

**Kittywalk Sys. Inc. v Pet Rageous Prods., Inc.**

2009 NY Slip Op 32724(U)

November 10, 2009

Supreme Court, Nassau County

Docket Number: 8092/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
KITTYWALK SYSTEMS INC. and  
MIGHTY PET PRODUCTS, INC.,

Plaintiffs,

-against-

PET RAGEOUS PRODUCTS, INC. and  
PET RAGEOUS DESIGNS INC.,

Defendants.

TRIAL/IAS, PART 3  
NASSAU COUNTY

INDEX No. 8092/08

MOTION DATE: Sept. 14, 2009  
Motion Sequence #001, 002

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Reply Affidavit....	X
Memorandum of Law.....	XX
Reply Memorandum of Law.....	X

This motion, by defendants, for an order granting defendants partial summary judgment pursuant to CPLR 3212(e) as follows:

- (i) dismissing the Complaint in its entirety as against defendants, as plaintiffs are not entitled to the relief demanded in the Complaint, as a matter of law; specifically, on the merits, all challenged expenses were legitimate and proper business expenses incurred

in good faith and in furtherance of legitimate joint venture purposes, thus no monies are presently due to plaintiffs; moreover, the claims alleged by plaintiffs have all been released and, if or not released (which they were), any such claims must be arbitrated in Massachusetts, as per the parties' joint venture agreement;

- (ii) granting PR Products summary judgment as to its First Counterclaim (breach of contract/promissory note) awarding it judgment for the sum still due under the plaintiffs' promissory note, which sum is \$7,649.06 in principal amount, plus interest thereon at the default rate of 12% per annum from May 15, 2008 to date of entry of judgment, as permitted under the note;
- (iii) granting PR Products summary judgment as to its Second Counterclaim (attorneys' fees) awarding PR Products judgment in the amount of \$7,988.49, which sum is equal to twenty percent (20%) of the original face amount of plaintiffs' promissory note, as expressly agreed to and provided for therein; and
- (iv) for such other and further relief as is just and proper;

and a cross-motion, by plaintiffs, for an order:

- (a) That this Court dismiss defendants' Fourth and Sixth Counterclaims.
- (b) Such other and further relief as to the Court may seem just and proper, together with the costs of this motion,

are **both** determined as hereinafter set forth.

That branch of the motion by defendants Pet Rageous Products, Inc. ("P.R. Products") and Pet Rageous Designs, Inc. ("P.R. Designs"), for an order granting them summary judgment as to the plaintiffs' Kittywalk Systems, Inc. ("KWS") and Mighty Pet Products, Inc. ("Mighty Pet") entire complaint is **denied** for the reasons set forth herein.

As to that branch of the defendants' motion for summary judgment on the defendants' first counterclaim for one payment (\$7,649.06) plus 12% interest (allegedly from May 15, 2008) and their second counterclaim for 20% attorneys' fees (based on 20% of the original face amount of the plaintiffs' note and attorneys' fees) is **granted** to the extent indicated herein.

The cross motion, by plaintiffs, to dismiss the defendants' fourth and sixth counterclaims of fraudulent inducement, fraud and material misrepresentation is **denied** for the reasons set forth herein.

Plaintiffs commenced this action for monies allegedly due plaintiffs from defendants arising from the plaintiffs' and defendants' (defendants allege only PR Products is a viable defendant) agreement to share costs/expenses and profits from a joint venture that functioned from November, 2005 to May 1, 2007. Defendants were to act as the exclusive distributor of certain pet products designed and manufactured by plaintiffs. Plaintiffs' complaint presents causes of action for an accounting, declaratory judgment and unjust enrichment. In their counterclaims, defendants seek, among other items, a compound balance on a promissory note, attorneys' fees under the note, fraudulent inducement and material misrepresentation.

Plaintiffs Kittywalk and Mighty Pet (by principal Jeff King) and defendant PR Products, Inc. (by Daniel A. Wren) signed a Mutual Release and Termination Agreement (see Exhibit 12 annexed to defendants' motion) on April 26, 2007. One paragraph of that agreement states:

Whereas, PRP and KWS desire to terminate their Marketing and Master Distribution Agreement and to settle amicably, and thereby discharge, any and all disputes and claims between them, by reason of any matter, cause or act related to or arising from said Marketing and Master Distribution Agreement from the inception of time to the execution of this Agreement. (emphasis added).

Reasonable expectation and purpose of the ordinary business person when making an ordinary business contract serve as the guide points to determine intent (*Album Realty Corp. v American House Assurance Co.*, 80 NY2d 1008, 1992); the tests to be applied are common speech and its reasonable expectation and purpose of the ordinary business person in the

factual context in which terms of the art and understanding are used and keyed to the level of business sophistication and acumen of the particular parties (*Ace Wire & Cable Co., Inc. v Aetna Casualty & Surety Co.*, 60 NY2d 390, 1983).

In interpreting a contract, the intent of the parties governs (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, *appeal den.* 77 NY2d 807); and the best evidence of what parties to a written agreement intend is what they say in their writing (*Slamow v Del Col*, 79 NY2d 1016). It is well established that when the meaning of a contract is plain and clear, it is entitled to be enforced according to its terms and not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist (*Uribe v Merchants Bank of New York*, 91 NY2d 336).

Factual issues as to whether a release had been procured through misrepresentation would preclude a summary determination where the party opposing the validity of the release has raised triable issues concerning the validity of the release (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934).

Every contract implies good faith and fair dealing between the parties to it (*511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144; *Rooney v Slomowitz*, 11 AD3d 864, 3d Dept., 2004). This would include the “release” referred to herein.

As noted by defendants, under the “business judgment rule,” absent evidence of bad faith, fraud, self dealing or other misconduct, the courts must respect (the defendants’) business judgments authorized, made in good faith, and in the furtherance of the business’s legitimate interests (*see* *Pugliese v Mondello*, 57 AD3d 637, 2<sup>nd</sup> Dept., 2008). Here, plaintiffs are alleging that defendants are guilty of bad faith, self dealing and other misconduct during the joint venture.

For plaintiffs, their joint venture for distribution with PR Products was its second distribution “failure.” Plaintiffs, based on the information provided to them by PR Products, was ready to “cut bait” and reconsider their options.

Upon examination of the Mutual Release and Termination Agreement, “discharging any and all disputes and claims” is not the entire content of the agreement since the parties have to perform “their respective obligations.” That would purportedly include PR Products providing figures, amounts, etc., to plaintiffs that are not based on fraud or misrepresentation. Plaintiffs are alleging that defendants did exactly that.

Paragraph 15 of the Mutual Release and Termination Agreement does state: “Either party may terminate the [Mutual Release and Termination] Agreement and all obligations thereunder if the other party commits a material breach of any of the material terms or provisions of this agreement and does not cure such breach within fifteen (15) days after receipt of written notice given by the other party or if either party fails to perform its obligations as provided and set forth herein.”

No particular form need be used in drafting a release; all that is required is that there is an expression of a present intention to renounce a claim or discharge an obligation, where the language of a release is clear and unambiguous, the signing of the release is binding on the parties (*Mangini v McClurg*, 24 NY2d 556, 1969; *Collins v E-Magine, LLC*, 291 AD2d 350, 739 NYS2d 15, 1<sup>st</sup> Dept., 2002). Defendants admit the language of the Release and Termination Agreement is unambiguous.

As noted by defendants, Jeff King, one of the principals of Kittywalk, did state that when he signed the release, the dispute with defendants over money and paper (documents, documentation) had not been eliminated; and the plaintiffs and/or King did not intend to settle or release claims that were allegedly anchored in bookkeeping, accounting, etc., that allegedly deprived plaintiffs of their proper share of profits. Thus, the King affidavit does not contradict his earlier deposition testimony.

Defendants seek, on their first counterclaim, the unpaid balance plus interest. In the second counterclaim, defendants seek attorneys’ fees to collect amounts due under the note.

The promissory note for \$39,942.48 is dated May 1, 2007 (see Exhibit 13 annexed to defendants’ motion). Its payment schedule is separate and apart from the Mutual Release and Termination Agreement.

A party establishes, *prima facie*, its entitlement to judgment as a matter of law in an action on a promissory note by producing the note executed by the parties and demonstrating that the opposing party had defaulted thereon (see *Raico v Concorde Funding Group*, 60 AD3d 834, 875 NYS2d 251, 2<sup>nd</sup> Dept., 2009) and where plaintiffs’ papers present no triable issue of fact (*Mainline Electric Corp. v PAV-LAK Industries, Inc.*, 40 AD3d 939, 836 NYS2d 294, 2<sup>nd</sup> Dept., 2007). Here, plaintiffs admit they owe the last payment on the note, and they consent to a conditional order for summary judgment plus interest plus 20% collection/attorneys’ fees as a set-off as to what is owed by both plaintiffs and defendants.

With respect to the promissory note cause of action, and its component parts of the last outstanding unpaid payment of \$7,649.06 plus interest plus attorneys' fees of 20% of the face value of the note, the plaintiffs agree that they owe on the note, but they contend that the exact calculation should be used as a set off as to what the defendants may owe plaintiff.

There is no sound reason for its proceeds to be used to set off any amounts owed by defendants; a hearing at the time of the trial herein shall be held to determine the amount plus interest plus attorneys' fees that are owed to defendants.

Plaintiffs, in their cross motion, seek to obtain summary judgment as to defendants' fourth and sixth counterclaims. In their counterclaims, defendants allege fraudulent inducement (fourth counterclaim) and fraud or material misrepresentation. Defendants allege the plaintiffs projected a yearly sales figure for Kittywalk products in excess of \$3 million (defendants allege this figure was grossly exaggerated) in their negotiations with defendants to bring defendants "on board" with the joint venture and for the "buy in" price. Plaintiffs allege they, plaintiffs, lacked scienter as to defendants' allegations of the misrepresentation of this figure.

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by another and damages (see *Eurycleia Partners, LP v Seward & Kissell, LLP*, 12 NY3d 553, 2009). The essential constituents of an action based on fraudulent representation are the representation of a material existing fact, falsity, scienter, deception and injury (*Cohen v House Connect Realty Corp.*, 289 AD2d 277, 734 NYS2d 205, 2<sup>nd</sup> Dept., 2001).

One who fraudulently makes a misrepresentation of intention for the purpose of inducing another to act or refrain from acting in reliance thereon in a business transaction is liable for the harm caused by the other's justifiable reliance upon the misrepresentation (*Channel Master Corp. v Aluminum Limited Sales, Inc.*, 4 NY2d 403, 1958).

A person's intent is capable of ascertainment, and a statement of present intention is deemed a statement of material existing fact sufficient to support an action for fraud (*Sabo v Delman*, 3 NY2d 155, 1957). Although plaintiffs allege they offered the projected amount based on their former distributor's estimate, a jury could find that the figure was inflated and deliberately made to entice defendants into the joint venture. thus, there is an issue of fact as to whether or not plaintiffs engaged in fraudulent representations by making the \$3 million projection.

Defendants contend the plaintiffs' allegation of "diverted" funds were, in reality, a few payments made to PR Designs that were fully explained and set forth to plaintiffs; that plaintiffs' claim of "unjust enrichment" to defendant PR Designs were covered, explained and part of defendants' legitimate transactions under the contracts between PR Products and plaintiffs. Defendants allege that PR Designs is not a viable party defendant.

A cause of action for unjust enrichment is stated where the plaintiffs have properly asserted that a benefit was bestowed by plaintiffs and the defendants will obtain such benefit without adequately compensating plaintiffs (*Sergeants Benevolent Assoc. Annuity Fund v Renck*, 19 AD3d 107, 796 NYS2d 77, 1<sup>st</sup> Dept., 2005); and a claim for unjust enrichment may not be maintained where a contract exists between the parties covering the same subject matter (*Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 776 NYS2d 12, 1<sup>st</sup> Dept., 2004). Here, plaintiffs allege that PR Designs, Inc. somehow improperly received funds from PR Products, Inc. PR Designs is not a signatory to the contracts between PR Products, Inc. and plaintiffs. Plaintiffs argue that PR Designs was, essentially, a depository for ill-gotten gains for PR Products. At this point in the proceeding, PR Designs is a viable defendant herein.

With respect to the issue of arbitration, the role of the courts in reviewing matters subject to arbitration is limited to determining whether a valid agreement or obligation to arbitrate exists and whether one party to the agreement has failed, neglected or refused to arbitrate (*Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395) unless the parties, by clear and unmistakable evidence, agree that an arbitrator must decide arbitrability (see *AT&T Technologies, Inc. v CWA*, 475 U.S. 643). Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit (*PaineWebber, Inc. v Bybyk*, 81 F3d 1193). By the release noted above, the parties' agreement to arbitrate disputes is terminated; the release does not in any way revive the utilization of arbitration in any disputes.

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662, 833 NYS2d 773, 2<sup>nd</sup> Dept., 2007; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397, 662 NYS2d 766, 2<sup>nd</sup> Dept., 1997).

The standards for summary judgment are well settled. A court may grant summary

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judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626, 620 NYS2d 500, 2<sup>nd</sup> Dept., 1995). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 1993).

Clearly, as to plaintiffs' complaint and defendants' fourth and sixth counterclaims, neither defendants nor plaintiffs have met their respective burdens to demonstrate that they are entitled to summary judgment on the above claims.

The parties are reminded of the pre-trial conference scheduled for November 20, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated NOV 10 2009

*Stephen Bucareni*  
I.S.C.

**ENTERED**

NOV 13 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE