

Luxury Fashion Inc. v Stein Mart Buying Corp.

2013 NY Slip Op 32499(U)

October 10, 2013

Sup Ct, NY County

Docket Number: 154911/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Index Number : 154911/2013
LUXURY FASHION INC.
vs
STEIN MART BUYING CORP.
Sequence Number : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ No(s). 4, 5

Replying Affidavits _____ No(s). 6

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/10/13


_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

LUXURY FASHION INC.,

Plaintiff,

- v -

STEIN MART BUYING CORP.,

Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
154911/2013

**DECISION
and ORDER**

Mot. Seq. 001

This is a case for breach of contract arising from defendant Stein Mart Buying Corp.'s ("Defendant") purchase of merchandise from Plaintiff Luxury Fashion Inc. ("Plaintiff"). It is alleged that Plaintiff is in the business of manufacturing and selling apparel goods for resale and that Defendant is a fashion retail chain.

Presently before the Court is Defendant's motion to dismiss the Complaint, pursuant to CPLR §3211(a)(1) and (7). Plaintiff opposes.

The Complaint alleges that "[p]rior to October 15, 2012, Plaintiff and Defendant entered into an agreement in writing, i.e. the Purchase Order, whereby Plaintiff agreed to sell and deliver, and Defendant agreed to take in, accept, and pay for 4,644 units of goods at the total price of \$45,279.00." The Complaint alleges that pursuant to the Purchase Order, on or about November 14, 2012, Plaintiff sold and delivered, and Defendant accepted and paid for 1,476 units of the goods for a total of \$14,391.00. The Complaint further alleges that Defendant refused accept the remaining 3,168 units of goods ordered and pay the remaining \$30,888.00, and therefore, that Defendant breached the Purchase Order.

Defendant now moves to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7).

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence;
- (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007][citation omitted]).

Here, in support of Defendant’s motion to dismiss, Defendant submits the affidavit of Susan McAbee, who is employed as a buyer by Defendant. Defendant states that Defendant’s purchase orders contain express language incorporating its “Standard Terms and Condition of Purchase”, which include a provision allowing

Defendant to cancel a purchase order for any reason, as follows:

Stein Mart shall have the right to cancel this order without cause so long as notice of cancellation has been received by Seller prior to Seller's shipment of such Products to Stein Mart. Stein Mart may, at its option, cancel this order without liability to Seller (except for conforming shipments previously accepted by Purchaser) in the event Seller shall cease to exist or become insolvent or the subject of bankruptcy or insolvency proceedings or shall commit a material breach in the performance of any part of its obligations hereunder.

Defendant argues that the Purchase Order in which Defendant offered to purchase various units of pants from Plaintiff expressly incorporated the Standard Terms and Conditions of Purchase and allowed Defendant to cancel any order without cause so long as notice of cancellation had been received by Plaintiff. Defendant contends that as stated in the Purchase Order, Plaintiff agreed not to ship any items to Defendant earlier than October 22, 2012 nor later than October 26, 2012.

Defendant contends that it thereafter exercised its right under its Standard Terms and Conditions of Purchase, as incorporated into the Purchase Order, to cancel its order of 1,188 units of violet pants and 1,980 units of pink pants by sending an email to Plaintiff on October 10, 2012, in which Defendant wrote, "We will not confirm, due to poor selling: Violet 1188 units [and] Power Pink 1980 units." However, as Plaintiff contends, the word "cancelled" is absent from Defendant's e-mail.

Accepting allegations as true, the four corners state a claim as against Defendant for breach for contract. Furthermore, Defendant's submission does not flatly contradict the legal conclusions and factual allegations of the complaint.

Wherefore, it is hereby,

ORDERED that Defendant's motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER 10, 2013

A handwritten signature in black ink, appearing to read 'ER', written over a horizontal line.

EILEEN A. RAKOWER, J.S.C.