Capital Bus. Credit LLC v Tailgate Clothing Co., Corp.
2018 NY Slip Op 31757(U)
July 18, 2018
Supreme Court, New York County
Docket Number: 655171/2016
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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CAPITAL BUSINESS CREDIT LLC,

Plaintiff,

- v -

TAILGATE CLOTHING COMPANY, CORP.,

Defendant.

INDEX NO. 655171/2016

MOTION DATE 07/06/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISS DEFENSE.

Upon the foregoing documents, the branches of plaintiff's motion for summary judgment on its second cause of action and to dismiss defendant's first affirmative defense are denied; the branch of plaintiff's motion to amend the caption is granted; and defendant's cross-motion for summary judgment is denied.

In this action, plaintiff Capital Business Credit, LLC asserts claims for breach of contract, account stated, goods sold and delivered, unjust enrichment and quantum meruit, and seeks damages in the amount of $304,001.10. Defendant Tailgate Clothing Company, Corp. (Tailgate) asserts four affirmative defenses in its Answer, the first of which – section 9-404 of the Uniform Commercial Code (UCC) – is one that plaintiff now moves to dismiss pursuant to CPLR 3211 (b). Plaintiff also moves for summary judgment on its second cause of action for an Account Stated and to amend the caption pursuant to CPLR 3025 (b). Defendant partially opposes plaintiff's motion and cross-moves for summary judgment based on its defenses under section 9-404 (a) of the UCC., to which plaintiff opposes.

BACKGROUND

Plaintiff is a company that provides trade finance, credit protection, factoring and other services to vendors of goods (NYSCEF doc. no. 9 - Amato Aff, ¶ 2). Defendant is a supplier of collegiate-themed apparel to retailers throughout the United States and elsewhere (NYSCEF doc. no. 25 - King Aff, ¶ 3). Defendant contracted with non-party Rio Garment, a textile manufacturer in Honduras, to manufacture and ship collegiate-themed clothing under a license agreement

between defendant and the College Licensing Company (CLC) (*id.* at ¶ 12; NYSCEF doc. no. 26). Rio Garment supplies clothing to retailers through its holding company, non-party Rio Asset Holdings LLC (Rio Asset) (NYSCEF doc. no. 9 - Amato Aff, ¶ 2). Plaintiff and Rio Asset are parties to a factoring agreement in which plaintiff agreed to buy, and Rio Asset agreed to sell, Rio Asset's accounts receivable (NYSCEF doc. no. 61 - Cole Aff, exhibit B). Plaintiff, as a factor, was assigned contract receivables attributable to the contract entered between defendant and Rio Garment (*id.*).

Defendant's manufacture and sale of collegiate-themed apparel is enabled through its CLC license (NYSCEF doc. nos. 25 - King Aff., ¶ 6; doc. no. 26 - CLC License). The CLC License maintains protections for college logos and trademarks and provides for royalty and use. It also includes provisions concerning the treatment of the manufacturer's workers as follows:

> "[Tailgate] shall take steps to ensure the following: Manufacturer shall produce the Licensed Articles only as and when directed by the Licensee [Tailgate], which remains fully responsible for ensuring that the Licensed Articles are manufactured in accordance with the terms herein including approval, labor code requirements and royalty payment. . .. Licensee's failure to comply with this Section may result in termination of this Agreement and/or confiscation and seizure of Licensed Articles"

(NYSCEF doc. no. 26 at § 2 [e][6]). With respect to labor code requirements, the CLC License states:

> "Licensee [Tailgate] shall comply, and ensure that all Manufacturers [here, Rio Garment] comply, with labor code and monitoring requirements as established by the respective Collegiate Institutions and as set forth in the Collegiate Licensing Company Special Agreement Regarding Labor Codes of Conduct, which is incorporated herein by reference. . ."

(*id.* § 2 [e][7]). The CLC License also requires defendant to "comply with all applicable laws, regulations, standards and procedures relating or pertaining to the manufacture, use, advertising, distribution or sale of the Licensed Articles" (*id.* § 2 [g]).

Defendant executed a related CLC Special Agreement Regarding Labor Codes of Conduct (CLC Special Agreement) incorporated into the CLC License by reference, which requires defendant "to remain in compliance" with and not be in "breach of" the CLC License (NYSCEF doc. no. 27 – CLC Special Agreement § 1). The CLC Special Agreement sets forth a list of "Labor Code Standards" that obligates defendant and its "subcontractors and manufacturers" to "comply with all applicable legal requirements of the countr(ies) of manufacture in conducting

business related to or involving the production or sale" of the licensed clothing, including ensuring minimum wages to workers along with all "legally mandated benefits" (*id.*, Schedule I § II [A], [B] [1]). Similar standards are also incorporated in the Workplace Code of Conduct (WCC) set by the Fair Labor Association (FLA), to which the CLC Special Agreement requires defendant and its manufacturers to comply (*id.*, Schedule II). In addition, the CLC Special Agreement requires defendant and its manufacturers to "cooperate" with the Worker Rights Consortium (WRC) to "aid[] workers to ensure that violations of College Institution Codes of Conduct are corrected" (*id.*, Schedule III). The CLC License and the CLC Special Agreement were the predicate for all contracts between defendant and Rio Garment to manufacture and sell clothing that incorporated college logos and trademarks licensed by CLC.

On October 16, 2013, Rio Garment executed a letter agreement with defendant agreeing to comply with the WCC, including its requirement that workers be paid a minimum wage and receive any fringe benefits required by law or contract (NYSCEF doc. nos. 25 - King Aff; doc.no. 26 – Certification of Vendor Compliance). On February 4, 2014, Rio Garment entered an Authorized Manufacturer's Agreement (AMA) with CLC under which Rio Garment was approved to manufacture clothing incorporating college logos and trademarks "pursuant to orders placed by [Tailgate], a CLC Licensee" (NYSCEF doc. nos. 25 and 31). Pursuant to the AMA, the authorization granted to Rio Garment was limited to "items only as ordered by Licensee [Tailgate]" in "accordance with a license agreement between CLC and Licensee, which agreement is incorporated herein by reference" (NYSCEF doc. no. 31, §§ 1-2). Also, like the CLC License, the AMA obligated Rio Garment to comply with "all laws, regulations and standards pertaining to the manufacture and distribution" of the manufactured apparel (*id.* § 5 [a]).

In September 2015, Rio Asset purchased Rio Garment (NYSCEF doc. no. 26). In October 2015, Rio Asset entered into a factoring agreement with plaintiff, under which, accounts arising from goods manufactured by Rio Garment would be assigned as collateral for loans issued by plaintiff (NYSCEF doc. no. 27). In January 2016, Rio Garment continued to affirm its agreement to comply with the WCC, including the minimum wage and fringe benefits requirements (NYSCEF doc. no. 29). Rio Garment also implemented an "Employee Reduction and Termination Policy" under which Rio Garment promised all its employees that, upon termination, mandatory compensation will be paid as required under applicable labor laws (NYSCEF doc. no. 30).

On February 1, 2016, with draft purchase orders having been acknowledged and only minor changes made, defendant issued formal purchase orders 6811, 6812, 6813, and 6814 (Rio Purchase Orders) to Rio Garment to manufacture and sell crew t-shirts incorporating college logos and trademarks licensed under the CLC License

and related agreements (NYSCEF doc. nos. 36 - 39). The Rio Purchase Orders included the identity of the goods ordered, the quantities, the pricing, shipment, payment terms, and the shipment cancellation date (*id.*). Defendant alleges that Rio Garment continued its acceptance by manufacturing the goods defendant ordered, and that Rio Garment then delivered the goods to shipping companies in Honduras, which shipped the products to the United States pursuant to the Rio Purchase Orders (NYSCEF doc. no. 36, 43-46).

From approximately April 2016 to August 2016, defendant issued several orders of clothing to Rio Asset (NYSCEF doc. no. 9 – Amato Aff at ¶¶ 3 – 4; doc. no. 12). Rio Garment manufactured the products (*id.*). For each purchase, Rio Asset issued an invoice on Rio Garment letterhead to defendant that bore the following ledger: "This bill and all future bills are assigned to, owned by, and payable only to [] Capital Business Credit LLC" (*id.*; doc. nos. 36, 43-46). Rio Asset issued twelve invoices (the Rio Invoices) to defendant totaling $318,915.45 for these orders (NYSCEF doc. no. 9 at ¶ 5). Defendant received and confirmed each invoice. The Rio Invoices are as follows:

Invoice Number	Date Issued	Date Payment Due	Invoice Amount
2015793	4/29/16	5/23/16	$51,190.65
2016117	6/23/16	7/23/16	$29,289.60
2016118	6/23/16	7/23/16	$88,345.60
2016125	6/24/16	7/24/16	$1,171.20
2016208	7/21/16	8/20/16	$11,824.00
2016209	7/21/16	8/20/16	$13,379.20
2016210	7/21/16	8/20/16	$20,768.00
2016215	7/26/16	8/25/16	$9,241.60
2016216	7/26/16	8/25/16	$10,704.00
2016228	7/27/16	8/26/16	$2,236.80
2016233	8/4/16	9/3/16	$58,684.80
2016234	8/4/16	9/3/16	$22,080.00

(*id.* at ¶¶ 4-5, doc. nos. 12, 36, 43-46).

As of May 2016, plaintiff inquired of defendant on a weekly basis as to the payment status of the Rio Invoices, and defendant consistently affirmed its obligation to pay the invoices (NYSCEF doc. no. 18 - Grbic Aff. at ¶¶ 3-6; doc. no 54). Plaintiff's collections inquiry for defendant's account shows that on June 28, 2016, defendant agreed to pay $118,000 to plaintiff, which included payment for invoice 2015793 for $51,190.65 (*id.*). On July 27, 2016, defendant submitted to plaintiff a payment in the amount of $14,914.35 against the then-outstanding amount of the Rio Invoices – $238,150.65 (*id.*). On August 11, 2016, defendant told plaintiff that it had mailed a check in the amount of $119,437.90 to plaintiff against invoices 2015793, 2016117, 2016118, and 2016125, which totaled $169,997.05 (*id.*; NYSCEF doc. no. 9, ¶ 6).

On or about August 12, 2016, Rio Garment terminated its employees and did not pay severance as required by Honduran law (NYSCEF doc. no. 25 - King Aff., ¶ 15; doc. no. 32). On August 18, 2016, defendant informed plaintiff that payment on the August 11, 2016 check was "stopped because [defendant] got wind that the vendor was cl[o]sing" but that "$119k will be reissue[d] this week" (NYSCEF doc. no. 9 – Amato Aff., ¶ 6; doc. no. 18 – Grbic Aff., ¶ 6). On August 19, 2016, defendant represented that "another check will go out to [plaintiff] for $119[k] the week of 8/22" (*id.*). Plaintiff alleges that defendant never made any additional payments for the Rio Invoices (*id.*).

On August 24, 2016, the WRC contacted defendant "concerning possible labor rights violations at Rio Garment, a factory located in San Pedro Sula, Honduras, that closed on Friday, August 12, 2016 without paying its workers all of the terminal benefits to which they were legally entitled" (NYSCEF doc. no. 25 - King Aff.; doc. no. 32). The notice stated that the applicable college and university labor codes required defendant, as a licensee, "to ensure that their supplier factories comply with all applicable labor laws, including those related to legally required compensation" and urged defendant "to act quickly to ensure that the former Rio Garment workers receive the compensation to which they are legally due under Honduran law" (NYSCEF doc. no. 32).

Between August 2016 and November 2016, the WRC conducted an audit of Rio Garment (NYSCEF doc. no. 25 - King Aff.; doc. no. 33). The WRC determined that the amount of severance owed to the workers was over $2 million (*id.*). On November 4, 2016, the WRC notified defendant of the applicability of Honduran law, including its requirement that all terminated employees receive severance, and reiterated defendant's responsibility under the CLC License and related agreements to ensure "that workers are made whole" (NYSCEF doc. no. 25 - King Aff., doc. no. 34). On November 29, 2016, Yale University, one of the universities that licensed its logos and trademarks under the CLC License, suspended defendant's license "until such time that Yale is notified in writing by WRC that the relevant Rio Garment factory workers are made whole . . . in accordance with section 23 (Code of Conduct)

of our agreement" (NYSCEF doc. no. 25 - King Aff.; doc. no. 35). As a result, defendant alleges that it caused $450,000 to be contributed to a worker's fund established to pay Rio Garment's terminated workers (NYSCEF doc. no. 25 - King Aff., ¶ 19).

On September 6, 2016, plaintiff sent a payment-demand letter to defendant informing it of the payments still due and informed defendant that if it did not immediately tender payment on the outstanding balance of $304,001.10 pursuant to the terms of the assignment notice and the payment terms on the Rio Invoices, plaintiff would initiate legal action to recover the full amount due, as well as interest, attorneys' fees, and costs (NYSCEF doc. no. 9 - Amato Aff.; doc. nos. 10-11). Defendant did not make any further payments after plaintiff sent the demand letter, and on September 29, 2016, plaintiff commenced the instant action.

DISCUSSION

Standard of Review

The standard of review on a motion to dismiss pursuant to CPLR 3211 is well established. The court must assume the truth of the allegations in the pleading and "resolve all inferences which reasonably flow therefrom in favor of the pleader" (*Sanders v Winship*, 57 NY2d 391, 394 [1982]). Under CPLR 3211 (b), a dismissal is warranted if "a defense is not stated or has no merit" (CPLR 3211 [b]). "[T]he plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). A defendant is entitled to the benefit of "every reasonable intendment of the pleading, which is to be liberally construed" (*Warwick v Cruz*, 270 AD2d 255, 255 [2nd Dept 2000]). In connection with a 3211(b) motion, the movant may "submit any evidence that could properly be considered on a motion for summary judgment" (CPLR 3211[c]).

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

UCC § 9-406 (a)

Section 9-406 (a) of the UCC, which is a key provision to this motion and cross-motion will be addressed first. UCC § 9-406 (a) provides that when an account debtor on an "account ... receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee ..., the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor" (UCC § 9-406 [a]). The assignee's right to receive payment on an assigned account is subject to "(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee" (*id.*). However, an account debtor may "only" assert this provision "to reduce the amount the account debtor owes" (*id.*).

Defendant's First Affirmative Defense under § 9-404 (a) of the UCC, states as follows:

> "Rio was contractually obligated under the terms of its agreement with Tailgate and under an Authorized Manufacturer Agreement, dated February 4, 2014, and other documents, to comply with certain applicable human rights and employment and labor laws, certain Labor Codes of Conduct imposed by the Collegiate Licensing Company, the Fair Labor Association Workplace Code of Conduct and the Tailgate Code of Conduct in connection with each of Tailgate's orders. The requirement was a material covenant of Tailgate's contractual relationship with Rio. Rio failed to comply with the policies and laws when it stopped paying wages and severance to its workers, and its owner has been sued for violation of local labor laws, among other matters, and therefore is in material breach of contract. The material breach of contract excuses [defendant] from its obligations to pay [ ] Plaintiff under the invoices."

(NYSCEF doc. no. 11 at 6). Defendant contends that the alleged failure by Rio Garment to comply with applicable laws pursuant to the CLC License and related agreements excuses defendant from paying the Rio Invoices and allows for recoupment under section 9-404 (a) of the UCC. Plaintiff counters that defendant cannot invoke the Rio Garment Agreements against Rio Asset because Rio Asset was not a party to either the AMA, or the October 16, 2013 letter-agreement and the two checklists related to the WCC (together, the Agreements) (NYSCEF doc. nos. 13-16).

Giving defendant the benefit of "every reasonable intendment of the pleading, which is to be liberally construed," plaintiff has not shown that the first affirmative

defense lacks merit (*Warwick*, 70 AD2d at 255). Under UCC § 9-404 (a) (1), the predicate issue is whether defendant's recoupment and contract rights "arise" from the transaction that "gave rise" to the contracts between defendant and Rio Garment. The "transactions" that gave rise to the contracts between defendant and Rio Garment had two components: (1) "transactions" consisting of the CLC License and related agreements granting defendant permission to purchase and sell collegiate-themed apparel manufactured by Rio Garment and (2) "transactions" under which defendant purchased the goods from Rio Garment.

Defendant claims that the goods referenced in the Rio Invoices were negotiated directly with and issued directly to Rio Garment, not Rio Asset, because in acknowledging the Rio Purchase Orders and then manufacturing and shipping the ordered goods, Rio Garment accepted defendant's offers, thereby entering into contracts with defendant that are at issue in this case. The relevant "transactions" that gave rise to the contracts at issue were entered between defendant and Rio Garment through offers – purchase orders – and acceptances – acknowledgement, manufacturing and shipping of goods – by Rio Garment (*see* UCC § 2-204[1] ["A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."]; *id.* § 2-206[1][b] ["Unless otherwise unambiguously indicated by the language or circumstances . . . 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"]).

Defendant's contention is that it is excused from paying the Rio Invoices because Rio Garment, not Rio Asset, purportedly breached the Agreements. The relevant "transactions" included the CLC licenses, the only way that the contracts between defendant and Rio Garment could be entered legally.

Plaintiff counters that the operative contract at issue is the Rio Invoices, in which Rio Asset was to supply and defendant was to purchase collegiate-themed apparel, and that plaintiff's rights as Rio Asset's assignee are subject to that contract. However, as defendant argues, and the court agrees, the Rio Invoices could not be possible without the contract between Rio Garment and defendant, which includes the CLC License and related agreements enabling the sale of collegiate-themed apparel. Thus, this affirmative defense survives plaintiff's motion for its dismissal.

Notwithstanding the above, there are questions of fact as to the validity of defendant's first affirmative defense. Defendant claims that the Rio Purchase Orders as opposed to the Rio Invoices are the applicable contracts but only submitted four of twelve purchase orders, thereby failing to submit all the purchase orders with its cross motion (NYSCEF doc. no. 36 - Garcia Aff.; doc. nos. 39-42).

Thus, defendant has failed to establish its entitlement to summary judgement based on its first affirmative defense (*see Paz v Singer Co.*, 151 AD2d 234, 235 [1st Dept 1989] ["[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it."]; *76-82 St. Marks, LLC v Gluck*, 147 AD3d 1011, 1013 [2d Dept 2017] ["Absent evidence of the complete terms of the guaranty, the plaintiff failed to establish its prima facie case."]).

Moreover, defendant has not submitted documentary evidence showing that it paid severance to Rio Garment's terminated workers in the amount of $450,000. Defendant's statement, without more, that "on March 16, 2017, [defendant] caused $450,000 to be contributed to a fund" (NYSCEF doc. no. 25 - King Aff., ¶ 19), is self-serving and insufficient to warrant summary judgment (*see Zuckerman* 49 NY2d at 562). It is not clear from this statement if defendant made any payment, instead of causing money to be contributed to a fund by some unstated person or entity. Given the questions of fact presented, defendant's cross-motion for summary judgment based on the first affirmative defense is also denied. As such, the parties' respective remaining related contentions are not addressed.

Account Stated

As to plaintiff's second cause of action, "[a]n account stated is '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'" (*Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 377 [1st Dept 1977] [internal citations omitted]). An account stated "arises when one party sends another party a bill for payment of a sum certain, and the recipient fails to object within a reasonable time" (*Sid Paterson Adv., Inc. v Giuffre Auto Group, LLC*, 17 Misc 3d 1127(A) [Sup Ct, NY County 2007] [citing *Shea & Gold v Burr*, 194 Ad2d 369, 370 [1st Dept 1993]). A seller of goods, as well as the seller's payment assignee, may obtain judgment for an account stated (*see Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169, 169-70 [1st Dept 2004]). Where the invoices are sufficiently detailed – for example, by setting forth the type and amount of goods ordered and delivered, the price, and payment due dates – and the buyer of the goods fails to object within a reasonable time, or makes a partial payment of the outstanding amount, there is an account stated (s*ee Mulitex*, 12 AD3d at 170).

