| **Alexander, Winton & Assoc. v Dataflow, Inc.** |
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| 2022 NY Slip Op 33588(U) |
| October 20, 2022 |
| Supreme Court, Broome County |
| Docket Number: Index No. EFCA2022000396 |
| Judge: Eugene D. Faughnan |
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 19th day of August, 2022.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

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ALEXANDER, WINTON & ASSOCIATES, AS ASSIGNEE OF ESSE LOGISTICS INC.,

Plaintiff,

-vs.-

DECISION AND ORDER

Index No. EFCA2022000396

DATAFLOW, INC.

Defendant.

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter is before the Court to consider the motion of Plaintiff, Alexander Winton & Associates ("Alexander Winton"), as assignee of Esse Logistics, Inc. ("Esse"), for summary judgment; and the cross motion of Defendant, Dataflow, Inc. ("Dataflow"), to dismiss the Complaint, pursuant to CPLR 3211 (a)(3) and (7). Oral argument was held on August 19, 2022, at which time only Defendant availed itself of the opportunity to appear in person. The Court will consider Plaintiff's position based on its written submissions. After due deliberation, this constitutes the Court's Decision and Order.

**BACKGROUND FACTS**

Dataflow is a company that specializes in print and data management services. In June 2020, Dataflow entered into an agreement with FRC Logistics ("FRC") for FRC to serve as a broker for the transportation of pallets of acrylic sheets from Globe Con Freight, located in Rancho Domingues, California, to Broome County, NY, where Dataflow is located. FRC then entered into an agreement with Esse to transport the goods for an agreed upon price of $6,500. The complaint alleges that Esse delivered the goods but was not paid, and set forth causes of action for breach of contract and account stated. Plaintiff, Alexander Winton, claims to be the assignee of Esse, and has sued to recover the contract price for the delivery of the goods.

Dataflow served an Answer with affirmative defenses and counterclaims on April 7, 2022. The counterclaims allege that: neither the Plaintiff nor Esse are authorized to conduct business in New York and are, therefore, barred from maintaining this action; the shipment was seriously late resulting in damages to Dataflow; Esse intentionally and deceptively promised to make timely delivery which it knew it couldn't perform, entitling Dataflow to treble damages and attorney's fees under General Business Law § 349; and that Plaintiff's actions constitute a prima facie tort.

Plaintiff filed this motion for summary judgment on July 7, 2022, and included an affidavit of Tony Mangini, legal manager of Alexander Winton. Plaintiff argues that Dataflow was the consignee under the shipping contract and is jointly and severally liable for

the shipping services such that Plaintiff could seek to recover from either FRC or Dataflow. The parties have not indicated if any steps were taken to recover from FRC.

Dataflow filed papers in opposition to Plaintiff's motion for summary judgment, and Dataflow also made a cross-motion for summary judgment. Dataflow contends that the Mangini affidavit is inadequate to support summary judgment because Mangini does not work for Esse and has no personal or first-hand knowledge of the underlying facts concerning the delivery of the goods and any agreement with respect thereto. Dataflow further contends that it has no liability because it made payment to FRC, its freight broker. Dataflow has no knowledge as to whether FRC made payment to Esse, or if there were any claims, disputes or defenses to any such payments. Dataflow also disputes it has joint and several liability with FRC. With respect to the cross-motion to dismiss the complaint, Dataflow argues that Plaintiff and Esse lack standing to bring this action because neither are authorized to conduct business in New York; and that there was no privity of contract between Defendant and Esse.

**LEGAL DISCUSSION AND ANALYSIS**

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York,* 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957])

and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

"'The 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; and (4) resulting damage." *Clearmont Prop., LLC v. Eisner*, 58 AD3d 1052, 1055 (3rd Dept. 2009), *quoting Hecht v. Components Intl, Inc.*, 22 Misc 3d 360, 3645 (Sup. Ct. Nassau County 2008); *Dee v. Rakower*, 112 AD3d 204 (2nd Dept. 2013). The second cause of action is for an account stated which is "'an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due.'" *J.B.H., Inc. v. Godinez*, 34 AD3d 873, 874 (3rd Dept. 2006) *quoting Jim-Mar Corp. v. Aquatic Constr.*, 195 AD2d 868, 869 (3rd Dept. 1993).

