SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

ARMOIRES FABRITEC LTEE,

Plaintiff,

INDEX NO.: 018836/2005
MOTION DATE: 03/22/2007
MOTION SEQUENCE: 001 and 002

-against-

MBMA CORP. d/b/a SPECTRUM KITCHENS,

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Amended Notice of Cross Motion, Affidavit, Affirmation & Exhibits Annexed	2
Defendant's Memorandum of Law in Support	3
Memorandum of Law in Opposition to Defendant's Motion Pursuant to BCL §§ 1301 and 1312 and in Support of Plaintiff's Cross Motion to Amend the Complaint and for Summary Judgment	4
Affidavit of Steven Nakash, Affidavits & Exhibits Annexed	5
Defendant's Memorandum of Law	6
Reply Memorandum of Law Further in Support of Plaintiff's Cross Motion to Amend the Complaint and for Summary Judgment	7
Affidavit of Moreen McQuillen & Exhibit Annexed	8

This motion by the defendant MBMA Corp, d/b/a, Spectrum Kitchens, for an order pursuant to Business Corporation Law, §§ 1301, 1312 prohibiting the plaintiff from maintaining this action unless all required taxes of a foreign corporation are paid; and the cross motion by the plaintiff Armoires Fabritec, Ltee for an order: (1) granting leave to amend its complaint pursuant

to CPLR 3025 by adding Louis DeLustro as a party defendant and by increasing the damage amount from $204,856.17 to $214,463.01; (2) granting summary judgment to the plaintiff on its first, second and third causes of action and dismissing the defendant's first though fourth counterclaims; and (3) imposing sanctions pursuant to 22 NYCRR § 130.1.1[a] are determined as follows.

In 2004 and 2005, the defendant MBMA Corp, d/b/a, Spectrum Kitchens ["Spectrum"], a domestic corporation which sells kitchen cabinets and vanities, agreed to purchase cabinets and other items from the plaintiff Armoires Fabritec, Ltee ["Fabritec"], a Canadian corporation with its principal offices located in Quebec, Canada (Bourgoeis Aff., ¶¶ 2-4; Nakash Aff., ¶¶ 4-6).

Prior to the parties' entering into their commercial relationship, Fabritec supplied a form to Spectrum entitled "Credit Application," which requested, among other things "the legal name" of the applicant and further provided above the signature line that, "We request an open account with a credit limit in the amount indicated above. We accept the conditions of sale as described in your price list and claim full responsibility for the company mentioned above in the "Legal Name * * * We hereby authorize the above listed institutions to release any credit or financial information to Fabritec to establish an[ ] open account" (Pltff's Exh., "2").

The so-called "price list" referenced in the credit application (alternatively labeled "Terms and Conditions"), contains a variety of terms, including a provision which states that, "complete inspection of all deliveries is to be performed before signing delivery receipt. If the goods are damaged, written confirmation must be noted on the delivery receipt" (Pltff's Exh., "2").

There is also reference to a limited warranty, which provides, *inter alia*, that (1) Fabritec would warranty all of its products to be "free from defect in material and workmanship" for five years under normal use; (2) that the warranty would exclude, among other things, "field cost" claims; and (3) that Fabritec, at its option, could "repair or replace defective material after inspection by a field representative". Significantly Spectrum asserts that it was never supplied with a copy of the so-called "Terms and Condition" mentioned in the September, 2004 Credit Application (Nakash Aff., ¶ 15).

Thereafter, Spectrum placed orders with Fabritec for some various jobs, all of which were located in New York City (Nakash Aff., ¶ 5).

According to the plaintiff, it confirmed orders with purchase order confirmation forms, which included payment terms of "45 days net" or "30 days net" (Bourgoeis Aff., ¶ 8).

Fabritec thereafter shipped the goods together with a bill of lading and delivery receipt which provided that damaged goods were to be noted on any receipts received (Bourgoeis Aff., ¶ 9).

The plaintiff contends that Spectrum never made notations on the delivery sheets when defective goods were discovered, although the plaintiff concedes that Spectrum, instead, contacted it directly by telephone or facsimile, after which the plaintiff would replace or remedy any defective cabinets, allegedly as a warranty claim (Bourgoeis Aff., ¶ 10).

According to the Spectrum, however, the plaintiff's products were riddled with defects, problems and deficiencies – some of them latent in scope. Moreover, the plaintiff's deliveries were frequently made in an untimely and incomplete fashion, all of which generated delays, substantial costs and severely strained Spectrum's business relationships with the customers to whom the products were being delivered (Nakash Aff., ¶¶ 18-31, 34).

In mid-2005, Spectrum sent an e-mail to the plaintiff claiming that a credit of over $106,000.00 was due and owing (Def's Exh., "A"). The plaintiff responded with its own e-mail, in which it advised that Spectrum was some $434,000.00 in arrears on its payments and that certain products would not be shipped until Spectrum agreed that the foregoing sum was, in fact, due and owing (Bourgoeis Aff., ¶ 13-14).

By letter dated May 20, 2005, the plaintiff wrote a letter to the defendant, which provided that "by signing this letter" Spectrum agreed to pay the amount mentioned above in specified installments, *i.e.*, $434,794.53 (Pltff's Exh., "8").

Spectrum subsequently executed the letter and returned it to the plaintiff, although it now claims that it had no choice other than to do so since the plaintiff refused to make further shipments and it faced back changes from its own clients if it could not deliver the products in question (Nakash Aff., ¶¶ 10-11).

Thereafter, the plaintiff contends that Spectrum made payments totaling some $245,837.90, leaving a balance of $188, 956.63 based on the $434,794.53 sum identified in the May 20 letter.

The plaintiff further asserts that Spectrum allegedly failed to pay for goods delivered after the May 20 letter in an amount equal to $25, 506.38. Spectrum claims that these subsequent deliveries were also late and contained defective products, causing it to incur additional costs and back charges from its client (Nakash Aff., ¶¶ 11-12).

The parties ultimately ceased doing business in July of 2005 and Spectrum apparently ordered replacement cabinets from another supplier to complete its contracts (Nakash Aff., ¶ 13; Bourgoeis Aff., ¶ 15).

By summons and verified complaint dated November 2005, the plaintiff commenced the within action against Spectrum setting forth four causes of action sounding in breach of contract, goods sold and delivered, unjust enrichment and account stated (Def's Exh., "A").

Spectrum has answered and interposed several affirmative defenses and counterclaims, alleging in substance, that the plaintiff delivered defective products in an untimely fashion, the effect of which was to damage Spectrum in a sum equal to $250,000.00 (Ans., ¶¶ 21-43).

Spectrum's third counterclaim further alleges that Fabritec knowingly made false statements relative to the quality of the cabinets in order to induce Spectrum to purchase the merchandise (Ans., ¶¶ 34-28).

Notably, Spectrum's answer contains an affirmative defense predicated upon BCL§1312, which avers that the plaintiff is a foreign corporation; that it is not authorized to do business in New York; that the plaintiff has not paid relevant New York State taxes; and that it is thereby precluded under BCL§1312 from maintaining the instant action in the Courts of New York (Ans.,¶¶ 16-20).

Spectrum moves now for summary judgment dismissing the complaint pursuant to BCL §§ 1301, 1312, prohibiting the plaintiff from maintaining the subject action on the grounds that it has not been authorized to do business in this State and has failed to pay stated New York State taxes.

The plaintiff cross moves for an order: (1) permitting the plaintiff to amend its complaint by adding Louis DeLustro as a party defendant and by increasing the damage amount from $204,856.17 to $214,463.01; (2) granting summary judgment to the plaintiff on its first, second and third causes of action; (3) dismissing the defendant's first though fourth counterclaims; and (4) imposing sanctions pursuant to 22 NYCRR § 130.1.1.

According to Fabritec, it inadvertently omitted from its damage demand, the $25, 506.38 invoice amount for deliveries made after the parties executed the May, 2005 letter agreement (Fabritec Br., at 134, fn 1).

However, and with respect to Spectrum's motion, the Court agrees that Spectrum has failed to discharge its burden of establishing entitlement to dismissal pursuant to Business Corporation Law § 1312(a), which bars suits by foreign corporations that do business in New York without authorization. *Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd. v. Leonard*, 26 AD3d 298; *Nick v. Greenfield*, 299 AD2d 172; *Uribe v. Merchants Bank of New York*, 266 AD2d 21 *see,* Def's 4th Aff. Defense.

Specifically, Spectrum has not shown that Fabritec's activities in New York are "systematic and regular as to manifest continuity of activity in New York", so as to "rebut the presumption that these entities are doing business where they were incorporated and not in New York." *Uribe v. Merchants Bank of New York, supra*; *Airline Exchange, Inc. v. Bag*, 266 AD2d 414; *Bank v. Spectrum Cabinet Sales*, 247 AD2d 373, 374 *see, Von Arx, A.G. v. Breitenstein*, 52 AD2d 1049, 1050, *aff'd,* 41 NY2d 958, 960 [1977]; *Household Bank (SB), N.A. v. Mitchell,* 12 AD3d 568.

Here, the evidence adduced indicates, among other things, that Fabritec maintains no office or telephone listing, owns no real property and has no employees permanently stationed in New York. *Uribe v. Merchants Bank of New York, supra.* Further, Fabritec's activities in New York were effectively "limited to solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce." *Id.* at 22; *see, Von Arx, A.G. v. Breitenstein, supra,* 41 NY2d at 960 *see, Bank v. Spectrum Cabinet Sales, supra.* The solicitation of business, and facilitating the sale and delivery of merchandise

incidental to a plaintiff's business in interstate and international commerce, will not alone constitute doing business in this state within the contemplation of section 1312. *Uribe v. Merchants Bank of New York, supra; Bank v. Spectrum Cabinet Sales, supra; see also, Von Arx, A.G. v. Breitenstein*, supra; *Alicanto, S.A. v. Woolverton*, 129 AD2d 601, 603.

The purpose of Business Corporation Law § 1312 is to regulate foreign corporations doing business in New York, not to permit defendants to avoid contractual obligations. *Bank v. Spectrum Cabinet Sales, supra; see also, Acno-Tec Ltd. v. Wall Street Suites, L.L.C.*, 24 AD3d 392, 393 *Alicanto, S.A. v. Woolverton, supra.*

The Court notes that the Fabritec has asserted – and the defendant has not demonstrated to the contrary – that all relevant sales taxes covering the time period during which sales were made to Spectrum, have been paid (Bourgoeis Aff., ¶ 16; Pltff's Exhs.,"11-12")(*see, Great Sage Financial Corp. v. Mah,* 10 Misc.3d 142(A), 2006 WL 156995 [Supreme Court, Appellate Term 1st Dept. 2006]).

That branch of Fabritec's cross motion which is for leave to add Spectrum Chief Financial officer, Louis Delustro as a party-defendant, is denied (CPLR 3025).

Although permission to amend pleadings is to be freely granted (CPLR 3025[b]; *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]), where a proposed amendment is lacking in merit, the application is properly denied. *e.g., Unger v. Leviton*, 25 AD3d 689; *Ricca v. Valenti*, 24 AD3d 647. It is settled that Courts possesses broad discretion in deciding a motion to amend. *Mohammed by Ahmad v. City of New York,* 242 AD2d 321.

Here, although Delustro executed a so-called written "Credit Application" dated September 14, 2004, there is nothing in that document which clearly, unequivocally commits him to agreeing to personally guarantee, or become individually answerable for, Spectrum's financial obligations to Fabritec. *See generally, Corman v. LaFountain*, ___AD3d___, 2007 WL 853177 (2nd Dept. Mar 20, 2007); *Weinreb v. Stinchfield*, 19 AD3d 482, 483; *Airline Cleaning & Maintenance Service, Inc. v. Cushman & Wakefield, Inc.*, 305 AD2d 523, 524.

It is well settled and old law that,"an agent who signs an agreement on behalf of a disclosed principal will not be held responsible for its performance unless there is clear and

explicit evidence of the agent's 'intentions to substitute or superadd his personal liability for, or to, that of the principal'." *Star Video Entertainment, LP v J & I Video Distrib. Inc.*, 268 AD2d 423, *quoting from, Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6 (1964); *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 (1961); *Yellow Book of NY, LP v. DePante*, 309 AD2d 859, 860.

The language relied upon by the plaintiff is, at best, ambiguous and obscure, *i.e.*, the italicized contract language which states, in part, that "we request an open account with a credit line in the amount indicated above" and "accept full responsibility for the company mentioned above * * *."

The foregoing phrase makes no express reference to any personal guarantee or personal liability; nor does it provide in specific terms that Delustro – whose signature appears above his corporate title only – would be assuming individual liability for corporate debts or obligation incurred under the credit application. *cf., Star Video Entertainment, LP v J & I Video Distrib. Inc., supra.*

Moreover, the contract, which was drafted by Fabritec, is cryptic and grammatically vague, since it is unclear whether the plural term "we" is intended to refer to the corporation in a collective sense as a group of individuals, or whether instead, it was intended to convey some other, unexplained meaning. No less confusing is the fact that the contract language uses the plural term "we," even though the immediately following signature portion of the document contains a space for – and was actually executed by – only one person.

It is well settled that ambiguities in a contractual instrument will be resolved against the party who prepared it. *e.g., 151 West Associates v. Printsiples Fabric Corp.*, 61 NY2d 732, 734 (1984). In short, Fabritec has failed to submit "clear and explicit evidence" supporting the existence of personal liability as against Delustro. *Weinreb v. Stinchfield, supra.*

However, Fabritec has demonstrated its *prima face* entitlement to judgment as a matter of law based upon the May, 2005 letter, in which Spectrum expressly acknowledged and agreed that it owed Fabritec the principal sum of $434,794.53. Only $245,837.90 has, to date, been paid.

The language of the May 20 agreement is clear and unequivocal in its import and evidences the parties' agreement with respect to the amounts recited in that document, *i.e.*, that as of May 20, 2005, it was agreed that the sum of $434,794.53 was due and owing and would be paid by Spectrum pursuant to the schedule set forth in the letter.

Spectrum's vaguely framed assertion that its consent to the May 20 letter was the product of economic duress, is unavailing. It does not raise a question of fact as to defendant's obligation to pay that sum.

The defense of economic duress "permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will." *805 Third Ave. Co. v. M.W. Realty Associates*, 58 NY2d 447, 451 (1983); *Stewart M. Muller Const. Co., Inc. v. New York Tel. Co.*, 40 NY2d 955, 956 (1976); *Bechard v. Monty's Bay Recreation, Inc.*, 35 AD3d 1131, *Smith v. Long*, 281 AD2d 897, 899. "Under New York law a party seeking to avoid his contractual obligations on grounds of economic duress shoulders a heavy burden." *International Halliwell Mines, Ltd. v. Continental Copper & Steel Industries, Inc.*, 544 F2d 105, 108 (2nd Cir. 1976).

Notably, "the threatened exercise of a legal right does not amount to economic duress," (*Friends Lumber Inc. v. Cornell Development Corp.*, 243 AD2d 886, 886 *see, Stewart M. Muller Const. Co., Inc. v. New York Tel. Co., supra*), and in general, "a party seeking to avoid a contract induced by duress must act promptly to repudiate it." *Leader v. Dinkler Management Corp.*, 26 AD2d 683, *affd*, 20 NY2d 393 (1967) *see, 110 Sand Co. v. Nassau Land Imp. Co., Inc.*, 7 AD3d 497, 498.

