

Ridge Produce, Inc. v BDKP, Inc.

2015 NY Slip Op 30042(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 160361/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RIDGE PRODUCE, INC.,

Plaintiff,

Index No.
160361/2013

Decision and
Order

- against -

Mot. Seq. 001

BDKP, INC. D/B/A BLUE DOG,
BORIS SLAVUTSKY and ELIZABETH
SLAVUTSKY,

Defendants.

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RIDGE PRODUCE, INC.,

Plaintiff,

Index No.
160363/2013

Decision and
Order

- against -

Mot. Seq. 001

BLUE DOG CAFÉ AT LE PARKER MERIDIEN
INC., BORIS SLAVUTSKY and ELIZABETH
SLAVUTSKY,

Defendants.

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Plaintiff, Ridge Produce, Inc. (“Ridge Produce”), is a wholesale supplier of fruits and produce. Defendant, BDKP, Inc. d/b/a Blue Dog (“BDKP”), is a commissary kitchen that prepares soups, salads, sandwiches, and other foods and juices for sale at Blue Dog Café locations and catering jobs. Defendant, Blue Dog Café at Le Parker Meridien (“Blue Dog Café”), operates a “Blue Dog” pop up stall in the food court at the Parker Meridien Hotel.

Common to both actions (Index Nos. 160361/2013¹ and 160363/2013²) are the following facts: Ridge Produce sold and delivered goods to BDKP and Blue Dog Café (collectively, “Defendants”) and submitted invoices pursuant to the agreement that Ridge Produce would supply produce for Defendants on an ongoing basis for use in food establishments. Ridge Produce now seeks to recover for monies owed for the goods sold and delivered to Defendants.

¹ Ridge Produce seeks to recover the sum of \$208,109.87 for goods sold and delivered to BDKP, from on or about May 26, 2013 to October 27, 2013. The Complaint sets forth claims for failure to pay for goods sold and delivered, account stated, and for liability against Boris Slavutsky and Elizabeth Slavutsky based on a April 3, 2013 guaranty. Defendants interposed an Answer with affirmative defenses on December 20, 2013, which included the following affirmative defenses: (1) “Upon information and belief, Plaintiff was in first breach of any agreement between Plaintiff and the Defendants, and by reason thereof the Plaintiff’s Complaint must be dismissed with prejudice”; (2) “Upon information and belief, the Plaintiff’s Complaint must be dismissed because the Plaintiff has breached the covenant of good faith and fair dealing that underscores all commercial agreements in the state of New York.;;” (3) “Upon information and belief, the Plaintiff’s claim must be dismissed with prejudice pursuant to the doctrine of accord and satisfaction.”; and (4) “Upon information and belief, and subject to additional discovery, upon information and belief, the Plaintiff’s claim must be dismissed with prejudice for violating its duty to the Defendants to maintain confidentiality and not disclose the business Defendants’ [sic] trade secrets and proprietary information to benefit the Plaintiff and third parties.”

² Ridge Produce seeks to recover the sum of \$45,137.50 for goods sold and delivered to Blue Dog Café from on or about April 28, 2013 through October 27, 2013. The Complaint sets forth claims for failure to pay for goods sold and delivered, account stated, and for liability against Boris Slavutsky and Elizabeth Slavutsky based on a guaranty. Defendants interposed an Answer with affirmative defenses on December 20, 2013, which include those asserted in Defendants’ Answer to the Complaint filed in the 160361/2013. Although Ridge Produce seeks to recover \$45,137.50 in the Complaint, the aging report submitted to their papers shows that \$35,922.60 is owed, an issue raised by Defendants’ counsel at oral argument.

Ridge Produce has moved for summary judgment on its claims for goods sold and delivered and account stated; Defendants, in opposition, raise the issue of impropriety, claiming that Ian Friedman, an agent for Defendants/Buyers, was receiving cash payments and kickbacks from Ridge Produce in exchange for bringing in Defendants' business, thereby rendering any agreement between Ridge Produce and Defendants for the sale of merchandise illegal and unenforceable and warranting summary judgment in Defendants' favor pursuant to CPLR §3212(b).³

The issue before the Court is whether Defendants have provided sufficient evidence in admissible form of the alleged kickbacks to make out a prima facie showing of entitlement to judgment as a matter of law in their favor, or to demonstrate that a factual issues remains.

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]).

CPLR §3212(b) empowers a court to search the record and grant summary judgment to a non-moving party. CPLR §3212(b), provides, "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

³ All other issues have been resolved at oral argument. The action bearing Index No 160363/2013 has been discontinued as against defendants Elizabeth Slavutsky and Boris Slavutsky and the sole remaining defendant is Blue Dog Café at Le Parker Meridien. The action bearing Index No 160361/2013 has been discontinued as against defendant Elizabeth Slavutsky, and proceeds as against defendants Boris Slavutsky and BDKP.

“It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Forman v. Guardian Life Ins. Co. of America*, 908 N.Y.S. 2d 27, 30-31 [1st Dept. 2010]) (citations and internal quotations omitted).

New York courts have held that “the concealment of such [secret payments] from the principal, in and of itself, violates the covenant of fair dealing and good faith implied in every contract” and “the mere nondisclosure of those dealings served to permit the employer... to terminate the agreement at issue.” *Black v. MTV Networks*, 172 A.D.2d 8, 11 [1st Dep't 1991]; *see also American Assur. Underwriters Group v. MetLife Gen. Ins. Agency*, 154 A.D.2d 206, 208 [1st Dep't 1990] (granting summary judgment to the defendant in a breach of contract claim and holding that in making secret stock payments to defendants' employees, the plaintiff breached the implied covenant of good faith and fair dealing implicit in all contracts and defendant could properly terminate its agreement with the plaintiff).

In *Black v. MTV*, the plaintiffs had entered into a contract with MTV. In litigating plaintiffs' breach of contract damages claim, “In the course of discovery, MTV learned the undisputed fact that from approximately 1981 to 1984, when he frequently worked for MTV on a series of successive, short-term agreements which preceded the contract of issue, plaintiff Melvyn Black had secretly made gifts totaling thousands of dollars to MTV's director of personnel and that, in 1985, he made an interest-free loan of \$30,000 to another MTV employee. MTV then moved for summary judgment dismissing the amended complaint on the ground that plaintiffs are precluded from any recovery for breach of contract since they had fraudulently obtained the contract in suit and had breached the implicit covenant of good faith and fair dealing in that contract by making such gifts and loan.” 172 A.D.2d at 9-10. Black did not dispute that these payments were made but had contended that “they were not intended to influence the behavior of MTV employees, but were given for personal reasons” and “that recipient of the gifts was not a decision maker, but exercised purely ministerial functions.” *Id.* at 10. The First Department held:

[R]egardless of intent, motive, illicit purpose, or pecuniary loss, such secret payments improperly create interests for agents that are “adverse to that of

their principal” and the principal’s complete knowledge and approval is required of “any substantial advantage received by an agent” from third persons. . . . And so, the concealment of such benefits from the principal, in and of itself, violates the covenant of fair dealing and good faith implied in every contract. . . . As a result, whether plaintiff’s payments were made to strangers or friends in need, the mere non-disclosure of those dealings served to permit the employer, MTV, to terminate the agreement at issue.

See Black, 172 A.D. 2d. at 11-12. See also *American Assur. Underwriters Group v. MetLife Gen. Ins. Agency*, 154 A.D.2d at 206 (“Implicit in all contracts is a covenant to deal fairly and in good faith. The record before us clearly establishes that plaintiff has breached this implied covenant, and we accordingly hold that defendants are entitled to summary judgment in this lawsuit brought by plaintiff to challenge their termination of contract and refusal to do further business on the basis of said breach.”)

In *Black v. MTV*, the payments themselves were uncontested. Not so here.

As to Ridge Produce’s alleged payment of improper kickbacks to Friedman in exchange for Defendants’ business, Defendants have proffered the affidavits of Elizabeth Slavutsky, a principal of BDKP, sworn to on April 25, 2014; Carl Savino, who was employed as the Head Chef of BDKP in 2013 and remained in that capacity until June 2013, sworn to on August 25, 2014.

As evidence that Ridge Produce was paying “an undisclosed commission” to Mr. Friedman for referring the BDKP account and the accounts of the other separate entities that also operated Blue Dog cafes, Mr. Savino avers that he witnessed Ridge Produce give Friedman, Defendants’ consultant, an “envelope of cash” during a meeting at Ridge Produce’s offices in late June or early 2013.⁴ Mr.

⁴Mr. Savino avers, “I attended at least one meeting with Mr. Friedman, at Ridge Produce’s office at the end of June 2013 or early July 2013 for the purpose of discussing Mr. Friedman’s juice venture. At this meeting, I witnessed Mr. Burdo [Ridge Produce’s Record Keeper] give a cash filled envelope to Mr. Monche [Ridge Produce’s salesperson], with instructions to ‘give this to Ian [Friedman] for the Blue Dog.’ Later I witnessed Mr. Monche hand the envelope with the cash to Mr. Friedman.”

Savino states, “Upon information and belief the cash stuffed envelope presented payment of a ‘commission’ or ‘gratuity’ from Mr. Burdo to Mr. Friedman for ‘bringing in’ the Blue Dog account to Ridge Produce.”

As further evidence, Mr. Savino avers that Mr. Friedman told him “on numerous occasions” that he was being paid a commission by Ridge Produce for the Blue Dog accounts, that Mr. Friedman told him that “he would like to ‘take a picture’ of himself in front of sacks of cash representing ‘all the money he was making from the Blue Dog’” although Mr. Savino states that he is uncertain whether cash Mr. Friedman was referring to represented undisclosed “commissions” that he had received from Ridge Produce for the Blue Dog accounts or from his expected profits from another business venture, and that on another occasion, “Mr. Friedman bragged that he was making ‘\$1,500 a month’ in cash payments from Ridge Produce for having forwarded the ‘Blue Dog’ account to Ridge Produce.”

Ms. Slavutsky’s affidavit refers to having discovered that Ridge Produce paid Mr. Friedman a commission on all purchases by BDKP and the other Blue Dog entities for bringing in Defendants’ produce business from Mr. Savino.⁵

Ridge Produce has submitted Sur-Reply Affidavits of Hal Burdo, the Records Keeper of Ridge Produce, Jose Luis Monche, a salesperson of Ridge Produce, and Ian Friedman.

In his Sur-Reply Affidavit, sworn to on September 23, 2014, Burdo avers, “I categorically deny this allegation as I have never given anybody any type of kick-

⁵ Ms. Slavutsky avers, “[U]pon information and belief, I have now discovered that the Plaintiff agreed to pay- and did pay-one of my consultants Ian Friedman a “commission” on all purchases by the corporate defendant and other Blue Dog entities from the Plaintiff ... in order to induce him to steer the corporate defendant’s produce business to the Plaintiff.” Ms. Slavutsky further avers, “upon information and belief, [I] learned that on at least one occasion Plaintiff paid Mr. Friedman with an ‘envelope of cash’ for arranging for the Blue Dog trade secrets to be opened with the Plaintiff ... Any undisclosed ‘commissions’ that were paid to the Plaintiff to Mr. Friedman would have been ‘built in’ to the prices that the Plaintiff charged to the corporate defendant.”

back or bribe to service an account. I have been in business for almost 25 years and would never do anything to risk my entire livelihood . . . Mr. Savino's allegation that he attended a meeting and saw cash being exchanged is false and untrue. No cash was ever given to anybody to be given to anyone . . . Neither I, nor anyone on my behalf, nor on behalf of my company, has ever given any type of bribe or kickback of monies of any nature . . .”.

Monche avers that he worked as a salesperson for Ridge Produce, servicing various accounts, including Defendants’ accounts. Monche avers, “At no time, was any payment, cash or otherwise, given to Mr. Friedman or anybody in exchange for servicing of these accounts.” Monche further avers, “Neither plaintiff, or anyone on plaintiff’s behalf, including myself ever gave any payments to Mr. Friedman as alleged by defendants.”

Friedman avers, “At no time, was any payment, given to me in exchange for servicing of defendants’ accounts . . . Neither plaintiff, nor anyone on plaintiff’s behalf, ever gave any payments to me as alleged by defendants.”

Defendants thereafter produced a Sur-Reply of Carl Savino, dated October 2, 2014, in which he provides a copy of an email exchange between himself and Mr. Burdo and “Munch,” in June 2013, after Savino left the employ of Defendants. That exchange contains Mr. Burdo’s offer to pay Savino a commission for all trade accounts that he forwarded to Ridge Produce, which Defendants contend challenges the validity of Mr. Burdo’s statements.

“An account stated has long been defined as an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance.” (*Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 355-56 [1st Dept. 2001]) (citation and internal quotes omitted). A plaintiff may recover for an account stated when it demonstrates that the defendant received invoices for services rendered, and retained them without objection within a reasonable time. (*see Fed. Express Corp. v. Fed. Jeans, Inc.*, 14 A.D.3d 424, 424-25 [1st Dept. 2005]). A defendant’s “[s]elf-serving, bald allegations of oral protests [are] insufficient to raise a triable issue of fact as to the existence of an account stated.” *Miller v. Nadler*, 60 A.D. 3d 499, 499-500 [1st Dept 2009]. *See also Darby & Darby v. VSI Intl.*, 95 N.Y. 2d 308, 315 [N.Y. 2000].

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept. 1998]).

Here, Plaintiff has established its prima facie entitlement to summary judgment as against defendants Boris Slavutsky and BDKP (Index No. 160361/2013) and against defendant Blue Dog Café (Index No. 160363/2013). Plaintiff has established that it sold and shipped goods to Defendants for which it billed Defendants pursuant to invoices and that Defendants received and retained those invoices without objection. Plaintiff has presented the subject invoices, which were signed for by an agent of defendant upon receipt, as well as the guaranty signed by Boris Slavutsky as it relates to BDKP’s obligations.

Defendants, in opposition, contend that there were problems with the produce delivered and invoices submitted by Ridge Produce. Defendants submit the affidavit of Mr. Savino. Mr. Savino generally avers, “Often we would receive a ‘short’ shipment in which we were invoiced for items that were not included in the shipment, or which were shipped in quantities that were less than the quantity indicated on the invoice. Other times we were billed for items which did not ‘match’ the items set forth in the invoice.” Mr. Savino further avers, “Other times, the fruit and produce items that were delivered were spoiled (and rejected) or of poor quality.” Mr. Savino states that he voiced his objections to the quality of the goods shipped and on “numerous occasions,” contacted Mr. Monche about his concerns “over the errors in the invoices, and the quality of the goods shipped” and was advised that Mr. Monche “would ‘take care of it’ and issue revised invoices and ‘trade credits,’” which were never received. However, Mr. Savino does not identify the date of his alleged oral objections, which shipments were a problem, the entity to which these shipments were bound, or any specific error in Defendants’ invoices. Such generalities and sweeping conclusions are insufficient to defeat Plaintiff’s motion for summary judgment. Furthermore, Defendants do not assert any counterclaim.

Defendants also allege that Ridge Produce, along with Mr. Friedman, attempted to misappropriate Defendants’ trade secrets and juice recipes by way of affirmative defense. Yet, no party seeks to bring a cause of action against Mr.

Friedman, who remains a non-party. Additionally, there is no counterclaim addressing any alleged misappropriation of trade secrets.

The Court recognizes a distinction between founded egregious conduct and allegations of egregious conduct. Here, goods were sold, delivered, and used by Defendants. The extreme sanction of allowing Defendants to profit while closing the courthouse doors to Plaintiffs would be inequitable under these facts.

Wherefore, it is hereby

ORDERED that action bearing Index Nos. 160361/2013 is discontinued as against defendant, Elizabeth Slavutsky with prejudice and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that action bearing Index Nos. 160361/2013 is severed and shall proceed against defendants Boris Slavutsky and BDKP Inc. d/b/a Blue Dog; and it is further

ORDERED that action bearing Index No. 160363/2013 is discontinued as against defendants Boris Slavutsky and Elizabeth Slavutsky with prejudice and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that action bearing Index No. 160363/2013 is severed and shall proceed as against defendant Blue Dog Café at Le Parker Meridien; and it is further

ORDERED that plaintiff's motion for summary judgment against defendants, BDKP, Inc. d/b/a Blue Dog, and Boris Slavutsky is granted on the second cause of action (Index No. 160361/2013, Mot. Seq. 1); and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff, as against defendants, BDKP, Inc. d/b/a Blue Dog, and Boris Slavutsky, jointly and severally, in the amount of \$208,109.37, together with interest at the rate of 9% per annum from October 27, 2013 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 (Index No. 160361/2013, Mot. Seq. 1); and it is further

ORDERED that defendants BDKP Inc. d/b/a Blue Dog and Boris Slavutsky's cross motion for summary judgment is denied (Index No. 160361/2013, Mot. Seq. 1); and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Blue Dog Café at Le Parker Meridien is granted on the second cause of action (Index No. 160363/2013, Mot. Seq. 1); and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff, as against defendant Blue Dog Café at Le Parker Meridien in the amount of \$35,922.60, together with interest at the rate of 9% per annum from October 27, 2013 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 (Index No. 160363/2013, Mot. Seq. 1); and it is further

ORDERED that defendant Blue Dog Café at Le Parker Meridien's cross motion for summary judgment is denied (Index No. 160363/2013, Mot. Seq. 1).

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 15, 2015


EILEEN A. RAKOWER, J.S.C.

MON. EILEEN A. RAKOWER