EPF Intl. Ltd. v Lacey Fashions Inc.
2019 NY Slip Op 30279(U)
February 5, 2019
Supreme Court, New York County
Docket Number: 153154/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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EPF INTERNATIONAL LIMITED,

Plaintiff,

- v -

LACEY FASHIONS INC.,

Defendant.

INDEX NO. 153154/2016
MOTION SEQ. NOS. 002 and 003

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion for REARGUMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to QUASH SUBPOENA.

Motion sequences 002 and 003 are consolidated for disposition. Upon the foregoing documents, it is ordered that the motions are **decided as follows**.

The instant action involves a dispute over the payment of goods between a buyer and seller. In motion sequence 002, defendant-buyer Lacey Fashions Inc. ("Lacey Fashions") moves, pursuant to CPLR 2221(d), for leave to reargue a prior decision of this Court that granted plaintiff-seller EPF International Limited ("EPF International") summary judgment on its second cause of action for damages in the amount of $59,050.42 for unpaid goods on the basis of an account stated.

Subsequent to the prior decision, EPF International served a subpoena duces tecum ("subpoena") and an information subpoena on non-party Elliott Brill ("Brill")—the alleged last

known officer or director of Lacey Fashions—in an attempt to enforce the money judgment rendered by this Court's prior decision.

In motion sequence 003, Brill moves, pursuant to CPLR 5223, 5224, and 5240, to quash EPF International's subpoena. In the alternative, Brill requests that this Court limit the subpoena's scope. EPF International opposes the motion and cross-moves, under CPLR 5223 and 5251, to compel Brill to appear for a post-judgement deposition in compliance with the subpoena, to produce any and all demanded documents, and to answer all of the questions contained in the information subpoena.

After oral argument, and after a review of the motion papers and the relevant statutes and caselaw, it is ordered that the motions are **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case have been set forth at length in a prior decision of this Court issued on October 29, 2017. (Doc. 57.) In that decision, this Court granted plaintiff EPF International summary judgment on its second cause of action for damages in the amount of $59,050.42 for unpaid goods on the basis of an account stated. (Docs. 51 at 8–9; 57 at 6.)

In determining whether EPF International established its prima facie entitlement to judgment as a matter of law, this Court found: (1) that EPF International had sent Lacey Fashions several invoices requesting the payment of goods that were delivered in 2014 and 2015; (2) that Lacey Fashions did not dispute the validity of the invoices; and (3) that Lacey Fashions made two partial payments in November of 2015 totaling $10,010.00. (*Id.* at 2.)

In opposition to EPF International's summary judgment motion, Lacey Fashions submitted an affidavit by non-party Brill—its former chief executive officer—who stated that he did not

remember receiving the invoices (Doc. 53 at 2) and that, because the invoices did not include a past balance, he would need to review every invoice exchanged between the parties over their 15-year relationship to determine whether Lacey Fashions indeed owed any money (*id.* at 3). Lacey Fashions also contended that EPF International had failed to establish that the invoices were delivered during EPF International's regular course of business (*id.* at 48–49), and that an affidavit submitted by Chan Chi Yau ("Yau"), EPF International's executive director, was inadmissible evidence due to her lack of personal knowledge of the invoices' transmittal (*id.* at 47–48). Last, Lacey Fashions argued that there was an issue of fact as to the amounts owed to EPF International (*id.* at 53–55) and that, in any case, the complaint should be dismissed because EPF International was an unauthorized foreign corporation doing business in this State (*id.* at 60).

This Court found those arguments unpersuasive. Specifically, this Court found that no factual issue was raised by Brill's affidavit because he did not deny that Lacey Fashions received the invoices. (Doc. 57 at 3.) Rather, he "merely aver[red] that he ha[d] no specific memory of having received them, and he [did] not dispute that he made the partial payments" (*id.*).

Additionally, this Court found that Yau's affidavit, although submitted with EPF International's reply papers, could be considered "to show that evidence presented in the party's initial papers [here, the invoices] is admissible, when the opposing party has challenged such admissibility." (*Id.* at 5) (citations omitted) (bracketed language added). Thus, this Court determined that, since Yau's statements established EPF International's regular practice of generating and sending invoices to clients (*id.* at 4), and she had personal knowledge of their transmittal (*id.*), the invoices were admissible under the business records exception to the hearsay rule (*id.*).

Finally, this Court concluded that, with respect to the allegation that EPF International was barred from bringing this action because it was an unregistered foreign corporation doing business in this State, such an allegation was not supported by facts or based on anyone's personal knowledge (*id.* at 5), and that "[t]he shipment of goods into New York does not, in and of itself, constitute doing business in the State" (*id.*).

Summary judgment was therefore granted on EPF International's second cause of action for damages in the amount of $59,050.42 for unpaid goods on the basis of an account stated. (Docs. 51 at 8–9; 57 at 6.) Additionally, because EPF International's first cause of action essentially sought the same relief[1] (Docs. 51 at 8; 57 at 6), and since its third cause of action sought the alternative relief[2] (Docs. 51 at 9; 57 at 6), this Court reasoned that they were "rendered academic," in that "a judgment on the second cause of action dispose[d] of th[e] matter" (Doc. 57 at 6).

Subsequent to the prior decision, which was rendered on October 29, 2017, EPF International served a subpoena duces tecum ("subpoena") (Doc. 65) and an information subpoena (Doc. 74 at 1–7) on Brill in an attempt to enforce the money judgment.

Lacey Fashions now moves (motion sequence 002), pursuant to CPLR 2221(d), for leave to reargue the prior decision. Brill moves (motion sequence 003), pursuant to CPLR 5223, 5224, and 5240, to quash EPF International's subpoena. In the alternative, Brill requests that this Court limit the subpoena's scope.[3] EPF International opposes the motion, and cross-moves, under CPLR 5223 and 5251, to compel Brill to appear for a post-judgement deposition in compliance with the

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[1] The first cause of action in EPF International's complaint requested damages in the amount of $59,050.42 based on goods shipped to and accepted by Lacey Fashions. (Doc. 51 at 8.)

[2] The third cause of action sought a recovery of all monies wrongly retained by Lacey Fashions on the basis of quantum meruit. (*Id.* at 9.)

[3] While Brill requests this Court to limit the subpoena, he does not explain how it should do so. (Doc. 64 at 5.) His affirmation in support of the motion simply argues that "if the Court does not quash the subpoena in its entirety it is asked that the Court modify the subpoena to limit the requests." (*Id.*) However, this Court notes that, in his argument to quash the subpoena, Brill requests that the subpoena be limited to records after June of 2014 (*id.* at 4), that requests for Lacey's tax returns be stricken (*id.* at 3–4), and that a plethora of other requests be stricken (*id.* at 5, par. 29).

subpoena, to produce any and all demanded documents, and to answer all of the questions contained in the information subpoena.

LEGAL CONCLUSIONS:

a. Lacey Fashions' Motion for Reargument (Motion Sequence 002).

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

In support of its motion for reargument, Lacey Fashions first relies on the well-settled rule that "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Azzopardi v Am. Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993].) Lacey Fashions argues that "the Court . . . considered the evidence submitted on reply in multiple parts of its [prior] decision." (Doc. 59 at 2.) Specifically, Lacey Fashions contends that this Court improperly took into consideration the affidavit by Luigi Cheung ("Cheung") (Doc. 59 at 3), EPF International's senior marketing executive, who attested to the transmittal of additional invoice copies to Lacey Fashions (Doc. 32 at 2). Cheung's affirmation was submitted on reply. (Doc. 32.) Because there is "no documentary evidence . . . that is presented in [EPF International's] initial

moving paperwork with regards to transmittal of invoices" (Doc. 59 at 3), Lacey Fashions argues that summary judgment should have been denied (*id.*).

Lacey Fashions' second argument is that EPF International should not have been allowed to authenticate records based on the business records exception to the hearsay rule in its reply papers. (*Id.* at 4.) Contrary to the caselaw cited in this Court's prior decision, Lacey Fashions alleges that the instant action is distinguishable, in that this "is a very different case" because EPF International was "trying to authenticate records that only [they] have access to." (*Id.*) Lacey Fashions also reiterates its position that EPF International cannot bring this action since it is an unregistered entity conducting business in New York. (Doc. 59 at 7–8.)

This Court finds that the motion for reargument must be denied. Lacey Fashions has not argued that this Court, in rendering the prior decision, overlooked a relevant fact. (*See Foley*, 68 AD2d at 567.) Therefore, if reargument is to be granted, it must be because this Court misapplied a controlling principle of law (*id.*), which Lacey Fashions alleges is what this Court did in considering Yau's and Cheung's affidavits in EPF International's reply papers (Docs. 59; 62).

A plaintiff establishes his or her prima facie showing of entitlement to summary judgment on the basis of an account stated by providing "evidence of the invoices, receipt by defendant, and lack of objection by defendant for a substantial period of time." (*L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017].) Here, EPF International adequately proved evidence of the invoices by attaching them in its moving papers on its summary judgment motion. (Doc. 14.) The dates of these invoices range from June of 2014 to July of 2015. (*Id.*) The moving papers further include two checks—dated November 24 and 30, 2015—that reflect a total payment of $10,010.00 by Lacey Fashions to EPF International. (Doc. 16.) Brill's signature appears on both checks. (*Id.*) The First Department has previously held that such partial payments

constitute "an acknowledgment of the validity of the bill, thereby establishing it as an account stated." (*Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977].) In other words, the fact that Lacey Fashions made partial payments to EPF International indicates that the invoices were received. Moreover, the last invoice is dated July 13, 2015 (Doc. 14 at 10)—over four months before Lacey Fashions tendered a check to EPF International on November 24, 2015 (Doc. 16)—which shows a lack of objection to the request for payments (*see Parker, Chapin, Flattau & Klimpl*, 59 AD2d at 378 (partial payments constitute acknowledgement of a bill's validity)). Even considering only its moving papers, EPF International established its prima facie case of entitlement to judgment. (*See L.E.K. Consulting LLC*, 148 AD3d at 528.) Thus, Lacey Fashions' contention that "[t]here is no documentary evidence (i.e., fax confirmations) or first-person testimony (i.e., non-hearsay) that is presented in the initial moving paperwork with regards to transmittal of invoices" (Doc. 59 at 3) is contradicted by the movant's documentary evidence itself.

This Court again concludes that Lacey Fashions failed to raise a triable issue of fact in response. At various points in his affidavit submitted in opposition to EPF International's summary judgment motion, Brill stated that he "do[es] not remember Lacey ever specifically receiving the invoices" (Doc. 21 at 1) and that he "never authorized [EPF International] to send invoices or communication about amounts due via email" (*id.*). Such bareboned statements are insufficient to raise an issue of fact. Instead, to defeat a summary judgment motion based on an account stated, a defendant must allege that he protested to the request for payments, identify the persons with whom he spoke, and specify the substance of the alleged conversations. (*See Zanani v Schvimmer*, 50 AD3d 445, 446 [1st Dept 2008]; *see also Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668, 668 [1st Dept 2003].)

Nor did Lacey Fashions raise a material issue of fact by questioning the transmittal of invoices. With respect to receipt of the invoices by Lacey Fashions, this Court's consideration of Leung's and Yau's affidavits in the prior decision did not run contrary to caselaw. Both affidavits were submitted to establish that the invoices were transmitted to Lacey Fashions in accordance with EPF International's usual business practices. (Docs. 31–32.) Lacey Fashions had challenged the admissibility of the invoices, claiming that they were hearsay. (Doc. 29 at 7–8.) In response, Cheung and Yau testified as to EPF International's course of delivering its invoices to clients. (Docs. 31–32.) Evidence offered in a summary judgment movant's reply papers may be considered where the evidence is relevant to refute claims raised in the nonmovant's affidavit. (*See Piraeus Jewelry, Inc. v Interested Underwriters at Lloyd's*, 246 AD2d 386, 387 [1st Dept 1998].) Again, even if this Court did not consider Leung's and Yau's affidavits, the documentary evidence in the moving paperwork indicates that Lacey Fashions received the invoices. (Docs. 14; 16.) To put it another way, consideration of the affidavits submitted in reply did not change the prior decision's result.

Last, in regard to Lacey Fashions' continued reliance on New York Business Corporation Law § 1312(a) (Docs. 29 at 16–19; 59 at 7–8; 62 at 3–4), that statute provides that a "foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state . . . ." Dismissal under this provision "is not jurisdictional, but rather, affects the legal capacity to sue." (*Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572 [1st Dept 2012].) A defendant seeking to dismiss a suit pursuant to this statute carries the "burden of demonstrating that plaintiff was a foreign corporation and that its activities [were] so systematic and regular as to manifest

continuity of activity in New York . . . ." (*G.P. Exports v Tribeca Design*, 147 AD3d 655, 656 [1st Dept 2017] (internal quotations omitted).)

Here, Lacey Fashions' reargument papers merely allege that "[EPF International] does come to the state to conduct business." (Doc. 62 at 4.) Even in Brill's affidavit in opposition to EPF International's summary judgment motion, he stated only that "[EPF International] has many clients in the US and I know this because a representative of Plaintiff travels to New York at least once a year to meet with their various clients." (Doc. 21 at 2.) These statements do not satisfy defendant's burden of proving that EPF International conducts business in this State. (*See Uribe v Merchants Bank of New York*, 266 AD2d 21, 22 [1st Dept 1999] (a corporation's activities that are "limited to solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" do not constitute "doing business in this state.").)

For the foregoing reasons, Lacey Fashions' motion for reargument must be denied.

b. Brill's Motion to Quash EPF International's Subpoena (Motion Sequence 003).

Before a judgment is satisfied, a judgment creditor can "compel disclosure of all matter[s] relevant to [its] satisfaction," including by service of a subpoena. (*See* CPLR 5223; *U.S. Bank N.A. v APP Intl. Fin. Co., B.V.*, 100 AD3d 179, 184 [1st Dept 2012].) This State's "public policy is to put no obstacle in the path of those seeking to enforce a judgment." (*U.S. Bank N.A.*, 100 AD3d at 179.) "An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry." (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] (internal

quotations and brackets omitted).) Thus, "[u]nder New York law, judgment creditors are entitled to broad disclosure . . . ." (*Id.* at 183.)

Lacey Fashions was served with a subpoena and an information subpoena on November 27, 2017, after this Court's prior decision had been handed down. (Docs. 65; 74 at 3–6.) Although Lacey Fashions has submitted partial answers in response to the information subpoena (Doc. 79), it now seeks to quash the subpoena on the grounds that: (1) the incorrect party was served; (2) the subpoena did not include a proper witness fee; (3) the subpoena's scope is overbroad; and (4) the subpoena does not comply with CPLR 5224(a)(3)(i). (Doc. 64 at 1–5.) In the alternative, Lacey Fashions argues that the subpoena should be limited,[4] if not quashed. (*Id.* at 5.)

The subpoena was served on Lacey Fashions via the Secretary of State. (Doc. 72.) While it is true that the subpoena is addressed to Brill, it is clear that EPF International was addressing Brill in his corporate, not personal, capacity: "We command you, Elliott Brill, the last known officer or director of Lacey Fashions, Inc. . . . to appear and attend a deposition . . . ." (Doc. 65 at 2.) Further, every item requested in the subpoena pertains to Lacey Fashions' operations. (*Id.* at 4–7.) "The law is clear that these organizations [i.e., corporations] have no Fifth Amendment privilege to assert and must thus designate a suitable representative to make responses." (*Big Apple Concrete Corp. v Abrams*, 103 AD2d 609, 612 [1st Dept 1984] (bracketed language added).) As "the last known officer or director of Lacey Fashions," Brill is a "suitable representative to make responses" on behalf of the corporation. Thus, the caselaw cited by Lacey Fashions is inapposite. *Deutsche Bank Ag v Sebastian Holdings Inc.*, 2017 WL 476784, *1 [Sup Ct., NY County, Feb. 1,

[4] *See* fn. 3. Brill does not explain how the Court should limit the subpoena's scope. (Doc. 64 at 5.) His affirmation in support of the motion simply argues that "if the Court does not quash the subpoena in its entirety it is asked that the Court modify the subpoena to limit the requests." (*Id.*) Nevertheless, this Court notes that, in his argument to quash the subpoena, Brill requests that the subpoena be limited to records after June of 2014 (*id.* at 4), that requests for Lacey's tax returns be stricken (*id.* at 3–4), and that a plethora of other requests be stricken (*id.* at 5, par. 29).

2017, No.161079/2013], held that subpoenas are improper to the extent that they seek information regarding persons or entities who are not the judgment debtor. EPF International's subpoena does not violate this caselaw, since it seeks information regarding Lacey Fashions.

Further, in regard to Lacey Fashions' contention that "CPLR 5224(b) requires the payment of a witness fee when a person is served with a subpoena requiring the production of books and records or to appear for a subpoena" (Doc. 64 at 2), this Court notes that EPF International has represented that it would be willing to pay Brill a witness fee[5] (Doc. 78 at 2).

With respect to Lacey Fashions' argument that the subpoena is overbroad, even a cursory review of the subpoena reveals otherwise. The subpoena lists thirty items to be produced. (Doc. 65 at 4–7.) All of them pertain to either Lacey Fashions' operations or potential liability. (*Id.*) Moreover, although EPF International sought summary judgment relating to goods that were sold in 2014 and is now requesting information dating back to January of 2011, this Court determines that the subpoena's temporal scope is not overbroad. A judgment creditor is "entitled to ascertain what happened to the assets" (*Exceptional Opts. v Optimus, Inc.*, 84 AD2d 515, 516 [1st Dept 1981]) of the debtor to prevent the risk of possible fraudulent transfers of assets by the debtor. Because the statute of limitations on fraudulent conveyance claims is six years (*see Matter of Setters v Al Props. & Devs. (USA) Corp.*, 139 AD3d 492, 493 [1st Dept 2016]), the temporal scope of the subpoena is not unreasonable. (*See also Big Apple Concrete Corp.*, 103 AD2d at 614–15 (holding that a subpoena issued in an investigation involving a violation of the Donnelly Antitrust

[5] EPF International's argument that it is not required to pay a witness fee because "a judgment debtor served with a subpoena . . . shall not be entitled to any fee" (Doc. 68 at 7) is unpersuasive. CPLR 5224(b) indeed states that judgment debtors are not entitled to any fees. However, notwithstanding the fact that Brill may be considered a "suitable representative to make responses" on behalf of the corporation, Brill himself is not the judgment debtor—EPF International is.

Act could cover a period of 10 years, even though the statute of limitations for a violation was 4 years).)

Finally, Lacey Fashions contends that the subpoena does not conform with the requirement in CPLR 5224(a)(3)(i) that it contain a certification by the judgment creditor that, to the best of the creditor's knowledge, the recipient of the subpoena has relevant information regarding the debtor.[6] (Doc. 64 at 5.) However, that provision is entirely inapplicable to the subpoena duces tecum, since the provision requires only information subpoenas to contain a certification. (*See* CPLR 5224[a][3][i].) Having considered the arguments set forth by Lacey Fashions for quashing or limiting the subpoena, this Court finds that the motion to quash must be denied.

The foregoing discussion resolves EPF International's cross-motion, insofar as it seeks to compel Lacey Fashions to comply with the subpoena. However, insofar as the cross-motion requests Lacey Fashions to comply with the information subpoena, Lacey Fashions refused to answer question 6 (Doc. 68 at 12), which asked: "Identify each debt owed to your company or Elliot W. Brill" (Doc. 74 at 5.) To this, Lacey Fashions responded that it "cannot answer questions about Elliott W. Brill [and] objects that you are not entitled to such information." (Doc. 79 at 2.) Because debts owed to Lacey Fashions are relevant to EPF International's enforcement of the judgment, Lacey Fashions should disclose what debts exist. The cross-motion is therefore granted as to the information subpoena.

[6] CPLR 5224(a)(3)(i) reads in pertinent part: "Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I hereby certify that this information subpoena complies with Rule 5224 of the Civil Practice Law and Rules and Section 601 of the General Business Law that I have a reasonable belief that the party receiving this subpoena has in their possession information about the debtor that will assist the creditor in collecting the judgment."

In accordance with the foregoing, it is hereby:

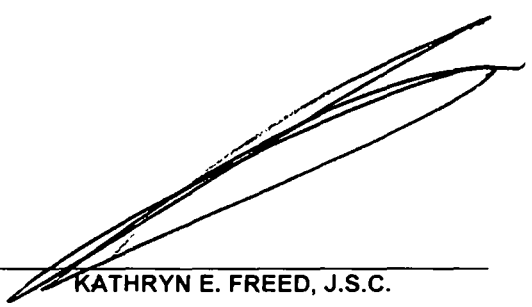
ORDERED that defendant Lacey Fashions Inc.'s motion for leave for argument (motion sequence 002) is denied; and it is further

ORDERED that non-party Elliott Brill's motion to quash or limit the subpoena duces tecum (motion sequence 003) served by plaintiff EPF International Limited is denied; and it is further

ORDERED that plaintiff EPF International Limited's cross-motion seeking to compel Lacey Fashions Inc.'s compliance with the information subpoena is granted; and it is further

ORDERED that defendant Lacey Fashions Inc. shall serve a copy of this order with notice of entry upon plaintiff EPF International Limited and upon non-party Elliott Brill within 30 days after entry of this order; and it is further

ORDERED that this constitutes the decision and order of this Court.



2/5/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
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APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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