

**The Miracle Group, Inc. v VGS Gomlek Tekstil
San.Ve Tic. A.S.**

2012 NY Slip Op 33552(U)

November 5, 2012

Supreme Court, New York County

Docket Number: 102576/2010

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

THE MIRACLE GROUP, INC.

INDEX NO. 102576/2010

Plaintiff,

MOTION DATE Aug. 16, 2012

-against-

MOTION SEQ. NO. 001

VGS GOMLEK TEKSTIL SAN.VE TIC. A.S.,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 7 were read on this motion, inter alia, for summary judgment.

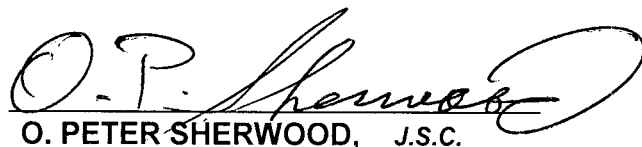
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-7</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, defendant's motion, *inter alia*, for an order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing the complaint and awarding judgment on its counterclaims is decided in accordance with the accompanying decision and order.

Dated: November 5, 2012


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49**

----- X
THE MIRACLE GROUP, INC.,

Plaintiff,

- against-

VGS GOMLEK TEKSTIL SAN.VE TIC. A.S.,

Defendant.
----- X

O. PETER SHERWOOD, J.:

**DECISION AND
ORDER
Index No. 102576/2010
Mot. Seq. No. 001**

In this contract action, plaintiff The Miracle Group, Inc. (“Miracle Group” or “plaintiff”) asserts a claim that the men’s shirts that it purchased from defendant VGS Gomlek Tekstill San.ve Tic. A.S. (“VGS”), a contract manufacturer in Turkey, do not conform to specifications, both as to quality and quantity. VGS asserts counterclaims for payment of \$454,118 for the goods, and upon checks issued to it by plaintiff that were allegedly rejected because of alteration prior to delivery to VGS, or on which payment was admittedly stopped by plaintiff.

Miracle Group, a seller of men’s sports apparel to major retailers, entered into a contractual relation with VGS through plaintiff’s agent in Turkey, Step Textiles (“Step Textiles”), which is not a party to this action. Step Textiles is a Turkish entity that facilitates commercial relations between clothing designers and Turkish manufacturers. While there is no express oral or written agreement directly between Miracle Group and VGS, there is no dispute that, beginning in 2008, VGS manufactured shirts to Miracle Group’s specifications, using material provided by Miracle Group, and delivered them to plaintiff or directly to its customers in the United States, and that plaintiff paid VGS directly.

Plaintiff alleges that VGS shipped finished goods that were not in conformity with the specifications agreed upon, and were late and short as to quantity. Plaintiff also alleges that VGS used some of the fabric it supplied for other purposes.

VGS moves for summary judgment (CPLR § 3212), dismissing the complaint and awarding it judgment on its counterclaims. Alternatively, VGS seeks an order precluding Miracle Group from offering evidence at trial that plaintiff has failed to produce in response to VGS's discovery requests.

The motion is granted to the extent set forth below, the complaint is dismissed, and the counterclaims are severed and continued.

Defendant states that it has not received the items of disclosure that it requested in the deposition of plaintiff, in violation of orders of this court dated November 12, 2011, and February 2, 2012. The open disclosure items include (1) documentation in support of plaintiff's allegation that VGS used materials provided by plaintiff for other purposes; (2) documents reflecting the cost of the materials provided to VGS by plaintiff; (3) plaintiff's accounts payable ledger for VGS covering 2008 through 2010; (4) documents listing all items delivered by VGS that were rejected by Miracle Group; and (4) Miracle Group's tax returns for 2007 through 2010.

In support of its motion for summary judgment, defendant relies upon the pleadings, the verified bill of particulars and the supplemental verified bill of particulars provided by plaintiff, the transcripts of the deposition testimony of Bruce Zimberg ("Zimberg"), plaintiff's CEO, and Volkan Kayabasi for defendant, copies of checks that were either rejected or on which payment was stopped, and a February 15, 2010 e-mail (Kayabasi Aff. in Support [Kayabasi Aff.], Ex. "N") from plaintiff to Step Textile regarding the checks. In that e-mail, Zimberg states that he had no idea why the checks were not paid, and that he had placed a stop payment on the checks at the recommendation of his bank because "they are floating between the banks" (*id.*).

In opposition to defendant's motion, Miracle Group submits the affidavit of Bruce Zimberg. Zimberg states that plaintiff's arrangement with VGS was that it would place orders through Step Textile, which would relay the orders to VGS. Plaintiff would provide specifications and samples to VGS, and arrange for material to be shipped to VGS. Step Textile would inspect the finished goods before they were shipped. Plaintiff would then send payment directly to VGS. In his affidavit, Zimberg also states, "VSG's poor performance and non-performance also caused Miracle

Group to stop payments on several checks that had been made out to VSG.” It cannot be readily determined from the copies of checks submitted by defendant which checks cleared, which were rejected, and on which plaintiff stopped payment.

By presenting evidence that it shipped goods and received payment in the form of checks, VGS has made a prima facie showing of entitlement to judgment as a matter of law, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Plaintiff’s conclusory assertion that the goods were non-conforming as to quality and quantity is insufficient to demonstrate the existence of a triable issue of fact, in light of its failure to produce court-ordered disclosure that would establish how many garments were short or were rejected, and its refusal to supply specific answers in response to VSG’s demand for a bill of particulars.

Plaintiff’s verified bill of particulars and supplemental verified bill of particulars (Kayabasi Aff. Exs. “E” and “F”, respectively) are equally insufficient. With respect to Demand 2 in the verified bill of particulars, plaintiff objects to the request for the specifications it provided to VGS for manufacture of the goods as being vague, ambiguous overly broad and burdensome, and “premature prior to discovery.” It gave a similar response to the demand with respect to how the goods allegedly failed to comply with specifications, and what deliveries were late or incomplete. In its verified bill of particulars, plaintiff refused to provide any detail to amplify its pleadings in response to defendant’s demand. In its verified supplemental bill of particulars, plaintiff provided details as to the formation of its contract with VGS, but on the central issue requesting “specific detail how VGS failed to adequately manufacture the goods [Demand No 3],” plaintiff’s response was only that defendant “did not cut the amount of shirts and there were many shortages [*id.*].” In response to each of the 21 demands for particulars, plaintiff provided only conclusory or non-responsive answers, totally lacking in specificity as to dates, quantities, or particular shipments.

A party opposing a motion for summary judgment must lay bare its proofs. Conclusory allegations or repetition of the allegations of the complaint without evidentiary facts or material

demonstrating the existence of a triable issue are insufficient (*see Indig v Finkelstein*, 23 NY2d 728, 729 [1968]; *Scheichet & Davis, PC v. Nohavicka*, 93 AD3d [1st Dept 2012]; *Adam v Cutner & Rathkopf*, 238 AD2d 234 [1st Dept 1997]).

Miracle Group has failed to produce any of the documents sought by defendant in its discovery requests at the deposition of plaintiff and twice ordered to be produced by this court. These documents could provide an evidentiary basis for plaintiff's claims of non-conformity. Furthermore, it has failed to come forward on this motion with any evidentiary material in support of its claims other than the conclusory allegations in the Zimberg affidavit of "late deliveries, deliveries that fell short of the quantities ordered, and finished goods that did not meet the specifications [Zimberg aff., ¶ 11]."

Plaintiff's cavalier approach to disclosure is similarly demonstrated by its filing of a note of issue and statement of readiness for trial that states that plaintiff "reserves the right to produce further documents supporting its damages."

In the exercise of the court's discretion in enforcing disclosure compliance (*see Liang v Yi Jing Tan*, 98 AD3d 653, 654-655 [2d Dept 2012]), plaintiff is precluded from submitting any documents in opposition to VSG's counterclaim which are responsive to any of the first three disclosure requests listed above, unless such documents are produced within fourteen (14) days of service upon plaintiff of a copy of this order, with notice of entry.

Disclosure of plaintiff's tax returns is not required in order to avoid preclusion of their use as evidence because defendant has not made the strong showing of necessity and desirability required for their production (*see Niagara Falls Urban Renewal Agency v Friedman*, 55 AD2d 830 [4th Dept 1976]; *Glenmark, Inc. v Carity*, 22 AD2d 680 [1st Dept 1964]).

Defendant's motion for summary judgment on its counterclaims is denied. Factual issues are presented on defendant's counterclaims, both as to payment and the conformity of the goods.

Accordingly, it is

ORDERED that defendant VGS GOMLEK TEKSTIL SAN.VE TIC. A.S.'s motion for summary judgment is **GRANTED**, the complaint is **DISMISSED**, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant VGS GOMLEK TEKSTIL SAN.VE TIC. A.S.'s counterclaims are **SEVERED**, and shall continue; and it is further

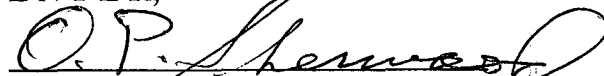
ORDERED that plaintiff The Miracle Group is precluded from submitting into evidence in opposition to defendant's counterclaims any documents that are properly responsive to the documents demanded and ordered to be produced by orders of this court, dated November 12, 2011, and February 2, 2012, unless such documents are produced within fourteen (14) days of service of a copy of this order upon plaintiff, with notice of entry thereof; and it is further

ORDERED that counsel for the parties are directed to appear for the pre-trial conference scheduled in Part 49, Room 252, 60 Centre Street, New York, New York, on Wednesday, November 28, 2012, at 9:30 a.m.

This shall constitute the decision and order of the Court.

DATED: November 5, 2012

ENTER,



O. PETER SHERWOOD

J.S.C1

11-5-12