SCANNED ON 10/16/2009

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

PRESENT: BARBARA R. KAPNICK J.S.C. PART 39

Index Number : 602026/2007

SILVERMARK CORP.

vs.

ROSENTHAL & ROSENTHAL INC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED OCT 15 2009 COUNTY CLERK'S OFFICE NEW YORK

Dated: 10/13/09

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

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SILVERMARK CORPORATION,

Plaintiff,

- against -

ROSENTHAL & ROSENTHAL, INC., and
STAR CITY SPORTSWEAR, INC.,

Defendants.

----------X

DECISION/ORDER
Index No. 602026/07
Motion Seq. No. 003

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK, J.:

Plaintiff Silvermark Corporation ("Silvermark"), brought this action against its factor Rosenthal & Rosenthal, Inc. ("Rosenthal"), and its client Star City Sportswear, Inc. ("Star City"), seeking to recover allegedly improper "chargebacks" from Rosenthal in the amount of $259,770.48 plus interest, arising under a Factoring Agreement entered into between plaintiff and Rosenthal on or about October 9, 2002.

Initially, the Complaint asserted claims against both defendants for breach of contract (first cause of action), breach of covenant of good faith and fair dealing (second cause of action), goods sold and delivered (third cause of action), unjust enrichment (fourth cause of action), fraud (fifth cause of action), and tortious conversion (sixth cause of action). Plaintiff also sought punitive damages.

Subsequently, Rosenthal moved to dismiss the Complaint based on documentary evidence and for failure to state a cause of action. Rosenthal also sought an award for attorneys' fees pursuant to the terms of the Factoring Agreement and imposition of sanctions on the grounds that plaintiff's claims are frivolous.

By Decision/Order dated January 25, 2008 on motion seq. no. 001, the Hon. Helen E. Freedman granted Rosenthal's motion to the extent of dismissing the first, third, fourth, fifth, and sixth causes of action, and the claim for punitive damages. Judge Freedman, however, denied that portion of the motion seeking to dismiss the claim for breach of the covenant of good faith and fair dealing (second cause of action), and denied Rosenthal's request for attorneys' fees and sanctions as premature.

Specifically, Judge Freedman held:

> Silvermark maintains that Rosenthal took control of the business and operations of Star City, fabricated disputes regarding goods received by Star City to avoid paying vendors, and diverted to itself the moneys that had been already credited to the vendors' accounts.
>
> ***
>
> Here, plaintiff has alleged that Rosenthal diverted to itself the funds that Star City owed to Silvermark and improperly exercised its right to charge back as part of a fraudulent scheme which resulted in Silvermark's deprivation of the benefit of its Agreement with Rosenthal. These allegations are sufficient to support a claim for breach of the covenant of good faith, independent of a breach of contract claim.

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In February 2008, Rosenthal filed an Answer asserting that plaintiff's damages, if any, are offset by a $100,000 payment Silvermark received directly from Star City, allegedly in breach of the Factoring Agreement.

Rosenthal also asserted a Counterclaim in which it alleges that after its factoring relationship with Silvermark terminated in November 2006, Rosenthal sent plaintiff a notice letter dated January 31, 2007 stating that "there remains due and owing to Rosenthal from you, pursuant to the Factoring Agreement, the sum of $130,205.74 (inclusive of the charge backs) plus interest, fees and charges..." Allegedly, Silvermark did not dispute that notice by timely notification by registered or certified mail as required under the Factoring Agreement. Thus, Rosenthal seeks in its Counterclaim to recover damages in the amount of $149,710.90, as of February 11, 2008, together with interest, fees and charges incurred thereafter.[1]

Rosenthal now moves for an order: a) pursuant to CPLR § 3212, granting it summary judgment dismissing plaintiff's one remaining

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[1] By Decision/Order dated January 9, 2009 on motion seq. no. 002, this Court granted on default plaintiff's motion for a default judgment against defendant Star City Sportswear, Inc. ("Star City"), based on its failure to serve an Answer and/or appear in this action, and directed that a judgment be entered in favor of plaintiff and against Star City in the sum of $293,827.72.

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claim for breach of the covenant of good faith and fair dealing; b) granting it summary judgment on its Counterclaim for damages; and c) awarding it attorneys' fees, pursuant to the Factoring Agreement, and/or attorneys' fees and/or sanctions, pursuant to Section 130-1.3 of the Uniform Rules for Trial Court.[2]

Rosenthal contends that the claim for breach of the covenant of good faith and fair dealing should be summarily dismissed because the testimony submitted on this motion shows that Star City, and not Rosenthal, initially raised the dispute about the invoices and no admissible evidence has emerged from discovery proving that Rosenthal had control over the business and operations of Star City during May 2006 through August 2006, when the alleged "chargebacks" were issued.[3]

Specifically, Rosenthal relies on the Affidavit of J. Michael Stanley ("Stanley"), the Managing Director of Rosenthal, dated October 16, 2008, in which he states that:

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[2] Section 130-1.3 is actually part of the Rules of the Chief Administrator of the Courts.

[3] The Factoring Agreement provides, in relevant part:

> [w]e shall not be responsible for any nonpayment of a receivable because of the assertion of any claim or dispute by a customer or the exercise of any counterclaim or offset (whether or not such claim, dispute, counterclaim or offset relates to the specific receivable)...

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> I was told by Alan Cohen and Robert Klein ["Klein"], the principal owners of Star City, of a split between the principals of Silvermark (one located in China and one in New York) and that each principal of Silvermark was demanding separate payment from Star City for the invoices. I was told that non only there was double billing, but that Star City was concerned that Star City could have continuity and quality problems with the purchased goods and would not know which of the two would take care of any problems. I was advised by Star City that Rosenthal should not make any payments to Silvermark 'until the situation was resolved.'

Rosenthal also relies on the deposition transcript of Alan Cohen ("Cohen"), the principal of Star City, from June 17, 2008, in which Cohen substantially confirms Stanley's testimony and states that during a meeting among himself, Klein and Stanley in the Star City showroom, he informed Stanley that Star City would hold up payment of the Silvermark invoices temporarily to determine if Star City's clients tried to return the goods, since Silvermark's partner who would have handled future production had indicated that he would not accept any responsibility or deductions for the garments that had already been shipped. Cohen further explained that it would take from three to four months from the time Star City shipped the garments to its clients to learn about possible "chargebacks."

In his deposition, Cohen also stated that in response to his explanation for declining to pay Silvermark, Stanley told him that Star City had to put a dispute in. Plaintiff contends that

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Stanley's alleged statement shows that Rosenthal acted in bad faith.

Plaintiff also contends that a dispute letter from Star City dated June 5, 2006 listing the disputed invoices, which Rosenthal allegedly received and provided to plaintiff, was on Star City stationary not in use as of the date on which it was written. The dispute letter contains a new address and telephone number which Star City did not have until July 2006. Plaintiff thus contends that the "new" stationary constitutes evidence that Rosenthal "created" the dispute letter.

However, in a deposition held on July 17, 2008, Morton Broyde, Rosenthal's Account Manager for Star City, stated that he had received and reviewed a dispute letter sent by Star City in May or June 2006. He went on to explain that that dispute letter had been lost, after which he called the accounting department of Star City to get a copy. The copy of the original dispute letter was received on the "new" stationary, was maintained in Rosenthal's files and was provided to plaintiff.

Further, during a deposition held on May 21, 2008, Jansen Chang, Silvermark's President, was asked whether he had any evidence supporting the allegation that Rosenthal, and not Star

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City, had prepared the dispute letter, but he had none. Moreover, the Factoring Agreement at paragraph 2 refers to "the assertion of any claim or dispute by a customer" and does not specifically require notices of claims to be in writing.

In any event, the issue here is whether Rosenthal, as alleged by plaintiff, fabricated a dispute regarding the goods purchased by Star City. This Court finds that the testimony submitted supports Rosenthal's contention that the dispute was raised by Star City and concerned Star City's business relationship with Silvermark in relation to the goods supplied. *See Tex Styles Group, Inc. v. Republic Factors Corp.*, 106 AD2d 257, 258 (1st Dep't 1984), *aff'd* 64 NY2d 959 (1985), which holds that "a factor may exercise its contractual right of charge back without verifying the merits of the dispute between the seller and the eventual buyer." Moreover, the Court held that the factor "was under no duty to make a determination as to whether the dispute was *bona fide* before exercising its right to charge back, as indicated by the factoring agreement between the parties." *Id.*

Further, this Court finds that the deposition of Mr. Chang fails to support Silvermark's allegations that Rosenthal had seized control of the operations of Star City between May and August 2006 and improperly exercised its right to charge back as part of a

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fraudulent scheme against Star City's vendors, as such deposition is based on hearsay and contains no admissible evidence.

Next, Rosenthal contends that this Court should grant summary judgment in its favor on its Counterclaim because plaintiff failed to object to the amounts at issue by certified or registered mail within sixty days of a December 2006 monthly statement and the subsequent notice letter of January 31, 2007, thus rendering those amounts binding upon plaintiff, pursuant to paragraph 7(c) of the Factoring Agreement.[4]

In opposition, plaintiff contends only that the Counterclaim relates to monies wrongfully withheld from Silvermark in bad faith. However, as this Court has found above that Rosenthal did not act in bad faith or in breach of the covenant of good faith and fair dealing, summary judgement should be granted on the Counterclaim, based on the fact that plaintiff did not provide a written objection to the amounts at issue, pursuant to the terms of paragraph 7(c) of the Factoring Agreement, and thus has waived its

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[4] Paragraph 7(c) of the Factoring Agreement provides, in relevant part, that: "[a]ll statements, reports or accountings rendered or issued by us to you, including such trial balances and sales summaries, shall be deemed accepted and be finally conclusive and binding upon you unless you notify us to the contrary by registered or certified mail within sixty (60) days after the date such statement, report or accounting is sent to you."

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contractual right to object to them.

Finally, Rosenthal contends that it is contractually entitled to the payment of the attorneys' fees it incurred in defending this action, pursuant to paragraph 11 of the Factoring Agreement, which provides, in relevant part, that:

> [i]n the event we shall retain counsel for the purpose of enforcing the performance, payment or collection of any of the *Obligations*, then and in that event you agree to pay the reasonable fees of our counsel, plus any and all expenses and disbursements incurred in connection therewith and/or incidental thereto (emphasis added).

Paragraph 8 of the Factoring Agreement defines "Obligations" as:

> any and all of your ... indebtedness and obligations to us ... whether matured or unmatured, absolute or contingent, now existing or that may hereafter arise ... and howsoever acquired by us, whether arising directly *between us* or acquired by us by assignment, whether *relating to this Agreement* or independent hereof, including all obligations incurred by you to any other concern factored or financed by us (*collectively*, the "Obligations")... (emphasis added).

Since Rosenthal retained counsel to enforce the performance of plaintiff's obligations under the Factoring Agreement, this portion of Rosenthal's motion is also granted.

The issue of the amount of attorneys' fees and expenses reasonably incurred by Rosenthal in this action is referred to a Special Referee to hear and report with recommendations (or, upon stipulation of counsel, to hear and determine).

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Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for assignment to a Special Referee.

Accordingly, Rosenthal's motion is granted to the extent of dismissing plaintiff's claim for breach of the covenant of good faith and fair dealing in the Complaint (second cause of action), granting Rosenthal summary judgment on its Counterclaim, and awarding Rosenthal reasonable attorneys' fees and expenses after a hearing before a Special Referee. That portion of the motion seeking to impose sanctions on plaintiff is denied in the discretion of the Court.

The Clerk may enter judgement on Rosenthal's Counterclaim against Silvermark in the sum of $149,710.90 with interest from February 11, 2008. The Clerk may also enter judgment dismissing plaintiff's second cause of action against Rosenthal with prejudice.

This constitutes the decision and order of this Court.

Dated: October 13, 2009

BARBARA R. KAPNICK

J.S.C.

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BARBARA R. KAPNICK
J.S.C.