

Creative Pet Group v Wan Hai Lines (USA) Ltd.

2022 NY Slip Op 32803(U)

August 19, 2022

Supreme Court, New York County

Docket Number: Index No. 155802/2021

Judge: William Perry

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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. WILLIAM PERRY PART 23

Justice

-----X

CREATIVE PET GROUP, LLC, HOME LUX AND CO. LLC,

Plaintiff,

- v -

WAN HAI LINES (USA) LTD,

Defendant.

-----X

WAN HAI LINES (USA) LTD

Plaintiff,

-against-

ISAAC KHASKI

Defendant.

-----X

INDEX NO. 155802/2021

MOTION DATE 02/08/2022

MOTION SEQ. NO. 001 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595877/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 49, 51

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78

were read on this motion to/for DISMISS.

Plaintiffs Creative Pet Group LLC (“Creative”) and Home Lux & Company LLC (“Home Lux”) bring this action against Defendant Wan Hai Lines (USA) Limited, a shipping company, for trespass to chattels associated with the shipment of six containers from Yantian, China to Long Beach, California.

Defendant sets forth 17 affirmative defenses and counterclaims for breach of contract, intentional interference with a contractual relationship, and a carrier’s lien. (NYSCEF Doc No. 14, Amended Answer.) Defendant has also impleaded Isaac Khaski, a former employee of Home

Lux, setting forth causes of action for interpleader under Uniform Commercial Code (“UCC”) 7-603 [“Conflicting Claims”], indemnification and contribution, fraud, and attorneys’ fees. (NYSCEF Doc No. 60, Amended Third-Party Complaint.)

In motion sequence 001, Plaintiffs move to dismiss Defendant’s affirmative defenses and counterclaims. (NYSCEF Doc No. 33, Ms001 Memo.) Defendant cross-moves for summary judgment (NYSCEF Doc No. 43) but fails to submit a memorandum of law in support.

In motion sequence 003, Khaski moves to dismiss the third-party complaint pursuant to CPLR 3211[a][1] and [a][7]. The motion is fully submitted and consolidated with motion sequence 001 for disposition.

Background

Plaintiffs allege that they are LLCs owned by Joseph Cohen and Mayer Cohen, both headquartered at 43 West 33rd Street, Room 603, New York, NY 10001. (NYSCEF Doc No. 1, Complaint, at ¶¶ 2, 3, 12.) Defendant is a branch of a Taiwanese shipping company with its branch offices located in Arizona. Plaintiffs contracted with Defendant, via a third-party broker, to ship six containers of merchandise from China to California. Plaintiffs allege that they paid Defendant for the shipment, through Creative, on March 24, 2021. (*Id.* at ¶ 14; NYSCEF Doc No. 4, Payments.)

However, after the containers arrived at US Customs and Border Protection on April 6, 2021 (NYSCEF Doc No. 5), Plaintiffs allege that, on April 14, 2021, Third-Party Defendant Khaski, a “disgruntled ... former independent contractor of Home [Lux],” emailed Defendant stating that he was the owner of Home Lux and instructed Defendant to hold the containers at the port because “people are trying to steal [his] containers away from [him] and they are not allowed to without [his] permission.” (Complaint at ¶¶ 15-17, 20; NYSCEF Doc No. 6, Email.) Plaintiffs

allege that a US Customs Broker wrongfully canceled the order as a result, due to “conflicting instructions,” despite the fact that it was Creative, not Home Lux, which was designated as the consignee. (Complaint at ¶¶ 16, 18, 19.)

Plaintiffs responded to US Customs that Khaski was merely a disgruntled employee of Home Lux, not an owner, and attempted to prove that Joseph Cohen was the real owner by submitting tax returns, proof of payments, and factory endorsements. (*Id.* at ¶ 23.) Plaintiffs, however, failed to receive a response, and commenced this action on June 16, 2021.

Defendant’s Answer

Defendant submits the “Bill of Lading” contract which lists Home Lux as the consignee, rather than Creative, and as the “notify party”. (NYSCEF Doc No. 15, Bill of Lading.) Defendant also argues that pursuant to the contract, Defendant has no liability for any losses arising from delays occurring after the containers reached their destination, that it had the right to suspend delivery when circumstances arose which would affect its performance, and that Home Lux agreed to be responsible for all expenses and attorneys’ fees incurred by Wan Hai as a result. (NYSCEF Doc No 14, Amended Answer, at ¶¶ 67-73.)

Defendant depicts Khaski, through Home Lux, and the Cohens, through Home Lux and Creative, as “warring factions” who have been actively disputing the ownership of the entities, without resolution, causing Defendant to continue to hold the containers as a result, incurring charges in excess of \$185,000.00. (*Id.* at ¶¶ 86-91.) Defendant sets forth counterclaims for breach of the Bill of Lading against Home Lux (*id.* at ¶¶ 92-96), intentional interference with a contractual relationship against Creative (*id.* at ¶¶ 97-102), and for a lien against both Plaintiffs. (*Id.* at ¶¶ 102-108.)

Motion sequence 001

“When moving to dismiss an affirmative defense [pursuant to CPLR 3211(b)], the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law.” (*Gonzalez v Wingate at Beacon*, 137 AD3d 747, 747 [2d Dept 2016], citing *Bank of NY v Penalver*, 125 AD3d 796, 797 [2d Dept 2015].) “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference.” (*Bank of NY*, 125 AD3d at 797.) “If there is any doubt as to the availability of a defense, it should not be dismissed.” (*Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255 [2d Dept 2012].)

Here, Plaintiffs’ bullet point arguments for the dismissal of each of Defendant’s 17 affirmative defenses (NYSCEF Doc No. 33, Ms001 Memo, at ¶¶ 1-17) fail to meet its burden for relief as a matter of law. (*See Douglas Worghs Realty, Corp. v Illgen*, 2016 WL 7468917, at *1 [Sup Ct, NY County 2016] [“other than arguing that defendant did not state its factual basis for the affirmative defenses, plaintiff did not meet its burden”].) However, the court grants the portion of the motion seeking dismissal of the ninth affirmative defense, as it is entirely duplicative of the eighth affirmative defense. (*See Amended Answer* at ¶¶ 43 and 44.)

The remainder of the motion seeking dismissal of the counterclaims is likewise denied, as Plaintiffs’ conclusory arguments fail to demonstrate entitlement to relief. (*See Ms001 Memo* at 11-12.)

The cross-motion is also denied, as Defendant fails to submit a memorandum of law detailing the grounds for its entitlement to summary judgment.

Motion sequence 003

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121, [1st Dept 2002].) However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Pursuant to CPLR 3211[a][1], in order to prevail on a motion to dismiss based on documentary evidence, “the documents relied upon must definitively dispose of plaintiff’s claim.” (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].) Dismissal pursuant to CPLR 3211[a][1] is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and “conclusively establishes a defense to the asserted claims as a matter of law.” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Khaski argues that he is entitled to dismissal of the third-party complaint because all of the allegations contained therein refer to him in his corporate capacity, working for Home Lux, rather than his individual capacity, and that he “explicitly directed” Defendant to release the containers to Plaintiffs. (NYSCEF Doc No. 67, Ms003 Memo, at ¶¶ 25-39; NYSCEF Doc No. 73, Correspondence from Khaski to Defendant.)


After accepting all facts as true in the third-party complaint and affording Defendant the benefit of every possible inference, the court finds that Khaski fails to meet his burden for relief.

The allegedly exculpatory correspondence, dated August 9, 2021, states that “the containers should have been delivered to Home Lux as consignee, and specifically to Isaac Khaski... [and that] Khaski will not object to the release of Home Lux’s goods[.]” The letter, however, does not indicate that Khaski ever “renounced his rights to the Containers on behalf of Home Lux.” (Ms003 Memo at ¶ 50.) Khaski also fails to demonstrate that the third-party complaint only sets forth claims against him in his corporate capacity, as Defendant, as well as Plaintiffs, allege that when Khaski sent the April 14, 2021 email to US Customers to hold the containers (NYSCEF Doc No. 6), he was no longer employed by Home Lux, and thus was operating in his individual capacity. (NYSCEF Doc No. 60, Amended Third-Party Complaint, at ¶¶ 17-23.) Khaski’s submissions also demonstrate the existence of another outstanding issue of fact, i.e., the ownership of Plaintiffs Home Lux and Creative, as Khaski alleges that the tax returns annexed to the complaint were fraudulently forged by Plaintiffs to omit Khaski’s status as an owner thereof. (Ms003 Memo at 5; NYSCEF Doc No. 2, Tax Returns.) As such, it is hereby

ORDERED that Plaintiffs’ motion sequence 001 to dismiss Defendant’s affirmative defenses and counterclaims is granted only to the extent that Defendant’s ninth affirmative defense is dismissed as duplicative; and it is further

ORDERED that Khaski’s motion sequence 003 to dismiss the amended third-party complaint is denied in its entirety; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court’s review and signature, within thirty (30) days.

<u>8/19/2022</u>						
DATE			WILLIAM PERRY, 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"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER		
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE