

**Milwaukee Elec. Tool Corp. v Albany County
Fasteners, Inc.**

2010 NY Slip Op 33357(U)

December 7, 2010

Sup Ct, Greene County

Docket Number: 10-213

Judge: Joseph C. Teresi

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STATE OF NEW YORK
 SUPREME COURT
 MILWAUKEE ELECTRIC
 TOOL CORPORATION,

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 10-213
RJI NO. 19-10-5244

ALBANY COUNTY FASTENERS, INC.,

Defendant.

Supreme Court Albany County All Purpose Term, October 28, 2010
 Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff alleges that it sold Defendant \$14,811.09 worth of tools and accessories, on credit, and has not been paid. Plaintiff commenced this action to recover its damages, setting forth a breach of contract and an account stated cause of action. Issue was joined by Defendant and discovery is ongoing. Plaintiff now moves for summary judgement on both causes of action. Defendant opposes the motion. On this record, Plaintiff failed to establish its entitlement to summary judgement.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (*Napierski v. Finn*, 229 AD2d 869, 870 [3d Dept.

1996]).

It is well established that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law” (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]), “by proffering evidentiary proof in admissible form.” (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). “The evidence is viewed in the light most favorable to the party opposing summary judgment.” (Renwick v. Oneonta High School, 77 AD3d 1123 [3d Dept. 2010]).

Considering first Plaintiff's breach of contract cause of action, Plaintiff must demonstrate “(1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage”. (Clearmont Property, LLC v. Eisner, 58 AD3d 1052, 1055 [3d Dept. 2009][citing Hecht v. Components Intern., Inc., 22 Misc3d 360 [Sup. Ct. Nassau Co. 2008]).

On this record, Plaintiff demonstrated its entitlement to judgment due to Defendant's breach of contract. Plaintiff first submitted a copy of the parties' contract, titled “credit application.” Such application was signed by both parties and authorized an initial order value of \$10,000.00, payable “2% 30 Days/ Net 45 Days.” Plaintiff also submits, to establish its performance and Defendant's nonperformance, two affidavits of its Customer Financial Services Department's supervisor (hereinafter “supervisor affidavits”). While such affidavits are not overly precise, they are sufficient for this cause of action because they specifically refer to

attached invoices and are based upon personal knowledge. The supervisor affidavits established that Plaintiff performed under the contract, by delivering \$14,811.09 worth of tools and accessories to Defendant. The supervisor affidavits further establish Defendant's failure to preform, by alleging Defendant's failure to pay for the goods it received from Plaintiff, in accord with the attached invoices. Due to such performance and nonpayment, Plaintiff demonstrated its damages in the amount of \$14,811.09. Thereby establishing its entitlement to judgment on its breach of contract claim.

In opposition, Defendant raised a material issue of fact. Defendant submits its Vice-President's affidavit. He alleges that the parties' credit application agreement was supplemented by their 2007 Heavy Duty Alliance Program Agreement ("Heavy Duty Agreement"). He submits the execution page of the Heavy Duty Agreement, and viewing the evidence in a light most favorable to Defendant, sufficiently alleged its formation. He further asserts, by reference to such execution page, the Plaintiff's obligation to develop a marketing plan with Defendant. Defendant specifically alleges Plaintiff did not work with it in developing a marketing plan, and such failure directly impacted its ability to resell the tools Plaintiff delivered. As "a buyer may defeat or diminish a seller's substantive action for goods sold and delivered by interposing a valid counterclaim for breach of the underlying sales agreement" (B. Milligan Contracting, Inc. v. Andrew R Mancini Associates, Inc., 174 AD2d 136, 138 [3d Dept. 1992], quoting Created Gemstones, Inc. v. Union Carbide Corp., 47 NY2d 250, 255 [1979]), on this record Defendant raised a triable issue of fact to defeat Plaintiff's summary judgment motion. (Id.; Elmo Mfg. Corp. v. American Innovations, Inc., 44 AD3d 703 [2d Dept. 2007])

Turning to Plaintiff's account stated cause of action, it failed to demonstrate its entitlement to judgment as a matter of law. "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.” (J.B.H., Inc. V. Godinez, 34 AD3d 873, 874 [3d Dept. 2006], quoting Jim-Mar Corp. v. Aquatic Const., Ltd., 195 A.D.2d 868, 869 [3d Dept.1993] lv. denied 82 NY2d 660 [2000]). This cause of action may be “implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances.” (Id.)

On this record, Plaintiff failed to establish its entitlement to judgment on its account stated cause of action with sufficient evidentiary proof. While Plaintiff’s supervisor affidavits reference its account stated cause of action, Plaintiff failed to sufficiently establish that its invoices were delivered to Defendant. Rather, the sole allegation Plaintiff proffers to establish delivery of its invoices states that “Plaintiff sent defendant numerous statements at regular intervals.” As Plaintiff did not provide any detail about the delivery of its invoices to Defendant, instead proffering only a conclusory and unsubstantiated allegation, it failed to demonstrate Defendant’s “retention of an account rendered for an unreasonable period of time.” (Id.) Thereby failing to demonstrate its entitlement to judgment as a matter of law.

Accordingly, Plaintiff’s motion for summary judgment is denied in its entirety.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 7, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 11, 2010, Affidavit of Pamela A. Schubert, dated July 8, 2010, Affidavit of Jeremy Ray, dated July 9, 2010; with attached Exhibits "A" - "C" and unnumbered exhibits (including Affidavit of Pamela A. Schubert, dated January 20, 2010.
2. Affirmation of Mariel Dreispiel, dated September 22, 2010, Affidavit of Robert Cominos, dated September 22, 2010, with attached Exhibits "A" - "D"
3. Reply Affidavit of Elliot F Marinstein, dated October 21, 2010, with attached Exhibits "D" - "E".