

**RLS Distrib., Inc. v Vetrano**

2010 NY Slip Op 33128(U)

October 28, 2010

Supreme Court, Nassau County

Docket Number: 11888/09

Judge: Denise L. Sher

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

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

\_\_\_\_\_  
RLS DISTRIBUTION, INC.,

Plaintiff,

- against -

JOSEPH VETRANO d/b/a PAPA CIRO'S,

Defendant.  
\_\_\_\_\_

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 11888/09  
Motion Seq. Nos.: 01, 02  
Motion Dates: 07/02/10  
07/02/10

**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion, Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affidavit, Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion</u>	<u>3</u>
<u>Reply Affirmation in Support of Cross-Motion and in Opposition to Motion</u>	<u>4</u>

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

Plaintiff moves (Seq. No. 01), pursuant to CPLR §3212, for an order granting summary judgment in favor of plaintiff and against defendant. Defendant cross-moves (Seq. No. 02), pursuant to CPLR §3212, for an order granting summary judgment to the extent of dismissing the Summons and Verified Complaint and the action against defendant and for an order directing sanctions against the plaintiff under the New York Court Rules § 130-1.1 on the grounds that the Plaintiff's Notice of Motion and underlying Summons and Verified Complaint are guilty of frivolous conduct, including but not limited to, an award of counsel fees. Plaintiff opposes the cross-motion.

This is an action for alleged monies owed by defendant to plaintiff, in the sum of \$27,077.36 plus interest, for shipping services rendered by plaintiff to defendant pursuant to an agreement between the parties and an account stated. Plaintiff commenced this matter on or about June 30, 2009 with the filing of a Summons and Verified Complaint. Issue was joined on or about August 13, 2009.

Plaintiff submits that defendant never complained as to the receipt or quality of the services rendered by plaintiff. An account was presented to defendant by plaintiff which, plaintiff argues, was accepted as correct by defendant, and, through defendant's silence, defendant agreed to pay on said account. Plaintiff further contends that defendant is not entitled to corporate protection as defendant did not disclose a legal entity that would be responsible for payment of his bills. Plaintiff states that defendant did not designate a proper corporate name in the account set-up. Plaintiff submits that it conducted a search with the New York Secretary of State website and found no corporation under the name Papa Ciro's and that the result is individual liability for the signor. Plaintiff claims that "[t]here has been no allegation that the services provided did not conform to contract specifications or the items were not received at their destination. The Defendant has refused to pay for shipped goods based upon unknown reasons or no reason at all and has not raised one valid defense, either before or during this action. Our office regularly billed the Defendant for the amount sought to be mailing out invoices and/or Statement of Account. Those invoices were accepted by the Defendant as correct. By not objecting to the billings, the Defendant agreed to be bound on the account. For the reasons above, Plaintiff has been damaged to the extent of \$27,077.36, plus interest from the time of the last shipment; November 16, 2008." In support of its motion, plaintiff submits a copy of a Customer Application - Profile in which states, "Company Name: Papa Ciro's...Operations Contact: Joseph Vetrano...Accounts Payable Contact: Joseph

Vetrano...Principals: Joseph Vetrano, Pres.,SS#: (omitted for purpose of the motion), % of ownership: 90.”

In opposition to plaintiff’s motion and in support of his own motion, defendant asserts that he is the President of Handmade Garlicknots Inc. and that he believes that Handmade Garlicknots Inc. is the true intended defendant in this matter not himself, Joseph Vetrano d/b/a Papa Ciro’s. Defendant claims that the named defendant in the suit, “Joseph Vetrano d/b/a Papa Ciro’s” is a non-existent entity. Defendant states that he never worked under the name of “Joseph Vetrano d/b/a Papa Ciro’s” and that he has never heard of such an entity. Defendant does state however that Handmade Garlicknots Inc. was authorized to do business under the name of Papa Ciro’s. Defendant contends that he is unaware of who actually prepared any documentation for plaintiff indicating that he was doing business as Papa Ciro’s. Defendant also argues that there has never been any representation by him personally that there was an individual obligation with regard to the contracting of their services of plaintiff. Defendant adds that all payments that were made on behalf of Handmade Garlicknots, Inc. were made by corporate checks and, as such, plaintiff was well aware that the party paying these invoices was a corporate entity. Defendant states, “[m]ore importantly, the Plaintiff has been made aware of the fact that this corporation is no longer operating they are clearly grasping at straws in an effort to hold me personally liable for a debt I have no personal obligation to pay.”

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues 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). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

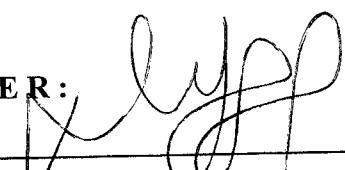
Based upon the evidence and legal argument provided in the motions as detailed above, the Court finds that neither plaintiff nor defendant have established *prima facie* entitlement to judgment as a matter of law. The Court finds that there exist material issues of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*.

Therefore, plaintiff's motion (seq. No. 01), pursuant to CPLR § 3212, for an order

granting summary judgment in favor of plaintiff and against defendant is hereby denied. Defendant's motion (Seq. No. 02), pursuant to CPLR §3212, for an order granting summary judgment to the extent of dismissing the Summons and Verified Complaint and the action against defendant and for an order directing sanctions against the plaintiff under the New York Court Rules § 130-1.1 on the grounds that the Plaintiff's Notice of Motion and underlying Summons and Verified Complaint are guilty of frivolous conduct, including but not limited to, an award of counsel fees is also hereby denied.

It is further ordered that the parties shall appear for a Preliminary Conference on December 1, 2010, at 9:30 a.m. in the Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the decision and order of this Court.

ENTER:   
 \_\_\_\_\_  
 DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
 October 28, 2010

**ENTERED**  
 NOV 03 2010  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE