

<b>G&amp;G Garments, Ltd. v BlueStem Mgt. Advisors, LLC</b>
2023 NY Slip Op 31989(U)
June 13, 2023
Supreme Court, New York County
Docket Number: Index No. 656182/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART IV

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G&G Garments, LTD.,

*Plaintiff*

-against-

BlueStem Management Advisors, LLC,

*Defendant.*

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Hon. Frank P. Nervo, J.S.C.:

**DECISION AND  
ORDER**

Index No. 656182/2021

Mot. Seq. 001

Plaintiff moves for partial summary judgment on its breach of contract claims. Plaintiff contends, inter alia, that it is undisputed that the parties agreed to a letter of intent by which defendant was to deliver gloves to plaintiff following plaintiff's tender of a deposit and that despite tendering the deposit, defendant failed to deliver the gloves. Defendant opposes contending, inter alia, that the delivery date is ambiguous, performance is impossible due to civil unrest, war, supply chain issues, government shutdown, and fraud.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept

2013]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). However, affidavits relying on hearsay statements of a non-party are of no evidentiary value and do not create a question of fact sufficient to defeat summary judgment (*McGinley v. Mystic West Realty Corp.*, 117 AD3d 504 [1st Dept 2014]).

As relevant to this motion, “[t]he elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff’s performance, (3) the defendant’s breach, and (4) resulting damages” (*Alloy Advisory, LLC w. 503 W. 33<sup>rd</sup> St. Assoc., Inc.*, 195 AD3d 436 [1st Dept 2021]). Where a seller fails to deliver goods, the buyer may cancel and recover the purchase price and any incidental damages reasonably incurred and resulting from the seller’s breach (UCC § 2-711; *Vernon v. Potamkin Cadillac Corp.*, 118 AD2d 698 [2d Dept 1986]).

Here, the parties do not dispute that the signed letter of intent was agreed to, that this agreement required defendant to deliver gloves following plaintiff’s deposit, and that plaintiff tendered the appropriate deposit in accordance with the parties’ agreement (*see e.g.* NYSCEF Doc. No. 25 at p. 13 of 27, *infra*). Thus,

there is no dispute that the parties' entered into a contract. The parties further agree that despite plaintiff tendering the agreed to deposit approximately two years ago, defendant has neither delivered the gloves nor refunded the deposit. Accordingly, plaintiff has established, as a matter of law, its entitlement to summary judgment for breach of contract and its entitlement to damages pursuant to UCC § 2-711.

The burden thus shifts to defendant to establish a question fact exists sufficient to preclude summary judgment. To the extent that defendant contends the four-week delivery date is ambiguous, or otherwise represents only an expected date by which the gloves would be delivered, same is without merit. Assuming, *arguendo*, that the expected delivery date was ambiguous, as defendant contends, contracted-for goods must nevertheless be delivered within a reasonable time (UCC § 2-309). It is beyond cavil that the failure to deliver simple goods, such as the latex style gloves at issue here, for several years is unreasonable. Defendant's related claim that discovery is required on the issue of timeliness of delivery of the gloves is without merit. It is undisputed that defendant has failed to deliver any gloves for a period of several years; plaintiff has not claimed untimely delivery but rather no delivery. Discovery on the issue of timeliness does nothing to elucidate the failure to deliver any gloves.

Likewise without merit is defendant's assertion of force majeure. Defendant's contention that civil war, civil unrest, global supply chain issues, fraud, and government shutdown have made performance impossible is unsupported by competent evidence. Defendant's claims rely entirely upon hearsay statements made by an unknown person at an unknown time (see NYSCEF Doc. No. 24). This is insufficient to raise a question of fact.

Finally, to the extent that defendant puzzlingly argues, in opposition to this motion, that further discovery is required to determine whether the agreement terms constituted an offer, defendant's argument is belied by its own concession that these very same terms constituted an offer and the letter of intent was an acceptance of this offer (“[a]s a threshold matter, Bluestem's Terms Agreement was an offer,” “[t]he LOI and PO operated as an acceptance” NYSCEF Doc. No. 25).

Consequently, plaintiff has established, as a matter of law, its entitlement to summary judgment for breach of contract and concomitant damages. Defendant has failed to establish, by competent evidence, the existence of any triable issue of fact. Having canceled the order and sought return of its deposit

in February 2021, plaintiff is entitled to interest from that date<sup>1</sup> (*see Fedmet Trading Corp. v. Ekco Intern. Trade Corp.*, 151 Misc.2d 927 [Sup. Ct. NY County 1991] [Moskowitz, J.]; *see also Vernon v. Potamkin Cadillac Corp.*, 118 AD2d 698).

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED, DECLARED, and ADJUDGED that plaintiff, G&G Garments LTD. 231 West 39<sup>th</sup> Street New York, NY, shall have judgment and does recover on its first and third causes of action for breach of contract as against defendant, BlueStem Management Advisors, LLC 12612 Bradshaw Street Overland Park, Kansas 66213, the amount of \$218,400.00 with interest from February 28, 2021; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment, as above; and it is further

[continued on following page]

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<sup>1</sup> The exact date of cancellation has not been provided “In or about February 2021, G&G cancelled its order” (NYSCEF Doc. No. 10 at ¶ 12). Accordingly, the Court determines interest should accrue from the last day of February 2021, the 28<sup>th</sup>.

ORDERED that judgment shall be submitted to the Clerk's Office, and not to chambers, unless directed otherwise by that office; and it is further

ORDERED that the issue of attorney's fees, sought in plaintiff's third cause of action, is severed and referred to a Referee/JHO; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) whether attorney's fees may be recovered under UCC 2-711 et. seq. and under the circumstances of this matter;
  - (2) the amount of attorney's fees due plaintiff, should same be recoverable;
- and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special

Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel and plaintiffs shall immediately consult one another and shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence, unless directed otherwise by the Special Referee Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel and plaintiffs shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall


be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that any arguments raised not addressed herein have nevertheless been considered and are hereby denied.

THIS CONSTITUTES THE DECISION, ORDER, AND REFERENCE OF THE COURT.

Dated: June 13, 2023

ORDERED:



HON. FRANK P. NERVO  
J.S.C.