

At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of May, 2001

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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G & L FOOD PRODUCTS INC.,

Plaintiff(s),

- against -

Index No. 41975/98

ERBA POND FOOD PRODUCTS INC.,  
d/b/a ERBA FOOD PRODUCTS,

Defendant(s).

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The following papers number 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 _____
Opposing Affidavits (Affirmations) _____	2 _____
Reply Affidavits (Affirmations) _____	3 _____
_____ (Affirmations) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Erba Pond Food Products, Inc. ("Erba") moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff G&L Food Products Inc. ("G&L"), and for an order directing plaintiff to release \$39,340 held in escrow to the defendant.

In its complaint, plaintiff alleges that defendant owes it \$62,647.61 for goods sold and delivered to defendant and that on or about February 1, 1997, the defendant had agreed that the above figure was due and owing. Instead of answering plaintiff's complaint, defendant allegedly paid plaintiff's collection agency \$34,000 in partial payment of the debt. Thereafter, plaintiff entered a default judgment against defendant. The Marshal collected \$34,340 from the defendant in execution of said judgment and the plaintiff filed a satisfaction of judgment in the amount of \$73,371. On June 24, 1999, this court (Dabiri, J.) permitted defendant to interpose an answer in this action and signed a stipulation ordering, among other things, that the respective attorneys exchange documents and that in the event that defendant did not owe plaintiff a sum in excess of \$34,000 and did not owe the \$39,340 collected by the Marshal, plaintiff's attorney was directed to return the \$39,340 to defendant's attorney.

In support of its motion, defendant proffers an affidavit of its employee Sam Green, to the effect that defendant had already paid plaintiff \$71,350.81 to satisfy the debt and that it is entitled to a refund of the extra \$39,340 collected by the Marshal. Green attaches a letter from plaintiff's attorney, dated September 28, 1999 providing a list of outstanding invoices totaling \$71,350.20. The letter concedes that plaintiff had already received checks in the amount of \$47,153.90 from the defendant (in addition to the \$39,340 check collected by the Marshal). Green explains that defendant also paid the remainder of \$28,342.25. He proffers a canceled check in the amount of \$74,412.10 which is meant to cover, among other

things, invoices totaling \$21,187.25 that the plaintiff claims are still outstanding. Green states that the remainder is covered by credits and adjustments to other invoices. For example, Green proffers an invoice and a letter by a walnut oil manufacturer, dated February 1, 2001, indicating that the plaintiff picked up walnut oil from the account of the defendant. Furthermore, the other credits (including one for \$1995.50 worth of mayonnaise) and price adjustments on other invoices total around \$3503.50.

In opposition to defendant's motion, plaintiff proffers an affidavit of its president, Elliot Gibber, to the effect that defendant still owes his company \$46,405.64. Gibber contests defendant's claim of a \$7500 credit to defendant for walnut oil and a \$1995.50 credit for mayonnaise, and other "unilateral price adjustments" made by the defendant. Gibber claims that the checks proffered by defendant reflect old invoices for which plaintiff is not suing. Plaintiff also proffers outstanding invoices which individually charge different amounts than the same invoices submitted by the defendant.

"Summary judgment is a drastic remedy which should not be granted when there is any significant doubt as to the existence of a triable issue of fact (Zuckerman v City of New York, 49 NY2d 557, 562). Here, it is not clear what invoices were covered by defendant's checks paid to plaintiff. Furthermore, there is an issue of fact as to the amount owed on outstanding invoices. Finally, there is a triable issue of fact as to whether defendant should be credited for, among other things, walnut oil and mayonnaise and whether there were other price adjustments on outstanding invoices.

Accordingly, the motion by defendant for summary judgment is denied. Based on this record, it is not clear whether the defendant owes the plaintiff a sum in excess of \$34,000. Therefore, the \$39,340 collected by the marshal shall remain in plaintiff's attorney's escrow account; however plaintiff's attorney is ordered to place the funds into an interest bearing escrow account.

The foregoing constitutes the decision and order of this court.

ENTER.  
J. S. C.