

**Performance Comercial Importadora E Exportadora
LTDA v Sewa Intl. Fashions PTV. Ltd.**

2010 NY Slip Op 30857(U)

April 6, 2010

Supreme Court, New York County

Docket Number: 603490/01

Judge: Emily Jane Goodman

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4-13-10

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 603490/2001
PERFORMANCE COMERCIAL
VS.
SEWA INTERNATIONAL FASHIONS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 denied
for attached

FILED

APR 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/6/10

[Signature]
EMILY JANE GOODMAN, U.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 17

-----x
PERFORMANCE COMERCIAL IMPORTADORA E
EXPORTADORA LTDA,

Plaintiff,

Index No. 603490/01

-against-

SEWA INTERNATIONAL FASHIONS PTV. LTD.,
STAR OF INDIA FASHIONS, INC., STAR OF
INDIA, STAR GROUP INDUSTRIES, STARINA,
NOSTALGIA, NOSTALGIA II, LOLA P., and
JOHN DOE CORP.,

Defendants.

-----x

Emily Jane Goodman, J.S.C.:

In this action for breach of contract, defendant Star of India Fashions, Inc. (Star of India), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third cause of action. For the reasons stated below, the motion is denied.

1. Background

According to the complaint, plaintiff Performance Comercial Importadora E Exportadora LTDA (Performance) was in the business of selling women's apparel in Brazil. Plaintiff states that Star of India was a designer and seller of clothing and accessories in the United States and that defendant Sewa International Fashions Ptv. Ltd. (Sewa) was a clothing manufacturer located in India.

Performance alleges that in 1994 it entered into a business relationship with Star of India and Sewa that lasted until 1998. During that time, Performance bought dresses from Star of India and Sewa for resale in Brazil. Performance states that the parties never signed any written agreements. The complaint states that Star of India was Sewa's agent at all time during the parties' relationship.

Performance states that in March of 1998, it ordered 9,300 dresses at a total price of \$156,600. Defendants allegedly promised to deliver ten sets of dress samples and thirty print swatches by June 14, 1998, in time for use at a summer fashion show. Plaintiff states that defendants knew that the delivery was important to plaintiff because approximately 40% of sales for the season were made during the fashion show, through the use of the representative samples and swatches.

Performance states that it received a non-conforming delivery on June 25, 1998, consisting of two sets of eight styles of dresses and ten print swatches. It states that it requested an expedited delivery of the remaining samples and swatches, as well as the dresses themselves. Defendants allegedly refused, stating that a change of shipping method was not possible.

Performance further asserts that it received a second delivery on September 9, 1998 which did not contain the required fabric

swatches. The 9,300 dresses were delivered on October 11, 1998.

Performance states that it canceled the parties' agreement on October 19, 1998 after Star of India and Sewa refused to adjust the purchase price.

Performance commenced this action in December of 2001. In an order dated January 8, 2008, this court granted, on consent of the parties, Star of India's motion for summary judgment dismissing the fourth cause of action, for negligence. The court also denied the motion with respect to the third cause of action, with leave to renew after discovery. In the meantime, Performance commenced a separate action in this court against Sewa based on the same transaction at issue here. *Performance Comercial v Sewa International*, 601431/2004, (Sewa Action). In an order dated February 8, 2005, Justice Richard Lowe granted plaintiff's motion for a default judgment and a judgment was entered on July 8, 2005 for \$650,000, plus interest from September 15, 1998 in the amount of \$398,761.64.

Star of India now moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third cause of action, which is for breach of contract. In this cause of action, Performance alleges that due to Star of India's failure to timely deliver the samples and swatches, Performance experienced a decline of approximately 40% of the orders usually and customarily taken by

it.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Grob v Kings Realty Associates, LLC*, 4 AD3d 394 (2d Dept 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

2. Agency

Initially, Star of India argues that the third cause of action must be dismissed because Star of India was a disclosed agent for Sewa and therefore is not responsible for the contract between plaintiff and Sewa. Star of India relies on several allegations in the complaint in which plaintiff describes Star of India as the agent for Sewa.

"When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound." *Simmons v Washing Equipment Technologies*, 51 AD3d 1390, 1392 (4th Dept 2008), quoting *Weinreb v Stinchfield*, 19 AD3d 482 (2d Dept 2005); see *Matter of Anderson v Pods, Inc.*, 70

AD3d 820 (2d Dept 2010).

It is undisputed that the complaint describes Star of India as Sewa's agent. However, the complaint does not clearly allege whether such agency was disclosed at the time of the transaction at issue.

Moreover, Performance has submitted documentary evidence (including Exhibits A, I, J and K), as well as deposition testimony of its president, Daniel Mendes, which raise factual questions as to whether the parties intended that Star of India, as the designer of the dresses, would also be contractually bound by the parties' agreement. Among other things, Mendes stated at his deposition that, at the time of the transaction, he understood that Star of India and Sewa were both purchasers and that he was not aware of an agency relationship. Therefore, defendant is not entitled to summary judgment dismissing this cause of action on these grounds.

3. Statute of Frauds

Star of India also moves to dismiss the third cause of action on the grounds that the alleged agreement does not comply with the statute of frauds as set forth in Uniform Commercial Code § 2-201.

UCC § 2-201 provides that:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is

some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Star of India argues that there is no writing signed by it which satisfies the statute of frauds. However, Performance has submitted documentary evidence, including letters between the parties, which supports its assertion of the existence of an agreement between them. In one such letter, dated March 6, 1998, Star of India's vice-president, Vishi Arya, thanks Mendes for placing an order of 9300 items at a price of \$156,600. The letter further states "I have placed the order with the factory." The letterhead includes the name "Star of India."

Such evidence, which includes quantity and price, the name of the buyer and the seller, and which is signed by the seller, is sufficient to permit Performance "to go forward and prove its allegations." *Bazak Intl. Corp. v Mast Industries, Inc.*, 73 NY2d 113, 124 (1989); see *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 (1st Dept 1997).

4. Election of Remedies

Star of India contends that Performance is precluded from maintaining the instant action because it has already obtained a default judgment against Sewa in the Sewa Action. However, Star of India was not a party to the Sewa Action and Star of India has not demonstrated that the entry of a default judgment against Sewa bars the maintenance of the instant action against Star of India. Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

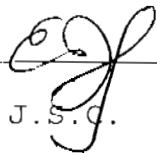
ORDERED that the parties are to appear on June 14, 2010 for trial in Room 422, at 60 Centre Street at 10AM.

DATED: April 6, 2010

This Constitutes the Decision and Order of the Court.

FILED
APR 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J.S.C.

EMILY JANE GOODMAN