

<b>Mark One Mach. Sales, Ltd. v Excelsior Packaging Group, Inc.</b>
2010 NY Slip Op 30347(U)
January 28, 2010
Supreme Court, Suffolk County
Docket Number: 13940-2009
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

*Present:* **HON. EMILY PINES**

J. S. C.

Original Motion Date: 10-29-2009; 12-09-2009  
 Motion Submit Date: 12-09-2010  
 Motion Sequence No's.: 001 MD  
 002 MG

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**MARK ONE MACHINERY SALES, LTD.,**

**Plaintiff,**

**-against-**

**THE EXCELSIOR PACKAGING GROUP, INC.,  
 and THE GREAT ATLANTIC CAPITOL  
 CORPORATION,**

**Defendants.**

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Attorney for Plaintiff

The Warfield Group, LLP  
 Christine Lombardi, Esq.  
 100 Park Avenue, 16<sup>th</sup> Fl  
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Attorney for Defendant Excelsior

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Attorney for Defendant Great Atlantic

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**ORDERED**, that the motion (motion sequence no. 1) by plaintiff for partial summary judgment the first and second causes of action against defendant The Excelsior Packaging Group, Inc., is denied; and it is further

**ORDERED**, that the unopposed motion (motion sequence no. 2) by plaintiff for leave to amend the Complaint to add further causes of action against defendant Great Atlantic Capital Corporation, is granted; and it is further

**ORDERED**, that a preliminary conference is scheduled for March 9, 2010 at 9:30 a.m. before the undersigned.

**BACKGROUND**

Plaintiff commenced this action against defendants, The Excelsior Packaging Group, Inc. ("Excelsior") and Great Atlantic Capital Corporation ("Great Atlantic") by the filing of a Summons and

Verified Complaint on or about April 22, 2009. Issue was joined as to Great Atlantic by its service of a Verified Answer, Counterclaim and Cross-Claim dated June 3, 2009 and as to defendant Excelsior by the filing of a Verified Answer, Affirmative Defenses, Cross-Claim and Counterclaims dated June 5, 2009. The Complaint sets forth four causes of action: the first and second causes of action are against Excelsior for breach of contract and account stated. The third and fourth causes of action are against Great Atlantic for fraud and promissory estoppel. The gravamen of the Complaint is that on or about October 22, 2008, plaintiff and Excelsior entered into a Purchase and Sale Agreement (“Agreement”) wherein plaintiff agreed to sell certain machinery and equipment to Excelsior for the sum of \$1,200,000.00. Pursuant to the terms of the Agreement, Excelsior was required to pay a down payment of \$400,000.00 by wire transfer immediately upon the signing of the Agreement and the balance of \$800,000.00 on or before December 15, 2008. According to plaintiff, Excelsior failed to make the down payment and thereafter, Great Atlantic advised that it would fully fund the purchase and on or about November 3, 2008 paid the \$400,000.00 down payment by wire transfer. Plaintiff claims that in reliance on Great Atlantic’s representations, it transferred the equipment to Excelsior and executed a Bill of Sale. An invoice dated November 25, 2008 reflects that Great Atlantic guaranteed the purchase order. Plaintiff alleges that defendants have failed and refused to pay the \$800,000.00 balance due and owing, despite a demand for payment. Plaintiff therefore commenced the within action against Excelsior for breach of contract and an account stated and against Great Atlantic for fraud and promissory estoppel.

#### MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff now moves for an Order, *inter alia*, granting summary judgment on the first and second causes of action against Excelsior. By separate notice of motion, plaintiff moves for permission to amend the Complaint to assert additional causes of action against Great Atlantic. Excelsior opposes the motion for partial summary judgment, but no opposition has been submitted to the Court on the motion for leave to amend the Complaint. In support of the motion for partial summary judgment, plaintiff submits a copy of the pleadings, an attorney affirmation, an affidavit of Mark Wilenkin (“Wilenkin”), president of plaintiff, copies of the Bill of Sale, Purchase Agreement and other exhibits annexed thereto. Additionally, plaintiff includes an affidavit of Jeffrey Thompson, Esq. (“Thompson”), Executive Vice President and General Counsel to Berry Plastics Corporation (“Berry”). Thompson explains that on or about August 22, 2008, plaintiff and Berry entered into an agreement wherein plaintiff purchased certain equipment from Berry, which included the equipment that plaintiff later sold to Excelsior. Thompson states that the equipment sold to plaintiff was transferred with good and marketable title, free of all liens, as evidenced by the Bill of Sale annexed to the moving papers. Although Thompson admits that Berry’s creditors, Bank of America, Credit Suisse and US Bank have a secured interest in certain of its assets,

he states that the security agreements permit Berry to operate in the ordinary course of business and buy and sell the machinery at issue. Plaintiff has included the provisions of the security agreements which Thompson asserts authorizes the sales which are the subject of this action.

Wilenskin states in his affidavit that on or about November 25, 2008, plaintiff issued an account statement to Excelsior and Excelsior never objected to the amount demanded in the statement.

Based on the foregoing, plaintiff argues that there is no genuine issue of fact and the Court should grant partial summary judgment on the first and second causes of action of the Complaint against Excelsior.

Excelsior opposes the motion and argues that, notwithstanding the neat package plaintiff has submitted to the Court, things are not as they appear and numerous issues of fact preclude the granting of partial summary judgment. In opposition, Excelsior submits an affidavit by Ronnie Shemesh ("Shemesh"), president and chief executive officer of Excelsior, an affidavit by Terry Wilson ("Wilson"), process engineer and maintenance manager of Excelsior, affidavit of Jeffrey Shaner, executive vice president of Great Atlantic, an affirmation of counsel, a copy of the Agreement, Bill of Sale, correspondence and emails, auction brochures and UCC filings. Shemesh states that the facts are not as simple as portrayed by plaintiff and that this was not a mere purchase/sale of assets from plaintiff to Excelsior. Instead, Shemesh claims that Wilenskin approached him in 2008 with a proposal wherein Excelsior would help plaintiff acquire the machinery owned by Berry, which would then be sold at an auction for a substantial profit. The proceeds of the auction were then to be shared between the parties. A copy of the auction brochure listing the machinery is annexed to the opposition papers. Shemesh asserts that the Agreement was actually "conditional" and plaintiff agreed to pay Excelsior 25% of the profits generated by the auction. Shemesh notes that plaintiff failed to mention the auction in its moving papers and ultimately Excelsior never received any proceeds of the auction. Shemesh argues that plaintiff never intended to sell Excelsior the equipment but rather it was to be sold at auction and the down payment returned. He refers to a letter, dated September 22, 2008 from Wilenskin to Great Atlantic which stated that plaintiff needed the \$400,000 for a maximum of nine months. Additionally, Shemesh states that a fire at the warehouse where the equipment was stored damaged the property and resulted in a separate litigation against plaintiff herein. He also adds that the subject equipment was non-operational and missing parts, despite the representation in the Agreement to the contrary. Further, Shemesh argues that plaintiff did not have clear title to the equipment because it had not fully paid Berry Plastics. This is evidenced by affidavit of Shaner, who refers to the UCC-1 filings on the equipment and also to correspondence between counsel for Berry and plaintiff's counsel, which indicates that Berry was not paid in full for the machines. All of these issues raise questions of fact, which Shemesh argues

precludes the Court from granting partial summary judgment.

Plaintiff submits a reply in further support of the motion for partial summary judgment and argue that Excelsior's claim that the Agreement was "conditional" is without merit. Plaintiff asserts that the fire and alleged damage occurred on October 13, 2008, prior to the execution of the Agreement on October 22, 2008 and payment of the deposit on November 3, 2008. Moreover, plaintiff asserts that the equipment damaged was different from the equipment that was the subject of the Agreement and Wilenkin states in a further reply affidavit that all the terms of the deal between the parties were set forth in the Agreement. He also claims that the inclusion of the equipment in the auction was for Excelsior's benefit so it could make an additional profit, but is irrelevant to the terms of the Agreement. With regard to the correspondence between Great Atlantic and plaintiff, Wilenkin states that this is also irrelevant in that it related to an inquiry regarding the possibility of a short term loan by Great Atlantic to plaintiff. However, Wilenkin states that it never borrowed the funds from Great Atlantic because Excelsior agreed to purchase the equipment, thus, this correspondence is irrelevant.

Turning to the allegation that the equipment was damaged, Wilenkin states that (1) this machinery was not damaged in the fire; (2) Excelsior had the opportunity to inspect the equipment prior to making the down payment; and (3) the Agreement provided that the equipment was sold "as is where is".<sup>1</sup> Thus, this argument must be rejected by the Court. Finally, Wilenkin reiterates that plaintiff had the right to transfer title to the subject machinery<sup>2</sup> and that Excelsior did not object to the account stated.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v. Brick & Ballerstein, Inc.**, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v. Half Hollow Hills Cent. School Dist.**, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). The elements of a claim for breach of contract are the existence of a valid contract, consideration, performance by the party claiming a breach, the basis of the alleged breach of the agreement and damages. **Furia v. Furia**, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986).

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<sup>1</sup>Plaintiff also annexes an affidavit by Joe Mills, President of M & M Construction, the rigger who was contracted by plaintiff to move the subject machinery. Mills states that there was a small fire but that it did not damage the equipment that was the subject of the Agreement.

<sup>2</sup>Plaintiff annexes UCC-3 forms by Credit Suisse, Bank of America and US Bank National wherein they release their respective rights, title and interest in the subject equipment.

In the case at bar, plaintiff has met its prima facie burden by the submission of the Agreement, and the Affidavit of Wilenkin stating that the equipment was transferred and Excelsior failed to pay in accordance with the terms of the Agreement. In opposition, however, Excelsior raised triable issues of fact. Specifically, the addendum to the Agreement provided that Excelsior would receive a percentage of the profits from the auction (which it states it did not receive), it is unclear whether the equipment sold at the auction and if not, whether plaintiff delivered clean title to the equipment. There are also issues of fact as to whether the machinery was delivered to Excelsior and thus, whether plaintiff performed under the terms of the Agreement. Likewise, there are questions of fact with regard to the claim for an account stated since there are issues as to the delivery of the goods. At this juncture, the Court finds that summary judgment is premature and the motion is therefore denied. Plaintiff may renew its motion upon completion of discovery. *CPLR §3212(f)*.

#### MOTION FOR LEAVE TO AMEND

Plaintiff moves, by separate Notice of Motion pursuant to CPLR §3025 for leave to amend its Complaint to assert additional causes of action against Great Atlantic for breach of contract, quantum meruit and account stated arising out of a transaction which occurred subsequent to those set forth in the original Complaint. Plaintiff states that it seeks to amend the complaint to add causes of action based upon Great Atlantic's breach of a contract wherein plaintiff provided appraisal services to Great Atlantic and it refused to pay.

Neither defendant has interposed any opposition to the motion for leave to amend.

CPLR §3025(b) provides that "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." It is well settled that such should be freely granted unless the amendment sought is palpably improper as a matter of law or unless prejudice or surprise directly results from the delay. *Uliano v. Entennann's Inc.*, 148 AD2d 604, 539 NYS2d 70 (2d Dept. 1989). Whether to grant or deny leave to amend is committed to the discretion of the Supreme Court. *Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957, 471 NYS2d 55 (1983). The merits of a proposed amendment will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt. *Sievert v. Morlef Holding Co.*, 220 AD2d 403, 631 NYS2d 774 (2d Dept. 1995); *Noanjo Clothing v. L & M Kids Fashions*, 207 AD2d 436, 615 NYS2d 747 (2d Dept. 1994).


In the case at bar, and upon review of the proposed amendment, the Court finds that leave to amend is proper as it sets forth additional transactions subsequent to the commencement of the action. Moreover, since no party has opposed the motion, and discovery is in the beginning stages, there is no claim of any prejudices.

The motion for leave to amend is therefore granted. Plaintiff shall serve the Amended Complaint on all parties within twenty (20) days from the entry of this Order.

A preliminary conference is scheduled for March 9, 2010 at 9:30 a.m. before the undersigned located at Supreme Court of the State of New York, One Court Street, Courtroom 2, Second Floor, Riverhead, New York.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: January 28, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.