

EPF Intl. Ltd. v Lacey Fashions Inc.

2017 NY Slip Op 32326(U)

October 29, 2017

Supreme Court, New York County

Docket Number: 153154/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

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EPF INTERNATIONAL LIMITED

INDEX NO. 153154/2016

Plaintiff,

MOTION DATE

- v -

LACEY FASHIONS INC.,

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion is granted.

Plaintiff EPF International Limited (EPF) moves, pursuant to CPLR 3212 (a), for summary judgment on its second cause of action, which alleges an account stated. Defendant Lacey Fashions Inc. opposes the motion. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is granted.

Plaintiff has shown that: (1) it sent defendant a number of invoices, seeking payment for goods delivered in 2014 and 2015 ("the Invoices"); (2) defendant retained the Invoices for up to a year, without disputing the validity of any of them; and (3) defendant made two partial payments, one in the sum of \$5,000.00, and the other in the sum of \$5,010.00. See Chan affirmation, exhibit F. Accordingly, plaintiff has made a prima facie case that it is entitled to judgment as a matter of law. See Jaffe v Brown-Jaffee, 98 AD3d 898, 899 (1st Dept 2012) ("[E]ither retention of bills

without objection or partial payment may give rise to an account stated”), quoting *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 (1st Dept 2004).

Defendant argues that plaintiff failed to submit any evidence of how, and by whom, the Invoices were sent, or of a regular office mailing procedure. Chan Chi Yau, plaintiff’s executive director, states in her affirmation that EPF regularly faxed its invoices to defendant after its goods were shipped. While nonparty Elliott Brill, defendant’s former chief executive officer, states, in his affidavit, that he never authorized EPF to fax its invoices, he does not state that the parties had an agreement that required EPF to use a different method of sending its bills. Nor does Mr. Brill deny that defendant received the Invoices. He merely avers that he has no specific memory of having received them, and he does not dispute that he made the partial payments. Instead, he states that defendant is no longer in operation and, noting that the Invoices do not state whether they include a past balance, he claims that he would need a record of every invoice that defendant received from EPF over their 15-year business relationship, as well as every payment made by defendant, in order to ascertain whether defendant owes any money to EPF.

However, Mr. Brill does not contend that he ever questioned an Invoice prior to signing his current affidavit. See *Zanani v Schwimmer*, 50 AD3d 445, 446 (1st Dept 2008) (a party opposing a claim for an account stated must make a detailed showing of contemporaneous objection to bills). More generally, “[a] party opposing summary judgment must submit proof in evidentiary form or explain the failure to do so.” *Flomenbaum v New York Univ.*, 71 AD3d 80, 86 (1st Dept 2009) *affd* 14 NY3d 901 [2010], citing *Barbour v Knecht*, 296 AD2d 218, 227 (1st Dept 2002). A motion for summary judgment “may not be defeated merely by surmise, conjecture or suspicion.” *Shaw v Time-Life Records*. 38 NY2d 201, 207 (1975); see also *Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 672 (1st Dept 2007). Defendant has failed to present any

evidence that a trial is necessary or that evidence contradicting plaintiff's claim exists but is unavailable.

Defendant also challenges the admissibility of the Invoices on the ground that Ms. Chan lacks personal knowledge of their transmittal. In her reply affirmation, Ms. Chan states that she has been the executive director and sales manager of plaintiff since 2013 and that, in those positions, she has overseen the execution of the purchase orders for EPF's goods (entering handwritten purchase orders into EPF's computer system), the shipping and delivery of those goods, and the invoicing of EPF's clients for the goods delivered. In support of the motion, she describes EPF's regular practice of generating and sending invoices. Specifically, she states that a copy of the typed purchase order is sent to the client for confirmation, upon receipt of which an EPF clerk enters the data into EPF's computer system, which then generates a pro forma invoice, which is sent to the client for final approval. When the signed pro forma invoice is returned, EPF produces the ordered goods and ships them to the client. Once EPF receives proof of delivery from the shipper, the final invoice is generated and faxed to the client. Ms. Chan further represents that the Invoices were generated in this manner, and that it is part of EPF's regularly conducted business to create and retain copies of the pro forma invoices, proofs of delivery, and final invoices, such as those submitted in support of the motion. Additionally, she states that the Invoices were faxed by Luigi Cheung, an EPF employee, on the date of the fax. Accordingly, the Invoices are admissible under the business records exception to the hearsay rule. CPLR 4518 (a); *People v Kennedy*, 68 NY2d 569, 575-580 (1986); *Clarke v New York City Tr. Auth.*, 174 AD2d 268, 272-273 (1st Dept 1992).

Ms. Chan further states that, on September 20, 2015, at defendant's request, EPF sent additional copies of the Invoices by email, and that the said email clearly states the balance due on

each Invoice and the total balance owed. *See* Chan reply affirmation, exhibit G at 1. Defendant made its partial payments two months after receiving that email. *See* Chan affirmation, exhibit F.

While reply papers may not be used to present evidentiary facts that should have been made in a party's prima facie case (*Batista v Santiago*, 25 AD3d 326, 326 [1st Dept 2006]), a reply may be used, as here, to show that evidence presented in the party's initial papers is admissible, when the opposing party has challenged such admissibility. *Castano v Wygand*, 122 AD3d 476, 477 (1st Dept 2014); *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 51 (2d Dept 2014).

Finally, defendant argues that plaintiff, a foreign corporation, is not registered to do business in New York and, therefore, is barred from bringing this action by Business Corporation Law § 1312 (a). However, defendant fails to substantiate this argument. The shipment of goods into New York does not, in and of itself, constitute doing business in the State (*Von Arx, AG. v Breitenstein*, 41 NY2d 958, 960 [1977]; *S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 374 [2d Dept 1998]), and Mr. Brill's statement that "a representative of Plaintiff travels to New York at least once a year to meet with their various clients" (Brill aff, ¶ 13) is neither supported by any facts nor claimed to be made on the basis of personal knowledge.

While defendant served discovery requests several weeks before EPF made the instant motion, defendant's contention that there might be evidence to contradict the evidence of the Invoices is completely speculative. It is also refuted by exhibit G to Ms. Chan's reply affirmation. Therefore, plaintiff is entitled to summary judgment on its second cause of action based on an account stated.

Since the second cause of action seeks essentially the same relief as the first cause of action, which seeks damages for goods shipped to and accepted by defendant, and the third cause of action seeks the alternative relief, a judgment on the second cause of action disposes of this matter.

Finally, although plaintiff seeks interest from January 1, 2015, a date which plaintiff characterizes as “a reasonable intermediary date from which the Invoices were delivered to defendant” (Plaintiff’s mem. of law at 8), that date is arbitrary and, instead, interest is granted from September 20, 2015, when plaintiff emailed its invoices to defendant.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff EPF International Limited for summary judgment on its second cause of action based on an account stated is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Lacey Fashions Inc. in the amount of \$59,050.42, together with interest at the statutory rate from September 20, 2015, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff’s first and third causes of action are rendered academic; and it is further

ORDERED that this constitutes the decision and order of the court.

10/29/2017

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

DO NOT POST

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE