

**Tango Fashions Trading, LTD v Rossi**

2009 NY Slip Op 31070(U)

May 14, 2009

Supreme Court, Suffolk County

Docket Number: 25875/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

**Hon. Paul J. Baisley, Jr.** \_\_\_\_\_

\_\_\_\_\_  
TANGO FASHIONS TRADING, LTD.

Plaintiff(s),

-against-

LISA ROSSI (f/k/a Lisa Caponigro),  
THOMAS MICHAEL ROSSI, FRANCES  
THOMAS, LLC., (d/b/a Cambridge Holding),  
MOUNTAIN INVESTMENT, L.P., ROBERT  
ROSSI and CHESS MATCH, INC.

Defendant(s).

**ORIG. RETURN DATE:** November 17, 2007

**FINAL RETURN DATE:** December 5, 2007

**MTN. SEQ. #:** 001-MD

**PLTF'S ATTORNEY:**

THALER & GERTLER, LLP  
90 MERRICK AVENUE, STE 400  
EAST MEADOW, NY 11554

**DEFT'S ATTORNEY:**

BROWN, GAVALAS & FROMM, LLP  
355 LEXINGTON AVENUE  
NEW YORK, NY 10017

Upon the following papers numbered 1 to 19 read on this motion to dismiss (001) pursuant to CPLR 3211(a)(3) and (5): Notice of Motion and supporting papers 1 - 2; Affirmation in Opposition, Supplemental Affidavit in Opposition and supporting papers 3 - 9; Reply Affirmation 10 - 19; it is,

**ORDERED** that the motion (001) by the defendants Lisa Rossi and Thomas Rossi for dismissal of the complaint on the grounds of legal capacity to sue (CPLR 3211[a][3]) and on statute of limitations grounds (CPLR 3211[a][5]) is denied; and it is further

**ORDERED** that parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on June 30, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m., this date taking into consideration the time allowed to file an answer in accordance with CPLR 3211(f); and it is further

**ORDERED** that the plaintiff is directed to serve copies of this decision and order upon all parties pursuant to CPLR 2103 within 30 days of entry of this decision and order with the Clerk of the Court and to file proofs of service thereof with the Clerk of the Court.

This is an action sounding in fraud in which the plaintiff Tango Fashions Trading, Ltd. (hereinafter Tango) is seeking to set aside two transfers regarding a residential property and some other money transfers in order to be able to draw on such assets to satisfy a judgment entered in favor of Tango against the defendant Thomas Rossi (hereinafter Rossi) and a third party.

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The underlying judgment arose out of an arbitration commenced by Tango before the National Association of Security Dealers (hereinafter NASD) in which Tango claimed that Rossi and a third individual not a party to this action, as agents and, in the case of Rossi, also as a principal of a licensed broker-dealer known as Cambridge Holding (hereinafter Cambridge), engaged in unauthorized dealings resulting in losses to Tango of over \$100,000.00. The broker-dealer relationship existed from October 1999 to June 2000.

In a further proceeding arising out of the underlying broker relationship brought by the Securities Investor Protection Corporation (hereinafter SIPA), Tango was given securities valued at \$10,000.00 toward its losses.

Subsequently, the arbitration concluded and Tango was awarded a base amount of \$60,000.00. This award was confirmed and made a judgment of the court on July 25, 2005 (with entry on September 12, 2005 in New York County).

On August 24, 2007, Tango commenced the instant action in which it claims that a house belonging to Rossi was fraudulently transferred on June 6, 2000 to a Rossi limited partnership known as Mount Investment, L.P. (hereinafter M.I.; also a defendant herein) in order to defraud creditors (causes of action 1 through 4; against Rossi and M.I.); that the same house was then transferred on August 30, 2001 from M.I. (alleged to be the alter ego of Rossi) to his wife, the defendant Lisa Rossi (hereinafter Lisa; also a defendant herein), also in order to defraud creditors (causes of action 5 through 8; against Rossi, M.I. and Lisa); and, that additional money transfers were made, also to defraud creditors (cause of action 9; against "all" defendants) (the additional defendants being Frances Thomas, L.L.C. [which is alleged to have done business under the Cambridge name]; Robert Rossi [Rossi's father]; and, Chess Match, Inc. [also alleged to be under the control of Rossi and his alter ego]).

Rossi and Lisa bring this motion for dismissal claiming that the instant action is barred by the applicable statute of limitations (CPLR 213[8]) and that Tango is a foreign corporation doing business in New York without authorization to do so and, thus, may not bring an action as a plaintiff in the courts of New York State (*see* BCL § 1312).

The applicable statute of limitations period for such actions based upon fraud is "six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud or could with reasonable diligence have discovered it" (CPLR 213[8]).

The movants contend that the cause of action accrued, at the latest, with the end of the broker-dealer relationship between Tango and Cambridge in June 2000. Since this action was commenced over six years later, on August 24, 2007, the movants argue that this action was not timely brought and must be dismissed.

The movants also argue that the alternate two year provision based upon discovery of the alleged fraud is unavailing to Tango because Tango surely knew of the allegations of fraudulent transfers because such allegations were part of an SIPC adversary proceeding brought against Rossi and others on January

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29, 2003. Since that date is over two years from the commencement of the instant action, this action is also untimely taking that date as the date Tango knew of the underlying alleged fraud or, with due diligence, could have known.

The second ground for dismissal relies upon the provisions of BCL § 1312 which provides that,

“A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed . . .” (BCL § 1312[a]).

The movants contend that the opening of an investment account with Cambridge in New York suffices as doing business in New York. In this regard, Rossi states in his affidavit submitted with this motion that Tango, which is a British company, “clearly conducted investment activities in New York in 2000, and is believed to have a continuing and on going presence in New York at present” (Rossi affidavit, page 7, ¶18). Significantly, Rossi does not describe what other acts of doing business exist and does not provide the basis for his “belief.”

In seeking dismissal on the ground that an action is barred by the statute of limitations, the initial burden is on the defendant to make a prima facie showing that the time to sue has expired (*see Rosenfeld v Schlecker*, 5 AD3d 461, 772 NYS2d 596 [2d Dept 2004]; *Assad v City of New York*, 238 AD2d 456, 656 NYS2d 669 [2d Dept], *lv dismissed* 91 NY2d 848, 667 NYS2d 683 [1997]).

The movants’ submissions in this regard satisfy the burden of making a prima facie showing that the time to sue has expired. There is no question that the investment relationship between Tango and Cambridge ended well over six years before the instant action was commenced. Furthermore, the allegation with regard to the related adversary proceedings commenced by SIPA over two years before this action was commenced is sufficient to at least make a prima facie showing that the “two years from discovery” provision also expired.

In opposition to this part of the motion to dismiss, Tango submits an affidavit from a director and owner of Tango, Robert Smith, who states that Tango was never aware of the SIPC adversary proceeding until August 2007 (this action was commenced later that same month) and, indeed, was never provided with notice of said proceeding (which was commenced in January 2003).<sup>1</sup> Thus, it was not until August

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<sup>1</sup> The movants ask the court not to consider the affidavit of Robert Smith because it was signed and notarized in Great Britain and failed to include the certifications required by CPLR 2309(c) for an out-of-state affidavit. This omission, however, was corrected with the submission of a supplemental affirmation which included the submission of a proper certification. Since such a correction may be given nunc pro tunc effect, the court finds the affidavit of Robert Smith to be in proper form for consideration by the court (*see Elizabeth R.E. v Doundley A.E.*, 44 AD3d 332, 841 NYS2d 871 [1<sup>st</sup> Dept 2007]; *Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504, 837 NYS2d 67 [1<sup>st</sup> Dept 2007]).

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2007 that Tango discovered and learned of the fraudulent allegations which were contained in the SIPC petition. Furthermore, while Tango had its own arbitration proceeding, that was solely with regard to the improper actions of Rossi and the third party in their investment activities on behalf of Tango and had nothing to do with the alleged fraudulent personal transactions of Rossi and his wife, Lisa, which were subsequent to the investment issues being addressed and only concerned post judgment considerations. In short, Tango argues that it had no reason to delve into these issues at that time.

For purposes of a motion to dismiss pursuant to CPLR 3211(a)(5), the court finds the arguments presented by Tango to be sufficient to support Tango's contention that it commenced the instant action within two years of learning of the underlying fraud claims and that it could not, with reasonable diligence, have discovered such facts sooner, especially since there was no reason for it to delve into such matters.

Accordingly, that part of this motion which seeks dismissal on statute of limitations grounds is denied.

Turning now to the movants' contention that Tango was doing business in New York without authorization to do so and, thus, has no standing to bring this action (*see* BCL § 1312[a]), the court finds that the movants have failed to meet their burden of overcoming the presumption that the plaintiff does business in the "state" of incorporation (that is, the United Kingdom) and not in New York (*see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 855 NYS2d 635 [2d Dept 2008]). The only factual allegation with regard to Tango and New York is that it had an investment account but that, alone, is insufficient to comprise doing business in New York (*see* BCL § 1301[b][4] [maintaining depositories with regard to a company's securities is not, by itself, an act of doing business in New York]; *see also In re Fraser*, 275 NY 135, 143 [1937]).

The movants also request, in the event the court is not inclined to grant dismissal on BCL § 1312 grounds at this time, that they at least be allowed to conduct immediate discovery pursuant to CPLR 3211(d) on this issue alone in order to potentially save further time and expense in this matter if they can show Tango was doing business in New York without authorization.

On its face, reliance upon CPLR 3211(d) is misplaced as it only pertains to parties opposing motions made pursuant to CPLR 3211(a). Nevertheless, in his practice commentaries, Prof. David D. Siegel notes that if the moving party can convince the court that the opposing party has information solely in its possession which could support the motion to dismiss, then the court may deny the motion to dismiss with leave to renew it either under CPLR 3211 or under CPLR 3212 (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:51).

In this case, however, the movants provide no facts or good faith basis to support that Tango did any business at all in New York other than the short period of time it had its New York investment account (which is not an act of doing business [*see* BCL § 1301 {b}(4)]). Nor do the movants propose any specific facts to contradict the facts contained in the Tango affidavit of Robert Smith. Indeed, the movants only

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make an unsubstantiated statement of a hope or speculation that something useful might be turned up to support their BCL § 1312 contention. Such arguments do not merit the relief sought herein (*see Black v Green Harbour Homeowners' Assn.*, 19 AD3d 962, 964, 798 NYS2d 753, 755 [3d Dept 2005]).

Accordingly, the court finds that the movants have failed to overcome the presumption that the plaintiff Tango was only doing business in the United Kingdom and not doing business in New York. In any event, the evidentiary submission in this regard from Tango, as evidenced by the Robert Smith affidavit, supports the facts that Tango never did business in New York - its business being the distribution and sale of women's clothes - and only did business in Asia (where the clothes were made) and Europe (where the clothes were distributed).

The movants's application to dismiss based upon BCL § 1312 is, thus, without support and is denied.

This constitutes the decision and order of the court.

Dated:

*May 14, 2009*

**HON. PAUL J. BAISLEY, JR.**

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**HON. PAUL J. BAISLEY, JR., J.S.C.**