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| Jiangsu Y & S Inc. v Jachs NY, LLC |
| 2020 NY Slip Op 32223(U) |
| July 7, 2020 |
| Supreme Court, New York County |
| Docket Number: 450819/2015 |
| Judge: Tanya R. Kennedy |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. TANYA R. KENNEDY PART IAS MOTION 63EFM

Justice

-----X

JIANGSU Y & S INC.

Plaintiff,

- v -

JACHS NY, LLC,

Defendant.

-----X

INDEX NO. 450819/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

HON. TANYA R. KENNEDY, J.S.C.:

Motions designated Sequence Numbers 004 and 005 are consolidated for disposition.

In Motion Sequence Number 004, plaintiff, Jiangsu Y & S, Inc., moves, pursuant to CPLR 3212, for summary judgment on the Amended Complaint, and to dismiss the counterclaims of defendant, Jachs NY, LLC.

In Motion Sequence Number 005, defendant moves, pursuant to CPLR 3212, for summary judgment on its second counterclaim.

BACKGROUND

Plaintiff commenced this action under Article 2 of the Uniform Commercial Code (“UCC”) seeking to recover damages from defendant for, among other things, breach of contract based on unpaid invoices for goods sold and delivered. The following facts are gleaned from the parties’ submissions.

Plaintiff is a Chinese trading company, which is engaged in the business of importing, exporting, and trading men’s and women’s apparel (Statement of Material Facts, NYSCEF Doc. No. 191, ¶5).

Defendant, formerly known as Shirt By Shirt, USA, LLC, is a New York limited liability company that designs, imports, and sells clothing to consumers and retailers (Statement of Material Facts, NYSCEF Doc. No. 195, ¶1; Ming Affirmation, NYSCEF Doc. No. 113, ¶4).

Defendant does not manufacture the clothing it designs, but rather, provides the technical specifications, including measurements, silhouettes, colors, fabrics, prints, trims, accessories, and other details, to third-party suppliers who manufacture the clothing (Statement of Material Facts, NYSCEF Doc. No. 195, ¶2). Defendant then sells the clothing to its customers (*id.*).

Beginning in 2011, the parties entered a business relationship where plaintiff manufactured clothing for defendant (*id.*, ¶3). Defendant ordered seasonal clothing from plaintiff, and the parties negotiated the contract terms, such as price, shipment, quantities of clothing and payment terms through emails, which were incorporated into defendant's purchase orders (Statement of Material Facts, NYSCEF Doc. No. 191, ¶7).

All purchase orders were Free on Board ("FOB") Shanghai, in which plaintiff's obligations ended once presenting the goods at its loading dock in Shanghai (Ming Affirmation, NYSCEF Doc. No. 113, ¶8). Defendant, as buyer, was responsible for paying all costs associated with shipping the goods to the United States (*id.*). The parties do not dispute the content of the purchase orders.

Plaintiff issued invoices after plaintiff fulfilled the purchase orders (*id.*). The invoices set forth, among other things, the date of issue, the styles and number of goods, and the specific purchase order (Invoices, NYSCEF Doc. Nos. 123, 141).

Defendant's local agent in China, Bestall, also ordered goods ("Bestall goods") from plaintiff, totaling \$46,910.00 (Ming Affirmation, NYSCEF Doc. No. 113, ¶13). Plaintiff fulfilled the Bestall purchase order and requested that Bestall retrieve the goods from plaintiff's facilities

(*id.*). However, Bestall failed to retrieve the goods, and plaintiff incurred storage costs of \$13,500.00 for over five years (Statement of Material Facts, NYSCEF Doc. No. 191, ¶13; Ming Affirmation, NYSCEF Doc. No. 113, ¶13).¹ Defendant received the invoice for the Bestall goods and promised to pay, but failed to do so (Ming Affirmation, NYSCEF Doc. No. 113, ¶13; Invoice, NYSCEF Doc. No. 120).

In November 2013, defendant fell into payment arrears and plaintiff made numerous demands and requests for payment (Statement of Facts, NYSCEF Doc. No. 191, ¶10). Defendant set forth proposed payment plans in March and April of 2014, which plaintiff rejected (Proposed Payment Plans, NYSCEF Doc. Nos. 125-126). Although defendant repeatedly promised to pay the outstanding amounts due on the invoices, defendant did not make the payments (Statement of Facts, NYSCEF Doc. No. 191, ¶¶10-11).

The parties' relationship further deteriorated in 2014, when plaintiff refused to ship certain goods to defendant without full payment in advance, resulting in defendant's customer, Saks Fifth Avenue Off 5th ("Saks"), to cancel its order (Statement of Material Facts, NYSCEF Doc. No. 195 ¶¶4, 30-32). The parties ended their relationship on June 5, 2014 (Ming Affirmation, NYSCEF Doc. No. 113, ¶29).

The Amended Complaint alleges causes of action for the purchase price of goods memorialized by Invoice No. 14SUWXQIA0009GCWB, in the principal amount of \$35,885.70 (first cause of action), breach of contract based on Invoice No. 14SUWXQIA0009GCWB (second cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0010GCW, in the principal amount of \$128,565.00 (third cause of action), breach of contract based on Invoice No. 14SUWXQIA0010GCW (fourth cause of action), the purchase

¹ The Amended Complaint fails to set forth any allegations that plaintiff incurred storage costs of \$13,500.00 for over five years due to defendant's failure to retrieve unpaid goods from plaintiff's Shanghai port.

price of goods memorialized by Invoice No. 14SUWXQIA0012GCW/0028GCW, in the principal amount of \$14,579.50 (fifth cause of action), breach of contract based on Invoice No. 14SUWXQIA0012GCW/0028GCW (sixth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0013LCY, in the principal amount of \$23,286.00 (seventh cause of action), breach of contract based on Invoice No. 14SUWXQIA0013LCY (eighth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0026GCW, in the principal amount of \$11,895.00 (ninth cause of action), breach of contract based on Invoice No. 14SUWXQIA0026GCW (tenth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0041LCYA, in the principal amount of \$1,879.00 (eleventh cause of action), breach of contract based on Invoice No. 14SUWXQIA0041LCYA (twelfth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0041LCYB, in the principal amount of \$1,191.50 (thirteenth cause of action), breach of contract based on Invoice No. 14SUWXQIA0041LCYB (fourteenth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0041LCYC, in the principal amount of \$3,390.50 (fifteenth cause of action), breach of contract based on Invoice No. 14SUWXQIA0041LCYC (sixteenth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0042LCY, in the amount of \$3,760.00 (seventeenth cause of action), breach of contract based on Invoice No. 14SUWXQIA0042LCY (eighteenth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0030LCY, in the principal amount of \$9,067.25 (nineteenth cause of action), breach of contract based on Invoice No. 14SUWXQIA0030LCY (twentieth cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0043LCY, in the principal amount of \$2,049.00 (twenty-first cause of action), breach of contract based on Invoice No.

14SUWXQIA0043LCY (twenty-second cause of action), the purchase price of goods memorialized by Invoice No. 14SUWXQIA0106LCY, in the principal amount of \$8,056.00 (twenty-third cause of action), breach of contract based on Invoice No. 14SUWXQIA0106LCY (twenty-fourth cause of action), the purchase price of goods memorialized by the Bestall Invoice, in the principal amount of \$46,191.00 (twenty-fifth cause of action), breach of contract based on the Bestall Invoice (twenty-sixth cause of action), the purchase price of the transaction memorialized by a March 2014 email bearing the subject line "PAYMENT OF FALL 14 SMS." in the principal amount of \$34,601.52 (twenty-seventh cause of action), unjust enrichment based on defendant's retention of the goods contemplated by the agreement memorialized in a March 2014 email bearing the subject line "PAYMENT OF FALL 14 SMS" (twenty-eighth cause of action), the price of goods memorialized by Invoice No. 14SUWXQIA0139LCY, in the principal amount of \$45,843.65 (twenty-ninth cause of action), breach of contract based on Invoice No. 14SUWXQIA0139LCY (thirtieth cause of action), and an alternative claim for unjust enrichment based on the above invoices and transactions (thirty-first cause of action) (Amended Complaint, NYSCEF Doc. No. 148).

Defendant answered, generally denying the allegations in the Amended Complaint, asserting multiple affirmative defenses, and alleging counterclaims for breach of contract and breach of a Confidentiality and Non-Disclosure Agreement ("Confidentiality Agreement") (Answer, NYSCEF Doc. No. 148).

Defendant maintains that sometime in the beginning of 2014, it placed an order with plaintiff to manufacture and ship three different styles of clothing defendant would sell to its customer, Saks ("Saks goods") (Statement of Material Facts, NYSCEF Doc. No. 195, ¶28). Defendant also maintains that shortly before it was scheduled to deliver the Saks goods to Saks,

plaintiff refused to ship the Saks goods without defendant's full payment in advance (*id.*, ¶30). Plaintiff did not timely ship the goods and Saks cancelled the order it placed with defendant, resulting in lost profits to defendant (*id.*, ¶¶31-32).

Defendant maintains that in August 2013, its predecessor, Shirt By Shirt, USA, LLC, and plaintiff entered a Confidentiality Agreement governing the confidentiality, non-disclosure, and limited use of defendant's proprietary and sensitive information, as well as the non-solicitation of defendant's employees and clients (*id.*, ¶¶ 7-8).

Section 8 of the Confidentiality Agreement provides, in pertinent part, that:

“[Plaintiff] acknowledges and agrees that money damages will be difficult to ascertain in the event of breach or violation by [plaintiff] of its obligations under this Agreement and that as [a] deterrent to any such violations, and not as a penalty, [plaintiff] agrees to pay [defendant] as liquidated damages for any material breach or violation of this Agreement that sum which shall equal the greater of (i) \$500,000, and that (ii) that amount equal to one times the sum of payments made by [defendant] to [plaintiff] and its Affiliates during the twelve month period preceding the date of breach or violation giving rise to such claim” (*id.*, ¶25).

The motion papers include three different versions of the Confidentiality Agreement which does not name plaintiff (NYSCEF Doc. Nos. 185-187). Only one version of the Confidentiality Agreement is dated August 1, 2013 and purportedly signed by “Daniel,” plaintiff's former employee (NYSCEF Doc. No. 186). The other two versions appear identical and are undated. However, plaintiff's general manager maintains that she never saw or approved the Confidentiality Agreement, and did not authorize anyone, including Daniel to sign it (Ming Affirmation, NYSCEF Doc. No. 113, ¶31).

Defendant further maintains that plaintiff breached the Confidentially Agreement in June 2014 by informing Saks that defendant was experiencing financial difficulties, and attempting to directly sell the Saks goods to Saks (Statement of Facts, NYSCEF Doc. No. 195, ¶¶33-48). As

such, defendant maintains that it is entitled to liquidated damages of \$818,119.35, the total sum of payments that defendant paid plaintiff during the 12 months prior to the breach.

Plaintiff now seeks summary judgment on the Amended Complaint and to dismiss defendant's counterclaims.² Defendant seeks summary judgment on its second counterclaim for breach of the Confidentiality Agreement.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]).

However, once the showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York, supra* at 562). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment (*id.*).

The Amended Complaint alleges, among other things, multiple claims for breach of contract based on unpaid invoices for goods sold and delivered.

The essential elements of a cause of action for damages for breach of contract are the existence of a contract, plaintiff's performance under the contract, defendant's breach of its

² Although the Amended Complaint seeks damages in the sum of \$370,240.62, plaintiff now seeks the sum of \$336,168.82. Plaintiff also maintains that it is entitled to a minimum of \$212,271.45, with respect to 10 invoices, which defendant does not dispute. Further, plaintiff acknowledges that the balance due on Invoice No. 14SUWXQ1A0139LCY for the Saks goods is now \$28,494.25 after defendant's partial payment of \$17,349.40.

contractual obligations, and damages resulting from the breach (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

The parties are “merchants,” as the term is defined in UCC 2-104(1) since they are engaged in the sale of clothing. Further, the transactions at issue are for the sale of “goods,” as defined in UCC 2-105(1). As such, UCC Article 2 governs plaintiff’s claims.

UCC 2-201(1), the Statute of Frauds, provides, in part, that “a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the parties against whom enforcement is sought or by his authorized agent or broker.”

UCC 2-201(2), the “merchant’s exception” to the Statute of Frauds, states:

“Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.”

“A written [purchase] order following an oral agreement is the usual and recognized contract between the parties and has become part of our statutory law” (*Loudon Mfg. v American & Efird Mills*, 46 AD2d 637, 638 [1st Dept 1974], citing Uniform Commercial Code §2-201[2]).

Thus, writings confirming the transactions between a buyer and seller which sets forth the sufficient terms satisfy the requirements of UCC 2-201(1) unless the buyer provides written notice of objection to its contents within 10 days after receiving same (*see Multex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169 [1st Dept 2004]). “Writings are confirmatory documents within UCC 2-201(2) when “they afford a basis for believing that they reflect a real transaction between the parties” (*Bazak Intl. Corp. v Mast Indus.*, 73 NY2d 113, 123 [1989]).

Upon its review of the submissions, the Court concludes that the emails and invoices are based upon real transactions which reflect the parties' previous agreements, and, thus, sufficient to satisfy the Statute of Frauds. The invoices herein set forth the names and addresses of the buyer and seller, the date, payment terms, price of the goods, a description of the goods, the amount of goods, and the total price of the sale (*see B & R Textile Corp. v Domino Textiles, Inc.*, 77 AD2d 539, 539-540 [1st Dept 1980]).

Further, the invoices indicate "FOB Shanghai," and are silent as to actual place of delivery. As such, "the store or factory of the seller, or the place where the goods are kept is the place of delivery," which, herein, is plaintiff's port in Shanghai (*see Miller & Sons Co. v Sergeant Co.*, 191 AD 814, 818 [1st Dept 1920]).

In seeking summary judgment, plaintiff argues that it satisfied the terms of the parties' contracts by manufacturing and shipping goods based on defendant's purchase orders, and that defendant accepted the goods and invoices, without objection. Plaintiff further argues that defendant breached the contracts by failing to tender payment for the goods that it received.

Defendant does not deny placing the orders, receiving the goods and invoices, or failing to make payment. In fact, defendant acknowledged the debt in multiple emails and the proposed payment plans. "[F]ailure to tender payment is generally deemed a material breach of a contract" (*ARP Films, Inc. v Marvel Enter. Group, Inc.*, 952 F2d 643, 649 [2d Cir 1991]). As such, plaintiff is entitled to summary judgment on the breach of contract claims for unpaid invoices since defendant failed to raise any triable issue of fact.

However, the Court grants that branch of plaintiff's motion for summary judgment on the breach of contract claims only as to liability since factual issues exists regarding defendant's counterclaim for liquidated damages.

The branch of plaintiff's motion for summary judgment on the causes of action for the price of the goods is denied, and the claims are dismissed as duplicative of the breach of contract claims.

Similarly, the branch of plaintiff's motion for summary judgment on the causes of action for unjust enrichment is denied, and the claims are dismissed. "The existence of a valid and enforceable written contract governing the particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]).

The competing requests for summary judgment regarding plaintiff's alleged breach of the Confidentiality Agreement are denied, as the Court cannot conclusively determine as a matter of law that a valid and enforceable agreement existed between the parties. At the very least, the submissions present questions of fact as to whether plaintiff is a party to the agreement, and whether the person who reportedly signed the agreement on plaintiff's behalf was authorized to do so.

Accordingly, it is

ORDERED that Motion Sequence Number 004 is granted to the extent that plaintiff is awarded judgment on the issue of liability on the second, fourth, sixth, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth, twentieth, twenty-second, twenty-fourth, twenty-sixth, and thirtieth causes of action for breach of contract, and the motion is otherwise denied; and it is further

ORDERED that the first, third, fifth, seventh, ninth, eleventh, thirteenth, fifteenth, seventeenth, nineteenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth and thirty-first causes of action are severed and dismissed; and it is further

ORDERED that Motion Sequence Number 005 is denied; and it is further

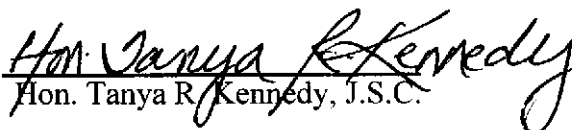
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this matter is referred to Part 40 for trial.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 7, 2020

ENTER:


Hon. Tanya R. Kennedy, J.S.C.

HON. TANYA R. KENNEDY