

**Hossam Hassan Elanwar Saber Hassn v Armouth
Intl. Inc.**

2021 NY Slip Op 31635(U)

May 14, 2021

Supreme Court, New York County

Docket Number: 650005/2020

Judge: Gerald Lebovits

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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. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 650005/2020

HOSSAM HASSAN ELANWAR SABER HASSN,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION + ORDER ON MOTION

ARMOUTH INTERNATIONAL INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to STRIKE PLEADINGS

Todd A. Gabor, Esq., Cedarhurst, NY, for plaintiff.

Jason R. Mischel, Esq., New York, NY, for defendant.

Gerald Lebovits, J.:

This is a contract action arising from the supply of articles of clothing by plaintiff to defendant for sale by third-party retailers. Plaintiff sued for defendant's alleged failure to pay for clothing purchased from plaintiff. Defendant counterclaimed, alleging that it incurred substantial losses because its retailer customers rejected the clothing made by plaintiff as defectively made. Plaintiff now moves to strike defendant's counterclaims for failure to provide requested discovery, or in the alternative to preclude or compel. Defendant cross-moves for sanctions. Plaintiff's motion is granted to the extent of compelling defendant to supplement further its discovery responses within 30 days; defendant's cross-motion is denied.

DISCUSSION

This motion is not the first time the parties have disagreed over defendant's responses to plaintiff's discovery requests related to the counterclaims. This court previously held an extended telephonic discovery conference with the parties in an effort to understand and resolve the parties' disagreement. Following that conference, the court directed plaintiff to submit a limited set of supplemental interrogatories and document requests. (See NYSCEF No. 27.) Plaintiff did so. (See NYSCEF No. 35.) Plaintiff now contends that defendant's supplemental responses are, in the main, inadequate. This court agrees.

Defendant's counterclaims allege that an important customer of defendant, retailer Zulily, informed defendant that it would be returning the plaintiff-sourced clothing to defendant as

defective, and charging defendant for the related shipping and labor costs. (*See* NYSCEF No. 20 at ¶¶ 38). As a result, defendant allegedly “lost significant revenue . . . [and] incurred significant costs as a result of returns, deductions, warehousing fees, trucking, margin guarantees and chargebacks.” (*Id.* at ¶¶ 41, 47).

1. Plaintiff seeks, among other things, (i) information about which categories of clothing that Zulily (and defendant’s other customers) returned, and in what quantities (*see e.g.* Supplemental Request No. 7 [c]-[d], NYSCEF No. 36 at 6); (ii) paperwork relating to the process of returning the goods (*see e.g.* Supplemental Request Nos. 7 [a]-[b], 21, *id.* at 6, 8); and (iii) evidence of the costs that were charged to plaintiff in connection with these returns (*see e.g.* Supplemental Request Nos. 19 [a], 20, 27, *id.* at 7, 8, 10).

Defendant’s responses to these supplemental requests have been both sparse and self-contradictory. Defendant initially responded to several requests by stating that “Zulily did not return any Subject Goods” to defendant—yet also that “[a]ny returns of the Subject Goods were made upon information and belief solely by Zulily.” (Supplemental Response Nos. 7, 19, 21, and 22, *id.* at 7-9.) And defendant has since made a further supplemental production of shipping invoices, appear to represent asserted return-related costs incurred by defendant. (*See* NYSCEF No. 66 at 6-32.) Defendant has not, however, indicated whether it is withdrawing or modifying its prior representation that neither Zulily nor defendant’s other retail customers returned to it clothing supplied by plaintiff.¹

If defendant *is* modifying its prior representation about returns, the most recent production does not indicate which retailer(s) returned the articles of clothing at issue, nor the categories and quantities of clothing being returned. The invoices do not themselves include information that might fill in these details. Indeed, there is nothing on the face of the invoices that might connect them to this action. And if defendant is *not* modifying that representation, it is unclear how these invoices relate to harms assertedly suffered by defendant due to plaintiff’s actions.

Defendant’s supplemental production thus, if anything, confuses, rather than clarifies, the evidence on this aspect of defendant’s counterclaims.

2. Plaintiff also seeks all documents relating to defendant’s counterclaim allegation that it lost significant revenue due to plaintiff’s (assertedly) defective clothing. (*See* Supplemental Request No. 26, NYSCEF No. 36 at 9.) Defendant’s only supplemental production in response is two pages of what appear to be an account statement reflecting the payment of sales commissions in 2018 and 2019; and 2019 W-2 tax forms for two of defendant’s employees. (*See* NYSCEF No. 66 at 2-5.) But these documents do not themselves show a loss of revenue by defendant; much less a loss of revenue due to any actions by plaintiff. Defendant’s *counsel* has since stated in an email to this court that the documents do relate to defendant’s loss of revenue

¹ Defendant’s counsel also has indicated by email to plaintiff’s counsel and the court that defendant is not in possession of any documents evidencing *payment* of charges incident to the return of goods from Zulily to defendant (as requested in plaintiff’s Supplemental Request No. 20).

because they reflect commissions paid (and income earned) on sales to Zulily. According to counsel, “[w]hen my client lost Zulily as a business partner as a result of the worthless, damaged goods provided by Plaintiff to my client, all of this revenue was lost to my client.” Counsel does not, however, provide any documentary support for any of these representations—though obtaining the supporting documents was the entire point of plaintiff’s supplemental request to begin with.

In short, defendant’s supplemental productions do not come close to remedying the deficiencies that plaintiff (and, for that matter, this court) identified in defendant’s prior discovery responses. This court declines at this time, though, to impose the severe sanction of striking defendant’s counterclaim altogether. Instead, this court grants plaintiff’s request to compel further supplementation of discovery, to the following extent.

Defendant must within 30 days provide the following categories of information.

(A) Whether any of defendant’s customers returned as defective clothing that plaintiff had supplied to defendant;

(B) If so, which customer(s) made returns, which styles were returned, in what quantities the styles were returned, and when they were returned;

(C) If not, whether defendant nonetheless incurred costs in the form of refunds, chargebacks, or similar due to their customers’ rejecting as defective clothing that plaintiff had supplied to defendant; and which costs related to which retailers and which styles of clothing.

Defendant also must within 30 days produce the following categories of documents, to the extent they are in defendant’s possession and have not already been provided. If no documents in a given category are within defendant’s possession, defendant shall supply a *Jackson* affidavit of diligent search. (*See Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]).

(A) All documents evidencing refunds, chargebacks, or other similar costs that defendant incurred due to defendant’s retail customers (including Zulily) rejecting as defective items of clothing that plaintiff had supplied to defendant;

(B) Documents sufficient to identify the style numbers and quantities of clothing supplied by plaintiff to defendant that defendant’s customers later rejected as defective, and for which defendant incurred costs due to the clothing’s rejection;

(C) All documents evidencing or relating to the return of clothing to defendant that had been originally supplied by plaintiff and that defendant’s customers rejected as defective—including documents and communications relating to planned or potential returns that did not ultimately occur;

(D) Documents sufficient to identify the costs (if any) incurred by defendant relating to the return of clothing rejected as defective by defendant’s customers, including which costs related to which returns from which customers; and

(E) All documents evidencing the loss of revenue due to plaintiff’s actions referenced in ¶ 41 of defendant’s answer.

If defendant does not timely provide the information and documents set forth above, absent good cause shown this court will strike defendant’s counterclaim on the request of plaintiff. That request may be made by letter (both e-filed and emailed to SFC-Part7-Clerk@nycourts.gov).

Defendant also cross-moves for sanctions, on the ground that plaintiff’s motion to strike is based on false statements and is primarily undertaken to harass defendant. For the reasons set forth above, this court disagrees.²

Accordingly, it is hereby

ORDERED that plaintiff’s motion to strike or compel is granted in part to the extent set forth above, and otherwise denied; and it is further

ORDERED that defendant’s cross-motion for sanctions is denied.

5/14/2021
DATE


HON. GERALD LEBOVITZ
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE

² Indeed, it is *defendant*, not plaintiff, who has been forced to correct a flatly inaccurate representation made in its supplemental discovery response. (See Supplemental Response No. 10, NYSCEF No. 36 at 7 [initial response]; NYSCEF No. 56 at 9 n 1 [counsel’s affirmation describing correction]; NYSCEF No. 61 [affidavit of defendant’s principal providing correction].)