Sev-Kon Tekstil Sanayi Ve Dis Ticaret Ltd. v JBM Intl., LLC
2008 NY Slip Op 33716(U)
February 7, 2008
Supreme Court, New York County
Docket Number: 103814/05
Judge: Herman Cahn

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------x

SEV-KON TEKSTIL SANAYI VE DIS TICARET LTD. and HEDEF KONFEKSIYON VE TEKSTIL DIS TICARET A.P.,

Plaintiffs,

-against- : Index No. 103814/05

JBM INTERNATIONAL, LLC,

Defendant.

----------x

Herman Cahn, J.

Plaintiffs bring this action seeking monies for goods shipped to Defendant, alleging that Defendant failed to make full payment therefor.

A trial was held before the undersigned.

BACKGROUND

The Parties:

Plaintiffs are two companies organized in the Republic of Turkey. Sev-Kon Tekstil Sanayi Ve Dis Ticaret Ltd. ("Sev-Kon") is a textile manufacturing company with its principal place of business in Istanbul, Turkey. Hedef Konfeksiyon Ve Tekstil Dis Ticaret A.P. ("Hedef") is a foreign trade intermediary for Turkish manufacturers that export goods and also has its principal place of business in Istanbul, Turkey. Sev-Kon owns a 0.06% equity interest in Hedef.

Defendant JBM International, LLC is a wholesale importer in New York that specializes in importing factory cancellations and overruns from overseas, into the United States.

The Transaction:

Plaintiffs allege that Defendant's agent, Mr. Mali Said, placed seven orders for garments manufactured by Sev-Kon, between November 2003 and January 2004. These orders were placed orally and were represented by invoices numbered: 320021, 320022, 32226, 32227, 330376, 330377 and 330390.

The goods in the shipments under invoices 320022, 32226, 32227 and 330390, were to be paid for within a month or a month and a half from the date of shipping. (Siyahi Tr Aff ¶ 47) These were alleged to be "cash against goods" invoices; that is, Defendant needed to make payment in order to take possession of the goods. Plaintiffs assert that JBM did not pay these invoices. (*Id.* ¶ 49)

Plaintiffs assert that the goods ordered by invoices, numbered 320021, 330376 and 330377, were to be "cash against documents." Under this arrangement, payment on the invoices would release the documents needed for JBM to take possession of the goods. Plaintiffs claim, however, that they had agreed JBM need only pay 50% of the agreed upon price up-front, and remit the balance within a month to a month and a half after the merchandise arrived. (*Id.* ¶ 29) Thus, according to Plaintiffs, JBM was entitled to receive the original documents and, in turn, the goods upon its payment of only 50% of the total cost of the merchandise. These invoices were therefore referred to as the "50% invoices."

Plaintiffs contend that, for these three invoices, the true purchase prices were actually double the amounts listed on the "50% invoices." They concede that JBM paid the amounts reflected on the "50% invoices," but allege that JBM was in breach of its contract with them by failing to pay the remaining 50% of the purchase price.

They claim JBM originally owed a total of $687,071.00 for the goods purchased through the seven invoices, of which JBM paid only $169,100.00. They allege that $340,091.00 remain unpaid on the "cash against goods" shipments and $177,880.00 remains unpaid on the "cash against documents" shipments. (Sever Tr Aff ¶ 39) Plaintiffs allege that all the goods were delivered to JBM, and that JBM never made any complaints regarding the merchandise. As such, they seek recovery of the $517,971.00 they claim remains outstanding.

Defendant's Allegations:

JBM alleges that any agreements Plaintiffs had regarding the invoices at issue were made with a middleman, and not with itself directly. It contends that it never had any direct contact or communication with Plaintiffs. It further asserts that it never signed, or was given, a purchase order, confirmation or other contract for the sale of the merchandise at issue. (Soffer Tr Aff ¶ 18) As such, it is JBM's position that it has no contractual relationship with the Plaintiffs. (*Id.* ¶ 18)

JBM contends that all of its negotiations regarding the goods at issue were verbal communications with Said. (*Id.* ¶ 18) It argues that Said was not its agent and that Said in fact works for Savitex, a Turkish seller of goods that does not itself manufacture goods, but contacts buyers and arranges to have merchandise shipped from a factory to the purchaser. (*Id.* ¶ 5) It claims that Said was Savitex' account manager for JBM's business, and that Said was its only connection to Turkey or Turkish manufacturers.

Defendant argues that it has already made full payment for the goods it received from Plaintiffs. It contends that the terms of payment for these goods were cash against documents or payment in advance by wire transfer, and that it never would have received the goods if it had not

paid for them in full. (*Id.* ¶ 19, 46)

It argues that any documentation reflecting higher prices than that indicated on the "50% invoices" is simply a consequence of import/export regulations. Defendant alleges that there are Turkish price floors, or price supports, which are export restrictions imposed by the Turkish government that only permit exports above a certain price. These are, allegedly, to protect the local market and limit exports out of Turkey. JBM alleges that, because of these price floors, it is a common practice to issue double invoices - - to send the real invoice with other documents and to have a fictitious invoice sent with the "export visa" for the merchandise and stamped by the Turkish authority.

DISCUSSION

At a bench trial, issues of credibility are for the fact finding court, "especially when the findings of facts rest in large measure on considerations relating to the credibility of witnesses." *Claridge Gardens, Inc. v Menotti*, 160 AD2d 544, 545 (1st Dep't 1990).

Plaintiffs' claims for breach of contract and breach of implied contract fail because they did not establish through credible evidence the existence of a contract with JBM.

Plaintiffs' assertion that Said was an agent of JBM, and that a contract therefore existed between the parties, was never proven. Nor did they establish that they had a reasonable belief that Said was JBM's agent. Mr. Seket Sever, the general manager of Sev-Kon, testified that he never saw a JBM business card with Said's name on it, or any other documents that indicated that he was an agent or employee of JBM. (Transcript of trial, hereinafter "Tr" 38) Moreover, although Sever testified that he was contacted by Said in late 2003 with regard to this transaction and that Said was the Turkish agent of JBM, Sever stated that he had known Said since 2000 and

identified him as "Mali Said of MGM Textile Buying Agency." (Sever Tr Aff ¶ 9)

Plaintiffs place great emphasis on the fact that JBM originally referred to Said in its Answer as its agent. However, this is not dispositive. Defendant informed Plaintiffs that Said was not its agent during discovery. As noted above, Plaintiffs knew the company for which Said worked and knew, or had substantial reason to believe, that it was not JBM. Most significantly, Plaintiffs themselves made certain errors in their own submissions to the Court, in the Complaint, and sought to correct it informally.[1] The Court will not hold Defendant to a stricter standard with regard to its Answer than Plaintiff requests for its own Complaint.

Ultimately, JBM contends that it did not have a contractual relationship with either of the Plaintiffs, and Plaintiffs have not proven that a contract existed. JBM never signed or was given a purchase order. (Def Tr Br at 3). Joseph Soffer, of JBM, testified that no one at JBM had ever met nor done business with anyone from either of the Plaintiffs. (Soffer Tr Aff ¶¶ 15-16) Indeed, he testified that he had no knowledge that Plaintiffs were claiming to be owed additional money until he received the summons and complaint. (*Id.* ¶ 19) This is supported, rather than contradicted, by Sever's testimony that he had Sev-Kon proceed directly to court, without first contacting JBM, when unable to resolve their issues through Said. (Tr 79)

Plaintiffs argue that the oral agreement at issue is fully enforceable because JBM admitted receipt and acceptance of the goods shipped under the disputed invoices.

---

[1] Plaintiffs allege that, due to a clerical error, the Complaint states that a payment of $76.000 from JBM was received for the outstanding amount due on one of the invoices at issue. Plaintiffs later asserted that this payment actually pertained to an unrelated invoice and "corrected the Complaint" and delivered it to counsel for JBM, without filing the document as an amended complaint. Plaintiffs now seek to have the Court accept this "Revised Complaint" for use in lieu of the Complaint actually filed. Pl Tr Br ¶ 2.

However, inasmuch as Plaintiffs have failed to allege, much less prove, any direct relationship with JBM and have further failed to establish that Said was an agent for JBM, that argument is unavailing. Oral agreements may be enforceable, but Plaintiffs have not established that one existed between themselves and Defendant.

Significantly, Plaintiffs have simply not offered any credible explanation why the goods that were alleged to have been sold as "cash against goods" invoices, were released to JBM, if JBM had not made payment of the monies it owed for these goods. Plaintiffs present a narrative to explain why the goods with "cash against documents" were released to JBM, alleging that the remainder of the payment on the "50% invoices" was to be paid within a month to a month and a half after the goods arrived. However, the evidence and testimony supporting this contention was too lacking to meet Plaintiff's burden of proof. Against Plaintiff's contention, is, *inter alia*: the lack of a basis for Plaintiffs to have extended credit to JBM, including but not limited to the lack of any relationship or even contact between Plaintiffs and Defendant; the lack of attempts to address any failure to pay prior to filing the action; and the lack of any documentation indicating an agreement that JBM would make payment in double the amount listed on the invoices.

Although Plaintiffs also seek redress under claims of unjust enrichment, goods sold and delivered, and account stated, these claims were also not proven at trial. Unjust enrichment "requires a showing that it would be contrary to equity and good conscience to permit defendant to retain what is sought to be recovered." *Insur. Co. Of State of Penn. v HSBC Bank*, 37 AD3d 251, 255 (1st Dep't 2007). The "sole requisite" for a claim for goods sold and delivered "is a perfected transaction between the assignor and the assignee." *M.S. Textiles, Ltd v Rafaella Sportswear, Inc.*, 293 AD2d 261, 262 (1st Dep't 2002). A claim for "an account stated assumes

the existence of some indebtedness between the parties. It cannot be used to create liability where none otherwise exists." *Gurney, Becker & Bourne, Inc. v Benderson Dev. Co., Inc.*, 47 NY2d 995, 996 (1979). Inasmuch as Plaintiff did not establish that a finding for Defendant would be contrary to equity, that the parties had a direct transaction, or that liability otherwise exists, these claims also fail.

The actual price agreed upon for the merchandise was not proven at trial. Much of the lack of clarity stems from Plaintiffs' own testimony. Sever testified at his deposition that Sev-Kon never engaged in a practice of "double invoicing." (Tr 63) However, at trial, he testified that they created double invoices, for this transaction only, because of the 50% agreement they had with Said. (*Id.* at 64) Additionally, Siyahi then testified that Hedef had actually created three sets of invoices for this transaction, at the request of Sev-Kon, and that Hedef issued the 50% invoices "in the regular course of business, and it is Hedef's routine business practice to prepare such invoices." (*Id.* at 95; Siyahi Tr Aff ¶ 32).

JBM proffered a more credible account, contending that its business practice is to pay for imported merchandise before or upon receipt of the goods because credit is not extended to them, particularly from companies with which it does not have a relationship. This position is actually supported by Sev-Kon, which alleges a compatible business practice of its own. Sev-Kon avers that its business practice was for Hedef to prepare documents, which would be sent to the bank, and the bank would not release the documents to the purchaser until payment was made for the merchandise. (Tr 46, 102) Plaintiffs' explanation, for why the transactions at issue were handled differently, is that credit was extended for this merchandise and there is a lack of paper documentation because these orders were emergencies. (*Id.* at 49, 51) Sever then acknowledges

that this alleged credit was discussed solely with Said, and never with JBM. (*Id.* at 49)

Finally, Plaintiffs have failed to prove their claimed damages. Given that there was little attempt to create a full and accurate record of any of the transactions, this is not surprising. However, Plaintiffs' proffered proof was limited to such evidence as Sever's testimony that for the allegedly outstanding half of the 50% invoices, the portion still "open" is reflected in his accounts in his office in Turkey, but nowhere else. (Tr 57-58) Inasmuch as it "is axiomatic that the party 'complaining of injury has the burden of proving the extent of the harm suffered'" (*City of New York v State*, 27 AD3d 1, 4 (1st Dep't 2005) (internal citations omitted)), this is not sufficient. *See also J.R. Loftus, Inc. v White*, 85 NY2d 874, 877 (1995). Accordingly, Plaintiffs failed to prove damages.

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is

ORDERED that the complaint is dismissed; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: February 7, 2008

ENTER:

J.S.C.