

FSA Fortex, AB v Universal Exports, Inc.
2011 NY Slip Op 32232(U)
July 26, 2011
Sup Ct, Suffolk County
Docket Number: 30296-2009
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 30296-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 05-17-2011
Motion Submit Date: 05-17-2011
Motion Sequence No.: 001 MOTD

☐ FINAL
☒ NON FINAL

X

FSA Fortex, AB,

Plaintiff,

-against-

**UNIVERSAL EXPORTS, INC., J & A
INTERNATIONAL RESOURCES, INC., AND
AVIS AFSHAR,**

Defendants.

X

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ORDERED, that the Defendants' motion (motion sequence # 001) for summary judgment pursuant to CPLR §3212 is granted in part and denied in part as set forth herein.¹

BACKGROUND

Plaintiff FSA Fortex AB ("FSA"), commenced this action against defendants Universal Exports, Inc. ("Universal"), J&A International Resources, Inc. ("J&A") and Avis Afshar ("Afshar") by filing a Summons and Verified Complaint on or about

¹The Court would like to acknowledge the valuable aid of Raymond Castronovo, legal intern.

August 4, 2009. Defendants filed an Amended Verified Answer by stipulation of all parties on September 16, 2010. Defendants now move for summary judgment pursuant to CPLR Rule 3212.

FSA is a foreign corporation with its principal place of business in Sweden. Universal is a New York corporation with its principal place of business in West Babylon, New York. J&A is a New York corporation with its principal place of business in West Babylon, New York. Avis Afshar is an individual who is the president of both Universal and J&A.

In this action, FSA as buyer seeks to recover \$152,904.40 it paid to Universal as seller, to purchase twelve containers of Northern-Bleached Softwood Kraft ("NBSK"), a variation of pulp for making kraft paper. FSA also seeks to recover damages for penalties, fines, demurrage and other costs incurred by FSA for possessing wastepaper at a port in Ningbo, China without a license to do so. According to the Verified Complaint, Marcus Westerlind an employee of FSA, negotiated with J&A and Afshar for the purchase of NBSK pulp. FSA alleges that the parties assented to the purchase and sale of a superior quality of NBSK. Subsequent to the parties' negotiations and prior to the parties' performance, Universal sent an invoice to FSA, which describes the material to be sold as STOCKLOT NBSK. The invoice defines STOCKLOT NBSK as a "variation in product which may include variation in specifications, substitutions as reflected in our price".

Universal and J&A sent twelve containers to FSA via two separate shipments. The first shipment consisted of three containers of stocklot NBSK, which were shipped to Ningbo, China. FSA paid for the first shipment by letters of credit in the amount of \$38,733.50. Upon receipt and visual inspection of the first shipment, FSA learned the first shipment contained wastepaper, not NBSK pulp. The second shipment consisted of nine containers, which were shipped to Ningbo, China. FSA paid for the nine containers by letters of credit in the amount of \$114,170.90. Upon receipt and visual inspection of the second shipment, FSA learned the second shipment, like the first shipment, contained wastepaper, not NBSK pulp.

FSA asserts eleven causes of action against defendants Universal, J&A and Afshar, including breach of contract (first, second, fourth, fifth causes of action), fraud (third, fourth, fifth causes of action), punitive damages (sixth cause of action),

breach of good faith (seventh cause of action), as well as, several causes of action pursuant to UCC provisions for receipt of non-conforming goods (eighth, ninth, tenth and eleventh causes of action).

The defendants now move for summary judgment dismissing plaintiff's complaint. In support of the motion, the defendants have annexed the affirmation of the defendants' attorney, the Verified Complaint, the Verified Amended Answer, deposition testimony of Marcus Westerlind, email correspondence between plaintiff and defendants, an invoice for the transaction at issue executed by defendant only, and the deposition testimony of Avis Afshar.

DISCUSSION

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v. New York University Medical Center**, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); **Zuckerman v. City of New York**, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). If the moving party meets its burden, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact, which require a trial. **Zayas v. Half Hollow Hills Cent. School Dist.**, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Mere conclusory statements and unsubstantiated allegations are insufficient to obtain summary judgment. **J. Manes Co. v. Greenwood Mills, Inc.**, 53 N.Y.2d 759, 421 N.E.2d 840 (1981). The Court must always be conscious of the need to balance the advantages of effective summary judgment procedure with the litigants right to a trial, **see, Sillman v. Twentieth Century-Fox Film Corp.**, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). Accordingly, the role of a court in deciding a motion for summary judgment "is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." **Dyckman v. Barrett**, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992).

Defendants first assert they are entitled to summary judgment dismissing plaintiff's claims for breach of contract against Universal, J&A and Avis Afshar individually. It is well settled in a breach of contract claim that plaintiff must allege the formation of a contract, performance by plaintiff, failure to perform by defendant, and resulting damages to plaintiff. **Furia v. Furia**, 116 A.D.2d 694, 498 N.Y.S.2d 12

(2d Dept. 1986). When interpreting a contract, "the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectation will be realized." **Herzfeld v. Herzfeld**, 50 A.D.3d 851, 857 N.Y.S.2d 170 (2d Dept. 2008). If terms of a written contract are clear and unambiguous, intent of the parties must be found within the four corners of the contract. **Correnti v. Allstate Properties, LLC**, 38 A.D.3d 588, 832 N.Y.S.2d 594 (2d Dept. 2007). Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide. **Innophos, Inc. v. Rhodia, S.A.**, 10 N.Y.3d 25, 852 N.Y.S.2d 820 (2008).

Defendants allege they have fully performed their obligations under the contract by providing plaintiff with downgraded NBSK or wastepaper. Defendants argue that the invoice that Universal provided to FSA, which was subsequently accepted by FSA, described the materials to be sold as "stocklot NBSK." The term stocklot is defined within the "remarks" section of the invoice as a variation or substitute of the described product. Avis Afshar testified that stocklot NBSK, downgraded NBSK and wastepaper are synonymous. Avis Afshar also testified that Universal shipped downgraded NBSK or wastepaper to FSA, thus performing their obligations under the contract. In addition, email correspondence between Marcus Westerlind and J&A evidences the parties' negotiation and understanding that the plaintiff was purchasing downgrade or stocklot NBSK. Thus, defendants have met there prima facie burden with respect to the causes of action for breach of contract.

In opposition to the defendants' motion, the plaintiff alleges that there are questions of fact regarding whether the contract the called for NBSK pulp or wastepaper and whether the material provided by defendant conformed with the contract. Plaintiff argues that the contract called for a grade of NBSK pulp, which is not akin to wastepaper. The deposition testimony of Marcus Westerlind and Avis Afshar indicate that the parties were in negotiation for downgrade NBSK, which is a grade of pulp. Both Marcus Westerlind and Avis Afshar have testified NBSK is a grade of pulp, which is different from wastepaper. Thus, Plaintiffs have raised an issue of fact regarding whether the contract called for a grade of NBSK pulp or a grade of wastepaper. In addition, plaintiffs argue defendants' performance did not conform to the contract. Avis Afshar's testimony indicates that the containers shipped to FSA contained downgrade NBSK pulp, while Marcus Westerlind's testimony states the containers contained wastepaper. If the contract called for a grade of pulp, but

defendants provided a grade of wastepaper the defendants performance is not in accordance with the contract.

Accordingly, plaintiff has raised triable issues of fact regarding whether the contract called for a grade of NBSK pulp or a grade a wastepaper, whether downgrade NBSK pulp is synonymous with wastepaper and whether the defendants in fact provided plaintiff with a grade of NBSK pulp or wastepaper.

With respect to Avis Afshar individually, it is well settled officers of a corporation may be held personally liable for the debts of the corporation when the officers themselves act tortiously or under the doctrine of piercing the corporate veil. **Walkovszky v. Carlton, 18 N.Y.2d 414, 276 N.Y.S.2d 585 (1966).** "Whenever anyone uses control of a corporation to further his own rather than the corporation's business, he will be responsible for the corporation's acts." Id. A plaintiff seeking to "pierce the corporate veil" to impose liability on corporation's owners must demonstrate that a court in equity should intervene because the owners exercised complete domination over the corporation in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff. **East Hampton Union Free School District v. Sandpebble Builders, Inc., 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009)** Factors to be considered in determining whether corporation's owner has abused the privilege of doing business in the corporate form so as to permit "piercing the corporate veil" and impose personal liability on owner for corporation's obligations include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. **Id.; see also, Ruti v. Knapp, 193 A.D.2d 662, 598 N.Y.S.2d 50 (2d Dept. 1993).**

Defendants' allege that Avis Afshar, as president of Universal and J&D is entitled to a shield of liability. Defendants rely only on Avis Afshar's testimony that although he created fictitious pen names to execute invoices and correspondence, he was acting on behalf of the corporations throughout the transaction at issue and has not committed a fraud against plaintiffs to justify piercing the corporate veil. Defendants have not met their prima facie burden of proof with respect to Avis Afshar individually. Particularly, whether Avis Afshar complied with corporate formalities or perpetrated a fraud in creating and utilizing two fictitious employees to execute invoices and engage in correspondence in the course of business.

Plaintiffs in opposition have shown the existence of triable issues of fact to preclude summary judgment in favor of defendants on plaintiff's claims for breach of contract and defendants have failed to meet their prima facie burden for summary judgment in their favor with respect to the personal liability of Avis Afshar. Accordingly, the branch of defendants' motion seeking summary judgment on plaintiffs breach of contract claims against Universal, J&A and Avis Afshar is denied.

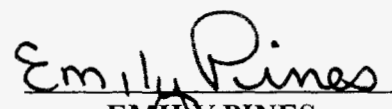
Defendants assert they are entitled to summary judgment to dismissing plaintiff's claims for fraud against Universal, J&A and Avis Afshar individually. In a cause of action for fraud, the plaintiff has the burden of proving a misrepresentation or material omission of a fact, which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance on the misrepresentation or omission by the plaintiff, and injury. Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 836 N.Y.S.2d 509 (2007). A cause of action alleging fraud does not lie where the only fraud claim related to a breach of contract. WIT Holding Corp. v. Klein, 282 A.D.2d 527, 724 N.Y.S.2d 66 (2d 2001). However, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud. Id.

Here, defendants contend that plaintiff's causes of action for fraud are merely duplicative of plaintiff's causes of action for breach of contract. Plaintiff's cause of action for breach of contract is based on the parties' alleged contract to buy and sell NBSK, when in fact defendants provided stocklot NBSK or wastepaper. Similarly, plaintiff's cause of action for fraud is based on defendants' representation that they would provide NBSK when in fact they provided stocklot NBSK or waste paper. Defendants further allege, arguendo, if plaintiff's fraud claims are treated as separate and distinct from plaintiff's breach of contract claims, plaintiff's fraud claims must still fail as a matter of law because plaintiff cannot sustain its burden of proving a representation by defendant that was false and known to be false, made for the purpose of inducing the plaintiff to rely upon it. Defendants argue that they never represented to plaintiff they were selling NBSK. Rather, defendants represented that they were selling stocklot NBSK, which is a downgrade NBSK or a variation of wastepaper. Defendants' arguments are evidenced by the deposition testimony of Avis Afshar and Marcus Westerlind, as well as, the correspondence and invoices between plaintiff and defendant. Therefore, defendants have met their prima facie burden of entitlement to summary judgment on plaintiff's causes of actions for fraud.

In opposition, plaintiff reiterates their conclusory statement that defendants intentionally provided the plaintiff with wastepaper. Plaintiff does not provide any proof of false statements by defendants, which were known to be false and made to induce plaintiff to rely upon them. Plaintiff does allege that defendant created two fictitious pen names to conduct business transaction and defendants' mill for packaging the materials was packaged by Afshar's brother. However, plaintiff does not show how these false statements induced plaintiff to engage in the transaction at issue. Plaintiff has failed to raise any disputed triable issues of fact with respect to their causes of action for fraud. Accordingly, defendants' motion for summary judgment dismissing plaintiff's causes of action for fraud and punitive damages against Universal, J&A and Avis Afshar is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 26, 2011
Riverhead, New York


EMILY PINES
J. S. C.

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