

Elie Intl., Inc. v Macy's West Inc.
2012 NY Slip Op 33188(U)
May 17, 2012
Supreme Court, New York County
Docket Number: 650811/2011
Judge: Ellen M. Coin
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: COIN
HON. ELLEN M. COIN Justice

PART 63

Index Number : 650811/2011
ELIE INTERNATIONAL, INC.,
vs.
MACY'S WEST INC.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.**

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

This constitutes the decision, order and judgment of the Court.

Dated: 5/17/12

EC, J.S.C.

HON. ELLEN M. COIN

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: CIVIL TERM: PART 63

----- X
ELIE INTERNATIONAL, INC.,

Plaintiff,

-against-

Index Number 650811/2011

Submission Date May 2, 2012

Mot. Seq. No. 001

**DECISION, ORDER and
JUDGMENT**

MACY'S WEST INC. and MACY'S RETAIL
HOLDINGS, INC.,

Defendants.

-----X

For Plaintiff :

Wimpfheimer & Wimpfheimer, Esqs.
By Michael C. Wimpfheimer, Esq.
300 West 58th Street, Suite 209
New York, New York 10019
(212) 247-8448

For Defendants:

Gibride, Tusa, Last & Spellane LLC
By Bennett H. Last, Esq.
708 Third Avenue, 26th Floor
New York, New York 10017
(212) 692-9666

Papers considered in review of this motion to dismiss:

Papers	Numbered
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Affirm. in Supp.....	<u>2</u>
Affids. in Opp to Cross-Mot.....	<u>3</u>

ELLEN M. COIN, J.:

This action was commenced on March 25, 2011. By order dated September 22, 2011, the Court granted the motion of defendants Macy's West Inc. and Macy's Retail Holdings, Inc. (Collectively, "Macy's") to dismiss the complaint, but gave plaintiff leave to replead. Macy's now moves to dismiss the Amended Verified Complaint pursuant to CPLR 3211(a)(5) on the ground that the causes of action in it are barred by the applicable statute of limitations. Plaintiff opposes the motion.

The Amended Verified Complaint asserts two causes of action: for breach of contract and for an account stated. Under CPLR 213(2), a claim for breach of contract is governed by a six-year statute of limitations. A claim for an account stated is also governed by CPLR 213(2). (*Kramer, Levin, Nessen, Kamin & Frankel v Aronoff*, 638 F Supp 714, 722 [S.D.N.Y. 1986]; *Erdheim v Gelfman*, 303 AD2d 714, 714 [2d Dept. 2003]; *Donahue-Havlerson, Inc. v Wissing Constr. & Bldg. Servs. Corp.*, 95 AD2d 953, 954 [3d Dept. 1983]).

This case arises out of a Consignment Agreement (the “Agreement”) between plaintiff Elie International, Inc. (“Elie”), as consignor, and Macy’s West Stores, Inc., as consignee. Under the Agreement the parties were required to generate a number of documents to keep track of their transactions. For each shipment Elie was to submit a Consignment Shipment Invoice, setting forth the price agreed to by Elie and Macy’s. Elie was also required to submit to Macy’s a Monthly Reconciliation Statement, setting forth payments made by Macy’s to Elie regarding any Consignment Shipment Invoice listed in the Statement.

Macy’s was required to generate a Consignee Monthly Settlement Statement, listing the net cost of all sales of merchandise less any expenses and charges incurred by Macy’s required to be reimbursed. Significantly, in a paragraph entitled, “Disagreement,” the Consignment Agreement provided as follows:

Unless Consignor disputes all or any portion of a Consignee Monthly Settlement Report within twenty (20) days following receipt thereof, such Consignee Monthly Statement [sic.] Report shall be deemed accepted by Consignor and Consignor shall be bound thereby and may not thereafter dispute the matters set forth in such Consignee Monthly Settlement Report. In the event that Consignor disputes all or any portion of a Consignee Monthly Settlement Report, Consignor shall do so in writing and shall describe its dispute with sufficient specificity so as to permit Consignee to investigate and respond....

Consignment Agreement, para. 3.5 (Exh. B to Affirmation of Bennett H. Last dated January 18, 2012).

The Amended Verified Complaint alleges that the amount sued for “did not become apparent until April 2008.” (para. 10). It alleges that defendants “took deductions on the total amount of bills, which is contrary to the agreement between the parties,” and that the deductions “created accounting discrepancies which only became apparent in April 2008, when all other merchandise on consignment was either returned or paid for.” (paras. 19, 20).

To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing *prima facie* that the time in which to sue has expired. In order to make such a showing, the defendant must establish, *inter alia*, when the plaintiff’s cause of action accrued. (*Swift v New York Medical College*, 25 AD3d 686, 687 [2d Dept. 2006]).

In contract actions, a claim generally accrues at the time of the breach. (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Appellate Division precedent, approved in *Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765 (2012), holds that “where ‘the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the [party making the claim] possesses a legal right to demand payment.’” *Id.* (citations omitted). Thus, the statute of limitations is triggered when the party that is owed money has the right to demand payment, not when it actually makes its demand. *Id.* “[T]he running of the statute in a breach of contract action may not be postponed from the time of the breach until actual discovery of the wrong or injury.” (*Westminster Props. v Kass*, 163 Misc2d 773, 775 [App Term, 1st Dept 1995]).

In support of its motion Macy's has supplied plaintiff's affidavit submitted in opposition to defendants' motion to dismiss its original complaint (Exh. B to the Last Aff.). In the affidavit plaintiff alleges the basis for its claim: "At issue in this action are certain short payments i.e., payments not made although indicated as amounts for goods sold by Defendant on the monthly sales reports. These amounts have been consistently carried on statements as short payments that are still due...." (Affidavit of Ed Eleasian sworn to June 27, 2011, para. 7; Exh. B to the Last Aff.). Plaintiff attached to the Eleasian affidavit its statement to defendant of 5/18/2011, reflecting three "due date[s]": 04/15/2002, 08/15/2002, and 02/15/2003. Macy's cites the Eleasian affidavit as a judicial admission, which, of course, it is (*Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept. 2009]), as is the statement that was an exhibit to the affidavit. (*Natl. Agric. Commodities, Inc. v Intl. Commodities Export Co.*, 108 AD2d 735, 737 [2d Dept. 1985]).

Accepting the allegations in the Amended Verified Complaint as true and according the plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83 [1994]), the record establishes that there are no triable issues of fact as to when plaintiff's causes of action accrued. According to plaintiff's own 5/18/2011 statement, the latest due date for Macy's payment was 2/15/2003. Thus, whether or not Elie made demand for payment, its legal right to payment accrued at least as of that date. As this action was not commenced until March 25, 2011, more than eight years later, it is barred by the statute of limitations.

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

This constitutes the decision, order and judgment of the Court.

Dated: May 17, 2012
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ENTER:



Ellen M. Coin, A.J.S.C.