UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AETNA GROUP USA., INC.,	
Plaintiff,	CIVIL ACTION
v.	NO. 1:08-CV-3341-RLV
AIDCO INTERNATIONAL, INC.,	
Defendant.	

O R D E R

In a three-count complaint, the plaintiff seeks damages from the defendant for its failure to pay under the terms of their agreements. This matter comes before the court on the plaintiff's motion for summary judgment [Doc. No. 64], which is unopposed.[1]

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no

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[1] The defendant's attorney was allowed to withdraw in April 2010. Because the defendant is a corporation, the court directed the defendant to obtain legal representation in orders dated May 18, 2010, and June 22, 2010. However, the defendant did not obtain legal representation, and the court in an order dated July 26, 2010, struck the defendant's answer and counterclaim which had been filed by the defendant's former attorney. In that same order, the court further directed the Clerk of Court to make an entry of default against the defendant. Prior to being allowed to withdraw in April 2010, the defendant's former attorney did not file a response to the plaintiff's motion for summary judgment. Because the court had previously struck the defendant's answer as well as its counterclaim, the plaintiff's arguments related to the merits of the defendant's counterclaim are now moot, and this court focuses on the plaintiff's claims.

genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

Even if a motion for summary judgment is unopposed, the movant must nevertheless show it is entitled to judgment on the merits, based on evidentiary materials in the record. See Dunlap v. Transam. Occidential Life Ins. Co., 858 F.2d 629, 632 (11th Cir.1988) (district court did not err in treating the motion for summary judgment as unopposed where it considered the merits of the motion). The district court "need not *sua sponte* review all of the evidentiary materials on file at the time the motion is granted," but it must at least review all those submitted in support of the summary judgment motion. United States v. 5800 S.W. 74th Ave., 363 F.3d 1099, 1101 (11th Cir. 2004).

In its motion for summary judgment, the plaintiff argues that the defendant breached its contract with it by failing to pay for equipment that the plaintiff had delivered to the defendant that was then in turn resold by the defendant to third parties for a profit. Specifically, the plaintiff argues that the defendant accepted the machines that it had ordered from the plaintiff, that the plaintiff failed to reject the machines or revoke its acceptance within the meaning of the Georgia Uniform Commercial Code, and that the defendant resold the machines to third-party end users who themselves accepted and paid for the equipment. The plaintiff argues that given these facts the defendant cannot raise any valid defense under Georgia law for its failure to pay for the equipment. The court agrees.

In reaching this conclusion, the court notes that the parties entered into at least two sets of agreements.

The first set of agreements involved the defendant's agreement to pay for machines, parts, and services delivered to and accepted by the defendant pursuant to the terms of various proposals made by the plaintiff to the defendant. It is undisputed that a dispute arose regarding each party's performance under the first set of agreements which resulted in the parties entering into another agreement. The defendant alleged that the plaintiff's equipment

and services were deficient, while the plaintiff argues that the defendant failed to properly pay according to the terms of the first set of agreements.

The second agreement was dated July 2, 2008. The court notes that this July 2, 2008, agreement satisfies the elements of novation under Georgia law.

The July 2, 2008, agreement is divided into a number of sections. The first section deals with past due and unpaid balances for machines that had been delivered to and accepted by the defendant. Specifically, this first section states that the defendant would "pay immediately" $174,065.28 of the $310,305.38 that was then due. The July 2, 2008, agreement further states, "The amount 'on hold' of $136,240.10 will be paid within the end of September if [the plaintiff] together with the [defendant] will enhance the capabilities of the Aetna/DIMAC machines to handle set configurations of bottles shown in 'Exhibit A' by the end of August 2008." The second section of the July 2, 2008, agreement provides that the defendant would "pay immediately" $40,889.88 of the $54,478.65 that was then outstanding for spare parts that the plaintiff had delivered to the defendant and for which the defendant had not paid. In the third section of the July 2, 2008, agreement, addressing service expenses incurred by the plaintiff

for which the defendant had not paid, the defendant agreed to "pay immediately" $85,406.02 of the then-outstanding balance of $127,310.15. In total, the July 2, 2008, Agreement provided that the defendant would "pay immediately" $300,361.18 of the $492,092.18 in charges that were then due and payable. The July 8, 2008, agreement made clear that the "immediate payment" was to be paid by the defendant no later than July 18, 2008. Also as part of the July 2, 2008, agreement, the plaintiff agreed to send its technicians to service the equipment that the defendant had sold to the third parties.

The plaintiff filed this action on September 24, 2008, seeking damages for breach of contract, suit on an open account and for statutory interest under Georgia law. At the time the complaint was filed, the plaintiff alleged that the defendant owed it $375,783.59 for machines and spare parts and services.

Having reviewed the evidence in the record, the court concludes that the defendant breached the terms of the July 2, 2008, agreement when it failed to completely pay the first installment of the amounts due and owning. Specifically, the defendant paid only $113,908.59 of the monies that were to be paid "immediately." Once that payment had been made, the defendant still owed the plaintiff $186,452.59 of the "immediate" payment

amount, and $191,731.01 of the additional amounts that had been placed "on hold," for a total of $378,183.60. Therefore, the plaintiff is entitled to summary judgment on its breach of contract and open account claims.

The facts in the record clearly indicate that the defendant accepted the equipment and that it never rejected the equipment in question in any way permitted by O.C.G.A. § 11-2-602(1). Nor did the defendant's customers attempt to reject the equipment on their own behalf or on the defendant's behalf. While the defendant previously argued that the equipment in question had performance problems and that it was entitled to reject the equipment or repudiate their acceptance of the equipment under the Georgia Uniform Commercial Code, there is nothing in Georgia's Uniform Commercial Code that allows the defendant to keep the equipment and sell them to third parties at a profit without paying for them. However, this is exactly what the defendant did in this case. Additionally, any arguments related to revocation or rejection of the equipment in question were waived by the defendant when it entered into the July 2, 2008, agreement.

With regard to the plaintiff's claim for an award of statutory prejudgment interest on the amounts due, award of such interest is justified in this case. O.C.G.A. § 7-4-16 provides:

> Unless otherwise provided in writing signed by the obligor, a commercial account becomes due and payable upon the date a statement of the account is rendered to the obligor. The owner of a commercial account may charge interest on that portion of a commercial account which has been due and payable for 30 days or more at a rate not in excess of 1 1/2 percent per month calculated on the amount owed from the date upon which it became due and payable until paid. "Commercial account" means an obligation for the payment of money arising out of a transaction to sell or furnish, or the sale of, or furnishing of, goods or services other than a "retail installment transaction" as defined in paragraph (10) of subsection (a) of Code Section 10-1-2.

In this case, the invoices the plaintiff sent to the defendant for the equipment in question, additional parts, and service calls, constitute a liquidated claim on a commercial account, within the meaning of O.C.G.A. § 7-4-16. All of the invoices followed the pricing terms that had been previously agreed upon by the parties in the original quotes and purchase orders, and, later, in the July 2, 2008, agreement. Therefore, the plaintiff is entitled to an award of prejudgment interest from the defendant at the rate provided by O.C.G.A. § 7-4-16.

For the above reasons, the plaintiff's motion for summary judgment [Doc. No. 64] is GRANTED. Within 7 days of the docketing of this order, the plaintiff is directed to submit affidavits regarding the amount of damages and interest it seeks.[2]

SO ORDERED, this 19TH day of August, 2010.

Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District Judge

[2] In allowing such affidavits, the court notes that the plaintiff filed its motion for summary judgment in April 2010 and that interest has accrued since the filing of its motion.