

**Langman v Apparel Prod. Inc.**

2009 NY Slip Op 31107(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 115926/08

Judge: Carol R. Edmead

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

**HON. CAROL EDMEAD**

PRESENT:

PART 35

Index Number : 115926/2008

**LANGMAN, RITA**

VS.

**APPAREL PRODUCTION, INC.**

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 3/25/09

MOTION SEQ. NO. 001

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

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

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Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

MAY 19 2009

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is granted.

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Apparel Production Inc. and Theodore "Teddy" Sadaka for an order, pursuant to CPLR §3211(a)(7), dismissing the third, fourth, fifth and seventh causes of action in the Complaint of plaintiff Rita Langman d/b/a "Trends Collection is granted; and it is further

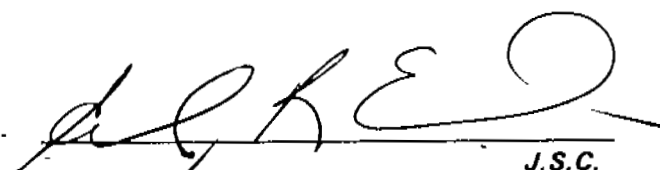
ORDERED that the motion of defendants for an order, pursuant to CPLR §3211(a)(7), dismissing plaintiff's second cause of action is denied; and it is further

ORDERED that the parties appear for a preliminary conference on August 4, 2009, 3 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/18/09



J.S.C.

**HON. CAROL EDMEAD**  
NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 35

-----x  
RITA LANGMAN d/b/a "TRENDS COLLECTION,"

Index No. 115926/08

Plaintiff,

-against-

**DECISION/ORDER**

APPAREL PRODUCTION INC. and THEODORE  
"TEDDY" SADAKA,

Defendants.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

**MEMORANDUM DECISION**

In this action, plaintiff Rita Langman d/b/a "Trends Collection ("plaintiff") seeks to recover against defendants Apparel Production Inc. and Theodore "Teddy" Sadaka ("defendants") (collectively "defendants") for *inter alia*, breach of fiduciary duty, fraud, intentional and negligent misrepresentation, and violating General Business Law ("GBL") §349.

Defendants now move to dismiss plaintiff's second, third, fourth, fifth and seventh causes of action, pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

*Plaintiff's Complaint*

Plaintiff alleges that in mid-2007, she and defendants agreed to form a joint venture to manufacture a line of apparel for sale for the fall of 2007. Based on "promises" made by the parties to each other, plaintiff and defendants were to own the joint venture equally and to invest equally in the venture to ensure its success. Plaintiff was to be responsible for design and sales, and defendants were to be responsible for production (Complaint, ¶ 5). Plaintiff performed her obligations in connection with the operation of the joint venture, expending significant sums of money and directing employees to prepare for the new line. Clothes were designed, fabrics were

purchased for review, sales personnel were recruited, and patterns and samples were made. Defendants never performed their obligations, refusing, despite repeated demands, to contribute their share of the expenses being incurred by plaintiff (after initially contributing \$5,000) and refusing to take any steps to prepare for production. Defendants at that time, and thereafter, refused to remedy the damages incurred by plaintiff despite due demand (Complaint, ¶¶ 6-7).

As relevant herein, in the second cause of action, plaintiff alleges that defendants breached the fiduciary duties they owed plaintiff.

In the third cause of action for fraud, plaintiff alleges that in order to induce plaintiff to invest time and money into the activities described above, defendants made certain statements and representations, and reiterated them continuously during the period they were doing business with plaintiff. Defendants' statements and representations were false and fraudulent, and defendants knew they were false and fraudulent when defendants made them, plaintiff alleges. In each instance, plaintiff reasonably believed such statements and representations to be true and was induced thereby to rely on them.

In the fourth cause of action for intentional misrepresentation, plaintiff alleges that she relied, to her detriment, upon the intentional misrepresentations of defendants and was thereby induced to expend money and time on the joint venture.

In the fifth cause of action for negligent misrepresentation, plaintiff alleges that she relied, to her detriment, upon the negligent misrepresentations of defendants and was thereby induced to expend money and time on the venture.

In the seventh cause of action, plaintiff alleges that defendants' words, activities and conduct in the conduct of a business, trade or commerce, or in the furnishing of any service in

this state, were misleading in a material respect, in violation of GBL §349 (Complaint, ¶ 29).

*Defendants' Motion<sup>1</sup>*

Defendants contend that defendant Apparel Production Inc. ("Apparel") is a provider of garment manufacturing services including, but not limited to, pattern making and sample construction. Defendant Theodore "Teddy" Sadaka ("Mr. Sadaka") is Apparel's president.

Defendants allege that at all relevant times, plaintiff represented herself to be a reputable and experienced designer and producer of garments, with extensive knowledge of the fashion industry (opp., ¶¶ 3-5). Defendants further allege that plaintiff is the long-time owner of Trends International, LTD, a well-known manufacturer of clothing that has been in business since at least 1997, more than 10 years before plaintiff and defendants began negotiations or arrangements concerning the subject matter of this lawsuit (motion, ¶¶ 6-7).

On or about May 2007, plaintiff approached defendants to discuss a potential joint-venture arrangement in which Apparel was to invest money and resources in plaintiff's company. Approximately two months later, on or about July 2007, the discussions or arrangements were terminated, defendants allege. Defendants contend that the entire span of defendants' alleged malfeasance was approximately two to three months (motion, ¶ 8).

Regarding plaintiff's second cause of action for breach of fiduciary duty, defendants argue that plaintiff failed to sufficiently allege that a fiduciary duty even exists. Citing caselaw, defendants argue that New York courts have routinely held that no fiduciary duty outside that which is created by contract is formed unless one party has superior knowledge. Furthermore, a

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<sup>1</sup>Defendants' motion comprises an affidavit by defendants' attorney Mark T. Sadaka ("Sadaka aff.") and a Memorandum of Law ("MOL").

fiduciary duty is not breached unless defendants misled plaintiff by making false representations concerning defendants' superior knowledge.

Defendant also argues that plaintiff also failed to provide any specific misrepresentation or fraudulent act by defendants, as required by CPLR §3016, so as to support her claims for fraud, intentional and negligent misrepresentation and violation of GBL §349. Indeed, the only fact plaintiff alleges is that defendants "never performed their obligations, refusing, despite repeated demands, to contribute their share of the expenses"(Complaint, ¶ 6). Accepting plaintiff's allegations as true, the Complaint, at best, describes a breach of some sort of obligation and not fraud or misrepresentation, defendants argue. Thus, these causes of action should be dismissed.

#### *Plaintiff's Opposition*

Plaintiff maintains that she has sufficiently stated causes of action for each of the claims in her Complaint. Plaintiff also distinguishes the caselaw defendants cite for the proposition that no adequate claim alleging a breach of fiduciary duty can lie. According to plaintiff, neither of such cases involved a joint venture or partnership. Plaintiff contends that "since Justice Cardozo delivered one of the most famous opinions in American jurisprudence in *Meinhard v Salmon* (249 NY 458, 463-64 [1928]), the law in this state has been utterly clear that partners and joint venturers owe each other the highest fiduciary duty known to the law." It makes no difference that both partners were reasonably sophisticated. Indeed, Justice Cardozo described the plaintiff in *Meinhard* as a "woolen merchant" who had invested a great deal of money in the prime subject piece of real estate located at 5th Avenue and 42d Street in Manhattan (*id.* at 461, 465). Justice Cardozo rested his opinion in part on the fact that being sophisticated, the plaintiff could

have taken steps to protect his interests, had the defendant not withheld vital information (*id.* at 464-65). Indeed, a fiduciary relationship is not hard to establish in New York, even in the absence of an “official” partnership, plaintiff argues.

Plaintiff further argues that the rest of her pleadings meet the requirements of CPLR §3016, because the facts are peculiarly within the knowledge and control of the defendants. “Indeed, for Defendants to avoid totally the factual allegations in the Complaint, including the allegation that Defendants contributed \$5,000 to the venture . . . demonstrates the lack of merit of their protestations regarding the content of the Complaint” plaintiff argues. Lastly, plaintiff argues that should any part of defendant’s motion be granted, leave to replead the Complaint should be freely granted.

#### *Defendants’ Reply*

Defendants argue that plaintiff’s interpretation of *Meinhard v Salmon* is misguided. While the case involved two partners that leased a property in Manhattan, the two partners in *Meinhard* were not equal. One partner was a woolen merchant by trade and invested only funds for the joint venture. The other partner also invested funds but was in real estate and was chosen to manage the leased property for the two partners. Near the end of the lease term, the managing partner entered into a new lease for same property without informing or including the non-managing partner in the new business opportunity. In finding that the non-managing partner deserved an equitable interest in the defendant’s new lease, the Court held that a fiduciary duty existed between the managing and non-managing partners and that duty was breached when the managing partner failed to inform the other about the new business opportunity. Concern over the “potential for abuse of special opportunities growing out of a special trust as manager” drove

the Court's decision, defendants argue. The Court reasoned that the superior knowledge of the managing partner requires complete candor and openness to the non-managing partner thereby creating an implicit or constructive trust.

Superior knowledge can be created through a managerial capacity, industry experience or a combination of both, as in *Meinhard*, defendants argue. In the case at bar, plaintiff alleges that plaintiff and defendants were to own the joint venture equally. Unlike in *Meinhard*, however, plaintiff, not defendants, was in the managerial position. Indeed, plaintiff's own set of facts states that plaintiff directed employees to design clothes, purchase fabric, recruit sales personnel and create samples and patterns. After contributing an initial \$5,000, inaction was defendants only alleged malfeasance, defendants contend.

All cases agree that a fiduciary duty is created when one partner has superior knowledge (either in a managerial role, from industry experience or a combination of both) to the other, defendants contend. That duty is breached when the partner with the superior knowledge misleads another partner concerning their superior knowledge. Plaintiff's Complaint clearly alleges that plaintiff was in some sort of managerial position, in a position of superior knowledge. Therefore, it is impossible for defendants to owe plaintiff a fiduciary duty when plaintiff's own version of the facts puts her in the more knowledgeable position, defendants argue.

Defendants further contend that they are unfairly prejudiced by the lack of specific pleading of acts of fraud and misrepresentation. Defendants cannot prepare defenses without said specificity.

*Analysis*

*Failure to State a Cause of Action*

In determining a motion to dismiss, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1<sup>st</sup> Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2D 46 [1<sup>st</sup> Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2D 205 [1<sup>st</sup> Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1<sup>st</sup> Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2D 802, 653NYS2d 279 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275,[1977]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ark Bryant Park*

*Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1<sup>st</sup> Dept 2001]).

*Breach of Fiduciary Duty*

To assert a cause of action for breach of fiduciary duty, a movant must allege (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty, and (3) damages suffered by the movant as a result of the breach (*see* 4A NY Prac, Com Litig in New York State Courts §70:17 [2d ed]; *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278 [1<sup>st</sup> Dept 2002]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184-185 [1<sup>st</sup> Dept 2000]). The First Department makes clear that a pleading of breach of fiduciary duty must comply with the requirements of CPLR §3016(b), which states: “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” (*emphasis added*) (*see Shearson Lehman Bros. Inc. v Bagley*, 205 AD2D 467, 467 [1<sup>st</sup> Dept 1994] [holding that plaintiff’s cause of action for breach of fiduciary duty satisfied CPLR §3016(b) because plaintiff provided sufficient detail about a complex scheme against plaintiff’s interests]).

Here, plaintiff alleges that she and defendants agreed to form a “joint venture to manufacture a line of apparel” (Complaint, ¶ 5). Plaintiff and defendants were “to own the joint venture equally and invest equally in the venture to ensure its success” (Complaint, ¶ 5). Specifically, plaintiff was to be responsible for design and sales, and defendants were to be responsible for production (*id.*). A joint venture is “an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge” (*Forman v Lumm*, 214 AD 579, 583 [1<sup>st</sup> Dept 1925]). It is well settled that joint venturers are governed by the same good-faith requirements as to their

dealings with each other and with the material and subject matter of the venture, that apply to partnerships (16 NY Jur 2d Business Relationships §2102; *Stem v Warren*, 185 AD 823 [1st Dept 1919], *affd as modified on other grounds*, 227 NY 538 [1920]). As such, “joint venturers owe each other a fiduciary duty” (*In re Kressner*, 164 BR 235, 238 [Bkrcty Ct SDNY 1994] *citing Gramercy Equities Corporation. v Dumont*, 72 NY2d 560, 534 [1988]).

Defendants’ argument that plaintiff failed to sufficiently allege the threshold requirement of a fiduciary relationship between her and defendants lacks merit. Defendants do not deny that a joint venture was formed between them and plaintiff. Instead, they cite caselaw involving parties that attempt to establish a fiduciary relationship from a conventional business relationship, as opposed to a joint venture.

It is well established that a conventional business relationship alone does not give rise to a fiduciary relationship (*Oursler v Women's Interart Ctr., Inc.*, 566NYS2d 295, 297 [1<sup>st</sup> Dept 1991]; *Feigen v Advance Capital Mgmt. Corporation.*, 541NYS2d 797, 799 [1<sup>st</sup> Dept 1989]). In the context of a commercial contract, a fiduciary duty may nevertheless exist where the parties specifically agree to it or if “one party’s superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party” (*Ross v FSG PrivatAir Inc.*, 2004 WL 1837366, \*5 [SDNY 2004], *quoting Calvin Klein Trademark Trust v Wachner*, 123 F Supp 2d 731, 734-34 [SDNY2000]). It is incumbent upon a plaintiff to plead some factors in the complaint from which it can be concluded that the parties had a fiduciary relationship (*Ross* at 6, *quoting Boley v Pineloch Assocs., Ltd.*, 700 F Supp 673, 681 [SDNY1988]).

Here, the Complaint contains sufficient allegations that the parties’ relationship goes

beyond that of a conventional business relationship to that of joint venturers, and that as joint venturers, the parties had a fiduciary duty to each other. Accordingly, plaintiff has sufficiently alleged the first element of the existence of a fiduciary duty.

Plaintiff has also sufficiently alleged that defendants breached their fiduciary duty to plaintiff. Plaintiff alleges that defendants “breached the fiduciary duties they owed plaintiff” (Complaint, ¶ 12). Plaintiff maintains that she performed her obligations in connection with the operation of the joint venture, *i.e.* expending significant sums of money and directing employees to prepare for the new line by designing clothes, buying fabrics, recruiting salespeople and making patterns and samples. However, after initially contributing \$5,000, defendants failed to perform their obligations to contribute their share of the expenses and prepare for production (Complaint, ¶ 6).

Furthermore, plaintiff sufficiently alleges that she suffered damages of not less than \$150,000 as result of defendants’ breach of their fiduciary duty (Complaint, ¶ 13). As such, plaintiff has sufficiently alleged damages, and a *prima facie* case for breach of fiduciary duty.

Accordingly, defendants’ motion to dismiss plaintiff’s second cause of action for breach of fiduciary duty is denied.

#### *Fraud*

As to the third cause of action for fraud, plaintiff must allege (1) the making of a material false representation, (2) the intent to defraud thereby, (3) reasonable reliance upon the misrepresentation, and (4) damage as a result the reliance (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1<sup>st</sup> Dept 1996]). CPLR §3016(b) requires that fraud be pleaded with sufficient particularity, *i.e.* in sufficient detail to give adequate notice (*see Foley v D’Agostino*, 21 AD2d

60, 64 [1<sup>st</sup> Dept 1964]). The statute does not require a plaintiff to prove his allegations. Indeed, the Court of Appeals has specifically noted that this rule “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 a fraud” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]). Further, on a motion to dismiss for failure to state a cause of action, “a plaintiff . . . need only plead that he relied on misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage” (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926 [NY Sup 2006]).

Here, plaintiff has failed to sufficiently plead fraud. Plaintiff alleges that in order to induce plaintiff to invest time and money into “the activities described above,” defendants made “the statements and representations as set forth above” (Complaint, ¶ 16, referring to her previous allegations). Earlier in her Complaint, plaintiff refers to “promises made by the parties to each other” (Complaint, ¶ 5). Plaintiff goes on to allege that defendants’ statements and representations were false and fraudulent, and defendants knew they were false and fraudulent when defendants made them (Complaint, ¶ 17). In each instance, plaintiff allegedly reasonably believed such statements and representations to be true and was induced thereby to rely on them (Complaint, ¶ 18). As a result, plaintiff sustained damages in a total sum not less than \$150,000 (Complaint, ¶ 19).

However, plaintiff never discloses the content of the alleged statements, representations and promises. She provides no facts or details as to any misrepresentations allegedly made by defendants (*cf. Foley v D’Agostino* at 66 [holding that the plaintiff’s cause of action was

“sufficiently particular” as *to facts and details* to state a derivative cause of action to secure an injunction and an accounting with respect to acts and threatened acts of the defendants in breach of their fiduciary obligations as officers and directors of the family corporations” (*emphasis added*). Plaintiff makes only conclusory allegations, which clearly are insufficient in a fraud pleading.

In her opposition, plaintiff argues that she has met the requirements of CPLR §3016(b) by “pleading the factual underpinnings” of the tort counts because the facts are peculiarly within the knowledge and control of defendants (opp., p. 2). She goes on to cite the cases of *Kaufman v Cohen*, 307 AD2d 113, 120-121 [1<sup>st</sup> Dept 2003] and *Jered Contracting Corp. v New York City Transit Auth.*, 22 NY2d 187 [1968] in support of her proposition. However, plaintiff’s arguments lack merit, in that she has not pleaded any “factual underpinnings” of fraud. Further, in both the *Kaufman* and *Jered* cases, the movants provided at least some specific details to support their fraud allegations (*see e.g. Kaufman* at 120 [“Plaintiffs’ fraud cause of action alleged that Cohen made the false representation that SIG’s partnership interest in 31-02 could not be salvaged at the same time when he was making plans to salvage such interest with third parties to the exclusion of plaintiffs; that Cohen knew the representation was false when made and that plaintiffs reasonably relied thereon; and that plaintiffs were damaged as a result], and *Jered* at 190-191 [holding that in substantiation of the fraud claim “the answer recites the refusal of the plaintiff’s officer, Jerry Jerome, to waive immunity before the New York County Grand Jury investigating collusive bidding on public painting contracts, the fact that four other witnesses summoned before the Grand Jury and who were connected or associated with four of the eight firms bidding on the contract involved here had likewise refused to waive immunity, and that the

corporate plaintiff and Jerry Jerome were both indicted for perjury in the first degree by the Grand Jury for submitting false noncollusive bidding statements to the New York City Housing Authority in order to procure contracts from that agency.”]). Here, plaintiff fails to indicate what the alleged promises or misrepresentations were. As plaintiff failed to meet the threshold requirement of alleging fraud, defendants’ motion to dismiss plaintiff’s third cause of action is granted.

*Intentional misrepresentation*

The elements of intentional misrepresentation are exactly the same as for fraud (*see e.g. MBF Clearing Corporation. v Shine*, 212 AD2d 478, 479 [1<sup>st</sup> Dept 1995] [holding that second cause of action for intentional misrepresentation was properly dismissed “since the plaintiff failed to establish that there was a misrepresentation of fact made by any of the defendants, other than defendant Kenneth Shine, prior to the execution of the Customer Agreement, which was false and known to be false, for the purpose of inducing the plaintiff to enter into the Customer Agreement . . . and where the plaintiff, in alleging a cause of action based upon misrepresentation and fraud, failed to comply with CPLR 3016 (b)”]). In her fourth cause of action, plaintiff repeats and realleges her previous allegations in support of claim of intentional misrepresentation (Complaint, ¶ 20). Then, she alleges that she relied, to her detriment, upon the intentional misrepresentations of defendants and was thereby induced to expend money and time on the joint venture (Complaint, ¶ 21), resulting in damages in a total sum not less than \$150,000 (Complaint, ¶ 22). However, plaintiff again failed to plead any specific details as to any misrepresentations, or specify what the alleged misrepresentations were, as required by CPLR §3016(b). Therefore, defendants’ motion to dismiss plaintiff’s fourth cause of action is granted.

*Negligent Misrepresentation*

Plaintiff's fifth cause of action for negligent misrepresentation fails for the same reason as discussed above. "The elements of negligent misrepresentation are (1) carelessness in imparting words; (2) upon which others were expected to rely; (3) upon which they did justifiably rely; (4) to their detriment; and (5) the author must express the words directly, with knowledge they will be acted upon, to one whom the author is bound by some relation or duty of care" (*Allen v WestPoint-Pepperell, Inc.*, 954 F Supp 682, 689 [SDNY 1997]). As plaintiff has failed to disclose any words from defendants on which she was expected to rely, pursuant to CPLR § 3016(b), defendants' motion to dismiss plaintiff's fifth cause of action is granted.

*Violation of GBL §349*

Plaintiff's seventh cause of action alleges that defendants violated GBL §349, a consumer protection statute. It is well settled that to "make out a *prima facie* case under Section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result" (*Maurizio v Goldsmith*, 230 F 3d 518, 521 [2000]; *see also Solomon v Bell Atlantic Corp.*, 9 AD3d 49, 52 [1<sup>st</sup> Dept 2004]; *Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205-206 [2004]). As a threshold matter, a movant must allege that the wrongful conduct impacts consumers at large (*State ex rel. Spitzer v Daicel Chemical Indus., Ltd.*, 42 AD3d 301, 303 [1<sup>st</sup> Dept 2007]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]; *Azby Brokerage, Inc. v Allstate Ins. Co.*, 681 F Supp 1084, 1089 [SDNY 1988] [holding that the plaintiffs failed to state a cause of action because their allegations failed to implicate the public interest or allege any facts that consumers had been

harmed]).

Here, plaintiff failed to state a cause of action under GBL §349. While reiterating her previous allegations, she provides only the following additional allegations in support of her claim:

By reason of Defendants' words, activities and conduct in the conduct of a business, trade or commerce, or in the furnishing of any service in this state, which were misleading in a material respect, in violation of New York General Business Law Section 349, described above, Plaintiff sustained damages in a total sum to be determined at trial, but estimated at not less than \$150,000, which damages continue to increase.  
(Complaint, ¶ 29)

Plaintiff neither implicates the public interest nor alleges any facts that consumers had been harmed by defendants' alleged conduct (*State ex rel. Spitzer v Daicel Chemical Industries, Ltd.; Azby Brokerage, Inc. v Allstate Ins. Co.*). As plaintiff has failed to state a cause of action under GBL §849, defendants' motion to dismiss plaintiff's seventh cause of action is granted.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Apparel Production Inc. and Theodore "Teddy" Sadaka for an order, pursuant to CPLR §3211(a)(7), dismissing the third, fourth, fifth and seventh causes of action in the Complaint of plaintiff Rita Langman d/b/a "Trends Collection is granted; and it is further

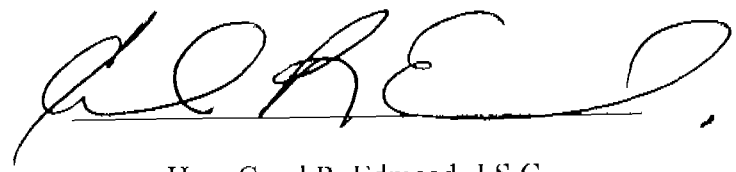
ORDERED that the motion of defendants for an order, pursuant to CPLR §3211(a)(7), dismissing plaintiff's second cause of action is denied; and it is further

ORDERED that the parties appear for a preliminary conference on August 4, 2009, 3:00 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 18, 2009



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**  
**FILED**  
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