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

PRESENT: ______________________ PART ______

Justice

Index Number : 603601/2007

INDIA GARMENTS, INC.

VS.

ERIC JAY, LTD.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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 is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/30/08 ______________________

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

INDIA GARMENTS, INC., and
PHASES, INC.,

Plaintiffs,

-against-

Index No. 603601/2007

ERIC JAY, LTD.,
NORMAN GOTTLIEB, and
STEVEN GOTTLIEB,

Defendants.

----------X

HELEN E. FREEDMAN, J.:

In this action, India Garments, Inc., and Phases, Inc. (collectively, the "plaintiffs"), wholesalers of garments, sue their sales agents Eric Jay, Ltd., Norman Gottlieb and Steven Gottlieb (collectively, the "defendants"), claiming breach of contract, fraud, breach of fiduciary duty, intentional interference with business relationships, conversion, unfair competition, and prima facie tort, and seeking replevin as well as compensatory and punitive damages. Defendants now move to dismiss the Complaint, pursuant to CPLR 3211(a)(5) (Statute of Frauds), CPLR 3211(a)(7) (failure to state a claim), and CPLR 3016(b) (lack of specificity).

For the reasons set forth below, defendants' motion is granted to the extent that the fraud and prima facie tort claims and the request for punitive damages are dismissed, and is denied as to the remaining claims.

Plaintiffs' Allegations

The Verified Complaint, as supplemented by plaintiffs' motion papers (*see Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976)), alleges that for about twenty-two years

plaintiffs and defendants conducted business together on the basis of an oral agreement (the "Agreement") which provided that: (a) plaintiffs purchased designs and sketches for women's garments from the defendants; (b) defendants, at plaintiffs' expense, accompanied the plaintiffs on trips to India and other countries to meet with manufacturers and obtain samples of the garments fabricated on the basis of the designs; (c) defendants used the samples to solicit orders from various retail stores; (d) plaintiffs submitted the orders to the manufacturers to produce the garments, imported the finished product and shipped it to the stores; and (e) plaintiffs paid defendants monthly commissions on the sales of the orders.

Pursuant to the Agreement, defendants' work followed two seasonal cycles, one beginning in April for the Fall/Winter line of clothing and the other starting in October for the Spring/Summer line. Either party had the right to terminate the Agreement at will before the start of the process for the upcoming season. Plaintiffs also allege that after the bi-annual trips overseas, defendants would solicit orders on behalf of plaintiffs from April through October for the Fall/Winter line, and from October through December for the Spring/Summer line.

In April 2007, defendants traveled to India with plaintiffs to meet with manufacturers and suppliers for the Fall/Winter line. Once back to the United States, defendants began soliciting orders from retail stores, including plaintiffs' customary buyers, with the samples and designs paid for by plaintiffs. During the following months, however, defendants did not produce any orders and told plaintiffs several times that the customers had been contacted and that the orders would come in late for that season. On August 7, 2007, defendants informed plaintiffs that, in fact, they had been gathering orders from the stores but did not intend to turn them over and no longer intended to work as sales agents for plaintiffs. Defendants also refused to return

plaintiffs' design sketches and samples.

Plaintiffs allege that they later learned that defendants, while holding themselves out as being the plaintiffs or their agents, had submitted the orders to various manufacturers, including some that they had met through the plaintiffs, and had sold the final product to several of plaintiffs' customary buyers. Also, defendants represented to certain customers and manufacturers that plaintiffs were no longer in business. After August 7, 2007, Defendants were still retaining plaintiffs' trade name "Phases" on their voice mail and on the bulletin board of their showroom.

Motion

Defendants move to dismiss the first cause of action for breach of an oral agreement based on the Statute of Frauds. They seek dismissal of the third cause of action for fraud based on failure to plead with particularity. They move to dismiss the second cause of action for replevin, the fourth cause of action for breach of fiduciary duty, the fifth cause of action for intentional interference with business relations, the sixth cause of action for conversion, the seventh cause of action for unfair competition, and the eighth cause of action for prima facie tort arguing that plaintiffs' allegations fail to state those claim.

Discussion

Breach of Contract – With respect to the first cause of action for breach of an oral agreement, defendants contend that it should be dismissed as barred by the Statute of Frauds, General Obligations Law § 5-701(a)(1), because the Agreement alleged by plaintiffs could not be performed within one year. Plaintiffs contend that the Agreement is valid and enforceable because it could have been performed within one year and, in any event, it was terminable at will.

Under § 5-701(a)(1), an agreement is void if, by its terms, it "is not to be performed within one year from the making thereof" unless it "or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith." Gen. Oblig. Law § 5-701(a)(1) (McKinney's 2002). The Statute is strictly construed and applies only to oral agreements which, by their terms, "have absolutely no possibility in fact and law of full performance within one year." *D & N Boening v. Kirsch Beverages,* 63 N.Y.2d 449, 454 (1984); *Foster v. Kovner,* 44 A.D.3d 23 (1st Dep't 2007). The critical test is whether the oral agreement, by its own terms, is not capable of performance within a year. It does not matter that completion of performance may be unlikely or improbable. *See Freedman v. Chemical Const. Corp.,* 43 N.Y.2d 260, 265 (1977). If an oral agreement is terminable at will, it is capable of performance within a year and does not fall within the purview of the Statute. *Apostolos v. R.D.T. Brokerage Corp.,* 159 A.D.2d 62, 64 (1st Dep't 1990).

In this case, plaintiffs' allegations establish that the Agreement was capable of being performed within a year. Each year it was renewed until defendants allegedly breached it by not turning over the orders to plaintiffs. As alleged, the Agreement, by its very terms, provided that defendants' work would revolve around two seasonal cycles, one beginning in April for the Fall/Winter line of clothing and the other starting in October for the Spring/Summer line. The Agreement provided that either party could terminate it prior to the April or October trips overseas which started the process of producing a new line of clothing. It is clear that defendants' work for each seasonal line could be performed within a year as orders for the Fall/Winter line could conceivably cease sometime in the Winter, well before the whole process for that line started again in April, and those for the Spring/Summer line could very well end

sometime in the Summer, well before the October trip. Since the Agreement was capable of performance within a year, it is valid and enforceable and the allegations state a viable breach of contract claim.

Replevin and Conversion – With respect to plaintiffs' second cause of action for replevin and sixth cause of action for conversion of the design sketches and samples, there is no basis to dismiss any of these claims at this juncture. Defendants do not dispute that the sketches and samples belong to plaintiffs, who paid for them, or that defendants refused to give them back when asked to do so. Even if defendants' possession of the sketches and samples was initially rightful and for the purpose of soliciting orders from buyers, a cause of action for replevin and conversion arises when the owner demands the return of its property and the demand is refused. *See Solomon R. Guggenheim Foundation v. Lubell,* 77 N.Y.2d 311, 317 (1991). Thus, the replevin and conversion claims remain.

Breach of Fiduciary Duty – With respect to the fourth cause of action for breach of fiduciary duty, defendants do not dispute that they were sales agents for plaintiffs, but instead contend that such a relationship did not give rise to fiduciary duties in this case because plaintiffs' sharing of information with defendants about the various manufacturers and customers was voluntary. In opposition, plaintiffs aver that there was a valid agency relationship that defendants breached by acting in a way that adversely affected the plaintiffs' interests. At this juncture, it is premature to decide whether or not the parties were in a fiduciary relationship of trust and confidence that would mandate the exercise of good faith and loyalty. *See Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409 (2001). Therefore, the cause of action for breach of fiduciary duty remains.

Intentional Interference With Business Relations With respect to the fifth cause of action for intentional interference with business relations, this claim is not dismissed. To make out a cause of action for tortious interference with business relations, a plaintiff must demonstrate that the defendant's interference was accomplished by "wrongful means" or that "defendant acted for the sole purpose of harming the plaintiff." *Snyder v. Sony Music Entertainment,* 252 A.D.2d 294, 299-300 (1st Dep't 1999). Here, plaintiffs have alleged that defendants, in violation of the oral agreement, interfered with plaintiffs' Indian manufacturers and customary buyers by misrepresenting either that plaintiffs were no longer in business or that they were still collecting orders as plaintiffs' agents. Since plaintiffs' allegations, if proven, would be sufficient to show that defendants used wrongful or improper means to interfere with plaintiffs' manufacturers or customers, this claim remains.

Fraud As to the third cause of action for fraud, this claim is not pled with sufficient particularity as required under CPLR 3016(b). In any event, it is based on the same facts that underlie the intentional interference claim. It is duplicative at best and therefore dismissed.

Unfair Competition As to the seventh cause of action for unfair competition, plaintiffs have sufficiently alleged the essential elements of an unfair competition claim involving misappropriation. The gravamen of such a claim is "the bad faith appropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or by exploitation of proprietary information or trade secrets." *Eagle Comtronics v. Pico Products,* 256 A.D.2d 1202, 1203 (4th Dep't 1998) (citing *Allied Maintenance Corp. v. Allied Mechanical Trades,* 42 N.Y.2d 538 (1977)); *see also Comprehensive Community Development Corp. v. Lehach,* 223 A.D.2d 399 (1st Dep't 1996); *Beverage Marketing USA v. South Beach Beverage Co.,* 20 A.D.3d 439 (2d

Dep't 2005). Here, plaintiffs have alleged that defendants misappropriated contact lists of customary buyers and foreign manufacturers, the design sketches and samples, and took advantage of plaintiffs' good will by using plaintiffs' trade name "Phases" on their voice mail and at their place of business after terminating the Agreement, and by representing themselves as the plaintiffs or their products as those of plaintiffs. Since plaintiffs' allegations, if proven, would be sufficient to make out a claim for unfair competition, this cause of action remains.

Prima Facie Tort As to the eighth cause of action for prima facie tort, this claim is dismissed for failure to state a cause of action. A prima facie tort claim requires a showing that a defendant inflicted economic damage without excuse or justification. *Board of Education v. Farmingdale Classroom Teachers Ass'n,* 38 N.Y.2d 397 (1975). New York courts do not recognize liability for prima facie tort unless malevolence is a defendant's sole motive. *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314 (1983). Motives of profit, economic self-interest, or business advantage bar recovery for prima facie tort. *Squire Records v. Vanguard Recording Soc'y,* 25 A.D.2d 190 (1st Dep't 1966). In this case, plaintiffs acknowledge that defendants allegedly breach the Agreement and sold garments to plaintiffs' clients at least in part to further their own economic self-interest. As malice was not the sole motivation, the prima facie tort claim is dismissed.

Punitive Damages – Defendants also move to dismiss plaintiffs' request for punitive damages. Plaintiffs are not entitled to recover punitive damages in this case. Punitive damages are only available for claims involving a gross and wanton fraud or wrong perpetrated upon the public at large. *See Garrity v. Lyle Stuart,* 40 N.Y.2d 354, 357-58 (1976); *see also Rocanova v. Equitable Life Assur. Soc'y of U.S.*, 83 N.Y.2d 603 (1994). Here, plaintiffs seek recovery for only

a private wrong.

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss of Defendants Eric Jay, Ltd., Norman Gottlieb and Steven Gottlieb is granted against Plaintiffs India Garments, Inc., and Phases, Inc., to the extent that the third cause of action for fraud and the eighth cause of action for prima facie tort in the Complaint are severed and dismissed, and it is further

ORDERED that the claim for punitive damages is dismissed, and it is further

ORDERED that the action remains as to the first, second, fourth, fifth, sixth, and seventh causes of action, and it is further

ORDERED that the defendants are directed to answer the Complaint on or before June 30, 2008, and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 29, 2008, at 9:30 a.m. in courtroom 208, 60 Centre Street, New York, New York 10007.

Dated: May 30, 2008

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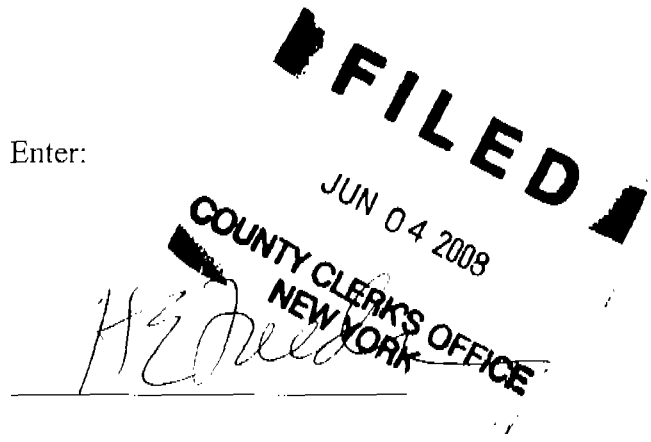

Helen E. Freedman, J.S.C.