Spectrum Source Corp. v Milano Diamond Gallery, LLC
2015 NY Slip Op 30973(U)
June 8, 2015
Supreme Court, New York County
Docket Number: 650686/2012
Judge: Ellen M. Coin

[* 1]

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

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SPECTRUM SOURCE CORP.,

Plaintiff,

-against-

MILANO DIAMOND GALLERY, LLC,

Defendant.

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Index No.: 650686/2012
Motion Date: Nov. 7, 2014
Mot. Seq. No.: 005

DECISION AND ORDER

For Plaintiff:
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Papers considered in review of these motion and cross-motion for summary judgment:

Papers	**Numbered**
Notice of Motion	1
Affirmation in Support	2
Notice of Cross-Motion with Affirm. in Support	3
Reply Affirmation in Support	4

ELLEN M. COIN, A.J.S.C.:

Plaintiff, Spectrum Source Corp. (Spectrum), seeks payment from defendant Milano Diamond Gallery, LLC (Milano) for jewelry Spectrum sold to Milano. Milano counterclaims for breach of contract.

Milano moves for summary judgment dismissing the complaint, and for partial summary judgment as to liability on its breach of contract counterclaim. Spectrum cross-moves for an order granting summary judgment on its complaint, for $45,739.75, with statutory interest, and for dismissal of Milano's affirmative defenses and counterclaim.

The complaint alleges that on multiple occasions from October 2009 through March 2010, Milano ordered jewelry from plaintiff by telephone or by written spreadsheet, and that plaintiff shipped the jewelry to defendant's premises, among other destinations. Plaintiff contends that defendant received the goods and, despite plaintiff's demands, has not paid for or returned them, but copied some of the goods. Plaintiff asserts claims for breach of contract, account stated, goods sold and delivered, conversion, attorneys' fees and punitive damages.

In its counterclaim, Milano alleges that it specializes in selling jewelry to customers who are vacationing on cruise lines, enticing them to visit Milano stores at various ports by offering small gifts, and that it ordered jewelry from Spectrum for that purpose. It informed Spectrum of this, and insisted that the goods needed to be delivered to the correct ports on a timely basis, so as to be available for a specific cruise season. Spectrum, in turn, understood that the goods would be useless if not delivered accordingly and was responsible for paying and arranging delivery of the goods to the various ports. Milano purchased the goods in reliance upon Spectrum's promises, but the items were not delivered in accordance with the parties' agreement.

In support of its motion, Milano submits an affidavit of its member, Anthony Gorjian (Ex. 8 to Moving Affirmation of Michael S. Horn, dated June 30, 2014).[1] Gorjian reasserts the allegations in the counterclaim and further explains that Milano paid a substantial amount of money to advertise the promotional items, which included printing brochures (Gorijan Affid., ¶ 7), but Spectrum failed to follow the delivery instructions Milano provided. Most of the goods

[1] In opposition to the cross-motion and in reply on its motion, Milano submits an additional affidavit of Anthony Gorijan, dated July [sic] 2014. The Court may consider only Gorijan's first affidavit in assessing whether Milano carried its summary judgment burden. The second affidavit may instead be considered on whether Milano has raised sufficient material issues of fact to defeat Spectrum's cross-motion.

were delivered to the wrong ports or to Milano's Great Neck office, and as a result, were left unattended and unopened for a long time, rendering the goods of no value because they could not be used for their intended purpose (*id.*, ¶ 9). Thus, Milano's reputation in its business community was allegedly injured.

Gorjian further claims that the shipments did not contain an invoice, making them difficult to account for and track, and that the shipping documents contained tracking numbers that could not be tracked (*id.*, ¶ 10). Gorjian surmises that Spectrum lost the spreadsheet that outlined where the goods were to be shipped, resulting in its continued shipping of goods at the wrong time to the wrong ports, as well as the shipment of some goods that were not ordered (*id.*, ¶ ¶ 10-11). Milano allegedly incurred additional costs for shipping the goods to the correct ports, and also wasted hundreds of thousands of dollars of advertising with cruise ships, because the advertisements promoted goods that were not shipped by Spectrum to the correct port, and replacement items had to be purchased (*id.*, ¶ ¶ 11-12).

At his deposition, Gorijan recalled having conversations with Spectrum's president Issac Aharonoff (Aharonoff), in which Gorjian brought to Aharonoff's attention that Spectrum improperly delivered orders (Affirmation of Michael S. Horn, dated June 30, 2014, Exhibit 9 at 59). Gorjian believed that Aharonoff was informed of this problem while the shipments were being made, but stated that it was possible that the communications occurred after Spectrum attempted to collect payments (*id.* at 60). Gorjian was not aware of an agreement with Aharonoff to return merchandise that Milano still had, and to pay for what it did not, and did not recall particular, individual shipments (*id.* at 64, 170). Gorjian stated that Milano decided against

returning the items and instead incurred extra costs re-shipping the goods to fulfill obligations with cruise lines. As a result, while Milano was able to get the goods, or some of the goods, to the correct ports, it was still at the wrong times, and Milano incurred costs of reprinting advertisements (*id.* at 76-77, 80, 161). Milano does not dispute that it did not pay for any of the goods (*id.* at 116).

Plaintiff submits Isaac Aharonoff's affidavit in support of its cross-motion and in opposition to defendant's motion. Aharonoff, the chief executive officer of Spectrum, avers that there were no due dates for any of the jewelry orders placed by Milano, and that Milano never stated that the orders were needed by a particular time for any particular purpose (Aharonoff Affid., ¶ 2) . Aharonoff further claims that the jewelry was shipped in 46 shipments, with the pearl pendants and all "love, hope and peace pendants" shipped by October 28 and November 23, 2009, respectively (*id.*, ¶ 3). Aharonoff states that white metal bracelets were shipped from November 2009 through March 2010, and that defendant accepted shipments without a single complaint (*id.*).

Spectrum also provides copies of invoices and certain bills of lading, and the affidavit of its bookkeeper, Rose Gershkovich (Gershkovich) (Exhibit C to Plaintiff's Memorandum of Law). Gershkovich alleges that as part of her regular business duties, she prepares and maintains records of invoices sent to Spectrum's customers with each merchandise shipment, as well as monthly summary invoice statements for customers with overdue accounts (*id.*, ¶¶ 1-2). Gershkovich avers that the invoices annexed to the motion are copies of the invoices she prepared and included in each shipment to defendant, that the information on each invoice is

accurate and matches plaintiff's books and records, and that the documents were prepared in the regular course of Spectrum's business (*id.*, ¶¶ 3-4). Gershkovich states that after each month in which Milano did not pay, she sent it a summary invoice statement showing the shipments and the balance due (*id.*, ¶ 5). Gershkovich attests that she reviewed the summary invoice statements, dated October 5, 2010, and December 2011, annexed to Spectrum's motion papers, as representative examples of the monthly summary statements sent to defendant, that she prepared these statements and mailed them to the defendant, and that the information in them is correct and matches plaintiff's books and records (*id.*, ¶ 6).

In opposition to the cross-motion, and in reply on Milano's motion, Milano submits the affidavit of Mr. Sapnil Khara (Khara), dated August 14, 2014,[2] who avers that he placed the orders for Spectrum's goods on behalf of Milano, and that the goods were intended to be used as part of an advertising campaign on which Milano spent a substantial amount of time and money. (Khara Affid., ¶ ¶ 1-2). Khara alleges that he had conversations about the goods with Aharonoff and Myna Kirschbaum (who, Aharonoff testified, was the other principal of Spectrum), informing them that an essential part of ordering the goods was that they be timely delivered to the correct port in the correct quantity (*id.*, ¶3). Khara alleges that prior to placing orders, around October 5, 2009, Aharonoff told Khara that Spectrum could deliver all of the goods within a month after they were ordered, would pay for the shipping, and would be able to deliver the goods to the correct port at the correct time in the correct quantities (*id.*). Khara states that he ordered the goods in reliance on these promises, and informed Aharonoff that the goods were

[2] Khara's affidavit was not provided as part of Milano's moving submissions, but in reply, and may not be considered in assessing whether or not Milano carried its summary judgment burden (*see Ford v Weishaus*, 86 AD3d 421 [1st Dept 2011]).

part of an advertising campaign for which Milano spent substantial sums and would be used as gifts to induce cruise patrons to go to Milano's stores, and that it was crucial that the correct goods be timely delivered to the correct ports or it would defeat the purpose of ordering them (*id.*, ¶ 4).

Khara also avers that he told Aharonoff that Milano based its reputation with cruise lines and customers on its ability to procure the promotional goods promised to customers in advertising, and that the failure to properly deliver the goods would render them worthless, cost Milano more money than the goods were worth, have a detrimental impact on Milano's reputation in the jewelry industry and result in angry customers, which would diminish Milano's sales (*id.*, ¶ 4).

Between October 21, 2009 and November 17, 2009, Khara sent a series of email distribution lists for the goods, and had a series of conversations with Aharonoff to ensure timely delivery to the correct ports *(id.*, ¶ 6 [paragraph not numbered consecutively]) . Aharonoff allegedly promised several times that the goods would be correctly and timely delivered (*id.*, ¶ 6). When Khara contacted Aharonoff in November 2009, complaining that the goods were not delivered timely, and stating that he no longer wanted them because of the mistakes, Aharonoff assured him that he would immediately "correct the problem," but failed to do so (*id.*, ¶ 11 [paragraph not numbered consecutively]).

On or about December 22, 2009, Khara further told Aharonoff that Spectrum's continuing failure to properly deliver the goods was a severe problem; Aharonoff again apologized and promised to ship replacement goods immediately to the correct ports, but the

goods never arrived (*id.*, ¶ 12 [paragraph not numbered consecutively]). As a result of Spectrum's mistakes, Milano was unable to provide the advertised gifts to customers, resulting in upset customers and lost sales, and rendering the goods worthless to Milano (*id.*, ¶¶ 13-14 [paragraphs not numbered consecutively]

Discussion

The moving party bears the burden of making "a prima facie showing of entitlement to judgment as a matter of law," by submission of sufficient admissible evidence to demonstrate the absence of genuine issues of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made . . . the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material" factual issues for trial (*id.* at 324). Facts must be construed in a light most favorable to the nonmoving party (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]). "[M]ere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief" (*Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004]).

Spectrum argues that it has met its summary judgment burden, as it has demonstrated that there was a contract, its performance, breach and damages. Milano argues that it has demonstrated Spectrum's breach of contract. Neither party disputes the existence of a contract for the sale of goods or that the transactions are governed by Article 2 of the New York's Uniform Commercial Code (UCC) (*see Sears, Roebuck & Co. v Galloway*, 195 AD2d 825, 826 [3d Dept 1993]). Generally, a buyer must pay the contract rate for goods that are accepted (*see* UCC §2–607 [1]), and a buyer alleging breach who has accepted goods "must within a

reasonable time after he [or she] discovers or should have discovered any breach notify the seller of breach or be barred from any remedy" (UCC § 2–607 [3] [a]; *see Sears, Roebuck & Co.*, 195 AD2d at 827). Concerning the notification, the official comment to UCC § 2-607, paragraph 4, states:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Gorjian admitted that Milano, at least eventually, received and used the goods, and did not sent them back to Spectrum, which is inconsistent with Spectrum's ownership of the goods (*see* UCC § 2–606 [1] [b]).[3] However, the record is replete with unresolved material factual issues concerning the underlying transactions that preclude summary judgment on either party's breach of contract claim. Khara's affidavit raises factual issues as to the terms of the parties' agreement concerning delivery date and place, contradicting Spectrum's submissions, as well as the issues of whether Spectrum knew of the underlying purpose of the transaction, whether time was of the essence, and whether there was reasonable notification of the breach. Although Khara does not give specific dates concerning all conversations and objections made, he provides enough detail that his allegations may not be deemed merely conclusory. These credibility

[3] While Milano argues that it rejected the goods, perhaps because Khara stated that he informed Aharonoff that he did not want them, there is no dispute that Milano received goods from Spectrum and used them or kept them.

issues, as to the agreement's terms and whether performance was tendered in accordance with those terms, cannot be resolved on this motion (*Ocean v Hossain*, 127 AD3d 402, 403 [1st Dept 2015] ["[i]t is not the court's function on a motion for summary judgment to assess credibility" [citation and quotation marks omitted]).

In addition, both sides rely on some material that is not admissible in the form in which it was submitted, and therefore cannot be used to carry their burden on summary judgment. Milano presents copies of advertisements, but no affidavit from a person with knowledge concerning the documents. Spectrum offers a printout of United Parcel Service (UPS) deliveries,[4] but does not demonstrate that it is self-authenticating. Nor could this print-out, even if admissible, by itself establish that deliveries were made to the agreed-upon locations.[5]

While Milano's opposition is sufficient to raise factual issues as to Spectrum's claims, its allegations about mis-delivery are too conclusory to permit summary judgment, as 40 separate shipments are involved. Milano did not adequately demonstrate which shipments were incorrectly delivered, or eliminate the possibility that some shipments arrived at the correct destination. Gorjian's conclusory assertion that Milano's damages exceed the value of the goods also fails to eliminate factual issues as to Milano's alleged damages.

However, Milano has sufficiently raised an issue of fact as to the existence of some damages, such as its shipping and printing costs. While the dates of the promotional or

[4] The UPS printout (Exhibit D to Affirmation of Jonathan E. Neuman, dated July 22, 2014) contains many duplicate entries (*see e.g.* 2d, 6th and 15th pages]). The Court has been unable to match orders to shipments, which should have been done by the litigants.

[5] Milano asserts that Spectrum breached the warranty of merchantability. To be deemed "merchantable," goods must meet a number of requirements concerning quality, packaging and labeling, none of which does Milano dispute (UCC § 2-314 [2] [a] - [f]).

advertising contracts do not support Milano's claim that it entered into those contracts in reliance on Spectrum's performance, other evidence that Spectrum knew the purpose of the shipments and agreed with Milano concerning timing and delivery precludes the grant of summary judgment. Thus, Milano may recover some damages, if proven, as the foreseeable consequence of late deliveries to the wrong ports (*see* UCC § 2-715 [2]). Furthermore, as Milano's counterclaim is sufficiently intertwined with the complaint, summary judgment is inappropriate (*Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995]).

In reply, Spectrum argues that Milano has not articulated which shipments it disputes, and that Spectrum cannot disprove what Milano fails to articulate. However, Spectrum does not explain why it cannot demonstrate with admissible evidence the agreement between the parties as to the destinations for shipments and Spectrum's performance in accordance with such agreement. While Spectrum contends that there is no admissible evidence of timely objection or notification of breach, this discounts or ignores Khara's affidavit, which Spectrum does not demonstrate is inadmissible, conclusory or self-serving.

Spectrum's motion for summary judgment on its account stated claim must also be denied. An account stated claim has "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 has been given for the balance" (*Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355, 355-356 [1st Dept 2001] [citation and quotation marks omitted]). To establish a prima facie claim, the movant is required to demonstrate "that it generated detailed monthly invoices and mailed them to defendant on a regular basis in the course of its

business" (*Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572, 573 [1st Dept 2010]), which were retained without objection (*Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 617 [1st Dept 2012]). Claims of oral objection without specificity are generally insufficient to rebut a proper account stated showing (*Stephanie R. Cooper, P.C.*, 78 AD3d at 573).

Milano has demonstrated that there is a factual issue as to whether or not the parties were engaged in an active dispute about the goods during the time that they were being shipped. An account stated claim is predicated on an agreement to pay an amount on an account, and this agreement is separate from the initial contractual promise to pay. Such an agreement may be implied through a purchaser's silence after receipt of invoices and statements, or where partial payment is made (*e.g. Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]). Where there is a factual issue as to disputes between parties shortly prior to, or during the time of, the mailing of invoices and statements, an inference drawn against the nonmoving party—that it implicitly agreed to pay invoiced amounts—is not the only reasonable one that may be drawn (*see Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]; *Construction and Marine Equip. Co. Inc. v Thomas Crimmins Contracting Co.*, 195 AD2d 535, 535 [2d Dept 1993] [citations omitted]) . Therefore, summary judgment against Milano on Spectrum's claim for an account stated is inappropriate.

Concerning Spectrum's claim for goods sold and delivered, plaintiff correctly states that general denials may be insufficient to raise any triable issues where a movant has demonstrated that it has met the requirements of CPLR 3016 (f) (*O'Callaghan v Republic W. Ins. Co.*, 269 AD2d 114 [1st Dept 2000] [invoices attached to complaint]). However, courts have held that the

rigorous application of CPLR § 3016 (f) should not be employed to deny a party its day in court when it has raised a material factual issue in opposition to summary judgment (*see e.g. Sterling Natl. Bank v Deetown Entertainment, Inc.*, —AD3d—, 2015 NY Slip Op 04205 [1st Dept 2015]; *Metro Envelope Corp. v Westvaco*, 72 AD2d 695, 696 [1st Dept 1979]). In addition, "[w]hen a party's defense goes to the entirety of the parties' dealings rather than to the individual contents of the account, specific denials addressed to the account's items are not required" (*Green v Harris Beach & Wilcox*, 202 AD2d 993, 994 [4th Dept 1994], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3016:9 [citing *Guth Co. v Gurland*, 246 App Div 67 [1st Dept 1935]). Finally, on this claim, a buyer may defeat or diminish a seller's substantive action for goods sold and delivered by interposing a valid counterclaim for breach of the underlying sales agreement (*see Created Gemstones, Inc. v Union Carbide Corp.*, 47 NY2d 250, 255-256 [1979]). As there are factual issues here concerning the counterclaim allegations, the Court denies plaintiff's motion on this cause of action.

"[A]n action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]). Spectrum notes that Aharonoff testified that the parties made another deal, whereby Spectrum offered to accept return of the goods, and a Milano representative agreed that if Spectrum were to send a letter to Milano so stating, Milano would remit the balance owed (Affirmation of Michael S. Horn, dated June 30, 2014, Exhibit 10, at 44). This is merely evidence of a subsequent agreement or modification to the prior agreement. Assuming, arguendo, that Spectrum's May 26, 2010 letter, in which it agreed to take back and give credit for

returned goods, is admissible against Milano, the letter could only be interpreted as demonstrating an agreement (Neuman Affirm., Ex. G at 1). Thus, as the alleged damages for both the conversion and the contract claims are the same, the conversion claim is dismissed.

Regarding Spectrum's punitive damages claim, ordinarily "punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved" (*Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 295 [1st Dept 1983] [quotation marks and citation omitted]; *see also New York University v Continental Ins. Co.*, 87 NY2d 308, 315 [1995]). Punitive damages are rare even in commercial tort cases, such as fraud, as they are only appropriate in extreme cases where a defendant "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011], quoting *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). "Mere commission of a tort, even an intentional tort requiring proof of common-law malice, is insufficient; there must be circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant" (*id.*). The record reveals no allegation or indication of the type of behavior that would warrant the imposition of punitive damages. Accordingly, Spectrum's claim for punitive damages is dismissed.

Spectrum's claim for attorneys' fees is also not viable, as it fails to allege that the parties entered into an "unmistakably clear" agreement for such fees (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010]). In addition, Spectrum cannot claim entitlement to recoup

legal fees pursuant to 22 NYCRR §130-1.1 based on allegations of frivolous conduct predating the commencement of the action. Therefore, Spectrum's cause of action for recovery of attorneys' fees is dismissed. In light of the foregoing, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted to the extent that the plaintiff's cause of action for conversion and claims for punitive damages and attorneys' fees are dismissed and the motion is otherwise denied.

Dated: June 8, 2015

ENTER:

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