[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

MARTIN S. LEVINE

-v-

MICHAEL ASHTON, INC.

INDEX NO. 110042/09

MOTION DATE 10/23/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ 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

FILED
JAN 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

Based on the foregoing, it is hereby

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing is granted, and the third cause of action is hereby severed and dismissed; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's fourth cause of action for fraud is denied; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's fifth cause of action for violation of GBL §349 is denied; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's request for attorneys' fees is granted as to all causes of action except for the claim for attorneys' fees under the fifth cause of action alleging a GBL §349 violation; and it is further

ORDERED that the parties appear for a Preliminary Conference in Part 35, Rm. 438 on Tuesday, February 2, 2010 at 2:15 p.m.; and it is further

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

Dated: This constitutes the decision and order of the Court:
1/4/2010

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

HON. CAROL EDMEAD

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

MARTIN S. LEVINE,

Plaintiff,

-against-

MICHAEL ASHTON, INC.,

Defendant.

----------x

Index No. 110042/09

DECISION/ORDER

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

MEMORANDUM DECISION

In this action, plaintiff Martin S. Levine ("plaintiff") seeks to recover damages against defendant Michael Ashton, Inc. ("defendant") for, *inter alia*, breach of contract.

Defendant now moves for an order, pursuant to CPLR §3211(a)(7), dismissing plaintiff's request for attorneys' fees and plaintiff's third, fourth and fifth causes of action.[1]

Background[2]

On December 15, 2007, plaintiff purchased a vintage Rolex watch (the "watch") from defendant for $48,000, at the request of his mother, who intended to give it as a holiday gift. Plaintiff contends that defendant agreed to make adjustments to the watch's bracelet and then ship the watch within a few days to plaintiff's mother in New Jersey.

On numerous occasions in early January 2007, plaintiff telephoned defendant to determine the status of the shipment. Each time, plaintiff received a recorded message that defendant was closed. On January 11, 2007, with plaintiff's mother never having received

---

[1]The Court notes that in its motion, defendant refers to the cause of action for breach of the implied covenant of good faith and fair dealing as the "fourth cause of action." Breach of the covenant is actually the third cause of action; common law fraud is the fourth cause of action.

[2]Information is taken from plaintiff's Complaint, defendant's memorandum of law ("MOL"), and plaintiff's opposition ("opp.") and MOL. Defendant opted not to submit a reply.

delivery of the watch and plaintiff not having been able to speak with defendant, plaintiff contacted American Express and requested that it cancel the purchase. American Express initially suspended the $48,000 payment to defendant. However, in November 2008, after deciding the charge dispute, American Express found in defendant's favor and required plaintiff to make the payment. Plaintiff contends that as of the date of this action, he still has not received the watch, and defendant has not refunded the $48,000.

Plaintiff seeks to recover the $48,000, plus interest and attorneys' fees on several theories articulated in the six causes of action of his Complaint. Relevant herein are plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing, fourth cause of action for common law fraud, and fifth cause of action for violation of General Business Law ("GBL") §349.

In support of its motion for dismissal, defendant argues that plaintiff's third cause of action (breach of the implied covenant of good faith and fair dealing) should be dismissed as it is duplicative of his breach of contract claim.

Next, defendant argues that plaintiff's fourth cause of action (common-law fraud) fails to allege that plaintiff relied on any misrepresentations causing injury. Instead, plaintiff alleges that American Express, a non-party, relied upon such alleged misrepresentations in its internal arbitration-like proceeding to resolve the payment dispute. Defendant also argues that plaintiff's fraud claim is duplicative of his breach of contract claim.

Further, defendant argues that while attorneys' fees may be available under GBL §349 under certain circumstances, plaintiff's fifth cause of action seeking recovery under this statute fails to state a cause of action. Defendant contends that private contract disputes unique to the

parties do not fall within the ambit of GBL §349; instead, the movant must demonstrate that the acts or practices have a broader impact on consumers at large. Plaintiff's Complaint pleads that the dispute involves a rare vintage Rolex watch. Defendant argues that such a dispute is unique to the parties because this type of rare watch is no longer produced. Therefore, plaintiff has failed to plead that the dispute at issue "has any effect whatsoever on public consumers, as is required to avoid dismissal."

Finally, defendant argues that plaintiff's request for attorneys' fees in each cause of action (except for the fifth cause of action) should be dismissed as they are not allegedly based on any contract or statute.

