

Sierra Fashions, Inc. v Y-Brands, Inc.

2008 NY Slip Op 33593(U)

August 6, 2008

Supreme Court, New York County

Docket Number: 100167/07

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK

PART 12

Justice

Index Number : 100167/2007

SIERRA FASHIONS, INC.

vs

Y-BRANDS, INC.

Sequence Number : 003

DISM ACTION/INCONVENIENT FORUM

INDEX NO.

100167/07

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

is 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**

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/6/08

[Signature]
BARBARA R. KAPNICK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION 156

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 : IA PART 12

-----X
SIERRA FASHIONS, INC.,

Plaintiff,

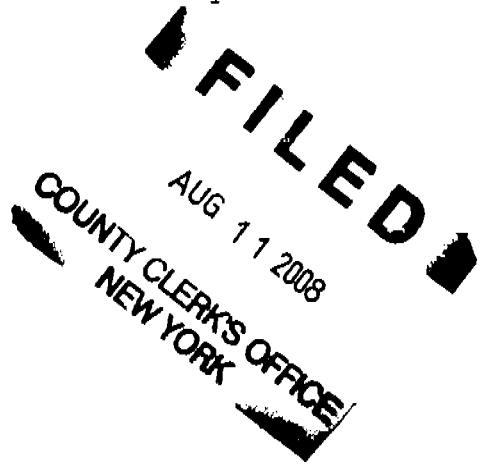
- against -

Y-BRANDS, INC., independently and
transacting as YMLA and/or Y-CHROME,
DAVID G. BERMAN, and JEFFREY WU a/k/a
CHIEN MIN WU,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 100167/07
Motion Seq. No. 003



In this action, plaintiff Sierra Fashions, Inc. ("Sierra") seeks to recover compensatory and punitive damages against two of its former employees, defendants David G. Berkman ("Berkman") and Jeffrey Wu a/k/a Chien Min Wu ("Wu"), and their new employer, defendant Y-Brands, Inc., independently and transacting business as YMLA and/or Y-Chrome ("Y-Brands").

Plaintiff claims that Berkman and Wu, while working for Sierra, took steps at Sierra's expense to create a sales and design plan that they would take to Y-Brands, Sierra's purported competitor.

Defendants previously moved, under motion sequence number 002, for an order pursuant to CPLR § 3211(a)(7) dismissing the Amended Complaint on the grounds that it failed to state a cause of action, and requiring plaintiff to pay the costs and disbursements of this action and motion, including reasonable attorneys' fees.

By Decision/Order dated January 10, 2008, this Court dismissed with prejudice plaintiff's (i) first cause of action which alleged that defendant Berkman, in violation of his alleged representations, terminated his employment with Sierra, (ii) second cause of action which alleged that defendant Wu, in violation of his alleged representations, terminated his employment with Sierra, (iii) third cause of action which alleged that defendant Berkman had taken a "Sales Plan" he formulated with Sierra, or a copy thereof, and had been using said plan or portions thereof for his own benefit while employed by his new employer, defendant Y-Brands, without Sierra's authority, (iv) fourth cause of action which alleged that defendant Wu had taken a "Designed Line" he formulated with Sierra, or a copy thereof, and had been using said line or portions thereof for his own benefit while employed by his new employer, defendant Y-Brands, without Sierra's authority, and (v) seventh cause of action which alleged that defendants Berkman and Wu conspired with willful intent and scienter to prepare the Sales Plan, the Designed Line and the samples at the expense of Sierra during, prior to and after their employment with Sierra.

This Court, however, denied that portion of the motion seeking to dismiss the sixth cause of action in which plaintiff alleges that defendant Y-Brands, directly or through its employees and/or agents had received samples that belong to Sierra, had retained and displayed said samples to potential customers, and taken orders based upon said samples, and that Y-Brands has thus been unjustly enriched.

In the fifth cause of action, plaintiff alleged that defendant Wu requested samples from persons/manufacturers who have access to the Designed Line, fraudulently claimed that said samples belonged to him, and demanded that the samples be sent to him and bear the name and/or mark of his new employer. Plaintiff further alleged that Wu obtained said samples bearing Y-Brands' name and/or mark.

Defendants argued that the fifth cause of action 'which sounds in fraud' failed to set forth the necessary elements.

In its Decision/Order dated January 10, 2008 this Court noted that

[i]n order to state a cause of action for fraud, a plaintiff must allege a misrepresentation or material omission of fact which was false and known to be false by the defendant and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

Morgenthau & Latham v Bank of New York Co., 305 A.D.2d 74, 80 (1st Dep't 2003), lv. to app. denied, 100 N.Y.2d 512 (2003).

Although the Amended Complaint set forth allegations of purported misrepresentations made to third persons, this Court found that there was "no allegation that defendants made a

misrepresentation to Sierra, nor is there any allegation that Sierra detrimentally relied on said representation."

Therefore, this Court dismissed plaintiff's fifth cause of action with leave to replead with the requisite specificity.

Plaintiff thereafter served an 'Amended Complaint Pursuant to Court Order' which alleges, in relevant part, in connection with the fifth cause of action as follows:

49. Defendant Wu has requested samples from persons/manufacturers who have access to the Designed Line, (hereinafter referred to as the "Samples").

50. In requesting the Samples, defendant Wu has claimed the Samples belong to defendant Wu and not to defendant Sierra.

51. When defendant Wu made this claim he knew it to be false.

52. As a result of defendant Wu's false claim, the Samples were sent to defendant Wu.

53. As a result of defendant Wu's false claim, the Samples were sent to defendant Wu bearing the mark of his new employer.

54. As a result of defendant Wu's false claim, defendant Wu has come into possession of samples that do not belong to him.

55. As a result of defendant Wu's false claim, defendant Wu has come into possession of samples that belong to Sierra.

56. As a result of defendant Wu's false claim, defendant Wu has retained possession of samples that belong to Sierra.

57. As a result defendant Wu has deprived Sierra of the ability to show these Samples to its customers.

58. As a result Sierra has been damaged.

59. As a result defendant Wu has been unjustly enriched.

Defendants now move for an order dismissing the amended fifth cause of action, together with costs and disbursements, including attorneys' fees, on the grounds that it still fails to state a legally cognizable cause of action and fails to set forth the claim with the particularity required by CPLR § 3016.

Specifically, defendants argue that plaintiff has still failed to allege any representations made by Wu to plaintiff, as opposed to third parties, and has not alleged that Wu or any of the other defendants intended that any of the alleged representations to third parties be conveyed to Sierra. Moreover, plaintiff has not alleged any detrimental reliance by plaintiff on such representations.

In addition, defendants argue that plaintiff has still failed to allege the time, place, manner and precise content of any alleged representations or any specific injury sustained thereby.

Plaintiff argues in opposition that the fifth cause of action was never intended to state a claim for fraud. Rather, plaintiff

contends that the gravamen of the fifth cause of action is conversion, and that the pleading requirements for fraud are, therefore, not applicable.

Defendants argue in reply that the fifth cause of action should be dismissed because it does not comply with the directives set forth in this Court's prior Decision/Order.

Alternatively, defendants argue that the amended fifth cause of action fails to state a claim for 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 (citation omitted). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (citations omitted) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (citations omitted).

Colavito v New York Organ Donor Network, Inc., 8 N.Y.3d 43, 49-50 (2006).

Plaintiff's principal testified at a hearing held in connection with plaintiff's motion for a preliminary injunction (which was subsequently withdrawn) that the samples did not belong to Sierra Fashions. Thus, defendants argue that plaintiff cannot

demonstrate that plaintiff had a superior possessory right or interest in the samples.

Based on the papers submitted and the oral argument held on the record on May 28, 2008, this Court finds that the fifth cause of action fails to state a claim for either fraud or conversion. Accordingly, said claim is hereby dismissed.


Plaintiff's sixth cause of action for unjust enrichment is severed and continued.

In addition, plaintiff's oral application on the record for leave to file and serve a further Amended Complaint in order to assert the sixth cause of action against the individual defendants, in addition to the corporate defendant, is granted. Plaintiff shall serve and file the Amended Complaint within 30 days of entry of this Order.

Defendants shall serve an Answer to the said Amended Complaint within 20 days of said service.

This constitutes the decision and order of this Court.

Dated: August 6, 2008


BARBARA R. KAPNICK
J.S.C.

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK
J.S.C.