P.H. INTERNATIONAL TRADING CORP., d/b/a HANA K., Plaintiff, v. NORDSTROM, INC., Defendant

07 CV 10680 (VB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2013 U.S. Dist. LEXIS 62459

March 12, 2013, Decided

SUBSEQUENT HISTORY: Affirmed by Ph Int'l Trading Corp. v. Nordstrom, Inc., 2013 U.S. App. LEXIS 24923 (2d Cir. N.Y., Dec. 17, 2013)

PRIOR HISTORY: PH Int'l Trading Corp. v. Nordstrom, Inc., 2009 U.S. Dist. LEXIS 27110 (S.D.N.Y., Mar. 31, 2009)

COUNSEL: [*1] For PH International Trading Corp., Plaintiff: Bernard Weinreb, LEAD ATTORNEY, Bernard Weinreb, Esq., Spring Valley, NY; Allen J. Kozupsky, Allen J. Kozupsky, Somers, NY; Daniella Levi, Daniella Levi & Associates, New York, NY.

law office of joseph yerushalmi p.c., Movant, Pro se.

For Nordstrom, Inc., Defendant: Jason Lee Jurkevich, LEAD ATTORNEY, Sills Cummis & Gross, New York, NY; Marc David Youngelson, LEAD ATTORNEY, Dentons US LLP, New York, NY; Mark Steven Olinsky, LEAD ATTORNEY, Sills Cummis & Gross, P.C.(NY), New York, NY.

JUDGES: Vincent L. Briccetti, United States District Judge.

OPINION BY: Vincent L. Briccetti

OPINION

MEMORANDUM DECISION

Briccetti, J.:

Plaintiff P.H. International Trading Corporation, doing business as Hana K., brings this diversity action against defendant Nordstrom, Inc., for breach of contract. Before the Court is defendant's motion for summary judgment. For the following reasons, the motion is GRANTED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

BACKGROUND

The parties have submitted briefs, statements of facts, and declarations with supporting exhibits, which reflect the following factual background.

Plaintiff is a manufacturer and distributor of leather, fur, [*2] and shearling outerwear. Defendant is a retail seller of men's and women's clothing. From 1996 to 2002, plaintiff and defendant engaged in a business relationship whereby plaintiff supplied its products to defendant for sale in defendant's stores.

In early 2002, defendant's employee Rick Boniakowski met with plaintiff's principal officers, Pierre and Hana Lang, to look at plaintiff's product line for the upcoming season. At that meeting, plaintiff alleges

Boniakowski placed an order on behalf of defendant to purchase certain products from plaintiff. Further, plaintiff contends that by doing so, plaintiff and defendant entered into a binding contract. In support of its allegation that the parties entered into a contract, plaintiff has produced four documents. Defendant claims none of the documents satisfies the U.C.C.'s statute of frauds provisions applicable to contracts for the sale of goods.

Handwritten Note

Plaintiff has produced a one page, handwritten document allegedly written by Boniakowski during his meeting with the Langs when he allegedly ordered $780,000 worth of merchandise from plaintiff. The word "Summary" [*3] appears on the top, and the note contains the following information:

> Anniversary Promo
> $30K = 54 garments = $29700
>
> Pre-Season Highlights
> $200K = . . . $33685
>
> Full Order Shearlings . . .
> $250K
>
> Full Order Furs . . .
> $200K
>
> Dyria
> $100K
>
> Total $780K

The document is unsigned, undated, and identifies neither a buyer nor a seller. Nevertheless, plaintiff contends this writing constitutes an enforceable contract.

Spreadsheets

Following the meeting with Boniakowski, plaintiff created several Microsoft Excel spreadsheets to "detail the production of the garments." The spreadsheets indicate they were created on June 21, 2002, and they are not signed by either party.

"PO Detailed Summary Report"

Sometime after the meeting between the Langs and Boniakowski, defendant sent by fax to plaintiff a document entitled "PO [purchase order] Detailed Summary Report." The document contains an "Order Number," and its "Order Status" is designated as "W -- Worksheet." It is sixty-five pages long and does not contain the signature of either party. The cover page, on which "Nordstrom" is printed on top, contains information relating to what appears to be an order to purchase certain pieces of merchandise. This information includes: [*4] the name of the supplier (Hana K), the total cost of the order ($116,395.00), the department (fur boutique), and the FOB designation. The document also designates a ship date of "Not Before 08/15/2002" and "Not After 09/10/2002." The remaining sixty-four pages contain information regarding specific items of merchandise.

