

**SZS Intl. Trading, Inc. v Apparel
Partnership Group, LLC**

2007 NY Slip Op 32432(U)

July 31, 2007

Supreme Court, New York County

Docket Number: 0105667/2007

Judge: Joan Madden

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SCANNED ON 8/7/2007

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

PRESENT: Hon Joac A. m. dbr

PART 11

Index Number : 105667/2007

SZS INTERNATIONAL TRADING, INC

vs
APPAREL PARTNERSHIP GROUP, LLC

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE 5-25-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
AUG 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 31, 2007

[Signature]
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: IAS PART 11

-----X
SZS INTERNATIONAL TRADING, INC.,

Index No: 105667/2007

Plaintiff,

-against-

APPAREL PARTNERSHIP GROUP, LLC and
MATTHEW HEALY,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
AUG 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff SZS International Trading, Inc. ("SZS"), a garment manufacturer and importer, moves for summary judgment in lieu of complaint pursuant to CPLR § 3213 against defendants Apparel Partnership Group, LLC ("APG"), a garment seller, and Matthew Healy ("Healy"), president/CEO of APG. For the reasons set forth below, the motion is denied.

Background

On October 24, 2006, SZS entered into an Inventory Transfer Agreement ("Agreement") with APG. Under the terms of the Agreement, SZS agreed to manufacture and deliver approximately 166,000 knitted garments to APG. The Agreement provided that upon delivery of the goods, APG would pay \$175,000 by certified check, and as additional consideration, it executed a promissory note in the amount of \$25,000 ("Note"), which was due within 60 days of the transaction. (Plaintiff's Exhibit A). On October 24, 2006, Healy signed the Note individually and on behalf of APG. The Note did not reference the Agreement. Once the Note became due, SZS demanded payment from both APG and Healy in December 2006 and January 2007. When these attempts were unsuccessful, SZS brought this action to recover the sum due on the Note.

SZS now moves for summary judgment in lieu of complaint to recover \$25,000 due on the Note, plus nine percent interest. SZS contends that the Note is eligible for accelerated

judgment under CPLR § 3213, since the Note is for the payment of money only and has gone unpaid by the defendants. SZS submits the Note, Agreement, and the affidavit of its president, Jiamin Shen ("Shen"), in support of its motion.

Defendants counter that the Note is inextricably intertwined with the Agreement and that SZS breached the Agreement by shipping excess and non-conforming goods. Defendants allege that the goods were defective because each garment was packaged individually, while APG's purchase order required six garments per package. Defendants assert that APG was forced to then repackage the garments at a rate of \$0.25 per garment. Defendants rely on an APG purchase order, the Note, Agreement, and Healy's affidavit to support their position.

In reply, SZS argues that the defendants have failed to demonstrate the existence of a triable issue of fact or a meritorious defense to its demand for payment on the Note. SZS contends that the defendants were required to reject the goods as defective within a reasonable time, pursuant to UCC §§ 2-601 and 602, in order to raise an issue regarding non-conforming goods. Moreover, SZS contends that there is no evidence that it breached the Agreement.

Discussion

CPLR § 3213 states that a motion for summary judgment in lieu of complaint may be served by the plaintiff "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment." The purpose of this motion is to provide "an effective means of obtaining an accelerated judgment where a defendant's liability for a certain sum of money is clearly established by the instrument, coupled with proof of nonpayment." Wagner v. Cornblum, 36 A.D.2d 427, 428 (4th Dept. 1971). See also Holmes v. Allstate Ins. Co., 33 A.D.2d 96, 98 (1st Dept. 1969).

The Note submitted by SZS is not an instrument for the payment of money only under CPLR § 3213, since the Note was offered as partial consideration under the terms of the Agreement, which defendants allege was breached by SZS when it shipped excess and non-conforming goods. When, as here, the contract and the obligation to pay on a note are intertwined as opposed to separate and distinct, summary judgment must be denied. Regal Limousine, Inc. v. Allison Limousine Service, Ltd., 136 AD2d 534 (2d Dept 1988); see also Fopeco, Inc. v. Gen. Coatings Tech., Inc., 107 A.D.2d 609, 610 (1st Dept. 1985) (quoting Ssangyong, Inc. v. Sung Ae Yoo, 88 A.D.2d 572, 573 (1st Dept. 1982) ("where 'a fundamental question exists as to whether the agreement between these parties can be viewed as being distinct and separate from the note', summary judgment must be denied.") compare East N.Y. Savings Bank v. Baccaray, 214 A.D.2d 601 (2nd Dept. 1995) (holding that the promissory note and loan security agreement were not intertwined because neither required additional performance from the holder of the note as a condition precedent to its repayment).

Furthermore, contrary to SZS's reply argument, defendants do not have the burden of raising a triable issue of fact or meritorious defense, since SZS has failed to establish its prima facie case under CPLR § 3213. See Interman Indus. Prods., Ltd. v. R. S. M. Electron Power, Inc., 37 N.Y.2d 151, 155 (1975). Consequently, this court need not address SZS's remaining arguments regarding its alleged breach of the Agreement and the timeliness of defendants' non-conforming goods defense.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendants' attorneys within 20 days of service on plaintiff's attorney of a copy of this order with notice of entry and defendants shall answer, move or otherwise respond to the complaint within 20 days after service of the complaint.

DATED: July 31, 2007



J.S.C.

FILED
AUG 07 2007
NEW YORK
COUNTY CLERKS OFFICE