UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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KOREA TRADE INSURANCE CORPORATION,

Plaintiff,

v. **13-CV-07918 (DAB)**
MEMORANDUM AND ORDER

OVED APPAREL CORPORATION,

Defendant.
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DEBORAH A. BATTS, United States District Judge

Plaintiff Korea Trade Insurance Corporation brings this suit against Defendant Oved Apparel Corporation for failure to pay the correct party for goods purchased. Plaintiff moved for summary judgment. That Motion is DENIED.

I. BACKGROUND

Unless otherwise noted, the following facts are undisputed.

Oved is an apparel wholesaler based in New York. (Pl.'s 56.1 Stmt. ¶¶ 2-3.) Oved ordered and received nineteen shipments of sportswear from Samjin Weaver Co., Ltd. ("Samjin"), a South Korean company, between October 2012 and February 2013. (Id. ¶ 4.) Oved submitted a purchase order for each shipment that specified the payment terms only as "wire transfer." (Pl.'s Ex. 3.) Oved received an invoice for each shipment that listed Oved as a notify party, Baek Hyang Textiles Inc. as the consignee, and Samjin as the beneficiary. (Pl.'s Ex. 4.) The

invoices provided bank account information for Samjin in Korea. (Id.)

Steven Park, the President of Baek Hyang (the entity listed as the consignee on the invoices), was Oved's only point of contact for purchasing the goods. (Pl.'s 56.1 Stmt. ¶ 29.) Samjin had no direct communications with Oved. (Id. ¶ 31.) The parties dispute who sent the invoices to Oved -- Samjin or Park. (Pl.'s 56.1 Stmt. ¶ 31; Def.'s 56.1 Stmt. ¶ 31.) They also dispute whether the goods were shipped directly from Samjin to Oved, (Def.'s 56.1 Stmt. ¶ 7), or whether Park delivered the goods to Oved, (Pl.'s 56.1 Stmt. ¶ 7).

Oved paid the over $1.2 million owed for fourteen of the nineteen shipments to Samjin's bank in Korea. (Pl.'s 56.1 Stmt. ¶ 8.) For three of the remaining shipments, based on instructions from Park, Oved paid the funds due to a bank account in New Jersey in the name of Samjin Weaver USA, Inc. (Id. ¶¶ 11-13.) Samjin asserts that it has no affiliation with Samjin Weaver USA, Inc. and, accordingly, that Oved has not fulfilled its contractual obligations. (Id. ¶ 14.) For the other two remaining shipments, Oved has not sent payment to anyone because of its purported confusion over the proper recipient. (Id. ¶ 10.) The sum of the payments due on these five shipments is over $200,000. (Id. ¶¶ 10, 19, 20.)

Samjin assigned its rights to Oved's five allegedly outstanding payments to Plaintiff Korea Trade pursuant to an export credit insurance policy. (Id. ¶ 34.)

II. DISCUSSION

A. Summary Judgment Standard

A court should grant summary judgment where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Genuine issues of material fact cannot be created by conclusory allegations. Victor v. Milicevic, 361 F. App'x 212, 214 (2d Cir. 2010). Summary judgment is appropriate only when, after drawing all reasonable inferences in favor of a nonmovant, no reasonable juror could find in favor of that party. Melendez v. Mitchell, 394 F. App'x 739, 740 (2d Cir. 2010).

In assessing when summary judgment should be granted, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. (internal quotation marks omitted). The nonmovant may not rely upon speculation or conjecture to overcome a motion for summary judgment. Burgess v. Fairport Cent. Sch. Dist., 371 F. App'x 140, 141 (2d Cir. 2010). Instead, when the moving party has documented particular facts in the record, "the opposing party must come forward with

specific evidence demonstrating the existence of a genuine dispute of material fact." FDIC v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010). Establishing such evidence requires going beyond the allegations of the pleadings, as the moment has arrived "to put up or shut up." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (internal quotation marks omitted).

B. Applicable Law

The United Nations Convention on Contracts for the International Sales of Goods ("CISG") governs sales contracts between parties from signatory nations, unless the contract specifies a different law. Arts. 1, 6, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3. There is no dispute that South Korea and the United States are signatory nations. Cf., e.g., Microgem Corp. v. Homecast Co., No. 10-3330, 2012 WL 1608709, at *2 (S.D.N.Y. Apr. 27, 2012).

Because Samjin and Oved are Korean and American companies, respectively, and there is no indication that they chose a body of law to govern their transactions, the CISG applies.

C. Contract Terms

There is no dispute here that an agreement existed between Samjin and Oved. Oved acknowledges that it must make a payment to someone for the two outstanding invoices. Rather, the dispute regards the payment method.

Under the CISG, "[a] a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Art. 11. That is, the CISG does not adopt the parol-evidence rule of American law, and instead "'allows all relevant information into evidence even if it contradicts the written documentation.'" TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00-5189, 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006) (quoting Claudia v. Olivieri Footwear Ltd., No. 96-8052, 1998 WL 164824, at *4-5 (S.D.N.Y. Apr. 7, 1998)).

Plaintiff points to the invoices, which list Samjin as the beneficiary and give Samjin's Korean bank account information, as conclusive evidence that Oved agreed to pay the funds owed to that account. Oved responds that it is Baek, not Oved, who is listed as consignee on these invoices and therefore that the payment request is not even directed to Oved.[1] More importantly, there is no dispute that Park gave Oved alternate payment instructions for certain shipments. Under the CISG, Park's

[1] "A consignee is defined as a 'person to whom a carrier is to deliver a shipment of goods; the person named in a bill of lading to whom or to whose order the bill promises delivery. The term itself implies an agency.'" N.B. Garments (PVT), Ltd. v. Kids Int'l Corp., No. 03-8041, 2004 WL 444555, at *1 n.2 (S.D.N.Y. Mar. 10, 2004) (quoting Ballentine's Law Dictionary (3d ed. 1969)).

representations may be part of the agreement between Samjin and Oved.

Plaintiff contends, however, that Park was not Samjin's agent and, consequently, that his statements could not bind Samjin. Thus, it is necessary to analyze whether an agency relationship existed between Park and Samjin.

D. Park As Samjin's Agent

An agent's authority to act on behalf of a principal may be "actual" or "apparent." Minskoff v. American Express Travel Related Services, Inc., 98 F.3d 703, 708 (2d Cir. 1996).[2] Actual authority "'is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.'" In re Motors Liquidation Co., 777 F.3d 100, 105 (2d

[2] The CISG does not address agency law. Article 7(2) of the CISG states that questions "not expressly settled in [the CISG] are to be settled in conformity with the general principles on which it is based . . . ." See also Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995). Although the parties assume that New York state law supplies the doctrine of agency here, other courts have looked to federal common law to fill gaps within the CISG. See, e.g., Semi-Materials Co. v. MEMC Elec. Materials, Inc., No. 06-1426, 2010 WL 3038086, at *2 (E.D. Mo. Aug. 3, 2010) ("[A]ssuming this cause to be fundamentally federal in nature given the assumed applicability of the CISG, Missouri's accountant-client privilege would not apply . . . ."). The Court need not dwell on the choice-of-law issue, however, because "there does not appear to be any substantive difference between federal common law principles of agency and New York agency law." Cromer Fin. Ltd. v. Berger, No. 00-2284, 2002 WL 826847, at *4 n.5 (S.D.N.Y. May 2, 2002).

Cir. 2015) (quoting Restatement (Third) of Agency § 3.01 (2006)).

Distinct from actual authority is apparent authority, which "arises from the 'written or spoken words or any other conduct of the principal which, reasonably interpreted, causes [a] third person to believe that the principal consents to have [an] act done on his behalf by the person purporting to act for him.'" Minskoff, 98 F.3d at 708 (quoting Restatement (Second) of Agency § 27 (1958)). "The existence of apparent authority is a question of fact." Herbert Const. Co. v. Cont'l Ins. Co., 931 F.2d 989, 994 (2d Cir. 1991) (internal quotation marks omitted); see also Toppel v. Marriott Int'l, Inc., No. 03-3042, 2006 WL 2466247, at *7 (S.D.N.Y. Aug. 24, 2006).

Plaintiff is wrong to suggest that, under the above definition, there can be no apparent authority in the absence of affirmative acts by Samjin. Although apparent authority cannot be established solely by the representations of the agent, Minskoff, 98 F.3d at 708, such authority nonetheless "may arise absent any direct contact between the principal and the third party," Prop. Advisory Grp., Inc. v. Bevona, 718 F. Supp. 209, 211 (S.D.N.Y. 1989). For example, "a principal may make [a] manifestation" that creates apparent authority "by permitting or requiring the agent to serve as the third party's exclusive channel of communication to the principal." Restatement (Third)

Of Agency § 3.03 cmt. b (2006). Additionally, a principal is "estopped" from denying an agent's authority where "a person of ordinary prudence conversant with business usages and the nature of the particular businesses is justified in assuming that such agent has authority to perform a particular act." Prop. Advisory Grp., 718 F. Supp. at 211 (finding apparent authority on this theory after an evidentiary hearing); see also Graffman v. Delecea, No. 96-7270, 1997 WL 620833, at *5 (S.D.N.Y. Oct. 8, 1997) (finding a question of fact under this theory).

Setting aside the question of actual authority, there exists an issue for trial at least as to whether Park had apparent authority to act for Samjin. Samjin allowed Park to be the exclusive contact with Oved for negotiating and consummating the transactions. Such action by Samjin creates a factual question as to apparent authority. See Restatement (Third) Of Agency § 3.03 cmt. b.

Moreover, the parties dispute whether Park or Samjin delivered the goods to Oved, and whether Park or Samjin sent the invoices to Oved. These questions are material to the reasonableness of Oved's assumption that Samjin consented to Park determining the payment method. It may be that if Park did deliver the goods or send the invoices to Oved, a person of ordinary prudence familiar with industry practices would think

that Park had authority to dictate payment terms. That question is also one for trial.

Plaintiff argues that Oved had a duty to inquire about Park's authority. In general, a third party is not required to inquire into the scope of an agent's authority. Herbert Const. Co. v. Cont'l Ins. Co., 931 F.2d 989, 995-96 (2d Cir. 1991). A duty of inquiry arises only where "(1) the facts and circumstances are such as to put the third party on inquiry, (2) the transaction is extraordinary, or (3) the novelty of the transaction alerts the third party to a danger of fraud." F.D.I.C. v. Providence Coll., 115 F.3d 136, 141 (2d Cir. 1997). Asking whether the third party had a "duty to inquire" is an alternative way of analyzing whether the third party reasonably relied on manifestations of apparent authority, Herbert Const. Co., 931 F.2d at 996, which again is a fact-intensive question, see, e.g., Muscletech Research & Dev., Inc. v. E. Coast Ingredients, LLC, No. 00-753A, 2004 WL 2191578, at *2 (W.D.N.Y. Sept. 27, 2004) (duty to inquire was a question of fact for the jury).

Here, Oved communicated only with Park, not Samjin, about the transactions. Park told Oved to make payments for certain shipments not to Samjin Weaver Co., Ltd. in Korea, but to Samjin Weaver USA, Inc. in New Jersey. Under these circumstances, drawing all inferences in favor of Oved, whether Oved should

have inquired to Samjin about Park's switch in the payment instructions is a triable question of fact.

III. CONCLUSION

Genuine issues of material fact exist as to the payment terms of the agreement and the apparent authority of Park to bind Samjin. Plaintiff's Motion for Summary Judgment is DENIED.

SO ORDERED.

Dated: New York, New York
March 23, 2015

Deborah A. Batts
United States District Judge