

Milberg Factors, Inc. v Ardmore Blouses, Inc.

2009 NY Slip Op 30224(U)

January 27, 2009

Supreme Court, New York County

Docket Number: 115067/2008

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PART 35

Index Number : 115067/2008

MILBERG FACTORS, INC.,

vs.

ARDMORE BLOUSES, INC.,

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

Justice

INDEX NO.

115067-08

MOTION DATE

1/26/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

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

The instant motion is decided in accordance with the annexed Memorandum Decision. hereby

ORDERED the instant motion of plaintiff Milberg Factors, Inc., for an order pursuant to CPLR 3212, granting summary judgment in its favor against defendant Ardmore Blouses, Inc., in the amount of \$189,861.56, is granted, and the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the balance of this action is hereby severed and shall continue; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference in Part 35 before Justice Carol R. Edmead, Supreme Court, New York County, 60 Centre Street, Room 438 on Tuesday, March 3, 2009, at 3:00 p.m.

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

Dated:

1/27/09

[Signature]

HON. CAROL EDMEAD ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

PAID PAPERS NUMBERED
FILED
FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

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 35

_____ x
MILBERG FACTORS, INC.,

Plaintiff

-against-

ARDMORE BLOUSES, INC.,

Defendant.

_____ x
EDMEAD, J.S.C.

Index No. 115067/2008

DECISION/ORDER

FILED
FEB 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff Milberg Factors, Inc. ("plaintiff") moves for an order pursuant to CPLR §312, granting summary judgment in its favor against defendant Ardmore Blouses, Inc. ("defendant"), in the amount of \$189,861.56, and severing the balance of the claim.

The Complaint

The Complaint alleges that plaintiff entered into a Refactoring Agreement with Finance One, Inc. ("Finance One"), wherein plaintiff agreed to purchase, and Finance One agreed to sell, various accounts receivables created by Finance One's clients, and that Finance One assigned the accounts receivables, and all the rights of Finance One and its factored clients in such receivables, to plaintiff.

The Complaint further charges that between July 15, 2008 and September 26, 2008, Finance One's clients sold and delivered goods to defendant for the agreed price and reasonable value of \$219,648.93.

Plaintiff's Contentions

Summary judgment is clearly warranted since the defendant does not dispute that it owes

plaintiff \$189,861.56. Paragraph 5 of defendant's answer admits that it owes no more than \$189,861.56. Although plaintiff contends that the additional monies remain due and owing from defendant to plaintiff, there is no dispute that defendant owes that amount. Therefore, judgment should be entered for said amount and the remaining balance of plaintiff's claim should be severed.

Defendant's Opposition

Defendant's answer does not admit that it owes said amount. Defendant's answer specifically refers to a balance "if any" due plaintiff.

Further, defendant denies knowledge and information surrounding the alleged assignment.

Plaintiff's Reply

Defendant, in its answer, did not dispute any of the specific items listed in the complaint. Rather, defendant attached its own schedule, which tracked the same invoice numbers, dates and amounts as set forth by the plaintiff. The only difference between the itemized lists was that the defendant claimed partial payment, so that according to the defendant, the balance due and owing was \$189,861.56 from the defendant.

Defendant's opposition is simply a delay tactic. Defendant has closed its business and is in the process of liquidating its assets.

For the first time, defendant challenges the standing of plaintiff as assignee. However, the Refactoring Agreement entered into between plaintiff and Finance One is submitted to the court.

Further, defendant does not dispute any of the itemized goods sold and delivered as it was

required to do pursuant to CPLR §3016.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Plaintiff has submitted admissible evidence demonstrating that \$189,861.56 is due and owing to the plaintiff by the defendant. Plaintiff’s motion for partial summary judgment is established by the items that both plaintiff’s Schedule and defendant’s Schedule list as outstanding. This amount is further established by defendant’s incorporated evidence for said

amount.

Further, defendant fails to specifically indicate those items it disputes.

And, plaintiff has established its standing to pursue this claim.

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Defendant failed to raise an issue of fact as to its liability as to the amount sought in partial summary judgment. Again, defendant does not specifically dispute the itemized invoices in the complaint that are the subject of this motion. Nor does defendant set forth any basis upon

* 6]
which the amount is not due.

Conclusion

Based on the foregoing, it is hereby

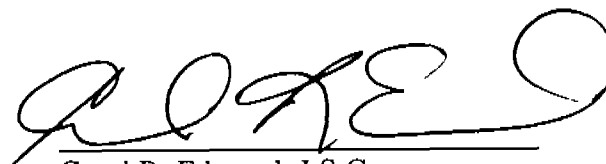
ORDERED the instant motion of plaintiff Milberg Factors, Inc., for an order pursuant to CPLR 3212, granting summary judgment in its favor against defendant Ardmore Blouses, Inc., in the amount of \$189,861.56, is **granted, and the Clerk of the Court is to enter judgment accordingly**; and it is further

ORDERED that the balance of this action is hereby severed and shall continue; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference in Part 35 before Justice Carol R. Edmead, Supreme Court, New York County, 60 Centre Street, Room 438 on **Tuesday, March 3, 2009, at 3:00 p.m.**

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

Dated: January 27, 2009



Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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