

Balestra 1882 S.p.A. v Designs by Glory, Ltd.

2007 NY Slip Op 34302(U)

December 21, 2007

Supreme Court, New York County

Docket Number: 0603806/2006

Judge: Louis B. York

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: York

PART 2

Index Number : 603806/2006

BALESTRA 1882 S.P.A.

vs

DESIGNS BY GLORY LTD.

Sequence Number : 002

DISMISS

IDEX NO. 603806/2006

OTION DATE _____

OTION SEQ. NO. _____

OTION 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 this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 12/21/07

Louis B. York
LOUIS B. YORK
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
BALESTRA 1882, S.p.A.,

Plaintiff,

Index No. 603806/06

-against-

DESIGNS BY GLORY, LTD.,

Defendant.

-----X
LOUIS B. YORK, J.:

This Court consolidates Motion Sequences 2 and 3 for disposition.

Plaintiff's first cause of action demands \$30,757.65 for the value of the goods received, accepted, and retained by Defendant. Plaintiff's second cause of action seeks \$250,000 in punitive damages based on fraud and individual misappropriation of corporate assets that subsequently left the corporation without assets to pay its creditors. Plaintiff also alleges actual and constructive fraud against Defendant, claiming Defendant violated Article X of Debtor and Creditor Law. Finally, Plaintiff's complaint demands counsel fees, interest, costs and disbursements of this action.

Defendant denies both causes of actions and asserts four counterclaims. In a prior decision, the Court dismissed the claims of fraud in the inducement, violation of GBL § 349, and requested legal fees, but the fourth counterclaim for breach of contract and breach of obligations of good faith and fair dealing, seeking \$40K, remains.

In Motion Sequence 2, Defendants move to dismiss the Plaintiff's second Cause of Action both for Failure to State a Cause of Action and Based on Documentary Evidence under *C.P.L.R. §§ 3211 (a)(1) and (7) and § 3016 (b)*, and for Summary Judgment under *C.P.L.R. § 3212*. Defendants also move for an order pursuant to *C.P.L.R. §§ 3101(b) and 3103(a)* precluding Plaintiff from the discovery it seeks.

[* 3]

In Motion Sequence 3, plaintiff moves for Summary Judgment and a modification of the Preliminary Conference Order of the Court dated June 6, 2007. Defendant cross-moves for an order pursuant to *C.P.L.R. § 3212* granting Summary Judgment in favor of Defendant to dismiss Plaintiff's complaint against Defendants as a result of Plaintiff's defaults of Defendant's discovery demands. Defendant also cross-moved for a judgment on liability against Plaintiff on Defendant's counterclaims for contract breach and the breach of the covenant of good faith and fair dealing because of Plaintiff's discovery defaults and because Plaintiff has not answered Defendant's counterclaims.

For the reasons below, the Court grants Defendant's motion to dismiss Plaintiff's second Cause of Action, denies Defendant's motion for Summary Judgment under *C.P.L.R. § 3212*, grants Defendant's motion to strike Plaintiff's demands for counsel fees, and grants Plaintiff's relief demanded in the complaint in the first cause of action.

Plaintiff, ("Balestra"), is an Italian-based manufacturer of gold jewelry. Defendant, Designs by Glory, Inc. ("Designs"), is a New York wholesale jewelry merchant. On or about October 14, 2005, Balestra sold Designs \$30,757.65 worth of goods, and Balestra now contends Designs received, accepted, and retained the goods but failed to pay for the goods. Balestra contends that payment was demanded, but Designs refused. Designs contends they received and accepted part of the goods, returned part of the shipment as non-conforming, but paid for the goods retained.

Aside from a form indicating Designs' initial order that was submitted with Balestra's Order to Show Cause, neither Balestra nor Designs has submitted documents that demonstrate the shipment, delivery, receipt, acceptance, retention, payment, return, or refusal of the goods in question.

[4]

Defendant's Motion to Dismiss

Under *C.P.L.R. § 3211*, a party may move for judgment dismissing one or more causes of action asserted against him on the ground that (a)(1) a defense is founded upon documentary evidence; or (a)(7) the pleading fails to state a cause of action.

It is well established that "where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to *C.P.L.R. 3211 (a)(1)* is warranted" (*Berardino v. Ochlan*, 2 A.D.3d 556, 557; 770 N.Y.S.2d 75, 76 [Sup. Ct. NY, App. Div. 2d Dept. 2003]).

To support its motion, Designs submitted evidence related to two previous cases involving Balestra's counsel and Designs. Designs submitted a November 16, 2006 letter regarding settlement payments from Designs and a copy of the subsequent settlement check. They also submitted a February 10, 2005 complaint and the subsequent September 26, 2005 Settlement Agreement between Designs and a previous client of Balestra's counsel, Alessi of Italy. Finally, Designs submitted the schedule of checks to be drafted pursuant to the September 26 Settlement Agreement from Designs to Alessi.

Under *C.P.L.R. § 3211 (a)(1)*, Designs' documentary evidence fails to definitively contradict Balestra's allegation that Designs does not have sufficient assets to pay Balestra. Designs' documentary evidence showing that it has been able to satisfy previous judgments fails to conclusively dispose of Balestra's allegation that Designs does not *currently* have sufficient assets to pay Balestra. Similarly, Designs and Alessi agreed to a schedule of checks to be issued between October 2005 and May 2006 does not conclusively dispose of Balestra's allegation.

5]

Further, when Balestra attempted to serve the summons and complaint on Designs, Balestra was notified that Designs had vacated the premises without notice to creditors. Designs does not deny these allegations

Designs moves to dismiss Balestra's second cause of action based on fraud. Under *C.P.L.R. § 3016 (b)*, where a cause of action or defense is based upon fraud, the circumstances constituting the wrong shall be stated in detail.

Under Debtor and Creditor Law § 276, a conveyance made with actual intent to delay, or defraud either present or future creditors is fraudulent as to both present and future creditors. *Prudential Saving Bank v. Grant* (99 N.Y.S.2d 602, 602 [Sup. Ct. NY Co. 1950]). states that "in order for a conveyance to come within Section 273 of the Debtor and Creditor Law [...] a debtor must have been solvent before the transfer and must be rendered insolvent by reason of having made the conveyance and the conveyance must have been made without a fair consideration"

The court in *IDC (Queens) Corp. v. Illuminating Experiences, Inc.* (220 A.D.2d 337, 337; 633 N.Y.S.2d 18, 19 [1st Dept. 1995]) unanimously affirmed the lower court's granting the defendant's motion to dismiss for failure to state a cause of action. The complaint was grounded in the Debtor and Creditor Law, and the court held that the plaintiff failed to plead the alleged fraudulent conveyance with the requisite particularity as required under *C.P.L.R. § 3016 (b)*. In granting the motion to dismiss, the court noted that there was an absence of any specific allegation concerning the value of the transferred property or a showing why the consideration was inadequate.

Balestra's second cause of action based on fraud in violation of the provisions of Article X of Debtor and Creditor Law fails to state in detail the circumstances

6]

constituting the wrong. Balestra does not allege a transfer was made without fair consideration or that a transfer was made with actual intent to defraud creditor. It has not stated that Designs was solvent prior to entering into the contract with Balestra and became insolvent due to a subsequent transfer. Balestra states only that the principals of Designs have been appropriating assets and are unable to satisfy their current debts without setting forth any specific facts to back up its claim.

Balestra's counsel's also states he has personal knowledge that Designs is fraudulently conveying corporate assets, and supports this allegation by referring to the pervious judgments against Designs. This Court recognizes that parties may enter settlement agreements to avoid the cost and time associated with a trial, and entering such agreements do not necessarily concede guilt or wrongdoing of either party. Previous settlement agreements in unrelated cases between Balestra's counsel and Designs do not prove that Balestra has personal knowledge that Designs is currently fraudulently conveying corporate assets.

Further, Balestra seeks only punitive damages under its second cause of action based on Article X of Debtor and Creditor Law. However, under Debtor and Creditor Law § 279, punitive damages are not appropriate. *Blakeslee v. Rabinor* (182 A.D.2d 390; 582 N.Y.S.2d 132 [App. Div. 1st Dept. 1992]) precludes an award of punitive damages in an action based on Debtor and Creditor Law § 279.

