Topline Prods. Co., Inc. v Beauty Visions, LLC
2020 NY Slip Op 33705(U)
November 5, 2020
Supreme Court, New York County
Docket Number: 650492/2020
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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TOPLINE PRODUCTS COMPANY, INC.,

Plaintiff,

- v -

BEAUTY VISIONS, LLC,CARGO COSMETICS, LLC

Defendant.

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INDEX NO. 650492/2020

MOTION DATE 10/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants' motion to dismiss is denied, and plaintiff's cross-motion to amend the instant complaint is granted, for the reasons stated hereinbelow.

Background

On or about November 28, 2017, plaintiff, Topline Products Company, Inc., and defendants, Beauty Visions LLC ("Beauty Visions") and Cargo Cosmetics, LLC ("Cargo"), entered into a Settlement Agreement, which outlined terms by which plaintiff and defendants would resolve a dispute about "payment to [plaintiff] for certain goods delivered, or ordered but not delivered" (NYSCEF Doc. 1, at 7).

Pursuant to the Settlement Agreement's Paragraph 2(a), Beauty Visions agreed to pay plaintiff $2,804,000.00 "in full liquidation and settlement of the amount" that plaintiff asserts that Beauty Visions owes (NYSCEF Doc. 1, at 7). Beauty Visions apparently agreed to submit that payment pursuant to a "BV Note," which obligated Beauty Visions to submit monthly installment payments to plaintiff, to commence on December 15, 2017 and continue until December 15, 2019 in the amount of $48,000.00 with a final payment of $1,604,000.00 on December 31, 2019 (NYSCEF Doc. 1, at 7).

Pursuant to the Settlement Agreement's Paragraph 2(c), Cargo agreed to pay plaintiff $310,000.00 "in full liquidation and settlement of the amount" that plaintiff asserts that Cargo owes (NYSCEF Doc. 1, at 7-8). The Cargo Note required monthly installment payments from Cargo to plaintiff, to commence on December 15, 2017 and continue until December 31, 2019 in the amount of $25,000.00 with the exception of the December 15, 2017 payment, which would be in the amount of $160,000.00 (NYSCEF Doc. 1, at 8).

Pursuant to the Settlement Agreement's Paragraph 8 and the Amendment's Paragraph 3, Beauty Visions and Cargo agreed to purchase, prior to September 15, 2018, at least 75% of the value of

inventory that plaintiff purchased (the "On-Hold Inventory") at a customary sales price valued at $1,160,278.00 as of the Settlement Agreement's effective date (NYSCEF Doc. 1, at 8).

By June 21, 2018, $2,506,000.00 remained due on the BV Note, and $50,000.00 remained due on the Cargo Note, "notwithstanding" the $906,000.00 due for the On-Hold Inventory (NYSCEF Doc. 1, at 9).

On or about June 26, 2018, plaintiff and defendants entered into the Amendment, pursuant to which defendants agreed to (1) submit the May 15, 2018 payment under the BV Note by June 21, 2018; and (2) purchase, for a value of at least $906,000.00, the remainder of the On-Hold Inventory pursuant to a purchase schedule (NYSCEF Doc. 1, at 8-9).

Also pursuant to the Amendment, plaintiff agreed, in pertinent part, to (1) extend the BV Note and Cargo Note's maturity dates to June 30, 2020; (2) defer principal payments on the BV Note due on June 15, 2018 through August 15, 2019 and permit payments to recommence in September 2019 in the amount of $72,000.00 monthly, pursuant to a revised payment schedule; (3) revise the payment date from the 15th day of each month to the 29th day of each month; and (4) defer Cargo's payments on the Cargo Note until the Cargo Note's maturity date, provided that defendants did not default on their obligation to purchase the On-Hold Inventory (NYSCEF Doc. 1, at 9).

On or around January 22, 2020, defendants had failed to fulfill their obligations pursuant to the Settlement Documents (NYSCEF Doc. 1, at 9). Specifically, defendants paid a total of $936,050.00 ($374,723.78 pursuant to the BV Note; $260,000.00 pursuant to the Cargo Note, and $301,326.22 for the On-Hold Inventory) (NYSCEF Doc. 1, at 10). Pursuant the BV Note and the Cargo Note, $211,276.22 remains due prior to acceleration. Beauty Visions has failed to pay pursuant to the BV Note and Amendment since August 2018, and Cargo has failed to pay pursuant to the Cargo Note since April 30, 2018 (NYSCEF Doc. 1, at 10). Pursuant to the On-Hold Inventory, $604,673.78 remains due (NYSCEF Doc. 1, at 10). Finally, defendants have failed to pay for the On-Hold Inventory since February 28, 2019 (NYSCEF Doc. 1, at 10).

Thus, plaintiff notes that, pursuant to the Amendment's Paragraph 8, defendants have defaulted on the BV Note, as modified, the Cargo Note, as modified, and the Settlement Agreement (NYSCEF Doc. 1, at 11). Pursuant to Paragraph 9 of both the BV Note and the Cargo Note, default entitles plaintiff to accelerate all required payments and declare the entire principal amount and any interest thereon due and payable (NYSCEF Doc. 1, at 11). Additionally, pursuant to Paragraph 3.4 of both the BV Note and the Cargo Note, any amount not paid when due, whether at the stated maturity date, or by acceleration, would bear interest at the rate of 12% per annum until paid in full (the "Default Interest") (NYSCEF Doc. 1, at 11).

On January 13, 2020, plaintiff notified Beauty Visions and Cargo of the payments owed to plaintiff (NYSCEF Doc. 1, at 11). As of January 22, 2020, defendants had failed to cure their defaults (NYSCEF Doc. 1, at 11).

On January 22, 2020, plaintiff commenced the instant action seeking a judgment against defendants, jointly and severally, (1) on the first cause of action, for breach of the Settlement

Agreement and Amendment thereto, against defendants, in the amount of $3,083,950.00, plus interest pursuant to the Default Interest provisions of the BV Note and Cargo Note, plus attorney's fees and costs; (2) on the second cause of action, for breach of the BV Note, as against Beauty Visions, in the amount of $2,429,276.22, plus interest pursuant to the Default Interest provision of the BV Note, plus attorney's fees and costs; (3) on the third cause of action, for breach of the Cargo Note, as against Cargo, in the amount of $50,000.00, plus interest pursuant to the Default Interest provision of the Cargo Note, plus attorney's fees and costs; and (4) for the Court to declare that [a] defendants breached the Settlement Agreement and Amendment thereto; [b] Beauty Visions breached the BV Note; and [c] Cargo defaulted on the Cargo Note (NYSCEF Doc. 1, at 11-13). Plaintiff claims that jurisdiction and venue in New York are proper pursuant to the subject Settlement Documents.

Defendants now move, pursuant to CPLR 3211(a)(1), (3), and (7), to dismiss the subject complaint (NYSCEF Doc. 4). First, defendants assert that plaintiff is a foreign (New Jersey) corporation that does business in New York but is not registered or otherwise authorized to do business here and, thus, does not have capacity to sue here (NYSCEF Doc. 5). Defendants also assert that the instant complaint "repeatedly relies upon impermissible group pleading of allegations against both of Defendants without reflecting the distinct acts underlying the purported claims against each of them," and thus, that the complaint fails to state a cause of action (NYSCEF Doc. 4, at 3). Additionally, defendants assert that the complaint pleads duplicative claims. For example, defendants assert that plaintiff's fourth cause of action, for declaratory relief, is duplicative with plaintiff's breach of contract causes of action (NYSCEF Doc. 4, at 4); thus, defendants quote, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate where the plaintiff has an adequate, alternative remedy in another form of action, such as [sic] breach of contract," Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 (1st Dep't 1988) (NYSCEF Doc. 4, at 4-5).

In response, plaintiff now cross-moves, pursuant to CPLR 3025(b), to amend the subject complaint (NYSCEF Doc. 10). Plaintiff claims that it is registered to do business in New York. Specifically, plaintiff asserts that on June 16, 2020, plaintiff filed, pursuant to BCL § 1304, an "Application for Authority" with the New York State Department of State, Division of Corporations, State Records and Uniform Commercial Code. Plaintiff claims that such an application constitutes the necessary step by which plaintiff can cure the defect that defendants allege (NYSCEF Doc. 11, at 3). Additionally, plaintiff asserts that its proposed amended complaint "provides further clarifications as to the specific obligations of both Beauty Visions and Cargo under the Settlement Agreement, the Amendment, the BV Note, as modified by the Amendment, and the Cargo Note, as modified by the Amendment" (NYSCEF Doc. 11, at 8).

Plaintiff has e-filed an amended complaint (Exhibit D, NYSCEF Doc. 15). The subject amended complaint differs from the original complaint in various ways, among which are, notably, the following: [1] the amended complaint states that plaintiff is registered to do business in New York under the fictitious name "TPCI," pursuant to BCL § 1304(a); and [2] the amended complaint crosses out the fourth cause of action, for declaratory relief (Exhibit D, NYSCEF Doc. 15).

Defendants oppose plaintiff's cross-motion (NYSCEF Doc. 18). Defendants assert that plaintiff has failed to comply with "threshold filing requirements of the First Department such as filing of an affidavit of merit" (NYSCEF Doc. 18, at 2). Defendants quote the First Department's holding that "a motion for leave to amend a pleading ... must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." NonLinear Trading Co. v Braddis Assocs., 243 AD2d 107, 116 (1st Dep't 1998). Additionally, defendants allege that plaintiff fails to address the second requirement of BCL § 1312(a), namely, that an unregistered corporation may not maintain an action within New York unless it has "paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation" (NYSCEF Doc. 18, at 3).

Discussion

Pertinent CPLR Provisions

CPLR 3211(a)(1), (3), (7), provide, respectively, that a party may move to dismiss one or more causes of action on the ground that a defense is founded upon documentary evidence; a party does not have legal capacity; a pleading fails to state a cause of action.

CPLR 3025(b) states the following:

> Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

The Instant Matter

Plaintiff has established its entitlement, pursuant to CPLR 3025(b), to amend the subject complaint. Specifically, plaintiff has submitted a proposed amended complaint (Exhibit D, NYSCEF Doc. 15) with strikethrough text to denote deletions to the original complaint and with the proposed changes clearly marked with underlined text to denote additions. By deleting its fourth cause of action, for declaratory relief, plaintiff has avoided duplication. Additionally, plaintiff has supported its motion to amend the subject complaint with the June 25, 2020 affirmation of William P. Opel, plaintiff's attorney (NYSCEF Doc. 11) and the June 25, 2020 affidavit, based on personal knowledge, of John J. Oberdorf, Jr., plaintiff's general counsel (NYSCEF Doc. 16). Plaintiff has also established that it is authorized to sue defendants in New York by submitting plaintiff's subject "Application for Authority" (NYSCEF Doc. 17).

This Court has reviewed defendants' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, the motion of defendants, Beauty Visions, LLC, and Cargo Cosmetics, LLC, to dismiss is hereby denied, and the cross-motion of plaintiff, Topline Products

Company, Inc., to amend the subject complaint is hereby granted, and the proposed amended complaint is hereby deemed served and filed.

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11/5/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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