

**Pollmeier Leimoholz GMBH v Perfect Interior  
Designs, Inc.**

2013 NY Slip Op 31495(U)

July 3, 2013

Supreme Court, New York County

Docket Number: 652828/2012

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART \_\_\_\_\_

Index Number : 652828/2012  
POLLMEIER LEIMHOLZ GMBH  
vs  
PERFECT INTERIOR DESIGNS  
Sequence Number : 001  
SUMMARY JUDGEMENT

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). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

**is decided in accordance with the annexed decision.**

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

Dated: 7/3/13

CYNTHIA S. KERN, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED
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

**CYNTHIA S. KERN**  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
POLLMEIER LEIMOHOLZ GMBH,

Plaintiff,

Index No. 652828/2012

-against-

**DECISION/ORDER**

PERFECT INTERIOR DESIGNS, INC.,

Defendant.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>      </u>
Answering Affidavits to Cross-Motion.....	<u>      </u>
Replying Affidavits.....	<u>      </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action asserting two causes of action, one for goods sold and delivered and the other for an account stated. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment on both causes of action. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. Plaintiff is a German corporation that is in the business of selling flooring materials. Defendant is a corporation that is in the business of selling floors directly to consumers. In 2007, defendant and plaintiff began conducting business together. According to defendant, the parties always had the same business arrangement—i.e. plaintiff as a

wholesaler would deliver flooring to the defendant, defendant would sell the merchandise to consumers via its showroom in New York City or in Brooklyn and any payment due from defendant would not be expected until such sale was made.

It is undisputed that sometime in 2010, certain inventory of plaintiff's was transferred from plaintiff's warehouse in Portland to defendant's warehouse in Brooklyn, New York. Sometime prior to the merchandise being transferred, plaintiff sent defendant two invoices dated July 29, 2011, outlining the merchandise that was transferred to defendant's warehouse showing an outstanding balance of \$24,563.47 and \$36,279.50, respectively. Thereafter, on or about September 28, 2011, after the merchandise was transferred, the plaintiff allegedly sent another invoice in the amount of \$65.70 to defendant. It is undisputed that defendant never paid the invoices.

On August 14, 2012, plaintiff brought the instant action by filing a summons with notice. Thereafter, on demand from defendant, plaintiff served its complaint asserting two causes of action for goods sold and delivered and for an account stated stemming from the merchandise transferred in 2010. Plaintiff now moves, prior to any discovery having taken place, for summary judgment on both causes of action. Defendant opposes the motion on several grounds. As an initial matter, according to defendant, plaintiff never "sold" the merchandise to defendant but their agreement was, like all prior dealings, a consignment sale wherein plaintiff withheld title to the property and payment only became due upon sale of the merchandise. Additionally, defendant contends that the invoices were only sent to show plaintiff's inventory in defendant's warehouse and upon receipt of the invoices it immediately contacted plaintiff to remind it about the aforementioned agreement. Moreover, defendant contends that it has been in constant

contact with plaintiff over this issue. Finally, defendant argues that plaintiff's motion must be denied as premature as no discovery has taken place.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

To make out a *prima facie* entitlement to summary judgment as a matter of law on a claim for goods sold and delivered, a plaintiff must present evidence establishing "a sale and delivery of the goods in question, the defendant's acceptance of the goods and its failure either to pay the agreed upon price or raise any objection to the sale terms, as reflected in the invoices, when the good were delivered or within a reasonable time thereafter." *Sunkyong America, Inc. v. Beta Sound of Music Corp.*, 199 A.D.2d 100 (1<sup>st</sup> Dept 1993). Additionally, evidence "showing that defendant received and retained [an] invoice without objection" gives rise to an actionable account stated entitling plaintiff to summary judgment. *Miller v. Nadler*, 60 A.D.3d 499 (1<sup>st</sup> Dept 2009). However, "evidence of an oral objection with some specificity, to an account rendered is sufficient to rebut any inference of an implied agreement to pay the stated amount." *Collier, Cohen, Crystal & Bock v. MacNamara*, 237 A.D.2d 152 (1<sup>st</sup> Dept 1997).

In the present case, summary judgment must be denied as defendant has presented sufficient evidence of its objections to plaintiff's invoices and to any alleged "sale" to raise a

material issue of fact as to the amount, if any, that is due and owing to plaintiff as well as the agreement between the parties in the first instance. In its moving papers, plaintiff annexes three invoices addressed to defendant in the amounts of \$24,563.47, \$36,279.50 and \$65.70. Additionally, plaintiff's managing director Doris Tegelkamp attests that "the defendant's statement of account were rendered regularly to the defendant and were retained by the defendant without protest." However, such contention is directly refuted by the affidavit of defendant's manager Steven Skutelsky, wherein he states that: "[f]rom July, 2011 to May, 2012, I repeatedly explained to Ms. Tegelkamp, over the phone, that the invoices were not due when they say they were due and that the amount that the defendant must pay to the Plaintiff will depend on what and when the Defendant sells the flooring as per consignment sale agreement." Additionally, Mr. Skutelsky attests that the invoices were sent solely to "show the [p]laintiff's inventory in both warehouses" and "[u]pon receipt of the aforementioned invoices, [he] immediately contacted Sandra Schenk, who was at the time an employee of the plaintiff and reminded her about [the consignment sale agreement]." Plaintiff presents no reply papers addressing the discrepancies between the affidavits. Thus, summary judgment is inappropriate as there remains material issues of fact as to the overall agreement between the parties and, as such, the amount, if any, that is due and owing by defendant.

Based on the foregoing, plaintiff's motion for summary judgment is denied. Both parties are to appear for a Preliminary Conference before this court on July 23, 2013, at 9:30 a.m. at 60 Centre Street, Room 432. This constitutes the decision and order of the court.

Dated:

7/3/13

Enter: \_\_\_\_\_

CK  
 J.S.C.  
 CYNTHIA S. KERN  
 J.S.C.