

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DI GIORGIO CORPORATION,	:	May Term 2004
	:	
Plaintiff,	:	No. 3202
v.	:	
DIS-FOOD CORPORATION, ET. AL.,	:	COMMERCE PROGRAM
	:	
Defendants.	:	Control Number 020065

ORDER and MEMORANDUM OPINION

AND NOW, this 25th day of May, 2005, upon consideration of the Motion for Summary Judgment of Plaintiff Di Giorgio Corporation, Defendants' response in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** that Plaintiff's Motion for Summary Judgment is **Denied** as to Count I and **Granted** as to Count II.

BY THE COURT:

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

This action stems from Plaintiff Di Giorgio Corporation (“Di Giorgio” or “Plaintiff”) attempting to collect from Defendants Dis-Food Corporation (“Dis-Food”), Sal-Nik Corporation (“Sal-Nik”) and Salvatore Chillemi unpaid invoices totaling \$96, 844, 86. For the reasons set forth below, Plaintiff’s Motion for Summary Judgment is Granted in part and Denied in part.

BACKGROUND

Plaintiff Di Giorgio Corporation is a distributor of grocery, frozen foods and dairy products. Porky Products, Inc. is a supplier of fresh meat, poultry and seafood. Di Giorgio and Porky Products, Inc. entered into a Merchandising Agreement wherein Plaintiff acted as the authorized supplier of Porky Products goods to certain Di Giorgio customers.

Defendant Salvatore Chillemi (“Chillemi”) is a principal in Dis-Food and Sal-Nik. Dis-Food owns and operates a grocery store in Philadelphia, Pennsylvania trading as “Super Sav Rite” and /or “Sal’s Great Value Super Sav Rite.” Sal-Nik owns and

operates a grocery store in Yeadon, Pennsylvania trading as “Sal’s Sav Rite” and/or “Yeadon Sav Rite.”

On April 28, 2003, Chillemi executed an unconditional guaranty (the Dis Food Guaranty) in favor of Di Giorgio whereby Chillemi guaranteed the payment of any amounts billed by Di Giorgio for merchandise sold and or delivered to Dis Food. Chillemi also executed on September 30, 2003, an unconditional guaranty (“Sal-Nik Guaranty”) in favor of Di Giorgio whereby Chillemi guaranteed the payment of any and all amounts billed by Di Giorgio for merchandise sold and/or delivered to Sal-Nik.

From March 2004 to May 2004, Di Giorgio sold and delivered to Dis-Food and Sal-Nik various grocery, frozen and dairy goods. Additionally from May 10, 2004 through May 14, 2004 Porky Products sold and delivered to Dis Food and Sal-Nik respectively various merchandise. Dis- Food and Sal Nik have failed to make any payments to Di Giorgio or Porky Products. Specifically,

1. Dis-Food has failed to pay Di Giorgio \$38, 778.36,
2. Sal-Nik has failed to pay Di Giorgio \$21, 204.80.
3. Dis Food has failed to pay Porky Products \$18, 634.99.
4. Sal-Nik has failed to pay Porky Products \$18, 226.71.
5. Dis-Food has failed to pay Di Giorgio for advertising and circulars.

As a result, Di Giorgio instituted the instant lawsuit against Defendants seeking payment of the outstanding balances set forth above as well as enforcement of a guarantee signed by Chillemi in favor of Di Giorgio. In response, Defendants filed an answer with new matter and counterclaims for breach of an oral contract (Count I), legal fraud (Count II), fraud in the inducement (Count III) and unjust enrichment (Count IV).

Plaintiff filed preliminary objections to the counterclaim. On October 18, 2004, the court dismissed Count II and III of the counterclaim. In the counterclaim, Defendants claim they are entitled to a \$26,100 credit. Defendants allege that at the time DiGiorgio and Defendants began to do business as an incentive to acquire Defendant's business, Plaintiff orally agreed to provide both Sal-Nik and Dis-Food with a credit for one free case each of Di Giorgio's private label grocery, frozen and dairy goods. Defendants allege that the credit has not been received. Defendant Dis-Food also asserts that Di Giorgio is not entitled to recover all the amounts guaranteed to Porky Products since the guarantee signed by Chillemi was terminated and therefore he is not personally liable for the Dis Food debt.

Plaintiff has now filed a Motion for Summary Judgment on Counts I and II of the complaint as well as Count I of the Counterclaim.¹

DISCUSSION

I. Standard of Review

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Potter v. Herman, 762 A.2d 1116, 1117-18 (Pa. Super. 2000). Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. In sum, only when the facts are so clear that reasonable minds cannot

¹ Plaintiff did not move for summary judgment on Defendants' counterclaim for unjust enrichment (Count IV).

differ, may a trial court properly enter summary judgment. Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000).

II. Count I

In Count I, Di Giorgio asserts that it is entitled to payment for three categories of invoices: 1) invoices submitted by Di Giorgio for groceries, 2) invoices submitted by Porky Products for meat products and 3) invoices submitted by Di Giorgio for advertising circulars. Each will be dealt with accordingly.

A. Invoices Submitted For Groceries and Advertising Circulars.

In Count I of the complaint, Di Giorgio alleges that it sold and delivered to Sal-Nik merchandise totaling \$21, 204.80 and sold and delivered to Sal-Nik merchandise totaling \$38, 217.17. In addition to groceries, Di Giorgio also submitted invoices for advertising circulars to Dis Food for \$541. 19. Dis Food and Sal-Nik admit that they ordered and received groceries from Di Giorgio and did not return any of them. They also admit that the invoices for advertising circulars is due and owing.

Di Giorgio maintains that section 2709 of the Pennsylvania Uniform Commercial Code governs the instant motion. Section 2709 of the Pennsylvania Uniform Commercial Code provides “when the buyer fails to pay the price as it becomes due the seller may recover ...the price of: (1) goods accepted or conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and ...” 13 Pa. C. S. § 2709 (a)(1).

By way of counterclaim (Count I), Defendants assert an entitlement to a credit totaling \$26, 100.00. Defendants allege that this credit arises as a result of a Set Up Agreement between Di Giorgio and Defendants. Under the terms of the Set Up

Agreement, DiGiorgio allegedly agreed to provide Sal Nik and Dis Food with one free case each of Plaintiff's private label grocery, frozen and dairy products. Despite requests by Defendants, Plaintiffs allegedly failed to honor the Set Up Agreement.

Di Girgio, on the other hand, disputes that such an agreement was ever made. It argues in the alternative, that if such an oral agreement was made it is unenforceable under the Statute of Frauds, Title 13 Pa. S.C. § 2201. The statute of frauds, first codified in the Uniform Commercial Code (U.C.C.), has been adopted by this Commonwealth in 13 Pa.C.S.A. § 2201, Formal requirements; statute of frauds. The statute states:

a contract of the sale of goods for the price of \$ 500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

13 Pa.C.S.A. § 2201(a), General rule.

There are, however, statutory exceptions to this requirement which Defendants claim apply. Defendants maintain that the instant situation falls under subsection (3) of § 2201 (c). Subsection (c)(3) states: "[A] contract which does not satisfy the requirements of subsection (a)...is enforceable: with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2606)." Id. Section 2606 of the code provides that acceptance of goods occurs when the buyer fails to make an effective rejection or "does any act inconsistent with the ownership of the seller....".

The UCC Comment explicitly states that under the Code, an oral contract is not void, it is merely unenforceable. Nor is the oral contract unlawful, and it may be voluntarily performed by the parties. Subsection (3)(c) makes it possible for a defendant to lose the defense of the statute of frauds where the goods have been received and

accepted. Here, it is undisputed that the Dis Food and Sal Nik received and accepted the goods. Accordingly, Plaintiff's Motion for Summary Judgment as it pertains to Count I of the Counterclaim is Denied.

As it pertains to Count I of the Complaint, the court finds that Plaintiff is indeed owed monies for the goods accepted and received by Defendants. However, the court at this time cannot conclusively determine the amount since a question of fact exists as to whether the defendants are entitled to a credit. Thus, Plaintiff's Motion for Summary Judgment as it pertains to Count I is Denied.

B. Porky Products Invoices.

Additionally, Count I of the complaint purportedly seeks, in part, to recover sums allegedly due by Dis Food and Sal Nik to Porky Products for product sold and delivered by Porky Products. On November 27, 2000, Porky Products Inc. and Di Giorgio Corporation entered into a Merchandising Agreement. Paragraph 3 of the Merchandising Agreement provides as follows:

3. Guarantee of Accounts Receivable

(a) White Rose² guarantees to Porky the payment in full of the oldest two weeks of accounts receivable of Porky generated from the sale of Products to any Store during the term of this Merchandising Agreement, but only to the extent of the credit limit specified in Schedule B, which schedule may be amended from time to time by written notice from White Rose. Such guaranty shall be exercised from time to time, but only once with respect to each Store, by notice from Porky to White Rose of non-payment of accounts receivable by any such Store accompanied by the back-up as set forth in Schedule. Within five (5) days of such notice, White Rose will pay to Porky the lesser of the oldest two unpaid weeks of accounts receivable or the Credit Limit as set forth in Schedule B. All other monies owed to Porky by the Store at the time of such notice shall hereinafter be referred to as the "Retained Porky

² White Rose Foods, White Rose Dairy and/or White Rose Frozen Food are Divisions of Di Giorgio. (Amended Compliant p. 5).

Receivable.” Upon payment by white Rose under the guaranty, white Rose shall be deemed to have purchased the underlying rights to the accounts receivable from Porky and Porky agrees to execute any documents reasonably requested by White Rose to effectuate White Rose’s legal rights and secured position in these underlying receivable.

Plaintiff contends that it is entitled to payment pursuant to section 2709 of the Uniform Commercial Code. In opposition, Defendants maintain that factual issues remain concerning the amount due on the Porky invoices and whether Di Giorgio paid the invoices as required under the Guarantee provision of the Merchandising Agreement. The court agrees. Although, Di Giorgio has submitted an affidavit as evidence that it paid Porky under the guaranty, the court cannot rely upon this affidavit to grant Plaintiff’s Motion for Summary Judgment. Oral testimony alone, either through testimonial affidavits or depositions of the moving party or the moving party’s witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. Pa. R. Civ. P. 1035.2. Based on the foregoing, Plaintiff’s Motion for Summary Judgment should be denied.

III. Count II

Count II of the amended complaint purports to recover from Chillimi the amounts due from Dis-Food and Sal-Nik in Count I of the complaint pursuant to two personal guarantees executed by Chillimi in favor of Plaintiff. Plaintiff asserts that Chillemi is liable to Di Giorgio for the Dis-Food debt pursuant to a Guaranty executed by Chillemi in April 2003 as alleged in Count I of the Amended Complaint. Defendant Chillemi asserts that the Guaranty of the Dis-Food debt was terminated at the time Dis- Food debt was paid for all of its purchases from Plaintiff. The plain language of the Dis-Food Guaranty states that the Guaranty shall remain in full force and effect until any and all claims that

Di Giorgio may have against Dis-Food and/or the undersigned (1) shall be paid in full or (2) until written notice of cancellation signed by all of the undersigned shall have been delivered, registered mail to Di Giorgio. See Dis-Food Guarantee at p. 2 . Defendant Chillimi has failed to produce any evidence that the Dis-Food Guarantee was terminated in writing. Accordingly, Plaintiff's Motion for Summary Judgment is Granted in favor of Di Giorgio and against Plaintiff. The court at this time is unable to calculate the amount of the judgment to be entered against Chillimi since questions of fact exist as to the amount in dispute as set forth above. When said amount is determined, Defendant Salvatore Chillimi may be held personally responsible pursuant to the personal guarantees signed by Chillimi.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is Denied as to Count I and Granted as to Count II. An Order Contemporaneous with this Opinion will follow.

BY THE COURT,

C. DARNELL JONES, II, J.