SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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NEXT FABRICS, LLC,

Plaintiff,

- v -

JOMAR INC.,JOEL NEVENS, JOMAR TABLE LINENS, INC.,

Defendants.

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INDEX NO. 652011/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION & ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to DISMISS.

Defendants Jomar, Inc. (Jomar), Jomar Table Linens, Inc. (Table Linens) and Joel Nevens move to dismiss the amended complaint (Dkt. 27 [the AC]). Plaintiff Next Fabrics, LLC opposes the motion. The motion is granted in part.

Background

The following facts drawn from the AC are assumed to be true for the purposes of this motion to dismiss.

For the last 15 years, plaintiff has been selling fabric goods to defendants. Plaintiff claims that as of October 2018, Jomar owed it more than $500,000.[1] Consequently,

[1] "This amount included payments Jomar owed for goods that Plaintiff had ordered from overseas manufacturers; had, therefore, paid for; and had delivered to Jomar's customers, such that Jomar should have received payment for the goods from its customers" (AC ¶ 23; *see also* ¶ 40 ["At the time the parties entered into the Agreement, Plaintiff, as set forth in annexed Exhibit A to the Agreement, was storing in its warehouse approximately 250,204.40 units of goods and servicing approximately 263,300 units of open orders for Jomar. Pursuant to the Agreement, Jomar was obligated to pay for these goods and orders no later than 180 days after the October 12, 2018 date of the Agreement"]).

plaintiff insisted that Jomar enter into a written agreement governing the then-in-default payment obligations and the parties' future dealings (AC ¶ 24).

On October 12, 2018, plaintiff and Jomar entered into a written agreement (Dkt. 39 [the Agreement]), which is governed by New York law and requires the parties to litigate all disputes related to the Agreement in this court (*see id.* at 6). Nevens executed the Agreement on behalf of Jomar in his capacity as its President (*see id.*). Paragraphs 3 and 6 of the Agreement govern Jomar's payment obligations (*see id.* at 2-3). Paragraph 7 prohibits Jomar from assigning the Agreement without plaintiff's approval (*see id.* at 3).[2] Paragraph 8 provides that "Either [plaintiff] or Jomar may, at any time, terminate the Agreement without cause upon written notice to the other party ('Notice of Termination') setting a termination date at least two hundred seventy (270) days from the date of the Notice of Termination" (*id.* at 4).

In March 2019, Nevens informed plaintiff in writing that he was in negotiations to sell Jomar's business (AC ¶ 47). "However, shortly afterwards, on or about March 25, 2019, [Nevens] advised Plaintiff, in writing, that in light of the outstanding amount Jomar owed to Plaintiff, Jomar might consider liquidating its business and filing for bankruptcy protection" (*id.* ¶ 48). The following day, by letter dated March 26, 2019, plaintiff purported to terminate the Agreement "effective immediately" because Jomar was in breach of the Agreement by failing to meet its payment obligations (Dkt. 40).

[2] This provision was allegedly included due to the disclosure in January 2018 by Nevens that he intended to sell Jomar (*see* AC ¶ 25).

In April 2019, plaintiff commenced this action, alleging that it is owed an outstanding balance of $1,462,125.70, by filing a complaint against Jomar and Nevens, which they moved to dismiss. That motion was withdrawn after the AC was filed in June 2019 (*see* Dkt. 43). The principal revelation of the AC is that Jomar never existed, but rather is Table Linens' trade name. The AC contains the following causes of action: (1) breach of contract, asserted against Jomar and Table Linens; (2) unjust enrichment, asserted against Jomar and Table Linens; (3) fraudulent conveyance, pursuant to New York Debtor and Creditor Law (DCL) §§ 276 and 278, asserted against all defendants; and (4) fraud, asserted against all defendants (*see* Dkt. 27).

Defendants move to dismiss, arguing that: (1) plaintiff's breach of contract claim is barred due to its failure to provide the amount of notice required by section 8 of the Agreement; (2) the complaint fails to state a claim for unjust enrichment, fraudulent conveyance, and fraud and (3) there is no personal jurisdiction over Nevens because he is not bound by the Agreement's forum selection clause as he only signed the Agreement on behalf of Jomar and not in his personal capacity.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v*

Brody, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

There is no basis for dismissing plaintiff's breach-of-contract claim. The Agreement only requires 270-days advance notice for a termination "without cause." It is well settled that, unless the parties' agreement provides to the contrary--and it does not here--once a party has materially breached a contract, the non-breaching party has the right to immediately terminate and sue for damages (*see Jeremy's Ale House Also, Inc. v Joselyn Luchnick Irrevocable Tr.*, 22 AD3d 6, 24 [1st Dept 2005]; accord *Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 81 [1st Dept 2016] [collecting cases]). That is exactly what allegedly occurred here. Plaintiff maintains that more than a million dollars is owed, which would certainly be a material breach. In any event, termination of the parties' contract is not a prerequisite to suing for its breach. Defendants failed to establish that anything in the Agreement prevents plaintiff from suing for breach.

Additionally, because, as defendants concede, "Jomar, Inc. is simply a fictitious business name employed by Table Linens" (*see* Dkt. 34 at 6), plaintiff may enforce the Agreement against Table Linens. The claim is dismissed against Jomar (*see Honeyman v Curiosity Works, Inc.*, 120 AD3d 1302, 1303 [2d Dept 2014] ["trade name is not a jural entity amenable to suit"]).

The fraud claim, which is based on Nevens misrepresenting that his business was conducted by Jomar instead of Table Linens, is infirm due to lack of justifiable reliance (*see MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 290-91 [1st Dept 2016]). A company's incorporation is a matter of public record in California.[3] It is undisputed that a public corporation search on the website of the California Secretary of State (https://businessfilings.sos.ca.gov) would reveal that "Jomar, Inc." does not exist (*see also* Dkt. 38 [showing Jomar to be a trade name of Table Linens).[4] Thus, plaintiff is charged with the knowledge that it was contracting with a nonexistent entity and cannot claim justifiable reliance (*Tall Tower Capital, LLC v Stonepeak Partners LP*, 174 AD3d 441, 442 [1st Dept 2019] [collecting cases]; *see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 195 [1st Dept 2012] ["the true nature of the risk being assumed could have been ascertained from reviewing … publicly available information"]). Moreover, because Table Linens itself would be liable under the Agreement anyway, plaintiff was not damaged by the alleged fraud and the claim is duplicative of the viable breach-of-contract cause of action (*see Suttongate Holdings Ltd. v Laconm Mgt. N.V.*, 173 AD3d 618, 619 [1st Dept 2019], citing *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142, 143 [2017]; *see*

[3] The same is true in New York (*see 88 Broad Street, LLC v Stone & Broad Inc.*, 2016 WL 6330142, at *5 n 10 [Sup Ct, NY County Oct. 26, 2016]).

[4] "Material derived from official government websites may be the subject of judicial notice" (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009]). A search of the website reveals that there were other companies called Jomar, Inc. but that none have been active since 2001 (and most have been inactive for more than half of a century). Searching for Jomar would put a reasonable person on notice that there are several Jomar entities and a reasonable person would ensure contracting with the correct one.

also MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC, 165 AD3d 108, 114 [1st Dept 2018]).

The unjust-enrichment claim is dismissed because the Agreement governs the dispute with Table Linens (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005]).

Regarding the DCL claim, the parties assume that New York law governs despite defendants being located in California.[5] The DCL claim against Table Linens is moot because it is a defendant on the breach-of-contract claim.[6] To be sure, if there were transfers made outside of the company without fair consideration that rendered it insolvent within the meaning of DCL § 271, plaintiff might be able to state a viable claim under § 273 (*see Wall St. Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). Plaintiff, however, only pleaded a claim under § 276 that does not satisfy the specificity requirements of CPLR 3016(b) (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018], citing *RTN Networks, LLC v Telco Group., Inc.*, 126 AD3d 477, 478 [1st Dept 2015]). It merely alleges a proposed assignment for the benefit of creditors and makes the conclusory allegation that "Nevens is liquidating [Table Linen's] assets for his own benefit" without specifying any transfers at all (*see* AC ¶¶ 65, 102). That is insufficient.

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[5] This would only matter if California's fraudulent conveyance law differed (*Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc 3d 1204[A], at *9-11 [Sup Ct, NY County 2014]; *see Deutsche Bank AG v Vik*, 2015 WL 458284, at *21 [Sup Ct, NY County Jan. 30, 2015], *affd* 142 AD3d 829 [1st Dept 2016]).

[6] While plaintiff might have been defrauded if Jomar lacked the ability to pay it after the transfer of its assets to Table Linens, obviously, any such intracompany transfers would not affect collectability.

Finally, because all of the claims asserted against Nevens are dismissed, there is no need to analyze whether there is jurisdiction over him based on the "closely-related" doctrine or otherwise. If plaintiff seeks to enforce the Agreement against Nevens personally or assert any viable claims against him, it must move for leave to amend.[7]

Accordingly, it is

ORDERED that defendants' motion to dismiss the AC is granted to the extent that: (1) all claims against Jomar are dismissed with prejudice; (2) the second cause of action for unjust enrichment and the fourth cause of action for fraud are dismissed with prejudice; (3) the third cause of action for fraudulent conveyance is dismissed without prejudice; and (4) the motion is otherwise denied.

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3/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[7] Plaintiff did not purport to supplement the AC by submitting an affidavit in opposition and cannot seek to amend through argument in its attorney's brief.