

**CJ Imports, Inc. v IMP Originals Inc.**

2009 NY Slip Op 32487(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 601930/08

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

10-22-09

PART 17

PRESENT: \_\_\_\_\_

Justice

Index Number : 601930/2008

CJ IMPORTS, INC.,

VS.

IMP ORIGINALS, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 601930-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits - Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided*

*per attached*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

FILED

OCT 22 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/9/09

*[Signature]*  
EMILY JANE GOODMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
CJ IMPORTS, INC. AND KT GROUP, INC.

Plaintiffs,

Index No. 601930/08

-against-

IMP ORIGINALS INC, RICHARD KAUFMAN  
AND BURT STERN,

Defendants.

**FILED**  
OCT 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
Emily Jane Goodman, J.S.C.:

In this action for goods sold and delivered, defendants IMP Originals Inc., Richard Kaufman and Burt Stern move, pursuant to CPLR 3211, for an order dismissing the complaint. For the reasons stated below, the motion is granted to the extent that the third and fourth causes of action are dismissed and the motion is otherwise denied.

**1. Background**

According to the complaint, plaintiffs CJ Imports, Inc. and KT Group, Inc. are New York corporations located in New York City. Defendant IMP is a New York corporation, also located in New York City. IMP states that it is in the children's wear business. Kaufman and Stern are residents of New York and are officers and shareholders of IMP.

The complaint states that, from October 2005 to September 2007, plaintiffs sold and delivered certain goods and merchandise

to IMP in the sum of \$480,909.64 as reflected in certain invoices delivered to IMP.

Plaintiffs commenced this action in June of 2008, asserting claims for goods sold and delivered, account stated and fraud. Defendants now move to dismiss the Complaint pursuant to CPLR 3211(a) (1), (5), (7) and (10).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009), citing *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference." *Id.*, citing *Leon v Martinez*, 84 NY2d at 87.

## **2. Goods Sold and Delivered**

Plaintiffs' first and second causes of action are for goods sold and delivered. As set forth above, plaintiffs allege that, from October 2005 to September 2007, they sold and delivered goods to IMP in the sum of \$480,909.64.

Defendants argue that these causes of action must be dismissed for several reasons. First, they assert that the complaint fails to adequately state a claim because it fails to distinguish between the plaintiffs as to which goods were bought from which plaintiff, and how much is specifically alleged to be owed to each plaintiff.

Defendants also submit documentary evidence which indicates that plaintiff CJ Imports was incorporated in December of 2005, two months after the beginning of the period of time in which plaintiffs allegedly sold goods to IMP.

Defendants further contend that the complaint should be dismissed because CJ Imports is no longer a real party in interest, since it sold its accounts receivable to non-party Finance One, Inc. In support of this contention, defendants submit an invoice dated January 17, 2007, from CJ Imports to IMP, which states that the account was assigned to Finance One and that payment should be made to Finance One. Defendants also submit a letter from Finance One to IMP, dated June 23, 2008, which states that all of CJ Imports' accounts were assigned to Finance One and that payment should be made directly to Finance One.

The court finds that plaintiffs have adequately stated a claim against IMP for goods sold and delivered. The complaint adequately alleges the sale and delivery of certain goods to IMP by plaintiffs during the period from October 2005 to September 2007, in the sum of \$480,909.64.

It appears that there are factual issues as to which goods were allegedly bought from which plaintiff, when such goods were purchased, and how much is specifically owed to each plaintiff. There is also a question as to whether Finance One is a real party

in interest to this action and whether title to the accounts reverted from Finance One to plaintiffs due to "charge backs." The documentary evidence submitted by defendants is not dispositive of these issues and thus, defendants have not demonstrated that the first and second causes of action should be dismissed. Defendants' argument, made for the first time in reply, which points out the that the Factoring Agreement submitted in opposition to defendants' motion to dismiss was only between plaintiff CJ and Finance One, and that no similar agreement was submitted between plaintiff KT Group and Finance One, does not meet defendants' burden for dismissal based on documentary evidence. Nor does the letter from Finance One dated June 23, 2008, regarding assignment of plaintiff CJ Import's accounts to Finance One conclusively establish defendants' contention.

### 3. Account Stated

Plaintiffs' third cause of action is for account stated. Plaintiffs allege merely that "an account was taken and stated between Plaintiffs and Defendant which showed a balance of \$480,909.64 as due and owing by Defendant to Plaintiffs." (Complaint, ¶ 9).

"An account stated represents an agreement between the parties reflecting amounts due on prior transactions." *M & A Const. Corp. v McTague*, 21 AD3d 610, 611 (3d Dept 2005); see, *Fred Ehrlich, P.C.*

*v Tullo*, 274 AD2d 303 (1st Dept 2000). Here, plaintiffs have not alleged any facts to demonstrate that the parties reached an agreement as to any amounts due in connection with the transactions at issue. Therefore, this cause of action is dismissed.

#### 4. Fraud

Plaintiffs' fourth cause of action is against Kaufman and Stern for fraud. Plaintiffs allege that, with respect to \$333,682.74 of the goods and merchandise, Kaufman and Stern represented to plaintiffs that IMP would timely pay for such goods and merchandise. Plaintiffs allege that it was on the basis of such representations that they authorized and released the shipments of \$333,682.74 of the goods and merchandise in the period from July 2007 to September 2007.

Plaintiffs further allege that at the time that Kaufman and Stern ordered such goods and merchandise, they knew or should have known, that IMP would not be able to pay for these goods and merchandise and did not intend to pay for such goods. Plaintiffs allege that Kaufman's and Stern's representations were knowingly false when made.

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of

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the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). CPLR 3016 (b) provides that where a cause of action is based on fraud or misrepresentation, the circumstances constituting the wrong must be stated in detail.

Here, the court finds that plaintiffs have failed to state a cause of action for fraud. First, the fraud claim is duplicative of the claims for goods sold and delivered.

"A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 (1st Dept 1999). "By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract." *Id.*; see *Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 (1st Dept 2009).

Here, the complaint alleges that defendants assured plaintiffs that IMP would comply with its contractual obligations. However, plaintiffs have not alleged any breach of duty separate from the alleged breach of contract. Plaintiffs allege that defendants knew that IMP would not be able to pay for the merchandise at issue at the time the contracts were executed. However, the complaint does

not set forth any details to support this allegation.

Finally, plaintiffs have not alleged any damages that are not also recoverable under their claims for goods sold and delivered. *See Linea Nuova, SA v Slowchowsky*, 62 AD3d 473, *supra*; *Manas v VMS Associates, LLC*, 53 AD3d 451 (1st Dept 2008). Therefore, the fourth cause of action is dismissed. Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that the third and fourth causes of action are dismissed, and the motion is otherwise denied; and it is further


ORDERED that the parties shall appear for a preliminary conference on November 5, 2009; and it is further

ORDERED that any future dispositive motions shall not automatically stay discovery, absent court order.

DATED: October 9, 2009

This Constitutes the Decision and Order of the Court.

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
OCT 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK