SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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H.B. FULLER COMPANY, PIDILITE USA, INC.

Plaintiff,

- v -

OPTMED, INC.,

Defendant.

INDEX NO. 654617/2022

MOTION DATE 07/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to DISMISS.

This is a breach of contract case. Plaintiffs H.B. Fuller Company ("HBF"), and Pidilite USA, Inc. ("Pidilite") (collectively "Plaintiffs") seek to recover over $5 million from Defendant OptMed, Inc., ("Defendant") for breaches of contract and failure to pay on accounts stated arising out of a series of loan agreements between the parties.

Defendant moves to dismiss Plaintiffs' First, Second, and Third Causes of Action for breaches of contract and replevin. For the reasons set forth below, Defendant's motion is **denied**.

FACTUAL BACKGROUND

According to the Complaint (NYSCEF 01), Pidilite and Defendant entered a Secured Convertible Note Purchase Agreement on September 29, 2014. Under that agreement, Pidilite loaned Defendant seven hundred-fifty-thousand-dollars ($750,000) (the "Pidilite Loan"), and Defendant executed a Convertible Secured Promissory Note for the full amount which granted

Pidilite a first priority security interest in all of Defendant's assets and properties (*id*. at ¶¶ 6-8). Separately, Defendant and HBF entered into another Secured Convertible Note and Warrant Purchase Agreement on July 11, 2016, under which HBF loaned Defendant two million five hundred thousand dollars ($2,500,000) (the "HBF Loan") (together with the Pidilite Loan, "the Loans") (*id*. at ¶ 11). Defendant subsequently executed two Convertible Secured Promissory Notes in favor of HBF, each for half of the amount of the HBF Loan amount (*id*. at ¶ 12).

On July 11, 2016, Defendant and HBF, in its capacity as Collateral Agent, entered into a Security Agreement which granted the Collateral Agent a first priority security interest in all right, title, and interest of Defendant in and to accounts, chattel paper, commercial tort claims, consumer goods, deposit accounts, documents, equipment, farm products, general intangibles, instruments, inventory, investment property, letter-of-credit rights, letters of credit and money, whether now owned or later acquired in favor of the Plaintiffs (*id*. at ¶ 14). Plaintiffs allege Pidilite and HBF, as Collateral Agent, also entered into a Patent and Trademark Security Agreement on the same date with Defendant, in which Defendant granted the Collateral Agent a security interest in all of Defendant's patents and trademarks. (*id*. at ¶ 15).

After a series of extensions to the maturity dates of the Loans, on July 2, 2021, HBF as Collateral Agent issued a Notice of Default and Demand for Payment to Defendant and subsequently commenced a Uniform Commercial Code ("UCC") process to dispose of the right, title, and interest to Defendant's patents and trademarks (*id*. at ¶¶ 18-22).

Plaintiffs and Defendant entered into a Workout Agreement on December 8, 2021, which extended the maturity date for all outstanding payments to March 31, 2022 (*id*. at ¶¶ 24-26). In consideration for the extension, Defendant executed a Bill of Sale (*id*. at ¶ 27). The Bill of Sale, which was to be held in escrow by HBF's counsel, would transfer title to the collateral upon

default under the Workout Agreement or Loans (*id.*). Ultimately, Plaintiffs allege Defendant failed to make the final payment and Plaintiffs subsequently directed HBF, as the Collateral Agent, to exercise its rights under the Workout Agreement and authorized the release of the Bill of Sale from escrow (*id.* at ¶¶ 33-34).

For the breach of contract and, alternatively, accounts stated claims, Plaintiffs are seeking over $5,000,000 (*id.* at ¶¶ 1-2). Plaintiffs also seek the Collateral (*id.* at ¶ 5).

DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

I. *Breach of Contract*

Defendant argues that Plaintiffs' breach of contract claims must be dismissed because they have not adequately alleged their own performance under the contract. To plead breach of contract under New York law, Plaintiffs must allege: (1) Plaintiffs and Defendant are parties to an executed agreement, (2) the agreement is supported by adequate consideration, (3) Plaintiffs have fulfilled all of their obligations under the agreement, (4) Defendant has breached the agreement, and (5) as a result of Defendant's breach of the agreement, Plaintiffs have been

damaged in an amount proven at trial (*see e.g., Markov v Katt,* 176 AD3d 401, 401-402 [1st Dept 2019]).

Here, the Complaint adequately alleges that Plaintiffs satisfied their obligations under the terms of the Loans to provide the funds to Defendant (NYSCEF 01 ¶¶ 6, 11). Defendant contends that Plaintiffs fail to allege that they delivered written notice of default under the pertinent contracts because the Purchase Agreement is not annexed to the Complaint (NYSCEF 28 at 5). However, the Complaint alleges "[a]fter the extended maturity date…expired…, the Collateral Agent issued a Notice of Default and Demand for payment…" (NYSCEF 01 ¶ 19). Plaintiffs likewise attach two notices of default to the Complaint which state "WE HEREBY DEMAND immediate payment in full of (i) the principal amount of $750,000, plus all accrued and unpaid interest, due under the Pidilite Note Purchase Agreement and (ii) the principal amount of $2,500,000, plus all accrued and unpaid interest, due under the HBF Note Purchase Agreement." (NYSCEF 10; *see also* NYSCEF 11). In any event, Defendant's arguments pertaining to the proper procedure for notice of default and conditions precedent were raised for the first time on reply and therefore are not presented properly before the court (*In re Erdey v City of New York*, 129 AD3d 546, 546-47 [1st Dept 2015]). Moreover, Plaintiffs are not required to plead or attach their supporting evidence to survive a motion to dismiss.

II. *Replevin*

Defendant's argument that Plaintiffs did not sufficiently allege demand for the remaining collateral is similarly unavailing. To plead replevin, "a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (*Khoury v Khoury*, 78 AD3d 903, 904 [2nd Dept 2010]). "[A] substantive element of a cause of action for replevin is that the plaintiff demanded

the return of the subject property and the one in possession thereof refuses to return it" (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 319 [1991]).

Plaintiffs adequately allege that following the default under the Workout Agreements, they demanded turnover of the remaining collateral (NYSCEF 01 ¶ 52). Moreover, Plaintiffs' affidavit filed in opposition to Defendant's motion to dismiss, containing the November 30, 2022, Demand for Turnover of Collateral (NYSCEF 27), is properly before the Court, and may be considered to cure any potential defect in the complaint (*see Ray v. Ray*, 108 AD3d 449, 452 [1st Dept 2013] ["[a] plaintiff may provide, and the court can consider, sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim"]). Thus, Defendant's motion is denied with respect to Plaintiffs' Third Cause of Action.

Accordingly, it is

ORDERED that Defendant's motion to dismiss Plaintiffs' Complaint is **DENIED**; it is further

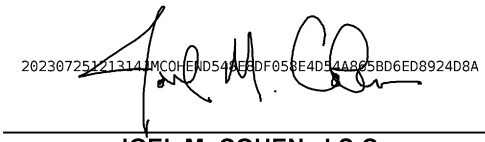
ORDERED that Defendant answer the Complaint within 21 days of this Decision and Order; it is further

ORDERED that parties appear telephonically for a preliminary conference on Tuesday, August 15, 2023, at 10:00 am, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference[1]; and it is further

[1] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.



7/25/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE