

**EOTAC LLC v N.Y. Ironworks, Inc.**

2014 NY Slip Op 31120(U)

April 28, 2014

Supreme Court, New York County

Docket Number: 650605/2011

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

EOTAC LLC,

Plaintiff/Counterclaim Defendant,

- v -

N.Y. IRONWORKS, INC.,

Defendant/Counterclaim Plaintiff(s).

INDEX NO. 650605/2011

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

MOTION SEQ. NO. 2

MOTION CAL. NO. \_\_\_\_\_

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

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

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

This action was commenced by filing a summons and complaint on February 24, 2011.

The Complaint alleges that Defendant, N.Y. Ironworks, Inc. (“Defendant”) ordered certain merchandise from Plaintiff, EOTAC, Inc. (“Plaintiff” or “EOTAC”), for the period ending May 27, 2010 in the agreed sum of \$137,606.52, Plaintiff complied with the orders in that they sold and delivered the merchandise and Defendant accepted and retained the merchandise without objection. The Complaint further alleges that Plaintiff delivered to Defendant account statements showing the amount due of \$137,606.42, and that Defendant accepted and retained the statements without objection.

Defendant filed its answer and counterclaims on May 20, 2011, asserting counterclaims based on allegations that EOTAC sent unsolicited merchandise to Defendant which Defendant has attempted to return but Plaintiff has refused to accept. The counterclaims are for fraud, injunction to enjoin Plaintiff from continuing to seek payment for unsolicited merchandise, attorneys’ fees, and for

the costs incurred by Defendant to store and return the merchandise.

Plaintiff filed its reply to the counterclaims on October 5, 2011.

Plaintiff now moves for an Order pursuant to CPLR §3212, granting summary judgment on its breach of contract claim, awarding Plaintiff damages in the amount of \$137,606.62 plus the costs and interest, and dismissing Defendant's counterclaims in their entirety with prejudice.

Plaintiff submits the affidavit of Cody Todd Grovijohn, Plaintiff's Controller. Grovijohn avers that Defendant began ordering merchandise from Plaintiff on or about September 2009 and from September 2009 through May 27, 2010, Defendant ordered clothing and accessories from Plaintiff in the total amount of \$230,006.80. Defendant made a total payment of \$92,400.17 for the merchandise. After applying Defendant's payment, Grovijohn states that \$137,606.63 remains due.

Annexed to Grovijohn's affidavit are copies of sales invoices for the merchandise ordered by Defendant, shipping reports, and proof of delivery of the merchandise.

Grovijohn further states that Defendant's counterclaims are without merit. Grovijohn avers that Defendant ordered each and every shipment of merchandise that was sent to Defendant and which Plaintiff seeks payment for in this action. Grovijohn further states that Defendant did not have a right to return the merchandise delivered.

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, 251-52 [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 AD2d 369, 370 [1st Dept. 1993]).

Here, Plaintiff has demonstrated made a prima facie showing of entitlement to judgment as a matter of law through Grovijohn's affidavit and annexed exhibits. Plaintiff has established that Defendant ordered certain merchandise from Plaintiff, Plaintiff delivered the merchandise and rendered invoices, and Defendant has failed to pay for the outstanding balance due. By failing to oppose, Defendant has failed to raise any issues of fact.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff, EOTAC, Inc., and against defendant N.Y. Ironworks, Inc., in the sum of \$137,606.63, together with interest as prayed for allowable by law (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 Plaintiff's motion to dismiss Defendant's Counterclaims is granted without opposition, and Defendants' Counterclaims are dismissed, and the

Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: APRIL 28, 2014

  
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**HON. EILEEN A. RAKOVER**

Check one: X FINAL DISPOSITION ~~NON-FINAL DISPOSITION~~

Check if appropriate:  DO NOT POST  REFERENCE