Importantly, the document contains a clause stating: "All Nordstrom PO terms and conditions . . . apply to all orders." According to a copy of the PO terms and conditions produced by defendant, the terms include a provision stating: "Purchaser will not assume liability for any merchandise shipped to it . . . prior to receipt by Seller of a duly authorized purchase order." (emphasis added). Plaintiff does not dispute that the "PO Detailed Summary Report" was never designated as an "authorized purchase order," but argues defendant had previously treated "worksheets" as approved or "authorized" orders.

"QRS Report"

Sometime after the Langs' meeting with Boniakowski, plaintiff created a breakdown of the merchandise it believed defendant had ordered, with descriptions of each item, and submitted the information to QRS Corporation ("QRS"). QRS is the company Nordstrom instructs [*5] its vendors to use to create and issue bar codes and UPC numbers for merchandise ordered by defendant. This resulted in the production of a "QRS Report," a series of spreadsheets listing each item of merchandise with its corresponding UPC number. The total cost of the merchandise listed in the QRS Report is $1.9 million. According to plaintiff, this document reflects all of the merchandise ordered by defendant. The QRS Report is dated September 3, 2002, and is not signed by either party.

Rejection of the Order

In the summer of 2002, defendant fired Boniakowski. In September 2002, plaintiff received a phone call and email from Monica Ward, defendant's

Vice President and Corporate Merchandise Manager. Ward informed plaintiff that defendant had a proposed order to purchase goods from plaintiff in its system, but the order "has not be[en] activated as an approved order . . . [because] it was faxed to you prior to an authorized signature."

On October 1, 2002, Ward sent plaintiff a letter with the subject line, "Re: Purchase Worksheet #10420647," which stated:

> [A] former Nordstrom buyer submitted the above referenced worksheet to your company with the prospect of placing an order with your company. [*6] Nordstrom subsequently learned this buyer was not following Nordstrom's policies and procedures as they relate to the proper confirmation of a Nordstrom purchase order. For this reason, Nordstrom does not consider this to be a confirmed or valid purchase order.
>
> Nonetheless, in the interest of continuing our business relationship of six years, we have elected to place a new order with your company . . . , which is a confirmed and valid purchase order.

The new order referenced in the letter was for goods in the amount of $88,245, and the "PO Detailed Summary Report" for that order indicated the order's status was "A -- Approved."

This case was removed from Supreme Court, Westchester County, in November 2007. In its complaint, plaintiff alleges defendant entered into a contract to purchase $780,000 worth of goods from plaintiff, as evidenced by Boniakowski's handwritten note and the other writings discussed above. Plaintiff further alleges defendant breached that contract by canceling the order in September 2002, after plaintiff had created the goods. Finally, plaintiff seeks to recover an additional $1,000,000 for goods plaintiff allegedly produced in anticipation of defendant needing to [*7] supplement its original order, as it had customarily done in the past.

DISCUSSION

I. Legal Standard

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dept., 613 F.3d 336, 340 (2d Cir. 2010).

If the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then summary judgment is appropriate. [*8] Celotex Corp. v. Catrett, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," summary judgment may be granted. Anderson v. Liberty Lobby, 477 U.S. at 249-50. The mere existence of a scintilla of evidence in support of the nonmoving party's position is likewise insufficient; there must be evidence on which the jury could reasonably find for it. Dawson v. Cnty. of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court resolves all ambiguities and draws all permissible factual inferences in favor of the nonmoving party. Nagle v. Marron, 663 F.3d 100, 105 (2d Cir. 2011). If there is any evidence from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

II. The Statute of Frauds

Defendant contends plaintiff has failed to demonstrate the existence of a contract that meets the statute of frauds requirements under N.Y. U.C.C. § 2-201. Further, defendant alleges neither the "merchant's exception" nor the "specially manufactured goods

exception" [*9] to the statute of frauds is applicable to this case. See N.Y. U.C.C. §§ 2-201(2); 2-201(3)(a).

N.Y. U.C.C. § 2-201 provides: "a contract for the sale of goods for the price of $500 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." (emphasis added). Because plaintiff alleges the existence of a contract for the sale of goods in an amount greater than $500, in order for the contract to be enforceable, the U.C.C. requires plaintiff to prove the contract was reduced to writing and signed by defendant.

It is undisputed that none of the documents plaintiff cites to support its breach of contract claim is signed by defendant or defendant's "authorized agent or broker." Consequently, the requirements of U.C.C. § 2-201 have not been met, and plaintiff has failed to demonstrate a material issue of fact as to whether there exists an enforceable contract between plaintiff and defendant.

Plaintiff's argument that a jury must determine whether Boniakowski's unsigned, handwritten note constitutes [*10] an enforceable contract, based on Isedore Siegal & Son, Inc. v. Burberrys Int'l Ltd., 78 A.D.2d 930, 433 N.Y.S.2d 240 (App. Div. 3d Dep't 1980), is unavailing. Whereas in that case the pages from the "order pad" at issue "[bore] defendant's name, address and trademark," the handwritten note allegedly written by Boniakowski does not identify by name any of the parties to the transaction it allegedly memorializes. As the comment to U.C.C. § 2-201 explains, a contract for the sale of goods in an amount greater than $500 "must be 'signed,' a word which includes any authentication which identifies the party to be charged." (emphasis added). Unlike the writings in Isedore Siegal, the note written by Boniakowski fails to identify the party to be charged.

Further, the "PO Detailed Summary Report," which does include defendant's name, nevertheless fails to satisfy the requirements of the statute of frauds. Unlike in Isedore Seigel, where the court found "a question of fact [was] raised as to the intent of the parties and particularly as to whether defendant intended to authenticate" various unsigned writings, 433 N.Y.S.2d at 241, the PO Detailed Summary Report is marked as a "worksheet" rather than an approved [*11] or "authorized" order, and the terms and conditions referenced in that document provide that defendant will not assume liability for goods delivered prior to the issuance of an authorized purchase order. Therefore, it is clear that defendant did not intend the PO Detailed Summary Report -- an unapproved order for $116,395 worth of goods -- to authenticate Boniakowski's alleged order for $780,000 worth of merchandise.

Also unpersuasive is plaintiff's argument that the emails and letters sent by defendant to plaintiff in September and October 2002 somehow cure plaintiff's failure to identify a written contract that complies with the statute of frauds. Plaintiff essentially argues that by using the word "order," defendant "admi[tted] in writing . . . that there was an order." (Pl.'s Opp'n Br. at 10). To the contrary, the October 2002 letter clearly states that defendant did "not consider this to be a confirmed or valid purchase order." Far from confirming the existence of a contract, the letter makes clear to plaintiff that defendant never intended to enter into the contract plaintiff now seeks to enforce. "There simply is no language in any of the documents signed by the defendants which [*12] would give rise to an implication that a contract was made." N. Dorman & Co., Inc. v. Noon Hour Food Products, Inc., 501 F. Supp. 294, 297 (E.D.N.Y. 1980).

Plaintiff also contends the Court should consider the fact that defendant's method of communicating its alleged order to plaintiff was consistent with the manner defendant had previously ordered products from plaintiff. However, while evidence of prior custom or usage may be admissible to clarify an agreement, it is only admissible when the agreement is ambiguous. Int'l Multifoods Corp. v. Comm. Union Ins. Co., 98 F. Supp 2d 498, 503 (S.D.N.Y. 2000). "To allow parol evidence such as custom and usage to create ambiguity where none exists in the plain language of the agreement unnecessarily denigrates the contract and unsettles the law." Id. (internal quotation marks omitted).

Here, on their face, the documents cited by plaintiff do not satisfy the formal requirements of the statute of frauds. None of the documents contains defendant's signature or otherwise indicates that defendant intended to enter into a binding contract. Therefore, evidence of custom or usage is inadmissible to determine whether any of the documents produced by [*13] plaintiff constitute an enforceable contract.

Additionally, plaintiff cites cases in which courts have found a combination of writings, signed and

unsigned, can be taken together to demonstrate an enforceable contract. See Thomaier v. Hoffman Chevrolet, Inc., 64 A.D.2d 492, 410 N.Y.S.2d 645 (App. Div. 2d Dep't 1978); N. Dorman & Company, Inc. v. Noon Hour Food Products, Inc., 501 F. Supp. at 294. Although the terms of a contract may be set out in different writings, "at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction." Scheck v. Francis, 26 N.Y.2d 466, 471, 260 N.E.2d 493, 311 N.Y.S.2d 841 (1970). Here, the only documents arguably containing defendant's signature -- the September and October 2002 email and letter -- clearly do not establish a contractual relationship between the parties; to the contrary, they unambiguously state defendant's belief that no such contract exists.

In the end, this case is straightforward. There is no enforceable contract, because there is no writing signed by defendant or its authorized agent.

III. "Merchant's Exception"

In the alternative, plaintiff [*14] argues the U.C.C.'s "merchant's exception" cures plaintiff's failure to demonstrate a contract that satisfies the statute of frauds. N.Y. U.C.C. § 2-201(2) provides, in relevant part: "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of [the statute of frauds] against such party."

Here the merchant's exception plainly does not apply. Assuming plaintiff and defendant are both merchants for purposes of the U.C.C., the writings plaintiff identifies as confirming the contract are the email and letter discussed above, which, far from confirming the existence of a contract, make clear defendant's belief that no enforceable contract exists.[1]

> 1 Plaintiff also cites a letter written by an agent of defendant to a third-party in support its "merchant's exception" argument. However, like the other writings cited by plaintiff, that letter also unequivocally reiterates defendant's position that no contract exists between plaintiff and defendant.

IV. "Specially Manufactured Goods"

Finally, plaintiff alleges the U.C.C.'s "specially [*15] manufactured goods" exception applies to this case. N.Y. U.C.C. § 2-201(3)(a) provides that the U.C.C.'s statute of frauds provisions are not applicable "if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business."

Plaintiff cites no case law in support of its argument that it created products specifically for defendant, and that those items were "not suitable for sale to others in the ordinary course of" plaintiff's business. Further, the deposition testimony and affidavits of plaintiff's witnesses indicate that plaintiff produced similar products for retailers other than defendant, and plaintiff admits that, from its financial records, it cannot differentiate between items manufactured specifically for defendant and items manufactured for other retailers. Finally, common sense dictates that leather and fur coats are not "specially manufactured goods" plaintiff could not sell to other retailers in the ordinary course of its business.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is GRANTED.

The Clerk is directed to terminate the motion (Doc. #82) and close this case.

Dated: [*16] March 12, 2013

White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti

Vincent L. Briccetti

United States District Judge

PH INTERNATIONAL TRADING CORP., Plaintiff-Appellant, -v.- NORDSTROM, INC., Defendant-Appellee.

No. 13-1287-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

555 Fed. Appx. 9; 2013 U.S. App. LEXIS 24923; 82 U.C.C. Rep. Serv. 2d (Callaghan) 318

December 17, 2013, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the March 19, 2013 judgment of the United States District Court for the Southern District of New York (Vincent L. Briccetti, Judge).

P.H. Int'l Trading Corp. v. Nordstrom, Inc., 2013 U.S. Dist. LEXIS 62459 (S.D.N.Y., Mar. 12, 2013)

COUNSEL: FOR PLAINTIFF-APPELLANT: Bernard Weinreb, Spring Valley, NY.

FOR DEFENDANT-APPELLEE: Jason L. Jurkevitch, Sills Cummis & Gross P.C., Newark, NJ.

JUDGES: PRESENT: JOSÉ A. CABRANES, RICHARD C. WESLEY, PETER W. HALL, Circuit Judges.

OPINION

[*10] **SUMMARY ORDER**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 19, 2013 judgment of the District Court be **AFFIRMED.**

Appellant PH International Trading Corp. d/b/a Hana K. ("Hana K.") appeals from the March 19, 2013 judgment of the District Court granting summary judgment for defendant Nordstrom, Inc. ("Nordstrom") in this diversity breach of contract action. Hana K., a wholesale distributor of fur, leather and shearling garments, claims that in 2002 it entered into a contract with Nordstrom, through Nordstrom's authorized fur buyer Rick Boniakowski, to sell Nordstrom $780,000 worth of garments, and that Nordstrom failed to honor that contract. In a March 12, 2013 Memorandum Order , the District Court granted summary judgment for Nordstrom on the basis that the alleged contract did not satisfy the [**2] statute of frauds under the New York Uniform Commercial Code ("N.Y. U.C.C.") § 2-201,[1] or any exception thereto. Hana K. contends that the District Court erred by concluding: (1) that the contractual documents were not "signed by the party against whom enforcement is sought," N.Y. U.C.C. § 2-201(1), in this case Nordstrom; and (2) that the goods in question did not satisfy the "specially manufactured goods" exception to the statute of frauds, *id.* at § 2-201(3)(a).[2]

1 The New York statute of frauds provides in relevant part:

> Except as otherwise provided in

> this section a contract for the sale of goods for the price of $500 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.

N.Y. U.C.C. § 2-201(1).

2 The "specially manufactured goods" exception states:

> A contract which does not satisfy the requirements of [the statute of frauds] but which is valid in other respects is enforceable (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in [**3] the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement[.]

