

Babineaux v Area...ID, Inc.

2022 NY Slip Op 31726(U)

May 25, 2022

Supreme Court, New York County

Docket Number: Index No. 655273/2017

Judge: Arlene Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

RICKEY BABINEAUX, QIAOZHENG LI AND LAURA LUONGO,

Plaintiff,

- v -

AREA...ID, INC.,

Defendant.

-----X

INDEX NO. 655273/2017

MOTION DATE 05/24/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - SUMMARY

The motion by defendant for summary judgment dismissing plaintiffs' complaint is granted in part and denied in part.

Background

This action arises out of a "business association" formed by plaintiffs, who made and sold luxury lamps and chandeliers. Plaintiffs claim that in 2010, they entered into an agreement with defendant, a furniture store in Manhattan, to sell their products. They claim that defendant earned a 50 percent commission on sale proceeds for each item and that forty lamps and chandeliers were sold during the seven years the agreement lasted. However, plaintiffs contend that defendant failed to pay plaintiffs for three chandeliers and owe \$32,000.

Defendant moves for summary judgment dismissing plaintiffs' causes of action for services rendered, account stated and breach of contract. It claims that plaintiff Li stated at his deposition that he never did any business with defendant or with the principal of defendant.

Defendant also claims that plaintiff Babineaux, at his deposition, acknowledged that there was no service rendered by the plaintiffs to defendant. Specifically, defendant claims that Babineaux could not provide proof of delivery for the three chandeliers in question or provide receipts from the delivery.

Defendant also points to the deposition of the third plaintiff, Luongo, and claims that she did not remember being in business with Li or Babineaux. It also seeks sanctions against plaintiffs and their counsel for bringing this case.

In opposition, plaintiffs contend that defendant mischaracterizes the deposition testimony of the three plaintiffs. They also point out that the questions posed to plaintiffs at the deposition were confusing and therefore elicited confusing answers. Plaintiffs argue that defendant admitted in its answer that it accepted delivery of these three chandeliers but somehow claims not to not have received them. Plaintiffs also ask for sanctions.

In reply, defendant argues that plaintiff Babineaux claims that he is not suing defendant in his affidavit in opposition and that Babineaux was paid on delivery, rather than after the sale of the chandeliers.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Services Rendered

The Court dismisses this cause of action because it is simply inapplicable to the plaintiffs' allegations. This matter clearly concerns plaintiffs' contention that defendant failed to pay for goods it provided to defendant. Plaintiffs seem to recognize this in their opposition (NYSCEF Doc. No. 63, ¶ 17) but ask the Court to overlook this poor drafting. The Court cannot do so; a claim seeking recovery for services rendered is inherently different from one seeking to recover based on the failure to pay for goods. Plaintiffs could have sought to amend their pleading but did not.

Account Stated

“An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them which is independent of the original obligation. A cause of action

for an account stated has been described as an alternative theory of liability to recover the same damages allegedly sustained as a result of the breach of contract. An essential element of an account stated is that the parties came to an agreement with respect to the amount due. While the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found” (*Episcopal Health Services, Inc. v Pom Recoveries, Inc.*, 138 AD3d 917, 919, 31 NYS3d 113 [2d Dept 2016] [internal quotations and citations omitted]).

The Court dismisses this cause of action. As defendant pointed out, plaintiffs failed to offer any evidence establishing that a claim for account stated is applicable to the instant circumstances. There was nothing submitted showing that plaintiffs sent defendant a bill, that they demanded the specific amount now sought in the complaint and that defendant failed to object within a reasonable time (*Scheichet & Davis, P.C. v Steinger*, 183 AD2d 479, 479, 583 NYS2d 407 [1st Dept 1992] [concluding that receiving and retaining accounts without objecting within a reasonable time gives rise to an account stated cause of action]).

In other words, plaintiffs argue that they dropped off certain chandeliers and that defendant failed to pay them but did not demonstrate that they sought payment based on an account for these specific items between the parties. The amount due seems to be based, in part, on a calculation from the sales prices—which also suggests that account stated is inapplicable because such a claim requires an agreement for the specific amount due.

Breach of Contract

The Court denies the motion with respect to defendant’s demand to dismiss of the breach of contract claim.

Defendant correctly points out apparent weaknesses in the deposition testimonies of the various plaintiffs. Plaintiff Li testified he did not do business with defendant's principal or defendant, but the question posed to him was "Did can you ever do business with Inga or Area...ID?" (NYSCEF Doc. No. 54 at 12). The Court declines to dismiss the case based on this inarticulate question and Li's response.

And while Babineaux offered confusing testimony about the fact that defendant might owe the other two plaintiffs (rather than him) (NYSCEF Doc. No. 56 at 68), that answer raises more questions instead of offering a basis to dismiss the case. The fact is Babineaux testified that defendant did not pay for three pieces (NYSCEF Doc. No. 55 at 15) and that forms the basis of this case. While it seems that defendant will likely have many areas upon which it can question Babineaux (and the other plaintiffs) at trial about the exact nature of the agreement between plaintiffs and defendant and plaintiffs' lack of documentation, that does not foreclosure plaintiffs' case. And defendant is certainly right to point out plaintiff Luongo's inability to recall entering into a contract with defendant (NYSCEF Doc. No. 57 at 13).

But Babineaux testified that "We made lamps and chandeliers, and we took them to her store for selling, and we quoted her a price, and then we negotiated that price comes out, and we split the rest of the money 50/50, so as consignment, that's what I think of as consignment" (NYSCEF Doc. No. 55 at 6). That, combined with the allegation that defendant did not pay for three pieces, forms the basis of a breach of contract action. It details the terms of the agreement, how the prices were determined and the breach of the agreement.

That defendant's principal denies that her company owes plaintiffs any money (NYSCEF Doc. No. 48) is of no moment. It merely is an issue of fact for a factfinder to consider. Her


affidavit in reply makes this clear—she admits she bought certain items from Babineaux over the years although she disputes many of plaintiffs’ factual contentions (NYSCEF Doc. No. 69).

The Court observes that Babineaux explained in his affidavit in opposition that the subject deposition was his first time testifying and that he simply did not remember certain details (NYSCEF Doc. No. 65). Although a witness cannot create an issue of fact in an affidavit by disavowing the deposition testimony, the Court finds that this affidavit is consistent with Babineaux’s testimony. He consistently claims defendant did not pay for three items. Undoubtedly, his inability to recall details will be explored at trial but this Court cannot make credibility determinations on a motion for summary judgment.

All requests for sanctions are denied.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted only to the extent that the services rendered and account stated causes of action are severed and dismissed and denied with respect to the remaining branches of the motion.

<u>5/25/2022</u> DATE					 ARLENE BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE