

East Coast Restoration & Consulting Corp. v Sika Corp.

2014 NY Slip Op 30361(U)

February 6, 2014

Supreme Court, New York County

Docket Number: 107217/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

EAST COAST RESTORATION AND CONSULTING
CORP.,

Plaintiff,

-v-

SIKA CORPORATION,

Defendant.

INDEX No. 107217/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1,2

Answering Affidavits- Exhibits _____

3,4

Replying Affidavits _____

FILED

CROSS-MOTION: _____ YES NO

FEB 11 2014

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

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION.

Dated: 2/8/14

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

EAST COAST RESTORATION AND
CONSULTING CORP.,

Plaintiff,

- against -

SIKA CORPORATION,

Defendant.

DONNA M. MILLS, J.:

INDEX NO.
107217/11

DECISION/ORDER

The defendant, SIKA Corporation ("SIKA or Defendant"), moves for summary judgment, dismissing the complaint and for damages to be awarded to the defendant on the counterclaims. The defendant has asserted counterclaims for breach of contract, account stated and unjust enrichment. Plaintiff East Coast Restoration and Consulting Corp. ("East Coast or Plaintiff") opposes the motion on the ground that there are questions of fact.

FILED

FEB 11 2014

BACKGROUND

COUNTY CLERK'S OFFICE
NEW YORK

East Coast is a roofing and waterproofing contractor. SIKA is a manufacturer and supplier of various roofing and waterproofing materials. Between September 2009 to October 2009, Plaintiff and Liquid Plastics entered into a series of Purchase Order agreements whereby Liquid Plastics agreed to supply and deliver certain roofing and exterior restoration materials to East Coast for a roof restoration project at 206-20 Linden Boulevard, Queens, New York. SIKA, having merged with Liquid Plastics, Inc. in January 2010, is the current defendant in this matter.

It was discovered on or about November 2009 that the Decoply material that was sold to East Coast was allegedly defective. SIKA remedied the situation by collecting the

remaining materials from the worksite, making repairs necessitated by East Coast's use of Decopy and providing East Coast with a credit. As a result of the defective Decopy, the parties entered into a release on December 7, 2009, whereby SIKA agreed to pay East Coast \$64,850.00 in order to resolve all claims arising from East Coast's use of the Decopy. The release which was negotiated by the parties did not address the remainder of the roofing and exterior restoration materials.

East Coast decided to terminate its relationship with SIKA and declined to pay the balance of \$84,397.74 for the non-defective materials SIKA delivered to East Coast and which East Coast had kept and stored for approximately seven months. On May 10, 2010, East Coast sent a letter to SIKA requesting that they pick up the remaining materials which East Coast had stored. SIKA refused to take back the material on the ground that East Coast was unable to make a representation that the materials in their possession would continue to conform to industry standards.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

The law is clear that goods are “conforming” or “conform to the contract” when they are in accordance with the obligations under the contract (UCC 2–106[2]). Subject to certain exceptions, a purchaser may reject goods tendered by the seller where the goods “fail in any respect to conform to the contract” (UCC 2–601), and the nonconforming goods must be rejected “within a reasonable time after their delivery or tender” (UCC 2–602 [1]). Where a purchaser timely and “rightfully rejects” nonconforming goods, the purchaser is entitled to recover the purchase price, plus reasonable damages, where appropriate (UCC 2–711, 2–715). However, a seller may, pursuant to UCC 2–508, cure any improper tender and make a conforming tender.

Defendant met its burden of establishing that the delay from delivery of the non-defective roofing and exterior restoration materials to plaintiff’s purported rejection was unreasonable as a matter of law. Under the facts of this case this Court finds, as a matter of law, that plaintiff failed to make timely rejection of the goods, and is therefore liable to defendant for the sale price (Uniform Commercial Code § 2–602). Generally, what is a timely rejection is a question of fact for the jury (see, Greacen v. Poehlman, 191 N.Y. 493, 498, 84 N.E. 390). However, as in the instant case, when only one inference may be drawn as to the reasonableness of the time in which defendant

rejected the goods, it becomes a question of law (cf. Bangor Clothing Co. v. Superior Sportswear Corp., 22 A.D.2d 864, 254 N.Y.S.2d 415, affd. 16 N.Y.2d 1018, 265 N.Y.S.2d 901, 213 N.E.2d 312; Brown & Lowe Co. v. Potolski, 221 App.Div. 299, 223 N.Y.S. 71). Plaintiff could have clearly rejected the subject materials in November 2009 when the other materials were deemed defective and the parties negotiated a resolution. Waiting almost seven months to reject the remaining materials is unreasonable.

Defendant also seeks summary judgment on its counterclaims for breach of contract, unjust enrichment and account stated. In light of the aforementioned discussion where this Court found that the evidence clearly shows that East Coast did not seek to return the materials and to obtain reimbursement until nearly seven months after delivery, Defendant has established that Plaintiff breached the contract by failing to pay the balance of \$84,397.74 for the non defective materials in question.

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." Ryan Graphics, Inc. v Bailin, 39 AD3d 249, 250 (1st Dept 2007), quoting Jim-Mar Corp. v Aquatic Constr., Ltd., 195 AD2d 868, 869 (3d Dept 1999). "An account stated is an account balanced and rendered, with an assent to the balance, either express or implied." Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 413 (1st Dept 1995). "[E]ither retention of bills without objection or partial payment may give rise to an account stated." Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51, 52 (1st Dept 2004). Having received and retained invoices without an objection for a

reasonable time, a defendant's silence gives rise to an actionable account stated. See Rosenberg Seisman Rosenweig & Co., LLP v Slutsker, 278 AD2d 145 (1st Dept 2000).

The record demonstrates that Plaintiff failed to dispute that Defendant sent them the subject invoices and that no objections were lodged thereto until nearly seven months later.

It is undisputed that SIKa paid \$16,212.50 towards the previously executed release, which leaves a balance remaining of \$48,637.50 owed on the release. SIKa is thus entitled to an award of damages on its counterclaims in the amount of \$35,760.24 which represents the \$84,397.74 less the amount owed on the release.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint and granting its counterclaims is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant and against plaintiff in the amount of \$35,760.24, together with interest at the statutory rate from the date of December 7, 2009, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 2/6/14

ENTER:

Donna Mills
J.S.C.

DONNA M. MILLS, J.S.C.

FILED

FEB 11 2014