Here, plaintiff has established its prima facie case for an account stated. The Rio Invoices were sufficiently detailed as they listed the style, numbers, quantity, description, price for each item, ship date of the goods, and payment due. Defendant accepted the total balance on the Rio Invoices when defendant made a partial payment of $14,914.35 on July 27, 2016 against the first eight of the Rio Invoices (2015793, 2016117-18, 2016125, 2016208-10, 2016215-16, and 2016228) (*see Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626, 626 [1st Dept 1990] [finding that the defendant's "agreement to pay a portion of the

indebtedness[] gave rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor"]). Defendant does not dispute making this payment nor did defendant object to these invoices at the time of the payment. Then, after making this partial payment, defendant failed to object to either of the two subsequent invoices – 2016233-34 – for $80,764.80 in total (*see Coudert Bros. v Finalco Group, Inc.*, 176 AD2d 622, 623 [1st Dept 1991] [finding that "[b]y [defendants'] silence and partial payments, defendants expressed their agreement that the bills were correct and would be paid"]).

However, defendant raises a question of fact as to whether defendant objected within a reasonable time. What constitutes a reasonable lapse between receipt of an invoice and objection "varies with the circumstances that surround the submission of the statements, and those circumstances include ... the relation between the parties" (*Newburger-Morris Co. v Talcott*, 219 NY 505, 511 [1916]). Plaintiff argues that defendant did not object within a reasonable time regarding the Rio Invoices as defendant did not object until submitting its Answer.

But, on August 18, 2016, only a few days after Rio Garment terminated its workers, without severance, defendant informed plaintiff that payment on the August 11, 2016 check was "stopped because [defendant] got wind that the vendor was cl[o]sing" but that "$119k will be reissue[d] this week" (NYSCEF doc. no. 9 – Amato Aff, ¶ 6; doc. no. 18 - Grbic Aff., ¶ 6). On August 19, 2016, defendant represented that "another check will go out to [plaintiff] for $119[k] the week of 8/22" (*id.*). Then, on August 24, 2016, the WRC contacted defendant "concerning possible labor rights violations at Rio Garment" and urged defendant "to act quickly to ensure that the former Rio Garment workers receive the compensation to which they are legally due under Honduran law" (NYSCEF doc. no. 25 - King Aff.; doc. no. 32). Thus, defendant raised an issue regarding the Rio Invoices in August 2016, when it learned that Rio Garment terminated workers without severance. Plaintiff acknowledges that defendant informed plaintiff of the issue and stopped the $119,437.90 check for the Rio Invoices only a few days after Rio Garment terminated its workers.

Therefore, because the timeliness of defendant's objection is a material question of fact and given the determination of defendant's first affirmative defense, plaintiff's branch of the motion for partial summary judgment for its account stated claim is denied. The parties' remaining contentions on this branch of the motion are not considered.

Motion to Amend the Caption

Plaintiff moves pursuant to CPLR 3025 (b) to amend the caption to reflect its name change what occurred after an acquisition by another company on May 1, 2017. Plaintiff's new name is White Oak Commercial Finance, LLC (NYSCEF doc.

no. 18 – Grbic Aff., ¶ 9; doc. no. 20). Defendant does not object to the requested caption change. The branch of plaintiff's motion to amend the caption is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion for partial summary judgment on its second cause of action for an account stated, and the branch of plaintiff's motion to dismiss defendant's first affirmative defense are denied; and it is further

ORDERED that the branch of plaintiff's motion to change the caption is granted, and the caption is hereby amended as follows:

WHITE OAK COMMERCIAL FINANCE, LLC,

Plaintiff,

- v -

TAILGATE CLOTHING COMPANY, CORP.,

Defendant.

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and it is further

ORDERED that defendant's cross motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

7/18/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE