SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

Index Number : 650802/2013
MAESA LLC
vs
JOUER COSMETICS LLC
Sequence Number : 001
DISMISS

PART 3

INDEX NO. 650802/2013
MOTION DATE 10/28/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1
Answering Affidavits — Exhibits ____ | No(s). 2
Replying Affidavits ____ | No(s). 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-6-14

Eileen Bransten J.S.C.

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: IAS PART THREE

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MAESA LLC,

Plaintiff,

-against-

JOUER COSMETICS LLC,

Defendant.

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Index No. 650802/2013
Motion Date: 10/28/2013
Motion Seq. No.: 001

BRANSTEN, J.

This action stems from Defendant Jouer Cosmetics LLC's ("Jouer") purchase of lip gloss vials from Plaintiff Maesa LLC ("Maesa"). Maesa claims that Jouer failed to pay for the vials, in breach of its contract. Jouer counterclaims, *inter alia*, that Maesa made misrepresentations regarding the composition of the vials, which fraudulently induced Jouer to enter into the parties' contract. Further, Jouer counterclaims that certain disclaimers and limitations in the contract are unconscionable.

Maesa now seeks dismissal of Jouer's counterclaims, as well as Jouer's affirmative defenses and demand for punitive damages. Jouer opposes. For the reasons that follow, Maesa's motion to dismiss is granted in part and denied in part.

I. Background

Jouer is in the business of selling cosmetics and beauty supplies. (Answer ¶ 3.) Before launching its new line of lip gloss, Jouer placed an order with Maesa, a producer of cosmetic supplies, for vials to be used to package the lip gloss for sale. (Counterclaims ¶ 2.) According to Jouer, the vials delivered by Maesa were made of an inferior plastic that cracked when filled with product. *Id.* ¶ 5.

Before placing its order, Jouer alleges that it met several times with Maesa to design the vials. (Counterclaims ¶ 19.) During these meetings, Jouer purportedly discussed its intended use for the containers and furnished specifications for its lip gloss to enable Maesa to design vials compatible with the product. *Id.* ¶ 20. Maesa then provided Jouer with technical drawings of the vials, which stated that the containers would be manufactured out of acrylonitrile butadiene styrene ("ABS") plastic. *Id.* ¶ 21.

Based on Maesa's assurances, technical drawings, and subject to the results of lab tests performed on pre-production samples prior to delivery, Jouer and Maesa executed a purchase order for the vials. *Id.* ¶ 22. The purchase order, like the technical drawings, stated that the vials would be manufactured out of ABS plastic. *Id.* Consistent with this representation, the pre-production samples were analyzed by Jouer's laboratory and were found to be comprised of ABS plastic and compatible with Jouer's lip gloss. *Id.* ¶ 23.

Concurrent with the execution of the purchase order, Maesa began taking orders for the lip gloss from several online retailers and committed to a television promotion. *Id.* ¶ 28. Upon receiving the vials from Maesa, Jouer then sent them to its filler vendor to begin the process of fulfilling the orders it had received. *Id.* ¶ 32.

After the filler vendor filled all of the vials – and after Jouer began shipping the lip gloss to its customers – the vendor informed Jouer that cracks were beginning to appear at the necks of the containers. *Id.* ¶ 34. Jouer informed Maesa of the cracking and sent the vials to its laboratory for testing. The laboratory test revealed that vials were not manufactured from ABS plastic but instead from an inferior polycarbonate plastic. *Id.* ¶ 36. The laboratory also determined that the polycarbonate plastic was the cause of the vial cracking. *Id.*

Although it initially denied any problems with the vials, Maesa later acknowledged that the containers were defective and offered to replace them with vials conforming to the technical specifications and purchase order agreed upon by the parties. *Id.* ¶¶ 38-39. Shortly thereafter, Maesa delivered the replacement vials; however, testing of the replacements confirmed that, like the original vials, they were made of polycarbonate plastic, not ABS. *Id.* ¶ 41.

Jouer notified Maesa that the vials were once again made from the wrong material. *Id.* ¶ 42. This time, Maesa asserted that the vials were not the issue, instead attributing

the cracking to the wiper located at the neck of the vial. *Id.* In response, Jouer tested several different types of wipers and determined that regardless of the type of wiper, the ABS vials did not crack. *Id.* ¶ 43. However, the polycarbonate plastic vials cracked with either type of wiper. *Id.*

While Jouer notified Maesa of its test results, Maesa refused to replace the non-conforming containers with ABS vials and demanded payment from Jouer for them. *Id.* ¶ 46. Since Maesa was not willing to produce ABS containers, Jouer asserts that it was forced to make other arrangements to meet its pending orders, including procuring more expensive vials. *Id.* ¶ 47.

On March 7, 2013, Maesa commenced this action, bringing breach of contract and declaratory relief claims against Jouer. With its answer, Jouer interposed six counterclaims and seventeen affirmative defenses.

II. Discussion

Maesa now seeks dismissal of two of Jouer's six counterclaims – fraudulent inducement and unconscionability – as well as Jouer's demand for punitive damages. In addition, Maesa argues for dismissal of Jouer's affirmative defenses. Each of Maesa's arguments will be addressed below in turn.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003).

Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Fraudulent Inducement*

In its first counterclaim, Jouer alleges that Maesa's representations regarding the composition of the vials fraudulently induced it to enter into the purchase order transaction. Jouer points to Maesa's representations regarding ABS plastic in the technical drawings, as well as its provision of pre-production samples comprised of ABS plastic, in support of its claim. "To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury." *Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 81(1st Dep't 2010).

Maesa first attacks Jouer's fraud pleading as duplicative of its breach of contract claim. Maesa contends that Jouer's fraud claim distills down to the assertion that Maesa knew from the outset that it would not honor the contract specifications. A fraud claim based on such general allegations would be duplicative. *See First Bank of Am. v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep't 1999) ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the

only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.").

However, this is not Jouer's claim. Jouer does not simply plead that Maesa entered into the transaction while harboring the intent not to perform. Jouer alleges that it was induced to enter into the transaction by Maesa's misrepresentation of a present material fact – that the vials to be sold to Jouer were comprised of ABS plastic. Such a pleading states "a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim." *Id.* at 291-92. "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dep't 2011) (internal citations omitted); *see also Deerfield Commc'n Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 1004 (1986). Accordingly, Jouer's fraud claim as pleaded is not duplicative of its breach of contract claim.

Maesa next challenges Jouer's pleading of justifiable reliance, arguing that Jouer failed to make reasonable efforts to protect itself against the alleged ABS plastic misrepresentation. Maesa contends that Jouer's post-transaction conduct, vitiates any showing of justifiable reliance, pointing specifically to Jouer's failure to exercise its

contractual right "to inspect the vials upon delivery to determine the conformity of the goods." (Moving Br. at 7.)

Although Maesa focuses on Jouer's post-transaction acts, Jouer's failure to test the vials after delivery does not render its reliance on Maesa's pre-transaction representations unreasonable as a matter of law. Jouer pleads that Maesa represented both orally and in the technical drawings that the vials would be made from ABS plastic. This representation was repeated in the parties' agreement. Further, the parties' agreement was made contingent on Jouer's performance of lab tests on pre-production samples provided by Maesa to confirm that the samples were made of ABS. Jouer performed such tests, finding that the vials were made of ABS. This pleading is sufficient to state justifiable reliance. While "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification available to it," *see HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185,194-96 (1st Dep't 2012), here Jouer pleads that it made use of the means available by testing the pre-production samples provided by Jouer. Therefore, at this preliminary stage, the Court concludes that Jouer has sufficiently pleaded justifiable reliance, and that Maesa's attacks on the sufficiency of Jouer's fraudulent inducement counterclaim fail.

C. *Unconscionability*

Jouer's third counterclaim asserts that the limitations in Maesa's Terms & Conditions are unconscionable under Article 2 of the Uniform Commercial Code. Jouer pleads that these Terms & Conditions "were drafted solely by Maesa, and purport to (i) disclaim Maesa's warranties (including the implied warranties of fitness and merchantability; (ii) limit Jouer's ability to seek any redress for Maesa's delivery of non-conforming or damaged goods; and, (iii) limit Maesa's liability for the damages caused by the goods." (Counterclaims ¶ 73.)

To survive a motion to dismiss, the proponent of an unconscionability claim must plead facts supporting both procedural and substantive unconscionability. *Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc. L.L.C.*, 72 A.D.3d 456, 457 (1st Dep't 2010). Procedural and substantive unconscionability generally requires "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988).

Here, Jouer has not pleaded any facts regarding a lack of meaningful choice regarding the Terms & Conditions at issue. *See Accurate Copy Serv.*, 72 A.D.3d at 457 (affirming dismissal of unconscionability claim where "plaintiffs failed to plead anything regarding an alleged lack of meaningful choice" regarding the contractual terms at issue).

Further, the counterclaim does not plead that Jouer was "coerced in any way to enter into that specific transaction." *Wachovia Sec., LLC v. Joseph*, 56 A.D.3d 269, 270 (1st Dep't 2008). While the Terms & Conditions were drafted by Maesa, Jouer has not pleaded that it lacked any meaningful choice with regard to entering into a contract incorporating such terms. In the absence of such a pleading, Jouer's claim fails to state a claim.

Moreover, even if Jouer had made some pleading as to elements listed above, the Court notes that "the doctrine of unconscionability rarely applies in a commercial setting, where the parties are presumed to have equal bargaining power." *Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 87 A.D.3d 850, 856 (1st Dep't 2011) (citing *Gillman*, 135 A.D.2d at 491). The parties to the instant agreement are merchants and are presumed to be sufficiently able to protect their own interests. *See Scotts Co., LLC v. Ace Indem. Ins. Co.*, 51 A.D.3d 445, 446 (1st Dep't 2008). Jouer has pleaded nothing to the contrary.

Accordingly, Jouer's third counterclaim is dismissed.

D. *Damages*

Maesa next seeks to strike two of the damages demands in Jouer's counterclaims. First, Maesa moves to dismiss Jouer's demand for lost profits damages for its fraudulent inducement claim. Next, Maesa asks that the Court dismiss Jouer's request for punitive damages.

1. Lost Profits Damages

Maesa contends that New York's "out-of-pocket" damages rule forecloses Jouer's attempt to recover "lost profits" on its fraudulent inducement counterclaim. For a fraud claim, "[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996) (internal citations omitted).[1] Under the rule, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained." *Id.* Maesa contends that Jouer's "lost profits" claim seeks recovery for the profits it would have made had the vials been conforming and thus runs afoul of the "out-of-pocket" rule.

Jouer states that its claim "stems from the cancellation of outstanding orders with retails [sic] that could only be fulfilled by using the [v]ials Maesa provided pursuant to [the purchase order]." *See* Jouer's Opp. Br. at 15. However, recovery of potential profits from these cancelled orders is squarely prohibited under the rule. "The recovery of

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[1] Jouer contends in its brief that California law governs its lost profits damages demand. However, Jouer points to no conflict between New York and California law on this point. "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993)."In the absence of substantive difference ... a New York court will dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it." *Harbinger Capital Partners Master Fund I v. Wachovia Capital Markets*, 27 Misc.3d 1236(A), at *9 (Sup.Ct. N.Y. Cty.2010) (quoting *Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir.2004)). Accordingly, the Court will apply New York law to Jouer's damages demand.

consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud." *Lama Holding Co.*, 88 N.Y.2d at 423; *see MTI/The Image Group, Inc. v. Fox Studios East, Inc.*, 262 A.D.2d 20 (1st Dep't 1999) (affirming dismissal of lost profits damages demand where plaintiff sought the $6 million in lost profit it would have gained under the transaction; "Lost profits are not recoverable under a fraud theory."); *Foster v. Di Paolo*, 236 N.Y. 132, 134 (1923) (reversing granting of lost profits on fraud claim because "[t]he question was what did [plaintiff] lose by being deceived into making the contract to purchase the cider. The true measure of damage in an action for fraud is indemnity for the actual pecuniary loss sustained as the direct result of the defendants' wrong. It does not include profits which he could have made on contracts with third parties."). Thus, Jouer's potential recovery is limited to damages that would restore to it to the position it occupied before Maesa's purported misrepresentations, rendering lost profits inapplicable.

2. Punitive Damages

Maesa next objects to Jouer's punitive damages demand, arguing that such damages are unavailing under the fraud claim as pleaded.

"Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the

same conduct in the future." *Ross v. Louise Wise Serv., Inc.*, 8 N.Y.3d 478, 489 (2007). To support such a claim for exemplary damages, it is not sufficient to simply plead that the alleged wrongdoing was intentional; instead, punitive damages "require a demonstration that the wrong complained of rose to a level of such wanton dishonesty as to imply a criminal indifference to civil obligations." *Weiss v. Lowenberg*, 95 A.D.3d 405, 407 (1st Dep't 2012). Accordingly, "[t]he misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights." *Ross*, 8 N.Y.3d at 489 (internal citations omitted). The wrongdoing asserted here, while serious, fails to rise to this heightened threshold for punitive damages. Jouer has pleaded that Maesa fraudulently induced it to enter into a purchase contract based on intentional misrepresentations. Such allegations, however, do not demonstrate the "requisite level of culpability" to sustain a punitive damages demand. *See 164 Mulberry Street Corp. v. Columbia Univ.*, 4 A.D.3d 49, 60 (1st Dep't 2004). Therefore, Jouer's demand for punitive damages is stricken.

E. *Affirmative Defenses*

Finally, Maesa contends that three of Jouer's affirmative defenses are conclusory and thus should be stricken from the answer: laches, estoppel, acquiescence, waiver, release, and/or unclean hands (second affirmative defense); *in pari delicto* (third affirmative defense); and, unjust enrichment (sixteenth affirmative defense). Notably, Maesa's argument in support of dismissal of these affirmative defenses is itself conclusory and provides no basis for dismissal aside from the bare statement that the defenses merely plead a legal conclusion. Review of the entirety of Jouer's answer and counterclaims, however, reveals that sufficient basis has been alleged at this preliminary juncture to allow Jouer's second, third, and sixteenth affirmative defenses to remain in the answer. *See* Counterclaims ¶¶ 20-27, 34-46. Thus, Maesa's motion to dismiss Jouer's second, third, and sixteenth affirmative defenses is denied.

The Court has considered the remainder of Maesa's arguments and finds them to be without merit.

III. Conclusion

Accordingly, it is

ORDERED that Counterclaim-Defendant Maesa LLC's motion to dismiss is granted as to Counterclaim Three, Jouer Cosmetics LLC's lost profits damages demand,

and Jouer Cosmetics LLC's punitive damages demand, and is otherwise denied; and it is further

ORDERED that Counterclaim-Defendant Maesa LLC is directed to serve an answer to the counterclaims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on February 11, 2014, at 10:00 A.M.

Dated: New York, New York
January 6, 2014

Hon. Eileen Bransten, J.S.C.