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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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LEONARD OBERMAN,

Index No. 155260/2013

Plaintiff,

-against-

TEXTILE MANAGEMENT GLOBAL LTD.,

Defendant.

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Joan A. Madden, J.:

Defendant Textile Management Global, LTD. ("defendant" or "Textile") moves to dismiss the complaint. Plaintiff Leonard Oberman ("Oberman") opposes the motion, which is denied for these reasons below.

Background[1]

This is an action to recover unpaid sales commissions in the amount of $100,000. Textile is a corporation that manufactures, imports, and sells various items of apparel and other related items for wholesale. On or around May or June 2011, Textile approached Oberman with a proposal, "to act with [Textile] as sales representative and/or a co-agent" (Complaint ¶8). Oberman accepted to the proposal and the parties entered into an agreement under which Oberman was to assist and service both Textile's customers, as well as customers introduced to Textile by Oberman, and was to be compensated by payment of a fifty percent "agency fee" on completed sales. Later in 2011, it is alleged that Textile took orders from one of Oberman's customers, and that Oberman helped service the customer. Upon completion of the sale, Textile

[1] Unless otherwise noted, the following facts are based on the allegations in the complaint which, for the purposes of this motion, must be accepted as true.

received an agency fee of approximately $200,000. However, it is alleged that Textile did not provide the agreed fifty percent commission to Oberman, even though he performed all of his obligations under his agreement Textile.

Oberman initiated this action on June 7, 2013. The complaint asserts causes of action against Textile for breach of contract, breach of implied covenants of good faith and fair dealing, unjust enrichment, and violation of New York Labor Law § 191-a through 1-c.

Textile now moves to dismiss the complaint pursuant to CPLR 3211(a)(3), (7), and (10), respectively, for lack of legal capacity to sue, failure to state a claim, failure to join a necessary party, and also requests attorneys' fees. Textile argues, based on the statements in the affidavit of its President Howard Poupko ("Poupko"), that Oberman lacks capacity to sue as Textile conducted business not with Oberman but, rather, with Vizcaya International Apparel Inc. ("Vizcaya") a company that sells products overseas. (Poupko Aff. ¶ 13).

Textile asserts that Oberman, who was principal and president of Vizcaya, brought this action in his personal capacity only because Vizcaya cannot sue in New York as it is a foreign corporation which is not qualified to do business in the State. See Business Corporation Law § 1312(a). In support of this position, Textile points out that on March 1, 2013, Vizcaya commenced an action against Textile ("the Vizcaya action") in which is asserted the same causes of actions and sought the same relief as Oberman does here. In addition, Textile notes that Vizcaya voluntarily discontinued the Vizcaya action without prejudice after Textile moved to dismiss it on the grounds that Vizcaya had no standing to sue in New York since it lacked a Certificate of Authority allowing it to do business in New York, and that Vizcaya had not paid the requisite franchise taxes on its income generated in New York.

Textile further argues that Oberman was acting in his capacity as a representative of Vizcaya throughout their relationship, and therefore cannot recover from Textile personally. In support of this argument, Textile submits a copy of Oberman's business card, which was allegedly given to Textile by Oberman, indicating that Oberman was acting as a representative of Vizcaya. In addition, Poupko states that all of Textile's agreements were with Vizcaya and not with Oberman, and that "all payments from Textile... on these transactions were paid directly by Textile to Vizcaya" (Id. at ¶ 8). In support of this statement, Textile submits a single check for $3,600 dated February 24, 2012, which is drawn on Textile's checking account and made payable to Vizcaya. Poupko also states that Textile's meetings with Oberman occurred in Vizcaya's offices and that he believed that Oberman was acting in his capacity as owner and principal of Vizcaya. (Poupko Aff. ¶ 13). In addition, Textile submits Vizcaya's Certificate of Incorporation from the Florida Secretary of State which indicates that Oberman is the president of Vizcaya.

Oberman opposes the motion, arguing that documentary evidence submitted by defendants is not dispositive, and that the Vizcaya action was the result of a "drafting error" in naming the wrong plaintiff. Oberman further argues that Vizcaya could not have entered into the joint sales agreement described in the complaint, which was allegedly made in or about June 2011, because Vizcaya was not in existence until January 11, 2012, as evidenced by Vizcaya's Certificate of Incorporation from the Florida Secretary of State submitted by Textile.

Discussion

When considering a dismissal motion under CPLR 3211(a)(7) based on the pleadings "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at

law . . ." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977)(citations omitted); See also, Foley v. D'Agostino, 21 A.D.2d 60 (1st Dept. 1964) Under CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe, 73 A.D.3d 242 (2nd Dept 2010), *citing*, Siegel's Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), 3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dept. 2007). Thus affidavits, emails and letters are not considered documentary evidence. Fontanetta v. Doe, 73 A.D.3d at 86. Next, insofar as Textile seeks to dismiss the complaint, a motion to dismiss pursuant to CPLR 3211(a)(3) for lack of capacity to sue, the relevant inquiry is whether a litigant has "an interest . . . in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." See Bank of New York v. Silverberg, 86 A.D.3d 274, 279 (2d Dept. 2011) (quoting Caprer v. Nussbaum, 36 A.D.3d 176, 182 (2d Dept. 2006)).

Here, Textile has failed to demonstrate a basis for dismissing the complaint based on lack of capacity to sue and/or for failure to state a cause of action, as the complaint adequately alleges that Oberman personally entered into an agreement with Textile. Moreover the documentary evidence submitted by Textile is insufficient to conclusively establish that the agreement was with Vizcaya and not with Oberman. In this connection, evidence of a single check written Textile to Vizcaya after its incorporation is not dispositive of the parties' interactions during their relationship, nor does it conclusively establish Oberman's lack of capacity to sue. Moreover, Poupko's affidavit and Oberman's business card do not qualify as documentary evidence and

thus do not establish a defense as a matter of law. Moreover, the Certificate of Incorporation from the Florida Secretary of State shows that Vizcaya was not incorporated until January 11, 2012, which is approximately six months after the alleged agreement between Oberman and Textile was made. Therefore, since, at the pleading stage, the court must accept allegations that Oberman entered into the agreement with Textile in his personal capacity as true, and as the documentary evidence does not conclusively establish otherwise, the motion to dismiss based on lack of capacity to sue and for failure to state a cause of action must be denied.

Finally, for these reasons, it also cannot be said that Vizcaya is a necessary or indispensable party, such that dismissal on that ground is warranted. See generally Joanne S. v. Carey, 115 A.D.2d 4, 7 (1st Dept 1986).

Conclusion

In view of the above, it is

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

ORDERED that Textile shall file and serve an answer to the complaint within 30 days of e-filing of this decision and order; and it is further

ORDERED that a preliminary conference shall be held on September 18, 2014, at 9:30 am, room 351 60 Centre Street, New York, NY.

DATED: July 11 2014

HON. JOAN A. MADDEN
J.S.C.