

**Maritime Delivery Serv. (USA) Inc. v Northpoint  
Trading, Inc.**

2021 NY Slip Op 30486(U)

February 19, 2021

Supreme Court, New York County

Docket Number: 154083/2019

Judge: Laurence L. Love

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

**PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

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**INDEX NO. 154083/2019**

MARITIME DELIVERY SERVICE (USA) INC

**MOTION DATE 02/03/2021**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

NORTHPOINT TRADING, INC. d/b/a SEVEN APPAREL  
GROUP, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

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

Upon the foregoing documents,

The following read on plaintiff’s summary judgment motion, CPLR 3212, in this breach of contract action totaling \$178,649. This action commenced via filing an amended summons and complaint on or about April 19, 2019. Defendant answered on or about June 28, 2019.

CPLR § 3212 (b) states that, “the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.” *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Plaintiff submits an affidavit, the credit agreement and freight guarantee, per diem invoices, demand letters and correspondences, and statements of account.

Plaintiff submits the affidavit of Merritt Harrison, the General Manager of Maritime Delivery Service Inc. The affidavit of Merritt Harrison affirms that, “[t]he plaintiff is an

intermodal drayage company ... and transported cargo on behalf of the defendant at their specific instance and request for the period ending December 10, 2018. The defendant executed a credit agreement and freight guarantee. Pursuant to the agreement, the defendant promised to be held absolutely and unconditionally liable to plaintiff for the payment of freight and other charges incurred by plaintiff relating to the transport of defendant's cargo. Following pickup from the port, each shipment is allotted a set number of free days within which to offload and return each container. The plaintiff performed all services it was requested to perform by transporting the defendant's cargo, however, per diem charges were assessed after the defendant failed to offload and return containers within the allotted number of free days. The invoices reflect the number of free days allotted to a particular container, the number of billable days in excess of those free days, and the rates to be charged for each billable day. Pursuant to the credit agreement and freight guarantee, the defendant agreed to be held responsible for these and other charges incurred by plaintiff. The plaintiff sent statements and demands for payment to the defendant via email and after no responses were (sic) received, a final demand letter was sent on February 15, 2019. The defendant has not paid the outstanding balance in full."

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Defendant's affirmation in opposition states i) Northpoint Trading and Seven Apparel are two separate entities; ii) the account stated and a dispute of amounts due; and iii) plaintiff's lack of standing.

Defendant submits the affidavit of Ari Markowitz, Chief Financial Officer of Northpoint Trading, Inc. and Manager of Seven Apparel Group, Inc. Ari Markowitz affirms that,

“Northpoint Trading does not ‘do business as’ Seven Apparel Group, and Seven Apparel Group was not a party to the credit agreement and freight guarantee between Northpoint and plaintiff.”

Ari Markowitz continues, “plaintiff’s defective performance and violation of its agreement with Northpoint caused charges to be incurred from steamship lines and chassis companies, which plaintiff now wants to recover from Northpoint. Specifically, plaintiff is trying to improperly bill defendants for ‘per diem’ and ‘bobtail’ charges that were caused by plaintiff’s own mistakes. Contrary to Merritt Harrison’s statement in his affidavit, these charges were disputed by Northpoint for months before he was even involved.”

Defendant also disputes plaintiff’s standing. Under New York Business Corporation Law § 1312(a), “[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes ...” (see NYBCL § 1312[a]).

In order to being considered as doing business in New York, a corporation’s activities in New York must be so systematic and regular as to demonstrate continuous presence and activity in New York (see *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943 [3rd Dept. 1986]). A corporation which ships products into New York but does not maintain an office, a telephone number or sales representatives in New York is not doing business in New York (see *Airline Exchange, Inc. v. Bag*, 266 A.D.2d 414 [2nd Dept. 1999]).

The party asserting that a foreign corporation is barred from bringing an action in New York because it is doing business in New York without having obtained authority has the burden of establishing noncompliance. (see *Scaffold-Russ Dilworth Ltd. v. Shared Management Group Ltd.*, 289 A.D.2d 932 [4th Dept. 2001]). Defendant’s affirmation in opposition states, “[a] search

for ‘maritime delivery’ with the New York State Department of State Division of Corporations returns no results” (see NYSCEF Doc. No. 31 Par. 19). Defendant has not reached the threshold of establishing plaintiff’s noncompliance with NYBCL § 1312(a).

The affidavit of Merritt Harrison further affirms, “[p]laintiff submits that it is not subject to the requirements of BCL § 1312 as it merely transports shipping containers into the state which does not constitute doing business in New York.”

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (see *Vega v Restani Constr Corp*, 18 NY3d 499, 503 [2012]).

Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

There remain questions of fact regarding amount due between the parties. The intricacies of shipping, freight, and the “intermodal drayage” industry need to be more clearly defined for this Court regarding fees, expenses, and delays. There remain questions of fact of whether Northpoint Trading and Seven Apparel are separate corporations.

Plaintiff’s motion for summary judgment, CPLR 3212, is DENIED.

2/19/2021  
DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: