

ABG-Jones LLC v Alba Longa Concepts LLC

2020 NY Slip Op 30109(U)

January 8, 2020

Supreme Court, New York County

Docket Number: 651964/2018

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

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

Justice

-----X

ABG-JONES LLC

Plaintiff,

- v -

ALBA LONGA CONCEPTS LLC

Defendant.

-----X

INDEX NO. 651964/2018

MOTION DATE 10/18/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

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

Under motion sequence 001, plaintiff ABG-Jones LLC brings a summary judgment action alleging breaches 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 and October 1, 2016 respectively, plaintiff and defendant entered into two licensing agreements for the use of “Jones New York” and “Jones New York Signature” trademarks (Chen Aff. ¶¶3–4 [NYSCEF Doc. No. 15]; Luggage Agreement [NYSCEF Doc. No. 16]; Swimwear Agreement [NYSCEF Doc. No. 17]). In exchange for use of the trademarks, the agreements 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.* ¶¶5–12, 27–35). The agreements

granted plaintiff the right to terminate the agreements in the case of defendant's failure to make required payments (*Id.* ¶13, 36).

On March 31, 2017, defendant breached the Luggage Agreement by failing to remit the required payment due of \$30,000.00 (*Id.* ¶15; Breach Notice [NYSCEF Doc. No. 18]). Defendant failed to cure its breach after being sent a notice of breach by plaintiff on April 20, 2017 (*Id.* ¶16–17; Breach Notice). On September 27, 2017, plaintiff delivered to defendant a Notice of Termination of the Luggage Agreement (NYSCEF Doc. No. 19) and, on November 14, 2017, plaintiff demanded that parties enter mediation before JAMS as required by the agreement, both of which defendant did not respond to (*Id.* ¶¶18–20; Demand Letter [NYSCEF Doc. No. 20]). By virtue of the uncured breach of the Luggage Agreement, plaintiff now seeks all sums due under the Agreement, totaling \$1,210,250 in all required payments (*Id.* ¶¶21–24; Luggage Agreement, Standard Terms ¶¶13(a), 16(e); Luggage Agreement, Commercial Terms ¶12).

On January 1, 2018, defendant breached the Swimwear Agreement by failing to remit the required payment due of \$42,000.00 (*Id.* ¶38; Breach Notice [NYSCEF Doc. No. 21]). Defendant failed to cure its breach after being sent a notice of breach by plaintiff on February 16, 2018 (*Id.* ¶¶39–40; Breach Notice). On March 6, 2018, plaintiff delivered to defendant a Notice of Termination of the Swimwear Agreement (NYSCEF Doc. No. 22) and, on April 4, 2018, plaintiff demanded that the parties enter mediation before JAMS as required by the agreement, both of which defendant did not respond to (*Id.* ¶¶41–43; Demand Letter [NYSCEF Doc. No. 23]). By virtue of the uncured breach of the Swimwear Agreement, plaintiff now seeks all sums due under the Agreement, totaling \$594,000 in all required payments (*Id.* ¶¶44–48; Swimwear Agreement, Standard Terms ¶¶13(a), 16(d), 16(e); Swimwear Agreement, Commercial Terms ¶12–13).

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 \$1,210,250.00, together with interest at the rate of 1% per month from the date of April 20, 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. It is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$594,000.00, together with interest at the rate of 1% per month from the date of January 1, 2018 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,¹ 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.

1/8/2020
DATE


O. PETER SHERWOOD, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

¹ Copies are available in Room 119 M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.