

Nuance Indus., Inc. v Union Apparel Group, Ltd.
2021 NY Slip Op 30953(U)
March 23, 2021
Supreme Court, New York County
Docket Number: 655882/2017
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

NUANCE INDUSTRIES, INC.,
Plaintiff,

- v -

UNION APPAREL GROUP, LTD., BUDMARK TEXTILES
INTERNATIONAL, INC., THOMAS LAM A/K/A TOMMY LAM
AND/OR THOMAS SHU KWONG LAM, CLARENCE
GELBER,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 27, 28, 29, 30, 31,
34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48

were read on this motion for JUDGMENT - SUMMARY.

DECISION + ORDER ON
MOTION

Upon the foregoing documents, the motion of plaintiff Nuance Industries, Inc.
("Plaintiff") for summary judgment is denied, and the cross-motion of defendant Thomas Lam
a/k/a Tommy Lam and/or Thomas Shu Kwong Lam ("Lam") for summary judgment is also
denied, in accord with the following memorandum decision.

Background

In this action, Plaintiff seeks damages for the purported breach of a settlement agreement
(the "Settlement Agreement") between Plaintiff and defendants Union Apparel Group, Ltd.
("Union Apparel") and Budmark Textiles International, Inc. ("Budmark"), and non-party Ashley
Stewart, Inc. ("Ashley Stewart"), negotiated in mediation in the U.S. District Court for the
Southern District of New York for the case captioned Nuance Industries, Inc. v Ashley Stewart,
Inc., et al., Case no. 1:15-cv-08513 (KMW) (verified complaint ¶ 1). Pursuant to the terms of

the Settlement Agreement, Union Apparel and Budmark agreed to make certain cash payments to Plaintiff, and Union Apparel agreed to make at least \$1,000,000 in textile purchases from Plaintiff “at its standard prevailing rates generally available to the market between April 30, 2016 and April 30, 2017” (Danchuk affirmation in support, exhibit C § 3.1, NYSCEF Doc 29). The Settlement Agreement further provides that, “in the event that [Union Apparel] completes less than the full \$1,000,000 in business before April 1, 2017, a final payment totaling 15% of the difference between the \$1,000,000 in purchases and the actual amount of purchases shall be payable by April 30, 2017” (*id.*). The parties do not dispute the payment terms set forth in the Settlement Agreement.

Section 5.1 of the Settlement Agreement indicates a guarantee and stipulated judgment, as follows:

5. Personal Guarantee and Stipulated Judgment

5.1 As further consideration for the release set forth below, and as a condition of NUANCE entering into this Agreement, Tommy Lam agrees to personally guarantee payment of any shortfall in the Settlement Amount, as set forth at the end of this Agreement.

5.2 Furthermore, the Parties agree that in the event of a default in payment that is not remedied in full within ten (10) days of written notice from NUANCE to DEFENDANTS, NUANCE shall be entitled to immediate judgment against defendants Union Apparel Group, Ltd. and Budmark Textiles International, Inc. and against Tommy Lam and Clarence Gelber jointly and severally, but in no event against defendant Ashley Stewart, Inc., in an amount equal to any shortfall in the remaining balance due of the Settlement Amount at the time of the breach. [Guarantors initial here: ___ ___]

(*id.* § 5.1 [brackets and blanks in original].) A copy of the Settlement Agreement submitted in support of the motion shows that the first blank on the line for Guarantors to initial has been initialed by Lam. The Settlement Agreement also contains a personal guarantee (the “Guaranty”), signed by Lam, that states as follows:

The undersigned absolutely guarantees the prompt payment of the shortfall portion of Settlement Amount payable by DEFENDANTS under the above-executed Agreement and, in the event of default in payment of any portion thereof, the undersigned promises to pay the full amount of such indebtedness in full. It is further agreed that the liability of the undersigned shall not be affected by the discharge or release of the indebtedness, liability, obligation of DEFENDANTS, other than through satisfaction of the Agreement. In the event of death of the undersigned guarantor, this guarantee shall be discharged.

(*id.* at 7.) Lam also executed the Settlement Agreement on behalf of Union Apparel as “Sales Manager” (*id.* at 6).

Plaintiff commenced this action on September 15, 2017 by filing the summons and complaint, which interposes one cause of action for breach of contract against all defendants. The complaint alleges that, between April 30, 2016 and April 30, 2017 (the “Settlement Term”), Union Apparel failed to purchase the \$1,000,000 in textiles from Plaintiff required by the Settlement Agreement, resulting in damages of \$131,052.93, which represents 15% of the difference between the \$1,000,000 in purchases and the actual amount of purchases made (verified complaint ¶¶ 8-10). On November 17, 2017, Union Apparel, Budmark, and Gelber (the “Union Defendants”) filed an answer wherein they denied Plaintiff’s allegations and asserted a cross-claim against Lam for indemnification (NYSCEF Doc 5). On November 30, 2017, Lam filed an answer to the complaint wherein he denied Plaintiff’s allegations and asserted a cross-claim against Union Apparel for indemnification. Lam also filed an answer to the cross-claims of the Union Defendants, denying the allegations therein.

Positions of the Parties

Plaintiff now moves for summary judgment on its cause of action for breach of contract on the basis of Union Apparel’s purported failure to purchase the required \$1,000,000 during the Settlement Term. To demonstrate that Union Apparel failed to make the required purchases, Plaintiff submits the affidavit of Samy Nimroody, CEO of Plaintiff, who attests that Union

Apparel purchased a total of \$126,507.49 in textile apparel from Plaintiff between April 30, 2016 and April 30, 2017 (Nimroody affidavit in support ¶ 8, NYSCEF Doc 30), and attaches five invoices for the purchases, to the affidavit (*id.*, exhibit 1). Lam opposes the motion for summary judgment and cross-moves for summary judgment on his cross-claim for indemnification.

In opposition, Lam asserts that his “working relationship” with Union Apparel ended in July 2016 and argues that he is not liable for the Guaranty because he signed the Settlement Agreement as a representative of Union Apparel “with the clear understanding and intent that he would only be liable in the event he was still associated with and maintained a working relationship with Union Apparel at the end of the Settlement Agreement Term”; that the guaranty is unenforceable because he was not a party to the prior federal court action and, therefore, received no consideration in exchange for the Guaranty; and that the Guaranty is unconscionable because “Union Apparel and [Plaintiff] had sole control to fulfill the terms of the Settlement, which the Guaranty is subject to” (mem in opp at 6-9, NYSCEF Doc 35). Additionally, Lam opposes the motion on the grounds that questions of fact exist regarding what amount is owed and that he is unable to determine whether Union Apparel made the required textile purchases because he no longer maintains a working relationship with Union Apparel and no discovery has taken place in the action. Lam also asserts that, after his working relationship ended, his own apparel business, Global Direct, made \$248,408.70 worth of textile purchases from Plaintiff, which he asserts should be credited towards the amount required by the Settlement Agreement. Finally, Lam cross-moves for summary judgment on his cross-claim for indemnification on the grounds that “a surety is equitably entitled to full indemnity against the consequences of a principal obligor’s default” (*id.* at 11).

The Union Defendants also oppose the motion for summary judgment on the grounds that Plaintiff did not make a *prima facie* showing that Union Apparel did not make the requisite \$1,000,000 in textile purchases and that it is unclear whether any purchases Lam made after his relationship with Union Apparel ended were credited to the amount required pursuant to the Settlement Agreement (Crawford affirmation in opp ¶ 13, NYSCEF Doc 41, 45).¹ The Union Defendants also oppose the cross-motion and contend that “it was LAM himself and not Union Apparel, who had exclusive responsibility for the duties under the . . . Settlement Agreement” (*id.* ¶ 21).

Standard of Review

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of admissible evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

¹ The Crawford affirmations submitted in opposition to the motion and cross-motion are identical. For the purposes of this motion, the court will refer to the first affirmation submitted.

Discussion

A. Breach of the Settlement Agreement

Although the complaint asserts only one cause of action for breach of contract against all defendants, the contractual obligations of the Union Defendants and the two individual defendants are distinct, with the obligations of Lam and Gelber isolated to those set forth in Section 5 of the Settlement Agreement, Personal Guarantee and Stipulated Judgment, and the separate Guaranty. For this reason, the court will separately address the purported breaches by the Union Defendants and the individual defendants. To make out a *prima facie* case on a claim for breach of contract, a plaintiff must prove the existence of a contract between the parties, plaintiff's performance, the defendant's breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). In support of its motion, Plaintiff submits an affirmation of its counsel, Emily A. Danchuk, with exhibits thereto, and an affidavit of Samy Nimroody, president and CEO of Plaintiff, with exhibits thereto. In the affidavit, Nimroody attests to having first-hand knowledge of the prior federal court action, the mediation that resulted in the Settlement Agreement, and to the signing of the Settlement Agreement on behalf of Plaintiff (Nimroody aff in support ¶¶ 3-4). A copy of the Settlement Agreement is annexed as an exhibit to the Danchuk affirmation. This is sufficient to demonstrate the existence of a contract between Plaintiff, the Union Defendants, and non-party Ashley Stewart, and the record further shows that Plaintiff performed its obligation under the Settlement Agreement to dismiss the prior federal court action (Danchuk affirmation ¶ 10). Neither Lam nor the Union Defendants dispute these elements of the claim.

Nevertheless, Plaintiff has not submitted admissible evidence sufficient to demonstrate that Union Apparel breached the Settlement Agreement by failing to purchase \$1,000,000 of textiles during the Settlement Term. To demonstrate this element of its claim, Plaintiff relies on the affidavit of Samy Nimroody and attached invoices that purportedly indicate Union Apparel made a total of only \$126,507.49 in purchases during the Settlement Term (Nimroody aff ¶ 8, exhibit 1). In general, any writing or record shall be admissible in evidence as proof of an act, transaction, occurrence or event, if it was made in the regular course of any business at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter (CPLR 4518 [a]). However, it is well established that a proper foundation for the admission of a business record must be provided by someone with personal or firsthand knowledge of the maker's business practices and procedures (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 503 [2015]). The Nimroody affidavit does not comply with the requirements of CPLR 4518 because no authentication, business records foundation, or other evidentiary basis was provided for the invoices. The affiant does not indicate that he has personal or firsthand knowledge of the maker's business practices or procedures; does not describe the practices or procedures; and does not attest that the procedures were followed with respect to the invoices on which Plaintiff relies (*see Oldham v City of New York*, 155 AD3d 477, 477-478 [1st Dept 2017] [Records inadmissible where affiants failed to indicate they possessed personal knowledge and lay proper foundation pursuant to CPLR 4518]). Therefore, the invoices that purportedly demonstrate that Union Apparel breached the Settlement Agreement are inadmissible hearsay and Plaintiff has failed to meet its *prima facie* burden for summary judgment, and the motion for summary judgment must be denied.

B. Breach of Guaranty

“On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty” (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Plaintiff relies on the plain language of the Settlement Agreement and Guaranty to prove the existence of the guaranty, and the Nimroody affidavit to prove the underlying debt and the guarantor’s failure to perform under the guaranty. As set forth above, the Nimroody affidavit is insufficient to prove the underlying debt. In opposition to Plaintiff’s motion, Lam also contests the existence of the Guaranty by arguing that the Guaranty is unenforceable because he signed the Settlement Agreement only as a representative, agent or employee on behalf of Union Apparel; because the Guaranty lacks consideration; because the Guaranty is unconscionable; and because questions of fact exist regarding what amount is owed under the Settlement Agreement.²

Turning to the first of these arguments, Lam is incorrect that the guaranty is unenforceable because he only signed the agreement as a representative, agent or employee on behalf of Union Apparel (mem in opp at 5, NYSCEF Doc 35). Officers or agents of a corporation are not liable for its contracts if they do not purport to bind themselves individually (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4; *Salzman Sign Co. v Beck*, 10 NY2d 63), but the terms of the instant Guaranty constitute a deliberately stated, unambiguous and separate expression personally obligating Lam for “prompt payment” of any shortfall amount owed as a result of Union Apparel’s failure to purchase \$1,000,000 in textiles during the Settlement Term. When asked at a deposition held in another action involving Lam and Union

² Curiously, the copies of the Settlement Agreement submitted in support of Plaintiff’s motion are not signed or initialed by Gelber, yet he has not raised a defense to the motion for summary judgment on this basis. In any event, because Plaintiff’s motion fails for other reasons, the court need not address this irregularity further.

Apparel,³ “[d]id you understand that by signing [the Guaranty] you were personally guaranteeing the obligation,” Lam answered “yes” (Crawford affirmation in opp, exhibit A at 173, ln 3, NYSCEF Doc 42). When asked a second time, “[d]id you understand that by signing the personal guarantee you were personally responsible for the money,” he again responded “yes” (*id.* at 175, ln 16). Lam also indicated that he guaranteed the obligation because he wanted to continue doing business with Ashley Stewart (*id.* at 175, ln 5) and that no one at Union Apparel made him sign the Guaranty (*id.* at ln 15), which also contradicts the assertion that he signed the Guaranty only in his capacity as a representative of Union Apparel and further contradicts his argument that the Guaranty lacks consideration.

Lam’s assertion that the Guaranty was unconscionable is similarly meritless. To establish unconscionability, a party must show that “the contract was both procedurally and substantively unconscionable when made – i.e., 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” (*Ortegas v G4S Secure Solutions [USA] Inc.*, 156 AD3d 580, 580 [1st Dept. 2017] [internal quotation marks and citation omitted]). With respect to the procedural element, “[t]he focus is on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power” (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10–11 [1988] [citation omitted]). Lam does not argue that the Guaranty was procedurally unconscionable when made and instead relies on *Brower v Gateway 2000, Inc.* (246 AD2d 246,

³ *Union Apparel Group, Ltd. v Lam* (index No. 653867/2016 [Sup Ct NY County]) (*see*, Crawford aff in opp [NYSCEF Doc 41] ¶ 13). The complaint in that action alleges that Lam “converted misappropriated and damaged the business relationships between [Union Apparel Group] and its largest retail clients” (complaint in that action ¶ 8).

254 [1st Dept 1998]) for the proposition that “the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable” (mem in opp at 9, NYSCEF Doc 35). Lam contends that the Settlement Agreement was unconscionable because “Union Apparel and [Plaintiff] had sole control to fulfill the terms of the Settlement . . . and Union Apparel and [Plaintiff] could do absolutely nothing under the Terms of the Settlement and leave Lam liable under the terms of the Guaranty” (mem in opp at 9, NYSCEF Doc 35). However, *Brower* is inapposite because it did not address the unconscionability in the context of a personal guaranty, and, in any event, it is commonly the case that a guarantor has no direct control over whether the obligations of the underlying agreement are fulfilled, and such circumstances do not, *de facto*, render a guaranty unconscionable. Lam is a sophisticated party with many years of experience as a principal or sole proprietor of numerous garment companies (Crawford affirmation in opp, exhibit A at 11-16, NYSCEF Doc 42) and he does not argue that the transaction was in any way procedurally improper. Thus, he has failed to demonstrate that the Guaranty was unconscionable when made.

Finally, Lam argues that “questions of fact remain concerning whether Lam has personally fulfilled his textile purchase obligations,” because his apparel business, Global Direct Consulting LLC (“Global Direct”), made \$248,408.70 worth of textile purchases from the Plaintiff after Lam’s departure from Union Apparel. This argument is adopted and reiterated by the Union Defendants, who also oppose the motion for summary judgment. This argument is unavailing because the plain language of the Settlement Agreement states that *Union Apparel* shall complete the textile purchases, not Lam or Global Direct (*see* Danchuk affirmation in support, exhibit C § 3.1, NYSCEF Doc 29). It is a fundamental rule of contract interpretation that “a written agreement that is complete, clear and unambiguous on its face must be enforced

according to the plain meaning of its terms” (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [1st Dept 2002]). Thus, any purchases that Lam made on behalf of Global Direct are irrelevant to Plaintiff’s claims. Nevertheless, as set forth above, Plaintiff has not submitted evidence in admissible form that Union Apparel failed to purchase \$1,000,000 of textiles during the Settlement Term, and, therefore, has not made a *prima facie* showing of proof of the debt and is not entitled to summary judgment for breach of the Guaranty.

C. Indemnity

In addition to opposing the motion for summary judgment, Defendant Lam cross-moves for summary judgment on his cross-claim for common law indemnification against the Union Defendants. The Union Defendants oppose the cross-motion on the grounds that Lam failed to make a *prima facie* showing of entitlement to summary judgment, specifically, that Lam failed to show that he “delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought [Union Apparel] and that Lam . . . did not commit any actual wrongdoing himself (Crawford affirmation in opp ¶ 6, NYSCEF Doc 41, *citing Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073 [2d Dept 2007]).

While it is generally true that “a surety is equitably entitled to full indemnity against the consequences of a principal obligor’s default” (*Lori-Kay Golf v Lassner*, 61 NY2d 722, 723 [1st Dept 1984]), questions of material fact regarding Lam and Union Apparel preclude summary judgment on the issue of indemnification. In opposition to Plaintiff’s motion for summary judgment and in support of its cross-claim for indemnification, Union Apparel asserts that “it was [Lam] himself and not Union Apparel, who had exclusive responsibility for the duties under the Subject Settlement Agreement” (Crawford affirmation in opp ¶ 21, NYSCEF Docs 41). To support this position, Union Apparel submits an affidavit of Chen Ai Ping, principal of Union

Apparel, who attests, in relevant part, that she had “limited involvement” in negotiating the terms of the Settlement Agreement; that neither she nor Union Apparel “asked Lam to personally guaranty the Subject Settlement Agreement”; and that she “always understood that all orders placed by Union Apparel and/or Lam would be credited to Union Apparel under the terms of such Settlement Agreement” (Chen aff ¶¶ 3, 5, 9). Nevertheless, Chen does not indicate that Lam lacked authority to bind Union Apparel by signing the Settlement Agreement as its agent. Moreover, Union Apparel clearly benefitted from the Settlement Agreement by having the prior federal court action dismissed against it and Union Apparel partially performed under the terms of the Settlement Agreement by paying to Plaintiff monies owed pursuant to Section 3.1 of the Settlement Agreement. Conversely, Lam attests that “after my working relationship with Union Apparel ended in July 2016, I had no impact on, nor was I able to have any impact on Union Apparel’s textile purchases from the Plaintiff” (Lam aff in opp ¶ 17, NYSCEF Doc 36). This indicates that for some portion of the Settlement Term, Lam had a role to play in Union Apparel’s compliance with the terms of the Settlement Agreement. These conflicting affidavits demonstrate that several questions of fact exist regarding the relationship between Lam and Union Apparel and Lam’s role in Union Apparel’s compliance with the terms of the Settlement Agreement. Thus, summary judgment on the cross-claims for indemnification is not appropriate at this time.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is denied, with leave to renew upon submission of admissible evidence consistent with CPLR 4518; and it is further

ORDERED that the cross-motion of defendant Thomas Lam a/k/a Tommy Lam and/or Thomas Shu Kwong Lam for summary judgment on his cross-claim for indemnification is also denied; and it is further

ORDERED that this decision and order shall be filed under seal in accord with this court's prior order dated November 5, 2018 (NYSCEF Doc 24) directing sealing of all court records referencing the terms of the Settlement Agreement; and it is further

ORDERED that a status conference shall be held in this matter on April 14, 2021 at 11 a.m. by a Microsoft Teams appearance to be arranged by the court.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/23/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE