

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

HAROLD WEISBERG,

Index No. 1845-1977

Plaintiff

-against-

AFFIRMATION

DIMONDSTEIN BOOK COMPANY, INC.,

Defendant.

STATE OF NEW YORK)
) SS:-
COUNTY OF NEW YORK)

HARRY M. SCHAPS, affirms under penalty of perjury:

1. That I am an attorney and counselor-at-law duly admitted to practice my profession in the courts of the State of New York and am a member of the firm of Levine, Kirshon & Schaps who represent the defendant herein.

2. I make this affirmation pursuant to CPLR 3211(5) to dismiss all three causes of action in the complaint. A copy of the summons and complaint is annexed hereto and made a part hereof and designated Exhibit A. The ground for said motion is that the statute of limitations has made all three causes of action time barred. The summons and complaint was served sometime in the month of March 1977, and the defendant's time to answer or otherwise move with relation to the complaint was extended by stipulation until and including April 13, 1977. A copy of said stipulation is

annexed hereto and made a part hereof and designated Exhibit B.

THE FIRST CAUSE OF ACTION

3. The first cause of action alleges that/on June 6, 1966 defendant became indebted to plaintiff upon a balance of account for goods sold and delivered. It further alleges that on July 18, 1971, (pursuant to defendant's request of May 17, 1971) plaintiff mailed an itemized statement of account to defendant who received the statement, accepted and retained it without making any objections thereto. Plaintiff further alleges that the statement shows a balance of \$3,962.71 due plaintiff from defendant and a copy of the statement is annexed to the complaint.

4. It is obvious that if the dates of sale, June 6, 1966 through August 1970 (see plaintiff's/said statement of account which is annexed to the complaint) were the dates upon which the statute started to run, then plaintiff's cause of action would certainly be barred. (See U.C.C. 2-725 which provides for a four year statute of limitations for breach of contract of sale and CPLR 213(2) which provides for a six year statute of limitations upon a contractual obligation or liability except as provided in Article 2 of the U.C.C.).

5. The only way that the July 18, 1971 date, (which was when the statement of account was mailed by plaintiff to defendant), may be availed of by plaintiff as the date that the limitations period commenced is if the amount claimed due was unliquidated and the parties settled on the amount set forth in the statement of account. There cannot be an "account stated" upon a liquidated

amount since the statement of the account is simply a reiteration of that which was already agreed upon. A statement mailed by the alleged creditor to the alleged debtor is not an "account stated" unless it can be shown that that statement represents an unliquidated amount which was later agreed upon by the parties. The mere retention by the defendant and his alleged acceptance of same without making any objection thereto is not sufficient to establish a statement of account whose date would commence the running of the statute of limitations. (Frucht v. Garcia, 44 M2d 52, 252 N.Y.S.2d 825; Siepka v. Bogulski, 164 Misc 831, 832-833, 299 N.Y.S. 1018, 1021).

6. In the case at bar plaintiff does not claim that the amount is in dispute and in fact in Paragraph 12 contained in the second cause of action he alleges the same amount and states that defendant breached its contract with plaintiff by failing to pay the sum of \$3,962.71 for the goods listed in the account annexed to the complaint. There is therefore no dispute or unliquidated amount as to how much was due alleged by plaintiff nor is there any claim of an affirmative agreement on defendant's part to pay that amount. The mere sending of a statement of account is not enough to establish a cause of action for "account stated" and thereby to commence the running of the statute of limitations from the date of the sending of the statement rather than from the date of the inception of the unliquidated obligation. (Frucht v. Garcia, supra).

THE SECOND CAUSE OF ACTION

7. The second cause of action in addition to claiming a breach of contract by reason of defendant's failure to pay the \$3,962.71 for the amount alleged to be due in the statement annexed to the complaint, also claims that defendant received an additional shipment of books which was not reflected in that statement because it was shipped to a third party by mistake and then allegedly reshipped by that third party to defendant. Plaintiff alleges in Paragraph 13 of the complaint that this occurred on or about August 17, 1968 and that by reason of defendant's receipt of the 1000 books, plaintiff was damaged in the additional sum of \$2,475.00.

8. It is respectfully submitted that without any further comment this claim originating almost nine years ago is certainly time barred by the applicable sections governing the statute of limitations above set forth.

THE THIRD CAUSE OF ACTION

9. Plaintiff alleges in its third and final cause of action that defendant intentionally and fraudulently concealed from plaintiff that it received the shipment of 1000 books and plaintiff did not discover this until 1973. The statute of limitations with respect to actual fraud is set forth in CPLR 203(f) which provides that the commencement of the time is computed when the facts are discovered or with reasonable diligence could have been discovered and must be commenced within

two years thereafter or from the time the cause of action accrued whichever is longer. CPLR 213(9) provides that an action for fraud shall be commenced within six years or from the time plaintiff had or with reasonable diligence could have discovered it. The analysis of said latter subsection by Dean ;McLaughlin found in McKinney's Consolidated Laws, states at page 329

"The statute of limitations would accordingly be six years from the commencement of the wrong or two years from the discovery thereof whichever is later."

10. The commencement of the wrong as alleged in Paragraph 17 of the complaint was August 17, 1968 and its discovery by plaintiff was 1973. Since more than six years have elapsed since 1968 and more than two years have elapsed since 1973 before the commencement of this action, the third cause of action is therefore time barred.

11. It is respectfully submitted therefore that all three causes of action are barred by the applicable quoted statutes of limitation and the complaint therefore must be dismissed.

12. This motion is being made in lieu of service of the answer. No previous application for the within relief has been made to any court or judge.

WHEREFORE, your affiant respectfully prays that the within motion be granted in all respects.

Dated: New York, N.Y.
April 13, 1977

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Index No.

Plaintiff designates

WESTCHESTER

County as the place of trial

The basis of the venue is

Defendant's place of business

HAROLD WEISBERG

Plaintiffs

against

DIMONDSTEIN BOOK COMPANY, INC.

Defendant

Summons

Plaintiff's residence at

Route 12, Frederick, Md. 21701

County of Frederick

To the above named Defendant Diamondstein Book Company, Inc.

You are hereby summoned

to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February 28, 1977

Defendant's address:

38 Portman Road
New Rochelle, New York

Attorney(s) for Plaintiff's
Office and Post Office Address

James H. Lesar
910 16th Street, N.W., Suite 600
Washington, D.C. 20006
Phone: [212] 223-5587

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Exhibit "A"

Affidavit of Service

State of New York, County of

ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at

That on 19 at No.

deponent served the within summons on defendant

INDIVIDUAL by delivering a true copy of each to said defendant personally; deponent knew the person so served to be the person described as said defendant therein.

1.

a corporation, by delivering thereat a true copy of each to

CORPORATION personally, deponent knew said corporation so served to be the corporation described in said summons as said defendant and knew said individual to be

2.

thereof

SUITABLE AGE PERSON by delivering thereat a true copy of each to

3.

a person of suitable age and discretion. Said premises is defendant's—actual place of business—dwelling house—usual place of abode—within the state.

AFFIXING TO DOOR, ETC. by affixing a true copy of each to the door of said premises, which is defendant's—actual place of business—dwelling house—usual place of abode—within the state. Deponent was unable, with due diligence to find defendant or a person of suitable age and discretion, thereat, having called there

4.

MAILING USE WITH 3 or 4

Deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to defendant at defendant's last known residence, at

and deposited said wrapper in a post office—official depository under exclusive care and custody of the United States Postal Service within New York State.

Index No. SUPREME COURT OF NEW YORK STATE COUNTY OF WESTCHESTER

HAROLD WEISBERG

Plaintiff

against

DIMONDSTEIN BOOK COMPANY, INC

Defendant S

SUMMONS

Action not based upon a Consumer Credit Transaction

James H. Lesar Attorney(s) for Plaintiff

Office, Post Office Address and Tel. No.

910 16th St., N.W., Suite 600 Washington, D.C. 20006 Phone: 223-5587

DESCRIPTION Deponent describes the individual served USE WITH 1 or 3 as follows: sex: male female; approximate age: 14-20, 21-35, 35-50, 51-65, over 65 approximate height: under 5', 5' to 5' 3", 5' 4" to 5' 8", 5' 9" to 6', over 6' approximate weight: under 100 lbs., 100 to 130 lbs., 131 to 160 lbs., 161 to 200 lbs., over 200 lbs. skin color: black, brown, red, white, yellow hair color: black, blonde, brown, grey, red, white, balding Other identifying features:

Sworn to before me on