SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BLUEBANANA GROUP LLC,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 152736/2016

SEARS HOLDING MANAGEMENT CORPORATION & SEARS HOLDING CORPORATION,

Defendants.

MELISSA A. CRANE, J.

Plaintiff Bluebanana Group LLC ("Bluebanana") commenced this action against defendants Sears Holding Management Corporation and Sears Holding Corporation ("Sears") for breach of contract, account stated, conversion, unjust enrichment, and quantum meruit. Plaintiff seeks to collect $102, 129.00 due on invoices Sears failed to pay for goods sold and delivered. Plaintiff alleges that Sears unilaterally and without authorization deducted this amount as a "credit" on an existing account balance between the parties.

Sears moves, pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7), to dismiss all of Plaintiff's causes of action, and for costs and fees. Sears contends that Frank Peticca, the former CFO of Plaintiff, signed a controlling "Master Agreement" ("Agreement") that allowed Sears to take certain chargebacks and deductions. Further, Vince Govindani ("Govindani"), who was working for the Plaintiff and was involved in the placement of the orders in question, allegedly executed a written chargeback agreement ("Chargeback Agreement") in which Plaintiff permitted and, indeed, affirmatively consented to the

chargeback of $102,129.00. Sears argues that these two agreements constitute documentary evidence that, under CPLR 3211(a), conclusively defeats the gravamen of the complaint, including that the chargeback of $102,129.00 was unilateral and unauthorized.

A motion to dismiss under CPLR 3211(a)(1) obliges the court "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Dismissal is appropriate only if the documentary evidence conclusively establishes a defense to the claims as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]; *McCully v Jersey Partners, Inc.*, 60 AD3d 562 [1st Dept 2009]).

Similarly, in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the allegations in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Wald v Graev*, 137 AD3d 573 [1st Dept 2016]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]; *TIAA Global Investments, LLC v One Astoria Square LLC*, 127 AD3d 75 [1st Dept 2015]).

In its opposition to Defendant's motion to dismiss, Plaintiff argues that: (1) the controlling Agreement between the parties does not allow for the chargeback and (2) Plaintiff neither signed off on or agreed to the alleged Chargeback Agreement. Thus, because Sears relies on an unauthorized Chargeback Agreement, Plaintiff contends that

there is insufficient documentary evidence to sustain the motion to dismiss.

Plaintiff does not dispute that the Agreement between the parties is controlling and that under certain circumstance it allows for "[netting] of all Refund Credits, Return Costs, Defense Obligations, Indemnity and Contribution Obligations and other monetary obligations owing by Seller to Company under any Vendor Agreement or otherwise…" (Agreement-Section 15). Instead, Plaintiff contends that the chargeback Sears took does not fall under any of these categories.

The chargeback Sears took is not a Refund Credit. It was not for nonconforming merchandise such as: (a) merchandise not produced, sold, shipped, delivered or otherwise not in compliance with the Agreement, (b) merchandise delivered in excess quantities, in broken packs, or in packages other than as specified, (c) merchandise allegedly violating applicable federal, state, local laws or regulations, (d) merchandise allegedly infringing on patent trademark, etc. …, or (e) merchandise that at a time of receipt by Sears will expire within a time period that is less than the applicable industry standard (Agreement-Section 13). Similarly, the chargeback does not fall in the category of Return Costs, as Sears did not claim any damages or nonconforming merchandise (Agreement-Section 13). Finally, the controlling Agreement between the parties defines Defense Obligations, Indemnity and Contribution Obligations as items related to Bluebanana's indemnity obligation for claims brought against Sears. (Agreement-Section 11.1 and 11.2) Because the chargeback Sears took is not related to a claim for indemnity, these three categories are also not applicable. Thus, the language of the controlling Agreement does not directly support the chargeback of $102,129.00 Sears took and the only remaining basis for it, is the separate Chargeback Agreement.

Plaintiff alleges that none of its managing members, directors, officers or any of

its agents, who are authorized to sign on behalf of Plaintiff, were aware of, approved or signed the Chargeback Agreement. Plaintiff is also allegedly not able to ascertain who prepared or discussed the Chargeback Agreement with Bluebanana's management for its approval. Sears counters that Govindani signed the Chargeback Agreement when he was working for Bluebanana and he was involved in the placement of the orders for the merchandise in question. However, even if Govindani or another agent of Plaintiff actually signed the Chargeback Agreement, this agent must have acted on behalf of Bluebanana with express, implied, or apparent authority (*Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47 [2nd Dept 2013]). Here, Sears has not conclusively established and the Chargeback Agreement itself is not clear whether an agent of Plaintiff signed it and whether that person acted with express, implied, or apparent authority to bind Plaintiff. Additionally, there are remaining questions of fact such as: (1) who prepared the Chargeback Agreement, (2) who sent the agreement to whom, (3) what conversations the parties held regarding the chargeback, and (4) who signed on behalf of Bluebanana and if they had authority to do so.

Neither the controlling Agreement nor the Chargeback Agreement form a proper basis for dismissal of this action, because they do not conclusively establish a defense to the claims as a matter of law (*Leon v. Martinez*, 84 N.Y.2d 83 [1994]) (under CPLR 3211(a)(1), a dismissal is proper only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law). Also, in assessing the motion under CPLR 3211(a)(7), the court accepts the facts as plaintiff alleged in the Complaint as true, and accords plaintiff the benefit of the favorable inference that it was not aware of and did not approve the Chargeback Agreement (*Morone v. Morone*, 50 N.Y.2d 481, 484 [1980]).

Accordingly, it is ORDERED that the court denies Sears' motion seeking dismissal of the complaint.

The parties are directed to appear for a preliminary conference on 1/31/2018 at noon.

Dated: December 6, 2017
New York, New York

ENTER:

Melissa A. Crane, J.S.C.