

S & S Fashions , Inc. v US Embroidery Inc.

2019 NY Slip Op 32126(U)

May 16, 2019

Supreme Court, Bronx County

Docket Number: 25547/2017E

Judge: Ruben Franco

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

S & S FASHIONS, INC.,

Plaintiff,

-against-

US EMBROIDERY INC. and JAHANGIR MUHAMMAD,

Defendants.

Index No. 25547/2017E

**MEMORANDUM
DECISION/ORDER**

Rubén Franco, J.:

This is an action for an account stated, as well as to recover on a personal guarantee. Defendant counterclaims, alleging that plaintiff overcharged for merchandise delivered. Plaintiff moves for summary judgment against defendants US Embroidery Inc. and Jahangir Muhammad (“JM”) on its account stated claim, and against JM on the personal guarantee.

The court has gleaned the following facts from the pleadings and the documents submitted by the parties in connection with the instant motion: Plaintiff submits invoices for miscellaneous merchandise that it delivered to US Embroidery Inc., from July 2014 through March 2015. On September 29, 2016, US Embroidery Inc.’s former sales manager, Momen, who was authorized to settle the account, acknowledged in a handwritten agreement that the total remaining debt was \$106,820.80. On October 18, 2016, plaintiff sent the first of two demand letters to US Embroidery Inc. It stated that a debt in the sum of \$167,920.11 was incurred, and that payments totaling \$40,000.00 were received. US Embroidery Inc. performed printing services for plaintiff, reducing the debt by an additional \$29,238.20. US Embroidery Inc. incurred additional debt in the sum of \$8,108.80 leaving the balance owed of \$106,820.80. On October 18, 2016, US Embroidery Inc. gave plaintiff twelve post-dated checks for \$5,000 each for monthly payments from February 1, 2017 to January 1, 2018. Two of the checks were cashed before US Embroidery Inc. stopped

payment, reducing the amount due to \$96,820.80, as stated in the second demand letter dated May 16, 2017. Relying on the checks provided, plaintiff delivered merchandise to US Embroidery Inc. for \$504.00, resulting in a total amount due of \$97,324.80.

There has been no discovery in this action.

Regarding the personal guarantee, JM contends that he is the wrong party to sue in that he did not sign any agreement, credit request, or personal guarantee. The purported one-page contract dated September 29, 2016, is a handwritten, unverified note, not signed by JM.

A party moving for summary judgment must show *prima facie* an entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]; CPLR 3212 [b]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]). The party moving for summary judgment has the initial burden on the motion (*see Gammons v City of New York*, 24 NY3d 562, 569 [2014]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]; *Jaroslavicz v Prestige Caterers*, 292 AD2d 232, 233 [1st Dept 2002]).

A motion for summary judgment may be considered premature where discovery has not been completed and relevant facts may be discoverable by the responding party (*see Groves v Land's End Hous. Co.*, 80 NY2d 978 [1992]; *Hoffman v Wyckoff Hgts. Med. Ctr.*, 129 AD3d 526 [1st Dept 2015]). However, a motion for summary judgment is not premature where the facts

needed to oppose the motion are available to the opposing party (*see O'Hara v New School*, 118 AD3d 480 [1st Dept 2014]), where the material facts are undisputed (*see Santos v Booth*, 126 AD3d 506 [1st Dept 2015]), and where the opposing party fails to offer an evidentiary basis to suggest that discovery might lead to relevant evidence (CPLR 3212 [f]; *see Jannetti v Whelan*, 131 AD3d 1209 [2nd Dept 2015]). Plaintiff provides evidence of its transactions with US Embroidery Inc., which defendants do not deny. On the account stated claim, defendants have not shown that discovery will uncover relevant evidence concerning its transactions with plaintiff.

“An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time (*see Herrick, Feinstein LLP v Stamm*, 297 AD2d 477 [(1st Dept) 2002])” (*Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005]). In *Bartning v Bartning* (16 AD3d 249, 250 [1st Dept 2005]), the plaintiff's attorney sought payment for services rendered to the plaintiff, who failed to establish that he objected to the attorney's invoices in a timely fashion. Rather, he asserted that when he received the bill he questioned whether the bill contained overcharges. The Court determined that the plaintiff's response was insufficient to raise an issue of fact to preclude summary judgment.

In *Professional Adv., Inc. v Intercontinental Capital Group, Inc.* (113 AD3d 412, 413 [1st Dept 2014]), an account stated action, the Court affirmed the lower court which granted the plaintiff summary judgment based on the documentary evidence showing that the defendant, without objection, received, retained, and partially paid the invoices presented. The Court also stated: “Defendant's challenges to the documentary evidence are without merit since they are ‘mere conclusions, expressions of hope or unsubstantiated’ (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Scheichet & Davis, P.C.*, 93 AD3d at 478 [1st Dept 2012]).” (*id.* at 413; *see L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527 [1st Dept 2017].)

Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its account stated claim by providing documentary evidence of the invoices, and an affidavit stating that it sent the invoices on a monthly basis to US Embroidery Inc., which received the invoices and failed to object to them. Defendants only provide vague and unsubstantiated allegations regarding charges over the market price, which is insufficient to raise an issue of fact (*see Abyssinian Dev. Corp. v Bistricher*, 133 AD3d 435, 436 [1st Dept 2015]).

Plaintiff has not made a *prima facie* showing of entitlement to summary judgment against JM on the personal guarantee. A corporation “exists independently of its owners, as a separate legal entity, ... the owners are normally not liable for the debts of the corporation, and ... it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). A corporate officer cannot be held personally liable for the corporation's failure to act (*see Peguero v 601 Realty Corp.*, 58 AD3d 556 [1st Dept 2009]). The invoices show that the merchandise was shipped to JM, but billed to US Embroidery Inc. There is no showing that JM agreed to assume personally liability for the corporate debt (*see McDonagh Real Estate & Dev. v Kwilecki*, 158 AD2d 372 [1st Dept 1990]).

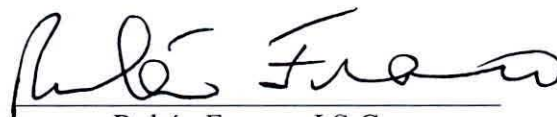
“On a motion for summary judgment to enforce a written guarantee, the creditor must prove an absolute and unconditional guarantee, the underlying debt, and the guarantor's failure to perform under the guarantee” (*United Rentals (N. Am.), Inc. v Iron Age Tool Corp.*, 150 AD3d 1304, 1306 [2nd Dept 2017]; *see Bank of Am., N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]). Plaintiff would have to produce “the subject guaranty, an affidavit and documentary evidence establishing the amount owed, and the defendant's refusal to pay” (*Pitsy, LLC v Rindenow*, 165 AD3d 1300, 1301 [2nd Dept 2018]).

With respect to its second cause of action to recover on a personal guarantee by JM, plaintiff fails to establish a *prima facie* entitlement to judgment as a matter of law. Plaintiff does not show the existence of the unconditional guarantee on the debt, and that JM has not performed under the guarantee (see *United Rentals (N. Am.), Inc. v Iron Age Tool Corp.*, 150 AD3d at 1306). Plaintiff has failed to produce any document or other evidence which shows that JM agreed to serve as personal guarantor of the subject debt.

Accordingly, plaintiff's motion for summary judgment is granted against US Embroidery Inc. only on its cause of action on an account stated. The motion is denied as to its second cause of action against JM as personal guarantor.

The foregoing constitutes the Decision and Order of the court.

Dated: May 16, 2019



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO