

**GP Precision, Inc. v Solidoodle LLC**

2016 NY Slip Op 32480(U)

November 28, 2016

Supreme Court, Kings County

Docket Number: 508691/15

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 20th day of November, 2016.

**PRESENT:**

Hon. LARRY D. MARTIN, J.S.C.

GP PRECISION, INC.,

Plaintiff,

Motion Sequence #2

-vs-

INDEX No. 508691/15

SOLIDOODLE LLC,

Defendant.

The following papers numbered 1 to 5 read on this motion

Papers Numbered

Notice of Motion and Affidavits (Affirmations) Annexed \_\_\_\_\_

1-2, 3

Answering Affidavit (Affirmation) \_\_\_\_\_

Reply Affidavit (Affirmation) \_\_\_\_\_

Other Papers \_\_\_\_\_

4, 5

Upon the foregoing papers, plaintiff GP Precision, Inc. ("plaintiff") moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor with respect to the allegations in the complaint and for dismissal of defendant's affirmative defenses.

**FACTS & PROCEDURAL HISTORY**

Plaintiff commenced the instant action to recover compensatory damages as a result of an alleged breach by defendant Solidoodle, LLC's ("defendant") of a contract for sale made between the parties. In its amended verified complaint, plaintiff alleges, inter alia, that defendant placed three orders for the purchase of various goods from plaintiff's inventory. With respect to the first purchase order ("Purchase Order #1"), plaintiff alleges that on March 27, 2014 defendant submitted an order for the purchase of goods in the amount of \$25,860.50 (plus freight charges). Plaintiff alleges that on March 28, 2014 it sent defendant a sales order confirmation, indicating that the price for Purchase Order #1 had increased to \$26,425.75 (plus freight charges). According to plaintiff, defendant accepted delivery of Purchase

Order #1 on May 9, 2014, upon which plaintiff sent defendant an itemized invoice for the amount of \$27,456.67. Following the initial transaction, on April 22, 2014 defendant submitted a second order (“Purchase Order #2”) for the purchase of goods in the amount of \$25,860.50 (plus freight charges). Plaintiff claims that defendant accepted delivery of Purchase Order #2 on June 23, 2014, upon which plaintiff sent defendant an invoice for the amount of \$27,134.39. Prior to accepting Purchase Order #2, plaintiff alleges that it sent defendant a sales order confirmation, dated April 25, 2014, indicating that the price for Purchase Order #2 had increased to \$26,839.25 (plus freight charges).

With respect to the third purchase order (“Purchase Order #3”), plaintiff alleges that on June 12, 2014 defendant submitted an order for the purchase of goods in the amount of \$33,672.50 (plus freight charges). On June 16, 2014, plaintiff sent defendant a sales order confirmation, indicating that the price for Purchase Order #3 had increased to \$35,586.00 (plus freight charges). However, plaintiff claims that on July 15, 2014 defendant requested that Purchase Order #3 be cancelled. In response, plaintiff advised defendant that a cancellation fee would be charged. Plaintiff contends that on September 4, 2014 it sent defendant an invoice in the amount of \$1,697.01, which reflected plaintiff’s fee for the cancellation of Purchase Order #3.

As a result of defendant’s alleged failure to pay the amounts due on the first two orders and the cancellation fee for the third order, plaintiff initiated the instant action. In its amended verified complaint, plaintiff alleges the following causes of action sounding in: (1) breach of contract; (2) goods sold, delivered and accepted in the amount of \$33,134.39, as well as the \$1,607.01 cancellation fee (*see* Amended Verified Complaint, ¶28 ¶29); (3) an account stated based upon defendant’s “promise to pay [plaintiff] in the amount of \$34,831.40, plus interest, costs, late charges, and attorneys’ fees” (*id.* at ¶ 32); (4) book account in the amount of \$34,831.40, among other costs (*see id.* at ¶ 35); and (5) quasi-contract theories of quantum meruit and unjust enrichment. Defendant interposed an amended verified answer on October 22, 2015, in which it denied plaintiff’s allegations and asserted the following affirmative

defenses: (1) failure to mitigate damages; (2) ambiguity; (3) lack of acceptance; and (4) failure to state a claim upon which relief can be granted. Plaintiff now moves for the relief requested herein. The Court notes that defendant has failed to oppose the instant motion.

**DISCUSSION**

***1. Breach of Contract***

Plaintiff, a sheet metal fabricator, alleges that it sold and delivered certain goods to defendant pursuant to a contract between the parties, which plaintiff asserts is evidenced by the purchase orders, sale confirmation orders and invoices that the parties exchanged. Plaintiff contends that defendant breached the parties' agreement by failing to pay for goods that they accepted and by failing to pay the fee for cancelling Purchase Order #3. In support of its motion for summary judgment on its claim for breach of contract, plaintiff proffers, inter alia, the affidavit of Seth Cabbage ("Mr. Cabbage"), the Vice President of Operations at its company, as well as copies of the three purchase orders, with the corresponding sales confirmations and itemized invoices. According to Mr. Cabbage, defendant did in fact submit three purchase orders for certain goods from plaintiff, and in return received three sales order confirmations (*see* Affidavit of Cabbage). However, with respect to Purchase Order #1, Mr. Cabbage avers that "[f]rom August 14, 2014 through January 5, 2015, [d]efendant made payments to [plaintiff] in the aggregate amount of \$21,456.67, leaving a balance due on the 1<sup>st</sup> Order of \$6,000" (Cabbage Affidavit, ¶ 11). Mr. Cabbage further avers that defendant did not make any payments on Purchase Order #2 (*id.* at ¶ 12).

With respect to Purchase Order #3, Mr. Cabbage avers that "[o]n June 12, 2014, [plaintiff] provided [d]efendant with a quotation bearing number 5011681, which provided estimated cost and delivery times for certain goods and notified [d]efendant that cancelled orders are subject to cancellation fees" (Cabbage Affidavit, ¶ 17). However, Mr. Cabbage contends that defendant did not tender any payment for its cancellation of Purchase Order #3 (*id.* at 24). Ultimately, Mr. Cabbage avers, defendant

failed to pay off its remaining balance under the three purchase orders, and, “[a]s of and including June 11, 2015, the total amount of \$34,831.40 was due under the Orders, consisting of \$33,134.39 remaining due on the 1<sup>st</sup> and 2<sup>nd</sup> Order, and a \$1,697.01 cancellation fee for the 3<sup>rd</sup> order” (*id.* at ¶26 ¶27). In support of Mr. Cabbage’s assertions, plaintiff proffers a copy of its account statement for defendant, which reflects the outstanding balance of \$34,831.40 that Mr. Cabbage cited (*see* Plaintiff’s Notice of Motion, Exhibit 13).

As an initial matter, the Court notes that the alleged contracts in this matter are governed by the Uniform Commercial Code (“UCC”), as the parties are merchants and the transactions at issue involve the sale of goods (*see* UCC § 2-104 [1]; *Kabbalah Jeans, Inc. v CN USA Intern Corp*, 26 Misc3d 1241[A], 2010 NY Slip Op 50507 [U] [Sup Ct, Kings County 2010]). UCC § 2-206 states, in pertinent part, that “an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods” (UCC § 2-206 [1] [b]). Moreover, UCC § 2-201(2) provides that “[b]etween merchants if within a reasonable time a writing in confirmation of [a] contract and sufficient against the sender is received[,] and the party receiving it has reason to know its contents,” then such writing satisfies the formal requirements of UCC § 2-201(1)<sup>1</sup> for contracts involving the sale of goods, “unless written notice of objection to its contents is given within 10 days after it is received” (UCC § 2-201 [2]).

Pursuant to these rules, the Court finds that the purchase orders defendant sent to plaintiff constituted offers to enter into contracts for sale of the goods specified. Additionally, the Court finds that plaintiff’s sales order confirmations and invoices contained promises to ship the requested goods to defendant, thereby constituting acceptance of defendant’s offers under UCC § 2-206(1)(b). Moreover,

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<sup>1</sup> UCC § 2-201(1) provides, in pertinent part, that: “[e]xcept as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker . . . .”

the sales confirmation orders and invoices, provided by plaintiff in confirmation of the parties' agreements, contained sufficient information to "indicate that a contract for sale ha[d] been made between the parties," as they were in writing, and, among other things, indicated the identity of the parties, the description of the goods and the quantities to be sold (*see* UCC § 2-201 [1], [2]; *see also* *Tetz v Schlaier*, 164 AD2d 884, 885 [2d Dept 1990]; *Multitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169, 169 [1st Dept 2004]). Since defendant did not timely object to the orders, the Court finds that a valid contract was created between the parties even without defendant's signature on the orders (*see* UCC § 2-201 [1]; *Bazak Int'l. Corp. v Mast Industries, Inc.*, 73 NY2d 113, 116 [1989]).

Based upon a review of the record submitted by the parties, and the relevant law, the Court finds that plaintiff has established its prima facie burden of demonstrating its entitlement to summary judgment on its claim sounding in breach of contract. In light of the Court's determination that a valid contract exists between the parties, as well as the fact that defendant does not dispute the aforementioned facts (*see* Holmes Affirmation, Exhibit F, ¶¶ 6-30), the Court finds that no triable issues of fact exist as to this claim (*see* *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, the Court grants that branch of plaintiff's motion for summary judgment on its cause of action for breach of contract.

**2. Payment for Goods Sold & Delivered**

Plaintiff, in its second cause of action, contends that defendant failed to pay for goods that were sold and delivered to it (*see* Holmes Affirmation, Exhibit E). When moving for summary judgment on a claim that goods were sold and delivered to a buyer, the proponent of summary judgment must come forward with "documentary evidence" demonstrating that the amount of goods at issue were in fact supplied to the party alleged to have failed to tender payment (*see* *Boise Cascade Office Products Corp v Gilman & Ciocia, Inc.*, 30 AD3d 454, 454 [2d Dept 2006]; *Neuman Distributors, Inc. v Falak Pharmacy Corp.*, 289 AD2d 310, 311 [2d Dept 2001]; *Drug Guild Distributors v 3-9 Drugs Inc.*, 277 AD2d 197, 198 [2d Dept 2000]). Here, according to Mr. Cubbage, defendant accepted delivery of

Purchase Order #1 and Purchase Order #2 on May 9, 2014 and June 23, 2014, respectively (*id.* at ¶ 9 ¶ 14). Moreover, plaintiff proffers copies of invoices which show that Purchase Order #1 was shipped to defendant on May 9, 2014, and Purchase Order #2 was shipped to defendant on June 23, 2014 (Plaintiff’s Notice of Motion, Exhibits 3 & 7). Notably, plaintiff has not submitted any proof that the shipped goods were actually delivered and accepted by defendant (*compare Neuman*, 289 AD2d at 311). However, in its verified answer, defendant admits to the truth of plaintiff’s allegations that defendant accepted delivery of the first and second purchase orders, thereby rendering this fact undisputed (*see id.* at ¶ 8 ¶ 13).

In further support of its second cause of action, plaintiff’s complaint sets forth an itemized list of the ten (10) goods that plaintiff asserts it sold to defendant, the cost of each item and the total amount billed on all of the orders (*see Holmes Affirmation*, Exhibit E, 5). Pursuant to CPLR 3016(f), where a plaintiff “set[s] forth and number[s] in [its] verified complaint the items of [its] claim and the reasonable value or agreed price of each,” the “defendant may not generally deny allegations of the complaint but must, instead, specifically dispute the items on the plaintiff’s list” (*Raytone Plumbing Specialities, Inc. v Sano Contruction Corp.*, 92 AD3d 855, 855-56 [2d Dept 2012]; *Summit Security Services, Inc. v Main Street Lofts Yonkers, LLC*, 73 AD3d 906, 906-07 [2d Dept 2010]). Here, upon a review of the invoices that plaintiff annexed to its moving papers, the Court finds that the amounts therein reflect the amounts set forth in plaintiff’s schedule of goods. As such, the Court finds that the schedule of goods set forth in the amended verified complaint complies with the requirements of CPLR 3016(f) (*compare Raytone*, 92 AD3d at 856). The Court notes that defendant’s verified answer contains general denials of the aforementioned allegations, without proffering any explanation or evidentiary proof for its position (*see Holmes Affirmation*, Exhibit F; *see also European American Bank & Trust Co. v Leonard Masonry, Inc.*, 107 AD2d 657, 658 [2d Dept 1985]).

Based upon a review of the record submitted by the parties, and the relevant law, the Court finds

that plaintiff has established its prima facie burden of demonstrating its entitlement to summary judgment on its claim for goods sold, delivered and accepted. The Court finds that defendant has failed to submit any papers in opposition to raise a triable issue of fact with respect to plaintiff's cause of action for goods sold and delivered (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; compare *Elmo Mfg. Corp. v American Innovations Inc.*, 44 AD3d 703, 704 [2d Dept 2007]). Accordingly, the Court grants that branch of plaintiff's motion for summary judgment on this claim.

**3. Account Stated**

Plaintiff next argues that it is entitled to summary judgment on its third cause of action for recovery on an account stated against defendant. An account stated "represents an agreement between the parties reflecting an amount due on a prior transaction" (*Cameron Engineering & Assoc., LLP v JMS Architect & Planner*, 75 AD3d 488, 489 [2d Dept 2010]). In order to recover under this theory, there must be an agreement in existence between the parties "with respect to the amount of the balance due" (*id.*). Such an agreement "may be express or [sic] implied from the retention of an account for an unreasonable period of time without objection and from the surrounding circumstances" (*Landau v Weissman*, 78 AD3d 661, 662 [2d Dept 2010]). Here, the Court finds that the purchase orders and sales order confirmations establish the existence of an express agreement between the parties. Plaintiff asserts that an account was stated against defendant in the sum of \$34,831.40, which represents defendant's outstanding balance of \$33,134.39 plus the \$1,697.01 cancellation fee. Since these amounts are corroborated by the invoices proffered by plaintiff, the Court finds that plaintiff has sufficiently demonstrated "that the parties came to an agreement with respect to the amount of the balance due" (*Raytone*, 92 AD3d at 856). Moreover, as noted earlier, given that the amended verified complaint contained an itemized schedule of goods, defendant's general denials of these allegations in its answer are insufficient to raise any triable issues of fact (compare *Summit*, 73 AD3d at 907; see *Dublan v Platt*, 23 AD2d 660, 660 [2d Dept 1965]). Accordingly, the Court grants that branch of plaintiff's motion

seeking summary judgment on its third cause of action based on an account stated.

**4. Book Account**

Plaintiff further argues that it is entitled to summary judgment on its fourth cause of action for recovery on a book account against defendant. The Court notes that such a cause of action is statutory in nature and there is no statute in New York which authorizes the action (*see Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]; *1 Corpus Juris Secundum, Account, Action on, Book Account or Book Debt*, § 42). Accordingly, the Court denies that branch of plaintiff's motion for summary judgment on its fourth cause of action for a book account as moot.

**5. Quantum Meruit / Unjust Enrichment**

Plaintiff further contends that it is entitled to recovery under the quasi-contract theories of quantum meruit and unjust enrichment. The Court notes the general rule that "[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum-meruit and unjust enrichment for events arising out of the same subject matter" (*Marc Contracting, Inc. v 39 Winfield Associates, LLC*, 63 AD3d 693, 695 [2d Dept 2009]). Here, the existence of a valid contract, i.e., the purchase orders, precludes plaintiff's claim of quantum meruit and unjust enrichment (*see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758-59 [2d Dept 2009]; *Marc Contracting*, 63 AD3d at 695). Accordingly, the Court denies that branch of plaintiff's motion for summary judgment on its fifth cause of action as moot.

**6. Defendant's Affirmative Defenses**

Plaintiff also seeks summary judgment dismissing defendant's affirmative defenses. In its verified answer, defendant raises four affirmative defenses to plaintiff's allegations: (a) failure to mitigate damages<sup>2</sup>; (b) ambiguity; (c) lack of acceptance; and (d) failure to state a claim upon which relief can be granted. As an initial matter, the Courts notes that defendant has failed to set forth any legal arguments

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<sup>2</sup> The Court notes that defendant's answer erroneously states that "defendant" failed to mitigate damages rather than citing plaintiff's failure to do so.

or proffer any evidentiary proof to support any of the aforementioned affirmative defenses. In this regard, the Court grants that branch of plaintiff's motion for summary judgment seeking dismissal of defendant's affirmative defenses.

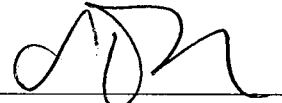
**CONCLUSION**

Accordingly, the Court grants that branch of plaintiff's motion for summary judgment on its first cause of action for breach of contract, its second cause of action for goods sold and delivered, and its third cause of action for an account stated. The Court further grants that branch of plaintiff's motion for summary judgment which seeks dismissal of defendant's affirmative defenses. Those branches of plaintiff's motion seeking summary judgment on its fourth cause of action for a book account, and its fifth cause of action for unjust enrichment and quantum meruit, are denied as moot.

Plaintiff is directed to settle order on notice.

ENTER,

NOV 28 2016



HON. LARRY D. MARTIN,  
J.S.C.

For Clerks use only  
MG\_\_\_\_  
MD\_\_\_\_  
Motion Seq. #