

P/Kaufmann, Inc. v Town & Country Linen Corp.

2008 NY Slip Op 30601(U)

February 22, 2008

Supreme Court, New York County

Docket Number: 0602066/2007

Judge: Helen E. Freedman

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

PRESENT: Helen E. Freedman

PART 39

Index Number : 602066/2007

P/KAUFMANN, INC.

vs

TOWN & COUNTRY LINEN CORP.

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

FEB 27 2008

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion *and cross motion* are decided in accordance with the accompanying memorandum of law.

... THIS MOTION IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/22/08

Hef
J.S.C.

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

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

-----X
P/KAUFMANN, INC.,

Plaintiff/Counterclaim Deft.,

-against-

Index No.

TOWN & COUNTRY LINEN CORP.,

Defendant/Counterclaim Plaintiff.

-----X
HELEN E. FREEDMAN, J:

In this action, plaintiff P/Kaufmann, Inc. (“P/Kaufmann”) sues defendant Town & Country Linen Corp. (“Town & Country” or “T&C”) for breach of contract, an accounting, unjust enrichment, and unfair competition. Town & Country interposes counterclaims sounding in fraud, breach of warranty, breach of contract, unjust enrichment, and failure of consideration, and seeks rescission. Defendant Town & Country moves to dismiss Counts IV and V of the Complaint for unfair competition and unjust enrichment and Plaintiff P/Kaufmann moves to dismiss Counts I through IV of the counterclaims for failure to state causes of action (fraud, breach of contract, breach of warranty, failure of consideration, and unjust enrichment). It particularly seeks to dismiss the fraud claim based on failure to plead an essential element of the claim, namely justifiable reliance.

Background

The factual background in this case involves an agreement concerning a shower curtain pattern. The parties are both in the wholesale business involving fabrics for home furnishing products that include draperies, tablecloths and shower curtains. In 2002, plaintiffs allegedly

showed a representative of defendant a quilted geometric "grid" pattern fabric design called "Zephyr Fabric" to be used for shower curtains. The representative allegedly took the idea back to defendant who proceeded to create a similar geometric or grid shower curtain design that it called "Parachute Fabric." Defendant marketed its product to Bed, Bath & Beyond nationwide and arranged for manufacture of the product in a factory in Turkey.

In or about April 2002 a P/Kaufman representative saw the Parachute Fabric at Town & Country's showroom and recognized it as being similar to the Zephyr Fabric. Plaintiff charged defendant with misappropriation and, according to defendant's executive, Kabat, copyright infringement. The parties then entered into an Agreement resolving the dispute, memorialized in an e-mail from Town & Country executive David Beyda, that provided:

- (1) P/Kaufmann would manufacture a finished product for T & C at [our] factory [Leno, in Turkey].
- (2) Based on an L.D.P. to the port of [\$]8.05-P/Kaufmann would charge T & C [\$]10.06 from the port or a 20% margin on the landed port price.
- (3) T & C would divulge the name of our factory [in Turkey] to P/Kaufmann under the understanding that P/Kaufmann would not manufacture competitive product to Town & Country at this factory.

The parties continued under the Agreement, with Town & Country selling the Parachute Fabric shower curtain to Bed, Bath & Beyond for almost five years. Town & Country then allegedly violated the Agreement by manufacturing and purchasing the Parachute fabric shower curtain in China based on what it claims were fraudulent representations concerning copyright ownership that induced it to enter into a "license agreement." P/Kaufmann denies that it ever

* 4]

contended that it had a copyright in the Zephyr Fabric or that the above Agreement constituted a license agreement since T&C never used the Zephyr pattern, rather it manufactured and sold the Parachute pattern shower curtain. P/Kaufmann denies that it ever contended that it had a copyright in the Zephyr Fabric or that the above Agreement constituted a license agreement. P/Kaufmann applied for copyright protection of its Zephyr Fabric pattern on at least two occasions, in 2001 and 2004, but each time the Copyright Office rejected the application.

Dismissal Claims

Town & Country moves to dismiss plaintiff's claims for unfair competition and unjust enrichment. Town & Country contends that the absence of a copyright renders the unfair competition claim moot, and that the extra element of a fiduciary relationship for a claim in the absence of copyright protection is missing here. Town & Country also avers that a "generic grid" cannot be the basis of unfair competition, particularly, where as here, the Parachute design was its design and not plaintiff's. While the design may not really warrant either copyright or other protection because of the absence of novelty of expression, New York law still protects ideas if they are sufficiently novel to warrant such protection. *Paul v. Haley*, 183 A.D.2d 44 (2d Dept. 1992). It is highly debatable that a grid pattern on a shower curtain constitutes a novel idea; moreover, the parties resolved that issue by allowing plaintiff to produce its Parachute pattern pursuant to contract as set forth above. Furthermore, the 1978 Copyright Act contains a preemption clause which appears to remove unfair competition from state actions where the underlying claim is really for copyright infringement of an uncopyrightable idea. Thus, that claim is moot in that it has been superseded by the contractual agreement and should be dismissed.

With respect to the claim for unjust enrichment, it is duplicative of the breach of contract

claim and should also be dismissed. Although, courts have allowed parties to plead alternatively where there is some doubt as to the viability of the of the contract *Zuccarini v. Ziff-Davis Media, Inc.*, 306 A.D.2d 405 (2d Dept. 2003), defendant's seeking rescission of the contract based on fraud is not the same as disputing the existence of the contract. Thus, a claim of breach of contract and a claim of breach of a quasi-contract are not compatible. *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 382 (1987; *Goldstein v. COBC World Markets Corp. et al.*, 6 A.D.3d 295 (1st Dept. 2004).

Dismissal of Counterclaims

Plaintiff seeks to dismiss the counterclaims for fraud or misrepresentation, breach of warranty, unjust enrichment and failure of consideration.

The fraud or misrepresentation claim is based on plaintiff's alleged statement that it had a copyright in its Zephyr design and that it would bring an infringement action against defendant, which induced defendant to enter into the above cited Agreement. Plaintiff contends that defendant was a sophisticated owner of many copyrights and that it knew or could easily have determined that no such copyright existed. Thus, plaintiff contends that the "justifiable reliance" element of fraud is missing. Plaintiff cites a number of cases in which fraud claims have been dismissed because a party's fraud claims were unreasonable under the circumstances. For example, in *Stuart v. Lipsky, P.C. v. Price*, 215 A.D.2d 102 (1st Dept. 1995), the Court dismissed a fraud claim where it found that the purchaser of a law practice had the means available to ascertain the truth of the defendant's claims. See also *Valassis Communications, Inc. v. Weimer*, 304 A.D.2d 448 (1st Dept. 2003) holding that "[a] 'sophisticated plaintiff cannot establish that it entered into an arms's length transaction in justifiable reliance on alleged misrepresentations if

that plaintiff failed to make use of the means of verification available to it' {citation omitted}”. However, defendant has put forward sufficient evidence that a copyright search for the Zephyr pattern would have been extremely difficult without more information than was available because among other things, P/Kaufmann filed twice, unsuccessfully, for copyright protection under the name of one of its divisions (See affidavit of David Mitnick). In view of this fact, dismissal of the fraud claim is not warranted at this time. Similarly, the rescission request, which is based on the fraudulent inducement claim, survives.

Town & Country’s claims for breach of warranty of title, unjust enrichment, and failure of consideration claims, must, however, be dismissed. There is no basis for claiming that plaintiff did not have “title” to the Zephyr fabric pattern, and it was defendant’s pattern, the Parachute pattern, that was produced and sold through the Agreement. The unjust enrichment claim, under the circumstances here, duplicates the fraud claim. The only basis upon which there could be a finding of unjust enrichment is a finding that defendant was misled into entering into the Agreement. Similarly, the failure of consideration claim, does not lie because the parties entered into a contract pursuant to which both parties operated for close to five years. Plaintiff had defendant’s fabric pattern produced by defendant’s mill in Turkey as provided for in the contract, and plaintiff would charge defendant a percentage of its land port price. The only alleged consideration failure is the misrepresentation concerning the copyright.

Based on the foregoing, it is hereby

ORDERED that Counts IV and V of the Complaint are dismissed; and it is further

ORDERED that Counts II, III and IV of defendant’s counterclaims are dismissed; and it

[* 7]
is further

ORDERED that the Clerk is directed to sever and dismiss those claims accordingly; and

it is further

ORDERED that the remaining claims continue; and it is further

ORDERED that the parties appear for a pre-trial conference on March 18, 2008 or as previously determined, in Room 208 at 9:30 a.m.

Dated: February 22, 2008

Enter:

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FEB 27 2008

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Helen E. Freedman, J.S.C.