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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

MICHAEL'S ELECTRICAL SUPPLY CORP.,

Plaintiff,

- against -

ALROSE ALLEGRIA, LLC, d/b/a ALLEGRIA HOTEL & SPA, ALLEN ROSENBERG, EAST END BUILDERS GROUP, INC., and JONATHAN RUBIN

Defendants

INDEX NO.: 016403/2010
MOTION DATE: 6/22/2011
SEQUENCE NO.: 01

The following documents were read on this Motion:

Motion for Summary Judgment .... 1.
Affirmation in Opposition on behalf of Alrose, Allegria and Rosenberg ..... 2.
Affirmation in Opposition on behalf of East End Builders and Rubin .... 3.
Reply Affirmation in Further Support of Motion .... 4.

PRELIMINARY STATEMENT

Plaintiff moves for summary judgment against all defendants for electrical equipment delivered to the site of the Allegria Hotel at 80 West Broadway, Long Beach, New York. Plaintiff claims that goods having a value of $413,334.24 were delivered to the work site, that none of the goods were rejected, and that no payment has been made. Plaintiff relies upon two documents entitled "CREDIT APPLICATION AND AGREEMENT", one of which was signed by Jonathan Rubin on behalf of East End Builders Group, Inc. on November 5, 2008, the other signed by Allen Rosenberg on behalf

of Alrose Allegria, LLC on September 8, 2009. The documents contained the following language, upon which plaintiff relies to seek personal liability:

> If the (buyer) is a corporation, the individual or individuals signing the within agreement, in considerate (sic.) Sum of One Dollar, to him (them) in handpaid (sic.), receipt where by is hereby acknowledged, to (sic.) Hereby personally guarantee the payments of all amounts owing by said corporation.

BACKGROUND

Alrose Allegria, LLC, d/b/a Allegria Hotel & Spa, is the owner and operator of a newly-constructed luxury hotel in Long Beach. Plaintiff, a supplier of electrical equipment, provided materials for the construction, for which it has billed $413,334.23. Plaintiff has sued the limited liability company, Allen Rosenberg, the principal member of the company, East End Builders Group, Inc., the construction manager, and Jonathan Rubin, an officer of the corporation. In its complaint, plaintiff claims that from September 17, 2009 onward, it sold and delivered goods to defendants. Packing slips annexed as Exh. "D" to the motion reflect deliveries as early as January 7, 2009. The last included slip was for January 8, 2010.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an

opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial". (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". (*Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Claims against Alrose Allegria, d/b/a Allegria Hotel & Spa and Allen Rosenberg

Defendant Alrose does not deny that it is the developer of the hotel, and the entity to which electrical materials were delivered by plaintiff. Nor is there any claim that the goods were defective or were returned. The contention is that material questions of fact remain in that the guarantee language was "buried in the credit application", and it is unknown which items were sold on a line of credit issued by plaintiff. As to the latter, plaintiff replies that all material was sold on credit, since none was paid for C.O.D. or otherwise.

With respect to the fact that guarantee was included within a credit application, such was the case in *Bellevue Builders Supply, Inc. v. Belmonte,* 271 A.D.2d 849 (3d Dept. 2000). In that case the personal guarantee was contained in a single-page credit

application, parts of which were incomplete when signed. The application was intended to show a "good faith" interest in purchasing the owner's 50% shares of the home building company. The Court was unconcerned that the language was contained in the last paragraph of the credit line application; but found that the lack of a delineation of the "Credit Limit Desired" at the time of the execution, was sufficiently material so that its omission negated a finding that the parties had come to a meeting of the minds. (*Matter of Express Indus. & Term. Corp. v. New York State Dept. Of Transp.*, 93 N.Y.2d 584, 589 [1999]). The Court distinguished the holding in *Norstar Bank of Upstate N.Y. v. Office Control Sys.* 165 A.D.2d 265 (3d Dept.1991), in which the guarantee was expressly unconditional in that it covered " * * * all amounts which the Borrower shall owe to [plaintiff] whether such indebtedness now exists or shall hereafter arise". *Id.* at 266.

There is no claim that there were any blanks in the "Credit Application and Agreement" when signed by Rosenberg. In fact, Exh. "K", the document signed by Rosenberg does not contain a space for the amount of credit requested, as does the document signed on behalf of East End Builders. It calls for the personal guarantee by the signer on behalf of a corporation "* * * of all amounts owed by the corporation".

Defendants' contentions that the guarantee language was buried in the credit request and was never properly articulated to Allen Rosenberg, are unavailing unless the conduct of the plaintiff rose to the level of fraud in the factum, defined in UCC § 3-305(2)(c) as "such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms". Where there is no evidence that the party sought to by held liable on the guarantee is "neither uneducated nor unable to read and could have ascertained the true nature of the document by reading it", the defense of fraud in the factum is unavailable. (*Norstar Bank of Upstate NY v. Office Control Systems, Inc.* 165 A.D.2d 265, 267 [3dDept1991]).

This, however, does not mean that plaintiff is home free in its claim for personal

liability against Rosenberg. The doctrine of contra proferentem remains alive and well. In this case the language of the "Credit Application and Agreement" was drafted by plaintiff. Aside from the linguistic maladies noted in its earlier recitation, it specifically provides that the individual signer's personal guarantee will arise "if the [buyer] is a corporation". Alrose Allegria, LLC is not a corporation, it is a limited liability company, and a signer could reasonably assume that since he was not signing on behalf of a corporation, the individual guarantee would not arise.

Plaintiff's motion for summary judgment against Alrose Allegria, LLC, d/b/a Allegria Hotel & Spa, is granted. The motion for summary judgment against Allen Rosenberg on the basis of a personal guarantee is denied.

Claims against East End Builders and Jonathan Rubin

Defendants East End Builders Group contends that it is not in privity with plaintiff, served only as the construction manager, and acted solely as an agent of Alrose. They claim that they did not order the materials, but do not deny that they signed the Credit Application and Agreement with a credit request of $100,000. (Exh. "G"). They therefore claim that even if they were found liable to plaintiff, the liability cannot exceed the $100,000 line of credit requested.

Defendant East End claims to be owed some $720,000 by defendant Alrose, and plaintiff raises the issue that they have not commenced an action against Alrose, or even cross-claimed against them in this action. This is curious, but not in any way determinative of the relationship between East End and Alrose.

If, in fact, East End was simply acting as the agent for Alrose, a disclosed principal, they can not be liable for the materials purchased by the principal. If, however, they are more closely aligned with Alrose, they may be found to be responsible for the materials provided by plaintiff. In *Yellow Book Sales and Distribution Company, Inc. v. Mantini,* 925 N.Y.S.2d 646 (2d Dept.2011), Champion Locksmith entered into certain advertising contracts with plaintiff. Defendant Mantini executed many of the contracts on behalf of

Champion. Defendant Mantini moved for summary judgment dismissing the complaint against him, asserting that he executed the contracts solely in a representative capacity and was not individually liable thereon. Trial Court granted summary judgment against both defendants in favor of plaintiff. In Second Department disagreed with trial court's determination that Mantini failed to sustain his prima facie burden on the motion. Quoting *Yellow Book of N.Y. v. Shelley,* 74 A.D.3d 1333, 1334 (2d Dept.2010), the Court stated that " ' (a)n agent who signs an agreement on behalf of a disclosed principal will not be held liable for its prformance unless the agent clearly and explicitly intended to substitute his personal liability for that of his principal' ".

Whether or not East End was acting solely as an agent for Alrose is not known. In order for plaintiff to proceed against East End, they must establish either that East End was more than an agent, and in fact was acting as a joint principal through some arrangement with Alrose, or that they clearly and unambiguously intended to substitute themselves in place and stead of Alrose as the responsible party. There is no evidence of the latter in the record before the Court; but there remains the possibility that East End was acting as a principal, and not just as an agent for Alrose.

This material question of fact precludes the grant of summary judgment against East End or Rubin. Plaintiff's motion for summary judgment against them is denied.

This constitutes the Decision and Order of the Court.

Dated: August 19, 2011

J.S.C.

ENTERED
AUG 29 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE