Jiangsu Jintan Liming Garments Factory v Empire Imports Group, Inc.
2017 NY Slip Op 30469(U)
March 8, 2017
Supreme Court, New York County
Docket Number: 650163/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JIANGSU JINTAN LIMING GARMENTS FACTORY,

Index No.: 650163/2016

Plaintiff,

DECISION & ORDER

-against-

EMPIRE IMPORTS GROUP, INC. & JOHN ZHOU,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff Jiangsu Jintan Liming Garments Factory (Jiangsu) moves (Seq 002) for partial summary judgment on the portion of its first cause of action for breach of the first sales agreement and guaranty, as defined below, against defendant Empire Imports Group, Inc. (Empire). CPLR §3212. Defendants Empire and John Zhou (Zhou, with Empire, defendants) oppose. Defendants move (Seq 003) for leave to amend their answer and counterclaims [CPLR § 3025(b)], and for summary judgment dismissing all causes of action in the complaint [CPLR §3212]. Jiangsu opposes. For the reasons that follow, Jiangsu's motion is granted, and defendants' motion is granted in part and denied in part.

I. Background

Jiangsu is a Chinese corporation that manufacturers and supplies clothing in bulk for wholesale. Dkt. 1 [Verified Complaint] ¶1.[1] Empire is a New York corporation that imports clothing from China for re-sale in the U.S. Dkt. 79 [July 28, 2016 Affidavit of John Zhou] ¶4.

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Liming Zhu, a Chinese resident, and defendant Kevin Zhou, a New York resident, are the presidents of Jiangsu and Empire, respectively. Dkt. 79 ¶ 1; Dkt. 45 [April 15, 2016 Affidavit of Liming Zhou] ¶1.

Over a two and half month period in early 2015, Empire submitted four purchase orders to Jiangsu, dated March 12, March 20, March 20, and May 30, 2015, for several thousand men's and women's polar fleece jackets.[2] Dkt. 79 ¶9, citing Dkt. 80-83. Each order called for Jiangsu to produce jackets of different two-tone color combinations, styles, and quantities. Dkt. 79, ¶10. The first purchase order included 7,200 black and 2,328 dark grey/black men's jackets. *See* Dkt. 80.[3] Jiangsu accepted the purchase orders, and the parties negotiated four sales agreements, dated April 2, April 22, April 22, and June 22, 2015, setting forth the terms and conditions of each order. Dkt. 79, ¶ 12; Dkt. 39-42 [collectively, Sales Agreements]. The Sales Agreements, drafted in Chinese with English translations, are identical, boilerplate contracts. Dkt. 39-42.[4]

A. The Sales Agreements

The April 2, 2015 sales agreement (first sales agreement), Contract No. MFL0715GMP-1, corresponded to the first purchase order. Dkt. 39. It identified the parties as Empire (as buyer) and Jiangsu (as seller), with addresses in Manhattan and Jintan, China, respectively. *Id.* The agreement's header reads, "Signing time: Apr. 2, 2015, Place: China," and the agreement provides that it is governed by the Vienna Convention on the sale of goods. *Id.* Jiangsu agreed to manufacture and deliver 32,520 polar fleece jackets in exchange for $280,296.00. *Id.* at 1.

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[2] Zhou states in his affidavit that he communicated with Jiangsu on behalf of Empire through a middle-man, Jianzheng Lu. Dkt. 45, ¶5. According to Jiangsu's President, Zhu, Empire was Jiangsu's first U.S.-based buyer. Dkt. 9, ¶ 12.

[3] Each purchase order designates jacket colors in the following format: "color 1/color 2." Color 2 refers to the jacket's chest color, while color 1 refers to the color of the rest of the jacket. Dkt. 45, ¶10 n. 1.

[4] The agreements contain what appear to be numerous translation errors.

Approximately one-third of the jackets were to be delivered before June 20, 2015. *Id.* The contract set the place of delivery as "Shanghai, China...FOB Shanghai, China," and called for payment by a letter of credit before release. *Id.* at 2. The bill of lading designated New York as the place of delivery. Dkt. 89 [Bill of Lading].

The first sales agreement obligated Empire to inspect and approve for shipment, during manufacture, a random sampling of the jackets. *Id.*, at 1-2. It stated, in relevant part:

> The standard and way of [a]cceptance: The sample clothing and manufacturing sheet will be the reference. [W]hen the [quality control inspector] designated by the buyer check[s] and accept[s] the sample[,] and issue[s] the accept[ance] report, the buyer will accept[;] otherwise[,] the buyer is entitled to reject... In case that both parties disagree, a report from [a] third party consented [to] by seller and buyer will be considered as final without disputes...

Id. at 2. Thus, once Empire inspected and approved the samples, it agreed to accept jackets that conformed to the samples. Paragraph four stated that Jiangsu would provide Empire with the samples at least 15 days before Jiangsu finished manufacturing the jackets. *Id.*, ¶4. Once the samples were approved, Empire was to apply for a letter of credit for payment. *Id.*, ¶5. Jiangsu represented:

> Jiangsu [is on] notice[] that the goods covered by the contract will be sold in the USA... **[Jiangsu] promises seriously to make delivery on time, in full quantity and with accepted quality**. The seller consents to instructions and inspections conducted by [Empire]'s representative on [the] premise[s] during production. And [Jiangsu] is fully aware that delivery can only be made with permission by [a] representative of buyer upon final inspection. *Id.* at 2 (emphasis added)

On April 22, 2015, the parties entered into a second (Contract no. MFL0815GMP-2, corresponding to the second purchase order) and a third (Contract no. MFL0915GMP-3, corresponding to the third purchase order) sales agreement, each for $240,933.60. Dkt. 40 & 41. The agreements called for partial delivery by no later than July 10 and July 30, 2015, respectively. *Id.* On June 22, 2015, the parties entered into a fourth and final sales agreement

(Contract no. MFL01015GMP-4, corresponding to the fourth purchase order) for $438,729.60, which called for partial delivery by September 5, 2015. Dkt. 41. Zhou admitted that he signed the final three sales agreements on behalf of Empire (but not the first), and claims to have done so solely in his corporate capacity. Dkt. 79, ¶13.

All of the Sales Agreements contain a section entitled "dispute resolution", which includes a forum selection clause and a choice of law clause. The forum selection clause provides that "when [a] dispute occurs" that the parties cannot resolve on their own, they will litigate in the court in the city where the exporting port is located. Dkt. 39, at 3. However, if the dispute arises before Jiangsu exports the goods, litigation will occur in the city where the contract was signed. *Id.*

The choice of law clause provides that the parties will apply the Vienna Convention on the sale of goods to "dispute resolutions." *Id.* If no relevant Convention regulations apply, the parties agree to apply the "contract law of [the People's Republic of China] and related Chinese law...." *Id.* The parties dispute whether they signed the agreement in China or in both China and New York.

B. Production, Inspection, Delivery, and the Letter of Credit

Jiangsu began manufacturing the first shipment of jackets shortly after entering into the first sales agreement. It submits an inspection certificate, dated July 18, 2015, in which Empire certified that the sample of jackets from that shipment had passed inspection and was approved for shipment. Dkt. 48 [Inspection Certificate]. However, the first sales agreement required Empire to inspect the jackets *before* Jiangsu completed production, and the bill of lading for the first shipment indicates that Jiangsu shipped the first set of jackets on or around June 29, 2015. Dkt. 89 [Bill of Lading]; Dkt. 1, ¶9. Additionally, the sales agreement required Empire to obtain

a letter of credit *after* inspecting and approving the goods. Here, Empire claims to have applied for the letter on June 19, 2015, a full month before the purported July 18th inspection certificate date. *See* Dkt. 79, ¶20, citing Dkt. 84 [Letter of Credit for the First Contract], §31C.

In his reply on behalf of defendant, Zhou submitted an unsigned document titled "Original, Outbound Swift Message", dated June 19, 2015, which he averred was a letter of credit for the first shipment. Dkt. 79, ¶20. The letter named "Jiang Su Jintan Liming Garments" as beneficiary. Dkt. 84, §59. The issuing bank was Bank Leumi, and the credit amount was $280,296.00 -- the amount due under the first sales agreement. *Id.*, §42D. Zhou claims that because Empire was a relatively new company,[5] he had to obtain the letter of credit through a more established, intermediary financing company, Mercantile Credit, Inc. *Id.*, §50.

The alleged letter of credit sets forth a lengthy list of documents that Jiangsu was to deliver to Bank Leumi to receive payment, including the original bill of lading for the first shipment. Dkt. 84, §§ 1-9. Zhou claims that he sent a draft of the letter to Jiangsu for approval before finalizing it. Dkt. 79, ¶¶ 28-35. According to Zhou, Jiangsu did not object to the letter, which expired on July 15, 2015. *Id.*

The parties agree that (1) the first shipment arrived in New York;[6] (2) Jiangsu eventually released those goods to Empire; and (3) Jiangsu did not receive full payment. Jiangsu claims that Empire never provided a letter of credit and that it did not release the first shipment to Empire until receiving the additional payment guaranty. Dkt. 45, ¶6; *see also* Dkt. 1, ¶¶ 6-8.

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[5] Zhou swore in his affidavit that he formed Empire in 2013. Dkt. 79 [Zhou Aff.], ¶4.

[6] It is not clear when the first shipment arrived in New York. The Verified Complaint alleges that the first shipment arrived in New York on or around June 29, 2015 [Dkt. 1, ¶9], but the Bill of Lading indicates that the first shipment was not shipped until June 29, 2015. Dkt. 89. Neither side addresses the provision in the first sales agreement requiring Jiangsu to deliver the first shipment before June 20, 2015. Accordingly, the court does not consider that provision.

Zhou argues that a mistake on the first letter of credit prevented Jiangsu from collecting payment for the first shipment until after the letter of credit expired. Dkt. 79, ¶¶ 28-35. The bill of lading for the first shipment refers to Jiangsu as "Jintan Liming Clothing Factory," [Dkt. 89 (Bill of Lading)], while the first letter of credit identifies "Jiang Su Jintan Liming Garments" as the credit beneficiary. Dkt. 84, §59. Zhou claims that it was impossible to have the name on the first letter of credit changed to match the bill of lading. Dkt. 79, ¶¶ 28-35.

On July 16, 2015, before Empire had made any payment for the first shipment, Jiangsu shipped the second set of jackets. *See* Dkt. 90, at 3 [Second Bill of Lading containing July 16, 2015 "Shipped on Board Date"]. Zhou alleges that he obtained a second letter of credit, dated July 20, 2015, for the amount due under the second sales agreement. Dkt. 85 [Letter of Credit for the Second Shipment]. This time, the letter correctly named "Jintan Liming Clothing Factory" as its beneficiary. The terms of the two letters of credit do not otherwise materially differ. Zhou claims he sent Jiangsu a copy of the second letter before finalizing it. Dkt. 79, ¶29.

