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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

THE WOODS KNIFE CORPORATION,

INDEX NO.: 006047/09

Plaintiff,

MOTION DATE:8-6-09
SUBMIT DATE:8-20-09
SEQ. NUMBER - 001

-against-

EASTMAN MACHINE COMPANY,

Defendant.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 7-16-09.....1
Memorandum of Law in Support, dated 7-16-09.....2
Affidavit in Opposition, dated 8-5-09.....3
Letter Memorandum of Law (def.).....4
Affirmation in Further Support, dated 8-17-09.....5

This motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the first and second causes of action alleged in its complaint and for dismissal of the defendant's counterclaims is granted to the extent indicated in this order.

In this contract action for goods sold and delivered, and insofar as it is relevant to this motion, the plaintiff The Woods Knife Corporation ("Woods") alleges in its complaint that from October, 2008 through January 2009 it sold and delivered $184,305.21 worth of commercial manufacturing knives (described as electric cloth cutting machine knives) to the defendant Eastman Machine Company ("Eastman"), billed the defendant, and was not paid.

In support of a separately plead cause of action for an account stated, it further alleges that the defendant did not challenge the invoices when rendered. In its answer, the defendant denied that it retained the invoices without objection or protest, but otherwise admits these allegations.

However, the defendant also asserts three counterclaims, sounding, respectively, in involuntary corporate dissolution pursuant to Business Corporation Law § 1104-a, involuntary common law dissolution, and what appears to be a hybrid conversion/unjust enrichment claim.

The counterclaims are based on a somewhat unusual relationship existing between these parties, in that the defendant owns 49% of the plaintiff. The majority interest of 51% is owned by James Woods, plaintiff's principal and manager. The history of this relationship as recited by the defendant in its counterclaims is largely admitted in plaintiff's reply, although not the characterizations of its behavior, nor the effect of that history on the present dispute.

This history as provided by Eastman is as follows: in 1936 the Woods and Stevenson families (the latter of which founded Eastman) established the plaintiff corporation to manufacture specialty cloth cutting blades to be used in Eastman's cloth cutting machines. The ownership interest was established as it is presently (51%-49%) with the Woods family holding the majority position and actively managing the plaintiff corporation. Eastman became its primary customer and adviser. The original agreement contained a pledge that Eastman would make every effort to purchase all of its blades from Woods, although Woods was not required to sell only to Eastman. The Woods blades became part of the machines,

and were sold as replacement blades for Eastman's customers throughout the world. The plaintiff's facility in is Massapequa, New York, while Eastman is located in Buffalo, New York.

Eastman purchased approximately 90% of the blades for its machines from Woods, the rest from other manufacturers. By 2001, however, Woods was no longer selling to any other customer. More recently, the manufacture of cheaper, equivalent quality blades in other areas of the world, such as China, has put pressure on Eastman and Woods to hold down the costs of the blades, and, according to Eastman, some two years ago it began to experience difficulty in selling or reselling Woods' blades because of their cost. By way of example, Eastman alleges that 10-inch carbon blades manufactured by Woods costs it $23.48 a dozen. This type of blade is available from China for $5 a dozen.

Eastman alleges that in its role as minority shareholder and adviser, it attempted to help James Woods reduce costs and expand its customer base, but has not been successful, pointing to Mr. Woods' lack of cooperation. Ultimately, Eastman offered to buy out Woods' interest in the plaintiff, but he rejected Eastman's offer. Eastman characterizes Woods' actions as oppressive and as a breach of his fiduciary duty to Eastman, the 49% owner, as this alleged lack of cooperation threatens the viability of the corporation, and consequently Eastman's interest. Eastman contends that there have been other acts that are contrary to its interests in the corporation, such as dumping industrial waste at the Woods manufacturing site on Long Island, for which Eastman as shareholder may be liable.

Finally, the third counterclaim alleges that Eastman purchased and caused to be delivered to Woods materials used in the production and sale of the blades Eastman ordered, but these goods have not been turned over despite requests that it do so. Eastman claims

money damages resulting from this failure.

The Court now turns to the present motion.

The law of summary judgment is well-established. Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). However, the court must draw all reasonable inferences in favor of the nonmoving

party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993). Nevertheless, even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Applying these standards to the case at bar, it appears that the plaintiff has made out its *prima facie* case. The affidavit of James Woods, and the admissions contained in the defendant's answer, are sufficient. Absent an affirmative defense that would support dismissal of the complaint, in whole or in part, on procedural grounds, the admissions contained in the answer must lead to summary judgment for the plaintiff. *See, Portfolio Recovery Assocs., LLC v King,* 55 AD3d 1074 (3d Dept. 2008); *EMP of Cadillac, LLP v Assessor of Village of Spring Valley,* 15 AD3d 336 (2d Dept. 2005).

No such procedural defense is offered. Rather, the defendant submits the affidavit of Steven F. Calzi, Executive Vice President and Chief Financial Officer, who essentially summarizes the history noted above and does not deny the shipments of the blades, that the amounts sought are accurate and that plaintiff has not been paid.

With regard to the dissolution claims, he states that "Eastman... is its partner in the ownership of that company. Because Woods management has failed to attract customers other than Eastman it is now moribund with the cessation of Eastman's orders [and is] an insolvent business. Unlike the dilemma often facing a court in directing the dissolution of

a thriving business, Eastman's moving for dissolution is merely a recognition that Woods [sic] business is not even a going-concern and [is] visibly in *de facto* dissolution."

He also recites the unsuccessful attempt to negotiate a buy-out, alleging that James Woods made unreasonable and unwarranted claims to additional monies which Calzi contends may mean that money paid by Eastman will go not to support the business, but will instead go to the individual, to the detriment of Eastman's interest. Calzi offers to pay $100,000 into court to retire legitimate debts of the plaintiff, pending an accounting to determine all of the plaintiff's legal liabilities and who should receive payment.

Finally, he recites the basis of the third counterclaim, which is asserted as an offset. The goods are cardboard blade boxes purchased from a third company, which are used as shipping containers, storage and for marketing purposes. Because Eastman is no longer buying blades and Woods is no longer manufacturing blades, Calzi asked Woods to return these boxes, which Eastman had purchased. Woods refused, and Calzi estimates the value of its boxes at between $25,000 and $30,000.

The foregoing is offered as the reason Eastman has not paid the sums demanded in the complaint. Even assuming, as it must, that the motion opponent's version of the relationship is correct, and that Calzi's opposing affidavit is accurate (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, *supra*), no issue of fact sufficient to defeat so much of the motion that seeks a judgment for the goods sold and delivered, or on the account stated, is made out given the admissions found in the answer and in the affidavit. *Portfolio Recovery Assocs., LLC v King,* 55 AD3d 1074, *supra*; *EMP of Cadillac, LLP v Assessor of Village of Spring Valley,* 15 AD3d 336, *supra.* There can be no offset and consequent denial of the

motion for the alleged retention of the shipping boxes, because there is no showing that this constituted a breach of the same agreement under which the knives were delivered to the defendant. *Created Gemstones v Union Carbide Corp.*, 47 NY2d 250, 255 (1979); *Panda Capital Corp. v Kopo Intl.*, 242 AD2d 690 (2d Dept. 1997). It may continue as a separate claim, however, as the plaintiff has not demonstrated its entitlement to summary judgment dismissing this claim on the merits.

Similarly, even if dissolution of the plaintiff is available to the defendant as 49% shareholder, this cannot serve as a reason to deny plaintiff judgment on its first and second causes of action. The Court agrees with the plaintiff that the defendant's concern about how payment will be used by the plaintiff is irrelevant in the context of the present action. However, these concerns would be quite relevant in a dissolution proceeding, and the Court finds that given the allegations made in the first and second counterclaims, and the Calzi affidavit, the plaintiff is not entitled to summary judgment dismissing these claims on the merits.

A proceeding for dissolution is available under Business Corporation Law § 1104-a, or the common law. *See, Matter of Sternberg v Osman,* 181 AD2d 897 (2d Dept. 1992). However, as the procedural mandates of Business Corporation Law § 1106 clearly have not been met the first and second counterclaims must be dismissed, without prejudice to commencement of an appropriate dissolution proceeding.

Accordingly, the motion is granted and judgment may be entered for $184,305.21, with interest at the legal rate from January 5, 2009. The first and second counterclaims are dismissed, without prejudice to commencement of an appropriate proceeding for dissolution

under the Business Corporation Law. The third counterclaim is severed and continued, or may be discontinued, without prejudice.

Absent discontinuance of the third counterclaim, a Preliminary Conference with regard to this claim shall be held in the basement of the Courthouse on October 1, 2009, at 9:30 a.m. Counsel are forewarned that failure to appear at this conference may subject the defaulting party to sanctions.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 2, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
SEP 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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