SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: Honorable **Leonard Livote** PART 33
Supreme Court Justice

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TWITCHELL TECHNICAL PRODUCTS, LLC Index No 713089/20
PLAINTIFF,

-- against -- Motion Date: 12/22/20

Seq: 3

MECHOSHADE SYSTEMS, LLC
Respondents

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The following numbered papers read on this motion by plaintiff Twitchell Technical Products, LLC (plaintiff), to dismiss the counterclaims of defendant Mechoshade Systems, LLC (defendant), pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), with prejudice.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 32-36
Answering Affidavits - Exhibits	EF 43-46
Reply Affidavits	EF 47

Upon the foregoing papers it is ordered that the motion is determined as follows:

Twitchell entered into a pair of exclusive distribution agreements with Mechoshade more than thirty years ago. Pursuant to those agreements, Twitchell agreed to manufacture fabrics on an exclusive basis for Mechoshade, which Mechoshade would then use to manufacture solar roller shades. The parties executed distribution agreements which contained restrictive covenants that whereby Twitchell agreed that the fabrics that it manufactured for Mechoshade would be the "exclusive designs for" Mechoshade and that if Mechoshade and

Twitchell ever terminated their contractual relationship, Twitchell would not sell any fabrics that it manufactured exclusively for Mechoshade, or any substantially similar fabrics, to Mechoshade's competitors.

On or about of May 31, 2019, defendant terminated its agreement with plaintiff, and that on or about July 30, 2020, defendant sent correspondence to plaintiff asserting that plaintiff was foreclosed and contractually restricted from selling the same, or substantially similar fabrics, that plaintiff had previously sold to defendant and its predecessors, to any other parties, effectively attempting to prohibit plaintiff from competing in the market for window shade fabric and, thus, remove plaintiff from the market.

Plaintiff commenced this action for a declaratory judgment that the restrictive covenant is unenforceable. Defendant counterclaims for a declaratory judgment, and a permanent injunction ruling that the restrictive covenant is enforceable.

Plaintiff has now moved to dismiss defendant's counterclaim in its entirety pursuant to CPLR § 3211(a)(1) and (a)(7), with prejudice. In support of its motion, plaintiff has first argued that defendant's counterclaim has failed to state a cause of action. CPLR § 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR § 3211, the complaint [or counterclaim] is to be afforded a liberal construction" (*Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]; CPLR § 3026; *see Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

"'In reviewing a motion pursuant to CPLR § 3211(a)(7) to dismiss the complaint [or counterclaim] for failure to state a cause of action, the facts as alleged in the complaint [or counterclaim] must be accepted as true, the plaintiff [or counterclaimant] is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory'" (*Benitez v Bolla Operating LI Corp.*, 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836; *Feldman v Finkelstein & Partners*, LLP, 76 AD3d at 704).

Restrictive covenants may be made a part of any kind of ordinary

commercial contract, such as licensing agreements (*Navajo Air, LLC v Crye Precision, LLC*, 318 F Supp 3d 640, 649 [SDNY 2018], as amended [Aug. 2, 2018]; *DAR & Assoc., Inc. v Uniforce Services, Inc.*, 37 F Supp 2d 192, 197 [EDNY 1999]). "A non-compete within an ordinary commercial contract is analyzed 'under a simple rule of reason, balancing the competing public policies in favor of robust competition and freedom to contract'" (*Navajo Air, LLC v Crye Precision, LLC*, 318 F Supp 3d at 649, quoting *DAR & Assocs., Inc. v. Uniforce Servs., Inc.*, 37 F Supp 2d at 197; *see Mathias v Jacobs*, 167 F Supp 2d 606, 611 [SDNY 2001]).

"New York courts will look at the totality of the circumstance when determining if a restrictive covenant in a commercial agreement is enforceable" (*Navajo Air, LLC v Crye Precision, LLC*, 318 F Supp 3d at 649). In applying this balancing test, the "[c]ourts will consider if the covenant: (1) protects a legitimate business interest; (2) is reasonable in regard to geographic scope and temporal duration; and (3) the degree of hardship imposed upon the party against whom the covenant is enforced" (*id.*).

Pursuant to this standard, and upon a careful review of the allegations contained in defendant's counterclaim, affording the allegations contained therein a liberal construction, accepting the facts alleged to be true, and granting defendant the benefit of every possible favorable inference, the court has concluded that, under the particular circumstances in this matter, defendant has sufficiently set forth facts to support a legally cognizable cause of action in the counterclaim. Therefore, plaintiff has failed to satisfy its burden on this branch of its motion.

Next, plaintiff has argued that it is entitled to dismissal based upon documentary evidence. CPLR § 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint [or counterclaim] pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Bonavita v Govt. Employees Ins. Co.*, 185 AD3d 892, 893 [2d Dept 2020]; *Lakhi Gen. Contractor, Inc. v. N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]). Furthermore, "[i]n order for evidence to qualify as documentary, it must be unambiguous, authentic, and

undeniable" (*Bianco v Law Offices of Yuri Prakhin*, 189 AD3d at 1326; *see Ajaka v Mount Sinai Hosp.*, 189 AD3d 963 [2d Dept 2020]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010]).

In addition to the pleadings, plaintiff has relied upon, among other things, copies of printouts from the internet and a copy of plaintiff's "Exclusive Distributorship Agreement" with defendant dated June 1, 1989. Inasmuch as the annexed printouts from the internet have not been certified as business records, they are not admissible (CPLR § 4518[a]; *see U.S. Bank Tr., N.A. v Collis*, 191 AD3d 922 [2d Dept 2021]; *McBryant v Pisa Holding Corp.*, 110 AD3d 1034, 1035 [2d Dept 2013]; *see also W & G Wines LLC v Golden Chariot Holdings LLC*, 46 Misc 3d 1202[A] [Sup Ct, NY County 2014]).

Furthermore, taking into consideration defendant's allegations on the counterclaim, after a careful review of the terms and provisions of the "Exclusive Distributorship Agreement," plaintiff has failed to satisfy its burden that, under the totality of the circumstances, the restrictive covenant is unenforceable (*see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013]). In addition, the documentary evidence submitted is not sufficiently "unambiguous, authentic, and undeniable" to constitute a basis upon which plaintiff may obtain dismissal (*Bianco v Law Offices of Yuri Prakhin*, 189 AD3d at 1326; *see Granada Condominium III Assn. v Palomino*, 78 AD3d at 996-997), and said evidence has failed to "utterly refute[] the [defendant's] factual allegations, thereby conclusively establishing a defense as a matter of law" (*Zeld Assoc., Inc. v Marcario*, 57 AD3d 660, 660 [2d Dept 2008]; *see Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Based upon the above, plaintiff has filed to satisfy its burden on this branch of its motion and is not entitled to relief sought.

Accordingly, plaintiff's motion is denied.

Dated: June 29, 2021

FILED
6/29/2021
COUNTY CLERK
QUEENS COUNTY

J.S.C.