In support of its motion, Plaintiff submitted Mangini's affidavit. An affidavit in support of a motion for summary judgment must be made by someone with personal knowledge of the underlying facts. *See, Delosh v. Amyot*, 186 AD3d 1793 (3rd Dept. 2020); *LaRusso v. Katz*, 30 AD3d 240 (1st Dept. 2006), *see also David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 NY2d 554 (1979); CPLR 3212 (b). An affidavit without personal knowledge is of no probative value and cannot be considered on a motion for summary judgment. *See, Dempsey v. Intercontinental Hotel Corp.*, 126 AD2d 477, 479 (1st Dept. 1987); *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 563. A person's review of records maintained in the normal course of business does not imbue the person with personal knowledge. *JPMorgan Chase Bank, N.A. v. Grennan*, 175 AD3d 1513 (2nd Dept. 2019). Although Mangini stated that he was

familiar with Plaintiff's business practices and records, he does not aver any personal knowledge of Esse's business practices, or the creation and execution of this delivery contract, or any breach of contract due to non-payment. Furthermore, there are no allegations to support an account stated between Esse and Dataflow, such as a prior business relationship between the two or periodic billing statements. *See, e.g. Hubbell, Inc. v. Lazy Swan Golf & Country Club LLC*, 187 AD3d 1448 (3rd Dept. 2020). In fact, the evidence shows that Defendant has objected to this bill. Therefore, the Mangini affidavit itself is insufficient to support a claim for summary judgment for either breach of contract or account stated.

An affidavit not based on personal knowledge can, nevertheless, serve as a vehicle for the submission of admissible documents (*Zuckerman v. New York*, 49 NY2d 557), so the Court will also consider the Exhibits that were attached to the Mangini affidavit (i.e. a Rate Confirmation Sheet and a Bill of Lading). The Rate Confirmation sheet is on FRC stationery, and shows the carrier to be Esse, and lists FRC Logistics as a broker. The shipment is listed as going from Globe Con Freight to Dataflow. It also states that the carrier will be paid $6,500 when the Bill of Lading is received by FRC. A second Exhibit to Mangini's affidavit is the Bill of Lading, and that also appears to have FRC's logo at the top. The Bill of Lading identifies the Carrier as "On Time Transit, Inc." at the top of the form, but Esse is listed as the carrier at the bottom of the form. No explanation has been provided to the Court regarding the discrepancy on the carrier identification. The goods were to be shipped from Globe Con to Dataflow. The Bill of Lading provided to the Court is difficult to read, but appears to include a section that says "Bill Third Party Prepaid to" FRC Logistics. That suggests that the money was paid to FRC and that FRC should be billed for the delivery services. Dataflow contends that it paid Dataflow in advance.[1] Nevertheless, Plaintiff's argument is that Dataflow is liable under the Bill of Lading, because liability for paying the carrier extends to both the shipper and receiver, ensuring that the carrier is paid for its services.

The crux of Plaintiff's argument is that, under principles governing interstate commerce, a carrier is entitled to seek payment from either the broker or the consignee (the

[1] The language is peculiar in that it makes reference to both a billing address and prepayment. If a charge is pre-paid, there would be no need to send out a bill; unless the prepayment was made to the entity to whom the bill is to be mailed.

party receiving the goods delivered). Liability for paying the carrier can be imposed on the shipper or the receiver. *See, CSX Transp. Co. v. Novolog Bucks County*, 502 F3d 247, 254-255 (3rd Cir. 2007) ("the consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision"). The shipper, consignee and broker can all be liable for unpaid freight charges. *See, Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F3d 949 (9th Cir. 2008). Plaintiff asserts that the carrier is entitled to be paid for the freight charges even if that forces a consignee to pay twice.

The Court finds Plaintiff's argument unavailing. Although the carrier is entitled to be paid for its delivery services, there is no absolute rule imposing liability on a consignee (*Airborne Freight Corp. v. Irving Trust Co.*, 26 AD2d 507 [2nd Dept. 1966]) and the facts of this case would not justify it.

First, the terms of the Bill of Lading itself undercut Plaintiff's position. The Bill of Lading specifically states that FRC is to be billed for the services, and that pre-payment has been made. Generally, the consignee is entitled to act in reliance on a statement on the Bill of Lading when it accepts the goods. *See, e.g. Airborne Freight Corp. v. Irving Trust Co.*, 26 AD2d 507. When the Bill of Lading shows that the shipping charges have been prepaid or provided for, there is no sound basis to impose liability on the consignee. *See, Mediterranean Shipping Co. v. Elof Hansson, Inc.*, 693 FSupp 80 (SDNY 1988); *see also Pacific W., Inc. v. E & A Restoration, Inc.*, 178 AD3d 834 (2nd Dept. 2019). The Bill of Lading in this case shows that FRC is liable for the freight charges.

In *Airborne Freight*, the Plaintiff shipper sought to recover the shipping charges from the consignee for two separate shipments. The Bill of Lading for each shipment indicated that freight charges had been prepaid. The evidence showed that the shipper had routinely been extended credit from Plaintiff shipper and payments were reconciled within 60 days. In essence, the payments were not actually prepaid but resolved after the fact. When these two particular shipments were made, the consignee paid the shipper for the cost of goods plus freight charges. In fact, the shipper did not make payment and the carrier was unable to collect, so it sued the consignee. The Second Department affirmed dismissal of the

complaint, noting that it was the carrier who chose to rely on the credit worthiness of the shipper. The court stated:

> the carrier has failed to receive the payment, but the statute was not aimed to compel payment of the tariff twice, or in every instance to guarantee the carrier against loss. When the plaintiff elected to transport the goods without immediate payment of its charges and represented that the freight was prepaid, it assumed the risk that the consignee would in reliance on that representation make payment of the charges to the shipper. Or, to put it differently, the exacting purposes of the public policy are satisfied once full payment of the rates is made; and the usual rules relating to the conduct of parties in private transactions then come into play. There is no absolute rule imposing liability on the consignee, even though the bill of lading may so provide; by its conduct the carrier may have made it inequitable and unreasonable that the terms of the bill of lading be strictly enforced.

*Airborne Freight Corp. v. Irving Trust Co.*, 26 AD2d at 510-511.

Similarly, in *Pacific W., Inc.*, the Second Department again denied consignee liability when the Bill of Lading showed that freight charges had been paid. In that case, the Bill of Lading indicated that charges were prepaid unless a specific box was checked. The box was not checked, but the shipper had not paid the freight charges and refused to pay after delivery. The court concluded there was no cause of action against the consignee because the document showed prepayment had been made.

These cases show that when the Bill of Lading shows prepayment has been made, the consignee should be able to rely upon that when deciding to accept a shipment. In the present case, the Bill of Lading states that the charges were prepaid, and that any billing for the charges should go to FRC, so Dataflow could reasonably rely on that documentation.

Second, and inter-related, is the fact that in this case, Dataflow has provided undisputed evidence that it paid the $6,500 freight charges to FRC. In its opposition papers, Dataflow included invoices from FRC for $6,489.33 and $5,024.86 for these shipments, and evidence of payment by wire transfer on June 26, 2020 in the amount of $11,514.19, covering both shipments. The invoices were for load numbers 307465 and 307466 respectively. The motion papers reference load number 307465 and a bill for $6,500, so it appears that Plaintiff is only alleging that one of the bills was unpaid. There is no information concerning load 307466 and payment for that bill. Dataflow's payment to FRC was for both invoices.

Imposing consignee liability would result in "double payment" by Dataflow. The Court concludes that estoppel precludes Plaintiff from recovering freight charges from Defendant. *See*, *Mediterranean Shipping Co. v. Elof Hansson, Inc.*, 693 FSupp 80; *Airborne Freight Corp. v. Irving Trust Co.*, 26 AD2d 507.

Third, even assuming that liability could extend to the receiver of goods under the Bill of Lading, Plaintiff would have to establish that Esse actually performed under the contract, and that it was not paid. Mangini's affidavit attesting to those "facts" is insufficient since he has no personal knowledge as to those events. Thus, even when considering the Exhibits attached to Mangini's affidavit, and if the Bill of Lading could show consignee liability, Plaintiff has failed to make a *prima facie* case for summary judgment. Plaintiff's argument under a theory of an agent acting for a disclosed principle fares no better due to the lack of any evidence based on personal knowledge. As Plaintiff has failed to make a prima facie showing, the sufficiency of Defendant's opposition papers need not be considered. *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470 (2013); *Vega v. Restani Constr. Corp.*, 18 NY3d 499; *Delosh v. Amyot*, 186 AD3d 1793. Therefore, Plaintiff's motion for summary judgment is denied.

The Court next turns to Defendant's cross-motion to dismiss the complaint. Dataflow argues that Plaintiff lacks capacity to sue. Pursuant to CPLR 3211 (a)(3), dismissal may be granted where "the party asserting the cause of action has not the legal capacity to sue." Capacity to sue relates to "a litigant's power to appear and being its grievances before the court." *Cmty. Bd. 7 v. Schaffer*, 84 NY2d 148, 155 (1994); *see Matter of New York State Bd. of Regents v. State Univ. of N.Y.*, 178 AD3d 11 (3rd Dept. 2019). Defendant argues that it has conducted a search of applicable records, which revealed that neither the Plaintiff, nor Esse, is licensed to conduct business in New York. Defendant maintains that, as a result, Plaintiff should not be allowed to maintain any legal actions in New York. The Court does not agree.

Business Corporation Law § 1312 (a) provides that a "foreign corporation doing business in this state without authority shall not maintain any action ... in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute." However, that statute does not stand for the proposition that a foreign corporation may not maintain any

action in New York State. Rather, it serves as a deterrent, or penalty, for a foreign corporation that is "doing business" in New York State, but which has failed to register and make payments to the State. "In order for the prohibition [of Business Corporation Law § 1312(a)] to apply, the plaintiff's contacts with New York must be sufficiently systematic, continuous, and regular to warrant registration with the Secretary of State." *Metal Partners Rebar, LLC v. ZDG, LLC*, 2017 NY Misc LEXIS 4532, *3 (Sup. Ct., New York County 2017) (citations omitted). Since Dataflow is the party relying on this "statutory barrier, [it has] the burden ... of showing that the corporation's business activities in New York were not just casual or occasional, but so 'systematic and regular as to manifest continuity of activity in the jurisdiction.'" *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 AD2d 943, 944 (3rd Dept. 1986) [internal citation omitted], *quoting Construction Specialties, Inc. v. Hartford Ins. Co.*, 97 AD2d 808 (2nd Dept. 1983); *S & T Bank v. Spectrum Cabinet Sales*, 247 AD2d 373 (2nd Dept. 1998); *see, McKenzie Banking Co. v. Billinson*, 79 AD3d 1728 (4th Dept. 2010). Dataflow has only presented an argument that Plaintiff and Esse are not licensed in New York, but has not submitted any evidence regarding any of their business activities. "There is a presumption in an action brought by a foreign corporation that it is doing business in the State of its incorporation rather than in New York." *Great White Whale Advertising, Inc. v. First Festival Productions*, 81 AD2d 704, 706 (3rd Dept. 1981) (citation omitted). Esse is alleged to be incorporated in South Carolina and Plaintiff is alleged to be a foreign corporation. Thus, both are foreign corporations and are entitled to a presumption they are doing business in their home state, and not in New York. Defendant has not alleged, nor presented, any evidence as to the business activities of Plaintiff or Esse. As such, Defendant has not met its burden of establishing that the business activities of either corporation were systematic and regular. Therefore, dismissal is not warranted for Plaintiff's (and/or Esse's) alleged failure to register with the Secretary of State. *S & T Bank v. Spectrum Cabinet Sales*, 247 AD2d 373; *Great White Whale Advertising, Inc. v. First Festival Productions*, 81 AD2d 704; *accord McKenzie Banking Co. v. Billinson*, 79 AD3d 1728.

Defendant has also moved for dismissal for failure to state a cause of action. Dataflow attached invoices and evidence of payment by wire transfer to FRC. In particular, the invoices for load 307465 and 307466 were paid in one wire transfer. As discussed above,

Dataflow was entitled to rely upon the representation in the Bill of Lading that the freight charges were pre-paid, and Dataflow has provided evidence that it fully paid FRC, conclusively establishing its defense as a matter of law. Accordingly, Plaintiff has no cause of action for consignee liability, and dismissal of the complaint is proper.

Dismissal of the Plaintiff's complaint does not fully dispose of this matter since Defendant has also asserted counterclaims, but Defendant has not made any motion with respect to those counterclaims. Accordingly, Defendant is directed to advised the Court and opposing counsel, within 45 days of this Decision and Order, whether Defendant is pursuing the counterclaims in light of this Decision and Order.

**CONCLUSION**

Based on all the foregoing, it is hereby

ORDERED, that Plaintiff's motion for summary judgment is DENIED, and it is further

ORDERED, that Defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a)(3) is DENIED, and it is further

ORDERED, that Defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: October 20, 2022
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

All the papers filed in connection with this motion are included in the electronic case file maintained by NYSCEF, the contents of which have been considered by the Court. These include:

1) Plaintiff's Notice of Motion for summary judgment dated July 7, 2022; Statement of Material Facts dated July 7, 2022; Affidavit of Tony Mangini, dated April 11, 2022, with Exhibits "A" – "F", and Memorandum of Law, dated July 7, 2022;
2) Defendant's Notice of cross-motion dated August 12, 2022; Affirmation of Alan J. Pope, Esq., in opposition to the motion for summary judgment and in support of cross-motion to dismiss, with Exhibits "A" – "C"; and
3) Reply Affirmation of Ari J. Stein, Esq., dated August 18, 2022, with Exhibit "G".