SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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LIGHTSTONE RE LLC,

Plaintiff, Decision and order

- against - Index No. 516443/21

ZINNTEX LLC, BARRY ZINN & RICKY ZINN,

Defendants, August 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement arguing there are no questions of fact the installment agreement entered into between the parties governs the obligations of the parties. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on April 13, 2020 the parties entered into an agreement whereby the plaintiff agreed to purchase personal protective equipment from the defendants. The next day they entered into another agreement whereby, again, the plaintiff would purchase personal protective equipment from the defendants. The plaintiff wired $2,085,000 pursuant to the agreements, however, the complaint alleges the defendants failed to deliver the equipment as outlined in the agreements. Thus, on May 6, 2020 the plaintiff notified the defendants they were cancelling the contract and sought a refund. On June 25, 2020 the parties entered into an agreement whereby defendants agreed

to return $1,475,000 of the funds to the plaintiff. That amount comprised the total amount owed to the plaintiff. The agreement was in the form of text messages sent between the parties. Pursuant to the agreement the defendant was required to make four installments of $368,750 to satisfy the return of the total amount owed. The payments were all due by September 25, 2020. The plaintiff received $475,000 pursuant to that agreement, thus the plaintiff asserts they are still owed one million dollars.

The plaintiff now moves seeking summary judgement arguing the text messages between the parties created a duly binding executory accord pursuant to General Obligations Law §15-501(3) for which the defendant has no defense. Alternatively, other documents between the parties establish the defendant has no defense. Thus, the plaintiff seeks summary judgement concerning the one million dollars still outstanding. The defendant opposes the motion arguing there are questions of fact whether the text messages entered between the parties ever created a binding accord.

Conclusions of Law

A court can grant summary judgment where the movant establishes sufficient evidence, which would compel the court to grant judgment in his or her favor as a matter of law. However, where material facts in a case are in dispute, summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557,

427 NYS2d 595 [1980]).

Generally, it is for the jury, the trier of fact, to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where the court can only draw one conclusion from the facts, the trial court may decide the legal issue as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgment, the movant must make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgment by pointing to gaps in the opponent's case, because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that an executory accord is an agreement to resolve an existing dispute between parties (Ognenovski v. Wegman, 275 AD2d 1013, 713 NYS2d 594 [4th Dept., 2000]). An executory accord must be in writing and signed by the party to be bound (Frank Felix Associates Ltd., v. Austin Drugs Inc., 111 F3d 284 [2d Cir. 1997]). Further, pursuant to Technology Law §304(2)

"an electronic signature shall have the same validity and effect as the use of a signature affixed by hand" and includes "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record" (Technology Law §302(3)). While some commentaries have expressed First, there are questions whether text messages and emojis in particular satisfy the statute of frauds (see, generally, *When a Picture is Not Worth a Thousand Words: Why Emojis Should Not satisfy the Statute of Frauds*, by Moshe Berliner, Cardozo Law Review 2020]). This is particularly true concerning a thumbs up emoji which may convey different meanings (id., at Footnote 19, see, also, *Emojis and the Law*, by Eric Goldman, Washington Law Review 2018). In any event, even if such an electronic signature in the form of an emoji can create a valid contract, there still must be a meeting of the minds and an intent to be so bound (Naldi V. Grunberg, 80 AD3d 1, 908 NYS2d 639 [1st Dept., 2010]).

Thus, an examination of the text messages sent between the parties is therefore necessary. The parties texts back and forth concern deals for protective equipment, changes in prices and the fact the goods to plaintiff were never delivered. On June 22, 2020 the defendant acknowledged he owed the plaintiff money and offered to pay some of the funds by the beginning of July. The next day the plaintiff sent a text which stated "how do you

expect me to be protected" (see, Text sent June 24, 2020 included within Exhibit H to Plaintiff's Motion [NYSCEF #43]). The defendant responded that he would not sign a "PG" for anyone, presumably referring to a personal guarantee (id). The following day the plaintiff offered to purchase goods for a certain price and that deal was rejected by the defendant. The plaintiff then texted that he was still owed significant sums. The defendant responded with numerous texts including that "have the attorneys work it out and we can be done" and "I can keep paying you with no written agreement" (id). The plaintiff asked for a personal guarantee and again the defendant refused. The plaintiff sought closure and asked the defendant to propose a resolution. The plaintiff further wrote "you won't sign an agreement is what your saying. So how I can make a deal this way?" (id). The defendant responded "have your lawyer call mine and work it out. I do not want to go back and forth" (id). More texts were sent to each other and then the plaintiff texted "are you honoring what you said without a pg?" to which the defendant responded "I will continue to pay you as is but you give me the time to do it as you said you would" (id). The plaintiff then texted "so are you agreeing to pay me over the next 3 months 1,475,000 but for exception of signing a PG?" and at 5:24:12 PM the defendant responded "I am not going to sign anything but I will have you paid out within 3 months" (id). The parties continued to

negotiate the terms of the payment amount and schedule and finally the plaintiff sent a text summarizing the payments expected which included four payments of $368,750 on July 15, August 15, September 15 and September 25, 2020. At 5:33:38 the same day, the defendant responded with a 'thumbs up' emoji.

The plaintiff argues the thumbs up emoji constituted a signature of an executory accord. While the legal use of such an emoji is questionable as noted above, there are surely questions of fact whether the defendant intended to be bound by that emoji where only nine minutes beforehand the defendant categorically asserted he would not sign any document. There are surely questions of fact whether he ever intended to be bound by a written text message in the form of a thumbs up emoji. Therefore, this case cannot be summarily decided on this basis.

Likewise, the fact the defendant partially performed and made payments to the plaintiff does not demand a summary determination the remaining money is owed. The plaintiff asserts the defendant paid $75,000.00 on July 29, 2020, $200,000.00 on August 19, 2020, $100,000.00 on August 28, 2020, and $100,000.00 on September 11, 2020. However, in order to establish part performance, the performance must unequivocally refer to the agreement and mere part performance is insufficient (Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 NY2d 229, 689 NYS2d 674 [1999]). The plaintiff's payments were

not timely, were for different amounts required by the agreement and the amounts paid were different from each other. Thus, there are questions of fact whether those payments unequivocally refer to the agreement. Consequently, the motion seeking summary judgement on this basis is denied.

However, there is no dispute the defendant owes the money sought. The technical reason for denial of the motion, essentially because of the statute of frauds, does not alter the reality that money is admittedly owed. Thus, the first agreement states delivery of most of the goods would be by April 22, 2020 with the remainder by April 29, 2020 and the second agreement provides no delivery date. However, an email sent by the plaintiff on April 13, 2020 states that "if Seller fails to deliver goods to the buyer based on the times agreed on, Seller should immediately return the funds. Timing can be adjusted as agreed between the parties" (see, E-mail sent by Barry Farkas, April 13, 2020 at 3:38 PM, included within Exhibit D to Plaintiff's Motion, [NYSCEF #39]). The defendant responded "confirming all" (id). There really can be no dispute that such confirmation was an independent acquiescence agreeing to be bound by all the terms of the email. Thus, according to the Uniform Commercial Code "between merchants, if within a reasonable time a writing in confirmation of the contract ...is received and the party receiving it has reason to know its contents, it satisfies

the requirements ...unless written notice of objection to its contents is given within ten days after it is received" (UCCC §2-201(2)). "Electronic communications between merchants—provided that they are sufficiently precise—can also serve as writings confirming an agreement" (Antifun Limited T/A Premium Vape v. Wayne Industries LLC, 2022 WL 2905368 [S.D.N.Y. 2022]). In this case, the email sent contained the following specific information "1. 5,000,000 3 ply mask (as agreed in previous emails with proper documentation) price of .49 per mask for a total price of $2,450,000.00, 2. 200,000 KN95 at 2.50 per mask for a total price of $500,000, 3. Delivery of at 2-3M between April 20-22nd. Balance to follow asap, no later then 27th., 4. Delivery of KN95 between April 20-22nd, 5. Deposit wires now of 1,450,000.00, 6. Balance Due upon receipt of goods., 7. Local Delivery to be paid by buyer" (id). The email did conclude that "a Purchase agreement and Invoice to be complete tonight with the remaining details" (id). However, there can be no question the email was sufficiently detailed and encompassed all the relevant terms regarding goods, price and delivery. The defendant argues that they rejected a proposed contract sent by the plaintiff later that day, highlighting the fact the email sent did not bind the parties at all. However, the email noted above was sent on April 13, 2020 in the afternoon. Thus, a time line of the emails sent that day will prove helpful. At 12:58 PM the plaintiff sent an

email inquiring whether the agreement contained insurance or guarantees. At 3:12 PM the defendant responded "our Invoice is the contract. We handle freight and insurance on our own" (see, E-mail sent by Ricky Zinn, April 13, 2020 at 3:12 PM, included within Exhibit B to Defendant's Opposition, [NYSCEF #48]). That prompted the above detailed email which provided all the necessary terms and the defendant's confirmation nine minutes later at 3:47 PM. At 11:58 PM, shortly before midnight the plaintiff sent another email which contained a sample contract which according to the defendant was summarily rejected by the defendant. However, that rejection later in the day has no bearing upon the earlier email which contained all the information necessary. In fact, the rejection of that proposed contract really supports the conclusion that the defendant's confirmation of the email earlier in the day was in fact intended to be a binding agreement. Likewise, an email sent by the plaintiff the following day regarding the second agreement was similarly confirmed by the defendant in an email shortly thereafter. Thus, there really are no questions of fact the plaintiff is entitled to a return of one million dollars owed by the defendant. Thus, there are no questions of fact that must be resolved and discovery will not serve to clarify any outstanding issues. Therefore, while the text messages may not have been sufficient to afford the plaintiff summary relief, surely the

agreements, including the binding emails, eliminate all questions of fact the defendant owes the plaintiff one millions dollars. On that basis the motion seeking summary judgement the plaintiff is entitled to one million dollars is granted.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC