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

PRESENT: JUSTICE DORIS LING-COHAN PART 36

Justice

3300625 Canada Inc INDEX NO. 602516/06

MOTION DATE

- v - MOTION SEQ. NO. 001

The New York Look Enterprise MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 is decided as per memorandum decision

FILED
JAN 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/5/09

J.S.C.
JUSTICE DORIS LING-COHAN

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36

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3300625 CANADA, INC.,

Plaintiff,

Index No.: 602516/06

-against-

DECISION AND ORDER

THE NEW YORK LOOK ENTERPRISES, INC.,

Motion Seq. No.: 001

Defendant.

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DORIS LING-COHAN, J.:

FACTUAL BACKGROUND

Defendant The New York Look Enterprises, Inc. (New York) is seeking partial summary judgment, pursuant to CPLR 3212, that it is not responsible for the value of that portion of goods that it returned to plaintiff 3300625 Canada, Inc. (Canada), pursuant to a contract of sale.

On September 27, 2005, the parties entered into a sales transaction evidenced by a sales receipt invoice, whereby Canada agreed to sell a variety of shoes to New York, with delivery on February 1, 2006. Delivery was to be completed by February 15, 2006, upon the failure of which the contract could be cancelled.

On January 31, 2006, Canada e-mailed New York that it would not be able to meet the delivery date, and provided a revised schedule, asking New York to indicate whether that would be acceptable.

New York did not respond to the e-mail, nor did it object when no delivery was made on February 1, 2006. New York also

failed to cancel the contract on February 15, 2006.

On March 17, 2006, Canada delivered the shoes to the five stores indicated by New York in its invoice, and, four days later, New York informed Canada that it was rejecting the shoes because they were delivered late. New York stated that it did not inform Canada of its rejection of the modification of the delivery dates because its buying personnel was away on business trips during the time that the shoes were initially to be delivered. There is some contrary evidence to the effect that New York's personnel did not begin the buying trips until March 1, 2006, one month after the e-mail was sent and the first delivery was to have been made.

On March 23, 2006, Canada advised New York that, as an accommodation, it would accept return of the shoes, provided that all of the shoes were returned in their original packaging within seven days. New York retained 20% of the shoes, and returned 80% to Canada on April 28, 2006.

According to New York, it did not have storage room in its stores, and so, after delivery, the shoes were unpacked from their bulk packaging and placed on the floor of the stores. When Canada advised it that the shipment could be returned if all of the shoes were returned in their original packaging within seven days, New York repackaged the shoes and sent them to the warehouse indicated by Canada one month later. In his

examination before trial, New York's buyer stated that the 20% of the delivery that was retained by New York consisted of one style of shoe.

When Canada discovered that New York had repackaged the shoes and retained 20% of the delivery, it demanded the full purchase price. New York refused, but agreed to pay for the portion of the delivery that it retained, if given a discount. This offer was refused by Canada, which then instituted the present lawsuit. The returned shoes have remained in Canada's warehouse.

Canada maintains that New York's failure to object to the modification in the delivery date, and its failure to return all of the shoes promptly in the manner requested by Canada, obligates New York for the full contract price of $91,196.00. New York's position, indicated by this motion, is that, at most, it should only be liable for the portion of the shoes it retained. New York does not allege any fact to indicate that the shoes were nonconforming in any way except for late delivery.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186

(1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

This case concerns a contract for the sale of goods between merchants, which is governed by the Uniform Commercial Code (UCC) in New York. Pursuant to § 2-209 of the UCC, contracts for the sale of goods may be modified by agreement of the merchants with respect to delivery dates, and whether such modification was agreed upon is generally a question to be determined by the trier of fact. *See Technologies Multi Source T.M.S.S.A. v MRP Electronics, Inc.*, 8 AD3d 361 (2d Dept 2004). Although, in the instant case, there existed a question as to whether New York agreed to Canada's change in delivery dates by its silence, that question became moot by the subsequent actions of the parties. Canada is not alleging wrongful rejection by New York, and agreed to the return of the merchandise when New York notified it of its rejection of the late delivery.

The question to be resolved, pursuant to this motion, is whether New York exercised any control over the goods that would

be deemed inconsistent with Canada's ownership of the shoes.

UCC § 2-601, entitled "Buyer's Rights on Improper Delivery," states, in pertinent part, that

> "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest ..."

UCC § 2-602 (2) (a) states

> "after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller."

> "On the issue of the timeliness of [the buyer]'s rejection of the [merchandise], UCC 2-602 (1) provides that such rejection must be made within a reasonable time after the buyer discovers or should have discovered the defect, and **any act inconsistent with the seller's ownership of the goods constitutes an acceptance** (UCC 2-606 [1] [c], including their retention without a seasonable notice of revocation of acceptance. [emphasis added, internal quotation marks and citations omitted]."

New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc., 28 AD3d 175, 178 (1st Dept 2006).

Any goods accepted, or deemed accepted, by the buyer must be paid for at the contract price. UCC § 2-607 (1).

In the instant matter, New York not only unpacked the shoes shipped by Canada and placed them for sale in its stores, it retained 20% of the shipment that represented a single style.

"Section 2-601 (c) provides that a buyer faced with a nonconforming delivery may accept any commercial unit or units and reject the rest. Section 2-606 (2) states that the

acceptance of a part of any commercial unit is the acceptance of that entire unit." *In re Crysen/Montenay Energy Company v Consolidated Edison Company of New York, Inc.*, 156 BR 922, 926 (SDNY 1993), *affd* 226 F3d 160 (2d Cir 2000).

A commercial unit is defined by UCC § 2-105 (6) as

> "such a unit of goods as by commercial usage is a single whole for purposes of sales and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole."

In the case at bar, there is no question that New York's retention of the entire shipment of a single style of shoe represents the acceptance of a commercial unit, obligating it for the full purchase price for that unit. However, New York's act of unpacking all of the shoes from their bulk packaging and placing them in its stores raises a question as to whether such act could be considered an attempt to resell the shoes, thereby constituting an act inconsistent with Canada's ownership of the goods. *See Sunkyong America, Inc. v Beta Sound of Music Corp.*, 199 AD2d 100 (1st Dept 1993). Additionally, New York's keeping just one style of shoe, failing to return the shoes to Canada for almost six weeks after delivery, and not following Canada's instructions with respect to reshipment, raises an additional question as to whether New York acted in good faith, which is a

part of every commercial contract under the UCC. UCC § 1-203.

Based on the foregoing, summary judgment must be denied because a question of fact remains as to whether New York's actions in unpacking the shoes, placing them on the floor of its stores, and not returning them to Canada for over a month, was an act of acceptance, inconsistent with Canada's ownership of the shoes.

CONCLUSION

It is hereby

ORDERED that defendant The New York Look Enterprises, Inc's motion for partial summary judgment is denied; and it is further

ORDERED that partial summary judgment is granted to plaintiff to the extent that defendant The New York Look Enterprises, Inc. is found liable to plaintiff for the percentage of shoes it retained, and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to defendant's liability to plaintiff for the percentage of shoes it returned to plaintiff.

Dated: 1/5/09

Doris Ling-Cohan, J.S.C.

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