UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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Case Title: High Energy Access Tools, Inc. v. Pyrotechnic Specialties, Inc.

Case Number: 03-01210

Document Information

Description: Memorandum Opinion Granting Defendant's [18-1] Motion For Summary Judgment b Pyrotechnic Specialties, Inc. .

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
HIGH ENERGY ACCESS TOOLS, INC..
Debtor. No. 11-03-10524 SA

HIGH ENERGY ACCESS TOOLS, INC.,
Plaintiff,
v. Adv. No. 03-1210 S

PYROTECHNIC SPECIALTIES, INC.,
Defendant.

MEMORANDUM OPINION GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant Pyrotechnic Specialties, Inc.'s Motion for Summary Judgment ("Motion")(doc. 18) and supporting memorandum ("Memorandum") (doc. 19), Plaintiff High Energy Access Tools, Inc.'s Response (doc. 24), and Defendant's Reply (doc. 31). Plaintiff is represented by Moore & Berkson, P.C. (George M. Moore and Arin E. Berkson). Defendant is represented by Hinkle, Hensley, Shanor & Martin, LLP (Richard E. Olson and Mary Lynn Bogle). This is a core proceeding. 28 U.S.C. § 157(b)(2)(E) and (H). The Motion will be granted.

Plaintiff's complaint in this case contains two counts based on substantially one set of facts. Plaintiff placed an order for certain goods with Defendant and paid a $42,000 deposit. Defendant never shipped the goods and has failed to return the deposit. Plaintiff seeks relief under a theory of

fraudulent transfer (count 1) and breach of contract (count 2).

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Bankruptcy Rule 7056(c). Once the moving party has properly demonstrated that there is no genuine issue of material fact, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

> If the movant carries this initial burden, the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant. Fed.R.Civ.P. 56(e); see Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); Celotex, 477 U.S. at 324, 106 S.Ct. 2548; Anderson, 477 U.S. at 248, 106 S.Ct. 2505. To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 506 U.S. 1013, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992).

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998).

In this case movant filed its motion for summary judgment and attached as supporting documents: Affidavit of June Ellerbee with attached exhibits 1 through 5, and Affidavit of Brad Swann. Both affidavits are sworn to, under oath, and notarized. Both are made on direct personal knowledge and contain statements of fact in areas of Defendant's business over which they have direct responsibility. In other words, Defendant has a motion for summary judgment properly supported by competent evidence. It establishes that it suffered damages in an amount in excess of the deposit, and thereby shows that it provided reasonably equivalent value for the purposes of the fraudulent transfer claim.

NM LBR 7056-1 states that a memorandum in opposition to a motion for summary judgment shall set out each fact as to which the party contends a genuine issue exists, and shall refer with particularity to those portions of the record upon which the opposing party relies. Any material fact set forth in movant's statement shall be deemed admitted unless specifically controverted in a response.

Defendant proposed as undisputed facts the following:

1. Plaintiff, a Nevada corporation doing business in New Mexico, has filed suit against Defendant, a Georgia corporation.

2. Plaintiff contacted Defendant by telephone in Georgia.

3. During the call, Plaintiff requested a quote for flash bang grenades, which quote Defendant provided.

4. After the call, Plaintiff issued and transmitted two purchase orders to Defendant for flash bang grenades, with a deposit of $42,000 toward the total price of $112,350.

5. By facsimile transmission dated July 15, 2002, Plaintiff notified Defendant that it did not have the required Class 10 license in order to receive shipment of the grenades. Thereafter, Plaintiff failed to obtain the required license and, subsequently, cancelled the order.

6. Defendant attempted to sell the grenades for Plaintiff, but was unable to do so. Defendant then sent Plaintiff an invoice for $48,616 in cancellation charges, which represented the material, labor costs and packaging for the grenades.

Plaintiff states two objections to Defendant's proposed undisputed facts. First, Plaintiff states that the Ellerbee affidavit and the calculations contained in Exhibit 5 do not show that Defendant attempted to sell the grenades to another purchaser and that such attempts were unsuccessful. Second, Plaintiff states that Defendant has failed to demonstrate that

it is due $48,616 in cancellation charges. Plaintiff cites to Defendant's Memorandum ¶ 6 as support for both objections. These objections are not well taken.

The Memorandum ¶ 6 refers to the Ellerbee affidavit.[1] The second ¶8 of the Ellerbee affidavit[2] refers to exhibit 4 and states "PSI thereafter attempted to sell the grenades for HEAT, but was unable to do so. Accordingly, PSI sent HEAT an invoice for $48,616.00 in cancellation charges, which represented the material, labor costs and packaging for the grenades. A copy of the cancellation charge invoice is attached as Exhibit 4." Attached to the affidavit as Exhibit 4 is the invoice for the cancellation charge. Therefore,

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[1] The memorandum and affidavit have some confusing misnumberings. The Ellerbee affidavit has two paragraphs numbered "M"; the second ¶8 contains the critical statement. The Memorandum refers to ¶¶6 and 7; it should refer to the second ¶8. The misnumbering of the affidavit paragraphs and the mistaken references in the Memorandum do not detract from (although they do distract from) the probative or evidentiary value of the documentation supporting the Motion.

[2] Also attached to the affidavit as Exhibit 5 is a back-up sheet purportedly showing how the amount of the cancellation charge was arrived at. Although PSI refers to Exhibit 5 in its brief in support of the Motion, the Ellerbee affidavit itself does not refer to the exhibit. Therefore there is no basis for the Court to consider Exhibit 5 as part of the evidentiary support for the Motion, and the Court has not relied on it in any way. On the other hand, Exhibit 4 is sufficient by itself to support the relevant part of the Ellerbee affidavit, so the page of calculations that constitutes Exhibit 5 is not necessary for PSI to make its showing.

Defendant has, in fact, established the fact that it attempted unsuccessfully to resell the grenades and incurred cancellation charges of $48,616.

At this point, the burden shifted to Plaintiff to come forward with "specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for Plaintiff. Adler, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." Id.

Plaintiff attached the affidavit of David Hudak, doc. 24 exhibit 1, that states: "¶9. HEAT never agreed to pay a cancellation fee or restocking fee of the order. ¶10. The order of flash bang grenades was not a special order and, as such, I believe that the grenades could have been sold to another purchaser."

Plaintiff has failed to meet its burden. First, whether HEAT agreed to pay a cancellation or restocking fee is not relevant. The Uniform Commercial Code does not require a buyer's consent to a seller's damages. Second, the fact that Mr. Hudak believes the grenades could have been resold is, as a matter of law, insufficient to defeat summary judgment. See Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 875 (10th Cir.

2004)("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.")(Citations omitted.); Rice v. United States, 166 F.3d 1088, 1092 (10th Cir. 1999)(An affidavit that does nothing more than state a belief that the facts set forth in another affidavit are untrue is insufficient to create a genuine issue of material fact.); cf. Tavery v. United States, 32 F.3d 1423, 1426 n.4 (10th Cir. 1994)(Statements of mere belief must be disregarded in moving for summary judgment.)

Therefore, Plaintiff has failed to meet its burden to demonstrate a genuine issue of material fact and Defendant is entitled to summary judgment as a matter of law. The Court will enter an Order dismissing this case with prejudice.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on August 25, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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