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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

BRIARE TILE, INC.,

Plaintiff,

- against-

TOWN & COUNTRY FLOORING, INC.,

Defendant.

INDEX NO. 600495/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☒ No

Plaintiff Briare Tile, Inc. ("plaintiff") brings this action for breach of contract and account stated against defendant Town & Country Flooring, Inc. ("defendant"), in connection with defendant's order for mosaic floor tiles from plaintiff for use on a commercial construction project. Plaintiff delivered the tiles to defendant and claims that a balance is still due under the invoice. Defendant concedes that it is indebted to plaintiff for the tiles, but disputes the amount that is owed. Discovery is not complete and the Note of Issue has not been filed. Before the Court is plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking judgment in its favor on the breach of contract claim, and dismissing defendant's counterclaim and affirmative defenses. Defendant has responded in opposition to the motion, and plaintiff has filed a reply.

BACKGROUND

In support of its summary judgment motion, plaintiff submits, *inter alia*, an affidavit of its

President, Jean Claude Kergoat ("Mr. Kergoat"); the subject invoice dated January 30, 2009; and copies of relevant correspondence between the parties. In opposition, defendant submits an affidavit of its President, Scott Hyman ("Mr. Hyman"). The following facts are undisputed.

Plaintiff is an importer and seller of mosaic flooring tiles. Defendant is a retailer of flooring products and is involved in interior design and construction for commercial and residential properties. The parties have had a business relationship for over ten years.

In February 2008, defendant requested an estimate of the cost for plaintiff to supply tiles for a proposed commercial construction project that defendant was bidding on. The tiles were based on drawings provided to plaintiff by defendant. The project would require approximately 800 square feet of CE39 black mosaic tiles ("CE39 Mosaic"), and 100 square feet of custom design sunburst pattern tiles ("Sunburst Pattern"). Plaintiff quoted an estimated price of $35.47 per square foot for the CE39 Mosaic tiles, and $80 per square foot for the Sunburst Pattern tiles, for a total price of $36,380 for the entire project.

On October 1, 2008, one of defendant's representatives, Ronni Lieberman ("Mr. Lieberman"), contacted plaintiff by email and requested to strike off a sample of the Sunburst Pattern tiles. Mr. Lieberman also referenced the prior price quote, stating: "I also need to speak to Mr. Kergoat's about pricing. We have an email from Francois and Mr. Kergoat's on this pricing dated Feb. 08" and I am trying to secure this job in these economic times" (Not. of Mot., Ex. 6).

Mr. Kergoat sent a fax to Mr. Lieberman on October 29, 2008, with a handwritten note addressing the price as follows: "We will stick with the prices quoted by Francois if you order before 12/31/08. Obviously we would want a confirmation from your customer to make sure everything is ok" (*id.*, Ex. 7).

On November 5, 2008, defendant submitted an order to plaintiff to purchase 830 square feet of the CE39 Mosaic tiles, and 100 square feet of the Sunburst Pattern tiles. On November

18, 2008, defendant informed plaintiff that the Sunburst Pattern tiles were unacceptable because its customer expected more palladium tiles in the design plans. On November 21, 2008, plaintiff sent an email to defendant indicating that the tiles could no longer be sold at the price quoted in February 2008, because that quote assumed the project would need less palladium tiles.

Mr. Kergoat spoke with Mr. Hyman by telephone to discuss the price of the Sunburst Pattern tiles on November 25, 2008. According to Mr. Kergoat's affidavit, during their conversation plaintiff and defendant agreed to a compromise price of $92 per square foot for the Sunburst Pattern tiles that reflected a compromise between the original estimate price of $80 per square foot and a re-design price of $110 per square foot, which increased the total price of the project by $1,200. Mr. Kergoat claims that the price was confirmed via emails on November 26, 2008, one of which was sent by defendant and stated: "We confirm the price of 92.00 per sf" (*id.*, Ex. 10).

Plaintiff shipped the tiles in accordance with defendant's instructions and sent an invoice for the tiles to defendant on January 30, 2009. The invoice stated that there was balance due of $27,419.98 (*see id.*, Ex. 12). The terms and conditions of the sale were printed on the reverse side of the invoice and provided that any unpaid balance more than 60 days past due would be charged an interest rate of 2% per month, and that any balance referred for collection would be subject to an additional 30% surcharge.

On October 1, 2009, defendant made a payment in the amount of $13,104.05 on the January 30, 2009 invoice. Mr. Kergoat spoke with Mr. Hyman about the unpaid balance in November 2009, and claims that during their conversation, Mr. Hyman stated that defendant did not pay the entire invoice and asked for additional time to pay because "business was slow." Since November 2009, defendant has not received any additional payment from defendant or had any communication with defendant regarding payment.

Plaintiff commenced the present action to recover the amount that is allegedly still owed under the January 30, 2009 invoice, bringing causes of action for breach of contract and account stated. The first cause of action seeks damages for breach of contract in the amount of $25,881.74, based on a claim that defendant failed to pay for the tiles that were sold and delivered. The second cause of action for account stated seeks to recover $14,315.93, and alleges that an account was taken and stated between the parties on January 30, 2009, which has not been objected to, and that defendant has made a $13,104.05 payment on the account stated. Plaintiff also seeks interest and costs. Defendant brings a counterclaim for breach of contract and raises the affirmative defenses of lack of personal jurisdiction, statute of frauds, and equitable estoppel.

In his affidavit in opposition to summary judgment, Mr. Hyman concedes that there was a contract and that defendant is indebted to plaintiff (*see* Aff. in Opposition at ¶¶ 3, 11, 12), but claims that defendant's debt is at most $13,104.05, not the sum of $25,881.74 plus interest claimed by plaintiff. Mr. Hyman maintains that defendant failed to pay the balance due under the invoice because there was a dispute about how much was owed, and he claims that plaintiff delivered the tiles to the job site with an invoice stating a new price that defendant rejected. Defendant purportedly could not return the tiles or physically reject them since it was obligated to complete the project for which it was hired. Mr. Hyman also contends that defendant detrimentally relied on its contract with plaintiff when it bid on and was awarded the contract for the commercial construction project. In addition, Mr. Hyman claims that plaintiff has failed to comply with discovery demands, including producing plaintiff for deposition to prove its damages.

DISCUSSION

Plaintiff argues that it is entitled to judgment as a matter of law on its cause of action for breach of contract, including interest and collection fees, because there are no material issues

of fact and because defendant's counterclaim and affirmative defenses lack merit.[1] Plaintiff contends that the undisputed facts establish that it performed its portion of the contract by delivering the tiles to defendant, and that defendant breached its agreement by not making payment in full within a reasonable time. Plaintiff seeks judgment in the amount of $25,881.74, plus interest and collection fees as set forth in the invoice.

Defendant argues that summary judgment should be denied because there are triable issues of fact concerning the alleged breach of contract, the amount of damages due plaintiff, and because discovery is still outstanding. Specifically, defendant contends that there are questions of fact concerning whether plaintiff breached the contract by unilaterally changing the contract price when it delivered the tiles. Defendant also claims that plaintiff fails to submit documentation supporting its claim that $25,881.74 is owed, and challenges the amount of damages requested as conclusory and inflated. Defendant further argues that summary judgment is premature because plaintiff has failed to provide the discovery necessary to determine exactly how much defendant owes to plaintiff.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

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[1]The Court notes that plaintiff's motion contains no arguments with respect to its second cause of action for account stated. In any event, the result herein would be the same under the alternate theory as the claims overlap (*see, e.g., Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apartments Ltd.*, 147 AD2d 327, 334 [1st Dept 1989]).

Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also* CPLR 3212 [b]). When deciding the motion, the Court's views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Court finds that plaintiff has established its entitlement to judgment as a matter of law on its breach of contract claim with respect to the issue of liability only. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Here, it is undisputed, and indeed, defendant has conceded, that the parties had a contract for the purchase of the tiles and that the tiles were delivered and a balance is still owed. Plaintiff has therefore made out a prima facie case on its breach of contract claim, and it is incumbent upon defendant to proffer admissible evidence sufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Castle Oil Corp. v Bokhari*, 52 AD3d 762, 762 [2d Dept 2008]). Since defendant has failed to present any evidentiary materials sufficient to raise a triable factual issue in its defense of the contract, plaintiff is entitled to summary judgment, at least as to liability (*see Pennie & Edmonds v F.E.I., Ltd.*, 161 AD2d 475, 475 [1st Dept 1990]; *Otterbourg*, 147 AD2d at 334; *Hartz Mountain Corp. v Allou Distributors, Inc.*, 173 AD2d 440, 440 [2d Dept 1991]).

Plaintiff, however, has not established it entitlement to judgment as a matter of law on the issue of damages (*see Florida Infusion Serv., Inc. v Alden Surgical Co.*, 23 AD3d 614, 614

[2d Dept 2005]). Plaintiff has presented insufficient evidence for the Court to determine, as a matter of law, the amount that is still owed under the invoice (*see id.*). Although plaintiff's counsel submits a reply affidavit in which he purports to explain how he calculated the $25,881.74 figure, the Court will not consider this evidence as it is submitted for the first time in reply papers (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [1st Dept 2009]; *McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005] ["Matter improperly raised for the first time in a reply should be disregarded"]). Even were the Court to consider it, the Court would consider it insufficient.

Further, there is a clear dispute between the parties with respect to the balance due, and there remain questions of fact regarding whether the parties agreed to the increased price of $92 per square foot for the Sunburst Pattern tiles. Therefore, summary judgment is inappropriate, and a trial is warranted on the issue of damages (*see Cooper v Robert*, 78 AD3d 572, 574 [1st Dept 2010] ["The motion court correctly held that discrepancies in the total amounts claimed due by plaintiff precludes full summary judgment at this time. Instead . . . there should be an immediate trial on damages in order to determine the total amount due on the invoices submitted"]; *Pennie*, 161 AD2d at 475; *Florida Infusion.*, 23 AD3d at 615).

Accordingly, plaintiff's motion for summary judgment is granted with respect to the issue of liability only. The motion is denied as to the amount of damages to be awarded on the breach of contract claim.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability with respect to the breach of contract claim, and denied as to damages; and it is further,

ORDERED that a trial shall be held on the issue of the amount of damages to be awarded on the breach of contract claim; and it is further,

ORDERED that discovery shall proceed and the parties are directed to appear for a

status conference on June 15, 2011, at 11:00 a.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that defendant shall serve a copy of this order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: May 24, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**