N.Y. U.C.C. § 2-201(3)(a). Hana K. also argued below that the "Merchant's Exception," *id.* at § 2-201(2) to the statute of frauds applied, but does not press that argument on appeal.

DISCUSSION

A. Requirement of a "Signed" Writing

The only element of the statute of frauds at issue here is the requirement that the writing be "signed." To establish this element, plaintiff relies on: (1) a "PO Detailed Summary Report" dated August 15, 2002, bearing Nordstrom's name at the top and detailing the buyer, seller, shipping dates, and a price of $116,395 (the "Summary Report"); (2) a September 11, 2002 email from Monica Ward ("Ward"), a Vice President at Nordstrom, stating that the Summary Report "has not be [sic] activated as an approved order in our system. This [Summary Report] was faxed to you prior to an authorized signature;" and (3) an October 1, 2002 letter from Ward [*11] stating that Boniakowski had not complied [**4] with Nordstrom's "policies and procedures as they relate to proper confirmation of a Nordstrom purchase order," and therefore Nordstrom did not consider it a valid purchase order.[3]

3 Hana K. also cites a handwritten note purportedly written by Boniakowski. This note is unsigned, undated, and does not identify the buyer or seller. Hana K. states that it does not rely on this document to satisfy the statute of frauds. Appellant's Br. at 9.

The District Court properly rejected plaintiff's argument that Ward's email and letter disaffirming the validity of the contract with Hana K. can provide the requisite "signature."[4] The purpose of the signature requirement is to confirm that the party had "present intention to authenticate the writing." N.Y. U.C.C. § 1-201 cmt. 39. The Ward documents do just the opposite.

4 Under the New York U.C.C., the term "'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing." N.Y. U. C.C. § 1-201(39). The official comment elaborates that "[i]t may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. . . . The question always is whether the symbol was executed or adopted [**5] by the party with present intention to authenticate the writing." *Id.* § 1-201 cmt. 39.

Plaintiff 's argument with respect to the Summary Report fares no better. Plaintiff relies on *Isedore Siegal & Son, Inc. v. Burberrys International Ltd.*, 78 A.D.2d 930, 433 N.Y.S.2d 240, 240-41 (3d Dep't 1980), which held that a "'worksheet' [bearing] defendant's name, address and trademark" raised "a question of fact . . . as to whether defendant intended to authenticate the sheet." As the District Court noted, "the [Summary Report] is marked as a 'worksheet' rather than an approved or 'authorized' order, and the terms and conditions referenced in that document provide that Nordstrom "will not assume liability for goods delivered prior to the issuance of an authorized purchase order." *P.H. Int'l Trading Corp. v. Nordstrom, Inc.*, No. 07 Civ. 10680 (VB), 2013 U.S. Dist. LEXIS 62459, 2013 WL 1811913,

at *4 (S.D.N.Y. Mar. 12, 2013). Thus, even if such a sheet could satisfy the signature requirement, Nordstrom's stated policy, of which Hana K. had notice, explicitly disclaimed intent to enter into a binding contract on the basis of the Summary Report. Hana K. cites no other document that could provide the basis for a signature authenticating the [**6] transaction. Accordingly, we affirm the District Court's finding that the documents in question did not meet the requirements of N.Y. U.C.C. § 2-201(1).

B. Specially Manufactured Goods Exception

In support of the argument that the coats in question were specially manufactured within the meaning of the statute of frauds, Hana K. argues that the coats were expensive, that a large inventory was not kept, and that one of Hana K.'s owners stated in an affidavit that his business specialized in custom made coats. Appellant's Br. at 37-38. However, as the District Court observed, Hana K. produced no evidence that these coats were specially made and were not suitable for sale to others as required by N.Y. U.C.C. § 2-201(3)(a). *See P.H. Int'l Trading Corp.*, 2013 U.S. Dist. LEXIS 62459, 2013 WL 1811913, at *6 (noting that "the deposition testimony and affidavits of plaintiff 's witnesses indicate that plaintiff produced similar products for retailers other than defendant, and plaintiff . . . cannot differentiate between items manufactured specifically for defendant and items manufactured for other retailers"). We therefore affirm the District Court's [*12] conclusion that the "specially manufactured goods" exception to the statute [**7] of frauds does not apply.

CONCLUSION

We have reviewed the record and the parties' arguments on appeal. For the reasons set out above, we **AFFIRM** the March 19, 2013 judgment of the District Court.