

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III

Justice

TRIAL/IAS, PART 2

NASSAU COUNTY

VEECO INSTRUMENTS INC.,

Plaintiff(s)

INDEX No.17849/2003

-against-

JUSTECH INC.,

MOTION DATE:1/9/08

MOTION SEQ.#008-009

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	X
Answering Affidavit	
Replying Affidavits	X

Motion (#008) by defendant for a default judgment against plaintiff on defendant's counterclaim, and cross motion (#009) by plaintiff for: (1) a declaratory judgment pursuant to CPLR 3001 declaring defendant's counterclaim a nullity, and (2) an order compelling defendant's production of responses to plaintiff's discovery demands, or, alternatively, striking defendant's answer, or precluding defendant's expert's testimony or report, are denied.

At the outset, it should be noted that plaintiff has withdrawn so much of its cross motion as sought production of documents responsive to its discovery demands, or, alternatively, sanctions, as defendant has now responded to such demands. The only issue remaining for consideration on defendant's motion and plaintiff's cross motion is the viability of defendant's counterclaim and whether defendant should be granted a default judgment against plaintiff on said counterclaim.

This action arising out of plaintiff's sale of a product line to defendant, was commenced with a summons and motion for summary judgment in lieu of complaint. In its papers in opposition to that motion, defendant raised claims of breach of contract,

fraud, and misrepresentation by plaintiff. Plaintiff submitted a reply in further support of its motion for summary judgment in lieu of complaint.

By order dated April 19, 2004, this Court denied plaintiff's motion for summary judgment in lieu of complaint holding that the note between the parties was an integral part of the entire agreement between the parties and thus not subject to treatment under CPLR 3213.

After denial of plaintiff's motion for summary judgment in lieu of complaint, this matter then proceeded as an "ordinary" action. However, no formal complaint or answer were ever filed or served by either side. Therefore, the motion for summary judgment in lieu of complaint and the papers submitted thereon, of necessity, constituted the pleadings in this matter. This continued to be the case through September 28, 2005, when this matter was certified as ready for trial, and through March 2, 2007, when the matter was re-certified for trial after the original note of issue had been vacated on December 12, 2006.

It was not until August 31, 2007, well after the second note of issue herein had been filed on May 31, 2007, that defendant served a formal counterclaim alleging fraud and misrepresentation by plaintiff. Plaintiff's counsel rejected defendant's counterclaim as a nullity. Since plaintiff did not formally reply to its counterclaim, defendant now seeks a default judgment against plaintiff on the counterclaim. Plaintiff for its part cross moves for judgment declaring the counterclaim a nullity.

Given the commencement of this action as a motion for summary judgment in lieu of complaint and the denial of same, this action has proceeded as somewhat of a hybrid, without any formal pleadings ever having been submitted by either party for over three years. Defendant's service of a formal counterclaim containing the same claims as made in its opposition to plaintiff's motion for summary judgment in lieu of complaint is superfluous at best. Defendant's attempt to hold plaintiff in default for failing to reply to such counterclaim is disingenuous at best.

The parties' intent, as gleaned from their conduct of this case, was that the papers submitted on the motion for summary judgment in lieu of complaint constituted the pleadings herein. Thus, defendant's opposition to plaintiff's motion for summary judgment in lieu of complaint constitutes its answer, including its defenses and any counterclaims. Defendant's formal counterclaim was unnecessary and redundant and plaintiff had no need to respond to it. Therefore, defendant's motion seeking a default judgment against plaintiff on the counterclaim is denied.

With regard to so much of plaintiff's cross motion as seeks a declaratory judgment that defendant's counterclaim is a nullity, while this Court finds defendant's "formal" counterclaim to be superfluous, the claims raised therein, since they were also raised in defendant's opposition to plaintiff's motion for summary judgment in lieu of complaint, which is, in effect, defendant's answer, may be raised at trial. Plaintiff is deemed to have denied defendant's counterclaim by way of its reply on its motion for summary judgment in lieu of complaint. (cf *Fine v DiStanti*, 79 AD2d 673.)

Date 1.24.08

EDWARD W. McCARTY III

J.S.C.

ENTERED

JAN 29 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**