Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

STARZPACK, INC.,

Plaintiff(s),

- against -

TERRAFINA, LLC,

Defendant(s).

Index No.: 705312/15
Motion Date: 10/27/15
Motion Cal. No.: 155
Motion Seq. No: 1

The following papers numbered 1 - 9 read on this motion by plaintiff to dismiss the affirmative defense of accord and satisfaction asserted by defendant, pursuant to CPLR § 3211[b].

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affidavit in Opposition-Service.....	5 - 6
Memorandum of Law.....	7
Reply Memorandum-Service.....	8 - 9

Upon the foregoing papers it is **ORDERED** that the motion is determined as follows:

Plaintiff in this breach of contract action seeks damages based upon defendant's failure to pay for goods sold and delivered to defendant. To recover payment for the goods, plaintiff commenced the instant action alleging causes of action for breach of contract, account stated and goods sold and delivered. Issue was joined when defendant filed its verified answer. In its answer, Terrafina asserted an affirmative defense of accord and satisfaction. Plaintiff moves to dismiss the affirmative defense and for summary judgment in its favor. Defendant opposes the motion.

FACTS

The record indicates the following: on or about December 30, 2014, plaintiff and defendant entered into an agreement for the sale of flexible packaging goods at the price of $10,079.81. On

or about February 10, 2015, plaintiff and defendant also entered into an agreement for the sale of flexible packaging good at the price of $57,385.45. Plaintiff shipped the goods, in conformance with the contract for sale of the goods, and the goods were accepted by defendant without comment. The price of the goods was indicated in each of the invoices.

A course of business had been previously established between plaintiff and defendant whereby defendant would pay for the shipped goods within 60 days of receipt. Starting on March 3, 2015, plaintiff sent several demands for payment to defendant. On or about April 10, 2015, through its attorney, plaintiff sent a formal demand to defendant stating that monies were owed to plaintiff in the amount of $67,465.26. In an email to plaintiff's attorney dated April 27, 2015, defendant responded to the formal demand with an acknowledgment that the amount in the invoices was not disputed. Notwithstanding the cited communications, plaintiff has not received payment from defendant to date.

Plaintiff submits, with respect to its first cause of action for breach of contract and its third cause of action for goods sold and delivered at the request of defendant, that it sold and delivered to defendant the goods at the agreed upon price totaling $67,465.26; that plaintiff performed all conditions, covenants and promises required on its part to be performed in accordance with the sale of good; and that defendant accepted the goods in the amount of $67,465.26, without return or rejection.

In its answer, defendant Terrafina asserts an affirmative defense which Terrafina purports to be the defense of Accord and Satisfaction. Specifically, defendant alleges that "in exchange for Terrafina agreeing to continue the business relationship between the parties, [StarzPack] offered, and Terrafina accepted, a credit of $72,387.89," and that this "bargained-for credit effectively wipes away any debt arising from the invoices which are the subject matter of the Complaint". In moving for summary judgment in its favor and dismissal of the affirmative defense, plaintiff contends that the affirmative defense is not pled properly and, in any event, lacks merit.

DISCUSSION

"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR § 3211 [b]; *see Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 882 [2011]). "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a

matter of law'" (*Mazzei v Kyriacou*, 98 AD3d 1088, 1088 89 [2012]; *Greco v Christoffersen*, 70 AD3d 769, 771 [2010]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2006]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2008]).

The party asserting the affirmative defense of accord and satisfaction must establish that there was a genuine dispute regarding an unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract (*Trans World Grocers Inc. v Sultana Crackers Inc.*, 257 AD2d 616, 617 [1999]). Here, contrary to defendant's contention, the record does not support defendant's contention that in exchange for defendant agreeing to continue the business relationship between the parties, plaintiff offered, and defendant accepted, a credit of $72,387.89," and that this "bargained-for credit effectively wiped away any debt arising from the invoices which are the subject matter of the Complaint."

Second, even assuming, *arguendo*, that there was a genuine dispute as to the amount owed to plaintiff, defendant has not alleged that the agreement to continue the business relationship between the parties was a new contract entered into to discharge defendant's obligation to pay for the goods delivered and accepted. Moreover, defendant does not allege that the "agreement" was entered into *after* its obligation to pay for the goods arose so as to suggest that the contract could have been made for such a purpose. Indeed no date is attributed to the alleged verbal agreement.

Third, the alleged new contract is unenforceable because the terms are too indefinite (*see In re Licata*, 76 AD3d 1076, 1077 [2d Dept. 2010]["[W]here a contract's material terms are not reasonably definite, the contract is unenforceable"]; *see also Mellen & Jayne, Inc. v AIM Promotions, Inc.*, 33 AD3d 676 [2d Dept. 2006]). Defendant alleges that plaintiff offered and defendant accepted, a credit of $72,387.89, in exchange for defendant agreeing to continue the business relationship between the parties. An agreement between the parties "to continue the business relationship" is a very general description and does not delineate the specific terms to which defendant must adhere to in furtherance of the abstract idea. Indeed, defendant doesn't allege any of the terms of the alleged new contract indicating, for example, the amount of goods sold, the frequency of transactions between the parties, the term of the agreement or any other more specific obligations. Accordingly, since the terms are vague and

indefinite, the alleged contract would be unenforceable (*see In re Licata, supra*).

Fourth, and significantly, in the absence of any writing "subscribed by the party to be charged therewith," the new agreement is insufficient to overcome the mandate of General Obligations Law § 5-701 (a)(1) (*see D'Esposito v Gusrae, Kaplan & Bruno PLLC*, 44 AD3d 512, 513 [2007]; *Nemelka v Questor Mgt. Co., LLC*, 40 AD3d 505 [2007]). In short the alleged new agreement violates the Statute of Frauds because it is not in writing and is an oral agreement which by its terms cannot be performed within one year as it calls for performance of an indefinite duration and is terminable within a year only by its breach (*see D& N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449 [1984]).

The branch of the motion which seeks summary judgment is, therefore, granted. To establish a cause of action to recover damages for breach of contract, plaintiff must demonstrate "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract and resulting damages" (*JP Morgan Chase v J. H. Elec of New York, Inc.*, 69 AD3d 802 [2d Dept. 2010]). Similarly, in an action for goods sold and delivered, a plaintiff must demonstrate that on a certain date, it sold and delivered certain goods to the defendant at the defendant's request; that the goods were of reasonable value or agreed price; and that payment was demanded by the plaintiff, but not made" (*Liquid Media, Inc. v TGG Digital Media, LLC*, 2010 NY Slip Op 30648[U] [Sup Ct, Nassau County 2010]; *see also Boise Cascade Off. Prods. Corp. v Gilman & Ciocia, Inc.*, 30 AD3d 454, 454 [2d Dept 2006]; *Neuman Distribs. v Falak Pharm. Corp.*, 289 AD2d 310, 311 [2d Dept 2001]). A buyer may defeat or diminish the seller's action for goods sold and delivered by alleging a breach of the underlying sales agreement or raising issues regarding the nonconformity of goods, which, if established, could diminish or negate a seller's recovery (*see generally* UCC 2--607, 2--714, 2--717; *Created Gemstones v Union Carbide Corp.*, 47 NY2d 250, 255 [1979]).

"An account stated represents an agreement between the parties reflecting amounts due on prior transactions" (*M & A Constr. Corp. v McTague*, 21 AD3d 610, 611 [3d Dept 2005]; *see also Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993], *lv denied* 82 NY2d 660 [1993]). Where "there is any dispute regarding the correctness of the account, the cause of action fails" (*M & A Constr. Corp.*, 21 AD3d at 612; *see also Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]).

Plaintiff made a *prima facie* showing of its entitlement to judgment as a matter of law on its breach of contract cause of action by tendering admissible evidence that it delivered goods to defendant, for which defendant did not pay (*see Castle Oil Corp. v Bokhari*, 52 AD3d 762, 762 63, [2008]; *Boise Cascade Off. Prods. Corp. v Gilman & Ciocia, Inc.*, 30 AD3d 454 [2006]; *Becker v Shore Drugs*, 296 AD2d 515 [2002]; *Neuman Distribs. v Falak Pharm. Corp.*, 289 AD2d 310, 311 [2001]; *Drug Guild Distribs. v 3-9 Drugs*, 277 AD2d 197, 198 [2000]). The plaintiff also established its *prima facie* entitlement to judgment as a matter of law on its cause of action for an account stated by demonstrating that defendant failed to object to the invoices that the plaintiff sent to him in the ordinary course of business (*see American Express Centurion Bank v Williams*, 24 AD3d 577, 578 [2005]; *Casa Redimix Concrete Corp. v MacQuesten Gen. Contr., Inc.*, 14 AD3d 641, 642 [2005]; *Neuman Distribs. v Jacobi Med. Ctr.*, 298 AD2d 568 [2002]). The defendant's affidavit in opposition to the motion for summary judgment is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Boise Cascade Off. Prods. Corp. v Gilman & Ciocia, Inc.*, 30 AD3d at 455; *Neuman Distribs. v Jacobi Med. Ctr.*, 298 AD2d at 569; *Becker v Shore Drugs*, 296 AD2d at 515; *Drug Guild Distribs. v 3-9 Drugs*, 277 AD2d at 198).

Accordingly, the motion by plaintiff to dismiss the affirmative defense of accord and satisfaction asserted by defendant is granted.

Dated: March 16, 2016

JANICE A. TAYLOR, J.S.C.

FILED

MAR 18 2016

COUNTY CLERK
QUEENS COUNTY