SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART _____

HPS Jewelers

-v-

M. Brown

INDEX NO. 650924/11

MOTION DATE 6/17/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of defendant Mark Brown, for an order, pursuant to CPLR §3211, dismissing the complaint of plaintiff HPS Jewelers, Inc., is denied in its entirety as premature; and it is further

ORDERED that in light of this court's decision, denying defendant's motion, defendant's application for costs and/or sanctions under CPLR §8006 and 22 N.Y.C.R.R. §130-1.1 for being required to defend plaintiff's knowingly meritless action, is denied; and it is further

ORDERED that counsel shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room 438, on Tuesday, 19, 2011 at 2:15 p.m.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/23/11

C. E. E., J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

HPS JEWELERS, INC.,

Plaintiff,

-against-

MARK BROWN,

Defendants.

Index No. 650924/2011

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Mark Brown moves for an order, pursuant to CPLR §3211, dismissing the complaint of plaintiff HPS Jewelers, Inc..

Background

According to the Complaint, this is a case for goods sold and delivered on consignment, seeking money damages of $53,375.00. The merchandise in question is jewelry sold by defendant on a now-defunct home shopping television show, sold pursuant to three (3) Memos issued by plaintiff to defendant. The parties had entered into fifteen (15) Memo transactions in total, of which the last three (3) went bad.

Defendant's Contentions

Defendant contends that the three memorandums resolve all factual issues as a matter of law and conclusively dispose of the claims, since they establish that plaintiff's causes of action may not be maintained under the Statute of Frauds for purposes of CPLR §3211(a)(5).

Moreover, the defendant was never a "merchant" with the plaintiff for purposes of U.C.C. §2-201(2), and never had an opportunity to reject the items allegedly provided, but

would have if given the opportunity to do so.

Since there is no writing sufficient to indicate that any of the alleged three contracts for sale have been made between the parties and signed by the defendant, as shown by the documentary evidence consisting of three "memo agreements," all factual issues have been resolved as a matter of law and the claims may be conclusively disposed of under CPLR §§3211(a)(1) & (5).

Defendant further argues that the Complaint fails to state causes of action for breach of contract for purposes of CPLR §3211(a)(7).

As to its causes of action for breach of contract, the plaintiff offers no allegations to support the material elements of: existence of a contract, since there is no allegation that a valid contract was entered into or its date of entry; plaintiff's performance thereunder, since the Complaint only states that the items were sold with "memos ..., but not the items themselves; and damages, as plaintiff states that defendant only "retained the invoices (memos)," but does not allege that it retained the items.

The aforementioned causes of action contained in the four corners of the Complaint fail to allege nearly all the material elements of breach of contract and therefore fail to state a cause of action on multiple grounds under CPLR §3211(a)(7).

The memorandum agreements that form the basis of this litigation reference contracts had between the plaintiff and an unnamed party, "Emvee TV." It appears that as a result of "Emvee TV's" possible breach of those contracts, plaintiff has proceeded to file a lawsuit against one of its employees, the defendant, with full knowledge that it is not a proper party, as evidenced by the above legal deficiencies.. Whether this lawsuit was filed to force a settlement or

for a similar monetary purpose is subject to speculation, however, it is without any legal basis whatsoever and amounts to harassment. The defendant therefore respectfully requests costs and/or sanctions under CPLR §8006 and 22 N.Y.C.R.R. §130-1.1 for being required to defend plaintiff's knowingly meritless action.

Defendant in his affidavit claims that at not time including but not limited to on or about March 7, 2010, and on or about November 13, 2010, did plaintiff sell defendant any items of jewelry and therefore never sold him any items of jewelry "on memo" or pursuant to any written memorandum agreements, or contract of sale, including but not limited to those agreements referenced in the complaint and numbered "9101," "9140" and "9151."

Defendant was first provided with the memorandum agreements referenced in the complaint when he was served with same on or about April 12, 2011. Had he been provided with same, he would have immediately rejected them as invalid.

It appears that the memorandum agreements reference agreements had between the plaintiff and an entity called "Emvee TV."

Although defendant was the executive produced for "Emvee TV," at no time did he enter into any contracts, agreements or any memorandum agreements with the defendant personally on behalf of "Emvee TV" or in any other capacity as stated above.

Plaintiff's Opposition

Defendant's motion is entirely premature at the pleading stage and is factually and legally baseless. Defendant's lead argument that plaintiff's claims based on the subject outstanding memos are barred by the Statute of Frauds, is faulty insofar as it relies on UCC § 2-201(1)'s rules governing non-merchant transactions. The proper source of law is UCC § 2-201(2)'s provisions

covering rules governing merchants. Defendant and his counsel give only the most grudging lip service to the salient legal issue, asserting in conclusory fashion that defendant is not a merchant. This statement is contrary to the facts, and, as a legal claim, is entirely premature.

As to defendant's contention that a breach of contract has not been adequately pled. defendant ignores that the complaint also contains a cause of action for "account stated." As to defendant's argument that the proper defendant to this action is the entity running the TV show that sold the memo jewelry, this argument is certainly premature at the pleading stage, and is also factually contracted in plaintiff's Affirmation. Finally, defendant's claim that he never received the Memos in question, triggers a factual dispute that is inappropriate for summary resolution, particularly at the pleading stage.

To be clear, defendant never argues that the unpaid Memos are in an way insufficient to satisfy the Statute of Frauds applicable "between merchants" under UCC § 2-201(2). Instead, he maintains that this provision never comes into play because he was not a merchant. Astonishingly, the sole basis for this assertion appears to be counsel's singular conclusory assertion that "Defendant was never a merchant for purposes of U.C.C. § 2-201(2)." Defendant's entire Statute of Fraud argument is nothing more than a house of cards. First, counsel's hearsay allegation, made without any claim even of first-hand knowledge, is valueless. Even had defendant himself claimed not to have been a "merchant," this also would have been insufficient to support a motion to dismiss as affidavit testimony extrinsic to the pleadings and documentary evidence could not support a motion to dismiss. Pursuant to CPLR 3211, In any event, the Complaint, at ¶ 15, alleges that there were "fifteen (15) separate 'memo agreements' between the parties. Reading the complaint in the light most favorable to plaintiff, and granting plaintiff, all

reasonable inferences, the number of transactions are indicative of "person[s] who deal in goods of the kind" - i.e., merchants as defined by the UCC.

Moreover, plaintiff Mr. Schoenberg of HPS (Schoenberg), in his accompanying Affidavit, crystallizes the fact that the transactions involved merchants. Schoenberg details how the parties met at an industry-only trade show; how defendant had solicited plaintiff for jewelry to sell on his Emvee TV slot and how he even requested additional quantities; how twelve (12) separate Memo transactions were consummated with defendant before the three (3) that are the subject of this litigation fell through; as well as how defendant signed the first such Memo.

Defendant's papers do not claim, and thus do not preserve any argument that assuming the parties are merchants, that the Memos and supporting documentation referenced in the Memos are insufficient to satisfy the Statute of Frauds applicable to merchants under UCC § 2-201(2). However, should the court construe defendant's argument otherwise, then it should conclude that the documentation amply supports compliance with the Statute of Frauds.

Here, all of the Memos, including Exhibits O-Q, contained the names of HPS as well as defendant, the dates and on attached sheets accompanying the memos (and referenced therein) all pertinent information regarding quantity, price and description. It has not been argued, and cannot reasonably be argued, that the requirements of the Statute of Frauds as it pertains to merchants has not been satisfied.

Here, each of the memos were rendered with a balance. The three memos specifically at issue in this case were rendered pursuant to a pattern and course of dealing that resulted in the payment in full of the prior 12 memos. It is alleged that defendant retained the memos without objection until the time of this lawsuit. Accordingly, a cause of action for an account stated has

been properly made out, in addition to the breach of contract claim.

The complaint is against defendant and not against any entity that he was affiliated with. The memos are made out to defendant.

Defendant claims that in dealing with plaintiff, he was at all times acting on behalf of Emvee TV (Brown Aff., ¶115-6; Goldsmith Aff., ¶ 19). Mr. Schoenberg, in his affidavit, is quite specific that the agreement was with Brown directly as Emvee TV was a risky start-up venture. The question is whether plaintiff states a claim, and not whether, as the case progresses, Brown will be able to make good on his defense that plaintiff sued the wrong party. Plaintiff asserts that it sued absolutely the correct party, and plaintiff states a claim upon which relief can be granted, and there is no documentary evidence that conclusively establishes otherwise.

The factual dispute existing between the allegations in the complaint that plaintiff provided defendant with the subject memos and defendant's denial of same (Brown Aff., ¶4) is a disputed factual question that cannot be decided in the context of a motion to dismiss (or even summary judgment).

Opposing counsel's argument that plaintiff has not stated a cause of action for breach of contract is persnickety and without legal merit. He writes that "there is no allegation that a valid contract was entered into or its date of entry" (Goldsmith Aff., ¶ 17). Given the liberal pleading standards, as well as the requirement that the court review the pleadings in a light favorable to the plaintiff and grant plaintiff factual inferences, the pleading is properly construed to mean that the memos were provided pursuant to an ongoing understanding between plaintiff and defendant that the Memos be paid for the goods provided. To the extent there is any ambiguity, this is cleared up by the accompanying Schoenberg Affidavit, which should be re read in clarification of

the pleading. The same goes for defendant's claim (also at Goldsmith Aff., ¶17), that there are no damages because the complaint does not spell out that defendant retained not just the memos but the items as well. This is implicit in the pleading, and in any event, clarified by the Schoenberg Affidavit.

Additionally, defendant appears to have omitted that there exists a second cause of action based on an account stated. Here, each of the memos were rendered with a balance. The three memos specifically at issue in this case were rendered pursuant to a pattern and course of dealing that resulted in the payment in full of the prior 12 memos. It is alleged that defendant retained the memos without objection until the time of this lawsuit. Accordingly, a cause of action for an account stated has been properly made out, in addition to the breach of contract claim.

The complaint is against defendant Brown and not against any entity that he was affiliated with. The memos are made out to Brown. Brown claims that in dealing with plaintiff, he was at all times acting on behalf of Emvee TV (Brown Aff., ¶115-6; Goldsmith Aff., ¶ 19). Mr. Schoenberg, in his affidavit, is quite specific that the agreement was with Brown directly as Emvee TV was a risky start-up venture.

While the question of whether Brown or Emvee TV is the proper party to this action obviously will be a significant issue through the course of the litigation, it is improper for Brown to raise this argument at the pleading stage. The question is whether plaintiff states a claim, and not whether, as the case progresses, Brown will be able to make good on his defense that plaintiff sued the wrong party. Plaintiff asserts that it sued absolutely the correct party, and plaintiff states a claim upon which relief can be granted, and there is no documentary evidence that conclusively establishes otherwise.

The factual dispute existing between the allegations in the complaint that plaintiff provided Brown with the subject memos and Brown's denial of same (Brown Aff., ¶4) is a disputed factual question that cannot be decided in the context of a motion to dismiss (or even summary judgment).

Defendant's Reply

Even assuming that an issue of fact exists as to whether transactions were "between merchants," the memos on their face nonetheless wholly fail to satisfy the Statue of Frauds under UCC §2-201(2). All the relevant memos alleged in the complaint (#9101,9151 & 9140) by their very language read merely as purchase orders that contemplate only future agreements. *(See,* Df. *Exhibit "B"):*

> "The receipt and retention by you of the goods described is your acceptance of all terms and conditions of this agreement and consideration for making it. ... A sale of any and all goods will take effect only from the date of our approval in writing delivered to you."

This language, contained in all three memos, does not in any way indicate that a contract had already been made, but to the contrary, indicates that no contract could exist until the defendant accepted plaintiff's offer and then only upon the plaintiff's approval. There is no evidence to suggest that the defendant ever received or retained the goods or that plaintiff thereafter delivered a writing to effect its sale.

The language of the memo agreements on their face, resolve all factual issues as a matter of law and conclusively disposes of plaintiff's claims since they amount to mere purchase orders in contemplation of future contracts. Essentially, the circumstances before this Court are three agreements between the plaintiff and "Emvee" that went bad and plaintiff's subsequent frivolous lawsuit against the defendant, a mere employee of Emvee, in an attempt to be repaid for goods that

he never personally contracted for and was never offered. The insufficiency of plaintiff's allegations are evidenced within the four corners of the complaint, which fail to show that these three purported contracts existed, their date of entry, plaintiff's performance thereunder or damages. Moreover, even assuming the parties were merchants, the memos, which the plaintiff impliedly admits are purchase orders, fail to satisfy the Statute of Frauds under UCC §2-201(2) as a matter of law, since they were not "confirmatory writings," were not signed by either party and never received. Therefore, plaintiff's complaint fails to state a cause of action under CPLR §3211.

Discussion

Defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1), based upon documentary evidence, CPLR 3211(a)(5), as precluded by the Statute of Frauds, and CPLR 3211(a)(7), for failure to state a cause of action.

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [l], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law"(*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO*

Indus., Inc. v Anderson Kill & Olick, P.C., 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

CPLR 3211[a][5]: Dismiss based on Statute of Frauds

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground, *inter alia,* that the cause of action may not be maintained because of the Statute of Frauds.

Pursuant to the Statute of Frauds, "[e]very agreement, promise or undertaking ... [that, b]y its terms is not to be performed within one year from the making thereof" is "void, *unless it or some note or memorandum thereof be in writing,* and subscribed by the party to be charged therewith, or by his [or her] lawful agent" (*id.* [emphasis added]).

It is well established that "[t]he Statute of Frauds does not require the 'memorandum ... to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion' " (*Crabtree v Elizabeth Arden Sales Corp.,* 305 N.Y. 48, 54, 110 N.E.2d 551). "All of [the terms of the contract] must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged (*id.* at 55–56, 110 N.E.2d 551). Thus, "[s]igned and unsigned writings relating to the same transaction and containing all the essential terms of a contract may be read together to evidence a binding contract" (*Weiner & Co. v Teitelbaum,* 107 A.D.2d 583, 583, 483 N.Y.S.2d 313; *see Western N.Y. Land Conservancy v Town of Amherst,* 4 A.D.3d 889, 890, 773 N.Y.S.2d 768). Moreover, "parol evidence is admissible to show the connection between the writings and the defendant's agreement to them (*Western N.Y. Land Conservancy v Town of*

Amherst, 4 A.D.3d 889, 890, 773 N.Y.S.2d 768 (4th Dept 2004); *see Crabtree,* 305 N.Y. at 55–56, 110 N.E.2d 551).

The sufficiency of the proffered writings should be considered in light of the purpose of the Statute of Frauds, i.e., "the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made" (4 Corbin on Contracts § 22.1, at 703 [rev ed 1997]; *see Morris Cohon & Co. v Russell,* 23 N.Y.2d 569, 574, 297 N.Y.S.2d 947, 245 N.E.2d 712). Thus, "we should always be satisfied with 'some note or memorandum' that is adequate, *when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence,* to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail" (4 Corbin on Contracts § 22.1, at 704).

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept

factual allegations as true]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). While affidavits may be considered, if the motion is not converted to

a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,i* 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez,* 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); *Guggenheimer v Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); *Salles v. Chase Manhattan Bank,* 300 A.D.2d 226, 228, 754 N.Y.S.2d 236 (1st Dept.2002).

§2-201(1) of the Uniform Commercial Code states:

> "... a contract for the sale of goods for the price of $500 or more is not enforceable by way of action ... unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party

against whom enforcement is sought ... ."

This, however, is only the general rule, which in the very next paragraph of the statute defines the rule applicable to "merchants." Specifically, UCC § 2-201(2) provides:

> "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirement of [the Statute of Frauds for the sale of goods for the price of $500 or more against such party unless written notice of objection to its contents is given within ten days after it is received."

See generally Kabbalah Jeans, Inc. v. CN USA International Corp., 26 Misc.3d 1241A, 907 N.Y.S.2d 438 (Sup. Ct. Kings Cou. 2010).

In turn, the term "merchant", as defined at UCC § 2-104(1) means:

> "...a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

The term "between merchants" (which is used in UCC § 2-201(2)) is defined at UCC § 2-104(3) as meaning "any transaction to which both parties are chargeable with the knowledge or skill of merchants."

The Complaint, at ¶ 15, alleges that there were fifteen (15) separate memo agreements between the parties. Reading the complaint in the light most favorable to plaintiff, and granting plaintiff, all reasonable inferences, the number of transactions are indicative of "person[s] who deal in goods of the kind" - i.e., merchants as defined by the UCC sufficient to defeat a motion to dismiss as premature at this juncture.

And, the issue of whether the issue of the subject Memos herein is within or without the Statute of Frauds is premature at this juncture.

With respect to defendant's application to dismiss the complaint based on the insufficiency of pleading a breach of contract, When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). With this standard in mind, defendant's application to dismiss the breach of contract cause of action is denied, as premature. Given the liberal pleading standards, as well as the requirement that the court review the pleadings in a light favorable to the plaintiff and grant plaintiff factual inferences, the pleading is properly construed to mean that the memos were provided pursuant to an ongoing understanding between plaintiff and defendant that the Memos be paid for the goods provided. To the extent there is any ambiguity, this is addressed by the accompanying Schoenberg Affidavit, which should be re read in clarification of the pleading. *Leon v. Martinez, supra.* Likewise, defendant's claim that there are no damages because the complaint does not spell out that defendant retained not just the memos but the items as well is unpersuasive. This is implicit in the pleading, and in any event, clarified by the Schoenberg Affidavit.

Further a determination on the question of whether defendant Brown or Emvee TV is the proper party to this action is a significant issue; however, any determination on this issue is

premature at this juncture.

Conclusion

Based on the forgoing, it is hereby

ORDERED that the application of defendant Mark Brown, for an order, pursuant to CPLR §3211, dismissing the complaint of plaintiff HPS Jewelers, Inc., is denied in its entirety as premature; and it is further

ORDERED that in light of this court's decision, denying defendant's motion, defendant's application for costs and/or sanctions under CPLR §8006 and 22 N.Y.C.R.R. §130-1.1 for being required to defend plaintiff's knowingly meritless action, is denied; and it is further

ORDERED that counsel shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room 438, on Tuesday, 19, 2011 at 2:15 p.m.

Dated: June 23, 2011

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD