

M E M O R A N D U M

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART TT36**

Aris Food Transit, Inc. :
 : BY: GAVRIN, J.
 Plaintiff :
 :
 - against- : DATE: February 20, 2007
 :
 Ahava Food Corp. :
 : INDEX: NO. 13332/2003
 Defendant :
 :

This is an action to recover the sum of \$66,711.89 for goods (foodstuffs) sold and delivered by the plaintiff to the defendant. Plaintiff commenced the action by the filing of a summons and complaint on May 30, 2003. All of plaintiff's claims in this action have been settled during trial with the exception of plaintiff's claim for \$49,750.08 for a shipment of Greek food products delivered to the defendant on November 20, 2002.

In the answer to the complaint, the defendant set forth various affirmative defenses, including the statute of frauds. The defendant also interposed several counterclaims. The third counterclaim seeks recovery of the sum of \$11,920.00 paid for non-kosher foodstuffs that were included in a shipment of Greek food products delivered by the plaintiff to the defendant on September 19, 2002.

A non jury trial of this action was commenced on January 5, 2006 and concluded on November 13, 2006. Memoranda of Law were submitted on December 15, 2007. At the trial, the following witnesses testified:

THEMIS KANGADIS, the vice president of plaintiff corporation in charge of general operations .

DENNIS KANGADIS, the director of sales for plaintiff corporation.

ARISTIDIS KANGADIS, the president of plaintiff corporation and founder of the food importing business which the corporation operates.

YEHUDA BANYAN who is now sales manager of defendant corporation and, in 2002, was the buyer who did the purchasing for the corporation.

MOISHE BANYAN, the president of defendant corporation and founder of the various businesses that the corporation operates.

SHMUEL a/k/a YOSSI BANYAN, who, in 2002 and 2003, was the manager of the public storage facility operated by defendant corporation.

The plaintiff introduced 20 exhibits into evidence. The defendant introduced 18 exhibits into evidence.

FINDINGS OF FACT

The plaintiff, Aris Food Transit, Inc. (hereinafter “Aris”), imports and distributes gourmet food products for resale. The defendant, Ahava Food Corp. (hereinafter “Ahava”), owns a facility in Brooklyn, New York that occupies an entire city block. Ahava purchases food products for distribution and also manufactures and distributes its own food products. In addition, it operates a public storage business and a truck parking business at the Brooklyn facility. The food products Ahava distributes are marketed to the ultra orthodox Jewish community and must have kosher certification (Transcript of May 12, 2006, p. 496-498).

In late 2001 or early 2002, plaintiff’s sales manager, Dennis Kangadis, began doing business with defendant Ahava. He first assisted the defendant in clearing merchandise imported from France and then sold Ahava different cheeses imported by plaintiff Aris. The items sold to Ahava by Aris were all specially ordered kosher products. The orders were placed verbally, either in person or by phone, and then entered into the Aris computer system. Occasionally, a purchase order from Ahava would arrive later, by fax.

Dennis Kangadis testified that bills of lading, invoices and account statements are computer generated by Aris. When a delivery is made, the bill of lading is returned to Aris and any return, shortage or objection to the product is noted thereon (See plaintiff exhibits 4, 6, 13). An invoice for the shipment, which is mailed to the customer, is generated the day after the bill of lading comes back. Account statements are produced and sent to the customers once a month.

In early summer 2002, Dennis Kangadis arranged a meeting at the Ahava office with the owner and the sales manager of a Greek factory that manufactured packaged Greek foods. Moishe Banayan, the president of Ahava, and Yehuda Banayan, who did the purchasing for Ahava, attended this meeting, as well as Aristidis Kangadis, the president of Aris, and several other persons from Ahava. The sales manager of the Greek factory showed them ready made Greek foods in cans that were pre-labeled

with Golan labels, a brand name used solely by Ahava. He told them that the food could also be packaged in plastic containers, which could be microwaved, but this packaging would be much more costly. The meeting was then adjourned to the following day. On that day, the plastic containers were produced and the food examined and tasted. Moishe Banayan was very enthusiastic about the products. Discussions ensued during which the parties negotiated price. Ahava agreed that it would arrange and pay the cost of having the products certified as kosher.

The packaged Greek food was to be shipped in standard forty foot ocean containers, each weighing about fifteen tons, which have to be unloaded and returned to the ocean carrier. (Transcript of April 6, 2006, pp. 172, 199-201). The owner of the factory in Greece wanted an order for a substantial number of containers, but insisted on the purchase of at least two containers because of the “hassle of dealing with rabbis” involved in obtaining kosher certification for the product (Transcript of April 10, 2006, p. 485).

Dennis and Aristidis Kangadis both testified that the deal finalized with the Greek factory owner was for two containers, one for immediate shipment and one to be shipped after thirty days. However, Moishe and Yehuda Banayan insisted that only one container was ordered. This dispute raises an issue of credibility which must be determined by the Court (See, *Torkieh v. Fox Paper, Ltd.*, 784 N.Y.S. 2d 924). The Court having heard and observed the witnesses and examined the trial exhibits, credits the testimony of plaintiff’s witnesses that an order for two containers of the Greek food products was placed by Ahava. The witnesses who attended the meeting, including Moishe Banayan, agreed that this was the minimum order required by the Greek company. It is also incredulous that specially manufactured foodstuffs, weighing fifteen tons and valued at almost fifty thousand dollars, would be shipped from Greece to New York City without an order.

The first container was delivered to Ahava on September 19, 2002, as evidenced by invoice number 2268 for \$49,460.28. This invoice was paid in full by Ahava (Plaintiff exhibit 20). The second container was delivered to Ahava on November 20, 2002, as evidenced by the signed bill of lading and invoice number 3480 for \$49,750.08 (Plaintiff exhibits 15, 16). A portion of the Greek foods in both containers, the cabbage, was not certified as kosher.

Moishe and Yehuda Banayan testified that when Dennis Kangadis called to inform them that a second container of the Greek food products had arrived, they stated that they would not accept delivery. They told Dennis that the second container had not been ordered and they were having difficulty moving the Greek food products

in the first container. However, after some discussion they agreed to store the container at the Ahava facility in order to afford Dennis an opportunity to find another buyer or to collect its cost from his insurance company. Since the second container went into the public storage warehouse and not the distribution warehouse, a purchase order was not issued for it (Transcript of April 6, 2006, pp. 246 -251; transcript of May 12, 2006, p.509).

Dennis Kangadis insisted that Ahava had ordered two containers of the Greek food products at the summer 2002 meeting in Ahava's office and that he was never told that Ahava was accepting the second container only for storage. He testified that sometime in December 2002, Yehuda Banayan telephoned him and acknowledged that Ahava had received the second container. Yehuda then told him that Ahava was a little heavy on the Greek food products and requested a ten percent reduction in the price. A faxed letter dated January 16, 2003, relating this request, was forwarded to the Greek factory owner who refused to lower the price. (Transcript of April 6, 2006, pp. 169-171; plaintiff exhibit 18). In the spring of 2003, after the request to lower the price of the Greek food was denied, Yehuda told Dennis that Aris was not going to pay for the second container of Greek food products. Sometime in the spring of 2003, Yehuda communicated this refusal (Transcript of April 6, 2006, p.174).

Yossi Banayan, who managed the public storage business at Ahava, testified that Aris was not one of the ten or twelve regular public storage customers. However, in November 2002, he was directed by Ahava's president, Moishe Banayan, to accept for storage a container of Greek food products, delivered by Aris. According to this witness, the container was placed in the public storage warehouse at the Ahava facility and a receiving ticket was issued for it. The container was never removed from storage and its contents were dumped sometime in 2004.

CONCLUSIONS OF LAW

The agreement by the defendant to purchase two containers of the Greek foodstuffs was verbal. An oral agreement for the sale of goods for \$500 or more is not enforceable [UCC 2-201 (1)]. However, an exception exists when the goods have been received and accepted [subd. 3 (c)].

The plaintiff has produced a bill of lading which confirms that the second container of Greek foods was delivered to Ahava by the shipper and accepted on November 20, 2002 (Plaintiff exhibit 15). This bill was not controverted or disputed by the defendant. Rather, the defendant claimed that the goods were accepted for storage and not for distribution.

The bill of lading for the second container does not have any notation that the goods were accepted only for storage and an invoice, number 3480, was generated for this container on the same day the delivery was made to Ahava (Plaintiff exhibit 16). Furthermore, an account statement from Aris to Ahava, dated December 2, 2002, that was produced by the defendant, indicates that the defendant was billed \$49,750.08 for the second container (Defendant exhibit C). The plaintiff continued billing the defendant for this delivery up to May 3, 2003 (See Plaintiff exhibit 24). Nevertheless, no objection was raised to these statements of account. Moreover, in a letter dated January 16, 2003, two months after the second container was delivered, Yehuda Banayan requested a ten percent discount on the Golan Greek products, for a sales promotion, because the product was not selling well (Plaintiff exhibit 18). It was not until May 30, 2003, six months after the delivery of the second container, that Dennis Kangadis received a letter from Ahava, signed by “Moshe Banayan, President”, stating that Aris had shipped double the amount ordered of Golan products and indicating that the items were being stored by Ahava and should be picked up. (Plaintiff exhibit 19). The credible evidence in this case does not establish that defendant Ahava “seasonably notified” plaintiff Aris that it had rejected the second shipment, as required by UCC 2-602(1). Therefore, the rejection was ineffective and the goods are deemed to have been accepted by the defendant [UCC 2-606 (b)].

It is undisputed that defendant Ahava sold only to the ultra orthodox Jewish community and that products purchased by Ahava for distribution had to be certified as kosher. Nevertheless, the cabbage products that were included in the two containers delivered to Ahava did not have the required kosher certification when the food products were shipped by the Greek factory. The defendant Ahava was entitled, within a reasonable time, to reject these items which did not meet its requirements (UCC 2-601; also see Frankel v. Foreman & Clark, Inc, 33 F2d 83).

Yehuda Banayan testified that shortly after the first container was delivered on September 19, 2002, he notified Dennis Kangadis that the cabbage had not received approval to be sold as kosher and demanded credit for the item (Transcript of April 10, 2006, pp. 430-432). This was confirmed in a letter dated September 24, 2002 (Defendant exhibit O). In a subsequent letter of October 2, 2002, Yehuda Banayan informed Dennis that Aris could sell the cabbage in the non-kosher market provided Ahava’s label was removed (Defendant exhibit P). Therefore, the non-kosher cabbage was rejected within a reasonable time and the defendant Ahava is not liable for the cost of the cabbage in the two containers of Greek food products.

The Court concludes that the defendant is liable to the plaintiff for the cost of the second container of Greek food products in the amount of \$49,750.08, less the sum of

\$11,920.00, billed for the non- kosher cabbage in that container. Therefore, plaintiff is entitled to recover the sum of \$37,830.08 for the second shipment of Greek food products delivered on November 20 ,2002.

All counterclaims of the defendant except the third counterclaim are dismissed. On the third counterclaim, the defendant is entitled to recover the sum o f \$11,920.00, paid for the non-kosher cabbage in the first shipment of Greek food products delivered on September 19, 2002.

The sum of \$11,920.00 which the defendant is entitled to recover on the third counterclaim is to be set off from the sum of \$37,830.08, which the plaintiff is entitled to recover on its complaint, leaving a balance due plaintiff of \$25,910.08.

Accordingly, the plaintiff is awarded a judgment for the sum of \$25,910.08, plus interest from March 11, 2003, to be entered by the County Clerk.

Dated: January 29, 2007

J.S.C.