

**Sunny Lumber & Hardware Inc. v J & A Kitchen and
Bath Showroom Corp.**

2009 NY Slip Op 30074(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 100156/2008

Judge: Shirley Werner Kornreich

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

PRESENT: ~~HON. SHIRLEY WERNER KORNREICH~~
Justice

PART 54

Index Number : 100156/2008

SUNNY LUMBER & HARDWARE INC.

vs

J & A KITCHEN AND BATH

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE

10/30/08

MOTION SEQ. NO.

1 1

MOTION CAL. NO. _____

Is motion to/for Summary Judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3-4

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 16 2009

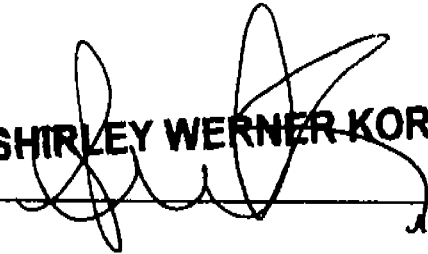
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: _____

1/9/09

HON. SHIRLEY WERNER KORNREICH



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 54

----- X
SUNNY LUMBER & HARDWARE INC.,

Plaintiff,

Index No.: 100156/08

-against-

DECISION
and ORDER

J & A KITCHEN AND BATH SHOWROOM CORP.
and JIANG HUA LI,

Defendants.

----- X
KORNREICH, SHIRLEY WERNER, J.:

This action arises out of defendants' failure to pay plaintiff Sunny Lumber & Hardware, Inc. (Sunny Lumber) for building supplies it delivered and sold in 2007. Plaintiff now moves for summary judgment, pursuant to CPLR § 3212, asking for \$192,795.93, which includes \$31,298.95 in attorneys' fees, on the ground that there are no material issues of fact which warrant a trial. Defendants oppose.

I. Background

Sunny Lumber's manager Yi-Tuan Chen avers the following. From February 22, 2007 through November 5, 2007, plaintiff delivered and sold building supplies to defendant J & A Kitchen and Bath Showroom Corp. (J & A). Each set of supplies was delivered pursuant to a numbered invoice. In support of its motion, plaintiff has attached copies of each individual invoice, accepted by J & A, as well as an account statement summarizing all of the debits and credits associated with J & A's account. The invoices amounted to \$154,458.86.

Mr. Chen states that J & A fell behind on the majority of its payments and, as of August 16, 2007, had an outstanding balance of \$145,594.77. That same day, in an attempt to reconcile

the matter, the parties entered into an agreement dated August 15, 2007 (August 15 Agreement). The agreement was signed by Mr. Chen and defendant Jiang Hua Li on behalf of J & A. In this agreement, J & A acknowledged that it owed plaintiff \$143,594.77. In addition, J & A agreed to make a payment of \$100,000 within 7 days. If the payment was not made, J & A and its "owners" would be "personal[ly] liable" for the entire balance owed. Mr. Li is J & A's owner and president.

Three days later, on August 18, 2007, the parties entered into a second agreement (August 18 Agreement). This agreement states that as of August 17, 2007, J & A owed plaintiff \$145,323.27. It provides that "[J & A] agrees to let [Sunny Lumber] into [J & A's] premises [to] get all [of the] inventory belonging to [J & A] until the whole balance is paid off. All [incurred] labor charges will be [J & A's] responsibility." Despite this agreement, plaintiff did not recover any of its inventory, and the entire balance remains due and owing.

Plaintiff claims that based upon the proffered invoices and two agreements, J & A and Mr. Li jointly and severally owe Sunny Lumber \$156,494.77 in past due invoice payments, plus attorneys fees of \$31,298.95, for a total of \$192,795.63.

In opposition, Mr. Li avers that all of the goods were purchased by J & A in its corporate capacity and that he is not personally liable for the debt. Mr. Li further avers that he did not personally guarantee any of these payments. He further contends that he does not "recognize" some of the invoices and that he returned some of the goods to the plaintiff.

II. Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is

upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

An account stated is an agreement between parties to an account predicated upon the existence of prior transactions between them regarding the correctness of the account and the sum which is due. *Ryan Graphics, Inc. v. Ernest Lawrence Group, Inc.*, 39 A.D.3d 249, 250 (1st Dept 2007). “[R]etention of bills without objection or partial payment may give rise to an account stated.” *Morrison Cohen Singer Weinstein LLP v. Waters*, 13 A.D.3d 51, 52 (1st Dept 2004).

Regarding the money owed by J & A in its corporate capacity, summary judgment is

warranted on the cause of action for an account stated. Plaintiff has submitted individual invoices which were signed for and delivered. Receipt of these invoices, which were never protested, created an account stated in the amount of \$154,458.86. Also, by signing the agreements and arguing they were signed in a corporate capacity, Mr. Li admits J & A owes the amounts set forth in the agreements as of the August 2007 agreement dates. This amount is not reduced by any credit associated with J & A's purported return of inventory, since Mr. Li has not offered any evidence to support his conclusory assertion that he returned some supplies to the plaintiff. *Zuckerman, supra*, 49 N.Y.2d at 562.

With regard to Mr. Li individually, summary judgment is denied. In its reply papers, plaintiff offers a third agreement executed between the parties dated September 7, 2007 (September Agreement). This agreement states that as of August 28, 2007, J & A was indebted to Sunny Lumber in the amount of \$160,663.27. It also provides that "[t]he owner of [J & A] Jiang Hua Li...agrees to pay the full balance. In case [J & A] can not pay for the full amount, Jiang Hua Li will [personally guarantee] the balance and pay for all attorney[s'] fees &...court costs incurred [in] any efforts [to] enforce...payment." The September Agreement was proffered by plaintiff for the first time in its reply papers. As such, it cannot be considered. *Hakim v. 65 Eighth Avenue, LLC*, 42 A.D.3d 374 (1st Dept 2007); *Doundley A.E. v. Elizabeth R.E.*, 44 A.D.3d 353 (1st Dept 2007).

Moreover, since the first agreement was followed by the second agreement, which did not contain a guarantee, the first agreement is not sufficient, at this point, to make Mr. Li individually liable.

Plaintiff's motion for attorneys' fees and costs is denied at this time, since the only

evidence to suggest J & A and/or Mr Li agreed to incur these expenses is the September Agreement. Accordingly, it is

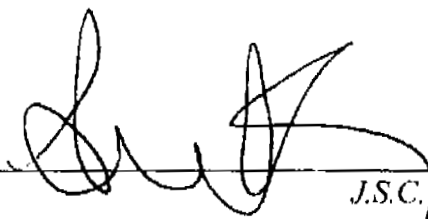
ORDERED that plaintiff's motion for summary judgment against defendant J & A Kitchen and Bath Showroom Corp. is granted only as to the cause of action for an account stated in the sum of \$154,458.86 and it is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that the parties are to appear before the Court for a status conference, as scheduled at 9:30 a.m. on January 29, 2009 at 111 Centre Street, Room 1227, New York, N.Y. 10013.

ENTER

DATE: January 9, 2009
New York, NY



J.S.C.

FILED
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