

**Wells Fargo Trade Capital Servs., Inc . v Blair Mills,
LLC**

2010 NY Slip Op 30253(U)

January 29, 2010

Supreme Court, New York County

Docket Number: 603701/2008

Judge: Debra A. James

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

WELLS FARGO TRADE CAPITAL SERVICES, INC.,
Plaintiff,

Index No.: 603701/2008

Motion Date: 09/22/09

- v -

Motion Seq. No.: 001

BLAIR MILLS, LLC,

Motion Cal. No.: _____

Defendant,

The following papers, numbered 1 to 6 were read on this motion for summary judgment and cross motion for default on counterclaim for failure to reply

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3, 4

5, 6

FILED

FEB 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff WELLS FARGO TRADE CAPITAL SERVICES, INC. ("Wells Fargo") moves for an Order granting a summary judgment against the defendant BLAIR MILLS, LLC. ("Blair Mills"). Blair Mills opposes that motion and cross-moves for a default judgment on the counterclaim interposed in its Answer for Wells Fargo's failure to reply to same. Most confusedly, Blair Mills appends a copy of an Amended Answer and Counterclaims that asserts an additional counterclaim for breach of contract concerning "charge backs"

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):

that it intends "to assert as soon as practicable". Wells Fargo opposes the cross-motion and appends a Reply to the Counterclaims that are interposed in Blair Mills's Amended Answer.

The court must deny Blair Mills's motion for a default judgment on the Counterclaims asserted in its Answer/Amended Answer. Wells Fargo is correct that as it moved for summary judgment on the pleadings before its time to reply to the counterclaim had expired, it met the requirement for an extension of time to reply. Dolgin Enterprises, Ltd v Central Adjustment Bureau, Inc., 118 AD2d 680 (2d Dept 1986). Moreover, Wells Fargo's Reply to the Amended Answer and Counterclaims appended to its response to Blair Mills's cross motion is timely with regard to Blair Mills's proposed Amended Answer and Counterclaims attached to such cross-motion.

With respect to Wells Fargo's motion for summary judgment, Blair Mills argues that the court should not entertain such motion because Wells Fargo's papers are procedurally defective in that they do not include a copy of any of the pleadings, including the summons and complaint as required pursuant to CPLR § 3212(b). A copy of the complaint is necessary to enable the court to determine the motion, and the failure of the parties to attach a copy of the pleadings could result in an automatic denial of the motion. Alizio v Perpignano, 225 AD2d 723 (2d Dept 1996). However, because the complaint in this action had been

filed with the court prior to the filing of the instant motion, the mandates of CPLR 2214 c have been sufficiently met so as to conclude that the Complaint is "already in the possession of the court."

Further, with respect to the Complaint, Answer, Amended Answer and Reply, any technical procedural errors in the original motion have been cured by defendant's cross motion and Wells Fargo's reply papers, so that the substance of the motion may be considered and Blair Mills claims no prejudice as a result of the omissions in the initiatory motion papers.

Therefore, the court also must grant Wells Fargo's summary judgment on "Count One", "Count Two" and "Count Three" of its Complaint, and dismiss the Counterclaims interposed in Blair Mills' Amended Answer.

With respect to "Count One", there is no dispute that non-party Frontier Spinning Mills, Inc. ("Frontier Spinning") sold certain goods having a value of \$72,763.22 to Blair Mills. Frontier Spinning assigned such Blair Mills account receivables, i.e. the invoices for the goods, to plaintiff Wells Fargo Trade Capital Services, Inc. ("Wells Fargo") the factor, at a discount, in exchange for cash. Blair Mills does not dispute that under the Factoring Agreement between it and Wells Fargo, upon the assignment of the Frontier Spinning accounts receivable to Wells Fargo, Blair Mills became obligated to remit payment for the

goods, known as Ledger Debt, to Wells Fargo. Further, there is no dispute that under such Agreement, Blair Mills is obligated to pay interest on any unpaid invoices. Wells Fargo has established that interest on such invoices has accrued from the date that Wells Fargo made due demand for payment of the invoices.

In connection with "Count Two", pursuant to the Agreement, Blair Mills agreed to pay Wells Fargo a minimum aggregate factoring commission of \$50,000 for each calendar year plus interest on the unpaid balances for factoring commissions. Having paid Wells Fargo only \$3,909.79 toward Wells Fargo's factoring commission for calendar year of 2008, Blair Mills owes Wells Fargo \$46,090.21, plus fees and interest on that amount. Blair Mills has not established any waiver of the minimum commission fee for 2008, given the no waiver "unless in writing" provision of the Agreement and Blair Mill's failure to offer any evidence that Wells Fargo manifested assent to any purported oral modification.

As for "Count Three", in the Agreement Blair Mills agreed to reimburse Wells Fargo for the amount of all costs, including attorney's fees, in connection with enforcement of such Agreement. As a matter of fact and law, Wells Fargo has established that Blair Mills is liable for all attorneys fees and costs incurred in this action.

Blair Mills's Counterclaims lack merit, as they are contrary to the explicit terms of the Agreement. Blair Mills is entitled to no offset for the Alran Sales invoices, which Blair Mills purported to assign to Wells Fargo, since Alran Sales has recourse with respect to the goods related to such invoices. Blair Mills only billed Alran Sales for the sale of such goods, but never delivered the goods to Alran Sales, but held them. Wells Fargo is correct that such "bill and hold" sales are not subject to its credit approval since all of the rights associated with the receivables have not been transferred to Alran Sales, as required under paragraphs 1.2, 2.1 and 6.2 of the Agreement. On the same basis, Blair Mills has no cognizable counterclaim for wrongful charge backs against Wells Fargo for the Alran Sales invoices. Since the goods were never delivered, it cannot be said even that Alran Sales constituted the eventual buyer or that Alran Sales would not have a dispute concerning the goods that were the subject of the unpaid accounts. Under such circumstances, Wells Fargo, as the factor, would have had the contractual right of charge back without verifying the merits of such dispute. See Tex Styles Group, Inc. v. Republic Factors Corp., 106 AD2d 257 (1st Dept 1984).

Accordingly, it is hereby

ORDERED that defendant's cross-motion for a default judgment is DENIED, and the Amended Answer and Counterclaims and the Reply

to Counterclaims are deemed served and filed nunc pro tunc; and it is further

ORDERED that the plaintiff's motion for summary judgment on "Count One" and "Count Two" of the Complaint is GRANTED and defendant is liable to plaintiff in the amount of \$119,929.38 on such claims, and the Counterclaims are DISMISSED; and it is further

ORDERED that plaintiff's motion for summary judgment on "Count Three" of the Complaint is GRANTED to the extent the defendant is liable to plaintiff on such claim; and it is further

ORDERED that to determine the amount of damages with respect to "Count Three" for reasonable attorney's fees, (1) plaintiff shall serve on defendant's counsel and file with the Supreme Court, New York County, Clerk of Part 50 R a copy of this Order with notice of entry and (2) the parties shall attend a hearing to report on the amount of the reasonable attorney's fees incurred by plaintiff in prosecuting this action before a Special Referee at a time, place and date to be set by the Clerk of Part 50R, who will to notify the parties of the time, place and date of such hearing; and it is further

ORDERED the reference is to be conducted and the report filed pursuant to CPLR 4320, and the Special Referee shall hear and report pursuant to CPLR 4311; and it is further

ORDERED that pursuant to CPLR 4403, any party may move to confirm or reject the report of the referee to report, and should no issues remain to be decided the court shall render decision directing judgment in this action.

This is the decision and order of the court.

Dated: January 29, 2010

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

FILED
FEB 04 2010
NEW YORK
COUNTY CLERK'S OFFICE