

M S Intl., Inc. v Nash Granites & Marble Inc.
2010 NY Slip Op 31493(U)
June 9, 2010
Sup Ct, Nassau County
Docket Number: 22692/09
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
M S INTERNATIONAL, INC.,

Plaintiffs,

-against-

NASH GRANITES & MARBLE INC.,

Defendants.

-----X

TRIAL TERM PART: 45

INDEX NO.: 22692/09

MOTION DATE:3-12-10

SUBMIT DATE:5-26-10

SEQ. NUMBER - 001

The following papers have been read on this motion:

- Notice of Motion, dated 4-8-10.....1**
- Affirmation in Opposition, dated 5-4-10.....2**
- Reply Affirmation, dated 5-21-10.....3**

This motion by plaintiff for an order pursuant to CPLR § 3212 for summary judgment on the first and second causes of action is denied.

The plaintiff's first cause of action alleges a breach of contract for goods sold and delivered, as the plaintiff delivered goods which the defendant accepted. The defendant has not made payments in reduction of the final balance claimed. The plaintiff's second cause of action alleges that an account stated has resulted from the dealings between the

parties. The plaintiff is suing to recover the remaining balance on the account, in the sum of \$18,894.73.

It is undisputed that the plaintiff, M S International Inc., (MSI), is a wholesale distributor of granite and marble. The defendant, Nash Granites & Marble Inc., (Nash), is a marble and granite retailer. The parties entered in a contract, wherein the plaintiff would sell and deliver marble slabs, in various sizes and colors, to the defendant. Payment was made in installments and all deliveries were initially accepted.

Nash specified the desired sizes and grades of the incoming marble in its orders. A number of the deliveries did not meet specifications, as some were either broken or did not comply with specified measurements. One delivery contained one less slab than ordered. Nash periodically contacted MSI' s New Jersey office to report the non-compliance of the slabs, whereby MSI agreed to credit Nash to compensate for the problems.

Following the initial dealings, there was an exchange of e-mails between the parties with regard to the number of credits to be applied to the account, as Nash expected more credits than were originally given. Nash then sent an itemized list of the slabs that did not conform to measurements or were returned. Also included in the list were a number of discrepancies in price between that agreed in regards to certain slabs and the price charged by MSI. Afterwards, MSI's New Jersey office agreed to apply the credits requested.

Six months after the final e-mail sent between the parties, MSI sent a letter to Nash, demanding payment for the balance owed, which had become overdue. MSI

attached a statement of Nash's account, which showed an open balance of \$35,782.52, which was 120 days late. MSI stated that the interest rate for the account was 18% per annum for each day payment was late.

In response to MSI's letter, Nash responded in writing, objecting to the stated account balance of \$35,782.53 and contending that the final amount was \$23,382.24. Nash requested a confirmation letter for the final amount of \$23,382.24, or for MSI to send a truck to accept a return of the materials delivered. Nash later sent MSI an additional letter, indicating that goods to be returned were valued at \$16,253.25, leaving the remaining balance at \$7,128.99. Nash requested that MSI send an approval letter and driver to pick up the goods at Nash's facility. Nash offered to give the driver the balance owed. The goods were picked up by an MSI truck; however, no payment was made.

In order to make a *prima facie* showing of entitlement to judgment as a matter of law on a cause of action to recover for goods sold and delivered, a plaintiff must present documents proving an outstanding balance that has not been paid. Itemized invoices, signed delivery receipts and affidavits from company executives are sufficient to make a *prima facie* showing of entitlement. *Neuman Distributors, Inc. v Falak Pharmacy Corp.*, 289 A.D.2d 310, 311 (2d Dept. 2001); *Drug Guild Distributors v 3-9 Drugs Inc.*, 277 A.D.2d 197, 198 (2d Dept. 2000).

In order to defeat a motion for summary judgment on a cause of action for goods sold and delivered, a defendant must put forth evidence identifying unresolved factual issues, thereby raising triable issues of fact. *Created Gemstones, Inc. v Union Carbide Corp.*, 47 NY2d 250, 253 (1979). Such a factual dispute renders the granting of summary

judgment premature. *Buffalo Newspress v Coleman Communications Corp.*, 8 AD3d 969, 969 (4th Dept. 2004). Further, under the Uniform Commercial Code, terms with respect to which the confirmatory memoranda of the parties agree intended to be the final expression of their agreement may not be contradicted, but may be supplemented by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. UCC § 2-202 (b).

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. *Jim-Mar Corp. v Aquatic Const., Ltd.*, 195 AD2d 868, 869 (3d Dept. 1993) citing *Marino v Watkins*, 112 AD2d 511, 512 (3d Dept. 1995). Any account stated theory will fail “[w]here either no account has been presented or there is any dispute regarding the correctness of the account.” *J.B.H., Inc. v Godinez*, 34 A.D.3d 873, 875 (3d Dept. 2006), quoting *M & A Const. Corp. v McTague*, 21 A.D.3d 610, 611 (3d Dept. 2005)

On a motion for summary judgment, the Court’s function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Fox v Wyeth Laboratories*, 129 AD2d 611 (2d Dept. 1987); *Royal v Brooklyn Union Gas Co.*, 122 AD2d 132 (2d Dept. 1986).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such

facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065 (1979). Conclusory statements are insufficient. *Sofsky v Rosenberg*, 164 AD2d 240 (1st Dept. 1990), *aff'd* 76 NY2d 927 (1990); *Zuckerman v City of New York*, 49 NY2d 557 (1980); *see Indig v Finkelstein*, 23 NY2d 728 (1968); *Werner v Nelkin*, 206 AD2d 422 (2d Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 (1st Dept. 1981), *app. dismissed*, 53 NY2d 1028 (1981); *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868 (3d Dept. 1993), *lv app. denied*, 82 NY2d 600 (1993).

In performing its review of the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

In the present case, the plaintiff has made an adequate *prima facie* showing of the defendant's liability for goods sold and delivered. The itemized invoices sent from MSI to Nash on September 4, 2008 and September 13, 2008, as well as the credit memos, show the balance accumulated on the account. Furthermore, the demand for payment sent from MSI to Nash on March 6, 2009, as well as the affidavit submitted by MSI Business Manager Bhavesh Ghandi, further support MSI's contention of an unpaid balance.

However, the defendant has provided sufficient evidence precluding an award of summary judgment. The letters sent from Nash to MSI, dated March 9, 2009, March 10, 2009 and October 5, 2009, reveal an unresolved factual dispute as to the amount owed on

the outstanding balance. *Created Gemstones*, 47 NY2d at 253; *Buffalo Newspress*, 8 AD3d at 969. Furthermore, e-mails between representatives of MSI's New Jersey office and Nash indicate an agreement as to the amount of credits applied to the account, which are rejected by the plaintiff. These additional terms supplement the additional agreement, providing further evidence of the existence of a triable issue of fact with regards to the remaining account balance. UCC § 2-202(b). Accordingly, summary judgment must be denied on the first cause of action.

The plaintiff has made a *prima facie* showing of an account stated. However, the defendant's response clearly indicates a dispute as to the remaining account balance, rendering summary judgment inapplicable. In its moving papers, the plaintiff presents an invoice dated June 7, 2009 for \$18,948.73. This invoice, accompanied by allegations that the defendant initially accepted it without objection, is sufficient to make a *prima facie* showing of an account stated.

However, the documents submitted by the defendant in its response indicate a dispute. In its letter to Nash, dated March 6, 2009, prior to the final invoice, MSI demanded the remaining account balance, contending that it was \$35,782.53. The defendant's response, dated March 9, 2009, disputed the stated balance, stating that it was \$23,382.24. *J.B.H.*, 34 AD3d at 875. Although the plaintiff, in its reply, attempts to provide detail to show that its final invoice was correct, this information may not be considered by the court in establishing the plaintiff's case for purposes of summary judgment. *See Higgins-Barber v Raffles International*, 45 AD3d 438, 439 (1st Dept.

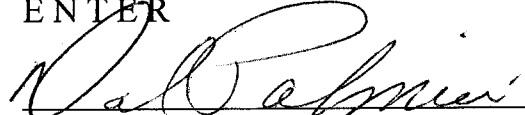
2007), citing *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept. 1992). (Holding that details and information improperly raised for the first time in plaintiff's reply papers will not be considered by the motion court). The Court finds that this proof does not resolve the issue in plaintiff's favor in any event. As the plaintiff's moving papers thus reveal the existence of a dispute regarding the correctness of the demanded balance, summary judgment may not be awarded on an account stated. *J.B.H.*, 34 AD3d at 875.

Accordingly, summary judgment is denied on both causes of action.

This shall constitute the Decision and Order of this Court.

DATED: June 9, 2010

ENTER



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JUN 10 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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