

**Isource NYC LLC v ROC Apparel Group, LLC**

2015 NY Slip Op 30654(U)

April 22, 2015

Supreme Court, New York County

Docket Number: 652025/13

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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ISOURCE NYC LLC,

Plaintiff,

Index No.  
652025/13

vs.

ROC APPAREL GROUP, LLC,

Defendant.  
-----x

**Hon. Charles E. Ramos, J.S.C.:**

In motion sequence 001, the plaintiff iSource NYC, LLC (iSource) moves pursuant to CPLR 3212 for summary judgment on its causes of action for breach of contract, account stated, *quantum valebant*, goods sold and delivered, and unjust enrichment in its complaint, and judgment against the defendant Roc Apparel Group, LLC (Roc) in the amount of \$450,993.27.

This action arises out of a sale of Rocawear branded fleece hooded sweatshirts and sweat pants (the Apparel), purchased by Roc from iSource. Roc accepted the Apparel, but failed to pay iSource the full purchase price. iSource commenced this action seeking to recover the unpaid balance of the purchase price.

**Background**

The facts set forth herein are taken from the parties' Rule 19-A statements and submissions, which are undisputed except where noted.

iSource is a distributor of men's apparel. Norman Jemal (Jemal) is the manager of iSource. Roc is a licensee of the

"Rocawear" brand and sells Rocawear branded apparel to retailers and directly to the public. Michael Prendergast (Prendergast) is the Chief Operating Officer and Chief Financial Officer of Roc.

Between April and June of 2012, Roc placed several orders with iSource for the Apparel.

On July 16, 2012, iSource delivered to Roc a shipment containing samples of the Apparel, accompanied with an invoice (Invoice 66278). Thereafter, in 2012, iSource delivered the Apparel to Roc in eight successive shipments with invoices on July 16 (Invoice 66280), August 23 (Invoice 66281), August 27 (Invoice 66282), September 6 (Invoice 66285), September 20 (Invoice 66289), October 20 (Invoice 66295), October 28 (Invoice 66301), and November 27 (Invoice 66308, collectively, the Invoices).

Roc did not object to any of the Invoices and confirmed the receipt of each shipment. Upon receipt Roc noticed the quality of the Apparel received was inferior to the samples provided. On several occasions, Roc informed iSource that the quality of the Apparel was inadequate. Despite the quality of the Apparel, Roc did not reject or return any of the shipments and accepted delivery of all of the Apparel.

On September 3, 2012, an email exchange occurred between Jemal and Prendergast referring to a prior meeting between the parties. Roc contends that during that meeting the parties

agreed to a modification of the terms of payment for the Apparel, specifically, that Roc would pay 60% of the purchase price upon receipt of the Apparel and that the payment of remaining 40% balance would be contingent on the retail performance of the Apparel. The parties did not set a date for payment of the 40% balance.

iSource disagrees with Roc's recollection of the meeting. It alleges that the parties agreed to a 60/40 payment structure for the first three invoices only, Invoices 66278, 66280, 66281. iSource further alleges that the payment of the remaining 40% balance was not contingent on the Apparel's retail performance, but was to be paid two to four weeks after the Apparel was shipped to Roc's clients. (Jemal Aff., Ex. 27).

On September 12, 2012, Roc paid iSource \$150,693.25 as partial payment for Invoices 66278, 66280, 66281, 66282 (Jemal Aff., ¶¶ 38-9). The total price for Invoices 66278, 66280, 66281, 66282 is \$256,022.25, thus, Roc only paid 59% of the purchase prices for these four shipments.<sup>1</sup>

Subsequently, Roc paid 60% of the Invoices 66285, 66289, 66295, and 66301, but failed to pay any portion of the Invoice 66308.

Thereafter, iSource retained counsel and demanded that Roc

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<sup>1</sup> 60% of \$256,022.25 is \$153,613.35, a difference of \$2,920.10 from what Roc paid.

pay the remaining balance of the purchase price for all of the Apparel.

On August 29, 2014, iSource moved for summary judgment on the causes of action in its complaint and for judgment against Roc in the amount of \$450,993.27.

#### **Discussion**

A motion for summary judgment may be granted when there is no triable issue of fact (CPLR 3212). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

iSource contends that Roc's acceptance of and subsequent failure to reject or return the Apparel warrants granting summary judgment in its favor.

UCC § 2-607(1) provides that "the buyer must pay at the contract rate for any goods accepted." The "rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller" (UCC § 2-607 [1]). Furthermore, the "acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it..." (*id.*).

Moreover, the "mere complaint about the goods does not constitute a clear and unequivocal act of rejection" (*Maggio Importato, Inc. v Cimitron Inc.*, 189 AD2d 654, 654 [1993]).

Roc notified iSource on multiple occasions about the defective nature of the Apparel (DeMichael Aff., Exs. 2, 3). It is undisputed that iSource delivered the Apparel in nine successive shipments, including the shipment of samples, to Roc. Roc acknowledged the receipt of each shipment and never rejected or returned the Apparel (Jemal Aff., ¶ 4).

"[A]cceptance also occurs when the buyer acts inconsistently with the seller's ownership" (*Sears, Roebuck & Co. v Galloway*, 195 AD2d 825, 826 [1993]).

In support of its argument, iSource submits a list of sales that demonstrates that Roc subsequently sold the Apparel to Macy's and Dillard's, among others, despite its complaints about the quality of the Apparel (Caputo Aff., Ex. C). Roc's resale of the Apparel is conduct that clearly demonstrates its acceptance of the Apparel and is inconsistent with the notion that the Apparel was still owned by iSource. Roc's "acceptance of the goods, even if the goods failed to conform to the contract, entitles plaintiff to recover the contract price (*Maggio* at 654).

Consequently, Roc's acceptance of the Apparel and its failure to revoke its acceptance or otherwise return or reject the Apparel provides a basis upon which this Court may grant

iSource summary judgment to recover the remaining balance due for the Apparel.

However, Roc's allegations that the parties modified the terms of payment for the shipment raises a triable issue of fact with respect to iSource's damages. Roc alleges that during a meeting with iSource on August 23, 2012, the parties agreed that Roc "would pay 60% of all invoices as it received the goods, and would only have to pay the remaining 40% if the good performed well at retail" (Def. Rule 19-A, ¶ 24).

However, iSource contends that it only modified the payment terms for the first three invoices, agreeing that Roc could pay 60% of the purchase price immediately, and the remaining 40% balance within 2 to 4 weeks after delivery to Roc's clients, if Roc paid the 60% portion as soon as possible (iSource Rule 19-A, ¶ 37).

Roc submits an email chain from September 2012 that purportedly memorializes the terms negotiated at the meeting (DeMichael Aff., Ex. 1).

The Court finds that the email chain qualifies as a confirmatory writing under UCC § 2-201(2), which provides that:

"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 10 days after it is received"

The email chain is between merchants, was sent within a reasonable time after the meeting between iSource and Roc, was received by a party with knowledge of its contents, and that no written objections were ever made, and reflects the existence of an oral modification to the terms of payment for the Apparel. Thus, the email chain satisfies the Statute of Frauds and is a valid enforceable oral modification of the payment terms (UCC § 2-201 [2]).

It is well established that "neither explicit words of confirmation nor express references to the prior agreement are required, and the writings are sufficient so long as they afford a basis for believing that they reflect a real transaction between the parties" (*Bazak Int'l Corp. v Mast Indus., Inc.*, 73 NY2d 113, 123 [1989]).

In the first email in the chain, dated September 3, 2012, from Jemal at iSource to Prendergast at Roc, Jemal states that he was "advised that [Roc] want[s] to do 60/40 on the first 3 invoices, leaving the balance to 2-4 weeks after you ship" (*id.* [emphasis added])).

The first email supports iSource's contention that the modification was only an extension of payment for the 40% balance of Invoices 66278, 66280, 66281 only, as confirmed by Prendagast in his September 4, 2012 response to Jemal, stating "[a]ll points below except one" (*id.*). The exception was the point related to

the timing of the payment of the remaining 40% balance.

In the second email, dated September 4, 2012, Prendergast responds that he will "reconcile the retail sell thrus asap, but 2-4 weeks is too quick...I cannot promise that we will be able to understand the selling liability that quick. It will most likely be 4-8 weeks. But if sooner we will reconcile asap" (*id.* [emphasis added]).

The second email seemingly supports Roc's contention that the payment would be contingent upon the sales performance of the Apparel at retail. Otherwise, the language relating to a reconciliation of sales and understanding sales liability would be unnecessary. There is no additional evidence that would illuminate this issue further.

Nevertheless, even if Roc establishes that its recollection of the modification is accurate, at best, that would only result in an offset or adjustment to the purchase price of Invoices 66278, 66280, 66281. Roc would still be liable for the full purchase price for Invoices 66282, 66285, 66289, 66295, 66301, and 66308.

Roc's admitted acceptance and its subsequent failure to reject or return the Apparel, and having failed to demonstrate that there were any modifications to the payment terms for these invoices warrants granting iSource summary judgment as to liability on the first cause of action for breach of contract,

the second cause of action for accounts stated, and the fourth cause of action for good sold and delivered, and denied as to the third cause of action for *quantum valebant* and the fifth cause of action for unjust enrichment.

The Court will conduct a hearing on damages to determine if Roc is entitled to an offset or adjustment with respect to the remaining 40% balance for Invoices 66278, 66280, 66281.

Accordingly it is,

ORDERED that plaintiff's iSource NYC LLC's motion for summary judgment is granted in part, as to liability on the first, second, and fourth causes of action for breach of contract, and it is further

ORDERED that the parties shall contact the Clerk of Part 53 to schedule a hearing on the issue of plaintiff iSource's damages within 20 days from entry of this order.

This constitutes the decision and order of the Court.

Dated: April 22, 2015

  
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J.S.C.

**HON. CHARLES E. RAMOS**