

Ridge Produce, Inc. v Angelic Foods, Inc.

2015 NY Slip Op 30626(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 160364/2013

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 63

RIDGE PRODUCE, INC.,

Plaintiff,

-against-

ANGELIC FOODS, INC. d/b/a BLUE DOG
 KITCHEN BAR & BAKERY, BORIS SLAVUTSKY
 and ELIZABETH SLAVUTSKY,

Defendants.

Index No. 160364/2013
 Motion Date: 8/20/2014
 Motion Seq.: 001

DECISION and ORDER

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 63

RIDGE PRODUCE, INC.,

Plaintiff,

-against-

YES FOOD, LLC d/b/a BLUE DOG CAFE,
 BORIS SLAVUTSKY and ELIZABETH SLAVUTSKY,

Defendants.

Index No.: 160365/2013
 Motion Date: 8/20/2014
 Motion Seq.: 001

DECISION and ORDER

Counsel of Record:

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Ellen M. Coin, A.J.S.C.

Plaintiff Ridge Produce, Inc. ("Ridge Produce") is a wholesale supplier of fruits and produce. Defendants Yes Food, LLC d/b/a Blue Dog Cafe and Angelic Foods, Inc. d/b/a Blue Dog Kitchen

Bar a/k/a Blue Dog Coffee Bar & Bakery ("Blue Dog 1" and "Blue Dog 2" respectively) produce soups, salads, sandwiches, and other foods and juices for sale at BlueDog Cafe locations and for catering events. Boris and Elizabeth Slavutsky are owners and officers of both corporate defendants.

Common to both actions (Index Nos. 160364/2013¹ (Action 1) and 160365/2013² (Action 2)) are the following facts: Ridge Produce sold and delivered goods to Blue Dog 1 and Blue Dog 2 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

¹ In Action 1, Ridge Produce seeks to recover the sum of \$56,324.70 for goods sold and delivered to Angelic Foods, Inc. 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, for liability against Boris Slavutsky and Elizabeth Stavutsky on a personal guaranty, a claim as against all defendants for a dishonored check in the amount \$2,740.50, and a request for attorney's fees, not separately claimed, but included in the "wherefore" clause. Defendants interposed an Answer with affirmative defenses on December 20, 2013. Although Ridge Produce seeks to recover \$56,324.70 in the Complaint, the aging report submitted to their papers shows that \$42,552.26 is owed, an issue raised by Defendants' counsel at oral argument.

² In Action 2, Ridge Produce seeks to recover the sum of \$52,978.25 with interest from October 27, 2013 for goods sold and delivered to Yes Food LLC from on or about April 12, 2013 through October 27, 2013. The Complaint sets forth claims for failure to pay for goods sold and delivered, account stated, for liability against Boris Slavutsky and Elizabeth Slavutsky on a personal guaranty, a claim as against all defendants for three dishonored checks totaling the sum of \$22,871.25 (check dated 8/16/2013 for \$2,871.25, checks dated 9/13/2013 for \$ 5,000.00 and \$15,000.00 respectively), and a request for attorney's fees, not separately claimed, but included in the "wherefore" clause. Defendants interposed an Answer with affirmative defenses on December 20, 2013, which include those asserted in Defendants' Answer to the Complaint filed in the 160364/2013. Although Ridge Produce seeks to recover \$52,978.25 in the Complaint, the aging report submitted to their papers shows that \$19,509.50 is owed, an issue raised by Defendants' counsel at oral argument.

recover for monies owed for the goods sold and delivered to Defendants.

Motion to Dismiss

Defendants Boris Slavutsky and Elizabeth Slavutsky move to dismiss the complaint pursuant to CPLR §3211(a)(8) for improper service.

The affidavit of service on Elizabeth Slavutsky, attached as Exhibit B to the moving papers, states that on November 15, 2013, the process server delivered and left process with Vladimir Slavutsky, Elizabeth's father, at 100 West 93rd Street, Apt. 10F, Elizabeth Slavutsky's dwelling house or usual place of abode. The second copy was mailed on November 18, 2013. The affidavit of service was filed with the Court on November 25, 2013.

The affidavit of service on Boris Slavutsky, attached as Exhibit D to the moving papers, states that on January 9, 2014, the process server delivered and left process with Ron "Smith" Concierge at 111 West 67th Street, Apt 12N, Boris Slavutsky's dwelling house or usual place of abode. The second copy was mailed on January 10, 2014. The affidavit of service was filed with the Court on January 14, 2014. Both affidavits also include the boilerplate non-military status clause.

In support of the motion, defendants submit affidavits of Vladimir Slavutsky, Elizabeth Slavutsky and Ronald Cintron. Vladimir attests that Elizabeth does not reside with him and that he informed the process server of that, but was nonetheless given the papers for his daughter. Further, the process server did not inquire as to the military status of his daughter.

Elizabeth attests that she does not reside with her father. However, she does not disclose her residential address. Mr. Cintron attests that he is a concierge at 111 West 67th Street and that the process server did not serve any papers on him in any apartment, as indicated in the affidavit of service, but instead dropped them off at the concierge desk without mentioning the name Boris Slavutsky. Citron further alleges that he does not know Boris Slavutsky, never met him and would not know what he looked like even if he ran directly into him. Mr. Cintron also could not say anything about Boris Slavutsky's non-military status, as he did not know him.

In response to the motion, Plaintiff re-served Boris in-hand on February 19, 2014, still within 120 days of the filing of the complaint, and Elizabeth on March 1, 2014. Elizabeth was re-served by delivering process to Blue Dog Cafe at 308 West 50th Street and handing it to Dasha Dvornikova, described as

"coworker" in the affidavit of process server Robert Piaskowy.³ In opposition to the cross-motion, Defendants submit an affidavit of Dasha Dvornikova, dated May 12, 2014. Dvornikova avers that she is employed as a waitress and counter-person, that she is not Elizabeth's co-worker and did not identify herself as such, that Elizabeth does not work at the subject café, that she sees Elizabeth from time to time, but not on any regular schedule, and that Elizabeth does not maintain an office at that location.

In addition, defense counsel argues that the affidavits of service on their face do not satisfy the due diligence requirement for substituted service, insofar as they are silent on what efforts the process server undertook to locate the individual defendants prior to resorting to service under CPLR 308(2) and (4).

It is undisputed that Boris was re-served through proper means on February 19, 2014, within 120 days of the filing of the summons and complaint. Accordingly, Defendants' motion as to him has been mooted (*see Helmand v Cohen*, 110 AD2d 751, 752 [2d Dept 1981]).

³ Piaskowy's affidavit of service was filed with the Court on March 6, 2014 (Docket # 33), but was never made part of the record on motion. In the interest of judicial economy, the Court will nonetheless consider it.

With respect to the attempted service and re-service on Elizabeth, Defendants' detailed affidavits refute material allegations of the proof of service. Thus, as there is a valid disagreement as to whether service on Elizabeth was accomplished, the Court shall hold a traverse hearing (*Hinds v 2461 Realty Corp.*, 169 AD2d 629,632 [1st Dept 1991]).

Cross-Motion For Summary Judgment

Ridge Produce has cross-moved for summary judgment on its claims for goods sold and delivered, account stated and personal guaranty.⁴

An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (see *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002][citation omitted]). In opposition, defendants submit an affidavit of Carl Savino, ex-head chef of BDKP, Inc., a related business entity that as a commissary kitchen supplied Blue Dog 1 and 2. Savino attests to objecting to plaintiff and plaintiff's manager responsible for the account, Jose Monche, orally on numerous occasions, regarding the quality of delivered goods and mis-description of the goods on the invoices. Savino also attests to frequent rejections of

⁴ At oral argument, counsel for plaintiff acknowledged that only Boris Slavutsky executed a personal guaranty and withdrew the third cause of action as against Elizabeth Slavutsky.

the goods. Also, he asserts that plaintiff often inaccurately billed Blue Dog 1 and 2 for the produce delivered to the related BDKP, Inc. Because Blue Dog 1 and 2 were much smaller operations than BDKP, Inc., plaintiff's demand in this action appears incongruent with the quantities of produce used day-to-day by them.

Although "self-serving, bald allegations of oral protests" are insufficient to raise a triable issue of fact as to the existence of an account stated (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]), Savino's affidavit, coupled with discrepancies between the numbers contained in plaintiff's invoices, aging reports and statements of account, warrant denial of the summary judgment motion on the cause of action for account stated at this early stage in litigation, before any exchange of discovery.

As to the cause of action for goods sold and delivered, plaintiff's evidentiary showing has not set forth a prima facie entitlement to summary judgment and is thus insufficient to shift the burden to Defendants of raising triable issues of fact (*A & J Produce Corp. v De Palo Indus., Inc.*, 215 AD2d 317, 318 [1st Dept 1995]). While Plaintiff submitted delivery invoices

and some returned checks, requisite signed receipts of acceptance of goods have not been produced (*id.*).

With respect to the third cause of action on a personal guaranty as against Boris Slavutsky, the cross-motion is also denied without prejudice to refiling at the close of discovery.

Further, in opposition, defendants raise the issue of commercial bribery, 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, warranting summary judgment in Defendants' favor pursuant to CPLR §3212(b)

New York courts have held that the concealment from the principal of secret payments to his agent, in and of itself, violates the covenant of fair dealing and good faith implied in every contract and may justify termination of the agreement (see *Black v MTV Networks*, 172 AD2d 8,11[1st Dept 1991]; see also *American Assur. Underwriters Group v MetLife Gen. Ins. Agency*, 154 AD2d 206,208[1st Dept 1990]).

Defendants have proffered the affidavits of Elizabeth Slavutsky and 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 July 2013 and heard Mr. Friedman make oral admissions of the same.

Ridge Produce counters Defendants' allegations by submitting affidavits from Messrs. Monche and Friedman, in sum and substance, denying the allegations of kickbacks.

The parties' conflicting submissions at this early stage in the litigation make it inappropriate for the Court to determine the issue of "commercial bribery". The parties have not conducted any discovery of e-mails and other business communications, or taken depositions. As the Court has denied the cross-motions for summary judgment on other grounds, it need not currently address Defendants' affirmative defense of the

breach of the covenant of good faith and fair dealing. The Court will revisit this issue at the close of discovery.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motions to dismiss pursuant to CPLR 3211(a)(8), motion sequence 001 in Action 1 (Index No. 160364/2013) and motion sequence 001 in Action 2 (Index No. 160365/2013), are denied as to defendant Boris Slavutsky, and the balance of the motions are held in abeyance pending a traverse hearing on the issue of the sufficiency of service of process of pleadings in both action on defendant Elizabeth Slavutsky; and it is further

ORDERED that the parties appear for a traverse hearing on May 15, 2015 at 9:30 a.m./~~2:30 p.m.~~; and it is further

ORDERED that the cross-motions of plaintiff for summary judgment pursuant to CPLR 3212 in Action 1 and Action 2 are denied without prejudice to renewal at the close of discovery.

This constitutes the Decision and Order of the Court.

Date: April 17, 2015

ENTER:



Ellen M. Coin, A.J.S.C.