

Sarv Inc. v A Y Foods, Inc.

2008 NY Slip Op 33364(U)

December 9, 2008

Supreme Court, Richmond County

Docket Number: 101990/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.101990/08
Motion No.:001**

**SARV INC. and
GAUTAM KAKKAR a/k/a GAUTAM KAKAR,**

Plaintiffs

against

**A Y FOODS, INC. And
AZIZUR REHMAN a/k/a AZIZUR REHAMAN,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff moves for an order granting summary judgment on its complaint against the defendants and dismissing the defendants first, second, third and fourth counterclaims. The plaintiff's motion is granted in its entirety.

Facts

This action arises out of the defendants failure to make payments on two promissory notes. On January 17, 2007 the parties entered into a contract of sale for the purchase of a convenience store located at 1650 A Bath Avenue, Brooklyn, New York for a purchase price of \$133,000. According to the contract of sale payment of the purchase price was to be paid in the following manor: \$1,000 paid by buyer in the form of an initial deposit at contract; \$98,000 in a promissory note for 3 1/4 years at 0% interest to be paid to seller over 39 months; and a balance of \$35,000 paid at closing in the form of cash, certified check or bank cashier's check.

However, on January 17, 2007 a promissory note was executed by Sarv Inc. - Gautman Kakkar and the defendant Azizur Rehaman, individually, for \$90,000 for a period of 36 months at 0% interest. The note provides that Rehaman is to pay \$2,500 per month during the 36 month period. But, the signature line above A Y Foods -Inc. was not signed.

Also at the time of closing, the defendants did not have cash on hand to satisfy the amount due and owing for the inventory on hand. The parties then executed a second promissory note to cover the cost of the inventory wherein Azizur Rehaman borrowed \$19,068 for a period of 3 months at 0% interest. The second promissory note indicates that the entire amount is due by April 17, 2007. This second note was similarly signed by Sarv Inc - Gautam Kakkar and the defendant, Azizur Rehaman individually. Once again the signature line above A Y Foods Inc was left blank.

The movant plaintiffs annexed letters demanding full payment for both notes. Both letters are dated on January 9, 2008. It is not disputed that neither of the named defendants contested these letters within thirty days. Plaintiffs' counsel sent a second letter dated second letter demanding payment on March 28, 2008. The letter demanded payment within ten days of receipt. It also reiterated the fact that neither named defendant objected to the January 9, 2008 letter and as a result the debt was deemed "valid."

The plaintiffs commenced this action by filing a summons and complaint on May 7, 2008. Defendants served their answer with counterclaims on July 15, 2008. Defendants contest the amount owed on the promissory note for the first time in their answer. In asserting their counterclaims the defendants assert that the plaintiffs misrepresented the weekly gross sales of the business; that the plaintiffs misrepresented the condition of the inventory as being fit for human consumption; and that the plaintiffs action is frivolous.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

In the present action the moving plaintiffs came forward with multiple forms of documentary evidence establishing a *prima facie* entitlement for judgment in their favor. Here the movants annexed fully executed promissory notes, along with repeated demands for payment. Such evidence is sufficient to satisfy entitlement to a judgment for summary judgment.⁶ Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Ellenbogen & Goldstein, P.C. v. Brandes*, 226 AD2d 237 [2d Dep't 1996]. (Court held that receipt without objection of indebtedness coupled with partial payments of the debt support the finding of an account stated.)

summary judgment to put forth evidence in admissible form to establish a triable issue of fact.⁷

In this case, the defendants submit their allegations of fraud on the part of the movants. It is a matter of well settled law that such conclusory and self serving statements are not admissible evidence to rebut the presumption of the existence of a debt owed on a promissory note.

The defendants' opposition is not without objective evidence. Annexed to their opposing papers the defendants included cancelled checks to Gautam Kakkar totaling \$16,568 significantly less than the \$109,068 owed to the plaintiffs based on the face value of the notes. In fact, in the absence of any written objection to the plaintiffs' demand for payment on the notes, the evidence of partial payment supports this court's finding of a debt obligation owed to the plaintiffs.⁸

Conclusion

Based on the objective evidence annexed to the plaintiffs' motion this court concludes that a defendants are liable to plaintiffs under the terms of the two promissory notes as a matter of law. The defendants' counterclaims are dismissed. Although a pleading's factual allegations are presumed to be true on a motion to dismiss, bare legal conclusions and factual claims that are flatly contradicted by the evidence are not presumed to be true.⁹ In this case, the record shows that the defendants waited until the pleading stage to voice any disagreement with respect to the promissory notes. It is also clear to the court that the defendants received value under the promissory notes as they are in possession of the convenience store.

⁷ *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

⁸ *Milistar (NY) Inc. v. Natasha Diamond Jewelry Mfrs., LLC*, 18 AD3d 402 [1st Dep't 2005] (Bald allegations of oral protest to plaintiff's invoices were insufficient to defeat a summary judgment motion.)

⁹ *See, Syracuse Orthopedic Specialists, P.C. v. Hootnick*, 16 AD3d 1019 [4th Dep't, 2004].

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion is granted to the extent it seeks summary judgment against Azizur Rehman a/k/a Azizur Rehaman, in its entirety, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against Azizur Rehman a/k/a Azizur Rehman; it is further

ORDERED, that the defendants' counterclaims are dismissed with costs and disbursements to plaintiffs as taxed by the Clerk of the Court; and it is further

ORDERED, that the calculation of reasonable attorneys fees and interest is referred to a Judicial Hearing Officer to hear and determine.

ENTER,

DATED: December 9, 2008

Joseph J. Maltese
Justice of the Supreme Court