

**Haryash v Hussain**

2009 NY Slip Op 32014(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 601875/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohen  
*Judge*

PART 36

Index Number : 601875/2007

**HARYASH, PAUL**

VS.

**HUSSAIN, SABIR**

SEQUENCE NUMBER : 002

DISMISS

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

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

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for dismiss counter claim + cross motion to dismiss

PAPERS NUMBERED Summary judgment

1, 2

5

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

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

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

Cross-Motion:  Yes  No

3, 4

Upon the foregoing papers, it is ordered that this motion by plaintiff to dismiss counterclaims + cross-motion to dismiss for summary judgment are decided in accordance with the attached memorandum decision.

**FILED**  
SEP - 4 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/2/09

[Signature]  
J.S.C.

Check one: FINAL DISPOSITION  NON-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 : IAS PART 36

-----x  
PAUL HARYASH,

Plaintiff,

Index No. 601875/07

Mot. Seq. No. 002

- against -

SABIR HUSSAIN,

Defendants.

-----x

**HON. DORIS LING-COHAN, J.:**

Plaintiff Haryash Paul, s/h/a Paul Haryash, moves pursuant to CPLR 3212, for summary judgment dismissing the counterclaims of defendant Sabir Hussain. Defendant cross-moves pursuant to CPLR 3211 or 3212, to dismiss the Complaint.

**BACKGROUND**

Plaintiff is a manufacturer, importer, and wholesaler of a sportswear line. Defendant owned Alpha Merchandising Corporation ("AMC") and BMC Sportswear, Inc. ("BMC"), are also in the clothing business. Defendant operated AMC and BMC at the premises located at 10 West 28<sup>th</sup> Street, New York, New York. AMC paid BMC rent in the amount of \$5,000 per month, pursuant to a sublease agreement beginning on April 2, 2006 and ending on April 1, 2008.

The parties *sharply* dispute the circumstances giving rise to this action. Plaintiff claims that in December 2006, he verbally agreed to purchase 100% of AMC's stock and inventory from defendant for \$45,000. He further maintains, however, that defendant intentionally inflated AMC's sales figures to induce

him to enter into the sales agreement, and that he relied on defendant's representation in entering into said agreement. Plaintiff urges that defendant's actions warrant rescission of the agreement.

Defendant denies making any representation regarding AMC's sales figures or fraudulently inducing plaintiff to purchase AMC. Defendant argues, instead, that plaintiff executed a written agreement to purchase 100% of AMC's stock and inventory for \$120,000, and that plaintiff breached the terms of the parties' agreement by failing to pay the stated purchase price. Defendant maintains that plaintiff made a payment of \$12,000, received a credit for inventory in the amount of \$33,000, and received additional credits and reduction, leaving an unpaid contract balance of \$69,236. Defendant further asserts that prior to the parties' agreement, AMC was obligated to pay BMC \$5,000 per month, pursuant to the above sublease agreement, and that plaintiff agreed to purchase AMC's stock and inventory subject to said sublease agreement. Defendant submits a document signed by plaintiff purporting to memorialize the terms of the parties' agreement (Not of Cross Mot, Exh F).

The transfer of AMC's shares to plaintiff took place on January 2, 2007. Defendant contends that plaintiff subsequently sold his interest in AMC to a third party, and that the third party soon defaulted on rent payment, causing plaintiff to resume control of the company. AMC also defaulted under the above

sublease agreement and BMC commenced a nonpayment proceeding, *B.M.C. Sportswear, Inc. v Alpha Merchandising Corp.*, Index No. 07N074824, Civ. Ct, Kings County, Hous Part. By Stipulation of Settlement, dated September 21, 2007, the parties agreed, *inter alia*: (1) that AMC's monthly rental payments were reduced to \$4,100 until the expiration of the sublease; (2) that AMC must pay rental arrears of \$20,500 for unpaid rent for May 2007 through September 2007, and the payments must be made in two equal installments on October 14, 2007, and November 14, 2007; and (3) that the warrant of eviction would be stayed until November 14, 2007 (Stip of Settlement, Not of Cross Mot, Exh I). AMC reportedly complied with the terms of the Stipulation Settlement until it stopped paying rent in April 2008, and BMC commenced another nonpayment proceeding, *B.M.C. Sportswear, Inc. v Alpha Merchandising Corp.*, Index No 097745/08, Civ Ct, NY County, Housing Part.

Plaintiff commenced this action to rescind the agreement to purchase AMC from defendant, essentially alleging fraud in the inducement. The Complaint alleges, *inter alia*, that defendant falsely and intentionally misrepresented AMC's rental obligations and sales figures to induce plaintiff to enter into the sales agreement; that defendant breached the terms of the agreement by failing to provide documents to substantiate AMC's financial position; and that defendant assaulted and beat plaintiff on December 23, 2007.

Defendant answered, generally denying the allegations in the Complaint and asserting numerous affirmative defenses. Defendant also alleges counterclaims seeking damages for breach of contract and unpaid rent against plaintiff.

Plaintiff now seeks summary judgment dismissing defendant's counterclaims. Defendant opposes the motion and cross-moves to dismiss the Complaint.

#### DISCUSSION

As stated, defendant seeks to dismiss the Complaint, pursuant to CPLR 3211 or 3212. On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Here, accepting plaintiff's factual allegations as true, the Complaint sufficiently alleges that defendant knowingly made false, material misrepresentations of fact, regarding AMC's rental expenses and sales figures with the intent to deceive plaintiff, and that plaintiff justifiably relied on defendant's representations resulting in damages, so as to sufficiently state a claim for fraud in the inducement (see *Skillgames, LLC v. Brody*, 1 AD3d 247, 250 [1<sup>st</sup> Dept 2003]).

Furthermore, plaintiff satisfactorily details the terms of the parties' agreement, the consideration, the performance by plaintiff and the basis of the alleged breach of the agreement by defendant so as to state a viable claim for breach of contract (see *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Likewise, the Complaint sufficiently alleges a claim based on assault and battery (*Holtz v. Wildenstein & Co., Inc.*, 261 AD2d 336 [1<sup>st</sup> Dept 1999]; *Hughes v. Farrey*, 30 AD3d 244 [1<sup>st</sup> Dept 2006]).

However, the cause of action to recover damages arising from defendant's alleged fraudulent misrepresentation of AMC's rental expenses and sales figures must be dismissed as duplicative of the causes of action for fraud in the inducement. Thus, the branch of the cross motion that seeks to dismiss the Complaint, pursuant to CPLR 3211, is granted only to the extent of dismissing the fourth cause of action for fraudulent misrepresentation and it is otherwise denied.

Defendant's request for summary judgment dismissing the complaint must be denied as defendant simply fails to make a prima facie showing of entitlement to judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant's conclusory reliance on the arguments advanced by plaintiff's counsel is simply unavailing.

Moreover, the sharp dispute between the parties as to the circumstances giving rise to this action present triable issues of fact which preclude summary judgment dismissing defendant's counterclaim for breach of contract. However, defendant's counterclaim for damages stemming from rent owed by AMC to BMC must be dismissed since neither AMC nor BMC are parties to this action (see *Hartloff v Hartloff*, 296 AD2d 849 [4<sup>th</sup> Dept 2002]).

Accordingly it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent that the counterclaim for unpaid rent is severed and dismissed and it is otherwise denied; and it is further

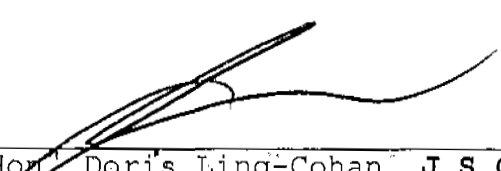
ORDERED that defendant's cross motion to dismiss the Complaint is granted to the extent of severing and dismissing the fourth cause of action for fraudulent misrepresentation and it otherwise denied; and it is further

ORDERED that the action in all other respects be continued and it is further

ORDERED that within 30 days of entry of the order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated:



  
Hon. Doris Ling-Cohan, J.S.C.

**FILED**  
SEP - 4 2009  
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NEW YORK