SHORT FORM ORDER

Index Number: 0786-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

_____X

S & Z IMPORTS, INC.,

Plaintiff,

-against-

IFFCO, INC.,

Defendant.
_____X

Attorney for Plaintiff
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Attorney for Defendant
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DECISION AFTER TRIAL

Plaintiff, S & Z Imports, ("S&Z") was in the business of purchasing and distributing goods to convenience and "Dollar" stores in 2006 and 2007, when it began ordering thousands of goods, consisting mostly of cookies, candies and soaps, from a U.S.A. affiliate of a Dubai corporation, IFFCO, Inc ("IFFCO"), the Defendant in this commercial litigation. The dealings of these parties gave rise to both a complaint and a counterclaim, which was the subject of a trial, for two days, in which a principal from both corporations testified and over thirty exhibits were admitted into evidence. The Court had the opportunity to view and assess the credibility of both witnesses. The Court also permitted counsel to submit post-trial memoranda which the Court has reviewed and considered in rendering its decision.

Majeed Rashidzada ("Majeed"), the President and owner of S & Z testified that his

corporation was in the business of supplying household goods, purchased from both U.S. and foreign suppliers, to convenience stores. He distributed cookies through an intermediary corporation, Maya, until he met Parvez Bhiwandiwalla ("Parvez"), the President of IFFCO's American branch in the Spring of 2006. According to Majeed, Parvez convinced him to start doing business directly with IFFCO and invited Majeed and his co-owner Fahim, to Dubai to view IFFCO's manufacturing plants. After several meetings occurring in New York and in Dubai, Majeed claimed that Parvez asked Plaintiff to start ordering cookies and other goods from Defendant and further claimed that IFFCO offered to pay Plaintiff's bills for promotion of these products. Majeed also asserts that Parvez offered to make S & Z the exclusive distributer of IFFCO's products, if all went well. Following these initial meetings, Plaintiff signed three sets of purchase orders for Defendant's goods, on November 28, 2006 , January 31, 2007 and on May 5, 2007 (Plaintiff's 25, Defendant's A-F). In each purchase order, the Plaintiff ordered a certain amount of goods from IFFCO for which it signed. According to Majeed, these goods were supposed to be shipped no later than thirty days from the purchase order (P O), since he had pre-sold many items to his customers. Thus, he had to assure that the expiration dates on the products had not passed or become unacceptably close to the time he distributed the items to his customers.

However, Majeed then asserted he began having problems with Defendant. First, the goods did not begin to arrive until March, 2007 and consisted mostly of goods ordered in his company's second PO. Second, the goods that arrived were significantly in excess of the amounts set forth in Plaintiff's purchase orders. He asserts that he called Parvez to discuss this with him and was told not to worry, that he would only be responsible for the amounts set forth in his initial purchase orders. In each case, following the purchase order, Majeed was sent a "Pro Forma Invoice" from Defendant, which set forth the amount of goods to be shipped and the likely shipping date (Defendant's A-F). Plaintiff signed these documents but claims he was told by Parvez that his signature was necessary only for promotional purposes and that he would not be responsible for the amounts of goods set forth on these documents.

In addition to the late arrival of the goods, Majeed testified that the goods were shipped

in a haphazard fashion; that some of them bore what is known as Julian dating, which obscured the true date of their expiration, making it impossible to know if they could be used by his customers; that some of the candies were discolored, and that the soaps were sent in twice the amount ordered. Majeed alleges that he got nowhere speaking to Parvez and began to communicate in writing. In a series of letters and e-mails dated August 20, 2007 (Plaintiff's 18); September 21, 2007 (**Plaintiff's 19**); October 8, 2007 (**Plaintiff's 20**); November 6, 2007 (**Plaintiff's 21**); and December 12, 2007, written to a collection agency for Defendant (**Plaintiff's 22**), Plaintiff set forth each and every one of its complaints regarding late delivery; haphazardous delivery; Julian Code dating; expiration of product; and over shipment. The Plaintiff asked the Defendant to come pick up the products that were unacceptable on September 21, 2007 and October 8, 2007 (Plaintiff's 19 and 20) and Defendant failed and/or refused to do so, merely insisting that Plaintiff pay for Defendant's outstanding invoices.

Majeed testified that as a result of problems with the products, he began to receive letters from his customers, essentially stating that certain items had to be returned to S&Z as their dates had expired or because the Julian dating code was unreadable and unacceptable (Plaintiff's 3,4,6,7,8,9,10,11, and 13, written between May 2007 and December 2007). He testified that based on rejection of goods and stop payments from some of his customers, the Plaintiff suffered a monetary loss of approximately $133,000.00, citing non payment by Kwality, Yahya Trading, A & A Imports, National Wholesalers and Global Suppliers. In addition, Majeed testified that Plaintiff expended $20,000 for four trade shows, for which Defendant had promised reimbursements that was never forth coming and built a trade show booth, that the Defendant has improperly retained. In all, Plaintiff asserts it is entitled to damages in the amount of $173,000.00. With regard to Defendant's outstanding invoice, Plaintiff asserts it is only responsible for the actual purchase orders, plus ten percent which it had agreed to pay, all of which has been paid to Defendant. In any event, based on Plaintiff's calculations, the "unpaid" invoices amount to $155,619.36, slightly less than that alleged by Defendant (Plaintiff's 24).

Parvez, the manager and President of IFFCO, Inc also testified at trial. In his position, he is responsible for the sales in North America, of IFFCO products. He agrees that he met Majeed and his partner, Fahim in 2006 and later that year, they came to IFFCO's factories in Dubai. Shortly thereafter, the entities decided to do business. However, according to Parvez, the quantity of goods shipped from overseas to Plaintiff was that set forth in documents, called "Pro-Forma Invoices", which were signed, in each instance, by the Plaintiff **(Defendant's A-Defendant's F)**. Due to the large quantities of merchandise shipped and the logistics of loading cartons on ships, the entity ordering the items agrees to take into account what will actually be brought to their warehouse. In each case, he relied on the Plaintiff's signatures and shipped the goods requested. Based on those invoices, the Defendant is still owed $157,460.76 for goods sold and delivered. According to Parvez, all of his business dealings were with Fahim, not Majeed. In addition, he states he never received complaints regarding late deliveries, overstocked items, discolored candies or improper expiration dates until he started pressing Plaintiff to pay IFFCO's invoices. According to Parvez, the goods shipped from Dubai had 12 months before expiration and generally about 10 months left when Plaintiff received them. Moreover, he asserts that Fahim, not IFFCO, wanted the Julian date Code on items. According to Parvez, Plaintiff accepted the items both by failing to issue complaints until months after receipt and by virtue of its later complaint letters, in which Plaintiff stated that it was not going anywhere, was trying to sell the product, and would eventually pay the Defendant (**Plaintiff's 18, e-mail of August 20, 2007**). It was only after the goods had been accepted and Defendant had been forced to contact a collection agency, that Plaintiff attempted to reject the goods delivered. (**Plaintiff's 22**).

With regard to the Trade Show issue, Parvez states there was never an agreement that IFFCO would pay for S & Z's trade shows. However, as set forth in Defendant's I, IFFCO did pay the cost to book a trade show for S & Z through Fahim and claims IFFCO also paid Fahim for the booth he fabricated for the show.

Thus, according to Defendant's witness, Plaintiff ordered $770,783.62 worth of goods

and paid $613,322.74, leaving a balance due and owing of $157,460.76 as set forth in Defendant's G and H as of September 2007.

The Plaintiff argues that, having properly notified and rejected the non-conforming goods shipped by Defendant, in a reasonable period of time after their arrival, he is entitled to disregard the amounts sought and, in addition to collect from Defendant, his corporation's out of pocket expenses for returned items, and waste management fees. In addition S&Z seeks $40,000.00 to cover its costs for four trade shows and for the trade show booth it manufactured that remains in Defendant's possession. Defendant asserts, on the other hand, that the goods shipped were those on Pro Forma invoices, signed by Plaintiff; that Plaintiff accepted the goods and, indeed sold most of them. Defendant claims it is entitled to be paid for the entire unpaid balance.

Under the UCC §2-206, goods are considered accepted when the buyer fails to make an effective rejection therefore. UCC §2-602 provides, in part, that a buyer must reject goods within a reasonable time following their delivery. UCC §2-608 permits a buyer to revoke its acceptance of a commercial unit (part) of goods, whose non-conformity substantially impairs their value, if the buyer has accepted them, upon the reasonable assumption that the non-conformity would be cured and the issue has not been resolved. Moreover, while a buyer may not reject goods after their acceptance or failure to revoke acceptance occurs, all other remedies for breach and non-conformity are still available. ***See, Cliffstarr v Elmar Industries, Inc*. 254 AD 2d 723, 678 NYS 2d 222 (4th Dep't 1998)**. Thus, while the general rule is that a buyer must pay for any goods accepted, the acceptance, in and of itself, will not act to impair other remedies provided by UCC Article 2. Thus, by interposing a valid claim for breach of a sales agreement, a buyer may either defeat or diminish a seller's action to be paid for the price of the goods delivered. ***See, Flick Lumber Company v Breton Industries, Inc*, 223 AD 2d 779, 636 NYS 2d 169 (3d Dep't 1996)**.

A buyer's failure to effectively reject or revoke acceptance of goods does not impair other remedies the buyer may have as long as it notifies the seller within a reasonable time after it has

or should have, with reasonable diligence, discovered the breach. UCC §2-605 (1)(a). A buyer's repeated complaints and requests to seller to rectify problems preserves the buyer's right to sue the seller for damages. UCC §2-605, §2-607 (3)(a). Where the buyer gives the seller such required notice of non-conformity within a reasonable period of time, the buyer may sue the seller for damages, which generally are measured by the seller's out of pocket costs. UCC §2-714; ***See, Belfont Sales Corp v Gruen Industries Inc*, 112 AD 2d 96, 491 NYS 2d 652 (1st Dep't 1985).**

To prevail on a claim for breach of contract, the claimant must demonstrate 1)an agreement between the parties; 2)performance by the claimant; 2)failure to perform by the breaching party; and 4) resultant damages. ***See, Furia v Furia*, 116 AD 2d 694, 498 NYS 2d 12 (2d Dep't 1996)**.

Applying the above to the case at bar, the Court finds as follows: By signing the ProForma Invoices, as an experienced distributor of goods, the Plaintiff is bound by their terms. In this case, the Plaintiff did accept the goods and, indeed, sold most of them to its customers. Accordingly, the Defendant's unpaid invoices in the amount of $155,619.36 are valid (**Plaintiff's 25**). The Court found credible, Plaintiff's complaint with regard to the non-conformity of some of these goods, especially with regard to their dating, discoloration, and confusing labeling. Defendant did notify the Plaintiff as early as August 2007 of each of these problems. However, Plaintiff did not reject the goods, since it followed its initial letter by a subsequent one telling the Defendant it would pay the invoices (**Plaintiff's 18 and 19**). Ultimately, in November and December of 2007, Plaintiff rejected goods that it had essentially already accepted. However, there is no question that Defendant was notified of the problems and that Plaintiff suffered some out of pocket costs as a result.

Based on Majeed's credible testimony in this regard as well as certain documents submitted into evidence, the Court finds that Plaintiff demonstrated it suffered damages due to cancelled orders, returned checks and waste management fees, for products it was required to

discard, in the amount of $131,918.46 (**see, Exhibits 1, 2, 3, 4, 5, 7, 10, 24**). The Court also finds that the Defendant breached its agreement with the Plaintiff by failing to reimburse Plaintiff for four trade show expenses in the total amount of $20,000.00 and that, having retained the trade show booth, Plaintiff is also entitled to reimbursement of $20,000.00 therefor. Thus Plaintiff is entitled to $171,918.46 on its claim and the Defendant is entitled to $155,619.36 on its counterclaim, the Court crediting Plaintiff's figure in this regard (**Plaintiff's 24**). This leaves a balance due and owing the Plaintiff S&Z in the amount of $16,299.10, the claim having accrued on March 1, 2008.

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

Submit Judgment on Notice.

Dated: August 10, 2010
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

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