Ultimately, Jiangsu never released the second shipment to Empire, or received payment for it. Empire submits a faxed notice from Bank Leumi indicating that Jiangsu attempted to present the second letter of credit to Bank Leumi for payment, but did not present all of the required documents. Dkt. 90, at 1 [August 3, 2015 fax from Bank Leumi itemizing document discrepancies]. According to the notice, Jiangsu's inventory list omitted certain fabrics, and Jiangsu failed to present an inspection certificate, a country of origin declaration, an authenticated swift message, or an issuance of shipping certificate. *Id.* Jiangsu alleges that Empire urged Jiangsu to release the second shipment and promised to make payment via wire transfer. Dkt. 1, ¶11.

C. The Guaranty

On August 6, 2015, Empire executed a document entitled "Guarantee" which references the first sales agreement only and the $280,296.00 due under that agreement. Dkt. 49. It modified the first sales agreement by changing the manner of payment under the first contract. The Guaranty states that "due to discrepancies in documents," the parties would arrange for payment for the first shipment via wire transfer. *Id.* Jiangsu was to release the first shipment to Empire within a week, and Empire was to request an extension on delivery from a third-party buyer. *Id.* In addition, Empire promised to pay 50% of the amount due under the first sales agreement ($140,148.00) within two days of picking up the jackets, and the contract balance within sixty days of pick up. *Id.* Empire signed the document by affixing its corporate seal along with an illegible "authorized" signature. *Id.* Zhou does not deny that he signed some of the Sales Agreements, but avers that he signed them in his individual capacity. Dkt. 79, ¶¶ 12 & 13. Shortly after Empire executed the Guarantee, Jiangsu released the first shipment to Empire. Dkt. 45, ¶7.

The parties agree that, on August 12, 2015, Empire wired $50,000 to Jiangsu. *Id.*, ¶ 8 & Dkt 78, ¶42.[7] The $50,000 retained by Jiangsu is the basis for defendants' proposed counterclaim for unjust enrichment. Zhou claims that he wired the money "shortly after picking up the goods under the first contract and before I have [sic] the opportunity to open the containers to check the goods." *Id*, ¶42. He further avers that he discovered, "[a]fter [he] checked the goods," that the jackets in the first shipment did not conform to the specifications set forth in the first purchase order and was missing the 7,200 black men's jackets, and 2,328 dark grey and black jackets. *Id.*, ¶43, citing Dkt. 80 [First Purchase Order]. His affidavit is silent on

[7] Zhou's affidavit avers that the money was wired on August 12, ***2016***, but the year is clearly a scrivener's error because the affidavit was signed in July 2016. Dkt. 79, ¶42 & p 10.

the date that he checked the goods. Zhou states that he "contacted [Jiangsu]" about the missing jackets, demanded that Jiangsu cure, threatened to reject the entire shipment, and refused to pay the balance due. Dkt. 79, ¶45. He does not say when or how he contacted Jiangsu or demanded cure. According to Zhou, Jiangsu denied that the jackets were missing, refused to cure or to release the second shipment, and, five months later, filed suit. *Id.*, ¶¶ 46-48.

The court notes the inspection certificate, bill of lading, and packing list for the first shipment (attached to Zhou's affidavit) appear to identify all of the items in the first purchase order. The packing slip for the first shipment [Dkt. 91, at 4] lists all of the jackets included in the first purchase order [Dkt. 80], together with their gross net weights (approximately 24,194 kilos in total). *Compare* Dkt. 91, at 3-4 with Dkt. 80. The jackets' total gross weight in the packing slip, in turn, matches the net weight in the bill of lading for the cargo actually delivered to Empire. Dkt. 89. Moreover, the number of shipping "boxes" in the packing slip matches the number of shipping "cartons" in the bill of lading. In sum, the shipping documents that defendants provided appear to show that Jiangsu delivered the correct number of items at the appropriate weight.

D. Alleged Defamation & Tortious Interference with Contract by Jiangsu

The day after the complaint was filed, Jiangsu filed an order to show cause for a preliminary injunction. Dkt. 8. In his supporting affidavit, Zhu, Jiangsu's President, made the first allegedly defamatory statement (first statement), which is emphasized in bold:

> I finally realized that Zhou and Empire had no intention of paying me. In October,[8] when I had conversations with my friend, who was also a garments manufacturer, I was told that he had signed several sales contracts with defendants. A few weeks later, I asked him whether he had received payments from defendants and he said he had not received any payment. I became suspicious and

[8] The context makes clear that the year was 2015. Dkt. 9, ¶¶8-19.

> began to investigate. I found that at least two other garment manufacturers had the same experience as mine with defendants. And there was another one just [sic] signed the contract with defendants and prepared [sic] to start production. **I told the manufacturer he should stop because defendants were crooks.**

Dkt 9., ¶18. Although the first statement is not alleged in the defendants' proposed counterclaim [Dkt. 70, ¶¶ 51-56], defendants point to it in their memorandum of law as the basis for their proposed defamation counterclaim. Dkt. 60, pp 4-5. The court will consider the affidavit of Jiangsu's President in determining whether defendants have a meritorious counterclaim for defamation. CPLR 104.

The second alleged defamatory statement (second statement) is that Jiangsu said that defendants "had defrauded many Chinese manufacturers." Dkt. 70, ¶54. The second statement also was in Mr. Zhu's affidavit. Dkt. 9, ¶19. However, there is no allegation in the proposed counterclaim, or defendants' other submissions, that the second statement was published (apart from the court filing), to whom it was published, or when it was made. Thererfore, it appears that it was made only in the course of this judicial proceeding. In their memorandum of law, defendants make no argument that the second statement was defamatory. Dkt 60, pp 4-5. The proposed fourth counterclaim for defamation alleges that as a result of the statements, "both Defendants suffered damages with respect to their reputations." Dkt 70, ¶56.

The fifth proposed counterclaim for tortious interference with business relations alleges interference with Empire's existing contracts. Dkt. 70, ¶¶ 58-61. It says that Jiangsu told "Chinese manufacturers that they should stop performing their contractual obligations because the Defendants were crooks" and that as a result, "some Chinese manufacturers have either terminated or breached sales contract [sic] with Empire Imports Group, Inc.," which damaged Empire. *Id.*

E. Procedural Background

On January 13, 2016, Jiangsu filed this lawsuit, alleging causes of action against Empire and Zhou, numbered here as in the complaint, for (1) breach of the four Sales Agreements and guaranty; (2) account stated; (3) unjust enrichment relating to the first shipment; (4) conversion of the first shipment; and (5) fraud. On the first cause of action, Jiangsu seeks $230,296.99 (the remaining contract balance) in damages from Empire based on the first sales agreement and guaranty, and $1,150,892.80 in damages as the alleged amount due under all of the Sales Agreements. Jiangsu also seeks punitive damages for fraud.[9]

On February 5, 2016, after failing to appear in court in response to Jiangsu's order to show cause [Dkt. 23 & 25], defendants filed an answer with four counterclaims [Dkt. 28]. Counterclaims 1-3 allege that Jiangsu breached the first sales agreement by providing non-conforming goods and failed to perform under the other three agreements. Dkt. 28. The answer and counterclaims did not raise any affirmative defense based on the Sales Agreements' forum selection clauses. *Id.*

On April 26, 2016, counsel for the parties attended a preliminary conference that set deadlines for the exchange of paper discovery.[10] Dkt. 38. Defense counsel indicated at the conference that he had served document demands and interrogatories on Jiangsu, and was considering removing the case to federal court. *Id.* No additional affirmative defenses were raised. Dkt. 37.

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[9] The copies of the agreements attached to the complaint were illegible. Dkt. 2-6. At the preliminary conference, the court ordered Jiangsu to re-file the agreements. On May 4, 2016, Jiangsu filed legible copies. Dkt. 39-43.

[10] Objections and responses to paper discovery were due in July, 2016. Dkt. 38. Production of paper documents was to be completed in August, 2016. *Id.*

On May 6, 2016, before the initial paper discovery deadlines had expired, Jiangsu made the instant motion for partial summary judgment. Dkt. 43. Defendants opposed the motion, but only submitted an attorney's affirmation without exhibits. Dkt. 54. Defense counsel's affirmation essentially re-stated the allegations in defendants' counterclaims; i.e. that the jackets in the first shipment were non-conforming. *Id.*, at 2-4. It did not assert a forum selection clause defense. *Id.*

On July 4, 2016, after failing to appear for two more scheduled conferences in June [Dkt. 55-56], defendants filed a consent to change attorney. Dkt. 57. Two days later, on July 6, 2016, defendants moved for leave to amend their answer and counterclaims and to assert affirmative defenses based on, *inter alia*, the Sales Agreements' forum selection clauses. Dkt. 70 [Proposed Amended Answer and Counterclaims], at 4. Zhou's affidavit, alleging for the first time that he notified Jiangsu that the first shipment was non-conforming and demanded cure, was offered for the first time in his reply affidavit on defendants' motion. Dkt. 79, ¶¶ 42-43.

The proposed amended answer includes counterclaims, numbered here as in the proposed pleading, for: (1) breach of contract for allegedly providing non-conforming jackets; (2) unjust enrichment for the $50,000 that Empire wired to Jiangsu for the jackets pursuant to the Guaranty; (3) fraud, based on Jiangsu's allegedly false promise to provide conforming goods; (4) defamation and slander against Jiangsu; and (5) tortious interference with business relations based on the same allegations underlying the defamation claim. Dkt. 70, pp 5-7.

Defendants also moved for summary judgment dismissing Jiangsu's complaint, citing the Sales Agreements' forum selection clauses. Defendants admit that they knew about the forum selection clause when Jiangsu filed this lawsuit. Dkt. 79 [Zhou Aff.] ¶ 49. Zhou stated in his reply affidavit that he "forgot" to tell defendants' former counsel about the forum selection

clause, and that he never intended to waive any defense based on the clause. *Id*, ¶¶ 50-51. He explains that he prefers litigating in China, as most of the parties' communication was in Chinese, and the agreements potentially call for the court to apply Chinese law. *Id.*, ¶ 56. Jiangsu points out that defendants have articulated no reasonable excuse for not raising the forum selection clause sooner, and contends that allowing defendants to assert a waived defense would unfairly prejudice Jiangsu. Both parties acknowledge the agreements' choice of law clause in their motion papers, but argue only New York law.

II. Discussion

A. Standard of Review for Motions to Amend & for Summary Judgment

Leave to amend pleadings should be granted freely, and should be denied only when it would cause prejudice or surprise, or the amendment is palpably improper or insufficient as a matter of law. CPLR 3025(b); *McGhee v Odell,* 96 AD3d 449, 450 (1st Dept 2012); *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 (1st Dept 2009) (denial of amendment proper where pleading clearly lacks merit). Prejudice means the "loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment." *See Acevedo v Holton*, 239 AD2d 194, 195 (1st Dept 1997), citing Siegel, *N Y Practice*, §237, p 353.

