

**Merchant Factors Corp. v OOC Apparel, Inc.**

2009 NY Slip Op 31046(U)

May 8, 2009

Supreme Court, New York County

Docket Number: 602398/08

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

*Justice*

Merchant Factors Corp.

Plaintiff (s),

INDEX NO. 102398/08

MOTION DATE \_\_\_\_\_

DOC Appard -v-

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

Defendant(s)

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

MAY 12 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/8/09

[Signature]  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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: PART 10

-----X

MERCHANT FACTORS CORP.,

Plaintiff,

-against-

OOC APPAREL, INC., ELLIOT LAVIGNE,  
AND ELLYN LAVIGNE,

Defendants.

-----X

**Decision/Order**

Index No.: 602398/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**FILED**  
MAY 12 2009  
CLERK

**Papers**

**Numbered**

Pltf's motion [d j/mt] w/DWL affirm, EB affid, exhs..... 1

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff has asserted causes of action for fraud and unjust enrichment against the defendants. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor on the issue of defendant's liability and setting this matter down for an inquest on damages. This motion has been submitted to the court without opposition.

Plaintiff is a commercial factor engaged in the business of factoring receivables for clients. Plaintiff claims that it provided financing to AE Square One, Inc ("AES"), a clothing manufacturer, and that AES assigned its right to prosecute this action to the plaintiff via a written assignment.

Defendant OOC Apparel, Inc. ("OOC") is in the business of licencing various

types of apparel. Defendant Ellyn Lavigne is the President of OOC and Elliot Lavigne is the Managing Director of OOC. Plaintiff maintains that the individual defendants jointly own OOC and each exercise dominion and control over OOC.

Plaintiff has provided proof that it served the instant motion, as well as the summons and complaint, on each defendant. Despite such service, none of the defendants have answered the complaint, nor opposed this motion. Therefore, the defendants have defaulted in this action.

Plaintiff is entitled to a default judgment against the defendants, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3d Dept 2001). The defendants' default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984).

Plaintiff seeks damages "by virtue of defendants blatant fraud in licensing products to AES as to which they had no valid license, and the resulting harm that their fraudulent conduct has caused." The sum and substance of plaintiff's allegations is that the defendants committed fraud against AES when they held out OOC as holding valid licensing rights to the "Sean John" brand name and as having the authority to license the manufacture of Sean John branded products.

Plaintiff has submitted the affidavit of Allen Penias, an officer of AES, wherein the following claims are made. Prior to November 2005, OOC held itself out to the market as holding valid licensing rights to the "Sean John" name, and as having the authority to license the manufacture of Sean John branded products. On or about November 30,

2005, plaintiff entered into an agreement with OOC whereby plaintiff was authorized to manufacture 180,000 Sean John branded t-shirts for resale to Family Dollar Stores ("FDS"), and in exchange, plaintiff was to pay \$360,000 to OOC for the right to manufacture and distribute these t-shirts. As evidence of this agreement, plaintiff has provided a copy of a letter sent from Elliot Lavigne, which memorializes this agreement.

Between April 26, 2006 and May 2, 2006, AES delivered to the FDS approximately 59,364 Sean John branded t-shirts. As a result of a dispute which arose between FDS and Christian Casey, LLC ("Casey"), FDS refused to pay AES for the shirts. The dispute arose from the fact that Casey maintained that it held the licensing rights for Sean John branded t-shirts. FDS commenced an action in the United States District Court for the Western District of North Carolina, entitled Family Dollar Stores Inc. v. Christian Casey LLC, et al., Case No. 3:06-CV-00377 (the "federal action"), seeking a declaration as to the validity of the Sean John trademark on the t-shirts it had purchased from AES. AES, Mr. Penias, and Betty Penias (Mr. Penias' wife), were also named co-defendants in that suit.

On or about March 13, 2007, FDS filed an amended complaint in which they alleged claims of fraud, negligent misrepresentation and unfair trade practices against AES, Mr. Penias, and Betty Penias, arising from the representations made as to the validity of the Sean John trademark and AES' right to manufacture and distribute Sean John branded t-shirts. The amended complaint in the federal action has been provided to the court. On July 25, 2007, a judgment was entered in the federal action which provided, in pertinent part: [1] FDS did not have to make any further payment to AES for the Sean John branded t-shirts; [2] that AES was required to indemnify FDS in the

amount of \$400,000; [3] that FDS could set off up to \$400,000 against funds it would otherwise owe to AES; and [4] that FDS was entitled to the recovery of its costs from AES.

According to Mr. Penias, although OOC at one time held valid licensing rights to the Sean John name, at the time it entered into the agreement with plaintiff regarding the manufacture of the t-shirts, OOC's rights had expired pursuant to a Termination and Settlement Agreement between OOC and Casey. The Termination and Settlement Agreement (the "Termination Agreement") has been provided to the court. This agreement provides that OOC's non-exclusive license to use the Sean John trademark in connection with the "manufacture, distribution, marketing and sale" of certain Sean John branded products expired on October 31, 2005. The Termination Agreement was executed by Ellyn Lavigne, as "Pres" of OOC. Mr. Penias maintains that the defendants never disclosed the existence of the Termination Agreement to plaintiff and that OOC's licensing rights with respect to the Sean John brand name expired on October 31, 2005.

AES' claimed damages include the licensing fees paid to OOC, manufacturing and distribution fees, and lost profits. In the complaint, plaintiff has asserted causes of action sounding in: [1] fraud against all defendants; [2] aiding and abetting fraud against Elliot and Ellyn Lavigne; and [3] unjust enrichment against all defendants.

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 NY2d 425 (1998). General allegations that

defendants entered into a contract while lacking the intent to perform it are insufficient to support a cause of action sounding in fraud. Rocanova v. Equitable Life Assur. Soc. of U.S., 83 NY2d 603 (1994).

Based on the foregoing, plaintiff has established the elements of causes of action sounding in fraud and fraudulent transfer and against OOC and both individual defendants, respectively. To wit, the record shows that OOC and the individual defendants falsely represented to AES that OOC had licensing rights to the Sean John trademark, invoiced AES for the licensing rights, collected the licensing payment from AES, and failed to disclose the existence of the Termination Agreement. Plaintiff's reliance on the defendants' representations was justifiable, and defendants' acts caused injury to plaintiff. Accordingly, plaintiff is entitled to a default judgment on the first cause of action for fraud on the issue of OOC's liability.

In order to prevail on this cause of action against the individual defendants, plaintiff must pierce OOC's corporate veil. Although the corporate form permits a principal to avoid personal liability [Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103 (1<sup>st</sup> Dept 2002)], a court may, in certain situations, pierce the corporate veil where: (a) the owner exercised complete dominion over the corporation; (b) such dominion was utilized to cause a wrong against the plaintiff; (c) the corporation was under capitalized; and (d) personal use of corporate funds [Hyland Meat Co., Inc. v. Tsagarakis, 202 A.D.2d 552 (2<sup>nd</sup> Dept 1994)]. Plaintiff has failed to establish a basis for this court to pierce OOC's corporate veil and hold the individual defendants liable on the first cause of action. Accordingly, the fraud cause of action against Elliot and Ellyn Lavigne is hereby severed and dismissed.

The elements of aiding and abetting fraud are: [1] the existence of a fraud; [2] that the defendant knowingly provided substantial assistance to advance the fraud's commission; and [3] plaintiff's damages as a result of the fraud. See Kaufman v. Cohen, 307 AD2d 113 (1st Dept 2003). Since plaintiff has established the underlying fraud, plaintiff's claims also support a cause of action for aiding and abetting against the individual defendants insofar as plaintiff has established that the Lavignes each knew that OOC did not have valid licensing rights after October 31, 2005 and nonetheless entered into the agreement with AES to sell licensing rights which did not exist. Accordingly, plaintiff is entitled to a default judgment on the issue of Elliot Lavigne and Ellyn Lavigne's liability on the second cause of action, joint and severally.

An action to recover on the theory of unjust enrichment is based on the equitable principle that a person must not be allowed to enrich himself or herself unjustly at the expense of another (Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833 (1st Dept 1983)). Plaintiff has factually established that the defendants each unjustly enriched themselves at plaintiff's expense. Therefore, plaintiff is also entitled to a default judgment on the third cause of action against all the defendants, on the issue of liability.

This matter shall be set down for an inquest on the issue of damages. The inquest shall be before a Special Referee who shall hear and determine the amount plaintiff may recover from each of the defendants. Plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119, so that this matter may be scheduled and assigned.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion for default judgment is granted to the following extent:

[1] plaintiff is entitled to entry of a default judgment on the issue of OOC Apparel, Inc.'s liability on the first cause of action;

[2] plaintiff is entitled to entry of a default judgment on the issue of Elliot Lavigne and Ellyn Lavigne's liability on the second cause of action, joint and severally; and

[3] plaintiff is entitled to entry of a default judgment on the issue of the defendants' liability on the third cause of action; and it is further

**ORDERED** that the first cause of action against Elliot Lavigne and Ellyn Lavigne is hereby severed and dismissed; and it is further

**ORDERED** that there be an inquest before a Special Referee who shall hear and determine the amount plaintiff may recover for her damages from defendant Hair Matics of Inwood, Inc.. Plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119, so that this matter may be scheduled and assigned.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 8, 2009

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
MAY 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK