

Repetto S.A. v Aidan Indus., Inc.

2009 NY Slip Op 32848(U)

December 1, 2009

Supreme Court, New York County

Docket Number: 601579/09

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 8

Index Number : 601579/2009
REPETTO S.A. D/B/A REPETTO
VS.
AIDAN INDUSTRIES INC. D/B/A
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

be decided pursuant to attached Memorandum

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

MARILYN SHAFER
J.S.C.

Dated: 12/1/09

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
NEW YORK COUNTY: PART 8

REPETTO S.A. d/b/a REPETTO PARIS,

Index No.: 601579/09

Plaintiff,

- against -

AIDAN INDUSTRIES, INC. d/b/a
CATHERINE MALANDRINO,

Defendant.

DECISION/ORDER

FILED
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SHAFER, MARILYN, J.:

In this action for breach of contract and goods sold and delivered, plaintiff Repetto S.A. d/b/a Repetto Paris (Repetto) moves for summary judgment against defendant Aidan Industries, Inc. d/b/a Catherine Malandrino (Aidan) for the amount sought in the complaint (\$35,147).

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must "establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986), citing *Zuckerman*, 49 NY2d at 562. The evidence must

be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is "arguable." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal citations omitted); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

In support of its motion, plaintiff submits an affidavit of Michael Flanagan, Repetto's General Manager, who attests that, in June 2007, plaintiff entered into an agreement with defendant to sell shoes; that shoes were shipped and delivered; that invoices were sent to defendant; and that the invoices were not paid. Plaintiff also submits copies of three invoices for the goods allegedly sold and delivered.

In opposition, defendant submits an affidavit from Ida Rafalovich, Controller of Aidan, who attests that she knows of no written agreement between the parties, that defendant has no records of receiving the shoes, and that plaintiff has failed to produce proof of delivery of the shoes, despite defendant's document demand for such proof. Accordingly, defendant argues that the motion is premature, and that it needs to conduct discovery, with respect to the alleged contract and the merchandise allegedly sold and delivered.

In reply, plaintiff submits two documents, which, it claims,

show proof of delivery of the shoes. However, those documents are not self-explanatory and do not clearly show receipt of the goods by defendant. One document, a customs document, shows only that a freight forwarder apparently received an unidentified shipment of shoes. The second document similarly fails to show what invoice or order the shipment corresponds to, what shoes were delivered, or who received them. In addition, plaintiff submits no evidence of an agreement between the parties in June 2007. Even if an invoice, under certain circumstances, may be enforceable as a contract when it is "intended by the parties to be the final expression of their agreement" (*Battista v Radesi*, 112 AD2d 42, 42 [4th Dept 1985]), here plaintiff submits no evidence, other than the invoices themselves, to show what the parties had agreed to. Notably, the invoices at issue reflect that orders were placed in April 2007, not in June 2007, the alleged date of the agreement.

The court thus finds that there are triable issues of fact as to whether defendant received the subject goods, and whether there was an agreement between the parties. At the time the instant motion was made, it appears that no preliminary conference had been held and little or no discovery had been conducted in this matter. Under these circumstances, defendant is entitled to discovery at this early stage of the case (see *Morris v Hochman*, 296 AD2d 481 (2d Dept 2002); *Ponce v St. John's*

Cemetery, 222 AD2d 361 [1st Dept 1995]; *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]), and summary judgment is denied. See CPLR 3212 (f) (where "facts essential to justify opposition may exist but cannot then be stated," the court may deny a motion for summary judgment). The court notes that a review of the court's on-line case information system shows that the instant motion was served less than two weeks after defendant's answer was filed. The court further notes that plaintiff failed to attach a copy of the answer with its motion, as required by CPLR 3212 (b), which provides a separate basis for denial of the motion. See *Deer Park Assocs. v Robbins Store, Inc.*, 243 AD2d 443 (2d Dept 1997).

It is accordingly

ORDERED that the motion is denied.

Dated:

12/1/09

ENTER:

**MARILYN SHAFER
J.S.C.**

~~MARILYN SHAFER, J.S.C.~~

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