

Wider Consolidated, Inc. v Tony Melillo, LLC

2012 NY Slip Op 30475(U)

February 26, 2012

Sup Ct, Queens County

Docket Number: 7081/09

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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WIDER CONSOLIDATED, INC.,

Index No.:7081/09

Plaintiff(s),

Motion Date:11/29/11

- against -

Motion Cal. No.: 25

Motion Seq. No: 3

TONY MELILLO, LLC and TONY MELILLO,

Defendant(s).

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The following papers numbered 1 - 13 read on this motion by the plaintiff for an order dismissing the defendants' answer to the amended complaint and awarding summary judgment on the issue of liability; and a cross-motion by the defendants for an order granting an extension of time to move for summary judgment and, upon the granting of such extension, for summary judgment on the plaintiff's fifth cause of action.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Reply Affirmation-Service.....	12 - 13

Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This action for breach of contract was commenced on March 23, 2009. According to the complaint, beginning in December, 2007 the parties contracted for the plaintiff Wider Consolidated, Inc. ("Wider") to render freight forwarding services to ship the defendants' cargo. It is alleged that defendant Tony Melillo is the principal and owner of defendant Tony Melillo, LLC. Plaintiff filed its Note of Issue on February 1, 2011. By order dated April 28, 2011, this court granted plaintiff Wider leave to file and serve a supplemental summons and amended complaint adding a fifth cause of action against defendant Tony Melillo, as guarantor. On

or about May 14, 2011, defendants answered the amended complaint.

Plaintiff Wider now moves, pursuant to CPLR §3012(a) and §3016(f) and for an order dismissing the defendants' amended answer for the failure to timely serve same and for the amended answer's failure to specify with the required particularity which items are in dispute. CPLR §3012 (a) requires service of an answer twenty days after service of the pleadings to which it responds. In its April 28, 2011 order, this court directed the defendants to serve an answer within twenty days of the date of service of the order with notice of entry. A review of the file maintained by the Queens County Clerk reveals that plaintiff served the subject order with notice of entry on or about May 11, 2011. According to the affirmation regarding service of defendants' amended answer, defendants served an answer to the amended complaint on May 15, 2011. Thus, service of the answer was timely. Additionally, CPLR §3016(f) mandates that, in an action involving the sale and delivery of goods, a defendant's answer must include both the items and the aspects of the claims that it disputes. A review of the defendants' amended answer reveals that it contains the specificity required by CPLR §3016. Accordingly, those portions of the instant motion, pursuant to CPLR §3012(a) and §3016(f), to dismiss the amended answer are denied.

Plaintiff Wider also moves, pursuant to CPLR §3212, for summary judgment. Under CPLR §3212[a], if no date is set by the court, a summary judgment motion must be made no later than 120 days after the filing of the Note of Issue, except with leave of court with good cause shown (see *Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Rivera v Toruno*, 19 AD3d 473 [2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347 [2005]). In this action, plaintiff's time to move for summary judgment expired on June 1, 2011, yet this motion was not filed until August 12, 2011. Accordingly, plaintiff's motion is denied in its entirety.

Defendants now cross-move for an extension of time to file a motion for summary judgment and, pursuant to CPLR §3212, for summary judgment and dismissal of the plaintiff's fifth cause of action. Defendants assert that they could not have made a timely motion as the amended complaint, which added the subject cause of action, was not served until after the Note of Issue was filed. Thus, the movants have sufficiently demonstrated that good cause exists for the requested extension. Accordingly, that portion of the cross-motion which seeks an extension of time to move for summary judgment is granted.

Defendants now also move, pursuant to CPLR §3212, for an order granting summary judgment and dismissal of plaintiff's fifth cause of action. CPLR §3212(b) requires that for a court to grant summary judgment it must determine if the movant's papers justify

holding, as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

In the fifth cause of action to its amended complaint, plaintiff asserts that, on or about May 8, 2008, defendant Tony Melillo signed a personal guaranty in which he promised to pay the debts of the corporate defendant, that the corporate defendant has failed to pay its obligations and that plaintiff is now entitled to enforce the guaranty. Defendants assert that, although defendant Tony Melillo did execute a guaranty, he only did so on behalf of himself, and did not guaranty the debts of Tony Melillo, LLC. As it is uncontested that this action is based only on the alleged debts incurred by defendant Tony Melillo, LLC, defendants assert that plaintiff's fifth cause of action must be dismissed.

A review of the subject guaranty reveals that the beginning of the document refers to defendant Tony Melillo, LLC and plaintiff Wider Consolidated, Inc. as "Importer" and "Freight Forwarder", respectively. However, the first complete paragraph of the document states:

"For the purposes of this document, any usage of 'Importer' will refer to Tony Melillo, and any usage of 'Freight Forwarder' will refer to Wider Consolidated, Inc. Any usage of the term 'Guaranty' will mean the 'Personal Guaranty of the Guarantor'. Accounting terms have been set as a credit limit of \$25,000 or 30 days, whichever comes first"

Defendants assert that the above-referenced paragraph of the guaranty proves that defendant Tony Melillo only guaranteed his own debts incurred as an Importer, not the debts of Tony Melillo, LLC. In support of its proposition that summary judgment is warranted, defendants rely on *Rae v. Kestenberg*, 23 AD2d 565 [2d Dept. 1965], for its holding that a guarantor's liability is limited to the scope, terms and meaning of the agreement executed. However, a review of the *Rae* decision reveals that in that decision, the Supreme Court of the State of New York, Appellate Division, Second Department ruled that, where a guaranty was for specific debts owed, it could not be used to obligate the guarantor to pay any and all debts that may ever become due and owing to the plaintiff. (See, *Rae, supra*). Unlike the facts in *Rae*, plaintiff Wider's fifth cause of action does not attempt to obligate defendant Tony Melillo to pay any and all debts that may ever become due and owing

to the plaintiff. Plaintiff Wider's fifth cause of action attempts to enforce the very debts that it believes were referred to in the subject guaranty.

Defendants also assert that, if this court finds the terms of the guaranty to be ambiguous, it must resolve the ambiguity against the plaintiff as the drafter of the guaranty. While true that some New York courts have ruled that ambiguity must be construed against the drafter, other courts have held that a guaranty must be read in context, and in a manner that affords the words of the document their "fair and reasonable meaning" (*Duane Reade v. Cardtronics, LP.*, 54 Ad3d 137 [1st Dept. 2008]). It has been held that, despite ambiguity which may exist in the definition section of a contract or guaranty, a court is not bound to interpret the ambiguity in a manner which will produce a result which is "absurd, commercially unreasonable or contrary to the reasonable expectation of the parties" (*Greenwich Financial Products v. Negrin*, 74 AD3d 413 [1st Dept. 2010]).

In support of the instant cross-motion, defendants submit the affidavit of defendant Tony Melillo in which he states that he does not personally do business with the plaintiff and only signed the subject guaranty because it did not obligate him to pay the debts of Tony Melillo, LLC. Thus, the movants seek an order from this court ruling that, despite the fact that defendant Tony Melillo, LLC is listed as the Importer on the guaranty and, despite the fact that defendant Tony Melillo has never had any debts with the plaintiff which could be guaranteed, a commercially reasonable interpretation of the document would be that defendant Tony Melillo never intended to guaranty the debts of the corporate defendant. This court finds that such an interpretation of the guaranty would create a result which is commercially unreasonable and patently absurd. Thus, as this court will not construe the ambiguity in the definition section of the subject guaranty as against the plaintiff, the defendants have failed to demonstrate that plaintiff's fifth cause of action has no merit. Accordingly, that portion of the instant cross-motion which seeks summary judgment and dismissal of plaintiff's fifth cause of action is hereby denied.

Dated: January 26, 2012

JANICE A. TAYLOR, J.S.C.

