

Sysco Metro N.Y., LLC v 99 Miles to Philly, Inc.

2017 NY Slip Op 32501(U)

November 2, 2017

Supreme Court, New York County

Docket Number: 651195/2015

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SYSCO METRO NEW YORK, LLC,
Plaintiff,

Index No.: 651195/2015

- v -

Motion Date: 10/03/2017

99 MILES TO PHILLY, INC. and BRADLEY KRANZ
a/k/a BRAD KRANZ,

Motion Seq. No.: 001

Defendants.

Motion Cal. No.:

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>	
_____	1
_____	2
_____	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion for summary judgment of the plaintiff shall be granted.

Plaintiff moves for summary judgment on its account stated claims. By affidavit in support, plaintiff sets forth that

- on January 12, 2006, the defendant corporation executed a credit agreement, under which defendant corporation agreed to credit terms for purchase of goods, wares, and merchandise from plaintiff, which merchandise plaintiff thereafter delivered to defendant; under such credit agreement, individual defendant Bradley Kranz executed an "Individual Personal Guarantee" in which he agreed to be individually bound to pay any debts of defendant corporation thereunder;
- on or about December 18, 2012, defendant corporation executed and delivered to plaintiff a Customer Authorization Agreement for ACH Debit Direct Payments that authorized plaintiff to initiate ACH debit payments from the checking account of defendant for such merchandise;

Check One: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- on October 15, 2014, plaintiff attempted to make an ACH debit for payment of defendant's account in the amount of \$48,749.73, which was rejected for insufficient funds, and no part of such amount has been paid.
- on or about October 3 and 15, 2014, plaintiff delivered, and defendant accepted without objection, goods at the agreed upon price of \$25,286.53.
- on or about October 3 and 15, 2014, plaintiff delivered to defendant corporation, without objection, ten (10) separate account statements that set forth invoices for \$25,286.53 plus the rejected ACH payment in the amount of \$48,749.73, totaling \$73,467.15. No part of such debt has been paid.

Defendant responds with the affirmation of his attorney, in which he contends that plaintiff has not established its prima facie case for summary judgment on its account stated claim.

The court finds that the defendant has failed to introduce evidence on this motion to rebut plaintiff's prima facie case that goods were sold and delivered and billed for. The defendant does not dispute that it received plaintiff's invoices and defendant further does not assert that it objected to plaintiff's invoices as to either the amounts billed for or the quality of the goods delivered.

As stated by the First Department

The IAS Court, in granting plaintiff summary judgment and dismissing the counterclaims in the underlying action for goods sold and delivered and for an account stated, properly determined that the defendant had failed to submit sufficient documentary evidence, raising genuine triable issues of fact, in support of its defenses and counterclaims, so as to preclude summary judgment in plaintiff's favor.

The uncontroverted evidence established a sale and delivery of the goods in question, the defendant's

acceptance of the goods and its failure either to pay the agreed upon price or raise any objection to the sale terms, as reflected in the invoices, when the goods were delivered or within a reasonable time thereafter.

Sunkyong America, Inc. v Beta Sound of Music Corp., 199 AD2d 100, 101 (1st Dept 1993) (citations omitted).

Similarly in this action, defendant has failed to present any evidence that it ever objected to the sale terms as reflected in the invoices, specifically, as argued by plaintiff, because the defense attorney's affirmation is insufficient to raise an issue of fact. See Martinelli v Shifrin, 260 AD2d 227, 228-229 (1st Dept. 1990). The court, therefore, determines that the measure of damages is the amount demanded in the invoices as reflected in the plaintiff's complaint and the court shall direct judgment therefore.

Given that the individual personal guarantee signed by defendant is unconditional, plaintiff has met its burden against such defendant.

However, as the invoices do not set forth the disbursements or attorney's fees, no account stated has been established for such fees, and a hearing on the amount of the disbursements and reasonable value of such attorneys fees for breach of the credit agreement must be conducted. See Mead v First Trust & Deposit Co., 60 AD2d 71, 76-77 (4th Dept. 1977).

Accordingly, it is

ORDERED and ADJUDGED that plaintiff's motion for summary judgment is GRANTED; and it is further

ORDERED that this court refers the issue of damages with respect to attorneys fees and disbursements to be assessed against defendants 99 Miles to Philly, Inc. and Bradley Kranz for determination pursuant CPLR 3215(b) to a Special Referee and that within 20 days from the date of this Order the plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to determine pursuant to CPLR 4317; and it is further

ORDERED and ADJUDGED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the sum of \$73,467.15 with interest at the statutory rate as calculated by the Clerk of \$ _____ from the date of August 1, 2003, until the date of entry of judgment, together with costs and disbursements as taxed by the Clerk of _____, and attorneys fees and disbursements as set forth in the report in the amount of \$ _____ for a total of \$ _____.

This is the decision and order of the court.

Dated: November 2, 2017

ENTER:

[Handwritten Signature]
DEBRA A. JAMES J.S.C.