

**Fourmen Corp. v Dove Pro Painting, Inc.**

2010 NY Slip Op 32063(U)

July 29, 2010

Sup Ct, Suffolk County

Docket Number: 16552-2009

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: 05-18-2009  
 Motion Submit Date: 05-18-2009  
 Motion Sequence.: 001 MOTD

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**FOURMEN CORP t/a WILLIS PAINT &  
 DESIGN CENTER,**

**Plaintiff,**

**-against-**

**DOVE PRO PAINTING, INC., ANTHONY  
 BRENNEN, LAURA MARTUSCELLO AND  
 JODI A. MCWILLIAMS,**

**Defendants.**

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**ORDERED**, that the motion (motion sequence number 001) by plaintiff for summary judgment is granted as against defendants Dove Pro Painting, Inc., Anthony Brennan, and Laura Martuscello without opposition and denied as against defendant Jodi A. McWilliams; and it is further

**ORDERED**, that a status conference is scheduled for August 16, 2010; and it is further

**ORDERED**, that a hearing on counsel fees and costs shall also be held on August 16, 2010; and it is further

**ORDERED**, that submission of Judgment shall abide the determination or resolution with defendant Jodi A. McWilliams.

This is an action by plaintiff for recovery of amounts due for goods sold and delivered pursuant to two separate Credit Applications. The first Credit Application, dated April 15, 2005 was between plaintiff and defendant Dove Pro Paint (“Dove Pro”). Defendants Anthony Brennan (“Brennan”) and Laura Martuscello (“Martuscello”) signed the personal guarantee on the bottom of the application. The second Credit Application, dated August 16, 2005, also between plaintiff and Dove Pro, was executed by defendant Jodi McWilliams, who indicated on the application that she was an officer of Dove Pro. McWilliams signed the personal guarantee on the bottom of this application.

Plaintiff commenced this action by filing a Summons and Complaint on May 15, 2009, alleging eight causes of action. The first and second causes of action are against Dove Pro for goods sold and delivered. Plaintiff alleges that between May 7, 2007 and October 28, 2008, plaintiff provided goods and services to Dove Pro in the amount of \$105,273.89, Dove Pro paid the sum of \$22,946.11, leaving the sum of \$82,327.78 due and owing plus interest since October 28, 2008. In the third cause of action, plaintiff seeks interest on the unpaid balance pursuant to the Credit Application in the amount of nine percent (9%) since October 28, 2008. The fourth cause of action seeks attorneys’ fees in the amount of \$16,465.56, pursuant to the Credit Application provision which stated that legal fees in an amount up to twenty percent (20%) of the recovery would be required in the event of default. The fifth and sixth causes of action are against defendants Brennan and Matruscello for recovery of the unpaid balance and attorneys’ fees, respectively, pursuant to the personal guarantees. Finally, the seventh and eighth causes of action are against defendant McWilliams for recovery of the unpaid balance and attorneys’ fees, respectively, pursuant to the personal guarantee. Defendants Dove Pro and Martuscello served an Answer with Counterclaims on or about June 29, 2009; defendant McWilliams served an Answer on or about June 26, 2009; and defendant Brennan served an Answer with Cross Claims on or about August 6, 2009. The Dove Pro/Martuscello Answer essentially contains general denials of the allegations of the Complaint and asserts affirmative defenses of failure to state a cause of action, plaintiff’s breach of contract, failure to seek the proper amount of damages, damages caused by plaintiff’s culpable conduct, unclean hands, payment in full, breach of the warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, and breach of contract by the plaintiff. The Brennan Answer contains

general denials of the allegations of the Complaint and cross-claims against the other defendants for contribution and indemnification. The McWilliams Answer asserts general denials of the allegations of the Complaint and the affirmative defenses of rescission of the personal guaranty, waiver, release and estoppel.

In sum, defendant Dove Pro, which is in the painting business, applied to plaintiff for sales on credit for the purchase of certain materials. Brennan and Martuscello executed the first Credit Application, and both executed the personal guarantee at the bottom of the form. McWilliams executed the second Credit Application and executed the guarantee at the bottom of the form. The Credit Applications and guarantees were identical and the guarantees stated that they personally guaranteed “immediate payment of any outstanding which has remained past due for a period of thirty (30) days. I (we) agree to make full payment upon written demand to my (our) home address(es). I (we) agree to pay any and all costs of collection including suit expenses, attorney fees and court costs”. The Credit Applications contained the following provisions:

CHARGES NOT PAID WITHIN 30 DAYS WILL BEAR A MONTHLY SERVICE CHARGE NOT TO EXCEED THE LAWFUL MAXIMUM CHARGE PERMITTED IN YOUR JURISDICTION.

INTEREST FOR LATE PAYMENT: If I fail to make any payment when it is due, Willis Paints may demand immediate payment of the full balance (including Finance Charge).

LEGAL FEE: In addition, if they refer my account to an attorney (who is not their employee) for collection, I will be required to pay an attorney’s fee as allowed by law up to 20% of my balance.

Plaintiff now moves for summary judgment on the ground that no issue of fact exists regarding the payment of the monies owed. Plaintiff has annexed a copy of the Credit Applications containing the personal guarantees, a copy of the invoices showing the unpaid balance of \$82,327.78, an Affirmation of Counsel, a copy of the pleadings, an affidavit by Michael Mantikas, Vice President of Plaintiff establishing the default in payment and copies of discovery demands and responses thereto.

With regard to the Dove Pro affirmative defenses and counterclaims, plaintiff asserts that Dove Pro never complained regarding the products received until commencement of this action. Moreover,

plaintiff states that it served discovery demands on Dove Pro on or about October 14, 2009 wherein it specifically requested photographs of the peeling paint, copies of all documents in support of Dove Pro's alleged damages and information pertaining to the instructions Dove Pro did or did not receive. Dove Pro never responded to the demands. Dove Pro additionally failed to give plaintiff any notice of a breach pursuant to UCC §2-607(3)(a), Dove Pro has not demonstrated any breach of warranty of merchantability or implied warranty of fitness for a particular purpose. With regard to the claims of Brennan and McWilliams that they were relieved of financial responsibility by Dove Pro, plaintiff challenges such claim as without merit as neither of these defendants allegedly gave notice to Dove Pro of the termination of their personal guarantees. Based on the foregoing, plaintiff urges the Court to grant its motion for summary judgment in its entirety and dismiss the counterclaims interposed.

Only defendant McWilliams has submitted opposition to the motion. She states in her affidavit that although she signed the Credit Application as an "officer" she was only an employee of the company. McWilliams further states that in or about August of 2005 her employer (she does not specify which individual) asked her to sign the personal guaranty and she felt that she had to do so or her employment would be jeopardized. Thereafter, by letter dated January 13, 2006 she resigned from employment with Dove Pro and revoked her personal guaranty and a copy of the letter is annexed to the motion papers. McWilliams states that in January of 2006, she contacted plaintiff and advised by telephone that she resigned from Dove Pro and revoked her personal guaranty. McWilliams states in her affidavit that she believed she spoke to Mantikas when she called Dove Pro. McWilliams argues that since the guaranty did not specify that any revocation had to be in writing, her oral notice was sufficient to release her from personal liability from charges that Dove Pro incurred subsequent to her resignation from employment. Therefore, McWilliams seeks denial of the motion for summary judgment as there are questions of fact regarding the revocation of her personal guaranty.

In reply, Mantikas submits an affidavit wherein he states that he never spoke to McWilliams on the telephone and Dove Pro was never notified of the revocation of her personal guaranty. Thus, he urges the Court to grant plaintiff's motion for summary judgment in its entirety.

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 granting summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. *McMahon v. McMahon*, 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009). “It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact.” *Triangle Fire Protection Corp. v. Manufacturer’s Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

In the case at bar, plaintiff has established entitlement to summary judgment on the first and second cause of action for goods sold and delivered pursuant to the Credit Application and the third cause of action for interest, and the fourth cause of action for counsel fees, by the submission of the Credit Application, the invoices and the affidavit of Mantikas establishing the default in payment. *See, e.g., Eagle Work Clothes, Inc., v. Gent Uniform Rental Corp.*, 30 A.D.2d 562, 817 N.Y.S.2d 144 (2d Dept. 2006); *Becker v. Shore Drugs, Inc.*, 296 A.D.2d 515, 745 N.Y.S.2d 492 (2d Dept. 2002). On the fifth and sixth causes of action against Brennan and Martuscello on the personal guarantee, plaintiff has also met its prima facie burden. The guarantee contained in the Credit Application is clear and unambiguous on its face, absolute and unconditional. Neither of these defendants have opposed the motion thus they have failed to show fraud, duress or other wrongful act in its inducement as would be necessary to vitiate the agreement. *See, National Westminster Bank v. Sardi’s Inc.*, 174 A.D.2d 470, 571 N.Y.S.2d 712 (1st Dept. 1991). Thus, Brennan and Martuscello are liable under the personal guarantee for the amounts due and owing plaintiff plus attorneys’ fees.

With regard to defendant McWilliams however, summary judgment is denied. There is a question of fact regarding whether McWilliams notified plaintiff as to the revocation of her personal guaranty.

The conclusory counterclaims by Dove Pro/Martuscello are insufficient to defeat the motion for summary judgment. *See e.g., Dvoskin v. Prinz*, 205 A.D.2d 661, 613 N.Y.S.2d 654 (2d Dept. 1994). Defendants accepted the goods without complaint and neither rejected nor notified plaintiff regarding any breach until the commencement of this action. Defendants have failed to state a cause of action for breach of warranty of merchantability or breach of warranty of fitness for a particular purpose.

The motion for summary judgment is granted to the extent set forth herein. Counsel are reminded that a status conference is scheduled for August 16, 2010, at which time a hearing on costs and counsel fees will also be held.

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

Dated: July 29, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

MG  
NONFINAL  
RRH 08-16-2010 @ 9:30 A.M.