

**United Graphics, Inc. v Lazar, Sons & Partners
Advertising, Inc.**

2012 NY Slip Op 31504(U)

May 31, 2012

Sup Ct, NY County

Docket Number: 104412/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 104412/2009
UNITED GRAPHICS
vs
LAZAR, JAY
Sequence Number : 009
EXTEND TIME

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) 1, 2
Answering Affidavits — Exhibits _____ | No(s) 3, 4
Replying Affidavits _____ | No(s) 5

Upon the foregoing papers, It is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/12


HON. EILEEN A. RAKOWER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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 15

-----X

UNITED GRAPHICS, INC.,

Plaintiff,

Index No.
104412/09

Seq No.: 09

- against -

Decision and
Order

LAZAR, SONS & PARTNERS ADVERTISING, INC.,
ANVIL KNITWEAR, INC., AREZZO JEWELRY, INC.,
DAMIANI USA CORPORATION, J.C. PENNEY
COMPANY, INC., JG KRONENBERGER FINE
JEWELRY, ROYAL CHAIN. INC., AND UNIVERSAL
PACIFIC DIAMONDS & JEWELRY, INC.,

FILED

JUN 07 2012

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff United Graphics, Inc. ("United" or "plaintiff") brings this action against defendants for breach of contract and account stated in connection with commercial printing services that United allegedly rendered from about October 31, 2007 through December 31, 2008.

Presently before the Court is a motion brought by defendants Lazar, Sons, & Partners Advertising, Inc. ("Lazar"), Damiani USA Corporation, JG Kronenberger Fine Jewelry, Royal Chain, Inc., and Universal Pacific Diamonds & Jewelry, Inc. for an Order extending the time to answer plaintiff's interrogatories served on them on February 1, 2012. Defendants claim that the "interrogatories are numerous and complicated," "a new attorney must familiarize himself with the new case file," some of the defendants "are large corporations," and that "time has elapsed since the events occurred of has made it difficult for the large corporate Defendants to identify all employees familiar with the facts and circumstances of the case."

Plaintiff opposes the motion and cross moves for an Order (1) granting summary judgment on its second cause of action for breach of contract and tenth cause of action for account stated against defendants Lazar, Sons & Partners Advertising, Inc. ("Lazar") and Anvil Knitwear, Inc. ("Anvil"); (2) directing the Court to enter judgment in the amount of \$78,188 plus costs; (3) vacating the automatic stay; and (4) upon such vacatur directing defendants to answer discovery. Lazar and Anvil oppose.

United submits an attorney's affirmation and the affidavit of United President John Giblin in support of its cross-motion for summary judgment on two of its claims. Annexed to these documents as exhibits are United's Summons and Complaint; Lazar's Answer; Anvil's Answer; the answers of the additional defendants; United's First Set of Interrogatories and Anvil's responses; a copy of the invoice allegedly sent to Lazar in connection with Anvil's 2008 Catalog; and the affidavit of Christopher Levesque, Vice President of Product Innovation and former Vice President of Marketing of Anvil.

According to the Giblin affidavit, Lazar is an advertising agency which hired United on behalf of, and as agent for, Anvil "to produce various commercial printed materials for use by the Principals in various advertising and publicity campaigns conducted by the Principals." Giblin states, "Lazar disclosed the identity of the Principals to Plaintiff and promised to pay Plaintiff for its production of the requested printed materials upon receipt of an invoice. All work rendered by Plaintiff at the request of Lazar was invoiced to Lazar after the work was completed and received by the Principals without objection." Giblin states that e-mails demonstrate that "Anvil was intimately involved throughout the process of creating the Anvil Catalog and had control over the details of the design, format, material and look of the Anvil Catalog," "consented to Lazar's hiring of Plaintiff," and "communicated directly to Plaintiff on several occasions with instructions."

Lazar submits an attorney's affirmation and the affidavit of Jay Lazar, President of Lazar, in opposition to United's cross motion for summary judgment. In his affidavit, Lazar states that his company "has never acted in an agency capacity for the production of print materials for any customer and was not acting as Anvil's agent." Lazar also states that the alleged goods and services provided by United were not conforming and were not of satisfactory quality or workmanship, the alleged goods and services were not delivered by the agreed upon time, and Lazar rightfully

objected to the quality and delivery of the goods within a reasonable amount of time.

Anvil submits an attorney affirmation of Lisa Simpson, Esq. and an affidavit of Christopher Levesque, former Vice President of Marketing of Anvil, in opposition to United's motion. According to the Levesque affidavit, Anvil contracted with A&M Marketing Services, Inc. ("A&M"), parent, predecessor, or affiliated company of Lazar, in 2007 to perform printing services for a 2008 Catalog on its behalf. Levesque states that Anvil did not engage United or have a contract with United. Levesque states Anvil's only agreement was with Lazar and that there was no formal contract, agency agreement or any agreement addressing Lazar's authority to conduct business on behalf of Anvil. Levesque states that Anvil had no right to control Lazar's employees in their day to day work on its 2008 catalog, did not supervise Lazar's manner or method of work, and did not authorize Lazar to act as its agent. Levesque states that United directed the invoices to Lazar, not Anvil, and that Anvil did not receive the invoices at any time. Levesque states that Lazar issued invoices to Anvil for its work on the 2008 catalog, that those invoices included and reflected work that Lazar's "subcontractors did on the 2008 catalog," and that Anvil paid in full on the invoices it received from Lazar for Lazar and United's work on the 2008 catalog. Attached to Levesque's affidavit are copies of checks reflecting Anvil's \$168,922,79 and \$1,840 payments to A&M for services rendered.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Plaintiff cross-moves for summary judgment on its second cause of action for breach of contract and tenth cause of action for account stated against Lazar and Anvil and requests a judgment against them jointly and severally. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other ... In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." (*Shea & Gould v. Burr*, 194 AD2d 369, 370[1st Dept. 1993]).

"The rule is firmly established that 'an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'"(*News America Marketing, Inc. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146 [1st Dept 2005])(citations omitted)).

Here, United has not made a prima facie showing of entitlement to summary judgment on its second cause of action for breach of contract and tenth cause of action for account stated against Lazar and Anvil. Questions of fact still exist as to the alleged agency relationship that forms the basis of United's motion. Additionally, summary judgment would be premature under CPLR §3212(f). Anvil's Answer to the Complaint in this matter was deemed served on October 11, 2011, and Anvil served responses to United's interrogatories on February 24, 2012. Anvil asserts that "[w]ithout any discovery from plaintiff and co-defendants, particularly as to United Graphics' own alleged perception of and reliance on any purported agency relationship, or as to the relationship between Lazar and United Graphics - all of which is outside the knowledge of Anvil and within the exclusive knowledge of co-parties," it is "precluded from mounting a full and fair defense to summary judgment."

Wherefore, it is hereby,


ORDERED that defendants' motion to extend the time to answer plaintiff's first set of interrogatories served on them by plaintiff on February 1, 2012 is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that defendants are compelled to answer plaintiff's first set of interrogatories within 15 days after receipt of a copy of this Order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 5/31/12



FILED

EILEEN A. RAKOWER, J.S.C. JUN 07 2012

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