

Royal Heritage Home, LLC v MNH Exports Ltd.

2011 NY Slip Op 32895(U)

October 25, 2011

Sup Ct, Nassau County

Docket Number: 009073-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ROYAL HERITAGE HOME, LLC,

Plaintiff,

-against-

**MNH EXPORTS LTD, NEETEX INTERNATIONAL
INC., MUHAMMAD KHAN, and JOHN DOE,**

Defendants.
-----X

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 009073-11
Motion Seq. No. 2
Submission Date: 9/13/11**

The following papers having been read on this motion:

- Notice of Cross Motion, Affidavit in Opposition/Support,
Affirmation in Opposition/Support and Exhibits.....X**
- Memorandum of Law in Opposition/Support.....X**
- Affirmation in Opposition and Affidavit in Opposition.....X**
- Reply Affirmation in Further Support,
Reply Affidavit in Support and Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Defendant Muhammad Khan ("Khan") on July 28, 2011 and submitted on September 13, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Khan moves for an Order, 1) pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing the Verified Complaint ("Complaint"); or 2) pursuant to CPLR § 3212, granting summary judgment dismissing the Complaint.

Plaintiff Royal Heritage Home, LLC ("Royal" or "Plaintiff") opposes Khan's motion.

B. The Parties' History

The Complaint¹ alleges that Royal is in the business of supplying and branding bedding and other goods to companies who supply local and national retail chains. Defendant MNH Exports Ltd. ("MNH"), whose primary place of business is in Pakistan, is a company that is in the business of manufacturing bedding and other goods. Defendant Neetex International, Inc. ("Neetex") is a foreign corporation formed under the laws of the State of California that is not licensed to do business in New York, and maintains an office in Elmont, New York. Defendant Muhammad Khan ("Khan") is the agent of MNH and Neetex, as well as the agent of Defendant John Doe, who allegedly created Neetex to collect funds in the United States for MNH and Khan.

The Complaint contains three (3) causes of action which are breach of contract, fraud and conversion. The causes of action relate to orders placed by Royal with MNH and Neetex on December 14, 2010 and February 2, 2011 for which Khan acted as the agent of the Defendant entities. Royal made payments to Neetex, towards these orders, and alleges that Defendants MNH, Khan and John Doe, *inter alia*, 1) willfully and intentionally substituted inferior goods for those previously approved; 2) failed to ensure that the correct goods were shipped; 3) failed to retrieve the conforming goods; 4) subsequently ceased contact with Plaintiff; and 5) maintain Plaintiff's funds totaling \$572,045.41 for the orders, which they have converted to their own use.

In support of Defendants' cross motion, Khan affirms that he is an independent contractor who makes his living by assisting textile buyers in the United States ("US") source products such as sheets, comforters, towels and other textile goods from companies based in Pakistan. Khan avers that he is a native of Pakistan residing in the U. S. and is "familiar with the customs, practices, and language of both nations and serve[s] as a facilitator and liaison between US textile buyers and textile manufacture[r]s based in Pakistan" (Khan Aff. at ¶ 5).

Khan affirms that, when working as an independent contractor with US buyers purchasing goods from Pakistan, an importer such as Plaintiff Royal sends an inquiry regarding the price for certain goods from Pakistani manufacturers. The US-based company decides which

¹ The Complaint is annexed as Exhibit A to Plaintiff's Order to Show Cause, motion sequence # 1, which is returnable before the Court on November 29, 2011. The motion that is the subject of this decision is titled a "cross motion," as it was submitted in response to Plaintiff's Order to Show Cause.

Pakistani company it wishes to purchase the goods from and the final terms are negotiated by the US buyer and Pakistani manufacturer. Khan's role has been to place US buyers in touch with these manufacturers, to facilitate the transaction and to address issues that may arise between the two companies.

Khan affirms that he has worked with Royal for over 13 years by assisting it in obtaining textile goods from Pakistani-based manufacturers. He avers that he is not a partner, officer or shareholder in any of the named corporate Defendants, does not have an ownership interest in those entities and is not involved in their business operations, except that Khan's home address in New York is used for mailings "for purposes of transactions conducted with New York based textile buyers" (Khan Aff. at ¶ 19). Khan provides a printout from the California Secretary of State dated July 22, 2011 (Ex. B to Khan Aff.) which reflects that Neetex's date of filing was April 19, 2005, and that it is currently in "suspended" status. He also affirms, upon information and belief, that MNH is a foreign company based in Pakistan.

With respect to the dispute that forms the basis of the Complaint, Khan affirms that he acted as an "intermediary" (Khan Aff. at ¶ 11) between MNH and Royal and attempted to resolve the matter "as a neutral third-party" (*id.*). Khan avers that his only contact with Royal is with Jeffrey Tauber ("Tauber"), Royal's Chief Executive Officer, who allegedly is aware of Khan's position as an independent contractor. Khan provides copies of an email exchange between Tauber and Khan dated June 13, 2011 which contains the subject line "MNH still has no response to this serious issue???" (Khan Aff. at Ex. C). Khan provides another email from Tauber dated May 27, 2011 which, he submits, reflects Tauber's praise of Khan for his efforts and his communication with Khan regarding his legal strategy with respect to MNH and Neetex.

Khan also affirms that Royal retained him on occasion to perform independent third-party inspections of goods ordered from Pakistani manufacturers. Khan provides an email dated December 5, 2009 from Tauber to Khan (Khan Aff. at Ex. E) in which Tauber advised Khan that he had ordered towels from a factory in Karachi and offered Khan \$1500 "to following progress and do the final inspection." Khan also provides, *inter alia*, a December 7, 2010 email exchange with Tauber (*id.* at Ex. G) that includes a negotiation of Khan's commission.

Khan submits that the documentation provided establishes that he acted as an independent contractor, rather than an officer or employer of MNH and/or Neetex. He affirms

that he does not have access to the corporate bank accounts or records of those entities and never received a portion of any funds that Plaintiff transferred to the accounts of MNH and Neetex which are the subject of this dispute.

In opposition, Tauber affirms that Khan's affidavit contains "many misconceptions of facts" (Tauber Aff. in Opp. at ¶ 3) and submits that Khan has a closer relationship to MNH and Neetex than he has described. Tauber affirms that he is the President of Royal which is in the business of supplying bedding and other products for sale to national and local retail chains. Royal supplies products under its own proprietary brand names as well as to third parties under their own brand names, pursuant to the third parties' required specifications.

Tauber affirms that Khan and MNH had a relationship with Royal prior to the date that Tauber began working with Royal. Prior to Tauber's employment with Royal, Royal placed its orders with MNH through Khan. When Tauber began working for Royal, Tauber believed that Khan had an ownership interest in MNH and Neetex based on the fact that 1) MNH's accounts receivable were collected through Neetex, which listed its billing address as Khan's home address; 2) during meetings, Khan posed and answered questions on behalf of MNH; 3) Tauber never paid Khan a commission or any other compensation for his services, and no such payment was reflected on any bills; 4) the \$1,500 payment to which Khan refers in his affidavit concerned a separate matter regarding a different vendor; 5) Khan's reference to orders he assisted Royal in obtaining from other manufacturers ("Other Orders") are not relevant to this action, as they were "anomalies" accounting for "approximately 2% of the goods" for which Khan took orders (Tauber Aff. in Opp. at ¶ 10), and were items that were obtained elsewhere because MNH did not manufacture them; and 6) Royal did not pay Khan a commission on the Other Orders, and Tauber submits that Khan had a vested interest in filling the Other Orders because it ensured that Royal continued to conduct business with MNH.

As to the allegations in the Complaint, Tauber confirms that two orders were sent to MNH on December 13, 2010. As was Royal's practice, the orders were placed with MNH through Khan, and Khan was to ensure that the orders were filled correctly. Royal approved the orders in two stages, the first consisting of submitting swatches for color and fabric approval, and the second consisting of the commencement of production and submitting actual production samples for approval. Royal received and approved these samples. At this point, the goods

shipped should be identical to the approved production samples. Tauber submits that any change in the goods shipped would be “the result of an underhanded ‘bait and switch’ of fabrics and final production goods” and contends, on information and belief that Khan “orchestrated this ‘bait and switch’ and fraud” (Tauber Aff. in Opp. at ¶ 15).

Tauber also avers that payment terms involved an initial deposit with the remainder of the first half due prior to production and the remaining payment due on shipment. As with prior orders, Neetex submitted the bill which directed that payment be sent to Khan’s home address in New York. Based on Khan’s representation that the goods shipped were identical to those approved and that he had personally inspected them and ensured that they were correct, Royal paid a total of \$535,901.41 for the two orders to Neetex, and sent those payments to Khan’s home.

Tauber affirms that when he examined the shipments, the goods were “visibly nonconforming” (Tauber Aff. in Opp. at ¶ 19) in that there was no uniformity in color and the fabric appeared to be of a lower quality thread count and cotton blend. Royal conducted a “forensic analysis” of the goods (*id.* at ¶ 20) which revealed that the goods were approximately 95% polyester and only 5% cotton, and had a thread count of as low as 59. Tauber immediately contacted Khan to request conforming goods or, alternatively, to require Khan to retrieve the allegedly nonconforming goods. Khan refused to ship conforming goods or cure the alleged breach. Royal cancelled any pending orders and requested that its deposits of \$36,144.00 be returned. Tauber affirms that Defendants have refused to compensate Royal for their breach and have “converted our \$535,901.41 together with any deposits they still hold” (*id.* at ¶ 27).

Tauber avers further that Royal has lost profits of approximately \$455,000.00 on the orders.

In reply, Khan, while conceding that his home address was listed on Neetex’s invoices, affirms that this was done “strictly for mailing purposes” (Khan Reply Aff. at ¶ 5). Khan denies any ownership interest in Neetex and notes in support that 1) Royal’s bank records (Ex. B to Khan Reply Aff.) reflect that payments were made through wire transfers and/or bank deposits and payments were never sent to Khan’s home; 2) Khan received an Internal Revenue Service tax form 1099 from Neetex (*id.* at Ex. C), reflecting his status as an independent contractor; 3) Neetex’s Workers Compensation Election of Coverage (*id.* at Ex. E) lists three officers, none of whom is Khan; and 4) Neetex’s 2008 tax returns (*id.* at Ex. F) lists Navid Karim Chaudhry

(“Chaudhry”) as the sole shareholder and do not contain Khan’s home address. Khan also provides a series of emails between Chaudhry and Tauber (*id.* at Exs. I-N) that, he submits, demonstrate that the dispute at issue involves moneys owed by Royal to MNH. Finally, Khan provides emails between Tauber and him (*id.* at Exs. O-Q) that, he argues, demonstrate that Tauber never believed that Khan had a financial interest in MNH and/or Neetex.

C. The Parties’ Positions

Khan submits that he is entitled to dismissal of the Complaint in light of the fact that the Khan affidavit and documentary evidence provided establish that Khan acted as an independent agent. Khan contends that the fact that Neetex’s invoices to Royal listed Khan’s home address as Neetex’s mailing address in the United States does not establish that Khan had a financial stake in Neetex, and submits that the remaining documentary evidence, including the tax returns and tax form 1099, establish Khan’s role as an independent contractor and mandate dismissal of the action against Khan.

Plaintiff opposes Khan’s application, submitting that Khan has not demonstrated his right to dismissal pursuant to CPLR § 3211, or summary judgment dismissing the action pursuant to CPLR § 3212, in light of evidence of his involvement in the transactions at issue, including but not limited to the following: 1) Royal placed the orders through Khan; 2) Khan and MNH directed that payment be made to Neetex at Khan’s home address, and it “strikes at logic to conclude a private person who maintains a corporation’s address at his personal home has no ownership interest in the corporation” (Gresio Aff. in Opp. at ¶ 14); 3) prior to shipment of the goods at issue, Khan provided preliminary samples of the fabric, and subsequent production samples of the actual goods ordered were shipped by Khan and approved by MNH; and 4) Khan’s affidavit does not constitute documentary evidence for purposes of a CPLR § 3211(a) motion. Plaintiff submits that it has stated a cause of action against Khan in light of the allegations that Royal placed an order with Khan for specific goods, for which Royal made payment, based on the understanding that the production samples were identical to those that would be shipped and Khan breached the parties’ agreement by failing to deliver conforming goods and intentionally substituting inferior goods.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005). An affidavit does not constitute documentary evidence for purposes of CPLR § 3211(a)(1). *HSBC Bank, USA v. Pugkhem*, 2011 N.Y. App. Div. LEXIS 6950, ** 5-6 (2d Dept. 2011), citing *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 85 (2d Dept. 2010) and *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347 (2d Dept. 2003).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

C. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id* at 50.

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

D. Application of these Principles to the Instant Action

The Court denies Khan's motion based on the Court's conclusion that the Complaint adequately states causes of action for breach of contract, fraud and conversion, and Khan has not established his right to judgment dismissing the Complaint, in light of Plaintiff's allegations that 1) the parties entered into agreements for the delivery of goods based on Defendants' representation regarding the quality of those goods; 2) notwithstanding Defendants' alleged inspection of those goods and assurance to Plaintiff as to the nature and quality of those goods, nonconforming goods were delivered to Plaintiff; and 3) Defendants failed to cure the alleged breach or return the sums paid to Plaintiff. The Court concludes that the Complaint sufficiently alleges Khan's involvement in these transactions and, while mindful of the issues raised by the documentary evidence and Khan affidavit regarding the nature of Khan's relationship to the

Defendant entities, thus concludes that the Complaint states causes of action against Khan.

All matters not decided herein are hereby denied.

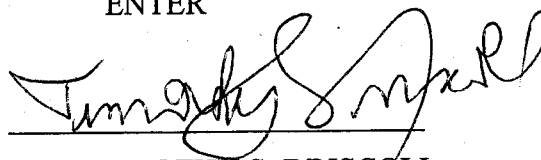
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 29, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 25, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE