SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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MERCHANT FACTORS CORP.,

Plaintiff,

- v -

BIJOU INTERNATIONAL CORPORATION, JACK HABER, MAURICE HABER, LEON HABER, JOHN DOE, and JANE DOE,

Defendants.

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INDEX NO. 650625/2020

MOTION DATE 11/03/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for breach of a 2012 agreement to purchase receivables and personal guaranties, the plaintiff previously moved pursuant to CPLR 3212 for summary judgment in the principal sum of $677,600.63 against the defendant guarantors, Jack Haber (Jack), Maurice Haber (Maurice), and Leon Haber (Leon) (collectively, the "defendants") (SEQ 003). By a decision and order dated April 26, 2021, the court denied the plaintiff's motion as premature, without prejudice to renewal upon the completion of discovery. The court noted that the papers submitted on the plaintiff's first motion raised triable issues of fact as to, *inter alia*, whether the factoring agreement between the plaintiff and Bijou International Corporation (Bijou) was subsequently modified. Specifically, the defendants submitted affidavits on the initial motion claiming that the plaintiff subsequently modified the original factoring agreement in connection with the plaintiff's financing of a new entity, Fragments Holdings, LLC (Fragments), that was to assume the debt and clients of Bijou. The plaintiff now moves to renew its motion for summary judgment against the defendants. The defendants oppose the motion.

Following the court's April 26, 2021, decision and order, the parties proceeded to discovery. Discovery is now completed, as reflected in the Note of Issue and Certificate of Readiness the plaintiff filed on November 16, 2021. To the extent the plaintiff claims the defendants are "in breach" of the court's compliance conference order dated September 9, 2021, any discovery the plaintiff contends is still owed pursuant to that order is deemed waived by the plaintiff's clear contrary statements in the certificate of readiness that "[d]iscovery now know[n] to be necessary [is] completed" and "[t]here are no outstanding requests for discovery." Inasmuch as the court expressly authorized renewal of the plaintiff's motion for summary

judgment upon the completion of discovery, the court grants the branch of the instant motion which seeks leave to renew pursuant to CPLR 2221(e).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). In ruling on a motion for summary judgment, the court must remain mindful that "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of its renewed motion for summary judgment, the plaintiff submits, *inter alia*, an attorney's affirmation; email correspondence among the parties; a UCC filing data report attributable to Bijou; a client ledger; and the transcript of the deposition of Scott Adler (Adler) the plaintiff's senior executive vice president, national regional manager. The plaintiff also incorporates by reference the evidentiary submissions on its first motion for summary judgment, which included copies of the subject factoring agreement and guaranties, an affidavit of the plaintiff's chief financial officer, and accounting records relating to the plaintiff's business with Bijou.

In opposition, the defendant notes several procedural defects in the plaintiff's submission which are not fatal to the motion. Although the plaintiff failed to include a copy of its original motion with its renewal motion, the plaintiff is not in violation of CPLR 2214(c) because the original motion was electronically filed and therefore available to all parties and the court. See Leary v Bendow, 161 AD3d 420, 420 (1st Dept. 2018); see also Maurice v Maurice, 183 AD3d 455, 456 (1st Dept. 2020); Studio A Showroom, LLC v Yoon, 99 AD3d 632, 632 (1st Dept. 2012). The plaintiff's failure to include a copy of the pleadings with its renewal motion is likewise excusable inasmuch as the pleadings were previously electronically filed and readily available. See Keech v 30 East 85th Street Co., LLC, 154 AD3d 504, 504 (1st Dept. 2017). The court exercises its discretion to disregard the plaintiff's failure to submit a certification by counsel setting forth the number of words in the plaintiff's motion papers, since it is apparent the plaintiff complied with the word count limitations of 22 NYCRR 202.8-b. See 22 NYCRR 202.1(b); CPLR 2001. Finally, at the time the plaintiff filed the instant motion, this court did not direct the parties to submit a statement of material facts. See 22 NYCRR 202.8-g (providing that the court "may direct" that a statement of material facts be annexed to a motion for summary judgment). Thus, contrary to the defendants' contentions, the plaintiff's failure to do so does not in itself warrant denial of the motion.

As to the merits, the plaintiff's submissions establish that the plaintiff and Bijou, a jewelry wholesaler, entered into a factoring agreement dated October 5, 2012 (the Bijou factoring agreement), whereby Bijou agreed to sell the plaintiff receivables at a discounted rate and pay

the plaintiff a "commission" on each receivable, amounting to no less that $24,000.00 annually, in exchange for the plaintiff's provision of loans or advances against Bijou's inventory. Jack, Maurice, and Leon each executed a personal guaranty wherein they irrevocably and unconditionally guaranteed Bijou's obligations under the Bijou factoring agreement. From October 15, 2012, through July 24, 2015, the plaintiff made cash advances of approximately $13,936,868.93 to Bijou. Partial payment towards Bijou's outstanding balance was made to the plaintiff through July 13, 2016. However, as of July 31, 2016, Bijou continued to owe $536,255.12 to the plaintiff under the Bijou factoring agreement. With the addition of daily interest after July 13, 2016, at the contractual rate, Bijou owed $677,600.63 to the plaintiff as of December 31, 2019. Bijou has not made any payments towards such amount, to date.

In opposition, the defendants again submit affidavits stating that Bijou ceased operations in July 2015 and that, in connection with Bijou's winding down, Maurice and the plaintiff agreed that a new entity to be controlled by Maurice, Fragments, would assume Bijou's debt as well as Bijou's customers and vendors. They aver that in December 2015, the plaintiff and Fragments entered into a factoring agreement (the Fragments factoring agreement) similar to the one between the plaintiff and Bijou. Maurice and certain other nonparties executed guaranties in furtherance of the Fragments factoring agreement. Notwithstanding Bijou's default, the plaintiff took no action to collect on Bijou's debt for the duration of the plaintiff's business relationship with Fragments. In August 2019, the plaintiff commenced an action against Fragments' guarantors, including Maurice, captioned Merchant Factors Corp. v Haber et al., Index No. 654950/2019, in the Supreme Court, New York County (the Fragments action). In the Fragments action, which is a matter of public record, the plaintiff sought $752,338.32 in payments owed pursuant to the Fragments factoring agreement. A judgment in the Fragments action in the plaintiff's favor, in the principal sum of $752,338.32, plus contractual interest, was entered on April 23, 2021. The defendants contend that such sum includes Bijou's debt under the Bijou factoring agreement.

Although the plaintiff demonstrates the existence of agreements between the parties that would make the defendants liable for Bijou's debts under the Bijou factoring agreement, the defendants, as they did on the original motion, present evidence creating a triable issue as to whether Bijou's debt was transferred to Fragments in or about late 2015. In addition to their sworn statements that Maurice and the plaintiff agreed to the same, the defendants point to Adler's deposition testimony that he negotiated the Fragments factoring agreement with Maurice while Bijou was in default, that he discussed how Bijou's debt would be paid with Maurice during the negotiation of the Fragments factoring agreement, and that Fragments' customer list was similar to, and may even have been the same as, Bijou's. The defendants also note that the plaintiff did not attempt to collect Bijou's debt until six months after Fragments defaulted and that the Fragments action sought a sum that could include Bijou's total claimed debt.

While the Bijou factoring agreement and the guaranties executed by the defendants each contain clauses prohibiting oral modification, a fact the plaintiff neglects to discuss in its moving papers, that is not dispositive of whether an oral modification was nonetheless made. A no-oral-modification clause is obviated where the party seeking to enforce a subsequent oral

promise demonstrates performance or partial performance of the promise. See Rose v Spa Realty Assoc., 42 NY2d 338, 343-44 (1977); Mot Parking Corp. v 86-90 Warren Street, LLC, 104 AD3d 596, 596 (1st Dept. 2013); Barber v Deutsche Bank Securities, Inc., 103 AD3d 512, 513 (1st Dept. 2013). The defendants contend and present some evidence that Bijou actually transferred all of its business to Fragments with the understanding that Fragments receivables would be applied towards Bijou's debt. Further, the defendants contend and present evidence that the plaintiff exercised its entitlement to judgment on a debt owed pursuant to the Fragments factoring agreement prior to pursuing Bijou, even though Bijou had defaulted several years earlier. The plaintiff has not produced evidence to rebut the defendants' claim that Fragments' debt incorporated Bijou's. To be sure, the plaintiff has not given any meaningful explanation in the course of this litigation or the Fragments litigation as to how it calculated Fragments' debt. For instance, the plaintiff has never stated when it advanced money to Fragments or submitted accounting statements relevant to the period before Fragments' default. Based on the transcript of Adler's deposition, it appears that the plaintiff has long resisted providing information as to its business with Fragments, notwithstanding that such information is highly relevant to the defenses in this matter. Consequently, there remains a triable issue as to whether the parties waived the no-oral-modification provisions of the Bijou factoring agreement and guaranties by performing an oral contract to transfer Bijou's debt to Fragments.

Insofar as the submissions on the plaintiff's renewed motion for summary judgment fail to eliminate the triable issues identified by the court in its April 26, 2021, decision and order, the court adheres to its denial of the prior motion.

The parties are strongly encouraged to explore settlement.

Accordingly, upon the foregoing papers and this court's prior orders, it is

ORDERED that the plaintiff's motion for leave to renew its motion for summary judgment is granted and, upon renewal, the Court adheres to its prior Decision and Order, dated April 26, 2021, denying said motion for summary judgment in its entirety.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

2/24/2023
DATE

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