

Parts Auth., Inc. v J & V Auto Servs., Inc.

2012 NY Slip Op 30704(U)

March 12, 2012

Supreme Court, Nassau County

Docket Number: 22741/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

PARTS AUTHORITY, INC.,

Plaintiff,

- against -

J & V AUTO SERVICES, INC. and ANTONIO METARAS,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 22741/10
Motion Seq. No.: 02
Motion Date: 03/05/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits and Memorandum of Law	1

Plaintiff moves, pursuant to CPLR § 3212, for an order granting it partial summary judgment on the Second Cause of Action of the Amended Verified Complaint, establishing an account stated in the amount of \$37,777.44, and the Third Cause of Action of the Amended Verified Complaint on a personal guarantee of payment in the amount of \$37,777.44; and for an order granting plaintiff interest, costs, disbursements and attorneys fees. Defendants failed to submit any opposition to plaintiff's motion.

Plaintiff submits that, between August 13, 2009 and December 28, 2009, under Account Number 0100 32040, and between April 10, 2010 and May 25, 2010, under Account Number 0100 31040, plaintiff sold and delivered goods, wares and merchandise consisting of automotive parts to defendants at their special instance and request. Defendants accepted the goods, wares

and merchandise sold to them by plaintiff. Plaintiff always had, and continues to have, an expectation of payment for said goods, wares and merchandise. Defendants were sent monthly statements reflecting the costs of the goods, wares and merchandise sold/provided by plaintiff in connection with defendants' business. *See* Plaintiff's Affidavit in Support Exhibit B. Said statements were retained by defendants without objections. As a result of the goods, wares and merchandise provided to defendants through May 25, 2010, a balance in the amount of \$37,777.44 remains due and owing to plaintiff. Demand for payment has been made to defendants, yet no payment has been forthcoming to date. Plaintiff further submits that, on or about January 4, 2007, individual defendant Antonio Metaras ("Metaras") executed a personal guaranty of payment to induce plaintiff to provide the aforementioned goods, wares and merchandise to defendants. *See* Plaintiff's Affidavit in Support Exhibit D. The personal guaranty provides that defendant Metaras, as guarantor, upon default in making payment as when and due by the business, promises and shall immediately pay to plaintiff the entire balance due, together with interests, costs, disbursements and attorneys' fees.

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 its motion as detailed above, the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law.

Plaintiff has established its *prima facie* entitlement to summary judgment on its "goods sold and delivered" claims by submitting invoices, delivery receipts and the Affidavit of its Vice President who has described the transactions and defendants' receipt of the goods. See *Castle Oil Corp. v. Bokhari*, 52 A.D.3d 762, 861 N.Y.S.2d 730 (2d Dept. 2008); *Boise Cascade Office Products Corp. v. Gilman & Ciocia, Inc.*, 30 A.D.3d 454, 816 N.Y.S.2d 374 (2d Dept. 2006);

Becker v. Shore Drugs, 296 A.D.2d 515, 745 N.Y.S.2d 492 (2d Dept. 2002).

Since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendants 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, supra*.

As previously stated, defendants have failed to submit any opposition to defeat the motion for summary judgment.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting it partial summary judgment on the Second Cause of Action of the Amended Verified Complaint, establishing an account stated in the amount of \$37,777.44 and the Third Cause of Action of the Amended Verified Complaint on a personal guarantee of payment in the amount of \$37,777.44, together with interest from May 25, 2010, is hereby **GRANTED**.

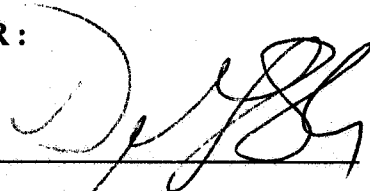
The branch of plaintiff's motion which is an award for contractually based counsel fees must be set down for a hearing to determine whether the fees sought are reasonable. *See Best Bldg. & Supply Lumber Corp. v. Mastercraft Homes & Renovations*, 39 A.D.3d 788, 835 N.Y.S.2d 355 (2d Dept. 2007); *TPZ Corp. v. Winant Place Assoc.*, 308 A.D.2d 577, 764 N.Y.S.2d 868 (2d Dept. 2003). "An award of attorney's fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *See CIT Group/Equipment Financing, Inc. v. Riddle*, 31 A.D.3d 477, 818 N.Y.S.2d 258 (2d Dept. 2006); *Kamco Supply Corp. v. Annex Contracting, Inc.*, 261 A.D.2d 363, 689 N.Y.S.2d 189 (2d Dept. 1999). Said hearing shall be held after the trial or resolution of this action.

Plaintiff must file a Note of Issue before the aforementioned hearing. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claims giving rise to the Inquest.

As this motion was only for partial summary judgment, it is further ordered that the parties shall appear for a Preliminary Conference on April 26, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 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 the DCM Case Coordinator. 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
March 12, 2012

ENTERED
MAR 14 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE