

Triad Intl. Corp. v Land 'N Sea, Inc.
2014 NY Slip Op 33587(U)
October 21, 2014
Supreme Court, New York County
Docket Number: 600119/2009
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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TRIAD INTERNATIONAL CORP. and
CARIBBEAN INDUSTRIAL CO.,

Plaintiffs,

-against-

Index No. 600119/2009

LAND 'N SEA, INC.,

Defendant.

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LAND 'N SEA, INC. ,

Third-Party Plaintiff,

-against-

FILED
OCT 27 2014
COUNTY CLERKS OFFICE
NEW YORK

NEW WORLD SOURCING GROUP, INC.,

Third-Party Defendant.

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Debra A. James, J.:

Defendant Land 'N Sea, Inc. (LNS) moves for summary judgment dismissing the complaint. For the reasons set forth below, the motion shall be denied.

In this contract action, plaintiffs seek payment for fabric they allegedly sold and delivered to LNS based on invoices they issued and had sent to LNS. LNS claims it did not have a contractual relationship with plaintiffs, and that the only

contracts for the fabric were LNS's purchase orders issued to third-party defendant New World Sourcing Group, Inc. (New World), and New World's sales orders issued to plaintiffs. LNS urges that because there is no privity between it and plaintiffs, the claims must be dismissed as a matter of law.

Plaintiffs Triad International Corp. (Triad) and Caribbean Industrial Co. (Caribbean) (collectively, Plaintiffs) manufacture, sell, and export textile fabrics to apparel manufacturers.

LNS purchases fabrics from suppliers, and contracts with various factories, to manufacture the fabrics into finished apparel.

Third-party defendant New World Sourcing Group, Inc. (New World) had been involved in transactions with LNS since 2005, obtaining fabric for it from fabric suppliers, as the textile agent or broker. It is a sourcing company on behalf of both the suppliers and the customers.

In February 2007, LNS contacted New World seeking to purchase certain fabrics. On February 8, 2007, LNS issued a written purchase order number 12577 for 444,000 yards of fabric with various constructions, colors, and other characteristics, and prices. At his deposition, New World's president Scott Wallach testified that New World's procedure was then to take LNS's purchase order and "factor it up with our purchase orders

to the mill [supplier], and the mill issues a confirmation order to the customer, in this case [LNS]". With respect to LNS's purchase orders, New World produced its own document, labeled "Sales Order," with the terms and conditions of LNS's purchase which it then sent to Plaintiffs as the supplier. New World's Sales Order stated on it "Bill to: Land 'N Sea, Inc."

After Plaintiffs received the Sales Order, they then issued a confirmation or a pro forma invoice, confirming the sale, made out to LNS, which they sent to New World, and New World would send it to LNS. The fabrics were shipped by Plaintiffs to factories LNS used overseas, and LNS wire transferred payments directly to Plaintiffs' bank accounts, as directed by New World. With respect to LNS purchase order number 12577, LNS made only a partial payment of the amounts due, based on its assertions that the price was incorrect, and that there were fabric quality issues.

On March 19, 2007, LNS again sought to purchase fabric through New World. LNS issued purchase order number 12588 for 356,000 yards of fabric with various constructions, colors, and other characteristics, and prices set forth therein. Again, New World created a Sales Order, which was sent to Plaintiffs. Plaintiffs' pro forma invoices, addressed to LNS, were sent to New World and delivered by New World to LNS, and fabric was delivered by Plaintiffs to the factories LNS was using to create

the garments. LNS, again, made partial payment on Plaintiffs' invoices, based on price and quality issues, which payment was wire transferred directly to Plaintiffs' bank accounts.

On June 11, 2007, LNS issued a third purchase order, number 12601, to New World, regarding 821,000 yards of fabric, with certain characteristics, colors, constructions, and prices. New World issued its Sales Order for this purchase order, Plaintiffs delivered the fabrics to LNS's factories, and delivered their pro forma invoices to New World, which then delivered them to LNS. LNS made only partial payment on the invoices to Plaintiffs' bank accounts, based on price and quality issues.

In 2009, Plaintiffs commenced this action seeking full payment on their invoices. They asserted eight claims: the first four for breach of contract with regard to their unpaid invoices and failure to return certain goods on the invoices; the fifth claim is for account stated; the sixth and seventh claims are for unjust enrichment and in quantum meruit; and the eighth claim is for goods sold and delivered.

In 2011, after some discovery but before depositions, LNS moved for summary judgment, seeking dismissal of all claims against it. In this prior motion, LNS asserted the same grounds as it asserts here: that the complaint must be dismissed, because it had not entered into any contract with Plaintiffs, only with New World. By decision and order, filed on January 11, 2012,

this court denied the motion, finding issues of fact based on Plaintiffs' submissions of the invoices from them to the account of LNS, the wire transfer remittances from LNS to Plaintiffs which reference the invoices, and the affidavit from Plaintiffs' sales manager, who stated that she prepared the invoices detailing the fabric being sold, the quantity, price, and method of payment, and did so in response to orders requested by LNS. The parties then proceeded with depositions.

LNS now moves for summary judgment, again asserting that all claims must be dismissed against it, because, as a matter of law, it did not enter into any contract with Plaintiffs. It urges that this is evidenced by the documents: the depositions of Plaintiffs' general manager, Oliver Lin, and their sales manager, Beryl; the established course of conduct as verified in an unrelated action between New World and SGS, SA (SGS) regarding SGS's inspection of fabrics New World obtained for LNS in 2004 (the 2005 SGS Action); and the reply affidavit from LNS's prior summary judgment motion of Kirk Gellin, LNS's president. LNS also contends that the account stated claim fails as a matter of law, because Plaintiffs did not send invoices directly to LNS -- it received Plaintiffs' invoices from New World, and LNS timely objected to the invoices. LNS urges that the unjust enrichment and in quantum meruit claims are barred by the express contracts covering the subject matter. Finally, it argues that the goods

sold and delivered claim merely restates the contract and quasi contract claims. LNS also requests, in its brief, that sanctions be imposed against Plaintiffs and their counsel for commencing and prosecuting their frivolous claims.

In opposition, Plaintiffs contend that, contrary to LNS's contentions, the depositions have demonstrated that New World was merely acting as an agent for Plaintiffs, and, therefore, there is a contractual relationship between Plaintiffs and LNS. They point to the deposition testimony of LNS's controller, Neil Fox, in which he testified that he received Plaintiffs' invoices and the goods listed in thereon, and paid them, at least partially, for those invoices. As further documentary proof of the contract, they point to New World's Sales Orders, which each states "Bill To: Land 'N Sea, Inc." as do Plaintiffs' invoices, and to the wire transfer receipts, evidencing that LNS partially paid the invoices by wire transfer direct to Plaintiffs' bank accounts. They rely on Mr. Lin's deposition testimony in which he states that he met with Kirk Gellin on March 22 and December 5 or 6, 2006, February 12, 2007, and June 13, 2007, regarding fabric types and prices, and samples were provided. Plaintiffs' sales manager, Beryl, confirmed the meetings in which LNS and Plaintiffs talked about orders, and fabric samples were provided. Plaintiffs also point to Gellin's testimony in which he admitted having met Lin, knowing that Plaintiffs were New World's mill,

that is, that it purchased the fabric from them, and discussing the fabrics at issue. Further, Gellin also admitted that New World had advised him that it "represented" Plaintiffs, and that Plaintiffs made the fabric, not New World. They point to Mr. Wallach's testimony in which he states that, in these transactions, New World acted as a textile agent or broker.

In addition, Plaintiffs urge that the 2005 SGS Action is irrelevant, because it involved orders for goods completely unrelated to the orders here. Plaintiffs contend that this motion should be denied because LNS is making the same summary judgment motion twice, because it is based on the same documentary evidence and the deposition testimony did not yield such new evidence as to warrant consideration of a second motion.

Plaintiffs argue that under Article 2 of the Uniform Commercial Code, the documents exchanged between Plaintiffs and LNS are sufficient writings to indicate that a contract of sale had been made, and that their invoices constitute confirmatory writings under the Merchant's Exception. They maintain that LNS did not object to them, and actually made partial payments thereon directly to Plaintiffs. Thus, they urge that, at the least, there are the same issues of fact raised as in LNS's prior summary judgment motion.

With respect to the quasi contract claims, Plaintiffs assert that they can pursue both theories alternatively. They argue

that the account stated claim is sufficient, because the invoices were delivered to LNS, and LNS's charge backs to New World did not constitute an objection to Plaintiffs, and LNS's partial payments were an acknowledgment of the correctness of the account.

Plaintiffs contend that the goods sold and delivered claim is sufficient, because it is undisputed that the fabrics were sold and delivered, and not fully paid for- the only issue is if LNS is entitled to an offset on account of the charge backs for price or quality issues. Finally, Plaintiffs assert, in their brief, that LNS and its counsel should be sanctioned for making this frivolous motion.

The motion for summary judgment shall be denied, because there are numerous issues of fact warranting a trial on the claims.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006] [internal quotation marks and citations omitted]). On a claim for breach of contract, the plaintiff must establish that: (1) the parties entered into a contract; (2) the plaintiff performed its obligation; (3) the defendant breached; and (4) the plaintiff suffered damages caused by that breach

(Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). As to a defense, LNS would have to establish that at least one of the reverse corollaries is true.

Here, LNS has failed to establish as a matter of law that there was no contract between the parties. In fact, as already determined by this court on the prior summary judgment motion, the issue of whether the LNS had entered into a contract to buy the fabrics from Plaintiffs is disputed. While LNS's purchase orders were addressed to New World, Plaintiffs' invoices, sent to LNS through New World, indicated that the fabrics were "For the Account Of: Land 'N Sea," with its address. Plaintiffs' pro forma invoices were also addressed to LNS, specifically referred to New World as the "Agent," and stated that "We confirm the following sales to you on the conditions set forth hereunder," and provided a line "Confirmed & Accepted By: Land and Sea". LNS admitted receiving the goods, and the wire transfer documents show that LNS at least partially paid Plaintiffs for the goods. In addition, New World never invoiced LNS for any of the fabrics.

There also is conflicting evidence as to what New World's role was in the transactions. While LNS claims in its motion that it was purchasing the fabric from New World, Mr. Wallach testified that New World was a sourcing company, which did not bill or invoice for goods or own them, but was the agent of Plaintiffs, which was supported by Mr. Lin's testimony that New

World was Plaintiffs' broker, which, if Plaintiffs accepted an order, "would follow our instructions to go through the process". Kirk Gellin of LNS admitted at his deposition that Mr. Wallach advised him that New World represented Plaintiffs, and that Plaintiffs were the mills which made the fabrics. Further, Mr. Lin and Beryl both testified, consistent with the affidavits submitted in opposition to the prior summary judgment motion, that there were meetings between Plaintiffs and LNS during the time of the transactions regarding the fabric requirements. All of this evidence raises issues of fact as to whether LNS contracted with Plaintiffs through New World to purchase the fabrics at issue.

LNS's reliance on the 2005 SGS Action is unavailing. That action involved completely different transactions between New World and another party from 2004, three years before the transactions at issue here.

As a sale of goods, these transactions fall under Article 2 of the Uniform Commercial Code (NY UCC). Under NY UCC § 2-204 (1) "[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A contract between the parties may be found "even though the moment of its making is undetermined" (NY UCC § 2-204 [2]). Moreover, "an offer to make a contract shall be construed as inviting

acceptance in any manner and by any medium reasonable in the circumstances" (NY UCC § 2-206 [1] [a]).

Under NY UCC § 2-201, for a sale of goods more than \$500, there must be "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." Subdivision (2) of UCC § 2-201 then specifically provides an exception in recognition of the usual and customary practice followed by merchants:

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received

(see Bazak Intl. Corp. v Mast Indus., 73 NY2d 113, 120-123 [1989] [writings are sufficient if they afford basis to believe they reflect a real transaction between parties]; B & R Textile Corp. v Domino Textiles, 77 AD2d 539 [1st Dept 1980]). Invoices may constitute confirmatory writings under this merchant's exception to the statute of frauds (see Multitex USA, Inc. v Marvin Knitting Mills, Inc., 12 AD3d 169, 169-170 [1st Dept 2004]; B & R Textile Corp. v Domino Textiles, 77 AD2d at 539-540).

Here, plaintiffs' invoices, as well as the pro forma invoices, for the various fabrics involved were accompanied by

bills of lading, packing lists, and certificates of origin, and were received and accepted by LNS without a written notice of objection to Plaintiffs within 10 days. The parties were textile merchants and fall within the merchant's exception. The invoices were on Plaintiffs' letterhead, and contained the names and addresses of both LNS as buyer, and Plaintiffs as the seller; the date; the price; a description of the fabric; the amount of fabric; the payment terms; and the total price. These constituted a writing in confirmation of a contract for the sale of goods sufficient to satisfy the statute of frauds, provided that no written notice of objection was given as to the content of the invoices within 10 days of receipt (see Bazak Intl. Corp. v Mast Indus., 73 NY2d at 124).

In addition, these invoices may constitute writings in confirmation under NY UCC § 2-201 (2), "even though the 'customer's acceptance' space on the document is unsigned" (Bayside Fuel Depot Corp. v Nu Way Fuel Oil Burners Inc., 25 Misc 3d 1237[A], *11, 2009 NY Slip Op 52469[U], *10 [Sup Ct, Kings County 2009], citing Bazak Intl. Corp. v Mast Indus., 73 NY2d at 119-120, 124). LNS has presented some proof of objections as to price and quality), and it is not clear when those objections were made and if they were made in writing (see B & R Textile Corp. v Domino Textiles, 77 AD2d at 539-540; Trafalgar Sq. v Reeves Bros., 35 AD2d 194, 197 [1st Dept 1970]). Moreover, the

partial payment of those invoices appear to constitute a ratification of the agreements between Plaintiffs and LNS (see Multitex USA, Inc. v Marvin Knitting Mills, Inc., 12 AD3d at 170). At the very least, the evidence raises issues of fact as to the existence of contracts between Plaintiffs and LNS, warranting denial of summary judgment dismissal of Plaintiffs' contract claims (the first through fourth claims).

Dismissal is also denied with regard to Plaintiffs' claim for an account stated (fifth claim). "An account stated is an account balanced and rendered, with an assent to the balance express or implied" (Interman Indus. Prods. v R. S. M. Electron Power, 37 NY2d 151, 153-154 [1975] [internal quotations and citation omitted]). There is no account stated where there is a dispute as to the account (Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 413 [1st Dept 1995]; Waldman v Englishtown Sportswear, 92 AD2d 833, 836 [1st Dept 1983]). Where there are disputes as to the nature of the parties' contractual obligations, and the extent and nature of the payments claimed due, summary judgment to either party on an account stated claim is precluded (Empire Magnetic Imaging v Comprehensive Care of N.Y., 271 AD2d 472, 473 [2d Dept 2000]). As discussed above, issues of fact have been presented as to the nature of the parties' contractual obligations, and whether LNS acquiesced in the correctness of the accounts by making partial payments thereon, or whether it made

objections as to the prices of the fabrics, and the quality of the goods listed in the invoices, within a reasonable time (see Abbott, Duncan & Wiener v Ragusa, 214 AD2d at 413; cf. Multitex USA, Inc. v Marvin Knitting Mills, Inc., 12 AD3d at 170 [judgment awarded on account stated based on finding of no dispute over invoices]). Thus, summary judgment dismissing this claim shall be denied.

Similarly, plaintiffs' claim for goods sold and delivered (eighth claim) withstands this motion. As discussed with regard to the contract claims, there is conflicting evidence about whether LNS ordered goods from Plaintiffs through New World, whether the parties agreed to the sale and delivery of the goods, whether LNS accepted the goods and either raised objection to the price, quality, or other sale terms, as reflected in the invoices, and whether it fully paid for the goods, or if it is entitled to any offset on account of any charge backs. These issues must be resolved at trial.

Finally, the quasi contract claims (sixth and seventh claims for unjust enrichment and in quantum meruit) shall not be dismissed. As Plaintiffs correctly argue, they may plead these claims in the alternative, particularly since LNS is disputing the validity of the contract with regard to the good sold and delivered (see Joseph Sternberg, Inc. v Walber 36th St. Assoc., 187 AD2d 225, 228 [1st Dept 1993]).

In light of the above, LNS's request for sanctions shall likewise be denied.

Plaintiffs' request for sanctions also is denied. Although LNS's motion does not demonstrate its entitlement to the relief sought, it was not entirely frivolous. With regard to plaintiffs' argument that the motion should be denied on the ground that this is a second successive motion for such relief, this argument is rejected. While the motion is made on virtually identical grounds to the 2011 motion by LNS, that is, that there was no contract between plaintiffs and LNS, LNS offered newly discovered evidence in the form of the parties' deposition testimonies, which were not available at the time of the 2011 motion, and which did yield such additional new evidence as to warrant consideration of this second motion (see Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc., 32 AD3d 218, 222 [1st Dept 2006] [while successive motions generally are disfavored, if significant discovery took place, such as depositions, second motion not precluded]; Olszewski v Park Terrace Gardens, Inc., 18 AD3d 349, 350 [1st Dept 2005] [same]; Sansol Indus. v 345 E. 56th St. Owners, 276 AD2d 370, 371 [1st Dept 2000] [same]; cf. Brown Harris Stevens Westhampton LLC v Gerber, 107 AD3d 526, 527 [1st Dept 2013] [defendant's deposition testimony was not such new evidence to warrant second motion]).

The court has considered LNS's remaining arguments and finds

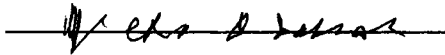
them to be without merit.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied.

Dated: October 21, 2014

ENTER:


DEBRA A. JAMES J.S.C.

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