

<b>ABG HMX LLC v Alba Longa Concepts LLC</b>
2020 NY Slip Op 30105(U)
January 8, 2020
Supreme Court, New York County
Docket Number: 651619/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

-----X  
ABG HMX LLC INDEX NO. 651619/2018  
Plaintiff, MOTION DATE 10/18/2019  
- v - MOTION SEQ. NO. 001

ALBA LONGA CONCEPTS LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Under motion sequence 001, plaintiff ABG HMX LLC brings a summary judgment action alleging breach of contract against defendant Alba Longa Concepts LLC. Defendant has not opposed plaintiff's motion.

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra; Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a

light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “[a] shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, “[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

To succeed on a breach of contract cause of action, plaintiff must prove: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

On July 1, 2016, plaintiff and defendant entered into a licensing agreement for the use of “Hickey Freeman” trademarks (“Chen Aff. ¶3 [NYSCEF Doc. No. 16]; Agreement [NYSCEF Doc. No. 17]). In exchange for use of the trademarks, the agreement required defendant to compute and pay royalties and fees owed on a quarterly basis with a 1% monthly interest rate for past due payments (*Id.* ¶4–11). The agreement granted plaintiff the right to terminate the agreement in the case of defendant’s failure to make required payments (*Id.* ¶12). On June 30,

2017, defendant breached the agreement by failing to remit the required payment due of \$56,250.00 (*Id.* ¶14). Defendant failed to cure its breach after being sent a notice of breach by plaintiff on September 8, 2017 (*Id.* ¶15). On September 27, 2017, plaintiff delivered to defendant a Notice of Termination of the Agreement (NYSCEF Doc. No. 19) and, on November 14, 2017, plaintiff demanded that parties enter mediation before JAMS as required by their agreement, both of which defendant did not respond to (*Id.* ¶¶17–19; Demand Letter [NYSCEF Doc. No. 20]). By virtue of the uncured breach, plaintiff now seeks all sums due under the Agreement, totaling \$752,500 in all required payments (*Id.* ¶¶21–23; Agreement, Standard Terms ¶¶13(a), 16; Agreement, Commercial Terms ¶12). Because plaintiff's affidavit and attached exhibits successfully prove each element of breach of contract, plaintiff has sufficiently established prima facie entitled to summary judgment. Defendant has offered no opposition. The motion for summary judgment is, therefore, granted.

**ORDERED** that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$752,500.00, together with interest at the rate of 1% per month from the date of June 30, 2017 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

**ORDERED** that the portion of the plaintiff's action seeking the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendant Alba Longa Concepts LLC is referred to a Special Referee to hear and report; and it is further

**ORDERED** that counsel for the [plaintiff] shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

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<sup>1</sup> Copies are available in Room 119 M at 60 Centre Street and on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the "References" section of the "Courthouse Procedures" link.

1/8/2020

DATE



O. PETER SHERWOOD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE