

**Bon Jour Group, LLC v Wathne Ltd.**

2006 NY Slip Op 30261(U)

February 1, 2006

Supreme Court, New York County

Docket Number: 0603432/2004

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 603432/2004

BON JOUR GROUP LLC.

vs  
WATHNE LTD.

Sequence Number : 004

REARGUMENT/RECONSIDERATION

**FILED**  
FEB 08 2006  
NEW YORK COUNTY CLERK'S OFFICE

INDEX NO. \_\_\_\_\_

MOTION DATE 11/1/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. 04

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

Notice of Motion / Memorandum / Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits County Statement, Motion, Aff  
Replying Affidavits 1 Reply Aff, 11 Aff, 1 Reply  
11 Reply Memorandum, Memo  
Cross-Motion:  Yes  No

PAPERS NUMBERED	
1, 2, 3	
4, 5, 6, 7	
8, 9, 10	
11	

Upon the foregoing papers, It is ordered that this motion and cross

motion are disposed of in accordance with the attached decision and order

Dated: 2/1/06

HON. RICHARD B. LOWE, III  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56**

-----X  
BON JOUR GROUP, LLC,

Plaintiff,

**Index No.,  
603432/04  
DECISION & ORDER**

-against-  
WATHNE, LTD.,

Defendant.

-----X  
WATHNE, LTD.,

Third Party  
Plaintiff,

-against-  
CHARLES DAYAN and CARMINE PORCELLI,

Third Party  
Defendants.

-----X  
**RICHARD B. LOWE III, J.S.C.**

**FILED**  
FEB 08 2006  
NEW YORK  
COUNTY CLERKS OFFICE

Defendant Wathne, Ltd., (“Wathne”) moves pursuant to CPLR § 2221 for an order granting reargument of that portion of the Court’s July 14, 2005 Decision and Order (the “Order”) dismissing its first counterclaim (breach of contract) and upon reargue reinstating the counterclaim.

Plaintiff Bon Jour Group, LLC (“Bon Jour”) opposes the motion to reargue and cross moves pursuant to CPLR § 3212, for an order granting summary judgment in the amount of \$3,342,911 with interest and setting the matter down for a hearing on reasonable attorneys’ fees incurred in this action from Wathne.

**BACKGROUND**

The salient facts giving rise to this action are set out in the July 14, 2005-Order and in the interest of brevity those facts are incorporated herein. The parties’ familiarity with the facts is presumed.

**DISCUSSION**

In the underlying motion, the plaintiff Bon Jour and Third Party Defendants Charles Dayan ("Dayan") and Carmine Porcelli ("Porcelli") moved for an order, pursuant to CPLR § 3211 [a] [7], dismissing all of the defendant's counterclaims and striking the requests for punitive damages and attorneys' fees as well as dismissing the Third Party Complaint. Bon Jour also moved for an order, pursuant to CPLR § 3211 [b], dismissing the affirmative defense of fraud. In turn, Wathne cross moved for an order, pursuant to CPLR § 3124, directing Bon Jour to produce documents and, pursuant to CPLR § 3103, directing Bon Jour to pay for the expense of a computer expert and to provide the expert access to its computers.

The Court granted Bon Jour's motion and dismissed all of the counterclaims and Third Party Complaint. The court also struck the request for punitive damages and attorneys' fees as well as the affirmative defense of fraud. The Court denied Wathne's cross motion which requested both additional discovery as well as an order compelling the plaintiff to pay for the expense of a computer expert. The court denied the request because Wathne had failed to provide an affidavit or affirmation of a good faith effort to resolve their discovery disputes (see, Order, p 10).

When it addressed the discovery aspect of Wathne's cross motion, the court held, future discovery practice would be considered "without prejudice" (id., p 10) to the extent that Wathne was "directed to contact the Clerk of the Part to arrange for a conference." In doing so, the court held that "[i]t [was] expected that counsel w[ould] discuss their dispute over discovery and whether the discovery sought [could] possibly be used as evidence in chief, for rebuttal, or for cross-examination as well as the appointment of a computer expert and the allocation of the expense for retrieving electronic files \* \* \* *in view of the dismissal of the affirmative defense of fraud, counterclaims and Third Party Complaint and the striking of the punitive damages and attorneys' fees*" (italics added for emphasis; Dec., & Ord., 07/14/05, p 10).

In its instant motion for leave to reargue, the defendant argues that this ruling was inconsistent with the dismissal of the affirmative defenses, third party complaint, as well as punitive damages and attorneys fees. However, this argument does not reference the *italic* portion of the Order, seemingly ignoring it for the purpose of arguing an “inconsistency” by the Court in dismissing the counterclaims and defense, but yet allowing a possible motion for the appointment of a computer expert and/or discovery, without prejudice. There is no ambiguity in the Order, lest the Court subscribe to defendant’s counsel’s myopic reading of the Order. So that defendant is on notice, the purpose of setting the matter down for a conference was to discuss the scope of discovery in view of the Order and not to provide defendant the opportunity to seek material from plaintiff with respect to the dismissed counterclaims, Third Party Complaint and affirmative defense of fraud.

Pursuant to CPLR §2221, a party may move to reargue a motion upon demonstrating that the court “overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law” (*Foley v Roche*, 68 AD2d 558, 567[1st Dept 1979]). Nonetheless, reargument is not designed to afford an unsuccessful party the opportunity to re-litigate issues already decided or to present new arguments (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv. denied* 81 NY2d 782; *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]; *300 West Realty Co. v City of New York*, 99 AD2d 708, 709[1st Dept 1984]). Section 2221 [d] is specific and unequivocal, it provides that leave to reargue shall be identified specifically as such and “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

Wathne maintains that the Court overlooked and/or misapprehended the relevant facts or misapplied controlling principle of law when it dismissed the first counterclaim of breach of contract. It argues that plaintiff did not move specifically to dismiss on the ground that the oral modifications claimed by Wathne were negated by the written agreements at issue. Hence, Wathne

maintains it did not brief the issue of the agreements' terms to oppose Bon Jour's motion and therefore the counterclaim was improperly dismissed.

After review, this court finds Bon Jour's initial motion clearly reveals argument that the subject agreements provided the only terms with regard to the parties' responsibilities and obligations (see, County Clerk file, Bon Jour and Dayan Memorandum of Law in Support of Motion to Dismiss, 01/24/05). In the underlying memorandum of law, Plaintiff contended, among other things, that the agreements' terms did not require it to launch any apparel line, nor did it require any other duty or obligation. Defendant raised these additional terms as a defense against the breach of contract claim. The Court's reliance on the reading of the very terms of the Agreement was a logical, reasonable and expected circumstance as the subject complaint is premised on the very agreements. Defendant's counsel's decision not to address the agreements and their terms in opposition to the motion was its own doing.

Moreover, the Court did not dismiss *sua sponte* the first counterclaim (but see, *Hoeffner v John F. Frank, Inc.*, 302 AD2d 428[2nd Dept 2003])( [trial court incorrectly dismissed, *sua sponte*, complaint on the merits, where plaintiff may have made different offers of proof to defeat the motion if the defendants had so moved or if the trial court had advised the plaintiff that it intended to consider such relief]). Furthermore, the fact that Bon Jour did not specifically move to dismiss the counterclaim pursuant to CPLR § 3211 [a] [1] on the ground of "documentary evidence", did not preclude the Court's consideration of the agreements in deciding Bon Jour's motion to dismiss pursuant to CPLR 3211 § [a] [7] (see, *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [in defendants' motion to dismiss, pursuant to CPLR § 3211 [a] [7], the factual allegations were flatly contradicted by the documentary evidence, *i.e.*, the contract, and the allegations were not presumed to be true or accorded any favorable inference. The criteria became whether the proponent of the pleading had a cause of action, not whether one was stated]).

Therefore, to the extent Wathne's motion to reargue is premised on the Court's dismissal of the first counterclaim based on documentary evidence and in which Wathne did not address the issue of the terms of the Agreements, it is denied. The motion to *reargue* is not a vehicle for Wathne to alter a previously held position or to introduce a new "theory" of the case (*DeSoignies v Cornasesk House Tenants' Corp.*, \_\_\_ AD3d \_\_\_, 800 NYS2d 679; *Frisenda v X Large Enters.*, 280 AD2d 514, 515 ["Reargument is not available where the movant seeks only to argue a new theory of liability not previously advanced"]; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, *lv dismissed* 80 NY2d 1005).

Wathne further submits that the Court overlooked and/or misapprehended points of fact and law in dismissing the breach of contract counterclaim when it held that Wathne's claims of oral modifications of the agreements were negated by the "unequivocal language in the Agreements . . . that any . . . modification . . . must be signed by the parties" (Order, p 7). Wathne maintains that under New York law oral modifications can be made to a written agreement regardless of a no-waiver provision where the parties' partial performance is "unequivocally referable to the oral modification" and "not otherwise compatible with the agreement as written" or where a "party's conduct induced the other party's reliance on the oral modification."

In its answer, Wathne alleges that the parties orally modified the written agreements, conducted themselves in a manner "unequivocally referable" to the oral modification, and that Bon Jour breached the oral modification thereby damaging Wathne (see also, Notice of Motion to Reargue, Ex B [Verified Answer, Counterclaims and Third Party Complaint, pp 2-4]).

The Court will not revisit its finding of the legal insufficiency of reliance on alleged oral representations that predate the execution of the Agreements as Wathne's motion to reargue references case law to support its reargument based on a claim of partial performance of an oral agreement "after" execution of the agreements.

The partial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the requirement of a writing. Moreover, when a party's conduct induces another's significant and substantial reliance on the agreement to modify, albeit oral, that party may be estopped from disputing the modification (*Rose v Spa Realty Associates*, 42 NY2d 338; *Absolute Direction, Inc. v Anderson*, 201 AD2d 256; *Blittner v Friesch-Groningshe Hypotheebank Realty Credit Corp.*, 221 AD2d 152).

Wathne's answer alleges: (1) an oral agreement to modify the Agreements to the extent that either party could terminate on August 31, 2004; (2) Wathne was relieved of making minimum royalty payments; (3) any royalty payment would be based on actual sales; (4) any obligation to contribute to image advertisements was reduced to 2% of net sales; (5) and Bon Jour would make efforts to arrange sales of handbags at J.C. Penneys. Wathne further alleges in its answer that the parties' conduct for nine months following the alleged oral agreement is unequivocally referable to the oral agreement. It alleges that it did not produce product samples or make any sales utilizing the Bon Jour marks nor pay any royalty payments to Bon Jour and Bon Jour never sent a bill for royalties nor provide Wathne with any designs, tags, labels, or any items as called for under the Agreements (Notice of Motion to Reargue, Ex B).

The allegations of the parties' partial performance of an oral agreement that postdates the execution of the written agreements and alleged to be unequivocally referable to the oral modification of the written agreements states a counterclaim cause of action of an oral agreement to modify the subject agreements and the breach of that oral agreement. Moreover, based on the allegations of partial performance of the alleged oral agreement, Wathne's also claims that the instant law suit is frivolous and as a result of the frivolity it has suffered damages, namely attorney fees and expenses.

Defendant alleges damages for both "frivolous suit" and "violation of the [unsigned]

Modification Agreement.”<sup>1</sup> As noted in the Order and conceded by Wathne, Bon Jour never signed a “Modification Agreement.” Hence, any claimed right of attorneys’ fees under the unsigned Modification Agreement is not enforceable. Therefore, an entitlement to attorney fees and expenses would have to be premised on frivolous litigation by Bon Jour and the application of 22 NYCRR § 130-1.1 (*Chapel v Mitchell*, 84 NY2d 345 [there can be no recovery of attorneys’ fees except when authorized by statute, agreed by the parties or court rule]).

Accordingly, upon reconsideration of that branch of the motion for reargue<sup>2</sup>, pursuant to CPLR 2221 [b], the Court grants reargue and upon review hereby modifies the Order to the extent of denying that branch of Bon Jour’s motion seeking an order dismissing the first counterclaim on the ground that it does state a cause of action. That branch of the Order dismissing the balance of the counterclaims and the Third Party Complaint remain in place.

With regard to Bon Jour’s cross motion for summary judgment, which is premised on the anticipation that the motion to reargue would be denied, there is no demonstration by Bon Jour that there is an absence of triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361, 364). Therefore, as the proponent of the summary judgment motion it has not demonstrated a prima facie showing of entitlement to a judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In short, there are material disputed facts - as amplified in the parties’ respective affidavits - that Bon Jour is entitled to the royalty payments of more than \$3 million from Wathne. Bon Jour has not submitted evidence which negates Wathne’s first counterclaim (*Franceschi v Consolidated Rail Corp.*, 142

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<sup>1</sup> Porcelli’s affidavit, dated May 16, 2005, raises disputed material facts as to who drafted the unsigned Modification Agreement. Porcelli affirms that defendant’s President, Laura Gunther, called him and requested to amend the agreements and he had advised her that any amendment required approval from Bon Jour’s principal, Dayan. He also affirms that Ms. Gunther informed him that her attorney “Helen” would draft the proposed modification.

<sup>2</sup> The Court reviewed the very same papers that were before it on the original motion, particularly Wathne’s Memo. of Law (Notice of Cross Motion, Ex 3, pp 4-6).

AD2d 915; *see also* *Hirsh v Bert's Bikes and Sports*, 227 AD2d 956; *Wilder v Rensselaer Polytechnic Inst.*, 175 AD2d 534; *Beasock v Dioguardi Enters.*, 117 AD2d 1015; *Gerhart v Town of Manchester*, 112 AD2d 32). Accordingly, Bon Jour's cross motion for an order granting summary judgment is denied.

Finally, in view of the above, the open issue in Wathne's original cross motion as to discovery will obviously include documents sought by Wathne from Bon Jour in support of the first counterclaim. However, the mere suggestion of a claim of email deletions by the plaintiff, which is refuted by the person who is attributed to have made the statement (Porcelli 03/18/05 Aff.), warrants a compliance conference and further order on discovery. The defendant is directed to request a compliance conference no later than 14-days of the service of a copy of this order with notice of entry. The issue of having an expert retained and paid by Wathne as well as access to Bon Jour's computer system will be conferenced (*Rosado v Mercedes-Benz of North Amer.*, 103 AD2d 395, 398 [each party should bear initial burden of financing his own suit, and it is party seeking discovery of documents who should pay the cost of their reproduction]).

The Court is cognizant of the cost entailed in electronic discovery and will at an appropriate juncture entertain an application by Wathne seeking an order to obligate Bon Jour to absorb all or a part of the cost incurred in the e-discovery sought by Wathne (*Schroeder v Centro Pariso Tropical*, 233 AD2d 314; *see*, CPLR 3103[a] ["The court may make a protective order \* \* \* regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, expense, \* \* \* or other prejudice to any person"]).

### CONCLUSION

To recapitulate, the defendant's motion to reargue is granted to the extent that the branch of the Order dismissing the first counterclaim is recalled. Plaintiff's cross motion is denied.

**ORDERED** that the first counterclaim is reinstated, and it is further

**ORDERED** that the defendant shall contact the Clerk of the Part forthwith to arrange for a compliance conference and no later than fourteen (14) days of the service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: February 1, 2006

ENTER



RICHARD B. LOWE III, J.S.C.

HON. RICHARD B. LOWE, III

**FILED**  
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