The court may grant summary judgment only when it is clear that no triable issue of fact exists, and the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The moving party bears the burden of making a *prima facie* showing, by the submission of admissible evidence, of its entitlement to summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). Failure to make such a showing requires the court to deny the

motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). Once a movant makes a *prima facie* showing, then the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The affirmation of an attorney who lacks personal knowledge is insufficient. *Zuckerman*, 49 NY2d at 563. The party opposing the motion must lay bare its admissible proof in opposition, or present an acceptable excuse for its failure to do so. *Zukerman*, 49 NY2d at 560. The court should examine the summary judgment papers in the light most favorable to the non-moving party. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). The court must deny the motion if there is any doubt as to the existence of a genuine factual issue. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Proposed Forum Selection Clause Defense

It is well established that forum selection clauses are *prima facie* valid and enforceable unless shown by the resisting party to be unreasonable. *Brooke Grp. Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 (1996). However, a forum selection clause may be waived. *Lischinskaya v Carnival Corp.,* 56 AD3d 116, 122–123 (2d Dept 2008). A forum selection clause defense is a defense founded on documentary evidence. *Id*; *citing 150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1 (1st Dept 2004) (treating motion asserting defense based on contractual term as 3211(a)(1) motion); *U.S. Merch., Inc. v L & R Distributors, Inc.*, 122 AD3d 613, 614 (2d Dept 2014) (same); CPLR 3211(a)(1); 2 NY Prac., Com. Litig. in New York State Courts §13:20 (4th ed. 2016).

A party waives a forum selection clause defense by failing to raise it in an answer or a pre-answer motion to dismiss. CPLR 3211(e) (defense based upon a ground set forth in paragraph (a)(1) [documentary evidence]... is waived unless raised either by motion to dismiss

or responsive pleading); *CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 491 (1st Dept 2010) (affirming denial of motion to amend to assert forum selection clause defense because defendants waived by appearing and participating in litigation without raising the defense, and failing to amend as of right); *IndyMac Bank, F.S.B. v LaMattina*, 49 AD3d 395 (1st Dept 2008) (trial court properly declined to consider the forum selection clause defense raised for first time in defendant's reply affirmation on motion to dismiss); *Basile v CAI Master Allocation Fund, Ltd.*, 39 Misc3d 1217(A) (Sup Ct, Kings County 2013) ("A party's active participation in a court action...estops the party from later asserting that a forum selection clause mandates dismissal of the action."), *aff'd*, 131 AD3d 660 (2d Dept 2015); *Leasecomm Corp. v Long Is. Cellular Ltd.*, 16 Misc3d 1 (App Term, 2d Dept 2007) (forum selection clause waived where neither party seeks to enforce it); *Superior Tech. Resources, Inc. v Lawson Software, Inc.*, 17 Misc3d 1137[A], *15 (Sup Ct, Erie County 2007) (forum selection clause waivable and parties waived by participating in litigation).

Here, defendants, who admittedly were aware of the defense, failed to raise the forum selection clause as a defense in their answer, did not move to dismiss on that ground, and did not amend their answer as of right to assert the defense. Defendants failed to raise the forum selection clause at their preliminary conference or during nearly four months of discovery, forcing Jiangsu to incur unnecessary litigation expenses and wasting the court's time. Nor was the defense raised in opposition to Jiangsu's motion for summary judgment. Dkt 54. Defendants have waived the defense. CPLR 3211(e),.

C. Choice of Law

The parties cite only to New York law and do not argue that the Vienna Convention on sale of goods or Chinese law conflicts with New York law. The parties, consequently, have

impliedly consented to New York law on this contract claim. *See MMA Meadows at Green Tree, LLC v Millrun Apts.*, LLC, 130 AD3d 529, 531 (1st Dept 2015). The account stated cause of action is essentially a contract claim, to which the court will apply New York law for the same reason. *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 (1st Dept 2007) ("An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due").

Similarly, where the parties' briefs reflect an assumption that one state's law applies to claims that do not sound in contract, there is implied consent to the use of the forum state's law. *Bullmore v Ernst & Young Cayman Islands*, 2006 NY Slip Op 30069(U) (Sup Ct NY Co Apr. 12, 2006), fn 17; 2006 NY Misc LEXIS 9553 (nor), modified on other grnds, *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461 (1st Dept 2007). Here, the parties exclusively cite New York law for their non-contractual claims and do not argue that there is conflicting applicable law. Again, the court will apply New York law to Jiangsu's non-contractual claims.

D. The Parties' Motions for Summary Judgment on Jiangsu's Contract/Guaranty Claim - First Cause of Action

Jiangsu seeks partial summary judgment against Empire on the portion of its first cause of action alleging breach of the first sales agreement and the guaranty. For the reasons that follow, the motion is granted. Defendants' motion to for summary judgment dismissing the first cause of action is denied insofar as it is against Empire, but is granted with respect to Zhou, individually.

Under UCC § 2-709, when the buyer fails to pay the price when it becomes due the seller may recover, together with any incidental expenses, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

UCC § 2-709.

Under UCC article 2, following delivery of … allegedly nonconforming goods, a buyer has the option to reject them [UCC §2-602], revoke its acceptance upon discovery of the nonconformity [UCC §2-608], or accept the goods and seek damages for the loss resulting from defendant's breach [UCC §2-714(1)]." *Cliffstar Corp. v Elmar Indus.*, 254 AD2d 723, 724 (4th Dept 1998). A buyer who has accepted nonconforming goods may recover damages, pursuant to UCC §2-714, equal to the difference between the value of the goods accepted and the value of the goods as warranted. *B. Milligan Contracting Inc. v Andrew R. Mancini Assocs. Inc.*, 174 AD2d 136, 139 (3d Dept 1992). However, a buyer who accepts goods must notify the seller within a reasonable time after he discovers, or should have discovered a breach, or he is barred from any remedy. UCC 2-607(a).

Here, Jiangsu submitted evidence that it entered into a binding first sales agreement and guaranty with Empire for $280,296.00 [Dkt 39], manufactured and delivered the jackets that Empire ordered [*see* Dkt. 89 (Bill of Lading) & Dkt 91 (Packing List)], and received only $50,000 in payment on August 12, 2015.

Defendants are barred from any remedy because they failed to come forward with admissible evidence that they notified Jiangsu within a reasonable time after they discovered, or should have discovered, that the goods were non-conforming. CPLR 3212(b); UCC 2-607(a). Zhou's reply affidavit on defendants' motion and their other submissions are silent on this point, and Empire offered no excuse for its failure to present such evidence, which is within defendants' own knowledge. Dkt. 79, ¶¶ 43-45. Thus, defendants failed to raise an issue of fact

as to whether Empire preserved its right to sue for damages by notifying Jiangsu within a reasonable time that the goods did not conform. UCC §2-607(a). The affirmation of defendants' former attorney, which stated that the first shipment was missing some of the all-black and plaid-chested jackets [Dkt. 54, ¶3], has no probative value because he lacked personal knowledge. *Zuckerman*, 49 NY2d at 563; *Marinelli v Shifrin*, 260 AD2d 227, 228–29 (1st Dept 1999).[11]

Hence, Jiangsu is entitled to summary judgment on the portion of its first cause of action for breach of the first sales agreement and guaranty against Empire. Jiangsu also is entitled to interest on the unpaid first sales agreement price, at the statutory rate of nine percent from the date of the breach, August 12, 2015, when Empire failed to pay half of the purchase price, as set forth in the guaranty. CPLR 5001; *Brady v Zambrana*, 221 AD2d 171, 172 (1st Dept 1995); *Bruce Supply Corp. v D & M Plumbing & Heating Corp.*, 291 AD2d 525, 526 (2d Dept 2002); CPLR 5004.

It follows that the court must deny defendants' motion for summary judgment dismissing the prong of the first cause of action against Empire relating to the sales agreement and Guaranty. With respect to summary judgment dismissing the portions of the first cause of action against Empire related to the other three sales agreements, Empire's motion is denied because it relied solely on its waived forum selection clause defense. Dkt. 60, pp 7-8.

The court grants summary judgment to defendants dismissing the first cause of action insofar as it is against Zhou, individually. Jiangsu lacked privity of contract with him, which

[11] It is not clear what counsel meant by "plaid" color, as none of the jackets in the first purchase order are listed as plaid. Dkt. 80. Furthermore, counsel's affirmation conflicts with the first purchase order [Dkt. 80 (calling for jackets with the following color combinations: "Black/Black, Dark Grey/Black, Navy/Grey and Red/Black.") the bill of lading [Dkt. 89] and packing list [Dkt. 91], which show that Jiangsu shipped the correct number of items (at the correct weight) to Empire.

precludes Jiangsu from enforcing the sales agreements or Guaranty against him. It is well settled that "a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 (1st Dept 2002). An officer "will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 (1961).

Here, there is no evidence that Zhou personally guaranteed Empire's performance under the Sales Agreements or Guaranty, or signed any contract in his individual capacity. That Zhou signed some of the agreements once, on Empire's behalf [Dkt. 6], does not constitute "explicit evidence" of Zhou's intent to be personally bound. *Id.* (noting "near universal" practice of signing agreement twice – once as officer and again as individual – to indicate officer's intent to be bound individually). Although Jiangsu argues that normal limited liability principles should not apply to Zhou because he acted in bad faith, the allegation is made in conclusory fashion without any supporting facts. Accordingly, defendants' motion for summary judgment dismissing the first cause of action against Zhou is granted.

E. Defendants' Motion for Summary Judgment Dismissing Jiangsu's Account Stated & Unjust Enrichment Claims

Defendants motion to dismiss the second and third causes of action is denied. Defendants make no argument in favor of dismissal. *Ayotte v Gervasio*, 81 NY2d at 1063 (failure to make prima facie case requires court to deny movant's summary judgment motion regardless of sufficiency of opposition papers). Assuming that those claims were encompassed

in defendants' argument that the whole complaint should be dismissed pursuant to the forum selection clause, the motion is denied because the defense was waived.

F. Defendants' Motion for Summary Judgment Dismissing Jiangsu's Conversion and Fraud Claims

Defendants move to dismiss Jiangsu's conversion and fraud claims, the fourth and fifth causes of action, respectively, on the ground that they duplicate the first cause of action for breach of contract. The court agrees.

Jiangsu's conversion claim is a reformulation of its claim for breach of contract and the guaranty. Jiangsu's conversion claim "alleges no independent facts sufficient to give rise to tort liability," aside from "refusing to pay [for the goods]" that Jiangsu delivered pursuant to the first sales agreement and/or guaranty. *Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 269 (1st Dept 2003) (cause of action for conversion cannot be predicated on mere breach of contract); *Yeterian v Heather Mills N.V Inc.*, 183 AD2d 493, 494 (1st Dept 1992). Thus, defendants' motion for summary judgment dismissing Jiangsu's conversion claim is granted.

Likewise, defendants are entitled to summary judgment dismissing Jiangsu's fraud claim because it fails to identify any misrepresentation collateral to the Sales Agreements and Guaranty, or to allege the elements of fraud with particularity. A fraud claim must allege reliance on specific misrepresentations of material fact collateral to the contract, not just a promise to perform under a contract. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 188-89 (1st Dept 2012). Jiangsu contends only that "[d]efendants made numerous false representations of fact and false promises, including, without limitation[,] that they were going to pay the full contract price..." Dkt. 1, ¶27. In addition to failing to meet the CPLR 3016(b) particularized pleading standard, Jiangsu fails to articulate any misrepresentation outside the scope Empire's

contractual promise to perform. Consequently, defendants' motion for summary judgment dismissing Jiangsu's fraud claim is granted.

G. Defendants' Motion to Amend to Assert an Unjust Enrichment Counterclaim

Defendants' motion to amend their answer to assert an unjust enrichment counterclaim is denied. Defendants' proposed second counterclaim alleges unjust enrichment against Jiangsu in the amount of $50,000. Dkt. 70, ¶¶ 42-44. They claim that Empire paid Jiangsu $50,000 towards the first shipment of jackets and then discovered that some of the jackets were missing. Defendants conclude that Jiangsu was unjustly enriched. As the court has granted Jiangsu summary judgment against Empire for failing to pay for the first shipment, Jiangsu was not unjustly enriched. Moreover, "[i]t is impermissible…to seek damages in an action sounding in quasi contract where the suing party has … performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Navillus Tile, Inc. v George A. Fuller Co.*, 83 AD3d 919, 919-20 (2d Dept 2011), quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Here, the alleged unjust enrichment arises from a transaction governed by an express written contract, the first sales agreement and Guaranty.

I. Defendants' Motion to Amend to Assert a Counterclaim for Fraud

The court denies defendants' leave to assert a third counterclaim for fraud. Defendants allege that Jiangsu misrepresented that its goods conformed to the terms of the first sales agreement, causing defendants to pay $50,000 towards the purchase price. Dkt. 70, ¶¶ 46-48. However, the court has determined that defendants breached the first sales agreement. Thus, they were not defrauded by Jiangsu's retention of part of the purchase price.

In addition, defendants proposed fraud counterclaim fails to plead a claim for fraud. The elements of a fraud claim are: (i) a misrepresentation or a material omission of fact (ii) which was false and known to be false by defendant, (iii) made for the purpose of inducing the other party to rely upon it, (iv) justifiable reliance of the other party on the misrepresentation or material omission, and (v) injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). A plaintiff claiming fraud must allege reliance on specific misrepresentations of material fact collateral to the contract, not just a promise to perform under a contract. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 188-89 (1st Dept 2012) ("A claim for [fraud] can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract."). CPLR 3016(b) provides that in a complaint alleging fraud, "the circumstances constituting the wrong shall be stated in detail." The particulars that CPLR 3016 require a party to plead include the persons to whom the alleged misrepresentations were made, where they were made, and when. *Fariello v Checkmate Holdings, LLC*, 82 AD3d 437 (1st Dept 2011); *Mountain Lion Baseball, Inc. v Gaiman*, 263 AD2d 636, 638 (3d Dept 1999); *see also Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 (1st Dept 1997) (CPLR 3016 requires that misconduct be stated in sufficient detail to clearly inform defendant of conduct complained of).

Here, defendants fail to identify any "collateral promise" underlying their fraud claim that differs from Jiangsu's contractual promise to provide conforming goods. Defendants proposed fraud claim is nothing more than a reformulation of defendants' dismissed claim for breach of the first sales agreement. Moreover, defendants proposed fraud counterclaim fails to

specify (1) who made the allegedly false representation; (2) when he/she made the representation; or (3) to whom he/she made the representation. Accordingly, the court denies defendants' motion to amend to assert a counterclaim for fraud.

J. Defamation

The elements of a cause of action for defamation are: (i) a defamatory statement against the plaintiff; (ii) published without privilege or authorization to a third party; (iii) negligence with respect to the statement's truth; and (iv) special harm or slander *per se*. *Dillon v City of NY*, 261 AD2d 34, 38 (1st Dept 1999). Slander per se can arise from statements that tend to injure the plaintiff in his or her trade, business or profession. *Liberman v Gelstein*, 80 NY2d 429, 435 (1992). CPLR 3016(a) provides that a plaintiff must plead defamation with specificity. *See also*, *Dillon*, 261 Ad2d at 37-38. The pleading must allege the time, manner, and to whom the defamatory statement was published. *Arsenault v Forquer*, 197 AD2d 554 (2d Dept 1993).

In determining whether a statement is defamatory, courts will consider the full context of the communication in which the statement appears, while also considering the broader social context or setting surrounding the communication. *Chau v Lewis,* 771 F3d 118, 129 (2d Cir. 2014) (applying New York law); *Dillon*, 261 AD2d at 38. An expression of pure opinion is not actionable defamation, no matter how vituperative or unreasonable. *Chalpin v Amordian Press, Inc.*, 128 AD2d 81, 84 (1st Dept 1987); *see also Chau,* 771 F3d at 128 ("[O]nly factual statements are actionable as defamation or libel."). Pure opinion includes "a statement of opinion which is accompanied by a recitation of the facts upon which it is based" or that does not imply that it is based on undisclosed facts. *Id.* at 129, citing *Steinhilber v Alphonse*, 68 NY2d 283, 293 (1986). Where a statement of opinion implies that it is based upon undisclosed facts which justify the opinion, it is deemed a "mixed opinion," and is actionable. *Chalpin*,

supra, 128 AD2d at 85 (alleged defamatory statement that plaintiff was "an unbelievably unscrupulous character" readily falls within ambit of what average reader would understand to be author's "opinion" rather than fact, but was implicitly based on undisclosed facts); *see also Rand v NY Times Co.*, 75 AD2d 417, 422 (1st Dept 1980) ("[A] mixed opinion is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.").

Courts apply a four-factor test to determine whether a statement is a factual or pure opinion: (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and, (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Weiner v Doubleday & Co.*, 142 AD2d 100, 108–09 (1st Dept 1988) (internal quotations omitted), aff'd, 74 NY2d 586 (1989).

Statements said in a context that implies dishonesty, misconduct, or unfitness in business constitutes slander per se. *Vacca v General Electric Credit Corp.*, 88 AD2d 740 (3d Dept 1982) (at retail location, creditor said in front of two creditors and others that business owners were "crooks and hijackers" and merchandise left in store would end up missing); *Afftrex, Ltd v General Electric Co.*, 161 AD2d 855 (3d Dept 1990) (statement that plaintiff was fired from his previous job because he was an "evil man" implied misconduct in trade or business and supported defamation claim); *Suarez v Angelet*, 90 AD3d 906 (2d Dept 2011) (statement that

plaintiffs were thieves could be actionable depending on context and should not have been dismissed as opinion in absence of more complete record).

Jiangsu opposes the amendment to assert a counterclaim for defamation on the ground that the alleged statements are non-actionable opinion. In the context of a conversation between manufacturers selling to Empire, Zhu's statement, after allegedly discovering that Empire failed to pay other manufacturers, that defendants were crooks, coupled with advice to stop production for Empire, could be found by a trier of fact to imply the undisclosed fact that defendants had been dishonest in business with Jiangsu and others. *Vacca v General Electric Credit Corp.*, *supra*; *Affirex, Ltd v General Electric Co.*, *supra*. As the statement impugned defendants in their trade or business, it could support a claim for slander per se. *Id.* Discovery is needed concerning the context in which the statement was made. *Suarez v Angelet*, *supra*. Although the court has found that Empire failed to pay Jiangsu for the first agreement, and truth is a defense, the context may have implied other dishonest dealings.

The second statement, that defendants had defrauded other Chinese manufacturers, does not state a claim for defamation because the time, manner, and to whom it was published were not pleaded. CPLR 3016; *Arsenault v Forquer*, *supra*. The only publication that can be gleaned from the record was Zhu's affidavit in this action, which was privileged. Statements made in the course of judicial proceedings, are absolutely privileged if at all pertinent to the litigation. *Lacher v Engel*, 33 AD3d 10, 13 (1st Dept 2006), citing *Youmans v Smith*, 153 NY 214, 219 (1897). Here, the statements were pertinent to Jiangsu's claim that Empire did not pay for the first shipment. Finally, defendants did not mention the second statement in their memorandum of law in support of their motion to amend.

K. Tortious Interference with Contract

The elements of a claim for tortious interference with an existing contract are: 1) the existence of a valid contract with a third party, 2) defendant's knowledge of that contract, 3) defendant's intentional and improper procuring of a breach, and 4) damages. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007); *Carvel v Noonan*, 3 NY3d 182, 189-190 (2004). The motion to amend is granted to the extent that it seeks to assert a counterclaim by Empire for tortious interference with existing contracts.[12] Defendants' fifth counterclaim alleges that plaintiff told some Chinese manufacturers that they should stop performing their contractual obligations because defendants were crooks and, as a result, some Chinese manufacturers terminated or breached contracts with Empire, causing it damage. Dkt. 70 ¶¶ 59-60. This sufficiently alleges the elements of the claim. Accordingly, it is

ORDERED that Jiangsu's motion for partial summary judgment against Empire on the portion of its first cause of action (Seq 002) relating to the first sales agreement and Guaranty is granted; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint and to amend their counterclaims (Motion Seq 003) is granted to the extent of: 1) dismissing Jiangsu's fourth (conversion), and fifth (fraud) causes of action, and all causes of action against Kevin Zhou, individually, and the motion for summary judgment is otherwise denied; and 2) granting the motion to amend to the extent of permitting defendants to assert counterclaims for defamation to the extent indicated in this opinion and tortious interference with existing contracts, provided that said amended counterclaims are efiled by April 13, 2017, and the motion to amend is otherwise denied; and it is further

[12] Defendants erroneously labeled the fifth counterclaim interference with business relations.

ORDERED that upon service upon him of a copy of this order with notice of entry at cc-nyef@nycourts.gov, the Clerk is directed to enter judgment on the portion of plaintiff's first cause of action for breach of the sales agreement and guaranty in favor of plaintiff Jiangsu Jintan Liming Garments Factory and against Empire Imports Group, Inc. (Empire), in the amount of $230,296.00, with interest at the statutory rate from August 12, 2015, plus costs; and dismissing plaintiff's complaint against John Zhou, and plaintiff's fourth and fifth causes of action against Empire for conversion and fraud; and it is further

ORDERED that the court *sua sponte* severs the remaining portions of Jiangsu's first cause of action, and its second and third causes of action against Empire, as well as defendants' counterclaims, which shall continue as a separate action; and it is further

ORDERED that upon service upon the Clerk and the Clerk of the Trial Support Office, at cc-nyef@nycourts.gov and trialsupport-nyef@nycourts.gov, respectively, of a copy of this order with notice of entry, they shall note the severance in their records; and it is further

ORDERED that there will be a status conference at 60 Centre Street, Room 228 on March 30, 2017, at 11:30 a.m., at which time the court will set a new discovery schedule; and it is further

ORDERED that within 5 days of the entry of this order in the NYSCEF system, Jiangsu shall serve a copy of it with notice of entry upon Empire by overnight mail.

Dated: March 8, 2017

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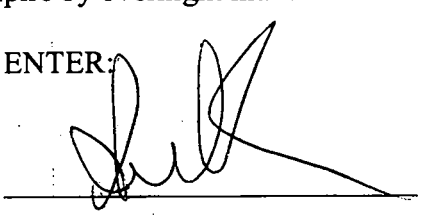

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C