

Aldi Inc. v Fashion Options, Inc.

2007 NY Slip Op 32195(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 0105319/2007

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Index Number : 105319/2007

ALDI INC

INDEX NO. 105319/2007

vs

FASHION OPTIONS INC

MOTION DATE 6/1/07

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMNT/LIEU COMPLAINT

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were filed on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits _____

5-7

Replying Affidavits _____

8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in

accordance with the annexed memorandum decision and order.

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

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/19/07



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
Refrain

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

ALDI INC.,

Plaintiff,

INDEX NO. 105319/2007

-against-

FASHION OPTIONS, INC.

Defendant.

FILED

JUL 20 2007

DECISION AND ORDER

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.

In this action for the recovery of the money due on a Promissory Note, plaintiff Aldi Inc. ("Plaintiff") moves under CPLR § 3213 for summary judgment in lieu of complaint. For the reasons discussed herein, the motion is granted.

Background

Defendant Fashion Options, Inc. ("Defendant") is an importer and wholesaler of apparel. It began doing business with Plaintiff in 2003, and a dispute arose between them in 2006. Following negotiations, they entered into a Letter Agreement that required Defendant to make a payment to Plaintiff, issue certain credits to it, and execute and deliver a Promissory Note, which is the subject of this action. The Letter Agreement also required Plaintiff to deliver a number of garments to Defendant.

On the same day the Letter Agreement was signed, Defendant's president Michael Haddad executed the Promissory Note. It obligates Defendant to pay Plaintiff the principal sum of \$67,627.98, without interest, on or before December 7, 2006, and states that it "may not be changed, waived, discharged, or

terminated except by an instrument in writing signed by the party against whom enforcement of such change, waiver, discharge, or termination is sought." The Promissory Note also states that "[w]henever an attorney is used to obtain payment under, or to otherwise enforce the [Promissory Note] or to enforce, declare, or adjudicate any rights or obligations under the [Promissory Note], whether by arbitration, suit, or by any other legal means whatsoever, the costs and expenses thereof, including reasonable attorneys' fees and expenses, shall be payable by the non-prevailing party."

Plaintiff's attorneys demanded payment of the entire balance of \$67,627.98 due on the Promissory Note by letter dated February 8, 2007. Defendant replied that because of Plaintiff's breaches of the Letter Agreement, it was withholding payment under the Promissory Note.

In April 2007 Plaintiff commenced this action by moving under CPLR § 3213 for summary judgment in lieu of complaint for \$67,628.98, together with attorneys' fees, costs and disbursements. Defendant alleges that while it fulfilled its obligations under the Letter Agreement, Plaintiff has not fulfilled its obligations; specifically, it contends that Plaintiff failed to release all of the garments, delayed releasing the rest, some of which was damaged, and created difficulties in delivery causing Defendant to incur extra freight charges. It alleges that these breaches caused it to incur \$80,323.37 in damages, and that its claim for this

amount is so intertwined with Plaintiff's motion that judgment should not be granted.

Discussion

"[I]t is the general rule that the alleged breach of a related but independent contract will not defeat a summary judgment motion on a promissory note[. It is only] where the contract and underlying obligation are intertwined, [that] the motion must be denied." Eurotech Dev. v. Adirondack Pennysaver, 224 A.D.2d 738 (3rd Dep't 1996). In this case, while the Letter Agreement and Promissory Note may be "related," there is no evidence that they are "intertwined."

The Promissory Note makes no reference to the Letter Agreement, and the only reference in the Letter Agreement to the Promissory Note is that Defendant will sign and deliver it to Plaintiff. Moreover, neither document attaches any conditions to payment of the Note, which makes payment unconditionally due by December 7, 2006; its express terms prohibit it from being "changed waived, discharged or terminated" unless by a writing.

The cases relied on by Defendant to support its contention that the documents are intertwined are distinguishable. In Chisholm Ryder Co., Inc. V. Munro Games, Inc., 58 A.D.2d 972 (4th Dep't 1977), summary judgment regarding payment of rent was properly denied because the lessor's entitlement to rent was inseparable from the defendant tenant's claim for damages it sustained due to water leaks on the premises. In Tibball v.

Catalanotto, 269 A.D.2d 386 (2nd Dep't 2000), the purchase price of a snack food route was "secured by a promissory note" and thus the note was necessarily dependant on the receipt of the route.

Similarly, in Christie's S.A. v. Gugliarda, 65 A.D.2d 714 (1st Dep't 1978), the Appellate Division reversed summary judgment on promissory notes because there were consideration issues about whether the plaintiff delivered the goods for which the notes were issued.

On the other hand, the First Department has expressly held that a promissory note is a proper subject for relief under CPLR § 3213 even if "interrelated" with a settlement agreement where, as is the case here, nothing in the agreement or note detracts from the note's status as an instrument for the payment of money only. See Liberty Capital Group v. Rich, 78 A.D.2d 342 (1st Dep't 1981). Defendant's argument that the Promissory Note lacks consideration is unpersuasive because the Letter Agreement expressly states that the Promissory Note was being delivered in exchange for Plaintiff settling all of its then existing claims against Defendant. As the Promissory Note is unambiguous and creates a distinct obligation for Defendant to pay the amount due, this court cannot refer to extrinsic evidence about a separate dispute between the parties. See DDS Partners, LLC v. Celenza, 6 A.D.3d 347 (1st Dep't 2004).

Plaintiff is entitled to attorney's fees under the Promissory Note, but the amount cannot be determined on this

motion.

Accordingly, it hereby is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is granted and it is entitled to judgment under the Promissory Note in the amount of \$67,628.98, with interest at the statutory rate from December 7, 2006; and it further is

ORDERED that the issue of how much Defendant owes to Plaintiff for reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations; and it further is

ORDERED that this motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served by hand within 45 days of entry on the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee, failing which the Clerk is directed to enter judgment in favor of Plaintiff and against Defendant for \$67,628.98 with interest from December 7, 2006, together with costs and disbursements as taxed.

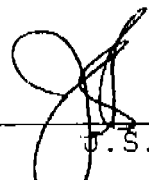
Dated: July 18, 2007

ENTER:

FILED

JUL 20 2007

NEW YORK
COUNTY CLERK'S OFFICE



U.S.C.

JANE S. SOLOMON