

**Goldman Assoc. of N.Y., Inc. v Kaplan**

2009 NY Slip Op 30555(U)

February 25, 2009

Supreme Court, Nassau County

Docket Number: 018799-08

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 9**

**GOLDMAN ASSOCIATES OF NEW YORK, INC.  
and WESTYE GROUP-EAST, LLC,**

**Plaintiffs,**

**INDEX NO.: 018799/2008  
MOTION DATE: 01/14/2009  
MOTION SEQUENCE: 001**

**-against-**

**MARC KAPLAN, RUSSELL KAPLAN, LOUIS  
FAIELLA and GREAT NECK PLUMBING &  
HEATING SUPPLIES, INC.,**

**Defendants.**

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibit Annexed .....	1
Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Complaint .....	2
Affidavit in Opposition of Melissa Goldman-Williams, Affidavit in Opposition of Jeffrey Moore, Affirmation in Opposition of Don L. Hochler, Esq. & Exhibits Annexed .....	3
Defendants' Memorandum of Law in Further Support of Their Motion to Dismiss Plaintiffs' Complaint .....	4

**PRELIMINARY STATEMENT**

The Defendants move pursuant to Civil Practice Law and Rules § 3211 (a) (7) for an Order dismissing the First, Fifth, Second and Sixth causes of action of the Complaint on the ground that they fail to adequately allege claims for fraud. They move for dismissal of the Seventh and Eighth causes of action on the grounds that a cause of action for unjust enrichment

is not stated, and does not lie in the face of an enforceable contract; and for dismissal of the Ninth and Tenth causes of action alleging violation of General Business Law § 349.

### **BACKGROUND**

The Plaintiffs are wholesale distributors to the trade, dealing in built-in kitchen appliances. The individual Defendants are alleged to be officers, principals, representatives or salesmen associated with Great Neck Plumbing & Heating Supplies, Inc. According to the Complaint in the First Cause of Action, commencing in 2003 the Plaintiff Goldman agreed with the Defendants to provide various plumbing supplies for resale by them. In addition to the traditional compensation, the Plaintiffs made, as additional compensation, payments known as "spiffs", commonly undertaken in the industry. These payments averaged \$15.00, and are based on an approximately 2% rate based on the sales price of the items.

The First Cause of Action further alleges that the Defendants submitted requests for spiffs on Franke Consumer Products which, between 2005 — 2006 amounted to \$243,440; that the representations made by the Plaintiffs as to their entitlement to these payments were false, the Defendants knew they were false, were made with the intent to deceive the Plaintiffs, who justifiably relied upon them, made payments for sales that did not occur, and were thereby damaged.

The Second Cause of Action alleges essentially the same course of conduct, with payments made by Westye in the amount of \$197,305. Again, this Cause of Action alleges misrepresentations by the Defendants, which they knew to be untrue, upon which the Plaintiff justifiably relied, and as a result of which they were damaged.

The Fifth Cause of Action alleges that in accordance with the agreement between Goldman and the Defendants, the latter were to provide sales information on each transaction, including the name, address, model number and other sales information; but that they made false representations in these respects, known by them to be false, with specific intention to deceive the Plaintiffs, that the Plaintiffs justifiably relied upon these representations, made payments to the Defendants based upon these representations and were thereby damaged.

The Sixth Cause of Action makes the same allegations against the Defendants on behalf of the Plaintiff Westye. The Seventh and Eighth claim unjust enrichment; the Ninth and Tenth

allege violation of General Business Law § 349.

### DISCUSSION

#### *Cause of Action for Fraud*

The essential elements of a claim for fraud are (1) material misrepresentation of an existing fact, (2) made with the knowledge of its falsity, (3) with the intent to deceive, (4) justifiable reliance upon the misrepresentation, and (5) ensuing damages. (*Golub Associates v. Lincolnshire Management, Inc.* 1 A.D.3d 237 [1<sup>st</sup> Dept. 2003]).

Civil Practice Law and Rules § 3016 establishes certain heightened standards for pleading designated causes of action. Subdivision (b) deals with fraud or mistake, and provides as follows:

**Rule 3016. Particularity in specific actions**

**(b) Fraud or mistake.** Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

The specific causes of action for fraud, which the motion seeks to dismiss, each allege the five essential elements for a claim of fraud. The only remaining issue is whether or not the claims meet the heightened standards mandated by § 3016. The Court concludes that they do.

Civil Practice Law and Rules § 3026 provides that “(p)leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” In this instance there is no doubt but that the Plaintiffs allege that the Defendants reported sales of Franke products which did not, in fact, occur; that they billed the Plaintiffs for spiffs in accordance with their contract, but that these were known to be false when made; the misrepresentations were intended to defraud the Plaintiffs; and they did, in fact, result in economic damages to the Plaintiffs.

The Plaintiffs have submitted an extensive response to the motion, including multiple Spiff Promotion Claim Forms, and the results of their inquiries into the bona fides of the reported transactions. Were the Defendants’ position to be adopted, the complaint would be insufficient unless it included all of the foregoing information. It is not the purpose of the specificity

requirement of § 3016 (b) to avoid the need for discovery. Rather, the statute

. . . requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting fraud' " (*P.T. Bank Central Asia v. ABN AMRO Bank N.Y.*, 301 A.D.2d 373, 377 [1<sup>st</sup> Dept. 2003]) (internal citations omitted).

#### *Cause of Action for Breach of Contract*

The Defendants seek dismissal of the causes of action for breach of contract on the ground that the pleadings fail to adequately allege the existence of a contract, in what manner it is claimed to have been breached, and that the Plaintiff has suffered damages as a result of the breach. The Plaintiffs allege in ¶ 8 that beginning in or about 2003, Plaintiff Goldman entered into an agreement with the Defendants for them to sell various plumbing supplies and related items from manufacturers represented by the Plaintiffs. In ¶ 20, they allege that the Plaintiff Westye entered into an agreement with the Defendants for the sale by them of plumbing supplies and related items manufactured by companies represented by Westye.

The Third and Fourth causes of action allege that despite the agreements with Goldman and Westye respectively, the Defendants failed to sell products of manufacturers represented by the Plaintiffs, failed to supply sales information as required, made false reports of transactions and requests for payment. Goldman and Westye claim to have complied with the terms of the contract, and, as a result of the Defendants' breaches of the agreements, sustained damages in the amounts of \$243,400 and \$197,305 respectively.

These are the same amounts of damage alleged in the First and Second causes of action, which allege fraud on the part of the Defendants, in that they reported sales, and received payments in the form of spiffs when, in fact, such sales did not occur. As the matter proceeds through discovery, the Plaintiff may refine their allegations to state that the damages were caused by only one of the alternative claims of fraud or breach of contract. We are here only at the pleading stage and the Court's role is to determine whether or not the allegations of the breach of contract claim adequately state a cause of action.

The Court concludes that the allegation of a contract, the breach of the contract, and resultant damages sufficiently allege a breach of contract and place the Defendants on notice of the nature of the claim. The claim, whether or not it can be established, is that the Defendants were somehow obligated to sell products supplied them from manufacturers represented by the Plaintiffs. Issues as to the specific terms of the contract, apparently oral in nature, are left to discovery. Cases such as *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d 719 (2d Dept. 1994) simply state that a plaintiff cannot proceed on a claim which was neither pleaded nor set forth in a bill of particulars. That is not so in this case. The motion to dismiss the Third and Fourth causes of action for failure to state a viable claim for breach of contract is denied.

#### *Causes of Action for Unjust Enrichment*

The Seventh and Eighth causes of action allege unjust enrichment by the Defendants against Westye in the amount of \$197,305 and Goldman in the sum of \$243,440. The term “unjust enrichment” does not constitute an independent, discrete cause of action. Rather it is a general principle underlying various legal doctrines, all of which are premised on the equitable principle that a person should not be entitled to retain ill-gotten gains at the expense of another. (*Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 836 [1<sup>st</sup> Dept. 1983]). The claim of unjust enrichment is quasi-contract in nature and is untenable when there is a contract between the parties covering the same subject matter. (*Goldstein v. CIBC World Markets Corp.*, 6 A.D.3d 295, 296 [1<sup>st</sup> Dept. 2004]).

It appears that the alleged contract upon which the Plaintiffs base their breach of contract claims was oral, and dates back to 2003. The allegations with respect to the breach of the contract relate to the period 2005 — 2007. If the Plaintiffs had a valid and enforceable contract at the times of the alleged misrepresentation, they are relegated to a breach of contract action. At this point there is a question of fact as to whether or not the parties actually had an enforceable contract. If they did, the claims for unjust enrichment should be dismissed. Pending the resolution of that issue, the motion to dismiss the Seventh and Eighth causes of action is denied without prejudice to renewal.

#### *Violation of General Business Law § 349*

This statute, which prohibits deceptive business practices, is not intended to constitute a

claim involving individual disputes. It is designed for circumstances in which the perpetrator of deceptive practices constitutes a danger to society in general. (*Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121 [2d Cir. 2000]). In order to state a valid claim, the Plaintiff must allege that the complained-of practice was consumer oriented, that it was misleading in a material way, and that the Plaintiff has thereby sustained damages. (*Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 [2000]). The complaint in this action makes no such allegations and the Ninth and Tenth causes of action are dismissed.

*Statute of Limitations with respect to General Business Law § 349.*

In view of the dismissal of the Ninth and Tenth Causes of Action, this issue is now moot.

### CONCLUSION

The motion to dismiss the First — Sixth causes of action is denied. The motion to dismiss the Seventh and Eighth cause of action is denied without prejudice subject to the determination of whether or not the parties were operating under a valid and enforceable contract. The motion to dismiss the Ninth and Tenth causes of action is granted.

Defendants are directed to file an Answer within twenty (20) days of the receipt of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.

Dated: February 25, 2009

  
J.S.C.

**ENTFRED**  
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