Tahari v Rosen

2007 NY Slip Op 31835(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0603120/2006

Judge: Helen E. Freedman

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[* 1]
SCANNED ON 6/26/2007

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

PRESENT: HELEN E. FREEDMAN **PART** 39
Justice

ELIE TAHARI, Individually and as Trustee of the Elie Tahari 2003 Grantor Retained Annuity Trust,

Plaintiffs,

-v-

ANDREW ROSEN, CHIKARA SASAKI a/k/a RICKY C. SASAKI, LINK THEORY HOLDINGS CO., LTD., LINK THEORY HOLDINGS (US) INC., US THEORY GROUP, L&F HOLDINGS INC., FAST RETAILING CO., LTD., GLOBAL RETAILING CO., LTD., GLOBAL INVESTMENT CO. and MAKOTO HATA,

Defendants.

INDEX NO. 603120/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that motion sequences 001, 002, 003 and 004 are consolidated for joint disposition and decided in accordance with accompanying memorandum decision.

Dated: June 19, 2007

Helen E. Freedman, *J.S.C.*

Check one: ☐ FINAL DISPOSITION x☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

FILED

JUN 22 2007

COUNTY CLERK'S OFFICE NEW YORK

RECEIVED JUN 20 2007 IAS MOTION SUPPORT OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 39

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ELIE TAHARI, Individually and as Trustee of the Elie Tahari 2003 Grantor Retained Annuity Trust,

Plaintiff,

-against-

ANDREW ROSEN, CHIKARA SASAKI a/k/a/ RICKY C. SASAKI, LINK INTERNATIONAL CO., LTD., LINK THEORY HOLDINGS CO., LTD., LINK THEORY HOLDINGS (US) INC., US THEORY GROUP, L&F HOLDINGS INC., FAST RETAILING CO., LTD., GLOBAL RETAILING CO., LTD., GLOBAL INVESTMENT CO., and MAKOTO HATA,

Defendants.

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Index No. 603120/2006

FILED
JUN 22 2007
COUNTY CLERK'S OFFICE
NEW YORK

Helen E. Freedman, J.:

Motions with sequence numbers 001, 002, 003, and 004 are consolidated for joint disposition.

In this action by fashion designer Elie Tahari individually and as trustee of the Elie Tahari 2003 Grantor Retained Annuity Trust ("Tahari"), Tahari claims that his former business partner Andrew Rosen ("Rosen") conspired with Chikara Sasaki ("Sasaki"), Sasaki's company Link Theory Holdings Ltd., and other related entities located in the United States and Japan to force Tahari to sell his interest in Theory LLC, manufacturer of a brand of clothing sold under the name "Theory," and to deprive him of royalties he is owed for the sale of "Theory" clothing sold in Asia. Tahari asserts causes of action for breach of fiduciary duty, fraud, imposition of constructive trust, unjust enrichment, prima facie tort, negligence, and breach of contract.

The defendants move to dismiss the Complaint based on documentary evidence, for failure to state a cause of action, and for lack of jurisdiction over some of the Japanese subsidiaries,

pursuant to CPLR 3211(a)(1), (7), and (8), respectively. Tahari cross moves pursuant to CPLR 3211(d) seeking disclosure and leave to replead as an alternative to dismissing the Complaint.

For the reasons discussed below, motions by Rosen, Sasaki, Link Theory Holdings Ltd. Co. and Link Theory Holdings (US) Inc. (002) and by Fast Retailing Co. Ltd. (004) are granted to the extent that the first through sixth causes of action are dismissed and denied as to the seventh cause of action for breach of contract action. Motions by Link International Ltd. Co. and its Chief Operating Officer Makoto Hata (001) and by Global Retailing Co., Ltd. and Global Investment Co.(the "Global Defendants") (003) are granted, with Tahari's consent as to Makoto Hata. The Global Defendants' request for sanctions is denied. Tahari's cross motion is granted only to the extent that the remaining defendants are directed to furnish documents related to the obligation to pay royalties.

Parties:

Tahari is a fashion designer and owner of Tahari Ltd., which manufactures and sells the well-known brand of women's clothing, "Elie Tahari." He also owned a fifty percent interest in Theory LLC ("Theory") before he and his business partner Rosen sold their interests in 2003.

Rosen owned the other fifty percent interest in Theory. He is currently the President and the Co-Chief Executive Officer of Link Theory Holdings (US) Inc. ("LTH-US").

Sasaki is the Co-Chief Executive Officer of LTH-US with Rosen and the President and Chief Executive Officer of Link Theory Holdings Co., Ltd.

Link International Co. Ltd. ("Old Link International"), a Japanese corporation, sold "Theory" clothing in Japan from 2000 to 2002 pursuant to a license agreement with Theory.

Fast Retailing Co. Ltd. ("Fast Retailing") is a Japanese corporation. It wholly owns the

Global Defendants, which principally serve as financing vehicles for some of Fast Retailing's other subsidiaries.

L&F Holdings Inc. ("L&F Holdings"), a Delaware corporation, was formed to purchase Theory in 2003. Its parent corporations are Old Link International and Fast Retailing. After the Theory sale, it reorganized to form LTH-US.

Link Theory Holdings Co., Ltd. ("LTH") is the new name for Old Link International, which was renamed after the Theory sale. On June 9, 2005, LTH issued shares in an initial public offering ("IPO") on the Tokyo Stock Exchange at a market capitalization of more than $500 million. According to the LTH website referenced by the parties, LTH currently owns the "Theory," "Helmut Lang," "Rosner," "Joie," and "Jean-Michel Cazabat" brands.

LTH formed subsidiaries to manage its operations in the United States, Europe, and Asia. Link International Co. Ltd. ("New Link International") is LTH's wholly owned Japanese subsidiary that manages LTH's Asian operations. It was established in December 2003.

LTH-US, a Delaware corporation authorized to do business in New York, manages LTH's United States operations. LTH and Rosen own eighty-nine and eleven percent of LTH-US, respectively.

US Theory Group is allegedly a "formal or informal structure" through which LTH conducts business in the United States. It has not been served separately in this action, and the Link defendants aver it is not an existing legal entity.

Background:

In 1997, Tahari and Rosen formed Theory to manufacture and sell contemporary women's apparel. Pursuant to the partnership agreement (the "Theory Partnership Agreement"), Tahari and

Rosen each contributed $100,000 for their fifty percent membership interests and an additional $325,000 as subordinated loans. Tahari provided the "visionary design and manufacturing concepts," Tahari Ltd. provided back office support, and Rosen handled the day to day operations. The Theory Partnership Agreement provided that in the event of disagreement, either party could buy out the other party.

In 2000, Theory executed a license agreement with Old Link International signed by Rosen on behalf of Theory and Sasaki on behalf of Old Link International (the "Link License Agreement"). Under that agreement, Theory granted Old Link International the right to manufacture, distribute, sell, and advertise women's apparel under the "Theory" trademark in Asia in exchange for royalties. The initial license term lasted from the spring 2000 season to the winter 2002 season. Old Link International agreed to furnish to the licensor royalty statements and to grant the licensor access to its books and records. The Link License Agreement obligated the parties to submit disputes arising from the agreement to arbitration.

In 2003, Old Link International and Fast Retailing formed L&F Holdings to purchase Theory. Tahari and Rosen both sold their fifty percent interests to L&F Holdings pursuant to the September 9, 2003 Purchase Agreement (the "Purchase Agreement"). Parties to the Purchase Agreement include Elie Tahari and Andrew Rosen as the sellers, L&F Holdings as the purchaser, and Old Link International and Fast Retailing as the purchaser's parent corporations. Rosen and Tahari each hired separate counsel to represent him in the transaction.

Tahari received approximately $53 million for his interest and additional compensation for services pursuant to a Services Agreement with Tahari Ltd. that terminated on August 31, 2006. Rosen received approximately $49 million and an eleven percent interest in L&F Holdings, which

was reorganized to form LTH-US. Rosen agreed to serve as the President and Chief Operating Officer of LTH-US for a minimum of one year with the option to extend his term pursuant to the Employment Agreement attached as Exhibit B to the Purchase Agreement.

Section 12.11 of the Purchase Agreement states that the parties intend the Purchase Agreement to constitute "a complete and exclusive statement of the agreement and understanding of the parties." It further states that the Purchase Agreement, "together with the exhibits and schedules attached hereto, and the other Transaction Documents supersede all prior agreements and understandings between the parties with respect to such subject matter."

Section 2.4(f) of the Purchase Agreement governs "Post-Closing Payments of Net Worth Adjustments." Section 2.4(f)(vi) obligates the parties to use good faith efforts to resolve closing net worth disputes within thirty days from receipt of a "Dispute Report." If the parties cannot resolve the issue within thirty days,

> such dispute shall be settled by the determination of a nationally recognized independent accounting firm with offices in the New York metropolitan area that does not at the time of retention provide, and has not in the prior five years provided, services to the Sellers, or the Purchaser or their Affiliates (the "Neutral Auditor"), or such other method as to which the Sellers and Purchaser may then agree, which determination shall be binding.

Section 2.4(f)(x) provides that after execution of the Purchase Agreement, the sellers Tahari and Rosen "shall commence an audit of the books and records of Link in order to verify the figure reported in all royalty statements furnished to Theory pursuant to the Link License Agreement from January 1, 2000 to and including August, 31, 2003." Old Link International (referred to as "Link" in the Purchase Agreement) is required to

> "prepare and deliver to the Sellers a schedule certified by the Chief Executive Officer of Link that sets forth the amount of royalties that have accrued under the Link License Agreements from August 1, 2003 to and including the Closing Date, indicat[ing] payments made to date

> and amounts that remain unpaid... such schedule shall be accompanied by all information reasonably necessary to verify the amount of royalties shown thereon."

After the sellers receive this information, Section 2.4(f)(x) provides that

> Together with the delivery by Sellers of the Closing Balance Sheet pursuant to Section 2.4(f)(ii), or as soon thereafter as is reasonably practicable, the Sellers may deliver to the Purchaser a written report setting forth any proposed adjustments to Closing Net Worth based upon any deficiencies in the Link Royalty Schedule or in any royalty payments for any prior period (a "Royalty Dispute Report" or a "Dispute Report). To the extent the parties are unable to reach agreement as to the amount that remains unpaid, the parties shall submit their dispute to the Neutral Auditor for resolution in accordance with Section 2.4(f)(vi) above.

Tahari's Allegations and Claims:

Tahari makes the following allegations in the Complaint that are assumed to be true for purposes of this motion.

Tahari considered terminating the licensing relationship with Sasaki's company because Tahari wanted to expand the Theory brand in Asia. However, Rosen convinced Tahari to renew the Link License Agreement, and he suggested that they sell their interests in Theory to Old Link International. At that time, Tahari had no interest in selling Theory.

On several occasions between 2000 and 2002, Rosen told Tahari that he intended to retire from both Theory and the fashion industry in the next six to twelve months. After Rosen again recommended that they sell their interests, Tahari felt compelled to agree to the sale. Rosen handled the sale process. He did not obtain an independent appraisal of Theory. Rosen told Tahari that the only company interested in purchasing Theory was Sasaki's company Old Link International in conjunction with Fast Retailing because no other company would purchase Theory if Rosen were not running it. Although Tahari admits that Rosen's Employment Agreement containing a one year employment term with the option to extend was disclosed as part of the Purchase Agreement

documents, Tahari relied on Rosen's representation that he did not intend to work for more than one year.

Tahari attempted to inspect LTH's books and records after he sold his interest in the fall of 2003, but a LTH representative told Tahari's accountants that information was unavailable to conduct the audit. In February 2005, Tahari again demanded information to perform the royalty audit, but LTH and its subsidiaries did not cooperate. In February 2006, Rosen refused Tahari's request to join him in a lawsuit against the LTH entities to compel an accounting and payment of royalties. In September 2006, Tahari commenced this action.

The gravamen of the breach of fiduciary duty and negligence claims are that Rosen lied about his intent to retire from the fashion industry, conspired with Sasaki to seize control of Theory, and failed to hire an independent appraiser to value Theory. Allegedly Sasaki, LTH, New Link International, and LTH-US aided and abetted the breach by acquiring Theory with knowledge of Rosen's breach. The fraud claim is based on a claim that Rosen, Sasaki, LTH, New Link International, and LTH-US made misrepresentations to Tahari to induce him to sell Theory at a below fair market value. The unjust enrichment claim is grounded in contention that all defendants unjustly benefited from their receipt of portions of the "actual value" of Theory during the public sale of LTH in 2005, for which Tahari seeks the remedy of imposing a constructive trust remedy. Tahari also claims that Rosen, Sasaki, LTH, New Link International and LTH-US intentionally and malevolently deprived him of an ownership interest in Theory so as to constitute a prima facie tort.

The breach of contract claim is based on the claim that LTH, New Link International, LTH-US, and Fast Retailing failed to account for royalties owed to Tahari and denied Tahari access to books and records reflecting defendants' outstanding royalty obligations.

Tahari seeks to recover half of the $500 million market capitalization of LTH in 2005 less the amount that he received for his interest in Theory in 2003 as well as royalty payments.

Contentions:

The crux of defendants' position is that this is a "classic case of sellers remorse" for which Tahari has suffered no cognizable injury. The fact that all material information was disclosed in the Purchase Agreement and accompanying documents belies Tahari's claim that he reasonably relied on Rosen's oral statements and was defrauded into selling his interest. In any event, Tahari is not entitled to the damages he seeks, a portion of the market capitalization of LTH in 2005, because Tahari received full compensation for his interest in Theory, and LTH is a significantly larger entity than Theory in that it consists of other manufacturers and has subsidiaries in the United States, Europe, and Asia.

Specifically, Rosen and the LTH defendants contend that Tahari could not have reasonably relied on Rosen's statements about his intent to retire because both the Purchase Agreement containing a merger clause and Rosen's Employment Agreement fully disclosed Rosen's position and options. Moreover, at most Rosen indicated an intent to retire but not a guarantee, and Rosen had the right to change his mind. Defendants contend that the allegations supporting the breach of fiduciary duty and fraud claims lack the specificity required under CPLR 3016(b) and seek purely speculative rather than ascertainable damages. Rosen contends that he did not act negligently by not hiring an independent appraiser because as Theory's Chief Executive Officer, he was qualified to value the company and coordinate the sale. He disclosed all financial documents to Tahari, who had an opportunity to make an independent evaluation before selling his interest.

Defendants contend that the existence of a valid written agreement, the Purchase Agreement,

covering the same subject matter defeats the unjust enrichment claim. Thus there is no basis for imposing a constructive trust. Moreover the claim is baseless because sums derived from the public sale of LTH were from a larger entity than Theory. Defendants also contend that the prima facie tort claim fails because Tahari alleges neither special damages nor a solely malicious intent.

Defendants aver that the breach of contract claim concerning the royalty payments must be resolved by a neutral auditor pursuant to Section 2.4(f) of the Purchase Agreement. Additionally, Fast Retailing argues that Tahari does not state a cause of action for breach of contract against it because it had no obligation to pay royalties since its sole role was as guarantor of the purchaser, L&F Holdings.

New Link International and the Global Defendants contend that this court lacks personal jurisdiction over them because they are Japanese corporations with no New York contacts; unlike their parent corporations, they have not submitted to jurisdiction in New York.

Tahari opposes the dismissal motions, contending that he has alleged sufficient details to inform the defendants of the substance of his claims, and any lack of particularity stems from the fact that the information is within defendants' sole and exclusive control. He contends that he reasonably relied on Rosen's oral representations concerning both the value of Theory and his imminent retirement, and the reasonableness of his reliance is a question of fact. With respect to the royalty claim, Tahari alleges that defendants colluded to conceal the actual royalty obligations owed to Tahari for the sale of "Theory" clothing by under reporting Theory sales in Asia, and that they breached the Purchase Agreement by refusing to cooperate with his demands to produce books and records reflecting royalty obligations. He avers that the arbitration provision in the Link License Agreement does not apply because the Purchase Agreement, which does not contain a mandatory

arbitration provision, supersedes that agreement. Since the defendants breached the provision in the Purchase Agreement requiring document production related to royalties, the parties cannot submit reports to a neutral auditor, and the breach of contract claim is properly brought here. Tahari bases jurisdiction over New Link International and the Global Defendants on the ground that the corporations serve as financial vehicles to further the alleged fraud and are mere departments of their parent corporations.

Standard:

Although on a motion to dismiss the plaintiff's allegations are ordinarily presumed to be true and are afforded every favorable inference, allegations that consist of bare legal conclusions or that are flatly contradicted by documentary evidence or are inherently incredible are not entitled to such consideration. *Perl v. Smith Barney Inc.*, 230 A.D.2d 664 (1st Dept. 1996); *Ullman v. Kamali*, 207 A.D.2d 691 (1st Dept. 1994). Here, as discussed below, the theories in which plaintiff seeks to recover the proceeds of LTH's public sale are either contradicted by the relevant contracts or are purely speculative and conclusory. However, the breach of contract claim seeking to recover unpaid royalties is sufficient so as to warrant further discovery.

Fraud:

Tahari's fraud claim is based on Rosen's alleged misrepresentations about his intent to retire from the fashion industry, Sasaki and the LTH entities' knowledge of those misrepresentations, and the LTH defendants' alleged misrepresentations about their obligations to pay royalties. To make out a claim for fraud, plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and

injury." *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (1996).

Rosen's alleged representations about his future plans are not actionable unless plaintiff can plead "facts giving rise to an inference that the defendant, at the time the promissory representations were made, never intended to honor or act upon his statements." *Stuart Lipsky, P.C. v. Price*, 215 A.D.2d 102, 103 (1st Dept. 1995). Although Rosen ultimately decided to extend his employment with Sasaki, that fact does not give rise to an inference that he did not intend to retire at the time that he told Tahari that he did. Rosen always had the right to change his mind. More importantly, the Employment Agreement that was attached to the Purchase Agreement and post dated any alleged oral representations explicitly gave Rosen a right to exercise an option to continue working for more than one year. A conflict between a written contract and a prior alleged oral representation negates a claim of reasonable reliance upon the oral representation. *See Daily News, L.P. v. Rockwell International Corp.*, 256 A.D.2d 13 (1st Dept. 1998). Thus, to the extent the fraud claim is based on Rosen's oral representations about his career plans, the fraud claim fails for lack of reasonable reliance. To the extent Tahari bases the fraud claim on misrepresentations about the royalty obligations, that claim duplicates the breach of contract claim, which is based on the same allegations. *See Orix Credit Alliance, Inc. v. The R.E. Hable Co.*, 256 A.D.2d 114 (1st Dept. 1998). Rosen's alleged misrepresentations are not actionable, because they fail to satisfy the particularity requirement of CPLR 3016, in that they are neither fraudulent nor are they misrepresentations. The only allegation against Sasaki and the LTH entities, that they knew about and intended Tahari to rely on those misrepresentations and are also baseless.

The conduct must cause "out-of-pocket" damages, moreover, to sustain the fraud claim. Damages caused by fraud are limited to compensation for the actual loss sustained, and do not include

potential profit. *See Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413 (1996). Any earnings that plaintiff could have realized in an alternative bargain is inherently speculative and does not satisfy the "out-of-pocket" injury rule. *See Geary v. Hunton & Williams,* 257 A.D.2d 482 (1st Dep't 1999). Here, Tahari seeks to recover half of the amount of LTH's market capitalization in 2005 less the amount that he received for his interest in Theory in 2003. Not only is LTH a different entity from Theory and therefore its market capitalization an inappropriate measure of Theory's value, but the market capitalization of LTH in 2005 is not a valid measure of what LTH's value was in 2003. According to defendants, the market capitalization of LTH as of October 31, 2006, a year after the IPO, was $240.9 million, much lower than it was in 2005. Additionally, Tahari's contention that the $100 million purchase price reflected the "crippling effect of Rosen's purported (false) imminent departure" makes no sense because the disclosed documents revealed that Rosen was contractually obligated to continue working for at least one year after the Theory sale. It is also speculative to assume that had Tahari not sold his interest he could have expanded Theory himself, convinced Rosen to continue to work for him or hired a comparable replacement to manage Theory, commenced an initial public offering, and realized the same amount from a public sale as did the owners of LTH. Thus, Tahari cannot demonstrate reasonable reliance or an actual out-of-pocket injury, and the fraud claim is dismissed.

Breach of Fiduciary Duty and Negligence Claims:

The breach of fiduciary duty and negligence claims against Rosen are based on Rosen's oral representation about his intent to retire and the fact that he did not hire an independent appraiser to value Theory. As Tahari's business partner, Rosen owed Tahari a fiduciary duty to act loyally and to fully disclose potential conflicts of interest and facts relevant to their business transactions.

Sterling v. Fifth Associates v. Carpentille Corp. Inc., 9 A.D.3d 261 (1st Dept. 2004). Disclosure of the relevant material fulfills the fiduciary obligation. *Dubbs v. Stribling & Associates,* 96 N.Y.2d 337, 341 (2001). Additionally, as sophisticated businessmen, both Tahari and Rosen had a duty to exercise reasonable diligence and independently assess the business risk before signing the Purchase Agreement. *Abrahami v. UPC Const. Co. Inc., Lee,* 224 A.D.2d 231 (1st Dept. 1996).

Here, Rosen's right to extend his employment term, his future relationship with Sasaki, and his ownership of LTH shares were set forth in documents attached to the Purchase Agreement documents and therefore were disclosed to Tahari. The Employment Agreement that was attached to the Purchase Agreement specifically provided Rosen with the option to extend his employment term for more than one year At the time of the sale, Rosen's and Tahari's financial interests were aligned. If the $100 million sale price of Theory understated the value of the company, then Rosen and Tahari would have been equally harmed. Unlike in *Bernstein v. Kelso & Co.*, 231 A.D.2d 314 (1st Dept. 1997), upon which Tahari relies, here, there is no indication that Rosen concealed specific financial information relevant to the valuation of Theory or that Rosen prevented Tahari from discovering relevant information or obtaining an independent appraisal. Both Tahari and Rosen hired separate counsel to represent them in the sale, and Tahari had a duty to review the documents. Thus, the fact that all relevant information was disclosed to Tahari and that he had an opportunity to perform an independent investigation bars the breach of fiduciary duty and negligence claims, and those claims are dismissed. Because the claim that Rosen breached a fiduciary duty is dismissed, there is no claim stated for aiding and abetting breach of fiduciary duty, and that claim is also dismissed.

Unjust Enrichment and Imposition of Constructive Trust:

Tahari claims that all defendants "received the actual value of Theory LLC beyond the purchase price received by Tahari which value rightfully belongs to Tahari." He claims that the "actual value" is equal to the market capitalization of LTH in 2005, and that the $100 million sale price of Theory must have been inadequate because the market capitalization of LTH almost two years after the sale was $500 million. As stated above, Tahari was not injured by the public sale of an entity different from and larger than Theory. Defendants' receipt of a benefit alone is not sufficient to sustain an unjust enrichment claim if plaintiff does not allege the benefit was to his detriment and the enrichment was unjust. *Old Republic Nat'l Title Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678 (2nd Dept. 2005); *Heller v. Kurz*, 228 A.D.2d 263 (1st Dept. 1996)(dismissing unjust enrichment claim where plaintiff alleged defendants were enriched by the sale of shares they owned in a corporation, but the enrichment was not at plaintiff's expense).

The existence of a valid written contract also defeats the unjust enrichment claim. In *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005), the Court dismissed plaintiff's claim that defendant was unjustly enriched when it profited from the sale of securities after an IPO because the parties' underwriting contract covered the same subject matter. Similarly, Tahari does not state a claim for unjust enrichment based on the Theory sale because the Purchase Agreement covered the valuation and sale of Theory. Thus, the unjust enrichment claim is dismissed.

Because Tahari does not state a claim for unjust enrichment, there is no basis to impose a constructive trust. *Nathanson v. Nathanson*, 20 A.D.3d 403 (2nd Dept. 2005). Thus, the claim seeking to impose a constructive trust is dismissed.

Prima Facie Tort:

Prima facie tort is a cause of action "designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Curiano v. Suozzi,* 63 N.Y.2d 113 (1984). Plaintiff must establish that the defendant was motivated solely by a malicious intent to harm the plaintiff and not merely by a desire to advance defendant's economic interest. *IBM Credit Financing Corp. v. Mazda Motor Mfg.*, 152 A.D.2d 451 (1st Dept. 1989). Here, the allegations suggest, at most, that the defendants were motivated by self-interest, not solely by malicious intent. The mere application of the words "malicious intent" to plaintiff's allegations will not suffice. *Roberts v. Pollack,* 92 A.D.2d 440, 447 (1st Dept. 1983). Additionally, Tahari does not allege any special damages deriving from malice necessary to sustain this claim. Thus, the prima facie tort claim is dismissed.

Breach of Contract:

The primary defense to Tahari's claim for breach of the agreement to provide access to books and records and to pay any unpaid royalties for the January 2000 to August 2003 time period is that that claim is either subject to the arbitration pursuant to the arbitration provision in the Link License Agreement or that a neutral auditor provision in the Purchase Agreement precludes litigation.

The Purchase Agreement, which does not contain an arbitration clause, supersedes the Link License Agreement. Thus the arbitration provision in the license agreement is no longer operative. A party who has not consented to arbitration cannot be compelled to arbitrate, and an arbitration provision must reflect a "clear and unequivocal manifestation of an intention to arbitrate." *Gulf Underwriters Ins. Co. v. Verizon Communications, Inc.*, 32 A.D.3d 709 at 710 (1st Dept. 2006). The neutral auditor provision in the Purchase Agreement is conditioned upon parties exchanging

information and, in the event of a dispute, creating dispute reports to submit to a neutral auditor. Since defendants are in sole possession of all relevant financial information and they have not produced that information to Tahari, Tahari can neither create a dispute report nor submit a claim to an auditor. Thus, the claim that the parties to the Purchase Agreement breached their contractual obligation to provide him financial information is properly litigated. Submission to a neutral auditor may be required to ascertain the amount of any unpaid royalties owed to Tahari to further the litigation after appropriate discovery has occurred.

The next issue is whether the breach of contract claim is properly brought against LTH, New Link International, LTH-US, and Fast Retailing. New Link International was not a party to the Purchase Agreement because it was formed after the Theory sale, and thus it has no contractual obligation to furnish royalties or financial information. LTH, under its previous name, had the explicit obligation to provide the sellers, Tahari and Rosen, access to books and records under Section 2.4(f)(x). That section also directed the sellers to submit dispute reports to the purchaser, which is now known as LTH-US, and stated that "the parties" should submit valuation disputes to a neutral auditor. Section 2.4(f)(x) further provides that if the amount of unpaid royalties is not determined before the closing date, the "parties" shall reserve "an amount to be determined in good faith" and "make payments as may be necessary." Fast Retailing contends that although it was a "party" to the contract, the word "parties" in Section 2.4(f)(x) only refers to the parties previously mentioned in that section. However, Tahari contends that the word "parties" refers to all of the parties to the Purchase Agreement. Although Fast Retailing points out that LTH is the only party with the explicit obligation to furnish financial information, it is not clear which parties have payment obligations under Section 2.4(f)(x). Thus, it is premature to dismiss the breach of contract claim against LTH, LTH-US, and

Fast Retailing, but the claim is dismissed against New Link International.

Claims Against New Link International and the Global Defendants:

Since claims against the Global Defendants and New Link International are dismissed for failure to state a claim against them, there is no need to discuss whether or not there is personal jurisdiction over these entities. The Global Defendants also seek sanctions because they attempted to avoid motion practice by asking Tahari to voluntarily dismiss the case against them on jurisdiction grounds and Tahari refused to prior to obtaining discovery. The request for sanctions is denied, as Tahari's refusal, under all of the circumstances, was not frivolous.

Tahari's Cross Motion:

Tahari cross moves for an order directing disclosure related to jurisdiction and royalty obligations. Disclosure related to personal jurisdiction is unnecessary, but Tahari is entitled to disclosure related to his breach of contract claim. Tahari also contends that he should be granted leave to amend his complaint, despite his failure to submit proposed pleadings, because CPLR 3211(e) was amended effective January 1, 2006 to remove the clause that stated that plaintiff need show "good ground" before obtaining leave to amend in response to a motion to dismiss. However, an amendment based on the facts alleged in Tahari's Complaint and opposition papers would be futile. Thus, leave to amend is denied at this time.

Accordingly, it is

ORDERED that the motions by Rosen, Sasaki, and the LTH entities and by Fast Retailing to dismiss the Complaint are granted to the extent that the first through sixth causes of action are severed and dismissed, and is denied to the extent that the seventh cause of action remains against LTH, LTH-US, and Fast Retailing, and it is further

ORDERED New Link International's and Makoto Hata's motion to dismiss claims asserted against them is granted, and it is further

ORDERED that motion by the Global Defendants is granted to the extent that the claim against them is dismissed and denied as to the request for sanctions, and it is further

ORDERED that Tahari's cross motion is granted to the extent that the remaining defendants are directed to produce documents related to royalties and is otherwise denied, and it is further

ORDERED that the remaining defendants, LTH, LTH-US, and Fast Retailing, interpose answers within twenty days of receipt of this order, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The remaining parties are directed to appear for a preliminary conference on July 17, 2007 in Room 208 at 9:30 a.m.

DATED: June 18, 2007

ENTER:

Helen E. Freedman

Helen E. Freedman, J.S.C.

FILED
JUN 22 2007
COUNTY CLERK'S OFFICE
NEW YORK