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| <b>My Size, Inc. v North Empire LLC</b>  |
| 2021 NY Slip Op 32829(U)   |
| December 30, 2021  |
| Supreme Court, New York County   |
| Docket Number: Index No. 653901/2018   |
| Judge: Jennifer G. Schechter   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JENNIFER SCHECTER PART 54**

*Justice*

-----X

INDEX NO. 653901/2018

MY SIZE, INC.,

MTN SEQ. NOS. 002 003

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTIONS**

NORTH EMPIRE LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 145

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 140, 141, 142, 143, 144, 146

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is ORDERED that the motions are DENIED.

This breach of contract dispute arises out of two Security Purchase Agreements and Zero Coupon Convertible Notes. Plaintiff alleges that defendant breached a December 22, 2015, Security Purchase Agreement (December SPA) where defendant agreed to pay plaintiff \$1,450,000 in exchange for issuance of a Zero Coupon Convertible Note (December Note), which was convertible into shares in My Size (Company). Plaintiff moves for summary judgment (Motion Sequence 002) claiming that it performed under the December SPA and that defendant failed to pay \$616,000 of the total amount promised.

Defendant North Empire, an investor in the Company, also moves for summary judgment (Motion Sequence 003) alleging that plaintiff materially breached its agreements with defendant. Defendant claims plaintiff breached the December SPA along with a March 10, 2015 Securities Purchase Agreement (March SPA) and Zero Coupon Convertible Note (March Note) by failing to deliver "Stock Certificate No. 305" (Stock Certificate) for approximately eight months and that by the time it ultimately received the Stock Certificate, My Size's share price dropped significantly.

### Background

Pursuant to the March SPA, North Empire agreed to provide \$1M in cash to My Size in return for the March Note. By its terms, the March Note automatically converted to equity when My Size's Common Stock became listed for trading on a national securities exchange at the "Conversion Price" of \$3.50 per share (NYSCEF 7 [March Note] at ¶¶5(b), 3 "Conversion Price"). In December 2015, the parties entered into an additional SPA where defendant would provide \$1.45M in cash to My Size in exchange for the December Note.

The March and December Notes are substantially the same and provide in Section 5(b) that in the event that the Common Stock becomes listed for trading on a national securities exchange prior to the Note having been paid in full, "the Outstanding Amount of this Note shall be deemed to have been converted automatically into Common Stock at the Conversion Price . . . Thereupon, this Note shall be considered void, and the Holder shall promptly surrender the Note for cancellation" (NYSCEF 7, 9 [Notes] at ¶ 5[b]).

The Notes further provide in Section 5(d)(i), that in order to convert the Note into Common Stock, the Holder "shall surrender this Note, . . . , to the Company, and shall give written notice . . . to the Company that the Holder elects to convert all or the portion of the Outstanding Amount . . . provided, however, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable . . . unless this Note with evidence of the principal amount hereof to be converted is delivered to the Company . . ." Once the Conversion Notice is given to the Company, then the "Company shall issue and deliver as promptly as practicable and in no event later than five (5) business days after delivery to the Company of the Note . . . a certificate for the number of shares of Common Stock . . ." (Notes at 5[d][ii]).

On July 14, 2016, My Size was listed on the Nasdaq stock exchange (NYSCEF 5 at Counterclaims [Counterclaims] ¶ 12). On that same date, My Size's transfer agent, V-Stock Transfer (VStock), issued Stock Certificate No. 305, in the amount of 699,999 shares of common stock, for the benefit of North Empire (Counterclaims at ¶ 14). However, rather than two separate stock certificates, a single stock certificate was issued in the name of North Empire (Counterclaims ¶ 12, NYSCEF 10).

North Empire's President Meshulam Martin affirms that he immediately and later repeatedly requested its Stock Certificate so that it would be able to trade (NYSCEF 133 [Tr Martin] at 41 [the first time North Empire asked My Size to deliver a share certificate was the date it was issued on the Nasdaq], 43 [from the minute My Size went public, North Empire requested "several, several, several" times to convert its shares and be able to trade]).

On August 15, 2016, VStock sent the Stock Certificate to My Size's office which is located in Israel (Counterclaims at ¶ 14). Defendant claims that despite its repeated demands from August 2016 through February 2017, My Size never informed it that the Stock Certificate

was in its possession and that it purposely delayed delivering it to North Empire preventing North Empire from selling it at a larger profit (Counterclaims at ¶¶ 14-15, 21).

On February 13, 2017, My Size's stock price reached \$16.70 per share (NYSCEF 12). North Empire alleges that because My Size failed to deliver the Stock Certificate in electronic form until February 24, 2017, (when the stock price had dropped and still needed to be converted into electronic form which happened on April 26, 2017), it was damaged (Counterclaims at ¶¶ 16-17, 20-21, NYSCEF 14, NYSCEF at 84 [Aff Kles] at ¶17). It seeks judgment for breach of contract and breach of the implied covenant of good faith and fair dealing.

My Size moves for summary judgment on its breach of contract claim because North Empire admittedly failed to pay \$616,000 due on the December SPA. It further argues that it in no way breached the SPA or Notes because defendant failed to follow the agreements protocols and conditions precedent to receiving the Stock Certificate. Specifically, defendant failed to provide the Notes, conversion notice or a notice to cure default pursuant to Notes § 15 (see Aff Kles at ¶ 12; NYSCEF 134 [Tr Kles] at 52 [Stock Certificate was sent to the Company because "Full payment was not received. There was no surrender of the note and we did not receive notice of conversion"]).

North Empire maintains that it did not pay the \$616,000 because it discovered that My Size, in material breach of the parties' agreements, deliberately held the Stock Certificate so that it could not be traded and that My Size, which did not enforce any of the preconditions in the agreements with North Empire and other shareholders, waived any of the Notes' requirements that it is now suddenly insisting apply. For example, North Empire points out that My Size alleges that North Empire was not entitled to the Stock Certificate because it "had not yet fully paid for its My Size Shares"; yet, it still actually issued the Shares before full payment (Aff Kles at ¶ 17; Tr Kles 72-73 [When the Stock Certificate was issued, North Empire still had a financial debt (\$1M Tr 76) and the conversion certificate and original notes had not been received by the Company. The Company provided the Stock Certificate because it had received a request from Avi Barone]). In fact, at the time of the listing on Nasdaq, none of the Company's investors had sent back the conversion certificates or original notes, yet some of the certificates were sent to the investors (Tr Kles at 53-55). Additionally, there was an investor that also owed the Company money, after making a request to Eli Walles, her stock certificate was issued in trust with an attorney until receipt of full payment (Tr Kles at 61-62). North Empire further argues that My Size waived all requirements, including the notice requirements, by dishonestly assuring North Empire that the Stock Certificate was being provided.

Martin, affirms that he was in contact with plaintiff, specifically Eli Walles, during the relevant time period on a weekly basis and was unaware that plaintiff had already received the Stock Certificate despite his repeated demands for it and assurances that My Size would send it (NYSCEF 138, [Aff Martin] at ¶¶ 5, 7, NYSCEF 111 [Tr Martin] at 44 [Martin communicated with Walles very often, a lot, and just got pushed off a week and then

another week. After months had passed and others were trading while North Empire could not, Martin realized something was “really off here”], 46 [Walles told Martin “we are going to get it to you. We are working on it. It’s getting there . . .don’t worry. Everything is under control”], 47 [We are getting it to you, we are working on it], 58 [took Martin time to realize “My Size is not keeping to their agreement . . . “It was always I am taking care of it. The transfer company is doing it. Its been issued.”], 58-9 [No one from My Size ever said they couldn’t deliver the shares]). Eli Walles, My Size’s then Chairman of the Board, denied having any conversations about the Stock Certificate with Martin (NYSCEF 135 [Walles Tr] at 29). He further affirmed that the only reason North Empire did not receive its Stock Certificate was because it had not paid its financial obligation in full (Walles Tr at 44-45).