The mere fact that Fabritec elected to withhold certain deliveries in light of Spectrum's nonpayment, does not establish that Spectrum's free will was overborne; nor did Fabritec coercively make demands in excess of its rights under the parties' agreement. *See, Stewart M. Muller Const. Co., Inc. v. New York Tel. Co., supra, at* 956; *Berzin v. W.P. Carey & Co., Inc.*, 293 AD2d 320, 321; *Smith v. Long, supra.* The Court notes that Spectrum was later able to secure the goods in question from a third-party supplier, made partial payments pursuant to the

terms of the agreement, and made no timely attempt to repudiate it. *cf. Austin Instrument, Inc. v. Loral Corp.*, 29 NY2d 124, 130-131 (1971); *110 Sand Co. v. Nassau Land Imp. Co., Inc., supra,* at 498.

Spectrum now argues that the amounts set forth in the agreement did not account for certain claims and offsets that it supposedly possessed, but the letter agreement makes no reference to offsets or potential defenses. (Nakash Opp. Aff., ¶¶ 35-36). Rather, it states without relevant qualification that the sum in question was due and owing and would be paid.

Additionally and insofar as Spectrum claims that it was unaware at the time of the extent to which it had allegedly been damaged by Fabritec's conduct (Delustro Aff., ¶¶ 12-13; Nakash Opp Aff., ¶¶ 35-36), its remedy was to refrain from executing an unqualified agreement to pay – or alternatively – to include language in the agreement reserving its right to insist upon any set-offs and deductions arising out of the invoices at issue.

"[A] party that signs a document is conclusively bound by its terms * * *." *Guerra v. Astoria Generating Co., L.P.*, 8 AD3d 617, 618; *see also, Fleet Capital Leasing/Global Vendor Finance v. Angiuli Motors, Inc.*,15 AD3d 535. Moreover, the time to address objectionable contract terms "is at bargaining table." *Maxton Builders, Inc. v. Lo Galbo*, 68 NY2d 373, 382 (1986); *see also, Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 (1995). Judging from the jobs where defendant was hired to install kitchens, it is a sophisticated commercial entity.

It follows that Spectrum's counterclaims and defenses which arise out of product deliveries and invoices covered by the May 20 letter agreement, those claims and defenses are dismissed.

However, triable issues of fact do exist as to alleged damages sustained by the plaintiff in connection with product deliveries not covered by the May, 2005 letter agreement, *i.e.*, Fabritec's claim that after the May 20 agreement was executed, it resumed deliveries to Spectrum and that Spectrum failed to pay for goods invoiced in the amount of $25,506.38 (Bourgoeis Aff., ¶ 15).

Although Fabritec contends, *inter alia*, that product defects were to be immediately noted on delivery slips and that no such notations were ever made by Spectrum, the record supports

Spectrum's claims that the parties developed a course of conduct by which claims were made and defects were corrected by telephone or facsimile transmission. Bourgoeis Aff., ¶ 16; *cf., Barsotti's Inc. v. Consolidated Edison Co. of NY*, 254 AD2d 211; *Austin v. Barber*, 227 AD2d 826. Nor does it appear from the contemporaneous record that Fabritec ever insisted upon adherence to the alleged contract requirement that all defects were to be noted on returned delivery receipts.

It is well settled law that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Coliseum Towers Associates v. County of Nassau*, 2 AD3d 562, 564; *see also, Jackson v. Board of Educ. of City of New York*, 30 AD3d 57, 64; *Alternatives Federal Credit Union v. Olbios*, LLC, 14 AD3d 779, 781.

Although Fabritec argues that the parties' treated these defect adjustments solely as warranty-type claims, for which delivery receipt notice was not required, it is undisputed that all damages claims were resolved in accord with the foregoing practice. Whether the parties' adopted method of resolving product claims can be viewed exclusively as warrant-type accommodations, cannot be summarily resolved upon the record presented.

The also Court disagrees that the counterclaims interposed by the Spectrum are "all" predicated upon breach of Fabritec's written warranty. Fabritec Brief at 31-33; *cf., Tiffany At Westbury Condominium ex rel. Bd. of Managers v. Marelli Development Corp.*, 34 AD3d 787, 789.

Although Spectrum has not affixed substantive titles to its counterclaims, Courts will generally "look to the essence of the stated claims and not to the label ascribed to them" by the parties. *e.g., Doe v. Jacobs*, 19 AD3d 641 *see also, Western Elec. Co. v. Brenner*, 41 NY2d 291, 293-294 (1977).

Applying this principle to the facts presented, and viewing the record favorably to Spectrum, "as is appropriate in the context of * * * [a] motion for summary judgment," *Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96 105, 106 (2006), *cf., Leon v. Martinez*, 84 NY2d 83, 87-88 (1994), Court finds that Spectrum's answer interposes claims

whose "essence" sounds in, among other things, breach of contract, negligence and fraud, for which the damages identified are potentially recoverable. Indeed, there is no reference to Fabritec's written warranty in Spectrum's four counterclaims (Ans.,¶¶ 21-43).

Additionally, Fabritec's written warranty: (1) does not purport to constitute the sole and exclusive damage remedy available to the Spectrum upon an alleged breach of the underlying contract; and (2) does not define the exclusionary term, "field costs" upon which Fabritec further relies in support of its motion. (Brief at 35-36).

While Fabritec also contends that Spectrum's damage claims are vague and unproven irrespective of what theory of recovery had been asserted in its counterclaims, the Court finds that questions of fact exist with respect to these claims which cannot be summarily resolved upon the record before the Court.

Similarly, questions of fact have been presented with respect to whether the Spectrum's fraud claims viably rest upon the breach of alleged duties which are collateral or extraneous to the underlying contract claim. (Ans., ¶¶ 37-38). *See, Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 NY2d 112, 122 (1995); *Deerfield Communications Corp. v. Chesebrough-Ponds*, 68 NY2d 954, 956 (1986); *Wright v. Selle*, 27 AD3d 1065, 1068 *cf., Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987); *Mendelovitz v. Cohen*, 37 AD3d 670.

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974); *Mosheyev v. Pilevsky*, 283 AD2d 469. Indeed, "[e]ven the color of a triable issue forecloses the remedy." *In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489.

Under the circumstances, however, and since issues of fact exist as to the parties' conflicting claims relative to deliveries not covered by the May, 2005 letter agreement, that branch of Fabritec's cross motion which is for leave to amend its complaint by increasing its damage demand to $214,463.01, is granted.

Lastly, that branch of Fabritec's motion which is for the imposition of sanctions pursuant to 22 NYCRR § 130.1.1[a] is denied, inasmuch as the Court finds that sanctions are not warranted upon the record presented. *e.g., Stone v. Stone*, ___AD3d___, 2007 WL 1016976 (2nd

Dept. 2007); *Academy of Medicine of Queens County v. Seminole 75 Realty Corp.*, ___AD3d___, 2007 WL 853196 (2nd 2007).

The plaintiff, if it be so advised, may serve and file an amended complaint within twenty days of the date of this order, increasing the damage amount to the stipulated sum of $214,463.01. Accordingly, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiff's motion to amend the ad damnum clause is granted and plaintiff's motion for summary judgment of the first, second and third causes of action are granted. The motion is denied as to dismissal of defendant's counterclaims.

The Court has considered the parties' remaining contentions and concludes that they are lacking in merit.

The foregoing constitutes the decision and order of the Court.

Dated: April 16, 2007

Ira B Warshawsky
J.S.C.

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APR 25 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE