

**Expedi Printing, Inc. v Torah Times**

2014 NY Slip Op 31333(U)

March 24, 2014

Supreme Court, Kings County

Docket Number: 503410/2012

Judge: David I. Schmidt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART COM 2

-----X  
EXPEDI PRINTING, INC.,

Plaintiff,

-against-

Index No. 503410/2012  
DECISION and ORDER

*Seg no 2*

TORAH TIMES and SHLOIME OESTREICHER,

Defendants.

-----X  
SCHMIDT, DAVID, J.:

Plaintiff Expedi Printing, Inc. cross-moves for an order, inter alia: granting it summary judgment on the complaint in the principal amount of \$128,039.28 and for costs and disbursements including attorneys' fees.<sup>1</sup>

**I. Relevant Background**

In the complaint, plaintiff alleges that, on May 28, 2008, it entered into an agreement by which it would provide printing services to defendants in exchange for defendants' payment of those services. Plaintiff alleges that, in breach of this agreement, defendants have refused to pay for its services since October 5, 2011, leaving a balance due and owing of \$128,039.28 plus interest. Plaintiff further alleges that it satisfactorily performed all of its obligations and duties under the parties' agreement. Based on these allegations, plaintiff asserts two causes of action: for breach of contract and for unjust enrichment.

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<sup>1</sup> Previously, defendants had moved for, among other things: (i) partial summary judgment dismissing all claims against defendant Shloime Oestreicher; and (ii) for leave to amend its Answer to assert additional counterclaims. After the hearing on the motion, the court, in a short form order dated June 11, 2013, denied defendants' motion, with leave to renew.

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Defendants served an answer in which they interposed ten affirmative defenses and a counterclaim. The counterclaim alleges that the parties' agreement required plaintiff to provide printing services to defendant Torah Times on a weekly basis. The weekly order would specify: (i) the number of newspapers plaintiff would deliver to Torah Times; (ii) the deadline by when the newspapers should be provided to Torah Times; and (iii) the number of color and/or glossy pages plaintiff would provide for each issue. Defendants further allege that the custom and practice of the parties was that plaintiff would give Torah Times a credit if it failed to provide the full complement of color or glossy pages that had been ordered for each edition of the newspaper; and if it delivered the newspapers to Torah Times past deadline. According to defendants, on several occasions plaintiff failed to provide the requisite number of color or glossy pages that had been ordered for a weekly edition and failed to make timely delivery of the newspapers. Contrary to the allegations in the complaint, defendants allege that Torah Times fully paid plaintiff for the printing services it was provided. Additionally, defendants assert that Torah Times is entitled to credits for those occasions that plaintiff did not meet its obligations and that such credits have been demanded and remain due and owing.

**II. Discussion**

To prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Once this showing has been made, the burden shifts to the party opposing the motion to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact. *See Kaufman v Silver*, 90 NY2d 204, 208 (1997). Additionally, in deciding the motion,

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the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference. *Negri v Stop & Shop*, 65 NY2d 625, 626 (1985).

In support of its cross motion for judgment on the complaint, plaintiff asserts that it properly performed its printing services without any defects, and that, despite due demand, defendants have failed to pay plaintiff the outstanding balance due for the work provided.

In particular, plaintiff asserts that it has established a prima facie case that it is owed the money claimed for the printing work by submitting the affidavit of Frank Xu (Xu), an officer of plaintiff. In this regard, Xu states, in relevant part, that he is:

1. The Comtroller [sic] for Expedi Printing Inc.
2. Torah Times and Shloime Oestreicher (hereafter referred to as “customer”) owe Expedi Printing Inc. \$128,029.28 for printing work and have refused to pay the bill since October 5, 2011.
3. The customer never made any complaints about the quality of the printing work.
4. The customer asked for extra time to pay the bill and ultimately stopped paying the bill entirely.

In opposition, defendants raise several arguments to successfully defeat the cross motion. Defendants first argue that there is an issue of fact as to whether plaintiff is owed \$128,039.28 by defendants. In an affirmation submitted in opposition to the cross motion, Oestreicher states that Torah Times never received a past due statement or invoice from plaintiff for this amount. To the contrary, Oestreicher affirms that Torah Times’ business records indicate that all invoices from plaintiff were paid by Torah Times in a timely manner and that Torah Times had never owed plaintiff the amount claimed. *See* Affirmation of Shloime Oestreicher, affirmed June 3, 2013 (Oestreicher aff.).

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Defendants also assail the evidentiary value of the Xu affidavit, contending that it cannot support a summary judgment motion because the affidavit fails to recite that it is sworn to under the penalty of perjury and amounts to a self-serving and unsworn statement that must be disregarded by this court. Defendants also note that plaintiff has not submitted any evidence in the form of invoices, statements or other information detailing how plaintiff arrived at the sum of \$128,039.28. Consequently, plaintiff has not even satisfied its initial burden on its cross motion.

To conclude, in light of plaintiff's failure to provide admissible evidence to support the allegations in the complaint, as well as defendants' duly affirmed denial of those allegations, plaintiff's cross motion for summary judgment on the complaint is denied.

The foregoing is the decision and order of the court.

Dated: March 24, 2014

ENTER:

J.S.C.

HON. DAVID I. SCHMIDT  
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