

R.E.L. Intl. Inc. v Diamonds by Janet Ltd.

2011 NY Slip Op 30979(U)

March 30, 2011

Supreme Court, New York County

Docket Number: 105372/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

R.E.L. INTERNATIONAL INC.,
Plaintiff,
- against -
DIAMONDS BY JANET LTD.,
Defendant.

FILED
APR 15 2011

INDEX NO. 105372/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5, were read on this motion by plaintiff for summary judgment, pursuant to CPLR § 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4, 5	_____

Cross-Motion: Yes No

R.E.L. International, Inc. ("plaintiff"), a wholesale distributor of jewelry, brings this action against a contracting wholesaler/retailer of jewelry, Diamonds by Janet LTD ("defendant"), to recover the unpaid balance of certain jewelry items ("Jewelry At Issue") it consigned and delivered to the defendant on invoice, which accepted and retained said Jewelry. Discovery has not been completed and the Note of Issue has not been filed. Plaintiff now moves for summary judgment, pursuant to CPLR § 3212, seeking \$83,599.00 with interest from December 10, 2009, for the unpaid balance of the Jewelry At Issue which was accepted and retained by defendant. Defendant opposes the motion on the basis that it did not retain all of the jewelry that was delivered by plaintiff, and that plaintiff's employee, Michael Short ("Mr. Short"), picked up the unwanted jewelry as a return on plaintiff's behalf, and subsequently took the Jewelry to Florida where it was stolen from him.

BACKGROUND

Plaintiff and defendant are both in the wholesale jewelry business and have been doing business together for about six years (Opposition ¶ 4). Defendant claims that in the past it has purchased goods from plaintiff and then either kept the goods and paid plaintiff, or defendant has returned the goods back to plaintiff wherein plaintiff signed a memorandum indicating and acknowledging that the goods had been returned (Opposition ¶ 4). Defendant further claims that this is standard practice in the jewelry industry (Opposition ¶ 4).

Plaintiff alleges that on December 8, 2009, Janet Hu ("Hu"), defendant's president and principal, personally selected certain pieces of jewelry totaling \$83,599.00. Hu took one jewelry item on invoice on December 8, 2009 and had plaintiff deliver the remaining items (Plaintiff ¶ 8). Plaintiff delivered two shipments of jewelry to defendant on December 9, 2009, and on December 10, 2009 defendant sent an agent to plaintiff's office to pick up the remaining items (Plaintiff ¶¶ 9, 10). Plaintiff attaches invoices documenting that the Jewelry At Issue was received and signed for by defendant on December 9, 2009, and on December 10, 2009 the final invoice was signed by defendant's agent who picked up the remaining items at plaintiff's office (Plaintiff ¶ 9, 10, exhibit 3). Each invoice attached to plaintiff's moving papers itemizes the jewelry sold and delivered by quantity, unit, description, amount and price (Plaintiff exhibit 3). Plaintiff claims that defendant has neither returned nor paid plaintiff for the Jewelry At Issue.

In opposition, defendant asserts that plaintiff's President and Account Manager Izhak Lati ("Lati") directed Hu, in a telephone conversation on December 9, 2009, to return the unwanted Jewelry At Issue to Mr. Short, an employee of plaintiff, or any of its other employees (Opposition ¶ 6). Defendant argues that on December 9, 2009 Mr. Short, as an agent of plaintiff and on plaintiff's behalf, picked up the Jewelry At Issue as a return, plus other jewelry from a past transaction. Defendant further alleges that Mr. Short also signed a memorandum

("Defendant's Return Memorandum") which allegedly documents the return of the Jewelry At Issue to plaintiff (Opposition ¶ 7, exhibit A). Defendant further argues that Mr. Short took the Jewelry At Issue, along with items of jewelry from two other companies, to Florida and while there the jewelry was stolen from him (Opposition ¶ 8). As such, defendant claims it does not owe plaintiff any money because it returned the unwanted Jewelry At Issue to plaintiff's employee.

Plaintiff proffers that Defendant's Return Memorandum is a feigned document and cannot be relied upon as Mr. Short is Hu's husband. Also, Defendant's Return Memorandum does not list the quantity, price or description of the jewelry returned, as it simply states "Assorted Jewelry" and lists a total price of \$75,000. Plaintiff states that this type of document would not be used in the industry as it does not list exactly which pieces of jewelry are being returned, as this is vital in keeping track of the goods. Hu's allegation that plaintiff demanded a return of the Jewelry At Issue the same day it was delivered and before the final jewelry delivery, plaintiff argues, is both fictitious and inconsistent with the facts. Lati claims that Mr. Short was never an employee of plaintiff's, as he owns and operates his own business called M. Short Diamonds, Inc. Additionally, plaintiff states that any of its jewelry in Mr. Short's possession while he was in Florida is separate and apart from the Jewelry At Issue between plaintiff and defendant.¹

In support of its summary judgment motion, plaintiff submits, *inter alia*, an affidavit of Lati; a statement of account; four invoices for each delivery of the Jewelry at Issue; and the summons and verified complaint. In opposition to plaintiff's motion, defendant submits an

¹Plaintiff, for the first time in reply, attaches five exhibits (amongst which is an itemized list of jewelry consigned to Mr. Short) which were not annexed to its original motion papers. Consequently, the Court cannot consider the exhibits as the purpose of "reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Schultz v 400 Co-op Corp.*, 292 AD2d 16, 21 [1st Dept 2002] quoting *Azzopardi v. American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]).

[* 4]

affidavit of Hu; an affidavit of Mr. Short; Defendant's Return Memorandum dated December 9, 2009; and a private report and statement given by Short regarding the jewelry theft in Florida to G.J. Smith & Associates, an insurance underwriter.

The following facts are undisputed. Hu personally selected jewelry from plaintiff on or about December 8, 2009 and took one item with her that day on invoice. On December 9, 2009 plaintiff delivered two shipments of jewelry to defendant, and on December 10, 2009 defendant sent an agent to plaintiff's office to pick up the remaining items. It is also undisputed that defendant received the goods and did not complain about their quality.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light

most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

A consignment agreement typically involves a wholesaler, like plaintiff, transferring possession of goods to a retailer/wholesaler, like defendant, who then tries to resell the goods to the consumer (*see Rahanian v Ahdout*, 258 AD2d 156, 158 [1st Dept 1999]). In a consignment the purchaser acts more like an agent, with an option to take title upon the occurrence of certain conditions (*See Rahanian*, 258 AD2d at 159). Title does not pass until that condition is exercised, and title and right to immediate possession remains with the plaintiff wholesaler (*Id*). A sale on consignment “is merely an ‘agency with a bailment’ and basically governed by the law of agency and service contracts” (*Rahanian*, 258 AD2d at 159) (internal citations omitted).

A. Causes of Action

1. Account Stated

“An account stated is an account, balanced and rendered, with an assent to the balance either express or implied” (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995] citing *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). “[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness...” (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). However, there can be no account stated if there is any dispute about the account (*see Abbott, Duncan & Weiner*, 214 AD2d at 412). Additionally, any issues raised about the quality of the goods constitutes a dispute concerning the account (*c.f. Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169 [1st Dept 2004]).

In this matter, there is no dispute that plaintiff provided defendant with invoices and a statement of account. Plaintiff proffers that an account stated exists because defendant did not object within a reasonable time to the four separate invoices or statement of account, nor did defendant complain about the quality of the goods. Defendants received the Jewelry at issue on December 8, 2009, December 9, 2009 and December 10, 2009. On December 9, 2009, defendant allegedly returned the Jewelry at Issue via Mr. Short. Returning the Jewelry at Issue on the same day as receiving same invoices constitutes an objection within a reasonable time (*see Herrick, Feinstein LLP*, 297 AD2d at 478). However, plaintiff denies that defendant returned the Jewelry At Issue. Accordingly, triable issues of fact exist concerning whether defendant rejected the Jewelry at Issue by returning them to plaintiff and requires a denial of plaintiff's motion for summary judgment on its account stated cause of action (*see DeBijou Inc. v Bachouro*, 2008 NY Slip Op 32246[U] [2008]).

2. Goods Sold and Delivered

In order to establish a sale and delivery of goods, there must be an "acceptance of the goods and... [the] failure either to pay the agreed upon price or raise any objection to the sale terms, as reflected in the invoices..." (*Sunkyong Am v Beta Sound of Music Corp.*, 199 AD2d 100 [1st Dept 1993]). Any objections to the sale terms must be made when the goods are delivered or within a reasonable time thereafter (*Id.*). Plaintiff points out the language printed on each invoice signed by defendant which states, in pertinent part:

"The goods described and valued as below are delivered to you for examination and inspection only and are the property of R.E.L. International, Inc. And subject to their order and shall be returned to them on demand. Such merchandise until returned to them and actually received, are at your risk from all hazards" (Plaintiff's exhibit 3).

Through plaintiff's documentary evidence of the four invoices and the statement of account, as well as its allegation that defendant has failed to pay plaintiff, plaintiff has made a prima facie case of goods sold and delivered (*see* Plaintiff exhibit 3; *Eldon Group Am. v Equiptex Indus.*

Prods. Corp., 236 AD2d 329 [1st Dept 1997]).

However, defendant has raised issues of fact as to its acceptance of the Jewelry At Issue with its allegation that it returned the Jewelry. Accordingly, plaintiff's motion for summary judgment on its goods sold and delivered cause of action is denied.

3. Conversion of Chattel

"Under New York Law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Goldman v Sotheby's, Inc.*, 2007 NY Slip Op 31019[U] [1st Dept 2007] citing *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; see *State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's interference with or dominion over the property, in derogation of plaintiff's rights (*Colavito* 8 N.Y.3d at 50 [internal citations omitted]; *Goldman* 2007 NY Slip Op 31019[U]; see *Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; see also Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15 at 92, 102 [5th ed]).

In the consignment of the Jewelry between plaintiff and defendant, plaintiff retained the right to possession, which satisfies the first element of conversion (*Rahanian*, 258 AD2d at 159). However there is a triable issue of fact as to whether the second element is met if the Jewelry At Issue was in fact returned to plaintiff (*Id.*). Consequently, plaintiff's motion for summary judgment on its conversion of chattel cause of action is denied.

4. Quantum Meruit & Unjust Enrichment

In order to state a claim for "quantum meruit, a plaintiff must allege its good faith performance of services, the defendant's acceptance of those services, an expectation of compensation for the services, and the reasonable value of those services" (*Skillgames, LLC v Brody*; 1 AD3d 247, 251 [1st Dept 2003] citing *Freedman v Pearlman*, 271 AD2d 301, 304 [1st

Dept 2000)). In order to "prevail on a claim of unjust enrichment in New York, a plaintiff must establish that the defendant benefitted at the plaintiff's expense, and that equity and good conscience require restitution" (*Amaranth LLC v JPMorgan Chase & Co.*, 2008 NY Slip Op 33544[U] [2008] [internal citations omitted]; see *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). Furthermore, the existence of a valid contract typically precludes the availability of quasi contractual remedies, such as quantum meruit and unjust enrichment, for events arising out of the same subject matter (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401 [1st Dept 2007]).

As an initial matter, plaintiff does not allege that it performed any services for defendant, only that it sold the Jewelry At Issue to defendant on consignment and defendant has failed to pay the balance of or return said jewelry. Furthermore "the Court is unaware of any case applying quantum meruit to the provision of money rather than services" (*Skillgames, LLC* 1 AD3d at 251). Accordingly plaintiff has not stated facts sufficient to support a cause of action in quantum meruit and unjust enrichment, and as such plaintiff's summary judgment motion on these causes of action are denied.

CONCLUSION

Summary judgment should "not be granted where there is any doubt as to the existence of... [triable] issues or where the [triable] issue is arguable" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 [1957] [internal citations omitted]). At this juncture there are arguable material and triable issues of fact, including: whether Mr. Short was plaintiff's employee in December of 2009; whether defendant in fact returned the Jewelry At Issue on December 9, 2009; whether Michael short picked up said jewelry from defendant as plaintiff's agent; and whether Defendant's Return Memorandum attached to defendant's moving papers is a feigned document (see *Frederick Modell, Inc. v Fairfax Distrib. Co., Inc.*, 120 AD2d 430 [1st Dept 1986] [summary judgment denied between plaintiff diamond wholesaler and defendant

9] jewelry retailer for unpaid invoices as multiple triable issues of fact existed]). Accordingly, plaintiff's motion for summary judgment dismissing the complaint is denied.

For these reasons and upon the foregoing papers, it is,

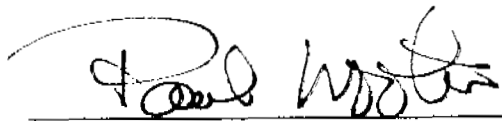
ORDERED that plaintiff R.E.L. International Inc.'s motion for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that defendant shall serve a copy of this Order, with Notice of Entry, upon plaintiff within 30 days; and it is further,

ORDERED that the parties are directed to appear at a Preliminary Conference on May 25, 2011, at 11:00 a.m., in Part 7, at 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

Dated: 3-30-11



Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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