In opposition, plaintiff argues that he has sufficiently asserted a cause of action for breach of the covenant of good faith and fair dealing. Plaintiff alleged that defendant acted in bad faith when it failed to timely deliver the watch to plaintiff's mother despite (a) being advised that the watch was intended to be a holiday gift, and (b) repeatedly assuring plaintiff that the watch would be delivered promptly after a minor alteration was made to the watch's bracelet. Plaintiff also argues that this claim is not duplicative of the breach of contract claim, in that New York law permits a party to assert causes of action in the alternative to a breach of contract claim, and a breach of the covenant of good faith and fair dealing can stand alone.

Plaintiff also argues that he has sufficiently pleaded a cause of action sounding in fraud, as New York law permits a party to assert a fraud claim based on fraudulent misrepresentations made to a third-party. Plaintiff argues that he "has clearly been damaged by the fraudulent misrepresentations made by [defendant] to American Express." Plaintiff contends that during the course of its investigation, American Express was provided with two purported receipts in

connection with the sale. The first receipt, bearing number 4867, contained a handwritten notation: "Hold Watch Till 1/15/08" ("defendant's receipt"). Plaintiff contends that this notation was not on the original receipt provided to him on December 15, 2007 and bearing the same number (see "plaintiff's receipt"). "It is evident that [defendant] intentionally doctored the original receipt in an effort to convince American Express that it had not failed to timely deliver the Watch," plaintiff contends. Defendant also provided American Express with a second undated receipt, bearing number 6220 and containing the notation "Hold Watch till 1/15/08" (see the "undated receipt"). This second purported receipt was never provided to plaintiff at the time of his purchase. As a result of defendant's "doctored and fraudulent receipts," American Express advised plaintiff that it was not in a position to substantiate the circumstances; that plaintiff should pursue his claims directly against defendant; and that plaintiff was required to make payment to American Express for the $48,000 purchase price.[3]

Second, plaintiff argues that he has sufficiently alleged all of the necessary elements of a GBL §349 claim. Plaintiff argues that it is "readily admitted on [defendant's] own website" that defendant is in business as a watch dealer/collector, and sells its watches to public consumers, and that the failure to timely deliver an item purchased by a consumer is a "consumer-oriented" act. Plaintiff sufficiently alleged that he purchased the watch after defendant's repeated assurances that the watch would be delivered to plaintiff's mother in time to be given as a holiday gift. Defendant did not timely deliver the watch, and its assurances to plaintiff, a consumer, were "misleading in a material way." Further, plaintiff has sufficiently alleged that he was damaged as a result of defendant's deceptive act. Plaintiff further argues that defendant's

[3]Plaintiff sent the full payment to American Express in December 2008.

argument that the GBL §349 claim should be dismissed because plaintiff's dispute with defendant is "private" lacks merit. If the Court were to accept defendant's contention and permit it to avoid potential exposure for violating the consumer protection afforded under GBL §349, then all retailers who sell merchandise to individual consumers would be immune from GBL §349. As GBL §349 was enacted to protect consumers from improper and deceptive acts, defendant's interpretation would render the statute powerless to protect the very consumers for which it was enacted, plaintiff argues.

Finally, plaintiff argues that as he has sufficiently alleged a cause of action for the violation of GBL §349, he is permitted to assert a prayer for relief seeking attorneys' fees.

Discussion

Failure to State a Cause of Action

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7) is 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 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). On a motion to dismiss made pursuant to CPLR §3211, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] 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]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to

determine whether or not plaintiff has produced evidence to support his claims" (*Salles* at 228). However, 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 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [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]; *Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Breach of the Implied Covenant of Good Faith and Fair Dealing

It is well settled that an implied covenant of good faith and fair dealing exists in every contract (*Timberline Development LLC v Kronman*, 263 AD2d 175, 178 [1st Dept 2000], citing *Wood v Lucy Lady Duff-Gordon*, 222 NY 88, 90-91 [1917]). "However, a breach of that duty will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for a claim for breach of covenant of an express provision of the underlying contract" (*In re Houbigant Inc.*, 914 F Supp 964, 989 [1995]; *Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000]; *Levi v Utica First Ins. Co.*, 12 AD3d 256 [1st Dept 2004], citing *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452, 453 [1st Dept 1995] [holding that the plaintiffs' "third and fourth causes of action are redundant since a breach of the implied duty of good faith and fair dealing *is intrinsically tied to the damages allegedly resulting from the breach of the contract*" (emphasis added)]).

Here, as demonstrated by plaintiff's Complaint, the conduct allegedly violating the

implied covenant (plaintiff's third cause of action) is also the predicate for the breach of contract claim (plaintiff's first cause of action): defendant's failure to timely deliver the watch to plaintiff's mother (Complaint, ¶¶ 15-18; 23-27). Further, the alleged breach of the implied covenant is intrinsically tied to the damages allegedly resulting from the breach of contract. Plaintiff seeks the exact same damages – $48,000 – in both causes of action. Finally, the caselaw plaintiff cites is not on point.

Plaintiff relies on *Maddaloni Jewelers. Inc. v Rolex Watch U.S.A.. Inc.* (41 AD3d 269 [1st Dept 2007]), for the proposition that the First Department "acknowledged that a cause of action for breach of the covenant of good faith and fair dealing sufficiently stood on its own where the implied covenant of good faith obligated the defendant Rolex to exercise its discretion in good faith, not arbitrarily or irrationally, when determining when to deliver the items purchased by plaintiff" (plaintiff's MOL, p. 12). However, *Maddaloni* does not address the issue of whether a breach of contract claim is duplicative of a claim for a breach of the covenant of good faith and fair dealing. The case involved a summary judgment motion in which the First Department upheld the trial court's dismissal of a claim for tortious interference with prospective business relations, as well as the trial court's finding that "genuine issue of material fact existed as to whether watch manufacturer exercised bad faith in allegedly punishing jeweler, by refusing to process certain customer orders and unreasonably delaying others" (*id.*) In *Maddaloni*, an issue of fact was raised as to whether defendant's discretion under contractual agreement was exercised in bad faith. However here, no such discretionary act under the parties' contract is at issue.

A plaintiff also can plead a breach of the implied covenant in the alternative to a breach

of contract claim where there are allegations that the defendant had exercised its contractual right malevolently, for its own gain, as part of a purposeful scheme designed to deprive the plaintiffs of the benefits of their contract (*Gross v Empire Healthchoice Assur., Inc.*, 16 Misc 3d 1112, 847 NYS2d 896 [Supreme Court New York County 2007]). However, no such allegations appear in the Complaint or in plaintiff's opposition. Therefore, as plaintiff's cause of action for a breach of the implied covenant is duplicative of breach of contract claim, plaintiff has failed to state such a cause of action, and plaintiff's third cause of action is dismissed.

Fraud

To state a claim for fraud, plaintiff must allege a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury (*Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]). Generally, the injured party is required to show that the misrepresentation was made to him, either directly or indirectly through a third party (*see* 28 NY Prac Contract Law §21:6.; *Pensee Assoc., Ltd. v Quon Indus., Ltd.*, 241 AD2d 354, 360 [1st Dept 1997] ["While the record evidence supports a theory of fraud against Quon Industries, it does not support such claims against the remaining defendants, who had not made misrepresentations directly to plaintiff"]). However, the Courts have made exceptions in certain circumstances (*see Siotkas v LabOne, Inc.*, 594 F Supp 2d 259, 275-276 [2009] [acknowledging that New York courts "have reached different results with respect to whether a claim of fraud may be sustained where the misrepresentation sued upon was made to a third party who relied on the representation to the detriment of plaintiff"]).

For example, in *Desser v Schatz* (182 AD2d 478 [1st Dept 1992]), a case involving the

foreclosure of a mortgage, the plaintiff alleged that the defendant fraudulently represented to Chemical Bank that the purchase money mortgage had been paid in full, "and thus induced Chemical to issue a satisfaction of the mortgage wrongfully extinguishing plaintiff's interest therein" (*id.* at 479). In her Complaint, plaintiff sought a judgment vacating the false satisfaction. Although the trial court acknowledged that New York law allows a court to set aside a fraudulently obtained satisfaction, it denied plaintiff's motion on the ground, *inter alia*, that "fraud was not alleged with sufficient particularity as required by CPLR 3016 (b)" (*id.*). In reversing the trial court, the First Department explained, *inter alia*, that plaintiff had alleged fraudulent representation "with compelling clarity": "*Reliance by Chemical, to the clear detriment of plaintiff*, is manifest, *and it is of no moment, in this context, that the false representation was not made directly to plaintiff*" (*id.* at 479-480) (emphasis added).

Rice v Manley (66 NY 82, 86 [1876]), addresses fraud in situations where a defendant is accused of making false statements to a third party in order to prevent the performance of a contract for the sale of goods between that third party and the plaintiff. The Appeals Court held that in such a context, "it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences" (*id.* at 87; *see also Eaton, Cole & Burnham Co. v Avery* (83 NY 31, 31 [1880] [holding that "[w]here a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the

firm upon credit, an action for deceit is maintainable at the suit of the vendor, against the partner making such false representations"]).

Finally, in *Buxton Mfg. Co., Inc. v Valiant Moving & Storage, Inc.* (239 AD2d 452, 453-454 [2d Dept 1997]), a corporation bought heat exchangers from the plaintiff, pursuant to a contract with the U.S. Department of Agriculture ("USDA"). Subsequently, the defendant, a vice president of the corporation, sent the USDA a "progress payment certification" that represented that all subcontractors and suppliers had been paid. The plaintiff, claiming that it was not fully paid, sued the defendant for breach of contract and fraud, alleging that "without the false representation in the progress payment certification, the [USDA] would not have made payment to [defendant] but would have withheld an amount sufficient to pay the plaintiff's outstanding claim" (*id.* at 451). Relying on, *inter alia*, *Eaton*, *Rice* and *Desser*, the Second Department stated that fraud "may also exist where a false representation is made to a third party, resulting in injury to the plaintiff" (*id.* at 451). The Court went on to hold that the defendant may be held personally liable for a fraudulent act committed in his capacity as a corporate officer, on the ground of "his admitted failure to do anything to check the accuracy of the progress payment certification which he signed" (*id.* at 454).

Here, the Complaint indicates that American Express relied on the representations of defendant to the detriment of plaintiff (*Desser* at 479-480). Plaintiff alleges that defendant made false representations to American Express in the form of a "doctored invoice" and a "separate receipt" that was different from the receipt provided to plaintiff (Complaint, ¶¶ 30-31). Plaintiff further alleges that defendant "intentionally provided American Express with fraudulent documents in order to defraud and mislead American Express" (*id.* at 34), and that "American

Express relied" on the fraudulent documents in requiring plaintiff to pay the $48,000 (*id.* at 35). Finally, plaintiff alleges that he was damaged by the foregoing (*id.* at 36). Further, while plaintiff does not allege that defendant sought to prevent plaintiff's contract for the sale of goods with a third party (*Rice*), he essentially alleges that defendant's misrepresentations prevented American Express' from suspending inappropriate charges upon a favorable investigation under the agreement between American Express and plaintiff.[4] Therefore, assuming the truth of plaintiff's allegations and according him every possible favorable inference to determine only whether the facts alleged fit within any cognizable legal theory (*Nonnon v City of New York*), the Court finds that plaintiff has stated a cause of action for fraud.

Defendants' argument that plaintiff's fraud claim is duplicative of his breach of contract claim lacks merit. The caselaw makes clear that a "fraud claim should be dismissed as redundant when it merely restates a breach of contract claim" (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). However, it is also is well established that in some cases tort liability may arise from a breach of a duty independent of a breach of contract (*Moustakis v Christie's, Inc.*, 2009 WL 4911273, 1 [1st Dept 2009]; *Gotham Boxing Inc. v Finkel*, 2008 WL 104155, 7 [Sup Ct New York County 2008], quoting *Channel Master Corp. v Aluminum Limited Sales, Inc.*, 4 NY2d 403, 408 [1958] ["A fraud claim, since it lies in tort, not contract, depends 'not upon agreement between the parties, but rather upon deliberate misrepresentation of fact, relied on by the plaintiff to his detriment'"]; *Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1st Dept 2001] [holding that the fraud claim must be "collateral

[4]The Court notes that defendants do not dispute that it made false representations to American Express. They only assert that the false representations were not made directly to plaintiff (see motion, pp. 5-6).

or extraneous to the breach of contract claim"]).

Here, plaintiff sufficiently alleges the breach of a duty collateral and extraneous to the breach of contract claim. Further, his breach of fraud claim does not merely restate his breach of contract claim (*First Bank of Americas* at 291). Plaintiff's breach of contract claim is premised on defendants' alleged failure to timely deliver the watch as agreed under the purchase agreement (Complaint, ¶¶ 15-18). However, plaintiff's fraud claim is based on defendants' alleged misrepresentations to American Express (Complaint, ¶¶ 28-36). Plaintiff states that defendant "intentionally provided American Express with fraudulent documents in order to mislead American Express, which resulted in American Express requiring" plaintiff to pay the $48,000 (Complaint, ¶ 34). Defendants' duty to provide American Express with accurate information is collateral and extraneous to plaintiff's agreement with defendant to purchase the watch. Therefore, as plaintiff sufficiently states a cause of action for fraud, defendants' motion to dismiss plaintiff's fourth cause of action is denied.

Violation of GBL §349

Plaintiff's fifth cause of action alleges that defendants violated GBL §349, a consumer protection statute. It is well settled that to "successfully assert a section 349(h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *see also Solomon v Bell Atlantic Corp.*, 9 AD3d 49, 52 [1st 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 (*Richards v Cesare*, 2009 WL 3415279, 3 [Sup Ct New York County 2009]; *State ex rel. Spitzer v Daicel Chemical Indus., Ltd.*, 42 AD3d 301, 303 [1st Dept 2007]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995] ["Plaintiff, thus, need not show that the defendant committed the complained-of acts repeatedly – either to the same plaintiff or to other consumers – but instead must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute"]).

Here, defendant's argument that the instant dispute is "private" because the watch is "unique to the parties" lacks merit. According to the Appeals Court, the test for determining whether a dispute is private is "that the acts complained of must be consumer-oriented *in the sense that they potentially affect similarly situated consumers*" (*Oswego* at 27). For example, the Court described a negotiation for rental of Shea Stadium to be "single shot transaction," not a typical consumer transaction and, therefore, not covered by GBL §349 (*id.* at 25, *citing Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). The Court went on to hold that the opening of a bank account was indeed a consumer-oriented act.

Here, plaintiff sufficiently states a cause of action under GBL §349. In his Complaint, plaintiff alleges that defendant violated GBL §349 "by engaging in deceptive acts and practices that in its conduct of business in New York." As proof that defendant engaged in consumer-oriented conduct, plaintiff provides a copy of defendant's webpage, on which defendant advertises itself as a seller of consumer goods, specifically vintage watches. The statement on the webpage reads in relevant part: "Some of the rarest ever made watches have been bought and sold by [defendant]. We are the watch source for the purest of collectors." Thus, it is clear that

defendant's sale of the watch to plaintiff was not a unique, "single-shot transaction." Plaintiff has sufficiently alleged that his dispute with plaintiff is consumer-oriented, as defendant's behavior is likely to affect other "similarly situated" consumers (*Oswego* at 27).

Plaintiff goes on to allege that by representing to plaintiff that the watch would be delivered to plaintiff's mother within a few days of purchase, defendant engaged in deceptive act. "Deceptive acts" are acts "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego* at 25). Here, in his Complaint, plaintiff alleges that, relying on defendant's representations, plaintiff purchased the watch; however, despite its representations, defendant failed to timely deliver the watch (Complaint, ¶¶ 37-39). Finally, plaintiff alleges that as "a direct result of [defendant's] deceptive practices . . . plaintiff has been damaged in an amount not less than [$48,000], plus interest thereon and costs" (*id.* at 40). Thus, plaintiff has alleged that defendant engaged in consumer-oriented conduct that is materially misleading and that plaintiff suffered injury as a result (*City of New York v Smokes-Spirits.Com, Inc.* at 621).

Accordingly, defendant's motion to dismiss plaintiff's fifth cause of action is denied.

Attorneys' Fees

It is well settled that a plaintiff is not entitled to an award of an attorneys' fee absent an agreement between the parties, statutory authorization, or court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]; *Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] citing *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]). Here, it is undisputed that GBL §349 provides for the recovery of attorneys' fees (*see* GBL §349[h]). As plaintiff has sufficiently stated a claim under GBL §349, he has provided a statutory basis for the

recovery of attorneys' fees herein.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing is granted, and the third cause of action is hereby severed and dismissed; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's fourth cause of action for fraud is denied; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's fifth cause of action for violation of GBL §349 is denied; and it is further

ORDERED that the branch of defendant's motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's request for attorneys' fees is granted as to all causes of action except for the claim for attorneys' fees under the fifth cause of action alleging a GBL §349 violation; and it is further

ORDERED that the parties appear for a Preliminary Conference in Part 35, Rm. 438 on Tuesday, February 2, 2010 at 2:15 p.m.; and it is further

ORDERED that defendant 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: January 4, 2010

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

HON. CAROL EDMEAD