

**Ralston v Life Style Forms and Display Co., Inc.**

2009 NY Slip Op 30612(U)

March 20, 2009

Supreme Court, New York County

Docket Number: 102733/06

Judge: Barbara R. Kapnick

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

PRESENT: Hon. **BARBARA R. KAPNICK**  
Justice

PART 39

RALSTON, Jill

INDEX NO. 102733/06

- v -

Life Style FORMS

MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*and cross-motion are decided  
in accordance with the  
accompanying memorandum  
decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE \_\_\_\_\_  
DATED: \_\_\_\_\_ J.S.C.

**FILED**  
MAR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/20/09

*[Signature]*  
**BARBARA R. KAPNICK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

-----X  
JILL RALSTON and MASSIMO BARRA d/b/a  
FABULOUS FIT,

Plaintiffs,

- against -

LIFE STYLE FORMS AND DISPLAY CO., INC.,

Defendant.  
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 102733/06  
Motion Seq. No. 001

This is an action for breach of contract.

Plaintiffs Jill Ralston and Massimo Barra d/b/a Fabulous Fit, are engaged in the business of securing and supplying mannequin forms to customers in the retail clothing business. Defendant Life Style Forms and Display Co., Inc. is engaged in the business of manufacturing those forms.

Plaintiffs claim to have entered into two purchase order agreements dated April 11, 2005 and April 21, 2005 with defendant for the purchase and sale of mannequin forms. The latter purchase order specifically provided that "[a]ll deliveries to be received by Fabulous Fit® no later than July 15th." Plaintiffs allege that defendant failed and refused to manufacture the mannequin forms in compliance with the specifications set forth in the purchase orders, and further allege that the samples delivered were not

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MAR 24 2009

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suitable for the purposes intended.<sup>1</sup> Plaintiffs claim to have repudiated the contract once it became apparent that defendant would not be able to deliver suitable goods by July 15, 2005. Plaintiffs claim to have sustained at least \$566,922.00 in damages as a result of defendant's purported breach, i.e., the cost of plaintiffs' "cover" under UCC § 2-711 and 2-712.<sup>2</sup>

Defendant now moves by Order to Show Cause for an order pursuant to CPLR §§ 3124 and 3126, (a) compelling plaintiffs to produce documents previously demanded by defendant, and (b) in the event of plaintiffs' refusal to produce such documents, imposing appropriate sanctions against plaintiffs.

Plaintiffs oppose the motion and cross-move for a protective order pursuant to CPLR § 3101(c) directing the return of a purportedly privileged document, which defendant annexed as Exhibit D to its motion; enjoining defendant from using said document at

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<sup>1</sup> According to plaintiffs, the forms did not stand upright, but rather leaned forward or sideways.

<sup>2</sup> "Where a seller breaches the contract," as is alleged here, "the buyer may cover by making a substitute purchase of goods from another seller, provided that such purchase is made in good faith and without unreasonable delay (see UCC 2-712[1]; additional citations omitted)." *Walck Bros. Ag. Service, Inc. v Hillock*, 5 AD3d 1058, 1060 (4th Dep't 2004).

This action is thus distinguishable from an instance where a buyer retained defective goods and thus could "recover as damages only the loss resulting in the ordinary course of events from the seller's breach." *Medinol Ltd. v Boston Scientific Corp.*, 346 FSupp2d 575, 596 (SDNY 2004); UCC 2-714.

trial or depositions, and determining that the attorney-client privilege has not been waived.<sup>3</sup>

In support of its motion, defendant argues that the documents sought directly relate to plaintiffs' allegations that the mannequins supplied by defendant were unsuitable for their intended purpose, and that as a result of defendant's alleged failure to provide these goods on a timely basis, plaintiffs were forced to obtain them from another manufacturer at substantial additional cost.

Defendant further contends that evidence of plaintiffs' underlying purpose for ordering the goods, and the terms of their agreement to resell the goods to their own customer, are relevant to whether or not plaintiffs acted in "good faith" under UCC § 2-712(a) and are thus discoverable.

Plaintiffs, on the other hand, argue that the contract was solely between the parties to this lawsuit and set forth the required specifications and delivery deadline. In addition, plaintiffs did not pass on the additional costs incurred in procuring the replacements to their customer. Plaintiffs thus claim

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<sup>3</sup> According to plaintiffs' counsel, the document, which is typed on Fabulous Fit's letterhead and is a recitation of the facts surrounding this action, "was created by counsel's request prior to the drafting of a complaint and the commencement of the action."

that defendant is improperly seeking discovery regarding communications plaintiffs had with their customers to create unfair leverage against plaintiffs in this highly competitive business.

Plaintiffs are directed to supplement their responses to defendant's discovery demands within 30 days of service of a copy of this order with notice of entry only to the extent of providing documents between Fabulous Fit and any party concerning the quality of the goods actually produced by defendant and any substitute, alternative or replacement goods obtained after plaintiffs' repudiation of the contract.

Plaintiffs need not respond to the remaining demands at issue, including defendant's requests for documents identifying the "purpose intended" for the goods which are the subject of the contract and documents concerning defendant's customer orders, as this Court finds that said requests seek information outside the scope of this action for breach of contract.

The cross-motion is granted as this Court finds that plaintiffs have met their burden of showing that their "client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure," plaintiffs "acted promptly after discovering the disclosure to remedy the situation," and defendant "will not suffer undue prejudice if

[\* 6]

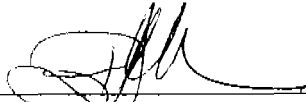
a protective order against use of the document is issued (citations omitted).” *Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747, 749 (2nd Dep’t 2008). See also, *John Blair Communications v Reliance Capital Group*, 182 AD2d 578 (1st Dep’t 1992).

Defendants are, therefore, precluded from using the document in question during depositions or at trial. This inadvertent exchange did not in any way waive the attorney-client privilege.

Counsel shall appear for a status conference in IA Part 39, 60 Centre Street - Room 208 on May 6, 2009 at 11:00 a.m. to coordinate all outstanding discovery.

This constitutes the decision and order of this Court.

Dated: March 20, 2009

  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

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