

De Marco California Fabrics, Inc. v Midthrust Imports, Inc.

2010 NY Slip Op 30365(U)

February 17, 2010

Supreme Court, New York County

Docket Number: 604037/2005

Judge: Jane S. Solomon

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

PRESENT: IANE S. SOLOMON
Justice

PART SS

De Marco

INDEX NO. 604037/05

- v -

Midthrust

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-5

Answering Affidavits — Exhibits _____

6-8

Replying Affidavits _____

9-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum declaration, order and Judgment

NB- 3-15-10 Pretrial Conf.
Set at end of decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: 2-17-10

[Signature]
IANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 55

-----X
DE MARCO CALIFORNIA FABRICS, INC.,

Plaintiff,

Index No.: 604037/2005

-against-

DECLARATION, ORDER and
JUDGMENT

MIDTHRUST IMPORTS, INC.,

Defendant.

-----X

JANE S. SOLOMON, J.:

The complaint of Plaintiff, De Marco California Fabrics, Inc. (De Marco), seeks a declaratory judgment against Defendant, Midthrust Imports, Inc. (Midthrust), that De Marco is not indebted to Midthrust on the outstanding balance on four purchase orders for fabric. In its answer, Midthrust asserted a counterclaim for the balance due for the fabric; De Marco did not reply. Midthrust now moves to "dismiss" the complaint and for summary judgment in its favor on the counterclaim on the ground that De Marco accepted and used the goods at issue. The motion is decided as follows.

FACTS

De Marco is a fabric procurer. Midthrust is a fabric importer and seller. De Marco entered into four purchase orders with Midthrust on February 4, 2005, June 3, 2005, June 7, 2005, and July 1, 2005, for white eyelet fabric. Midthrust shipped each order to De Marco's printer, Textile Transprint

Corporation(Textile).¹

During printing, Textile noticed several defects in the fabric and began pre-inspecting each roll of fabric (Opposition, Ex. F). Textile notified De Marco of the problems it found on July 29, 2005, though it continued printing on the fabric, and "decline[d] any responsibility on the finished goods shipped to your client" (Id.). Soon thereafter, De Marco communicated with Midthrust regarding the defects, both by phone and email. Midthrust admits that it received the emails and may have had phone conversations (see Affidavit of Kamran Noman, attached as Opposition, Ex. C, p 43-44, 49-50). Despite the defects, De Marco did not stop Textile from using the fabric, nor did it return any fabric to Midthrust. Textile completed its printing job and then shipped the printed fabric to De Marco's client, Barco Uniforms.

The aggregate price of the four purchase orders was \$126,520.35. De Marco paid Midthrust \$15,525.00 but refused to pay the remainder on the ground that the fabric was non-conforming and defective (Complaint, ¶4). Midthrust's counterclaim for \$105,262.13 reflects some additional credits given to De Marco.

¹ De Marco rejected the February 4, 2005 shipment because Midthrust sent the wrong fabric. The goods were returned and the correct fabric sent, without further incident.

DISCUSSION

De Marco specifically seeks a declaration that "De Marco is not further indebted or liable to Midthrust in any amount for the defective and non conforming fabric which Midthrust delivered to De Marco" (Complaint, ¶9). De Marco argues it has no debt to Midthrust because some of the goods were non-conforming and defective. Midthrust contends that regardless of any non-conformity, De Marco accepted the goods by its use of substantially all of the fabric.

A buyer's "mere complaint about the goods does not constitute a clear and unequivocal act of rejection. Moreover, [a buyer's] use of the goods and failure to return same constituted an acceptance of the goods" (*Maggio Importato, Inc. v. Cimitron Inc.*, 189 AD2d 654 [1st Dept, 1993]).

De Marco accepted the fabric shipped to its printer pursuant to the four purchase orders, had it printed on by its contractor and shipped to its client. De Marco's complaint about the quality of the goods is an insufficient rejection (*Id.*).

However, the inquiry does not end here, as "acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the [purchase] price" (UCC 2-607, Comment 6). Pursuant to UCC 2-607 (3)(a), however, a buyer who

has accepted goods "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy" (Id.; see also, *Sears, Roebuck & Co. v. Galloway*, 195 AD2d 825 (3rd Dept, 1993)).

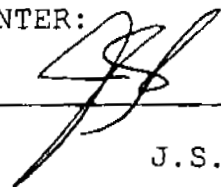
The July 2005 communications from De Marco to Midthrust regarding the fabric defects give rise to a triable issue of fact as to the extent of the defects and whether any diminution in value or extinction should be awarded. Accordingly, it hereby is

ADJUDGED and **DECLARED** that De Marco California Fabrics, Inc, remains indebted to Midthrust Imports, Inc. on the invoices at issue here, the amount of which shall be determined at trial; and it further is

ORDERED that Midthrust's motion for summary judgment on its counterclaim is granted as to liability only with the amount of damages to be determined at trial, and the parties are directed to appear at a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on March 15, 2010 at 2 PM.

Dated: February 17, 2010

ENTER:



J.S.C

JANE S. SOLOMON

UNFILED JUDGMENT
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