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| <b>Merchant Cash &amp; Capital, LLC. v Portland Wholesale Jewelry, LLC</b>   |
| 2017 NY Slip Op 31651(U)   |
| July 31, 2017  |
| Supreme Court, Nassau County   |
| Docket Number: 600683/17   |
| Judge: James P. McCormack  |
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**SUPREME COURT - STATE OF NEW YORK  
TRIAL/TAS TERM, PART 27 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**  
**Justice**

\_\_\_\_\_ X

**MERCHANT CASH AND CAPITAL, LLC.,**

**Plaintiff(s),**

**Index No. 600683/17**

**-against-**

**Motion Submitted: 6/8/17**  
**Motion Seq.: 001**

**PORTLAND WHOLESALE JEWELRY, LLC,  
and JOY GAMBLE,**

**Defendant(s).**

\_\_\_\_\_ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Affirmation in Opposition.....X  
Reply Affirmation.....X

Defendants, Portland Wholesale Jewelry, LLC (Portland) and Joy Gamble (Gamble) move this court for an order, pursuant to CPLR §501(1) to change venue and for an order dismissing the complaint pursuant to CPLR §3211(a)(7). Plaintiff, Merchant Cash and Capital, LLC (MCC) opposes the motion.

MCC commenced this breach of contract action against Defendants in Nassau County by service of a summons and complaint dated January 11, 2017. Defendants brought this motion in lieu of a complaint. Defendants made a demand to change venue dated April 14, 2017, alleging

that New York County would be the proper venue as MCC's principal place of business is located there. The within motion ensued.

### DEFENDANT'S MOTION TO CHANGE VENUE

It is undisputed that the parties entered into a contract, and that the contract contains a forum selection clause. Portland, an out-of-state corporation, and Gamble do not challenge that New York State is the proper forum to hear the matter. Instead, they argue that Nassau County is an improper venue.

CPLR §501 States: "Subject to the provisions of subdivision two of §510(2), written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." Herein, section 5.5(c) of the parties' contract states, in pertinent part, that "Seller and Guarantor(s) waive any claim that...the venue of the action is improper...". Ignoring that they agreed to provision 5.5(c), Defendants now argue that venue in Nassau County is improper. In so arguing, Defendants rely on a recently decided case by Judge Arthur M. Diamond of this court. That case involved the same Plaintiff as here, but different Defendants who were represented by Defendants' counsel herein. In that case, which appears to involve a similar contract to the one at issue herein, Judge Diamond found that since the contract did not specifically choose Nassau County as the venue, then CPLR §503 required venue to be in New York County where MCC is situated. Judge Diamond found: "Thus, while the waiver provision of this section addresses such claims that a court in the State of New York is inconvenient and that such dispute should be brought in a court located in another state, the parties have not by agreement done away with the requirements of CPLR 503 entirely.

(*Merchant Cash & Capital, LLC v. Laulainen*, 55 Misc. 3d 349, 351 [N.Y. Sup. Ct. 2017]).

What is missing from Judge Diamond's description, however, is a provision, like the one herein, where Defendant specifically waives venue. Absent a similar provision, Judge Diamond's matter is distinguishable from matter herein. In the current case, the parties clearly chose New York as the forum, and just as clearly waived any objections to venue.

In *Trump v. Deutsche Bank Trust Co. Ams*, 65 A.D.3d 1329 (2<sup>nd</sup> Dept. 2009), the contract that was the subject of that action contained a forum selection clause that included the borrower waived objections to venue. The court found the forum selection clause was enforceable absent proof it was unjust, unreasonable, violated public policy or was "gravely" inconvenient. *Id.* Herein, Defendants have not argued venue in Nassau County is unjust, unreasonable, violates public policy or is gravely inconvenient. The merely argue it violates CPLR §503. That being their sole objection, and the court finding Defendants contractually waived raising such an argument, the court will deny the motion to change venue

#### **DEFENDANT'S MOTION TO DISMISS PURSUANT TO CPLR §3211(a)(7)**

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]). Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in

proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference (see *511 W. 323rd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (see CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). “When evidentiary material is considered” on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; see *Sokol v. Leader*, 74 AD3d at 1182).

Herein, the complaint contains four causes of action, including two for breach of contract against Portland, one for breach of contract against Gamble and one for counsel fees against both Defendants based upon the breach of contract. A party seeking to recover for breach of contract must establish (1) formation of a contract between the parties, (2) performance by the plaintiff, (3) failure to perform by the defendant, and (4) resulting damages (see, e.g., *JP Morgan Chase v. J.H. Elec.*, 69 AD3d 802 [2<sup>nd</sup> Dept. 2010]; *Brualdi v. Iberia*, 79 AD3d 959 [2<sup>nd</sup> Dept. 2010]). The complaint establishes all the necessary elements. It alleges both parties entered into a sales agreement in April 2016, that MCC provided the necessary purchase price to Defendants as promised, but Defendants defaulted, resulting in a large unpaid balance. The complaint further alleges that Gamble guaranteed Portland’s commitments and when Portland failed to pay,

Gamble defaulted in paying on Portland's behalf.

Defendants first argue the contract is actually one for a usurious loan. Second, they argue they owe nothing because they made nothing. Third, Defendants argue that MCC cannot claim it was not paid because, by the terms of the contract, payment only occurs when MCC initiates an ACH-debit. The court finds none of these arguments persuasive. Defendants have provided no admissible proof that the contract is actually one for a usurious loan, nor is there proof they "made nothing." Finally, regardless of how payment is to be made, the court must accept every fact alleged in the complaint as true and give MCC the benefit of every inference. The complaint clearly alleges Defendant defaulted under the contract by failing to pay pursuant to its terms. As the court finds the breach of contract causes of actions are pled sufficiently enough to defeat the motion to dismiss, the cause of action for counsel fees based upon the breach shall also survive the motion to dismiss.

Accordingly, it is hereby

**ORDERED**, that Defendant's motion for a change of venue is DENIED in its entirety.

**ORDERED**, that Defendants' motion to dismiss the complaint is DENIED in its entirety.

The court has considered the remaining arguments raised by the parties and finds them to be without merit.

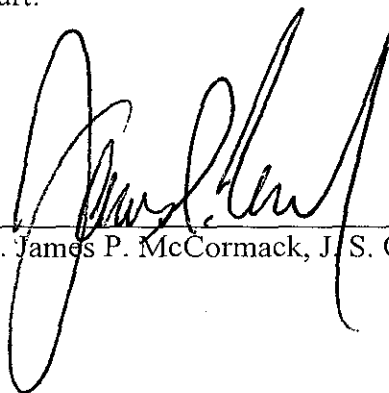
This constitutes the Decision and Order of the Court.

Dated: July 31, 2017  
Mineola, N.Y.

**ENTERED**

AUG 07 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE



Hon. James P. McCormack, J. S. C.