enumerated in the April agreement or any sum beyond the \$50,000 enumerated in the February agreement are impermissible attempts to modify unambiguous documents.

We have considered the other arguments of the parties and find them to be without merit.

Accordingly, it is


ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that defendant's cross motion for summary judgment be denied; it is further

ORDERED that the clerk is directed to enter judgment for plaintiff Performance Apparels Pvt., Ltd. In the sum of \$15,000 plus interest at the statutory rate from Oct. 15, 2003 and costs as taxed by the clerk upon the presentation of a bill of costs.

This reflects the decision and order of this Court.

Dated: 12/3/08


MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
DEC 08 2008
COUNTY CLERK'S OFFICE
NEW YORK