#### Analysis

“Once a contract is formed, the parties may of course change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel” (*CT Chems. [U.S.A.] v Vinmar Impex*, 81 NY2d 174, 179 [1993]). Thus, contractual “rights may be waived if they are knowingly, voluntarily and intentionally abandoned,” and such “abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage” (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

The intentional relinquishment of a known right “should not be lightly presumed” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). Ordinarily, mere negligence, “oversight or thoughtlessness” does not create a waiver (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 280 [2d Dept 2017] citing *Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]). Similarly, “a party’s reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract do not necessarily constitute a waiver of the innocent party’s rights in the future” (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 280 [2d Dept 2017] citing *Seven-Up Bottling Co. [Bangkok], Ltd. v PepsiCo, Inc.*, 686 F Supp 1015, 1023 [SD NY 1988] [applying New York law]).

A waiver, however, may be proved by “undisputed acts or language so inconsistent with [the party’s] purpose to stand upon [its] rights as to leave no opportunity for a reasonable inference to the contrary” (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 281 [2d Dept 2017] citing *Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY at 37).

“In approaching this question, it is useful to recall that the roots of waiver lie firmly in equity, and are ‘designed to prevent the waiving party from lulling the other party into a belief that strict compliance with a contractual duty will not be required and then either suing for noncompliance or demanding compliance for the purpose of avoiding the transaction’ (13 Richard A. Lord, *Williston on Contracts* § 39:15 at 621 [4th ed 2013])

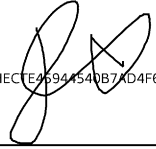
[footnotes omitted]]” (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 281 [2d Dept 2017]).

North Empire moves for summary judgment urging that My Size waived preconditions to issuance of the Stock Certificate and unreasonably delayed its issuance to North Empire causing damages. North Empire points to My Size’s course of conduct with it as well as other investors to evince such waiver. However, on this record, there is no basis for a matter of law determination that My Size waived the contractual requirements for notice and surrender of the Notes. Here, there is a question of fact as to whether Mr. Martin and Mr. Walles discussed the Stock Certificate during the relevant period. Accordingly, North Empire’s motion for summary judgment is denied in its entirety as questions of fact remain with respect to My Size’s waiver of conditions precedent to issuance and delivery of the Stock Certificate.\*

Plaintiff’s motion for summary judgment is likewise denied in its entirety. Although North Empire admits that it did not pay \$616K remaining on the December SPA, it urges that it withheld payment when it discovered My Size’s material breach--that it improperly and deliberately withheld the Stock Certificate preventing North Empire from trading. Plaintiff contends that such argument was waived under the election of remedies doctrine when North Empire continued to make payments after it demanded the Stock Certificate. That cannot be true, however, where, as here, defendant was unaware that plaintiff was in breach and could not meaningfully have elected anything (see *Fletcher v Rodriguez*, 47 Misc 3d 582, 905 [Sup Ct, Queens County 2015]; see *Kamco*, 149 AD3d 275, 282-83). Factual questions about when North Empire discovered the alleged wrongdoing and whether plaintiff materially breached preclude summary judgment. Additionally, at trial, the parties can offer evidence related to waiver and whether My Size may have breached by not timely issuing a stock certificate based on the March Agreements for which there was payment in full. In the end, this case is riddled with factual issues that preclude summary judgment. The parties’ remaining arguments have been considered and are rejected as they do not establish entitlement to judgment as a matter of law.

Accordingly, it is ORDERED that motion sequence numbers 002 and 003 are denied and the parties are directed to email Karen Touaf ([ktouaf@nycourts.gov](mailto:ktouaf@nycourts.gov)) to coordinate pretrial exchanges and schedule a pretrial conference.

12/30/2021  
DATE

  
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JENNIFER SCHECTER, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
 GRANTED  DENIED  GRANTED IN PART  OTHER

\* Defendant contests the propriety of the alleged guarantees (see Tr Walles at 61-65 [My Size was informed around July 2016, through Arye Barone, that North Empire wanted to give guarantees for payment]).