

**Valery SpA v Milltex Group, Inc.**

2013 NY Slip Op 33431(U)

November 22, 2013

Supreme Court, New York County

Docket Number: 107053/2011

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

Index Number : 107053/2011  
VALERY SPA  
vs.  
MILLTEX GROUP  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2

Replying Affidavits \_\_\_\_\_ No(s) 3

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

*The court grants plaintiff's motion for summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212(b).*

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

**FILED**  
DEC 05 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/22/13

Lucy Billings, J.S.C.  
**LUCY BILLINGS**  
J.S.C.

- 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: PART 46

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VALERY SpA, an Italian business  
entity,

Index No. 107053/2011

Plaintiff

- against -

DECISION AND ORDER

MILLTEX GROUP, INC., a New York  
corporation,

Defendant

**FILED**

DEC 05 2013

NEW YORK  
COUNTY CLERK'S OFFICE

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendant for breach of contract, an account stated, and unjust enrichment, to recover the value of lingerie products ordered by defendant and delivered to it by plaintiff for distribution and sale in the United States. Plaintiff moves for summary judgment on its claims. C.P.L.R. § 3212(b). For the reasons explained below, the court grants plaintiff's motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiff satisfies this standard, the burden

shifts to defendant to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the plaintiff's motion, the court construes the evidence in the light most favorable to defendant. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

### III. PLAINTIFF'S EVIDENCE OF ITS CLAIM

Plaintiff bases its claim on unpaid invoices, attached as exhibit A to the complaint, for products provided to defendant for sale from July 2006 to March 2007, totalling 25,911.85 euros. Defendant's responses to plaintiff's interrogatories verified January 18, 2012, by defendant's president George Abdelnour, admit that (1) the invoices in exhibit A to the complaint were transmitted by plaintiff to defendant, (2) defendant received the merchandise specified in those invoices, and (3) defendant accepted that merchandise.

This evidence supports plaintiff's claim and shifts the burden to defendant to raise a factual dispute that would undermine plaintiff's claim of defendant's nonpayment for the products reflected in the invoices. Gard Entertainment, Inc. v. Country in N.Y., LLC, 96 A.D.3d 683, 684 (1st Dep't 2012); Fortress Credit Corp. v. Hudson Yards, LLC, 78 A.D.3d 577 (1st Dep't 2010); Red Tulip, LLC v. Neiva, 44 A.D.3d 204, 209 (1st

Dep't 2007). See Sokolow, Dunaud, Marcadier & Carreras v. Lacher, 299 A.D.2d 64, 69 (1st Dep't 2002). Given defendant's admissions, the only remaining issue is whether defendant's affirmative defense of an accord and satisfaction regarding payment for the products reflected in the invoices bars plaintiff's claim of nonpayment. Even if plaintiff bore the burden to disprove defendant's affirmative defense, rather than defendant bearing the burden to support the defense, plaintiff meets that burden.

#### IV. DEFENDANT'S DEFENSE OF AN ACCORD AND SATISFACTION

Acceptance of a payment to settle fully a disputed claim discharges the claim as an accord and satisfaction. Merrill Lynch Realty/Carll Burr, Inc. v. Skinner, 63 N.Y.2d 590, 596 (1984); Nationwide Registry & Sec. v. B&R Consultants, 4 A.D.3d 298, 299 (1st Dep't 2004). The party receiving the payment must be informed without ambiguity that acceptance of the payment will discharge the claim. Merrill Lynch Realty/Carll Burr, Inc. v. Skinner, 63 N.Y.2d at 596; Rosenthal v. Quadriga Art, Inc., 105 A.D.3d 507, 508 (1st Dep't 2013); Fleischman v. New York Life Ins. & Annuity Corp., 93 A.D.3d 496 (1st Dep't 2012); Nationwide Registry & Sec. v. B&R Consultants, 4 A.D.3d at 300. The payor may establish the payee's intent to discharge the payee's claim through the payee's testimony. See Horn v. PTJP Partners, L.P., 16 A.D.3d 103, 104 (1st Dep't 2005).

An affidavit by Lorenzo Demichelis, plaintiff payee's president, attests that, as of the last invoice in March 2007,

defendant owed over 40,000 euros on the underlying invoices, of which defendant paid only 15,000 euros. Although defendant payor's president Abdelnour testified at his deposition that defendant originally owed only 28,000 euros on the invoices, this dispute is immaterial given his admissions above and his further testimony below.

Abdelnour further testified that Antonio Gioetto, plaintiff's financial manager during 2007-2008, offered to reduce the amount owed to \$28,000 instead of 28,000 euros. Abdelnour rejected this amount and transmitted 15,000 euros, in installments of 10,000 euros in June 2007 and 5,000 euros in November or December 2007, after which he no longer received any invoices from plaintiff. After those payments, however, Abdelnour encountered Gioetto in Paris, France, and conveyed to him: "this is 50 percent of what I owe you. We're done. He said okay." *Aff. of Randall Rasey Ex. 12*, at 43. When Abdelnour encountered Gioetto again, subsequently, they did not discuss the payment. In defendant's responses to plaintiff's interrogatories verified January 18, 2012, Abdelnour further attests merely that: "At no time prior to this action did plaintiff ever object to defendant's payment in full." *Id. Ex. 4 ¶ 17*.