The Blakeslee Court went on to note "the courts have construed the Debtor and Creditor Law strictly. The Court of Appeals, in assessing the scope of sections 278 and 279 of the law, stated [...] a creditor's remedy for the transfer of its debtor's assets, where

7]
undertaken prior to a judgment on the debt, is still to obtain a nullification of the conveyance" (*ID*, 182 A.D.2d 390, 391; 582 N.Y.S.2d 132, 133).

Further, *Marine Midland Bank v. Murkoff* (20 A.D.2d 122, 132; 508 N.Y.S.2d 17, 22 [2d Dept. 1986]) noted that "to hold that the act of removing property from the reach of a creditor is not misconduct so 'gross and wanton' so as to justify an award of punitive damages. [...] The creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance."

The statutory remedies available under Debtor and Creditor Law § 279 are clear. A court may restrain the defendant from disposing of his property, appoint a receiver to take charge of the property, set aside the conveyance or annul the obligation, or make any order which the circumstances of the case may require—but an award of punitive damages is not an option for relief. Therefore, the Court grants Designs' Motion to Dismiss Balestra's second cause of action.

Because the Court grants Designs' Motion to Dismiss, an analysis regarding Designs' Motion for Summary Judgment and Motion to preclude Balestra from discovery it seeks is unnecessary.

Defendant's Motion to Strike Demand For Counsel Fees

In *Matter of A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5; 511 N.Y.S.2d 216, 218 [Ct. App. N.Y. 1986], the general rule is that attorneys' fees are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule. None of these

8]
bases for awarding counsel fees is alleged by Balestra. Accordingly, Defendant's motion to strike demand for counsel fees is granted.

Plaintiff's Relief Demanded in Complaint in First Cause of Action

Balestra's first cause of action is grounded in breach of contract. It seeks payment for goods shipped, received, and accepted by Designs. In response to Balestra's motion for Summary Judgment for the relief demanded in the complaint, Designs has cross-moved for Summary Judgment.

Summary judgment is a drastic remedy. It is well established that summary judgment should be granted only when it is clear that no material issues of fact exist. The party seeking summary judgment must present sufficient evidence in admissible form to demonstrate the absence of any material fact (*Estate Of Nathan Rudin*, 2005 N.Y. Misc. LEXIS 4411 [Surr. Ct, N.Y., N.Y. Co. 2005]).

U.C.C. § 2-606 states that acceptance of goods occurs when the buyer fails to make an effective rejection. Under U.C.C. §2-602, rejection of goods must be within a reasonable time after their delivery, and rejection is ineffective unless the buyer seasonably notifies the seller. Finally, U.C.C. § 2-607 (4) states that the burden is on the buyer to establish any breach with respect to the goods accepted.

Designs has the burden to establish a breach with respect to the good accepted. Designs failed to submit evidence demonstrating that it had rejected the goods a reasonable time after delivery. There were no receipts or invoices indicating partial acceptance or partial rejection, there were no accounting records to demonstrate that Designs had in fact paid for the goods retained, and there were no dated documents to establish that Designs had notified Balestra of its rejection in a timely manner.

9]

It is undisputed that the goods were shipped and received. However, because Designs failed to submit evidence to demonstrate that it had rejected the goods a reasonable time after delivery, the Court grants Summary Judgment for Balestra.

Designs moves to dismiss Balestra's complaint as a result of Balestra's discovery defaults under the December 19, 2006 discovery demands. Because there are not issues to be decided at trial, the issue of discovery failure is moot.

Accordingly, it is

ORDERED that Defendant's Motion to Dismiss Plaintiff's second cause of action is granted, and it is further

ORDERED that Defendant's motion for Summary Judgment is denied and Plaintiff's demand for \$30,757.65 in Plaintiff's first cause of action is granted, and it is further

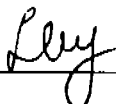
ORDERED that Defendant's Motion to strike Plaintiff's demand for counsel fees is granted and Plaintiff's Motion demanding counsel fees is denied, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly together with costs and disbursements.

ENTER:

Date: 12/21/07

LOUIS B. YORK
J.S.C.



Louis B. York, J.S.C