

<b>TBF Fin. LLC v Owens Funeral Home, Inc.</b>
2018 NY Slip Op 31667(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 158293/2017
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM**

*Justice*

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TBF FINANCIAL LLC

Plaintiff,

- v -

OWENS FUNERAL HOME, INCORPORATED,

Defendant.

INDEX NO. 158293/2017

MOTION DATE 01/31/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents,

Nonparty CIT Finance and defendant, Owens Funeral Home, entered into an equipment lease on or about March 5, 2015. The equipment, a photocopier/printer, was delivered on March 17, 2015. The agreement was assigned to plaintiff, TBF Financial, LLC. No lease payments were ever made for the leased property. On the delivery date, defendant signed a Delivery and Acceptance Certificate (the "Certificate"). In the Certificate, defendant unconditionally accepted the photocopier/printer as satisfactory. Despite signing the Certificate, defendant claims that it complained immediately that photocopier/printer did not work as promised. Upon defendant's continued nonpayment, plaintiff filed the instant action alleging three causes of action that were raised, (1) breach of contract, (2) accounts stated, and (3) unjust enrichment. The instant motion brought by plaintiff seeks summary judgment for the outstanding payments. In support of the motion for summary judgment plaintiff submitted the affidavit of Adam Boehm, the manager of plaintiff setting forth the facts, the lease, the Certificate and the bill of sale from CIT to plaintiff.

Defendant submitted both an affidavit in opposition to the motion for summary judgment and an objection letter.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

A plaintiff seeking summary judgment on a breach of contract claim needs to establish a *prima facie* showing of all of the elements of a breach of contract. Under New York law “[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage” (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]).

Plaintiff has established its *prima facie* case, through the affidavit of Boehm and the exhibits. Thus, the burden shifted to defendant to raise a genuine issue of material fact in dispute. In opposition, defendant raised specific and factual allegations various ways in which the photocopier/printer failed to work properly and questions whether plaintiff performed its

obligations under the contract. As defendant has, sufficiently raised genuine questions of fact as to performance, summary judgment is inappropriate.

“An account stated has long been defined as an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance” (*Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 56 [2nd Dept 2001]). Additionally, to grant summary judgment based on accounts stated, plaintiff’s *prima facie* burden is to prove that it sent defendant invoices, and that defendant failed to object to them within a reasonable time (*Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.*, 37 NY2d 151 [1975]; *Rockefeller Group, Inc. v Edwards & Hjorth*, 164 AD2d 830 [1st Dept 1990]). Even if defendant did not expressly assent, it would be bound by them as accounts stated unless fraud, mistake or other equitable considerations were shown (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 [1st Dept 1983]).

Defendant properly raised that it objected promptly to the invoice and did not assent to the bills. Defendant specified its objections and that it requested that the machine be taken back. As such, summary judgment on the account stated cause of action is denied.

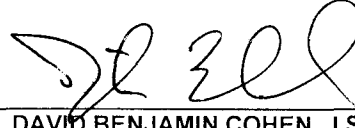
In order for the court to grant summary judgment on a claim of unjust enrichment for the movant the plaintiff must prove “that (1) the defendant was enriched, (2) at plaintiff’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Defendant has properly raised issues of fact that it received any benefit from the machine that it claims did not work and has not been used and that equity would permit a recovery. For the above reasons, it is hereby

ORDERED that the plaintiff’s motion for summary is denied.

This constitutes the decision and order of the Court.

6/29/2018

DATE



DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**HON. DAVID B. COHEN  
J.S.C.**