

Carroll, McNulty & Kull, L.L.C. v BCC Group, Inc.

2013 NY Slip Op 32896(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 654219/12

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ Justice

PART 13

CARROLL, McNULTY & KULL, L.L.C.,

Plaintiff,

-against-

INDEX NO. 654219/12
MOTION DATE 10-23-2013
MOTION SEQ. NO. 001
MOTION CAL. NO.

THE BCC GROUP, INC., THE AMERICAN GROCER, LLC, A RISK PURCHASING GROUP, 1115 PENNSYLVANIA MEAT CORP., 120 NORTH MAIN STREET INC. 161 T & J FOOD CORP., 1626 MEAT CORP., 1757 TJM MEAT CORP., 3690 JAD FOOD CORP., 4125 MEAT CORP., 54 ISLIP FOOD CORP., A&J FOOD CORP., A.J.C. FOOD CORP., BEDFORD BOULEVARD FOOD CORP., C-MARKET FOODS CORP., DANBURY FOOD CORP., GENERATION NEXT LTD., COLD CITY SUPERMARKET INC., GREEN FOOD CORP., JORGU MEAT CORP., JUNCALITO ABAJO MEAT CORP., METROPOLITAN FOOD SUPERMARKETS INC., NEW FOOD CORP., RAYCA FOOD CORP., and TRANQUILO FOOD CORP.,

Defendants.

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment and cross-motion to dismiss pursuant to CPLR 3211 [a], [10]:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-3, 4-6, 7

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for summary judgment, is granted solely to the extent of awarding summary judgment on the account stated causes of action and is limited to specifically named defendants. Defendant's cross-motion to dismiss this action pursuant to CPLR §3211[a],[10], is denied.

Plaintiff seeks an Order pursuant to CPLR §3212, granting summary judgment and a money judgment against each of the named defendants based on its causes of action for breach of contract and account stated. Plaintiff has settled and withdraws its claims against C-Market Foods Corp. and Gold City Supermarket Inc..

Defendants oppose plaintiff's motion and cross-move to dismiss this action pursuant to CPLR §3211[a],[10], for failure to join a necessary party.

Plaintiff (hereinafter also referred to as "CMK") is a law firm, that brought this action against the named defendants to recover legal fees for services provided under an insurance policy. American Grocer LLC, (hereinafter referred to as "American Grocer"), is a Delaware based limited liability corporation, formed as a risk purchasing group. The BBC Group, Inc., is a broker that arranged with the other remaining defendants (hereinafter

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

referred to collectively as the “Supermarket defendants”) to obtain an insurance policy from non-party, Crum & Forster Specialty Insurance Company (hereinafter referred to as “Crum & Forster”). Crum & Forster is not licensed in or subject to supervision by the State of New York. The policy had a Self Insured Retention (“SIR”) of \$15,000.00 per occurrence (Mot. Exh. D). The SIR acted as a deductible for the payment of legal fees, up to \$15,000.00 per occurrence, with the balance being the Crum & Foster’s responsibility up to the policy limits. Non-party Engle Martin Claims Services (hereinafter referred to as “EMCS”), a third-party claims administrator was retained to handle SIR claims and entered into a separate written agreement with American Grocer. EMCS retained plaintiff to defend the Supermarket defendants in personal injury lawsuits.

Between April 2010 and July 2012, plaintiff mailed copies of its legal invoices to EMCS. EMCS would pay CMK’s invoices directly from funds provided by American Grocer. Periodically American Grocer, sent payments directly on some of plaintiff’s invoices (Mot. Exh. I). The affidavits of Janet B. Smith, Billing Specialist, Sharon P. Swanson, Finance Manager and Jay S. Laudenschach, Facilities Clerk (Mot. Exhs. E, F & G), establish the manner in which invoices were generated and mailed through the United States Post Office in Basking Ridge, New Jersey. After being mailed through the United States Post Office, copies of the invoices were also e-mailed to EMCS.

Commencing in July of 2012, EMCS was terminated as third-party administrator by Crum & Forster. The BBC Group LLC notified CMK that effective July of 2012, Crum & Forster had taken over all the claims activity from EMCS. Crum and Forster assumed all expenses over the SIR threshold for the two years that EMCS was the third-party claims administrator and agreed to make payments directly to CMK (Mot. Exh. J). On May 1, 2012, American Grocer and Crum & Forster were provided with a spreadsheet from EMCS indicating the amount due to plaintiff. American Grocer requested copies of CMK’s invoices after receipt of the spreadsheet (Mot. Exhs. K & M). By letter dated, November 9, 2012, plaintiff notified all the defendants including each of the Supermarket defendants of the amount due for legal representation. The letters state that prior notice of the amount owed was, “served upon your agents” and no objection had been made (Mot. Exh. P).

Plaintiff contends that it is entitled to damages for breach of contract under the express retainer agreement with EMCS, which was breached by the failure to make payments. EMCS acted as an agent on behalf of American Grocer and the Supermarket defendants, the disclosed principals. The written retainer agreement between CMK and EMCS is binding on all of the defendants based on EMCS’s authority to consent to the agreement. In addition, the partial payments made by American Grocer created an implied in fact contract with plaintiff to pay for legal fees. Plaintiff claims that the BBC Group LLC accepted premiums from the Supermarkets for purposes of obtaining insurance, and formed American Grocer. BBC Group LLC is liable for breach of contract because of its conduct in accepting all of CMK’s legal bills, responding on behalf of American Grocer and the Supermarket defendants and partially paying the invoices. Plaintiff contends that the supermarket defendants as individual members of American Grocer are also liable for breach of contract pursuant to both Delaware Law and New York Insurance Law §5909[d]. Pursuant to New York Insurance Law §5909[d] each of the Supermarket defendants is liable for its own SIR. New York State Insurance Law §5909[d], applies the same results as under Delaware law.

Plaintiff contends that all the defendants are liable for an account stated. EMCS would attempt to collect and make payments on outstanding balances through BBC Group LLC’s, American Grocer account. EMCS was aware of the amount owed and as agent

advised American Grocer. CMK's managing partner wrote to the BBC Group LLC on July 13, 2012 concerning potential litigation for non-payment of substantial legal fees (Mot. Exh. O), and no objections were made to the amount owed at that time. Defendants made partial payments and did not object to the amount owed until a few weeks before the commencement of this action. The failure to object to the SIR invoices sent to EMCS, American Grocer and BBC Group LLC, or to specifically deny any specific fees and the partial payment of invoices, establishes that all of the defendants are liable to plaintiff for account stated.

Defendants cross-motion seeks to dismiss this action for failure to join a necessary party. Defendants contend that the retainer agreement and testimony as to the review and payment of the invoices is necessary to this action. EMCS must be joined in order for the plaintiff to obtain complete relief. Defendants oppose the underlying motion contending that plaintiff cannot establish its breach of contract claim because there is no privity of contract. Plaintiff cannot establish breach of contract based on failure to join EMCS as a party or annex a copy of the written retainer agreement with EMCS. A copy of the written contract would establish the terms and obligations between the parties. The affidavit of Joseph Gatti, a principal of American Grocer, states that EMCS entered into a written agreement with American Grocer as part of the agreement with Crum & Forster. BBC Group, LLC is only the broker for American Grocer, it did not retain EMCS, purchase the policy at issue from Crum & Forster, or issue any checks. BBC Group LLC does not have an "American Grocer Account." As a broker, BBC Group, LLC is not liable for the SIR or the legal fees related to the insurance policy.

Defendants contend that they are not liable to plaintiff for an account stated because EMCS was responsible for making payments and none of the defendants were aware of the balance due. Prior to discharge, EMCS received CMK's bills, processed them and notified American Grocer of funds due for legal fees and other expenses. Checks for the amounts owed were sent by American Grocer, from its own account to EMCS or to plaintiff. Defendants claim they were unaware of any outstanding balance or bills until after Crum & Forster terminated EMCS in July of 2012. Plaintiff forwarded invoices to BBC Group, American Grocer and each of the Supermarket defendants indicating a large amount was owed for the first time in November of 2012. Objections to the amount billed were voiced by the defendants upon receipt of invoices from plaintiff.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

To establish a breach of contract claim, a party must allege, "(1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages" (*Morris v. 702 East Fifth street HDFC.*, 46 A.D. 3d 478, 850 N.Y.S.2d 6 [N.Y.A.D. 1st Dept., 2007] citing to *Furia v. Furia*, 116 A.D. 2d 694, 498 N.Y.S. 2d 12 [N.Y.A.D. 2nd Dept., 1986]). A contract requires definiteness as to the terms of the agreement. Unless a court can determine the terms of the agreement it cannot determine whether it has been breached or provide a remedy (*Metro-Goldwyn-Mayer v. Schneider*, 40 N.Y. 2d 1069, 360 N.E. 2d 930, 392 N.Y.S. 2d 252 [1976] and *Marlo v. McLaughlin*, 288 A.D. 2d 97, 734 N.Y.S. 2d 4

[N.Y.A.D. 1st Dept. 2001]). The use of extrinsic evidence may be required to establish the intent of the parties raising a material issue of fact necessitating the denial of the summary judgment motion (67 Wall Street Co. v. Franklin Nat. Bank, 37 N.Y. 2d 245, 333 N.E. 2d 184, 371 N.Y.S. 2d 915 [1975] and American Express Bank Ltd. v. Uniroyal, Inc., 164 A.D. 2d 275, 562 N.Y.S. 2d 613 [N.Y.A.D. 1st Dept., 1990]).

To establish prima facie claim of account stated, the movant is required to demonstrate that it, "generated detailed monthly invoices and mailed them to the defendant on a regular basis in the course of its business" (Stephanie R. Cooper, P.C. v. Robert, 78 A.D. 3d 572, 911 N.Y.S. 2d 63 [N.Y.A.D. 1st Dept., 2010]). Plaintiff is also required to establish that the defendant retained the invoices or made a partial payment without objection for a reasonable period of time. It is not necessary to establish the reasonableness of the legal fees. A claim for account stated is not barred based on failure to provide a written retainer agreement (Thelen LLP v. Omni Contr. Co., Inc., 79 A.D. 3d 605, 914 N.Y.S. 2d 119 [N.Y.A.D. 1st Dept., 2010] and Morrison Cohen Singer and Weinstein LLP v. Waters, 13 A.D. 3d 51, 786 N.Y.S. 2d 155 [N.Y.A.D. 1st Dept., 2004]). A defendant's conclusory denial of receipt, contending that only some of the invoices were received, or claims of oral objection without specificity, is insufficient to rebut the presumption of delivery (Geron v. DeSantis, 89 A.D. 3d 603, 933 N.Y.S. 2d 260 [N.Y.A.D. 1st Dept., 2011]).

Insurance Law §5909[d], states, "No liability insurance policy issued or issued for delivery in this state to a purchasing group...or located within this state shall provide for a deductible or self-insured retention shared among purchasing group members or applicable to the group itself." (McKinney's Consolidated Laws of New York, Insurance Law §5900 [d] and 70 NY Jur. 2d Insurance §1711). The legislative history of Insurance Law §5909[d], indicates that it was intended to require each member of a risk retention group, involved with an unauthorized insurer, to be solely liable for its own SIR (NY legis. (1988), 109).

CPLR §3211[a][10], permits the Court to dismiss an action based on the absence of a necessary party (Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y. 3d 801, 798 N.E. 2d 1047, 766 N.Y.S. 2d 654 [2003]). CPLR §1003, permits the Court to join a nonparty at any stage of the action, it also provides that failure to join a party pursuant to CPLR §1001 is a basis for dismissal of the action. CPLR §1001 and CPLR §1003 are usually applied in conjunction with a motion to dismiss pursuant to CPLR §3211[a][10]. The Court pursuant to CPLR §1001, in its discretion, can determine whether joinder is necessary based on, (1) whether plaintiff has another effective remedy based on the non-joinder; (2) prejudice to the defendant or non-party based on non-joinder; (3) avoidance of future prejudice; (4) feasibility of a protective provision in an order or judgment; and (5) whether an effective judgment may be rendered without the party sought to be joined. The purpose is to avoid judgments without providing non-parties with a right to be heard and protect against inconsistent judgments resulting from more than one lawsuit (Swezey v. Merrill Lynch, Pierce, Fenner & Smith Inc., 19 N.Y. 3d 543, 973 N.E. 2d 703, 950 N.Y.S. 2d 293 [2012]).

Plaintiff has not established a prima facie basis to obtain summary judgment on the breach of contract causes of action. Plaintiff has not annexed a copy of the retainer agreement to the motion papers to establish the terms of the retainer agreement as it applies to the defendants. Plaintiff's has not established a basis to find that there was an implied in fact agreement and has not asserted any quasi-contract causes of action. There remain issues of fact concerning the terms of the agreement, the extent of services to be provided and the terms of payment for services.

Plaintiff is not entitled to summary judgment on its account stated causes of action against BBC Group LLC. The certification from the Delaware Secretary of State for American Grocer, annexed to the motion papers does not establish that it is owned, managed or controlled by BBC Group LLC. BBC Group LLC, is not named on the insurance policy, or on the checks sent in partial payment of plaintiff's invoices. There remains issues of fact concerning whether BBC Group LLC acted in a capacity other than as a broker, or that EMCS was retained as an agent on behalf of BBC Group LLC.

Plaintiff has stated a prima facie basis to obtain summary judgment on its account stated claims against American Grocer. EMCS acted as an agent on behalf of a disclosed principal and forwarded invoices to American Grocer, which were paid with no objection. Under New York Insurance Law §5909[d], each of the Supermarket defendants are liable for their own SIR. American Grocer acted as an agent on behalf of the Supermarket defendants. Plaintiff received partial payment for the invoices directly from American Grocer, including after EMCS was discharged. The failure to raise specific denials of the invoices and the partial payments results in both American Grocer and each of the Supermarket defendants being liable to plaintiff.

Defendants have failed to establish a basis to dismiss the complaint for failure to join a necessary party. Defendants rely on conjecture to establish that EMCS is a necessary party. Defendants failed to establish that EMCS was not an agent acting on their behalf as disclosed principals.

Accordingly, it is ORDERED that plaintiffs' motion for summary judgment, is granted only on the fourth, sixth, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth, twenty-second, twenty-four, twenty-sixth, thirtieth, thirty-second, thirty-fourth, thirty-sixth, thirty-eighth, fortieth, forty-second, forty-fourth, forty-sixth and forty-eighth causes of action for account stated, against THE AMERICAN GROCER, LLC, A RISK PURCHASING GROUP; 1115 PENNSYLVANIA MEAT CORP.; 120 NORTH MAIN STREET INC.; 161 T & J FOOD CORP.; 1626 MEAT CORP.; 1757 TJM MEAT CORP.; 3690 JAD FOOD CORP.; 4125 MEAT CORP.; 54 ISLIP FOOD CORP.; A&J FOOD CORP.; A.J.C. FOOD CORP.; BEDFORD BOULEVARD FOOD CORP.; DANBURY FOOD CORP.; GENERATION NEXT LTD.; GREEN FOOD CORP.; JORGU MEAT CORP.; JUNCALITO ABAJO MEAT CORP.; METROPOLITAN FOOD SUPERMARKETS INC.; NEW FOOD CORP.; RAYCA FOOD CORP.; and TRANQUILO FOOD CORP.; and it is further,

ORDERED, that plaintiff is granted a judgment on the fourth cause of action against THE AMERICAN GROCER, LLC, A RISK PURCHASING GROUP, in the amount of \$109,383.76, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the fourth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the sixth cause of action against, TRANQUILO FOOD CORP, in the amount of \$5,795.94, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the sixth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the eighth cause of action against, JORGU MEAT CORP., in the amount of \$6,640.86, together with interest at the statutory rate

from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the eighth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the tenth cause of action against, A&J FOOD CORP., in the amount of \$13,536.82, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the tenth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the twelfth cause of action against, JUNCALITO ABAJO MEAT CORP., in the amount of \$8,278.44, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the twelfth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the fourteenth cause of action against, 4125 MEAT CORP., in the amount of \$4,800.96, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the fourteenth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the sixteenth cause of action against, 3690 JAD FOOD CORP., in the amount of \$4,599.48, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the sixteenth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the eighteenth cause of action against, RAYCA FOOD CORP., in the amount of \$4,737.30, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the eighteenth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the twenty-second cause of action against, BEDFORD BOULEVARD FOOD CORP., in the amount of \$4,483.84, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the twenty-second cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the twenty-fourth cause of action against, 161T & J FOOD CORP., in the amount of \$5,584.22, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the twenty-fourth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the twenty-sixth cause of action against, METROPOLITAN FOOD SUPERMARKETS INC., in the amount of \$2,097.96, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the twenty-sixth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the thirtieth cause of action against, NEW FOOD CORP., in the amount of \$10,205.38, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the thirtieth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the thirty-second cause of action against, 1115 PENNSYLVANIA MEAT CORP., in the amount of \$2,709.04, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the thirty-second cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the thirty-fourth cause of action 54 ISLIP FOOD CORP., in the amount of \$4,636.82, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the thirty-fourth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the thirty-sixth cause of action 1626 MEAT CORP., in the amount of \$8,166.41, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the thirty-sixth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the thirty-eighth cause of action 120 NORTH MAIN STREET INC., in the amount of \$4,903.98, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the thirty-eighth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the fortieth cause of action A.J.C. FOOD CORP., in the amount of \$2,324.96, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the fortieth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the forty-second cause of action DANBURY FOOD CORP., in the amount of \$3,510.64, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs,

the forty-second cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the forty-fourth cause of action GENERATION NEXT LTD., in the amount of \$6,580.74, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the forty-fourth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the forty-sixth cause of action GREEN FOOD CORP., in the amount of \$4,653.26, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the forty-sixth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff is granted a judgment on the forty-eighth cause of action 1757 TJM MEAT CORP., in the amount of \$2,921.15, together with interest at the statutory rate from December 4, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the forty-eighth cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED, that plaintiff's motion for summary judgment is denied as to the BBC GROUP LLC, and it is further,

ORDERED, the nineteenth, twentieth, twenty-seventh and twenty eighth causes of action asserted against GOLD CITY SUPERMARKET INC. and C-MARKET FOODS CORP. , are severed and dismissed, and it is further

ORDERED, that the action shall continue as to the remaining causes of action; and it is further,

ORDERED defendant's cross-motion to dismiss pursuant to CPLR §3211[a],[10], is denied; and it is further,

ORDERED, that the parties shall appear for a Preliminary Conference on January 22, 2014 at 9:30 am in IAS Part 13.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

Dated: November 8, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE