

**Harold Levinson Assoc., Inc. v Super Value Distribs.  
Inc.**

2015 NY Slip Op 32779(U)

October 5, 2015

Supreme Court, Nassau County

Docket Number: 601143-14

Judge: Vito M. DeStefano

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 13  
NASSAU COUNTY

\_\_\_\_\_  
**HAROLD LEVINSON ASSOCIATES, INC.,**

**Decision and Order**

**Plaintiff,**

**MOTION SEQUENCE: 02,03**  
**INDEX NO.: 601143-14**

**-against-**

**SUPER VALUE DISTRIBUTORS INC.,**  
**and ALTAF OZA,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on the motions:**

Notice of Motion	1
Notice of Cross Motion	2
Reply Affirmation	3
Reply Affirmation	4

The Plaintiff, Harold Levinson Associates, Inc. (“Plaintiff”), moves for “an Order pursuant to CPLR 2221(d) and CPLR 2221(e), “permitting reargument and renewal, and upon such reargument and renewal, modifying the Court’s Order dated April 2, 2015 (DeStefano, J.) to grant Plaintiff’s prior motion for summary judgment on the Second, Third and Fourth Causes of Action in the Complaint, or, alternatively, pursuant to CPLR 3212(c), to grant Plaintiff’s prior motion for summary judgment as to liability on the Second, Third and Fourth Causes of Action as set forth in the Complaint,<sup>1</sup> and to further set the matter down for a hearing on the amount of damages on said causes of action” (Motion Seq. No. 2).

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<sup>1</sup> The Plaintiff argues that “reargument and renewal are warranted” because, given the “Court’s determination in the Order that Plaintiff met its *prima facie* burden to merit summary judgment as a matter of law, summary judgment pursuant to CPLR 3212(c) should be granted as to liability on the Second, Third and Fourth Causes of Action, and the matter set down for a hearing on the amount of damages.”

The Defendants cross-move for the following relief: “Granting the Defendants’ cross motion for reargument and renewal pursuant to CPLR 2221(d) and CPLR 2221(e)”; “Denial of Plaintiff’s motion for reargument and renewal pursuant to CPLR 2221(d) and CPLR 2221(e)”; “Denial of Plaintiff’s request pursuant to CPLR 3212(c) and deny summary judgment as to liability on the Second, Third and Fourth causes of actions” (Motion Seq. No. 3).

### The Plaintiff’s Motion

The Plaintiff’s motion is denied except for the branch thereof seeking renewal. As a matter of discretion, the court grants renewal and, upon renewal, adheres to its original determination.

The Plaintiff’s basis for renewal of its underlying motion for summary judgment is set forth in Plaintiff’s counsel’s supporting affirmation as follows:

In denying Plaintiff’s motion for summary judgment, the Order (Exhibit “A”, at page 3) relied on certain exhibits. However, a review of the eCourts electronic filing system docket entries shows that *one critical page* of one of Plaintiff’s Reply Exhibits, Reply Exhibit “J” (Docket Entry 32) (Spreadsheet), referred to in the Order was actually missing due to an evident clerical error by Affirmant’s law office<sup>2</sup> - and its omission from being electronically filed obviously caused the Court to deny summary judgment as is clear from the Order as the factual issues raised by the Court were actually addressed in the missing page of the exhibit! To be clear, that exhibit was part of Plaintiff’s reply submission and was expressly referred to, and commented on, in Plaintiff’s reply affidavit.

It is, therefore, respectfully submitted that, upon consideration of the missing page, the Court would have granted summary judgment on the Second, Third and Fourth Causes of Action. As such, renewal is warranted to modify the Order to grant summary judgment in Plaintiff’s favor. . . .

\* \* \*

Thus, in accordance with the **full** Exhibit “J”, the payments made by Defendants on those dates referenced in the Order, as well as numerous other dates, were actually fully credited to Defendants’ accounts, and Defendants were given each and every

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<sup>2</sup> “Law office failure can be accepted as a reasonable excuse in the exercise of the court’s sound discretion” (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2d Dept 2008]; *see also Gordon v Boyd*, 96 AD3d 719, 720 [2d Dept 2012]).

credit deserved, with a balance of \$398,184.59 *still* due, owing and entirely outstanding (Affirmation in Support of Motion at ¶¶ 2, 3, 12, 13).<sup>3</sup>

Contrary to Plaintiff's counsel's affirmation, the court notes that, in its order dated April 2, 2015 ("prior order"), it did not "refer" to "one critical page" that was "missing". Rather, the court stated (citations to the record omitted):

In opposition, the Defendants submit the affidavit of the Defendant Oza wherein he alleges, upon information and belief, that no monies are owed to the Plaintiff for the relevant time period. Oza further states that all deliveries since on or about February 2010 have been on a COD basis and they have invoices from that time period marked "paid", but that the "full extent of all payments made and the actual balances that may be owed to the plaintiff can only be confirmed after discovery is completed".

In this regard, the Plaintiff submitted certain monthly balance sheets accompanied by the corresponding invoices for the months of January and February 2014 to prove the amount of monies owed by Defendants. On several of the invoices, however, there appear to be notations indicating monies that were paid on the date of the invoice that do not appear on the balance sheets as credits or amounts paid. For example, the January 25, 2014 invoice indicates the amount of \$41,787.73 was paid and on January 28, 2014, \$39,135.73 was paid. On the corresponding balance sheet, there is no indication of these payments received or credited to the account (Ex. "A" to Motion at pp 3-4).

Notwithstanding Plaintiff's mischaracterization of the court's prior order, the court has considered the spreadsheet page previously omitted from Plaintiff's underlying motion and is still unable to ascertain the total amounts paid by the Defendants and the balances to which those payments were credited. In this regard, the court notes the parties' dispute as to whether payments were credited to prior balances owed or, rather, were made on a COD basis for current amounts due. Accordingly, Plaintiff has not established entitlement to summary judgment.

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<sup>3</sup> According to the Plaintiff's Accounts Receivable Manager, the spreadsheet annexed to the underlying motion as Exhibit "J" to Plaintiff's Reply Affidavit showed that all of Defendants' payments in January and February 2014 (which totaled \$626,907.72) were applied to Defendants' open balances from invoices in December 2013 and January 2014, "specifying each invoice which was credited", and that after such payments were applied to Defendants' accounts and credited accordingly, the Defendants still owe \$398,184.59.

### The Defendant's Cross Motion

The Defendants' cross motion is granted only insofar as it seeks renewal. It is noted that the Defendants seek renewal of the branch of the Plaintiff's motion to the extent that it requested summary judgment on the fourth cause of action (in connection with the guarantee), which resulted in a finding by the court that the subject guarantee was valid and enforceable (CPLR 3212[g]). In view of the court's discretionary grant of renewal of the Plaintiff's motion, it also grants renewal of the motion to permit consideration of the evidence proffered by the Defendants herein. In this regard, Defendants argue that information which they deem critical was not conveyed to the court on the underlying motion consisting of two pages of an unsigned three-page guarantee from 2010.<sup>4</sup> Upon consideration thereof, the court concludes that it has no bearing on the validity of the signed guarantee and, thus, adheres to its original determination, which includes the finding that the guarantee contained within the "New Account Application" was valid and enforceable.

### **Conclusion**

Based on the forgoing, it is hereby

Ordered that the motion of the Plaintiff (Motion Seq. No. 2) is granted to the extent that it seeks renewal of its prior motion; upon granting renewal, the court adheres to its prior determination; and it is further

Ordered that the cross motion of the Defendants (Motion Seq. No. 3) is granted to the extent that it seeks renewal of a prior motion; upon granting renewal, the court adheres to its prior determination;

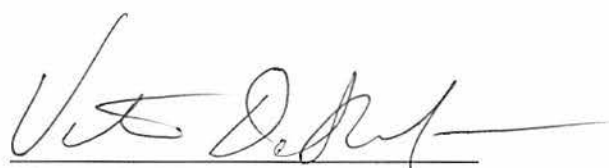
Ordered that in all other respects the motion and cross motion are denied.

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<sup>4</sup> The court held in its prior order dated April 2, 2015 that the guarantee contained in the "New Account Application" dated March 18, 1996, was clear and unambiguous on its face and, thus constituted a valid and enforceable guarantee rather than "just a credit application", as argued by the Defendants (*see HSBC Bank USA, National Association v Laniado*, 72 AD3d 645 [2d Dept 2010]; *Sullivan County Wholesalers, Inc. v Cornwall Construction Co., Inc.*, 90 AD2d 914 [3d Dept 1982]). In support of their contention that the guarantee contained within the "New Account Application" was "just a credit application" and not a guarantee, Defense counsel argues that "it is clear" that the reason Plaintiff asked Defendant Oza "to sign the guarantee agreement in October 2010 was because there was no guarantee agreement in place prior to that date" (Affirmation in Support of Cross Motion at ¶ 15).

This constitutes the decision and order of the court.

Dated: October 5, 2015



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

OCT 08 2015

NASSAU COUNTY  
COUNTY CLERK'S OFFICE