

Eden State Bank v Colors In Optics, Ltd.

2009 NY Slip Op 32585(U)

November 4, 2009

Supreme Court, New York County

Docket Number: 601424/08

Judge: Walter B. Tolub

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

PRESENT: Tolub

PART 15

Index Number : 601424/2008
EDEN STATE BANK,
VS.
COLORS IN OPTICS, LTD.,
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

RECORDED


IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM

FILED

NOV 05 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/4/09

Tolub  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: IAS PART 15

-----x
EDEN STATE BANK

Plaintiff,

-against-

COLORS IN OPTICS, LTD.

Defendant.
-----x

Index No. 601424/08
Mtn Seq. 001

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

Plaintiff moves and Defendant cross-moves for summary judgment (CPLR §3212).

Facts

Plaintiff, Eden State Bank (Eden), is a Texas bank which made several loans to a firm called Horizons Display, Inc. (Horizon). Horizon's loans were consolidated in a promissory note and Eden took a security interest in Horizon's accounts receivable as of at July, 2005.

Defendant, Colors In Optics (Colors), is a corporation in the business of selling eyewear. On occasion, Colors ordered custom manufactured retail displays from Horizon. Colors was an account debtor of Horizons.

On or about August 8, 2005, Eden sent Horizons' account debtors a notice explaining that Horizons' account receivables had been assigned to Eden (Assignment). The letter stated:

As part of our financing terms with Horizons Display, Inc., The Eden State Bank holds a security interest in all accounts of Horizons Display, Inc. The July 2005 accounts

receivable listing from Horizons Display shows your company as owing an outstanding balance to horizons. Please provide the balance owed to Horizons as of July 31, 2005 at the bottom of this latter.

As part of our agreement with Horizons and as noted on all future invoices, please make all payments on your account to Horizons jointly to The Eden State Bank and Horizons Display, Inc., and remit to The Eden State Bank, P.O. Box 999 Eden, Texas 76837, attention Larry Upshaw, President.

This notice is provided to you under the terms of a Commercial Security Agreement between the Bank and Horizons and pursuant to Sections 9-406 and [illegible] of the Texas Business and Commerce Code. . .

(emphasis added Complaint Ex. 1).

The letter was signed by both Larry Upshaw ,the President of Eden and by Scott Goodwin, the President of Horizons.

At the bottom of the page, Colors listed the outstanding balance owed to Horizons as of July 31, 2005 as \$2,432.23. The letter is also signed by Hema Parmar, Colors bookkeeper.

On January 2, 2006, Colors ordered custom manufactured display material from Horizons. Horizons demanded Colors make a deposit of \$41,791.16. The invoice states that the payment should be remitted to "Horizons Display c/o Robert Atnip 6819 Waxahachie Way San Antonio, TX 78256." (Defendant's Ex. B). Colors made the payment in the manner directed by the invoice (Defendant's Ex. C).

On January 31, 2006, Horizons submitted an invoice to Colors for \$44,229.39. That invoice also provided that Colors make

their payment to Horizons. Colors made the payment as directed to by the invoice (Defendant's Exs. D and E).

After Colors sent the payments detailed in the invoices to Horizons, Eden discovered that the owner of Horizons had created an entity called Horizons Visual Display, LLC (Visual) and deposited Colors payments into Visual's account.

Plaintiff commenced this action against Colors to recover payments made to Horizons which, pursuant to the signed notice, should have been made to Horizons and Eden jointly.

By this motion Plaintiff seeks summary judgment against Colors for breach of contract and for violating UCC 9-406.

Defendant cross-moves for summary judgment arguing that UCC 9-406 applies to account debtors and since Colors is not an account debtor, UCC 9-406 is inapplicable. Additionally, Defendant argues that Ms. Parmar, Defendant's bookkeeper, was not in charge of the transactions Colors made after the notice was sent.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New

York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

UCC Article 9-406 Claims

UCC Article 9-406(a) states:

Discharge of account debtor; effect of notification. Subject to subsections (b) through (h), an account debtor on an account, chattel paper, or payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the

assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee **and may not discharge the obligation by paying the assignor.**

(*Emphasis added* ECC 9-406[a]).

Defendant argues, *inter alia*, that Colors is not an account debtor because an account debtor does not include persons obligated to pay a negotiable instrument (UCC 9-105). Defendant argues that when Colors received the notice of Assignment in August of 2005, it was not account debtor as it did not owe Horizons any money. Defendant argues that it did not have an account with Horizons, but rather, in January and February of 2006, it made a deposit and progress payments with Horizons for new work.

UCC 1-902(3) defines an account debtor as "a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper."

UCC 1-902 defines an account as:

"Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (I) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a

vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(UCC 9-102[a][2]).

Here, by definition, Colors is an account debtor and its orders to Horizon were not negotiable instruments. Colors was obligated on its accounts both before and after notification of the Assignment by Eden.

The payments at issue here occurred pursuant to two invoices dated January 3, 2006 and January 31, 2006.

It is well settled that an account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee (General Motors Acceptance Corp. v. Albany Water Board, 187 AD2d 894, 896 [3d dept 1992] citing UCC 9-318 [3]; see, 6 NY Jur2d, Assignments, §40, at 279-280). After notice of the transfer, if the debtor pays the

assignor any money which, under the assignment belongs to the assignee, or if he does anything prejudicial to the rights of the latter, he is liable for the resulting damage (General Motors Acceptance Corp. v. Albany Water Board, 187 AD2d 894, 896 [3d Dept 1992]; see, Lincoln Rochester Trust Co. v Marasco Steel, 66 Misc2d 295, 297; Whitehall Mercantile Corp. v Wellbilt Corp., 36 Misc 2d 788, 789). No particular form of notice is required, it is sufficient if the information known to the debtor either apprises the debtor of the assignment or serves to put the debtor "on inquiry" (General Motors Acceptance Corp. v. Albany Water Board, 187 AD2d 894, 896 [3d Dept 1992] see, 6 NY Jur2d, Assignments, § 42, at 280).

Here, the proof submitted in support of the respective motions for summary judgment plainly establishes that Colors was on notice that any and all payments were to be made directly to Plaintiff. Plaintiff's letter explaining the Assignment states plainly states "[a]s part of our agreement with Horizons and as noted on all future invoices, please make all payments on your account to Horizons jointly to The Eden State Bank and Horizons Display, Inc." (Complaint Ex. 1).


Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted in the amount of \$84,531.53 plus interest; and it is further

ORDERED that the Clerk of Court enter Judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/4/09



HON. WALTER B. TOLUB, J.S.C.

FILED
NOV 05 2009
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