

M. Slavin & Sons, LTD v Penny Port, LLC
2013 NY Slip Op 32054(U)
August 29, 2013
Supreme Court, New York County
Docket Number: 157502/2012
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

M. SLAVIN & SONS, LTD.,

Plaintiff,

INDEX NO. 157502/2012

- v -

MOTION DATE

PENNY PORT, LLC D/B/A
MICHAEL JORDAN'S STEAKHOUSE,

MOTION SEQ. NO. 1

Defendant.

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for/to

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answer, and Replying Affidavits.

Cross-Motion: X Yes No

Plaintiff M. Slavin & Sons, Ltd. ("Plaintiff"), a wholesale fish sales business, brings this action to recover damages from defendant Penny Port, LLC d/b/a Michael Jordan's Steakhouse's ("Defendant") based on Defendant's alleged failure to pay for fish which Plaintiff sold and delivered to Defendant.

Defendant interposed an Answer and Counterclaims dated December 7, 2012. Defendant's Answer raises the following affirmative defenses: (i) failure to state a cause of action, (ii) lack of agreement between plaintiff and defendant; (iii) unclean hands; (iv) plaintiff's breach of contract; (v) excessive charges; (vi) failure to deliver conforming goods; (vii) failure to deliver the merchandise set forth on invoices and/or charging for merchandise not received; (viii) payment; (ix) plaintiff filed for bankruptcy and litigation must be stayed; and (x) defective goods.

Defendant also interposed the following two counterclaims: (i) delivery of defective fish and failure to deliver fish which Defendant purchased and paid for; and

(ii) plaintiff instituted this lawsuit in bad faith.

Plaintiff now moves, pursuant to CPLR §3212, for summary judgment in its favor and for a judgment in the amount of \$73,976.23 against Defendant. Plaintiff also seeks to dismiss Defendant's affirmative defenses and counterclaims. In support of its motion, Plaintiff provides: the affidavit of Herbert Slavin, an employee of Plaintiff, the affirmation of Thomas Torto, Esq., attorney for Plaintiff, the pleadings, and the invoices for all of Defendant's fish purchases.

Defendant opposes Plaintiff's motion and cross-moves for summary judgment dismissing the Complaint. Defendant contends that Plaintiff lacks standing. Defendant further argues that Defendant rejected certain fish sold and delivered to it by Plaintiff and that Plaintiff's motion is premature.

In opposition, and in support of its cross-motion, Defendant annexes: the affirmation of Darren J. Epstein, Esq., attorney for Defendant, the Third Amended Plan of Reorganization for Slavin under Chapter 11 of the Bankruptcy Code, the Findings of Fact, Conclusions of Law and Order Confirming the Third Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code, the Stipulation of Personal Guaranty by Herbert and Barry Slavin,

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, 251-252 [1st Dept. 1989]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D.3d 80, 91 [1st Dept. 2009]).

“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 A.D.2d 369, 370 [1st Dept. 1993]).

Pursuant to UCC §2-607, a buyer who “accepts goods” must pay for them. Acceptance occurs under UCC §2-606(b) “when the buyer ... fails to make an effective rejection ... but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them.” A buyer who retains the goods and does not object to their conformity after a reasonable period of time for inspection has accepted the goods and is precluded under UCC §2-607(2) from rejecting them after acceptance. *See e.g., New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D. 3d 175, 178 [1st Dept. 2006].

As set forth in Herbert Slavin’s affidavit, on September 7, 2011, and between March 1, 2012 through June 20, 2012, Defendant purchased fish from Plaintiff on credit on seventy-six separate occasions (copies of invoices are attached). Slavin further avers that Defendant had the opportunity to inspect the fish, accepted the fish and never rejected any fish delivery, and did not object to the invoice price, quantity of the fish sold and delivered.

Slavin further avers that on January 10, 2012, Plaintiff engaged RHK Recovery Group, a debt collection firm, to recover from Defendant the debt at issue. Defendant entered into a payment plan, whereby Defendant would pay the entire debt in installments of \$1,000 per week. Plaintiff states that Defendant subsequently made three separate payments of \$1,000 each on account of these unpaid invoices but made no further payments. Plaintiff alleges that Defendant owes a balance of \$73,976.23, and moves for summary judgment on this amount.

In opposition, Defendant fails to raise a triable issue of fact. Defendant first contends that Plaintiff lacks standing to prosecute the instant “avoidance action/trust action” as it was vested in the Post Consummation Trust in Plaintiff’s bankruptcy proceeding. However, as Plaintiff states in its reply, this is an accounts receivable action, which is distinct from an avoidance action, and since accounts receivable

claims such as the instant one was not assigned to the Post Consummation Trust for the benefit of the creditors, Plaintiff has standing to maintain this action.

In addition, Defendant contends that there are issues of fact concerning the quality of fish delivered. However, Defendant does not produce any evidence in admissible form as to support their allegations that the fish delivered by Plaintiff was defective.

Defendant also argues that Plaintiff's motion is premature in light of there having been no discovery. Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212(f)) However, the opposition must offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. *See Pow v. Black*, 182 A.D.2d 484, 485 (1st Dept. 1992). It is incumbent upon the party opposing a motion on CPLR §3212(f) grounds to provide a proper evidentiary basis supporting its request for further discovery. Here, Defendant does not specifically identify what discovery it seeks or needs in order to defend this action.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Penny Port, LLC d/b/a Michael Jordan's Steakhouse, in the sum of \$\$73,976.23, together with interest (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Defendant's Counterclaims are dismissed; and it is further

ORDERED that Defendant's cross motion for summary judgment is denied.

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

Dated:

8/29/13


HON. EILEEN S. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE