

**Hunan Textile I/E Corp. v JM Textile USA Ltd.**

2009 NY Slip Op 30125(U)

January 20, 2009

Supreme Court, New York County

Docket Number: 106859/2008

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
HUNAN TEXTILES I/E CORP.,

Plaintiff,

-against-

JM TEXTILE USA LTD., NEW TIMES INTERNATIONAL  
GROUP, INC. f/n/a COSMIC MARS, INC., LING LEE  
d/b/a COSMIC MARS, INC. and XUE HUI TANG a/k/a  
TAMMY TANG d/b/a COSMIC MARS ,

Defendants.  
-----X

DECISION AND  
ORDER

Index No. 106859/2008

**FILED**  
JAN 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

O. PETER SHERWOOD, J.:

In an action to recover payment for goods sold and delivered upon, *inter alia*, theories of fraud, breach of contract and an account stated, defendants move for an order pursuant to CPLR §§ 3016 (b), 3211 (a) (1) and 3211 (a) (7) dismissing the complaint.

The facts as alleged in the complaint are as follows: On or about December 16, 2006, plaintiff Hunan Textiles I/E Corp. ("Hunan") entered into a sales agreement with defendants JM Textile USA Ltd. ("JM Textile") and Cosmic Mars, Inc. ("Cosmic Mars") whereby plaintiff was to provide certain goods, wares and merchandise to the named defendants for the total sum of \$95,865.60. Plaintiff contends that it performed under the agreement by delivering the goods ordered and rendered a statement of account to defendants JM Textile and Cosmic Mars for the total amount of \$95,865.60 which they retained without objection. Said defendants have failed to pay the amount due.

Again in March 2007, plaintiff agreed to provide goods, wares and merchandise to defendants for the sum of \$100,000.00. Although plaintiff delivered the goods, defendants have failed to pay the sums due. In addition, defendants Xue Hui Tang a/k/a Tammy Tang ("Tang") and Ling Lee ("Lee"), acting on behalf of Cosmic Mars, guaranteed the payments for such goods sold and delivered. Apparently, one day before they executed the subject guarantees of payment, Tang and Lee changed the name of Cosmic Mars to New Times International Group, Inc. ("New Times") by filing a change of name with the New York Secretary of State. Plaintiff contends that Tang and

Lee executed the guarantee knowing that Cosmic Mars no longer existed and that Hunan would rely on same in shipping the goods and Tang and Lee did so in an attempt to defraud plaintiff.

Hunan commenced the instant action against the corporate defendants JM Textile and New Times and against Tang and Lee individually and doing business as Cosmic Mars. The complaint alleges nine causes of action, specifically, for breach of contract (first cause of action), goods sold and delivered (second cause of action); account stated (third cause of action); fraud in the inducement as against Tang (fourth cause of action), fraud in the inducement as against Lee (fifth cause of action), fraudulent conveyance (sixth cause of action), and fraud (seventh, eighth and ninth causes of action).

Defendants now move for a pre-answer order dismissing the complaint pursuant to CPLR §§ 3016 (b) and 3211 (a) (1) and (a) (7). Defendants contend that plaintiff issued purchase orders to JM Textile for certain goods, but when the goods arrived they were non-conforming and of poor quality. Plaintiff and JM Textile engaged in negotiations resulting in an agreement whereby plaintiff would give JM Textile discounts and a letter of credit in exchange for JM Textile paying a balance due of \$111,223.20. Defendants alleged that JM Textile thereafter wired plaintiff the sum of \$72,771.60 and released a letter of credit for the remainder of \$38,291.60 and have, therefore, fully performed on the contract. On this basis, defendants contend that there is no viable claim for breach of contract, or for the other attendant claims stemming from any agreement for the purchase of goods. Defendants further argue that New Times, Tang and Lee have no contractual obligation to plaintiff nor have Tang and Lee had dealings with plaintiff in their individual capacity. Accordingly, the complaint must be dismissed against them. Lastly, defendants argue that even if the court were to find that the causes of action stemming from the alleged contract are sufficiently stated, the fraud causes of action must be dismissed as they are based on the same allegations as the breach of contract claim.

Plaintiff opposes the motion by the affirmation of its attorney and an affidavit of Yu Zhicheng, Hunan's "legal representative". Plaintiff argues that the purchase orders to which defendants refer in their motion papers are not the same as the purchase orders which are the subject of the complaint. The purchase orders that form the basis of the motion to dismiss are numbered 263, 264, 277, 282, 282X, 285 and 285X, while those involved in this action as alleged in the

complaint are numbered 290, 291, 293, 293X, 300, 301 and 7347-85. Plaintiff further asserts that the events defendants refer to in their motion papers occurred in 2006 through March 6, 2007, while the goods for which payment is sought in the instant action were not delivered until March 12, 2007.

Plaintiff contends that it entered into a sales agreement with JM Textile and that Cosmic Mars executed a guarantee of payment on the sales contract with respect to the subject purchase orders on the date the goods were delivered, *i.e.*, March 12, 2007. Plaintiff asserts that Lee and Tang should be held liable in their individual capacity because they executed the guarantee on behalf of Cosmic Mars when they knew that Cosmic Mars no longer existed and that New Times is a proper party to the action because it is the corporate entity formerly known as Cosmic Mars. Plaintiff also contends that the fraud causes of action are based upon allegations separate and apart from the contract claims and, therefore, are sufficiently stated to withstand dismissal. Lastly, plaintiff states that the instant motion to dismiss is premature as discovery is needed to resolve numerous issues of fact.

In reply, defendants aver that the commercial invoices annexed to plaintiff's opposing papers are fake and fraudulent as they bear neither the corporate stamp nor an endorsement of an authorized representative. Conversely, the invoice annexed to the moving papers has both the stamp and authorized signature required by the U.S. Customs Office. Defendants also contend that the commercial invoices and the bill of lading submitted by plaintiff do not match, whereas they have submitted the packing list, arrival notice, bill of lading and U.S. Customs Declaration for the goods which they ordered and for which they paid.

Under well-established principles, defendant's motion to dismiss plaintiffs' claims under CPLR § 3211 (a) (7) for failure to state a cause of action requires the court to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff[s] the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). In this regard, the court should not *sua sponte* search the record on a CPLR § 3211 motion to dismiss as this motion simply addresses the sufficiency of a pleading whereas the standard of review upon a motion for summary judgment involves searching the record and examining the evidence underlying the pleadings (*see, Friedman v Connecticut General Life Ins.*

*Co.*, 30 AD3d 349, 349-350 [1st Dept. 2006, *affd as mod.* 9 NY3d 105 [2007]; *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1<sup>st</sup> Dept. 1987]). The sufficiency of a pleading generally depends on whether there is substantial compliance with CPLR § 3013 (*see, Foley v D'agostino*, 21 AD2d 60, 62-63 [1<sup>st</sup> Dept. 1964]), which provides: “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

The elements for a cause of action for breach of contract are: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendants' failure to perform; and (4) damages resulting from the failure to perform (*see, Furia v Furia*, 116 AD2d 694 [2d Dept. 1986]). Plaintiff's complaint, its attorney's affirmation in opposition to defendants' motion, the exhibits annexed thereto and the affidavit of Yu Zhicheng sufficiently establish a prima facie case for breach of contract as against the corporate defendants JM Textile and Cosmic Mars. The conflicting affidavits as to whether the purchase orders at issue are forged, and whether the parties negotiated a settlement of the amounts owing on the subject purchase orders are not properly resolved on a pre-answer motion to dismiss particularly where the documentary proof cannot stand on its own but requires an explanation as to the indicia of authenticity.

The second cause of action for goods sold and delivered requires the plaintiff to show that: (1) it had a contract with the buyer; (2) the buyer failed to pay the purchase price, and (3) the buyer accepted the goods (*see, Uniform Commercial Code* § 2-709 [1] [a]; *Weil v Murray*, 161 F. Supp 2d 250, 254-55 [S.D.N.Y. 2001]). The complaint sufficiently alleges that Hunan agreed with JM Textile and Cosmic Mars to sell goods to them, that such goods were delivered and that said defendants failed to pay for such goods. Plaintiff also submitted documentary proof in support of the delivery of such goods. Such allegations, considered with the documentary proof, are sufficient to state a cause of action for goods sold and delivered.

With respect to the third cause of action for an account stated, the receipt and retention of itemized bills for a sum certain without objection within a reasonable time gives rise to an actionable account stated (*see, Zanani v Schwimmer*, 50 AD3d 445, 446 [1<sup>st</sup> Dept. 2008; *Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355 [1<sup>st</sup> Dept. 2001; *Shea & Gould v Burr*, 194 AD2d 369

[1<sup>st</sup> Dept. 1993]). By failing to object, the recipient of the bill signifies that it agrees with the sender concerning the amount owed (*id.*). Plaintiff in the instant matter has established a prima facie case of an account stated as against the corporate defendants JM Textile and Cosmic Mars by the allegations in the complaint that the plaintiff delivered goods to the corporate defendants pursuant to an agreement, that it billed for such goods upon delivery, and neither JM Textile nor Cosmic Mars paid the balance owed and by the documentary evidence of the purchase orders demonstrating the amount due.

Turning then to whether the allegations as against Tang and Lee in their individual capacity must be dismissed, the Court observes that, as a general rule, a party may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity of contract (*see, e.g. Grinnel v Ultimate Realty*, 38 AD3d 600 [2d Dept. 2007]; *Shenouda v Cohen*, 17 AD3d 565 [2d Dept. 2005]; *Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515 [2d Dept. 1998]). Nor may a plaintiff maintain a cause of action to recover on an account stated in the absence of some business relationship between the parties as “[a]n account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists” (*id.* At 516; *see, Ryan Graphics, Inc. v Bailin*, 39 AD3d 249 [1<sup>st</sup> Dept. 2007]; *Grinnel v Ultimate Realty, LLC*, 38 AD3d 600 [2d Dept. 2007]). By extension of reasoning, recovery on the theory of goods sold and delivered also assumes that the party to be charged either consented to, or otherwise assumed, an obligation to pay the plaintiff on an underlying contract. Defendants contend that New Times, Tang and Lee may not be held liable as they did not contract with Hunan.

It is well settled that an officer acting expressly as an agent for a corporation is not thereby personally liable on contracts executed by him for the corporation (*see, Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 468 [1988]; *American Media Concepts v Atkins Pictures*, 179 AD2d 446, 448 [1<sup>st</sup> Dept. 1992]). However, it is equally well established law in New York that one who signs a contract on behalf of a nonexistent principle is individually obligated under that contract (*see, Lodato v Greyhawk N.A., LLC.*, 39 AD3d 496 [2d Dept. 2007]; *San Sung Korean Methodist Church of N.Y. v Professional USA Constr. Corp.*, 14 AD3d 501 [2d Dept. 2005]; *Grutman v Katz*, 202 AD2d 293 [1<sup>st</sup> Dept. 1994]). Here, the allegations of the complaint are that the individual defendants Tang and Lee executed guaranties of the purchase agreement on behalf of the corporate entity Cosmic Mars

at a time when Cosmic Mars no longer existed and they are, therefore, personally responsible for the goods purchased. If true, such allegations are sufficient to sustain the first, second and third causes of action against the individual defendants Tang and Lee.

The question of whether New Times may be held liable upon the theories alleged in the complaint as the successor corporation to Cosmic Mars is a question of fact that may not be determined on these papers. A corporation may change its name by filing an amendment to its certificate of incorporation with the State setting forth the change of name (*see*, Business Corporation Law § 801 [a] and [b]). If the change in the name of the corporation is merely formalistic, that is that the purported name change is a change in name only and a separate legal entity is not created thereby, such name change would not discharge the debt of the previous corporation as the newly named corporation would not constitute a new, separate and distinct legal entity from the former corporation (*see*, *Seidman & Co. v Maharam*, 295 AD2d 292 [1<sup>st</sup> Dept. 2002]; *95 Lorimer, LLC v Insurance Co. of the State of Pa.*, 6 Misc3d 500 [Sup. Ct., Kings Co., 2004]). Here, a question of fact exists as to whether New Times is an extension of Cosmic Mars and may, therefore, be liable for Cosmic Mars' obligations.

In its fourth and fifth causes of action, Hunan alleges claims for fraud in the inducement against defendants Lee and Tang, the essential elements of which are: (1) a false representation of a material fact by the defendant; (2) the false representation was made by the defendant knowingly; (3) plaintiff justifiably relied upon the misrepresentation; and (4) plaintiff sustained some damage or injury as a result (*see*, *Lama Holding Co. V Smith Barney*, 88 NY2d 413, 421 [1996]; *Graubard Mollen Dannett & Horowitz v Moskowitz*, 86 NY2d 112, 122 [1995]).

Plaintiff in the complaint alleges that Tang and Lee provided it with guaranties on behalf of Cosmic Mars with full knowledge that Cosmic Mars was no longer a viable New York corporation in an attempt to fraudulently induce plaintiff to ship goods and that plaintiff reasonably relied upon such misrepresentation and was damaged as a result. Although, as previously observed, there is a question as to whether New Times is simply an extension of Cosmic Mars, plaintiff has for purposes of a pre-answer motion to dismiss adequately alleged each of the requisite elements for fraud in the inducement.

Defendants in seeking dismissal of the fraud causes of action relies on the general principle that a cause of action seeking to recover damages for fraud cannot be sustained where the only fraud charged relates to the breach of contract or where the fraud claim is duplicative of the breach of contract claim (*see, Sellinger Enters. v Cassuto*, 50 AD3d 766 [2d Dept. 2008]; *Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671 [2d Dept. 2006]). Defendants argument is unavailing as to the fourth and fifth causes of action as a “party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract . . . if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future” (*Schulman v Greenwich Assocs.*, 52 AD3d 234 [1<sup>st</sup> Dept. 2008], quoting *Eastman Kodak Co. V Roopak Enters.*, 202 AD2d 220, 222 [1<sup>st</sup> Dept. 1994]). Here, plaintiff alleges that Tang and Lee alleged misrepresentations of present facts, to wit, that they were executing guaranties of payment for goods on behalf of an existing corporation in order to induce plaintiff to agree to ship goods to the corporate defendants. Thus, the fraudulent inducement claims are not duplicative of a breach of contract claim, but are based upon facts extraneous to the original purchase agreement. Plaintiff’s claims in this regard also allege a separate and distinct legal duty independent of the original purchase agreement.

The same does not hold true with respect to the seventh, eighth and ninth causes of action for fraud alleged in the complaint. Those allegations relate to misrepresentations made as to Cosmic Mars legal existence in incurring debts for goods purchased from plaintiff and as such are duplicative of and subsumed by the causes of action arising from the breach of contract and related claims. Accordingly, those causes of action must be dismissed.

The remaining sixth cause of action alleges a fraudulent conveyance by defendant JM Textile under Article 10 of the Debtor and Creditor Law (DCL). Plaintiff fails to state the specific sections of Article 10 upon which the cause of action is predicated. In any event, the allegations of the complaint state legal conclusions rather than specific factual allegations sufficient to establish the requisite elements of the sixth cause of action for fraudulent conveyance and, therefore, fail to comply with the requirements of CPLR § 3013.

Based upon the foregoing, it is hereby

**ORDERED**, that defendants’ motion to dismiss is granted to the extent that the sixth,

seventh, eighth and ninth causes of action in the complaint are severed and dismissed; and it is further

**ORDERED**, that the action is continued as to the remaining causes of action stated in the plaintiff's complaint; and it is further

**ORDERED**, that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry (CPLR 3211 [f]); and it is further

**ORDERED**, that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 1/20/09

ENTER,



O. PETER SHERWOOD

J.S.C.

**FILED**  
JAN 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK