

Liptis Pharms. USA, Inc. v Liptis for Pharms. & Med. Prods., SAE
2022 NY Slip Op 35255(U)
April 28, 2022
Supreme Court, Rockland County
Docket Number: Index No. 035274/2021
Judge: Thomas P. Zugibe
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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LIPTIS PHARMACEUTICALS USA, INC.,

Plaintiff,

DECISION AND ORDER

Index No.: 035274/2021

-against-

Mot. Seq. #s: 1 and 2

LIPTIS FOR PHARMACEUTICALS AND MEDICAL
PRODUCTS, SAE

Defendant.

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ZUGIBE, J.

Plaintiff LIPTIS PHARMACEUTICALS USA, INC. (hereinafter “Plaintiff” or “Liptis USA”) has filed two motions in the present action against LIPTIS FOR PHARMACEUTICALS AND MEDICAL PRODUCTS, SAE (hereinafter “Defendant” or “Liptis Egypt”): (1) a motion seeking a declaration that Defendant, by reason of its interposition of unrelated counterclaims in its Answer, has waived all jurisdictional defects and therefore future service upon its New York based counsel should be deemed sufficient service of process in this case; or alternatively, for an order granting Plaintiff an additional 120 days to serve process upon Defendant via its New York state counsel; and (2) for dismissal of Defendant’s breach of export counterclaim pursuant to N.Y. CIV. PRAC. L&R (“CPLR”) §§ 3211(a)(1) and (7).

In connection with each of the aforementioned motions, the Court has reviewed and considered NYSCEF documents numbered 9-16 and 20-51, and hereby renders the following Decision:

PROCEDURAL HISTORY

In terms of procedural posture, on September 11, 2021, Plaintiff commenced this action by filing of a Summons and Verified Complaint with the Rockland County Clerk. NYSCEF Docs. 1-3. The Complaint asserts causes of action sounding in breach of contract, breach of the

covenant of good faith and fair dealing, and unjust enrichment, and seeks injunctive relief in addition to monetary damages. *Id.* On December 10, 2021, Defendant filed an Answer with Affirmative Defenses, along with a breach of contract counterclaim. NYSCEF Doc. 4. On December 30, 2021, Plaintiff filed an Amended Verified Complaint. NYSCEF Docs. 5-8. The Amended Complaint adds trademark infringement/dilution and unfair competition claims. *Id.* On January 7, 2021, Plaintiff filed motion sequence number 1, detailed *supra*. NYSCEF Docs. 9-16. On January 19, 2022, Defendant filed its Answer to the Amended Complaint with Affirmative Defenses and a breach of contract counterclaims. NYSCEF Doc. 19.

MOTION FOR DECLARATORY RELIEF OR AN EXTENSION OF TIME TO SERVE

~Sequence Number 1~

It is without dispute that Liptis Egypt is an Egyptian corporation without a place of business in New York State. Both the United States and Egypt are signatories to the Hague Convention. Service of the above pleadings, therefore, could be made in accordance with the Hague Convention, which provides for the proper avenue of service of process without the need to go through diplomatic channels.

As per the Affirmation of Plaintiff's counsel, Plaintiff utilized the services of a Hague Service Specialist Company known as Viking Advocates (hereinafter "Viking"), to assist in service of process of the initial Complaint filed in this matter. NYSCEF Doc. 10, p.4. On September 27, 2021, Viking delivered the Summons and Verified Complaint with the presumably appropriate accompanying documents to Egypt's Central Authority, where it was received on October 3, 2021. *Id.* at p.5. It could take quite some time to now determine if service has been effectuated in Egypt. As of the date of the motion, neither Plaintiff's counsel nor Viking had received confirmation either way. *Id.* Plaintiff's counsel has not yet effectuated service of process of the Amended Complaint, for, as he requests, service of same may be unnecessary pending the determination of the Court on the instant motion. *Id.*

In support of his contention that Defendant has waived any jurisdictional defects, Plaintiff's counsel submits the well settled law that such defects are waived if a defendant brings an "unrelated counterclaim". Plaintiff is of the opinion that the counterclaim that appears in Defendant's Answer is unrelated to the primary asserted claims, though he does not give specific reasons as to why.

In opposition to this prong of the motion, Defendant indicates that the counterclaim at issue is directly related to Plaintiff's claims. Specifically, Defendant points out that Plaintiff claims, in its Complaint, that Defendant breached the parties' contract by refusing to purchase supplies of raw materials from Plaintiff for the "Dorofen and Cavigen" trademarked brands, and by refusing to manufacture these brands for Plaintiff, and finally by illegally using the brands in competition with Plaintiff. NYSCEF Doc. 1, ¶¶ 25, 32, 33, 84. Defendant's counterclaim asserts that Plaintiff failed to deliver the raw materials that Plaintiff claims they in fact failed to purchase. The counterclaim alleges that it was in fact Plaintiff that failed to fulfill its obligations under the parties' agreement. NYSCEF Doc. 4, ¶¶ 16-18.

Therefore, as the counterclaim is "inextricably linked to and arise[s] out of the same set of transactions or occurrences as plaintiff's claims" (*Dinicu v. Groff Studios Corp.*, 215 A.D2d 323, 626 N.Y.S.2d 800 (1st Dept. 1995)), the Court determines that Defendant did not waive its jurisdictional affirmative defenses. Whether those defenses will be determined to be valid, and therefore dispositive, is a question for another day.

The Court declines to consider the arguments that were raised for the first time in Plaintiff's reply papers on this point, specifically, that Defendant consented to the jurisdiction of this Court in the parties' underlying agreement. This argument was not raised in the application itself, and the Court is not prepared at this stage to determine that the language Plaintiff is referring to in the parties' underlying agreement is tantamount to a waiver of service of process requirements.

In terms of Plaintiff's alternative request for relief, to wit, that they be granted an extension of an additional 120 days to serve process upon Defendant, the Court notes that Defendant consented to that request in its opposition papers. NYSCEF Doc. 22, p. 2. This Court therefore grants this prong of Plaintiff's motion, on consent. The Court will not, however, authorize service via counsel at this time. "[A] corporate defendant's location in a foreign country does not, *standing alone*, provide a basis for court-ordered service." CPLR § 311(b), Practice Commentaries C311:3. Service must therefore be effectuated in accordance with the provisions of the CPLR or through the Hague Convention unless and until Plaintiff cannot make a showing that service pursuant to this method is "impracticable" pursuant to CPLR § 311(b).

MOTION TO DISMISS COUNTERCLAIM

~Sequence Number 2~

Plaintiff moves to dismiss Defendant's breach of contract/export counterclaim pursuant to CPLR § 3211(a)(1) and (7). In deciding a motion to dismiss, whether it pertains to a Complaint or a counterclaim as asserted in an Answer, the allegations in a complaint must be construed liberally, in the light most favorable to the plaintiff, and said allegations must be accepted as true. *Zellner v. Odyll, LLC*, 117 A.D.3d 1040, 986 N.Y.S.2d 592 (2d Dept. 2014). If, from the four corners of the pleading, "'factual allegations are discerned which taken together manifest any cause of action cognizable at law'..." the dismissal motion must fail. *Id.* at 1040 (internal citation omitted). Whether the complaint will survive a summary judgment motion, or whether plaintiff will ultimately be able to prove its entitlement to relief, is irrelevant in determining a CPLR 3211 dismissal motion. *See generally, Id.*

"A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where 'the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims'" *HSBC Bank USA, N.A. v. Decaudin*, 49 A.D.3d 694, 695, 854 N.Y.S.2d 184 (2d Dept. 2008), *quoting Saxony Ice Co., Div. of Springfield Ice Co., Inc. v. Ultimate Energy Rest. Corp.*, 27 A.D.3d 445, 446, 810 N.Y.S.2d 344 (2d Dept. 2006). "If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." *Baker v. Andover Associates Management Corp.*, 30 Misc.3d 1218(A), 924 N.Y.S.3d 307 (Westchester Cnty. Sup. Ct. 2009).

In order for a document to be considered by the Court on a motion pursuant to CPLR § 3211(a)(1), same must be unambiguous and of undisputed authority. *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta v John Doe 1*, 73 A.D.3d at 84-85 [internal quotation marks omitted]). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)" *Cives Corp. v. George A. Fuller Co.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658 (2d Dept. 2012) (internal citations omitted).

Here, Plaintiff contends that the counterclaim at issue is based on allegations that the terms or conditions of certain export orders were unfilled by Plaintiff, but that documentary evidence in the form of shipping orders conclusively refutes that claim by demonstrating the export orders were filled. NYSCEF Doc. 31, p. 5. In addition to the shipping orders, Plaintiff points to a Declaration submitted by Liptis USA's CEO, Sharif Omar, in a pending federal court lawsuit wherein Sharif Omar indicates the export orders at issue were filled. *Id.* at 5-6.

Plaintiff further contends that the export orders are part and parcel of the parties' business relationship and of their primary contract, and as such, they are not independent contracts that can be the subject of a breach claim. Plaintiff argues that the counterclaim must therefore be dismissed for failure to state a claim pursuant to which relief can be granted. *Id.* at 5, 8.

In opposition, Defendant argues that the documentary evidence submitted by Plaintiff does not rise to the level of that which is required to meet its burden on a CPLR 3211(a)(1) motion. The invoices are not conclusive, as per the Defendant, as the invoice numbers do not apparently match those that are set forth in the counterclaim. Additionally, the Declaration, like an affidavit, is insufficient to constitute "documentary evidence." *Cives Corp., supra*. Even if considered by the Court, the documents proffered by Plaintiff simply do not, as per Defendant, resolve all factual issues.

In addition, Defendant argues that the export orders that are the subject of the counterclaim are independent contracts that can form the basis of its breach claim. In support of this contention, Defendant points to case law that indicates a failure of a purchase order to reference a master agreement indicates that the master agreement did not govern or control the transactions at issue. *See, e.g., Boress v. 200 Park, L.P.*, 2015 WL 7070072, at *11 (Sup. Ct. N.Y. Cnty. 2015).

The Court has reviewed the contentions of the parties and hereby determines that Defendant's counterclaim must be dismissed pursuant to CPLR 3211(a)(7). The Court agrees with Defendant that the invoices, the board meeting minutes, and the self-serving Declaration all submitted in support of Plaintiff's CPLR § 3211(a)(1) motion to dismiss are either insufficient to constitute "documentary evidence" or do not sufficiently resolve all factual issues raised in the counterclaim. In fact, the documents raise more questions before the Court about the facts here than they purport to resolve.

However, the Court determines that the counterclaim fails to state a cause of action based on the fact that the export orders upon which it is based are, in fact, related to the “master agreement” that is the subject of this action. Specifically, the agreement, a copy of which is annexed to the Complaint, expressly sets forth that “[t]he terms and provisions of this Agreement shall govern and control each purchase order submitted by the manufacturer to the Company and any additional terms or provisions contained in any such purchase order shall have no force or effect whatsoever.” NYSCEF Doc. 3, ¶4(a). Defendant relies on the *absence* of reference to the main agreement in the purchase orders themselves as evidence that the purchase orders are separately enforceable contracts, but this is not, in the Court’s opinion, dispositive. Defendant further argues that Plaintiff has not proven the purchase orders are even related to the main agreement, and that the main agreement does not, therefore, govern.

The parties’ main, or “master”, agreement clearly contemplates subsequent purchase/export orders. The Defendant does not dispute the existence of this agreement, and a signed contract can constitute documentary evidence. *Cives Corp., supra*. This does mean that the Defendant’s claim that Plaintiff did not keep up their end of the main agreement is irrelevant in these proceedings, as it forms the basis of at least one of the affirmative defenses, and will therefore be fleshed out in discovery. It cannot, however, form the basis of a legally cognizable breach of contract counterclaim, and is therefore dismissed upon Plaintiff’s motion.

CONCLUSION

In sum, the Plaintiff’s motion to extend their time to serve Defendant is granted, on consent. Said service, however, shall be made in accordance with the applicable provisions of the CPLR or through the Hague Convention, and not by way of Defendant’s New York State counsel. Plaintiff’s motion for a declaration that Defendant has waived any and all jurisdictional defenses is denied. Plaintiff’s motion to dismiss Defendant’s breach of export counterclaim is granted.

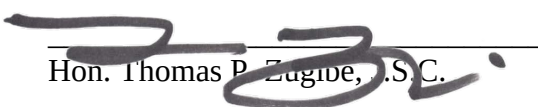
Based on the foregoing, it is hereby

ORDERED, that Plaintiff shall have an additional 120 days from the date of this Decision and Order to effectuate service of process upon the Defendant as set forth above; and it is further

ORDERED, that the parties are to appear virtually before the Court on ***Tuesday, June 7, 2022 at 11:30 a.m.*** for further proceedings in connection with this matter. The Clerk of the Court shall send out links via Microsoft Teams to counsel of record.

The foregoing shall constitute the Decision and Order of this Court.

Dated: New City, New York
April 28, 2022



Hon. Thomas P. Zugibe, J.S.C.

To: *All counsel of record with NYSCEF*