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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

TRADEWIND CORP. LTD.; PT TRADEWIND INDONESIA d/b/a TRADEWIND CORP. LTD.; D&C MFG. CO. LTD.; CK GLOBAL CO. LTD. And JIANGYIN HUAREN GARMENT CO. LTD. d/b/a CK GLOBAL CO. LTD.,

INDEX NO. 652934/2012

-against-

MOTION DATE _____

ELLIOT SHALOM, SOHO FASHION LTD. and Q4 DESIGNS, LLC.

MOTION SEQ. NO. 001 & 002

The following papers, numbered 1 to _____ were read on this motion to/for dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

It is ordered that these motions are decided in accordance with the accompanying decision/order dated October 10, 2013.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 10, 2013

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

TRADEWIND CORP. LTD.; PT TRADEWIND INDONESIA d/b/a TRADEWIND CORP. LTD.; D&C MFG. CO. LTD.; CK GLOBAL CO. LTD. And JIANGYIN HUAREN GARMENT CO. LTD. d/b/a CK GLOBAL CO. LTD.,

Plaintiffs,

Index No.: 652934/2012
Motion Seq. 001 & 002

DECISION/ORDER

- against -

ELLIOT SHALOM, SOHO FASHION LTD. and Q4 DESIGNS, LLC,

Defendants.

In this action for goods sold and delivered, defendant Elliot Shalom and defendant Q4 Designs, LLC (Q4) each move to dismiss the complaint for failure to state a cause of action.

The standards for determination of a motion to dismiss are well settled:

> "The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." In furtherance of this task, [the court] liberally construe[s] the complaint and accept[s] as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. [The court] also accord[s] plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

(511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted].)

The complaint pleads the seventh, eighth and ninth causes of action against Shalom and

Q4 for breach of the implied covenant of good faith and fair dealing, the tenth cause of action against both defendants for violation of General Business Law § 349, the eleventh through thirteenth causes of action against Q4 for "successor liability," and the fourteenth cause of action against Shalom for liability under a personal guarantee of the debts of defendant Soho Fashion, Ltd. (Soho).

The claim that Shalom personally guaranteed the debts of Soho is based on three emails (Exs. 1-3 to Kim Aff. In Opp.) sent by Shalom to plaintiffs' representatives after Soho was unable to pay for goods delivered to it by plaintiffs. It is well settled that "an agent for a disclosed principal 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., Inc. v Beck, 10 NY2d 63, 67 [1961].)

Here, Shalom's emails are equivocal, as he refers to "Soho's obligation" for the debt but makes first person statements of intent to honor the company's obligation. For example, he states: "I am personally writing to assure you of Soho Fashions Ltd responsibilities and how we intend to meet our obligations to you. . . . We are in the process of selling this inventory. . . . I anticipate that I will also have to raise additional capital to cover the cash shortfall from selling off the inventory to meet my obligations to you. . . . This is Soho's obligation." (Ex. 1.) "I want to reassure you that I intend to honor the Company's obligation . . . ." (Ex. 2.) "For the past 3 months I have been negotiating with my current lender and we have been unable to reach a resolution. . . . What I am proposing is to pay 10% of what I owe as soon as I finalize my new banking arrangements. . . ." (Ex. 3.)

These writings do not contain the word "guarantee," and do not state the essential terms

of a guarantee, including the amount of and date for payment. Indeed, Exhibit 3 is couched in terms of a "proposal" rather than an agreement. The writings lack the specificity necessary to evidence an intent to assume personal liability. They are also insufficient to satisfy the statute of frauds as they do not "adequately identify and describe the alleged contract's subject matter or state its other essential terms." (Adiel v Lincoln Plaza Assocs., 254 AD2d 5 [1st Dept 1998]; DeRosis v Kaufman, 219 AD2d 376 [1st Dept 1996]; Tradewinds Fin. Corp. v Repco Secs., Inc., 5 AD3d 229 [1st Dept 2004].) Moreover, parol evidence may not be considered in assessing the adequacy of a writing for statute of frauds purposes. (DeRosis, 219 AD2d at 379.) The court accordingly holds that the fourteenth cause of action against Shalom on the guaranty must be dismissed.

The seventh through ninth causes of action against Shalom for breach of the implied covenant of good faith and fair dealing must be dismissed, as Shalom is not a party to the underlying contracts with Soho and is not bound under a guaranty. The tenth cause of action against Shalom for violation of General Business Law § 349 must also be dismissed, as the complaint fails to allege conduct that affects consumers at large, but, rather, is based on a private contract dispute which does not fall within the ambit of the statute. (Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995].)

The eleventh through fourteenth causes of action against Q4 allege "successor liability" based on Shalom's status as a principal of both Soho and Q4, and on the alleged "transfer of the assets from an insolvent corporation (Soho) to a new entity" (Q4). (Compl., ¶¶ 61, 64, 67.) In moving to dismiss these causes of action, Q4 claims that these allegations are insufficient to support the successor liability claim. Plaintiff claims that the allegations support successor

liability under the de facto merger doctrine.

> "This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation. The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation.
>
> Not all of these elements are necessary to find a de facto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name. The concept upon which this doctrine is based is that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased."

(Fitzgerald v Fahnestock & Co., Inc., 286 AD2d 573, 574-575 [1st Dept 2001] [internal quotation marks and citations omitted]; Matter of AT& S Transp., LLC v Odyssey Logistics & Technology Corp., 22 AD3d 750 [2d Dept 2005].)

The allegations of the complaint are factually insufficient to plead a claim of de facto merger. However, in opposing the motion, plaintiff submits an email from Soho, dated March 9, 2012, containing details about the transfer of Soho's business to Q4. "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976].) The email, which is addressed to "vendors," stated that Soho's "future business will be the responsibility of Q4," and that "[t]hey [Q4] have acquired our licenses and staff." The letter also stated that Q4 has not acquired Soho's debts, and that Soho was negotiating with its bank, which had taken possession of Soho's inventory, for its release. These latter assertions, if ultimately proven, would militate against a finding of successor liability. However, the admissions in the email about Soho's transfer of its business

and staff to Q4, coupled with the allegations pleaded in the complaint, are sufficient, at this early juncture, to avoid dismissal of the successor liability claims against Q4.

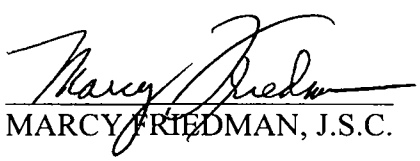
The breach of implied covenant claims against Q4 are based on the same allegations as the successor liability claims, and therefore should be dismissed as duplicative. The GBL § 349 claim will be dismissed for the reasons stated in connection with Shalom's motion.

It is accordingly hereby ORDERED that the motion of Elliot Shalom is granted to the extent of dismissing the seventh, eighth, ninth, tenth and fourteenth causes of action as against Elliot Shalom; and it is further

ORDERED that the motion of Q4 Designs, LLC is granted to the extent of dismissing the seventh, eighth, ninth, and tenth causes of action as against Q4 Designs, LLC.

This constitutes the decision and order of the court.

Dated: New York, New York
October 10, 2013



MARCY FRIEDMAN, J.S.C.