scan

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LIVINGSTON FARMS, LLC,

Plaintiff,

- against -

KLEIN'S KILL FRUIT FARMS CORP.,
A. BARTOLOTTA & SONS and RUSS BARTOLOTTA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9013/08
Motion Seq. Nos.: 05, 06
Motion Dates: 08/03/10
08/17/10

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Notice of Cross-Motion, Affidavit and Exhibits and Memorandum of Law	2
Reply Affirmation, Affidavit and Exhibits and Memorandum of Law	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Motion (Seq. No. 5) by the attorneys for the plaintiff for an order granting plaintiff judgment against each of the defendants, jointly and severally, upon their Verified Accounting in the amount of $97,633.03, together with pre-judgment interest at the statutory rate from December 21, 2007; and cross-motion (Seq. No. 6) by the attorneys for the defendants for an order approving defendants' accounting as attached to defendants' cross-motion papers and plaintiff's motion papers, as amended, and adjudging that plaintiff has failed to prove it sustained any damages in this action are both denied.

Whether the apples were "golden" fit to be sold as whole apples on the marketplace, as

alleged by the plaintiff, or of such inferior quality, as alleged by the defendants that they were only suitable for being pressed into apple juice, is the issue at the core of this case, and can only be resolved after a full evidentiary trial.

The plaintiff, Livingston Farms, LLC, is the owner of real property containing an apple orchard in Columbia County, New York with a principal place of business at 333 South Service Road, Jericho, Nassau County, New York. Defendant Klein's Kill Fruit Farms Corp. is a licensed broker who negotiates the sale to third-party buyers of apples grown by farmers in the Hudson Valley. Defendant Russell C. Bartolotta is the general manager of Klein's Kill Fruit Farms Corp.

On or about August 2007, the plaintiff and defendants entered into an oral agreement wherein the plaintiff retained the defendants to pick and market the apples grown on plaintiff's apple orchards in Columbia County. There is no dispute that plaintiff retained defendants to pick, store, grade, pack, transport and sell plaintiff's apple crop to customers. There is little else that the parties agree to at this stage of the litigation. For example, the parties cannot even agree on the number of bins of apples that were sold.

The plaintiff alleged that the defendant sold the greater bulk of the apples (90%) for juice, at a significantly lower price than had they been sold in the fresh market as whole apples.

Judge Martin signed an Order and Interlocutory Judgment dated September 4, 2009 directing the defendants to account to the plaintiff:

> regarding all aspects of the defendants' inspection, receipt, storage, handling and disposition of the plaintiff's apples, including but not limited to the gross proceeds of the sale of the apples and all deductions taken by defendants from such gross proceeds.

The judgment directed the accounting to include:

> any and all documents and information in the possession or under the control of the defendants, or which it is within the power of the defendants to obtain, which may be relevant to the defendants' inspection, receipt, storage, handling and disposition of the plaintiff's apples, including but not limited to the gross proceeds of the sale of the apples, as well as all deductions taken by defendants from such gross proceeds.

The judgment also granted any of the parties leave to apply to the Court for "such other or further order or judgment as the parties may be advised."

On November 19, 2009, defendants served their accounting. As set forth in the accounting, the total gross sales of plaintiff's crop were $14,913.00, the total deductions for expenses were $6,826.03, and the total amount paid to the plaintiff was the sum of $8,086.97.

Plaintiff argues that the apples had a market value of $105,720 on the fresh market. Reducing the amount by $8,086.97 already paid by the defendants, yields an amount of $97,633.03, for which plaintiffs seek a judgment. The defendants have cross-moved for an order approving defendants accounting showing an amount due the seller of $7,178.16 and dismissal of the complaint. (Since the defendants allege they erroneously paid the plaintiff $8,086.97, there is nothing due and owing.)

Neither counsel assists the Court with a citation to any New York Statute such as the CPLR pursuant to which relief is sought. Plaintiff appears to be moving pursuant to CPLR § 3212 for an award of summary judgment in the amount of $97,633.03. Defendants appear to be moving pursuant to CPLR § 3212 for an award of summary judgment confirming the accounting in the amount of $7,178.16. The Court will treat both as motions for summary judgment pursuant to CPLR § 3212.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth*

Century- Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992) ; *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981). Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR § 3212(b)), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat a motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR § 3212(b). *See also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*,66 N.Y.2d 965. 498 N.Y.S.2d 786 (1985); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *See Mgrditchian v. Donato*, 141 A.D.2d 513, 529 N.Y.S.2d 134 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the parties must do more than merely parrot the language of the pleadings. There must be evidentiary proof in support of the allegations. *See Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380, 615 N.Y.S.2d 702 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 A.D.2d 631, 595 N.Y.S.2d 236 (2d Dept. 1993).

The role of the court in deciding a motion for summary judgment is not to resolve issues

of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *See Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992); *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *James v. Albank*, 307 A.D.2d 1024, 763 N.Y.S.2d 838 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 A.D.2d 330, 605 N.Y.S.2d 888 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v. Wild Oaks Holding, Inc.*, 196 A.D.2d 812, 601 N.Y.S.2d 940 (2d Dept. 1993); *Barclays Bank of New York, N.A. v. Sokol*, 128 A.D.2d 492, 512 N.Y.S.2d 419 (2d Dept. 1987).

Affidavits by persons allegedly familiar with the facts (Russell C. Bartolotta, General Manager of Klein's Kill Fruit Farms Corp.) and (Russell Holze, a certified crop consultant, licensed by the State of New York) submitted by the defendants' claim that at the time they observed the orchard "the Gala variety apples were already completely spoiled and that the McIntosh and Jonamac varieties were falling off the trees. . . The remainder of the apples . . . observed at Livingston Farms, LLC orchard were also poor quality, soft, suffering from disease and decay and certainly not sufficient quality to be sold on the fresh market . . . and would be lucky to be salvaged for processing as juice or cider."

Affidavits by persons allegedly familiar with the facts (David Martin, Farm Manager for plaintiff's apple orchard) and (Maurice J. Dalton, Project Manager for plaintiff orchards) submitted by the plaintiff argue that defendants "offered to find pickers for plaintiff's apples and said in no uncertain terms that he could sell all or almost all of plaintiff's apples on the fresh market, meaning that they were good enough quality to be sold to be eaten as apples rather than turned into juice" and that the accounting failed to provide proof of sales, "especially to Mott's, which supposedly was the recipient of 90% of plaintiff's apples."

The accounting states that upon arriving at defendants' cold storage facility, the fruit was visually inspected and pressure tested. Plaintiff argues that since defendants could have

produced documentation of the pressure testing and failed to do so, this Court should draw on appropriate inference adverse to defendants' position. In addition, the plaintiff asserts there is no written certification as to the grading of the plaintiff's apples.

According to defendants, the 90% of plaintiff's apples that were determined to be of juice quality only were "diverted to their juice truck," while the remainder "continued through the automatic grader and [was] packed." Plaintiff argues the accounting does not address the subject of grading nor does it produce any documentation of the grading of plaintiff's apples.

New York Agriculture and Markets Law § 250-e(4) provides:

> A producer delivering apples to a dealer * * * for processing shall, at the time of delivery, receive from the dealer * * * a certificate of official inspection which shall state the grade of the apples delivered as determined by an official federal or state inspection conducted at the time of delivery.

Plaintiff asserts it is entitled to the drawing of an adverse inference where a document under the opponent's control is shown to exist but not produced without reasonable explanation. Apparently referring to PJI 1:77 General Instructions - Evidence - Failure to Produce Documents. *See also Bleecker v. Johnston*, 69 N.Y. 309 (1877); *Wylde v. Norther R. Co.*, 53 N.Y. 156 (1873); *Gruntz v. Deepdale General Hospital*, 163 A.D.2d 564, 558 N.Y.S.2d 623 (2d Dept. 1990) *cited in* PJI 1:77.

The plaintiff requests this Court to draw on inference adverse to the defendants; to wit: a grading certification and pressure tests should have been prepared; documents that defendants could and should have procured from the buyers of plaintiff's apples in the fresh market verifying the terms of those transactions and from Mott's regarding the alleged sales for juice should have been produced.

In opposition, defendants' attorneys argued that plaintiff is not entitled to the drawing of an adverse inference also referring to PJI 1:77.

Implicit in their respective arguments for or against the drawing of an adverse inference based on PJU 1:77, is the recognition by counsel that there are questions of fact. Since

questions of fact cannot be resolved as a matter of law in a summary judgment motion, both motions are denied. Moreover, plaintiff claims the oral agreement did not provide for a 10% commission. Plaintiff asserts that the agreement was that it would be charged commission at a rate that was customary in the industry, competitive and reasonable, not to exceed 10%. Plaintiff contends the oral agreement did not provide that the plaintiff would be charged separately for packing and storage.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on October 28, 2010 at 9:30 a.m

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 19, 2010