

CVT Prepaid Solutions, Inc. v Kare Distrib., Inc.
2008 NY Slip Op 33286(U)
December 2, 2008
Supreme Court, New York County
Docket Number: 112918/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART _____

Index Number : 112918/2007
CVT PREPAID SOLUTIONS
vs.
KARE DISTRIBUTION
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

motion (a) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

DEC 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/2/08

JUDITH J. GISCHKE, 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 10

-----X
CVT PREPAID SOLUTIONS, INC.,

Plaintiff,

- against -

KARE DISTRIBUTION, INC., CREATIVE
CALLING CARDS, INC., CREATIVE
CALLING CARDS OF TEXAS, LP,
SEAN MCBRIDE, DENISE MCBRIDE, and
JASON MCBRIDE,

Defendants.
-----X

Decision/Order

Index No. 112918/07

Seq. No. : 002

Present:

Hon. Judith J. G.

J.S.C.

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NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def Kare pre-answer motion [dismiss] w/DS affirm in support, exhs	1
Def Creative Calling Cards, Inc and McBrides LC affirm	2
Pltf's LC affirm in opp	3

Upon the foregoing papers, the decision and order of the court is as follows:

In this action to recover damages for, *inter alia*, breach of an oral contract, plaintiff moves for partial summary judgment on its account stated claim against defendant Creative Calling Cards, Inc. ("Creative"). CPLR § 3212. Creative opposes the instant motion.

The underlying facts in this case were previously stated by the court in its decision and order dated July 2, 2008 (the "prior decision") on the defendants' motion to dismiss. The court herein incorporates the prior decision by reference, and will only restate facts herein as needed. For the reasons that follow, plaintiff is not entitled to partial summary judgment on its account stated claim.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 AD2d 868 (3d Dept. 1993), *lv. denied* 82 NY2d 660 (1993). Plaintiff alleges that pursuant to an oral contract, it agreed to sell calling cards to Creative and Creative agreed to purchase these

calling cards for resale to retailers. Plaintiff also claims that Creative held exclusive rights to sell these calling cards in certain designated markets. CVT has pled that it sent and delivered invoices to Creative for calling cards, showing \$259,243 as the total amount due and owing from Creative. CVT further maintains that Creative has not disputed the invoices, yet has failed to make payments due to CVT thereon.

Based on the sworn affidavit of Leonard Carone ("Carone"), Chief Financial Officer and Executive Vice President of plaintiff, plaintiff shipped calling cards to Creative that were inactive. Plaintiff then activated these calling cards at Creative's specific request, which was required prior to Creative's sale and distribution of these cards. Carone maintains that Creative requested activation of these cards by faxing a purchase order to plaintiff wherein Creative identified the number and type of cards they wanted activated.

Carone states that plaintiff would invoice the charges incurred by Creative for the calling cards it purchased on a weekly basis. Plaintiff then would send these invoices to Creative via email, "[a]s was the accepted practice between [plaintiff] and Creative." Plaintiff has provided copies of numerous invoices which indicate that the charges therein were due within four weeks from the date of the invoice. Carone also states that when Creative would request that plaintiff accept the return of certain activated cards, plaintiff would, "[i]n its sole discretion" determine whether or not to agree to the return. Carone claims that during the period June 22, 2007 to August 3, 2007, Creative requested and plaintiff agreed to accept returned calling cards in the aggregate amount of \$111,148.42, but that to date, \$13,247.62 remains outstanding for the unauthorized return of calling cards by Creative.

Plaintiff also maintains that an additional \$245,995.53 is due and owing on several

[* 5]
invoices dated December 31, 2006 through July 6, 2007 for calling cards which were accepted by Creative and not otherwise contested

Creative argues that plaintiff cannot establish an account stated claim because it timely objected to plaintiff's invoices. Creative has submitted to the court the affidavit of Sean McBride ("McBride"), president of Creative, wherein he disputes, *inter alia*, the material terms of the oral agreement between plaintiff and Creative as alleged by plaintiff and claims that Creative timely disputed plaintiff's statement of account. Creative has provided to the court an email dated August 10, 2007 from Nick Pappas, Controller of plaintiff to McBride, which provides in pertinent part:

In response to your email to Charles Freiburger and Leonard Carone on August 10, [plaintiff] will not confirm your outstanding balance as \$147,075.03. You agreed to make a good faith payment of \$100,000 in order to keep the lines of communication open. If a check for \$100,000 is not faxed to [plaintiff] by 5:00 PM today, August 10, 2007, [plaintiff] will continue to pursue all legal remedies against [Creative] and there will be no future negotiations.

Plaintiff's motion for partial summary judgment fails for several reasons. Creative returned some of the calling cards, which leaving aside the issue of whether these returns required prior authorization, raises the inference that Creative timely objected to plaintiff's statement of account for the balance due and owing related to these returned items. On the issue of authorization, although plaintiff claims that it had the right, under the oral contract, to accept or deny these returns in its sole discretion, defendant vigorously disputes this characterization of the oral contract. McBride's affidavit sufficiently raises a question of fact on the terms of the oral contract, and therefore, there is a question of fact as to whether Creative timely disputed plaintiff's statement of account in connection with the returned cards.

As for the remaining portion of plaintiff's statement of account, the August 10, 2007 email from Creative's controller contradicts plaintiff's claim that Creative never timely disputed the invoices. Accordingly, plaintiff has not established the elements of its account stated cause of action and partial summary judgment on this claim is denied.

Conclusion

In accordance herewith, it is hereby:

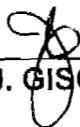
ORDERED that plaintiff's motion for partial summary judgment is denied in its entirety.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
December 2, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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NEW YORK