

Guo Window Inc. v A Affordable Storefront Sales & Serv. Inc.

2011 NY Slip Op 32927(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 103970/2010

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.
Justice

PART 11

Index Number : 103970/2010
GUO WINDOW INC
vs.
A AFFORDABLE STOREFRONT SALES
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

FILED

NOV 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: *November 3, 2011*

[Signature]
HON. JOAN A. MADDEN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

GUO WINDOW INC.,

Plaintiff,

INDEX NO. 103970/2010

-against-

A AFFORDABLE STOREFRONT SALES &
SERVICE INC. & JAMES ZITIS, each defendant
d/b/a A AFFORDABLE STOREFRONT,

Defendants.

-----X

JOAN A. MADDEN, J.:

FILED

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This is an action to recover damages in the amount of \$32,561.89, for goods sold and delivered. Individual defendant James Zitis moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against him, on the ground that he is not personally liable to plaintiff, as plaintiff sold the goods to his employer, Affordable Enterprises, Ltd, which is a corporate entity. Plaintiff opposes the motion.¹

As the proponent of a motion for summary judgment, defendant Zitis bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof

¹Plaintiff states that the action has been discontinued against the named corporate defendant.

in admissible form establishing the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Summary judgment, however, should not be awarded if there is any doubt as to the existence of a triable issue of fact, or where the existence of an issue is arguable. See American Home Assurance Co. v Amerford International Corp, 200 AD2d 472, 473 (1st Dept 1994).

It is well settled that when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for breach of contract absent clear and explicit evidence of the agent's intent to be personally bound. See Savoy Record Co. v. Cardinal Export Corp., 15 NY2d 1, 4 (1964); Worthy v. New York City Housing Authority, 21 AD3d 284 (1st Dept 2005); News America Marketing, Inc. v. Lepage Bakeries Inc., 16 AD3d 146 (1st Dept 2005). However, where the agent enters into a contract for an undisclosed or partially disclosed principal, a third-party may proceed directly against the agent, the principal or both. See J.P. Endeavors v. Dushaj, 8 AD3d 440 (2nd Dept 2004); Kucker Kraus & Bruh, LLP v. Warwick, 289 AD2d 63 (1st Dept 2001); Unger v. Travel Arrangements, Inc., 25 AD2d 40 (1st Dept 1966). The law imposes no duty on plaintiff, as the third-party, to inquire or conduct an investigation to obtain actual knowledge whether the defendant with whom it was dealing was in fact an agent for a disclosed principal. See Rothschild Sunsystems, Inc. v. Pawlus, 129 AD2d 933 (3rd Dept), app den 70 NY2d 610 (1987); Tarolli Lumber Co. V. Andreassi, 59 AD2d 1101 (4th Dept 1977); Rafner v. Toplis & Harding, Inc., 25 AD2d 826 (1st Dept 1966). Absent appropriate disclosure by the agent, the agent may be held personally liable on the contract. See Kucker Kraus & Bruh, LLP v. Warwick, *supra*.

Defendant Zitis fails to satisfy his burden of establishing as a matter of law that he is not

personally liable. In support of the motion, defendant submits an affidavit, an attorney's affirmation, the pleadings, and documents consisting of records from the New York Department of State Division of Corporations, invoices from plaintiff made out to "Affordable Enterprises," bank records, and cancelled checks printed with the name "Affordable Enterprises" made payable to plaintiff. In his affidavit, defendant Zitis merely states that at "all relevant times herein," he was an "employee of Affordable Enterprises, Ltd, a corporation" and he "did not transact business with the plaintiff, other than in my capacity as a employee of Affordable Enterprises, Ltd."

The invoices and checks show that plaintiff was dealing with an entity known as "Affordable Enterprises," and defendant James Zitis signed at least one of the checks plaintiff received from that entity. While the records from the New York Department of State Division of Corporations list an entity known as "Affordable Enterprises, *Ltd.*" at 969 East New York Ave, Brooklyn, NY 11212, which is the identical address printed on the checks plaintiff received from Affordable Enterprises, the company name as it appears on both the company's own checks to plaintiff, and plaintiff's invoices, does not include the "Ltd." Noticeably absent from defendant's affidavit is a statement that during the course of his dealings with plaintiff, he affirmatively informed plaintiff that he was acting in his capacity as an agent for a corporate principal. To the contrary, plaintiff president's submits an affidavit that "Mr. Zitis, with whom we individually and exclusively dealt, never declared, orally, in writing or otherwise, that he was acting as an agent on behalf of someone else, especially a corporation. If we had know this our credit terms would have been different." Plaintiff's position is consistent with the fact that defendant Zitis signed one of the checks made payable to plaintiff, and also signed one of the

documents provided by the bank, where he lists his "title" as "V.P."

Thus, in the absence of competent and conclusive evidence establishing that defendant Zitis disclosed to plaintiff that he was acting in his capacity as an agent for a corporate entity, Zitis is not entitled to summary judgment dismissing the complaint as against him. See J.P. Endeavors v. Dushaj, *supra*; Kucker Kraus & Bruh, LLP v. Warwick, *supra*; Unger v. Travel Arrangements, Inc., *supra*.

Accordingly, it is hereby

ORDERED that the motion by defendant James Zitis for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on December 15, 2011 at 10:00 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: November 3, 2011

ENTER: NOV 07 2011

FILED

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.