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| Glamour Line, Inc. v Great White Bear, LLC |
| 2007 NY Slip Op 32791(U) |
| August 23, 2007 |
| Supreme Court, New York County |
| Docket Number: 0600314/2007 |
| Judge: Richard B. Lowe |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOWE
Justice

PART 56

Index Number : 600314/2007
GLAMOUR LINE
vs
GWB 11, LLC
Sequence Number : 002
DISMISS

INDEX NO. 600314/07
MOTION DATE 7/9/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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 this motion

FILED
SEP 04 2007
COURT NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

RICHARD B. LOWE JR.

Dated: 8/23/07

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

GLAMOUR LINE, INC.,

Index No: 600314/07

Plaintiff

-against-

DECISION AND ORDER

GREAT WHITE BEAR, LLC; GWB II, LLC; GLENN SANDS, and DANIEL FODIMAN,

Defendants

-----x

FILED
SEP 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

In the instant action, Plaintiff Glamour Line, Inc. ("GLI") brings claims for fraud, breach of contract, conversion, and misrepresentation against Defendants Great White Bear, LLC ("Great White Bear"), GWB II, LLC ("GWB"), Glenn Sands ("Sands"), and Daniel Fodiman ("Fodiman") ("collectively, the Defendants"). In the instant motion, Defendants Great White Bear, Sands, and Fodiman move to dismiss the First, Second, Third, Fifth, Sixth, Seventh, and Eighth causes of action plead against them pursuant to CPLR 3211(a)(7).

BACKGROUND

GLI is organized under New York law, and has its principal place of operations in Forest Hills, New York. It is in the clothing-manufacturing business. Non-party Paul Haryash ("Haryash") is its President. During early 2005, it entered into negotiations with Great White Bear for the latter

to purchase clothing from the former. Great White Bear is a New Jersey-organized company with its primary place of business in New York, New York. Defendants Sands and Fodiman are directors, officers, and shareholders of Great White Bear. GLI alleges that GWB is Great White Bear's successor in interest, organized under New York law on July 25, 2006. (*See, Complaint at page 1, ¶ 3-4*)

GLI alleges that on October 20, 2005; October 26, 2005; and December 7, 2005 Great White Bear placed orders for a total of 76,800 shirts costing in sum \$237,000.00. GLI contends that it invoiced Great White Bear for said orders, but never received payment.

Through Haryash, GLI spoke with Sands and Fodiman about the non-payment. GLI alleges that both Sands and Fodiman informed Haryash that the merchandise received sat in a warehouse and could not be sold as of yet, and that some of the purchase orders with Great White Bear's customers were closed and needed to be opened before it could submit payments. GLI eventually demanded the goods' return, but Great White Bear failed to comply with the request. Despite Sands and Fodiman's aversions that the received goods remained unsold, GLI alleges that a number of picking tickets demonstrate that the shirts were indeed shipped from the warehouse and sold to retail outlets. (*Id at pages 3-6, ¶ 13,15,16,22,2330,31,42,48*).

GLI commenced the instant action against the Defendants for fraud, breach of contract, conversion, and misrepresentation. In the instant motion, Sands, Fodiman, and GWB move to dismiss the claims plead against them pursuant to CPLR 3211(a)(7).

DISCUSSION

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . ." (*CPLR 3211(a)(7)*) In a

motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v State Street Bank and Trust Co*, 5 NY 3d 582 [2005]). “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, a motion for dismissal will fail.” (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993].) Here, Sands, Fodiman, and GWB move to dismiss the claims for fraud, conversion, and misrepresentation against them. Each cause of action will be addressed in turn.

I. The First, Second, and Third Causes of Action: Fraud

In order to sustain a claim for fraud, “there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury.” (*Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD 2d 64 [1st Dept 2003].) Furthermore, “each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail.” (*Bramex Associates, Inc v CBI Agencies, Ltd*, 149 AD 2d 383 [1st Dept 1989].)

Here, GLI pleads that on January 14, 2006, Sands told Haryash that the goods arrived late and payment could not be made. (*See, Complaint at page 7, ¶ 52*) Similarly, on February 2 and 16, 2006, Sands allegedly stated that the purchase orders were closed and needed to be opened in order to pay GLI. (*Id.*, ¶ 53, 54) GLI avers that these statements were false.

GLI pleads that during the month of August, on September 5, 2006 and on October 4 & 15, 2006, Fodiman summarily told Haryash that the shirts remained in the warehouse, and that Great White Bear would remit payments in a monthly-installment plan. (*Id.*, ¶ 56-59) GLI alleges these

goods were in fact shipped from the warehouse to retail stores before and concurrent with the dates of Fodiman's averions. (*Id at page 3, ¶ 12, 13, 14; at page 4, ¶ 24*) GLI sufficiently pleads that these statements were false.

As to reliance, GLI pleads that Great White Bear placed its final order on December 7, 2005, which was shipped on April 6, 2006. (*Id at page 6, ¶ 39; at page 5, ¶ 29*) Sands allegedly made false statements in January and February 2006 regarding the reasoning for non-payment. (*Id at page 7, ¶ 52-54*) After said statements were made, GLI continues to ship the goods. GLI sufficiently pleads that it relied on the purported statements since it continued to fill orders after these were made. Finally, as to injury, GLI asserts that it suffered \$273,000.00 in damages, the price of the goods delivered but not paid for. (*Id at page 10, ¶ 74; at page 11, ¶ 80*)

GLI adequately pleads that Sands, Fodiman, and GWB committed a fraud against it. It specifies dates that the statements were made, alleges that the statements were false, and avers that it relied on said statements to its detriment. (*See, Sokolow, supra*) But this alleged fraud is connected to the GLI-Great White Bear contract. Indeed, it is the contract's subject matter, the shirts, that these Defendants allegedly made misrepresentations about. In order to survive the instant motion to dismiss, GLI must satisfy yet another heightened-pleading requirement.

"To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties." (*Krantz v Chateau Stores of Canada*, 256 AD 2d 186 [1st Dept 1998].) "The mere addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud." (*Devlin v 645 First Ave. Manhattan Co*, 229 AD 2d 343 [1st Dept 1996].)

Here, GLI's fraud claim does not contain any allegations beyond the breach-of-contract claim. GLI alleges in both claims that it performed its end of the bargain by supplying Great White Bear with the merchandise, and that the latter failed to pay \$273,000.00. The fraud claim does contain the additional contention that Sands; Fodiman; and GWB, through them, made false representations regarding the payment. But this aversion reverts back to the contract-breach claim because it is this alleged fraud that serves as the basis for it: Great White Bear averred it would pay for the goods, but did not.

This aversion is insufficient to re-package the breach of contract claim as a fraud claim. (*See Devlin, supra*) Since the fraud claim is identical with that for breach of the contract, it must be dismissed.

II. The Fifth and Sixth Causes of Action: Conversion

"A 'conversion' takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v New York Organ Donor Network*, 8 NY 3d 43 [2006].) "Two key elements of the tort of conversion are (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Id.*) However, a claim for conversion cannot be maintained if it is duplicative of one for breach of contract. (*See, Retty Financing, Inc v Morgan Stanley Dean Witter & Co*, 293 AD 2d 341 [1st Dept 2002].)

Here, GLI pleads that Sands and Fodiman "unlawfully and acting with the authority of Great White Bear sold plaintiff's merchandise without paying plaintiff GLI the agreed upon price for the clothing." (*Complaint at page 12, ¶ 86; at page 13, ¶ 90*) Further, it alleges that neither individual

“intended to pay plaintiff and intended that Great White Bear keep plaintiff’s clothing for [their] own benefit.” (*Id at page 12, ¶ 87; at page 13, ¶ 91*) Finally, GLI avers that it was damaged in the amount of \$273,000.00 because of the alleged conversion. (*Id at page 12, ¶ 88; at page 13, ¶ 92*)

GLI certainly has an interest in the goods, for it is the entity that manufactured and delivered the shirts to Great White Bear. The first prong of the two-prong test articulated by the Court of Appeals in *Colavito* is therefore satisfied. Moreover, “[if] possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand [to do so is made].” (*Matter of White v City of Mount Vernon, 221 AD 2d 345 [2nd Dept 1995]*.) Here, Great White Bear’s dominion over the merchandise is indeed lawful because it obtained said goods pursuant to a contract. But when GLI demanded that Great White Bear return the merchandise, and it refused, *Colavito*’s second prong was satisfied. (*See, Complaint at page 8, ¶ 58*)

But “an action for conversion cannot be predicated on a mere breach of contract.” (*Yeterian v Heather Mills NY, Inc, 183 AD 2d 493 [1st Dept 1992]*.) Here, GLI pleads that it delivered goods to Great White Bear pursuant to separate orders. Great White Bear allegedly did not pay the \$273,000.00 it is owed. The allegation that Great White Bear, through its agents, did not perform as promised sounds in breach of contract. The asserted conversion causes of action is simply a repeat of said breach-of-contract claim. Accordingly, these conversion claims must be dismissed.

III. The Seventh and Eighth Causes of Action: Misrepresentation

The elements of misrepresentation are that 1) the defendant made a material false statement; 2) the defendant intended to defraud the plaintiff thereby; 3) the plaintiff reasonably relied on the representations; and 4) the plaintiff suffered damaged as a result of their reliance. (*See, J.A.O. Acquisitions Corp v Stavitsky, 18 AD 3d 389 [1st Dept 2005]*.)

The elements of a claim for misrepresentation are nearly identical to that for fraud. Accordingly, the discussion regarding GLI's fraud claim, *supra*, is reiterated here. While GLI pleads a cognizable claim for misrepresentation, it is, as the fraud claim, duplicative of the breach of contract claim. Therefore, it must be dismissed. (*See, Rockefeller University v Tishman Const Company of New York*, 240 AD 2d 341 [1st Dept 1996].)

IV. GLI's Request for Punitive Damages

Punitive damages may be awarded in cases where the defendant's conduct is gross and wanton and involves a high degree of moral culpability. (*See, Borkowski v Borkowski*, 39 NY2d 982 [1976]; *Cahen-Vorburger v Vorburger*, 41 AD 3d 281 [1st Dept 2007].) Here, GLI alleges that a private wrong was done against it; namely that Great White Bear, its agents, and successor-in-interest, breached the sales contract. Punitive damages are not warranted in the instant action, and GLI's request for this is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Defendants' motion to dismiss GLI's first, second, third, fifth, sixth, seventh, and eight causes of action is granted; and it is further

ORDERED that the Defendants' motion to dismiss GLI's request for punitive damages is granted.

This shall constitute this Court's decision and order.

Dated: August 23, 2007

ENTER

RICHARD B. LOWE III

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

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