SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIC SCHUMACHER** **PART** **23M**

Justice

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KID CITY COOL, LLC,

Plaintiff,

- v -

ELI PERSONAL CARE LLC,

Defendant.

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INDEX NO. 151723/2021

MOTION DATE 04/24/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

NYSCEF doc nos. 14-31 were read on this motion for summary judgment.

Motion by plaintiff pursuant to CPLR 3212 for partial summary judgment on the issue of liability in favor of plaintiff and against defendant on the first cause of action granted.

BACKGROUND

Plaintiff commenced this action on February 19, 2021, by filing a summons and complaint (see NYSCEF doc no. 1 [hereinafter complaint]). The complaint alleges, in sum and substance, that defendant purchased certain assets, including intellectual property and formulas, of plaintiff used in the manufacture, sale, and distribution of children's haircare products (see complaint ¶ 1). The complaint further alleges that, pursuant to a certain Asset Purchase Agreement (hereinafter APA), defendant agreed to make quarterly earnout payments to plaintiff beginning July 1, 2018, through September 30, 2024 (see id. ¶ 2). The complaint further alleges that defendant made partial and untimely quarterly payouts to plaintiff in July and October 2020, and failed to make full quarterly payments after that (see id. ¶ 4). The complaint further alleges that defendant owes plaintiff at least $204,659.00 in arrears on the earnout payments pursuant to the APA (see id.).

The complaint's prayer for relief seeks a judgment declaring defendant to be in breach of the APA, an order that defendant shall provide an accounting to plaintiff of all gross sales of the subject products since July 1, 2018, and a judgment against defendant in an amount no less than $204,659.00 (see id. at 7).

On May 10, 2021, defendant interposed an answer (see NYSCEF doc no. 3). On April 5, 2023, plaintiff filed the note of issue (see NYSCEF doc no. 13).

On May 25, 2023, plaintiff filed this motion for an order granting partial summary judgment on the issue of liability in favor of plaintiff and against defendant on the first cause of action, breach of contract (see NYSCEF doc no. 14). Plaintiff's papers are silent as to the second cause of action, which sought an accounting.

Plaintiff submits an affidavit by Scott Gurfein, a member of plaintiff's Board of Managers (see aff of Gurfein ¶¶ 1-2). Gurfein states that, in 2018, plaintiff and defendant entered into a Settlement Agreement to make certain adjustments to the APA (see id. ¶ 8). Gurfein states further that, under the Settlement Agreement, $125,721 was payable by defendant to plaintiff for accounts receivable (see id. ¶ 9). Gurfein states further that "[o]ther than an immediate settlement payment of $30,000, [defendant] would account for – but hold back – earnout payments to [plaintiff] that would be due from [g]ross [s]ales under the [APA] until the [d]eductions [a]mount had been recouped" (see id. ¶ 10). Gurfein states further that the Settlement Agreement, along with the APA, was intended to be the final statement of terms between the parties (see id. ¶ 11). Gurfein states further that defendant produced a chart from its own records indicating that defendant should have started to make quarterly payments to plaintiff at the end of the fourth quarter in 2019, and that defendant should have continued making such payments every quarter after that (see id. ¶¶ 13-14). Gurfein states further that, by defendant's own calculations, it owes plaintiff $727,279.60 as of September 2022 (see id. ¶¶ 15-17). Gurfein states further that defendant also produced a chart showing that defendant owed plaintiff at least $1,000,000.00 by the end of 2022, and must, by terms of the APA, pay plaintiff 5% of all gross sales through the end of September 2024 (see id. ¶ 18).

Plaintiff further submits excerpts from the deposition of Hasan Ansari, defendant's CEO. As is relevant here, when asked, "[d]id you prepare these [monthly sales, earn-out, and gross sales] charts?", Ansari replied, "I did" (Ansari tr at 17, lines 14-15). When asked, "[d]o you have any reason to believe these numbers are not correct?", Ansari replied, "[n]ot at this point, I don't" (id. at 18, lines 8-10). When asked, "[w]hy were the other quarterly payments not made?", Ansari replied, "[t]he company was – had been in [a] critical liquidity crunch. It was an inability, not an unwillingness. The liability was accrued. If not, the payment would have been made" (id. at 15, lines 21-25). When asked, "[t]o your knowledge, is the plaintiff in breach of the [settlement] agreement, at this time?", Ansari replied, "[a] judge would have to determine that" (id. at 35, lines 11-15). When asked, "[w]ould you agree that, as a party to the [APA], the . . . plaintiff Kid City Cool has fulfilled all of its obligations under the [APA]?", Ansari replied, "[t]hat's the same question you just asked me. I wouldn't be able to tell" (id. at 35, lines 16-22). When asked, "[d]o you consider, at this time, that the plaintiffs in this lawsuit have committed fraud or intentional misconduct?", Ansari replied, "I do not know" (id. at 37, lines 4-7). When asked, "[a]s you sit here today, do you think [plaintiff] knew the representations made in the [APA] were inaccurate, false[,] or misleading?", Ansari replied, "[w]e're going to have to discuss that in front of the judge as well" (id. at 37, lines 13-17). When asked, "[i]s it not true that, if there were any inaccurate information in the [APA] that were fraud, they would not be in the settlement agreement?", Ansari replied, "[t]he known items, at that moment in time, should have been addressed, I believe, in the settlement agreement" (id. at 38, lines 2-8). When asked, "[h]ave you found any items since then?", Ansari replied, "I don't recall" (id. at 38, lines 9-10).

Plaintiff further submits the: (1) Settlement Agreement, which states that "[a]n estimated $125,721[.00] is due to [plaintiff]", and that approximately $375,000.00 would be deducted from all amounts due to plaintiff (NYSCEF doc no. 23 at 2); (2) APA, which states, under a section entitled "Post-Closing Obligations", that "[a]fter the [c]losing, [plaintiff] and [defendant] shall cooperate with one another . . . . such cooperation shall be without additional cost or liability" (NYSCEF doc no. 22 at 21); and (3) charts prepared by Ansari indicating that defendant owed

plaintiff $727,279.60 as of September 2022, and at least $1,000,000.00 by the end of 2022 (see NYSCEF doc nos. 24-25).

On June 13, 2023, defendant filed an affirmation in opposition to plaintiff's motion for summary judgment. As is relevant here, defendant asserts in the affirmation in opposition that it "does not challenge the allegations that [d]efendant has not made all of the earnout payments due under the [APA]" (affirmation of Adrian ¶ 3). Defendant then argues that: (1) "there are questions of fact whether [p]laintiff[] [has] fully performed under the [APA] and the Settlement Agreement" (id. ¶ 12); (2) "there are issues of fact whether [p]laintiff has released [d]efendant[] from some of the claims set forth in this matter" (id. ¶ 13); and (3) "[p]laintiff has failed to provide any proofs that the Settlement Agreement ever was executed by all parties" (id. ¶ 17). Defendant annexes three previously submitted pages from the transcript of the Ansari deposition (see NYSCEF doc no. 28). Defendant submits no new evidence with the opposition papers.

On June 19, 2023, plaintiff filed an affirmation in reply to the motion and annexed a copy of the executed Settlement Agreement (see NYSCEF doc no. 31).

DISCUSSION

To succeed on a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985], citing Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad at 853).

Once the movant's prima facie showing has been made, the burden shifts to the opposing party to establish the existence of a material issue of fact sufficient to require a trial (see De Lourdes Torres v Jones, 26 NY3d 742, 763 [2016]). An opposing party's "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to defeat a movant's summary judgment motion (Siegel v City of New York, 86 AD3d 452, 455 [1st Dept 2011], quoting Zuckerman at 562).

To plead a cause of action for breach of contract, a plaintiff must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached a contractual obligation; and (4) defendant's breach resulted in damages to plaintiff (see 34-06 73, LLC v Seneca Ins. Co., 39 NY3d 44, 52 [2022]).

The court finds based on the papers submitted that the parties entered into a valid contract by way of the APA and Settlement Agreement. To the extent defendant argues that plaintiff has failed to provide any evidence that the Settlement Agreement was executed, plaintiff has eliminated any issue of fact concerning its execution by annexing a fully executed copy of the Settlement Agreement in the reply papers.

To the extent that defendant raises any argument that plaintiff failed to perform under the APA and Settlement Agreement, the court finds that there is no dispute that the deal between

plaintiff and defendant closed. Under section 10.8 of the APA, defendant cannot hold plaintiff liable for not cooperating after closing (see NYSCEF doc no. 22 at 21). The course of conduct of the parties is such that defendant never could have started selling the subject products if plaintiff had failed to fully perform under the APA, as the deal would not have closed. By closing, all conditions precedent to closing were satisfied, and there is no dispute that defendant received the products from plaintiff and began selling them. As the course of conduct of the parties indicates that the deal closed, the court finds that there is no genuine issue of material fact as to that plaintiff performed its obligations in accordance with the APA and the Settlement Agreement.

Yet defendant failed to fulfill its post-closing obligation to pay plaintiff in accordance with the APA and Settlement Agreement. Defendant's CEO himself stated at his deposition that "[t]he liability was accrued", citing defendant's inability to pay due to its critical liquidity crunch (NYSCEF doc no. 16 at 15, lines 23-24). There can be no question that defendant had exhausted any remaining deductions and was obligated to pay plaintiff pursuant to the quarterly earnout schedule. Therefore, the court finds that plaintiff has met its prima facie burden. There is no genuine issue of material fact as to that defendant's failure to make timely quarterly earnout payments to plaintiff constitutes a breach of the APA and the Settlement Agreement.

The burden having shifted to defendant, the opposition papers fail to raise a genuine issue of material fact. Defendant submits three previously submitted pages from the Ansari deposition. One excerpt from the pages submitted indicates that, when asked, "[t]o your knowledge, is the plaintiff in breach of the agreement[] at this time?", Ansari replied, "[a] judge would have to determine that" (NYSCEF doc no. 28 at 35, lines 11-15). The plaintiff having moved for summary judgment, the time for the court to make such a determination has arrived. The court finds that defendant has failed to demonstrate the existence of a genuine issue of material fact.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability in favor of plaintiff and against defendant on the first cause of action is granted; and it is further;

ORDERED that the second cause of action is resolved as academic; and it is further

ORDERED that, within five days of entry, plaintiff shall serve a copy of this order with notice of entry on defendant.

The foregoing constitutes the decision and order of the court.

4/24/2024
DATE

ERIC SCHUMACHER, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

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