At his deposition Abdelnour also authenticated an email dated February 1, 2008, that he received from Gioetto and translated it from French to English. Gioetto's email instructs: "We are waiting for your confirmation to our proposition to define the debt with an amount of \$28,000." *Id. Ex. 12*, at 50.

A certified translation of this email agrees with the substance of Abdelnour's translation: "We are awaiting confirmation of our proposition to settle your debt with a payment of 28,000 US dollars." Id. Ex. 14, at 2.

Accepting Abdelnour's testimony as true, it fails to establish an accord and satisfaction through an agreement between Abdelnour and Gioetto or anyone else on plaintiff's behalf, to settle defendant's account with plaintiff for 15,000 euros. Abdelnour's testimony only reinforces plaintiff's other evidence in establishing that the payments totalling 15,000 euros did not settle the parties' dispute regarding the payments plaintiff claimed that defendant owed. Merrill Lynch Realty/Carll Burr, Inc. v. Skinner, 63 N.Y.2d at 596; Fleischman v. New York Life Ins. & Annuity Corp., 93 A.D.3d 496. Abdelnour's testimony nowhere indicates Gioetto's awareness that the 15,000 euros settled defendant's full debt to plaintiff, particularly when Gioetto followed up those payments by reminding defendant of plaintiff's earlier offered compromise of \$28,000. Even assuming that Abdelnour's declaration, "We're done," informed Gioetto that plaintiff's receipt of the 15,000 euros was to discharge its claim, Abdelnour communicated that implication only after the payment, not before. Rasey Aff. Ex. 12, at 43. Gioetto's response, moreover, was ambiguous. "Okay" simply may have expressed Gioetto's understanding of defendant's position, not necessarily an unambiguous agreement with it. See Merrill Lynch Realty/Carll Burr, Inc. v. Skinner, 63 N.Y.2d at 596; Rosenthal

v. Quadriga Art, Inc., 105 A.D.3d at 508; Fleischman v. New York Life Ins. & Annuity Corp., 93 A.D.3d 496; Nationwide Registry & Sec. v. B&R Consultants, 4 A.D.3d at 300.

Defendant relies on plaintiff's ensuing silence and failure to object after defendant insisted on concluding their negotiations upon payment of 15,000 euros. Yet this conduct still fails to show any awareness that, by accepting the 15,000 euros, plaintiff was discharging its claim against defendant in full. In fact, Abdelnour's testimony further demonstrates that defendant did not dispute the amounts plaintiff billed defendant, but instead sought to pay less to offset its losses from currency exchanges and from expenses in supporting plaintiff's product line. EchoStar Satellite L.L.C. v. ESPN, Inc., 79 A.D.3d 614, 619 (1st Dep't 2010); Courtney-Clarke v. Rizzoli Intl. Publs., 251 A.D.2d 13, 14 (1st Dep't 1998). See Rosenthal v. Quadriga Art, Inc., 105 A.D.3d at 508; Nationwide Registry & Sec. v. B&R Consultants, 4 A.D.3d at 300.

V. SUMMARY JUDGMENT IS NOT PREMATURE.

Although plaintiff has yet to produce Demichelis for his deposition sought by defendant, defendant points to nothing it might elicit from him that would establish plaintiff's intent to discharge its claim. Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Griffin v. Pennoyer, 49 A.D.3d 341 (1st Dep't 2008); Global Mins. & Metal Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006). See

Horn v. PTJP Partners, L.P., 16 A.D.3d at 104. Defendant concedes there was no such agreement in writing that Demichelis might locate in plaintiff's records. While defendant questions why plaintiff did not pursue its claim until 2011, defendant does not suggest any accord and satisfaction with Demichelis between 2008 and 2011 or even with Gioetto after his email of February 1, 2008. Defendant maintains that any such oral agreement was with Gioetto before then, yet defendant has not sought to depose Gioetto, who has not been employed by plaintiff since 2010, and has not obtained any affidavit from him. No potential testimony by Demichelis would contradict Abdelnour's own testimony establishing the absence of an accord and satisfaction and his prior attestations verifying plaintiff's claim. Therefore Demichelis's outstanding deposition is not a reason to postpone summary judgment. W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 531 (1st Dep't 2012); Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Brown v. Bauman, 42 A.D.3d 390, 393 (1st Dep't 2007).

#### VI. CONCLUSION

For all the reasons set forth above, the court grants plaintiff's motion for summary judgment against defendant on plaintiff's claims for the value of 25,911.85 euros in United States dollars as of December 31, 2007, the date of the final invoice to defendant, and after receipt of defendant's final payment. C.P.L.R. § 3212(b). Interest at 9% per year shall run

from December 31, 2007, as well. C.P.L.R. §§ 5001(a) and (b), 5004; Spodek v. Park Prop. Dev. Assocs., 96 N.Y.2d 577, 581 (2001); Eisen v. Feder, 47 A.D.3d 595, 596 (1st Dep't 2008); Richard Friedman Assoc., CPA PC v. Jereski, 26 A.D.3d 296, 297 (1st Dep't 2006); Tesser v. Allboro Equip. Co., 73 A.D.3d 1023, 1027-28 (2d Dep't 2010). This decision constitutes the court's order.

DATED: November 22, 2013

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**  
DEC 05 2013  
NEW YORK  
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