

**Pastavilla Makarnacilik Sanyi ve Ticaret, AS v  
Wakefern Food Corp.**

2010 NY Slip Op 31285(U)

May 14, 2010

Sup Ct, Nassau County

Docket Number: 012016/06

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

\_\_\_\_\_  
PASTAVILLA MAKARNACILIK SANYI  
ve TICARET AS and TAT Konserve Sanayi AS,

Plaintiffs,

INDEX No. 012016/06

MOTION DATE: April 6, 2010  
Motion Sequence # 001

-against-

WAKEFERN FOOD CORP. and VILLA  
MARIA PRODUCTS,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affidavit in Support..... X
- Affidavit in further Support..... X
- Memorandum of Law..... X
- Reply Brief in further Support..... X

This motion, by the defendant Wakefern Food Corp., pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it, is **granted** in part and **denied** in part.

The plaintiffs Pastavilla Makarnacilik Sanayi ve Ticaret, AS and TAT Konserve Sanayi, AS, are Turkish companies which sell pasta and spaghetti products in the United States and elsewhere [collectively "Pastavilla"]. In early 2003, Pastavilla entered into an agency agreement with co-defendant Villa Maria Products – a New York corporation –

PASTAVILLA

Index no. 012016/06

pursuant to which it shipped goods to Villa Maria for sale to customers in the United States ["Villa Maria"] (Cmplt., ¶¶ 4-7; Unalp Dep., 32-34).

Co-defendant Wakefern Food Corp ["Wakefern"] is a retailer-owned cooperative, headquartered in New Jersey whose members operate over 200 supermarkets under various trade names, including the "Shoprite" line of stores (Henig Aff., ¶ 2).

In 2002 and 2003, Wakefern entered into a business relationship with Villa Maria, under which Wakefern agreed to purchase certain pasta products from Villa Maria (Henig Aff., ¶ 11).

Thereafter, Villa Maria shipped pallets of pasta to Wakefern's member stores, for which Wakefern paid invoice sums cumulatively amounting to approximately \$300,767.31. In early 2003, however, Wakefern's business relationship with Villa Maria terminated (Henig Aff., ¶¶ 11,12).

According to Pastavilla, at approximately the same time the Villa Maria-Wakefern transactions were ongoing, *i.e.*, in 2002 and 2003, it shipped pasta goods to Villa Maria with an invoiced value of \$360,453.65, but received only partial payment, leaving an alleged balance of some \$203,795.43 (Cmplt., ¶¶ 11-12).

Pastavilla further alleges that "there came a time when there was a [separate and direct] transaction between \* \* \* [Pastavilla and Wakefern]," without Villa Maria being involved (Unalp Aff., ¶¶ 3-4).

Specifically, the complaint alleges that Pastavilla entered into two oral sales agreements with Wakefern pursuant to which pasta goods were to be delivered and invoiced directly to Wakefern. Neither of these oral agreements is described with any particularity in Pastavilla's complaint, *i.e.*, there is no factual context supplied which describes how the contract arose or any of its specific terms or conditions (*e.g.*, Cmplt., ¶¶ 12-14; Unalp Dep., 37-38).

Nonetheless, Pastavilla alleges that during 2003, it shipped goods directly to Wakefern valued at \$162,816.00 (Pltffs' Exh., "B"; Cmplt., ¶¶ 13-14). In support of this claim, plaintiff submits two invoices, Invoice 243308 dated April 4, 2003 in the amount of \$101,760 and Invoice 243535 dated August 5, 2003 in the amount of \$61,056. Both invoices show Wakefern Food Corp. at the top of the invoice as the "sayin" and Villa Maria in the middle of the invoice as the "marka." Defendant Wakefern does not appear to deny having received the goods corresponding to those invoices.

PASTAVILLA

Index no. 012016/06

Pastavilla contends that at some point thereafter, it requested payment from Wakefern, but that Wakefern rejected its request (Cmplt., ¶ 14). Instead, Wakefern advised the plaintiffs that it had already paid Villa Maria over \$300,000.00 for whatever foreign pasta products it had received and that it would not be making any additional payments (Cmplt., ¶¶ 14-15; Unalp Aff., ¶¶ 5-6).

Pastavilla commenced the within action as against Wakefern and Villa Maria to recover the sums allegedly due and owing on the various invoices referenced in the complaint. The complaint contains five causes of action, four of which sound in breach of contract and fraud. The fifth cause of action, which does not expressly identify a specific theory of recovery, merely alleges in general, that the defendants' collective actions caused Pastavilla "significant financial losses" (Cmplt., ¶¶ 18-27).

Wakefern has answered and denied the material allegations of the complaint and interposed various affirmative defenses, including defenses to the effect that the fraud claims are fatally lacking in particularity (CPLR 3016[b]), and that Pastavilla's causes of action fail to state actionable claims (Ans., ¶¶ 1, 5).

According to Wakefern, Villa Maria has not appeared in the action (*see*, Wakefern Brief at 5, fn 1). Discovery has been conducted and Wakefern now moves for summary judgment dismissing the complaint insofar as asserted against it.

Wakefern asserts that it has never had any communications – oral, written or otherwise with the plaintiffs; that it dealt exclusively with, and paid Villa Maria for, any pasta products it purchased; and that it never received any of the invoices relied upon by the plaintiffs.

On the record presented, Wakefern has established its *prima facie* entitlement to judgment as a matter of law with respect to the Pastavilla's breach of contract and fraud claims.

More particularly, Wakefern has submitted the affidavit of its then Procurement Manager, Stephan Henig, who asserts that his job duties included overseeing various Wakefern procurement managers – the individuals responsible for negotiating purchase agreements with outside vendors. According to Henig, he examined Wakefern's internal records and also reviewed Pastavilla's claims with Wakefern's procurement managers.

Upon concluding these inquiries, Henig ascertained that there were no internal

PASTAVILLA

Index no. 012016/06

records evidencing any “orders, agreements” – or any communications at all for that matter – with Pastavilla (Henig Aff., ¶¶ 8-11). Henig further alleges that during the 2002 to 2003 time period, Wakefern had a “business relationship” with Villa Maria and “paid...all of the invoices that it has received from Villa Maria” (Henig Aff., ¶¶ 8-11).

Additionally, Wakefern has submitted excerpts from the deposition of Pastavilla’s Helga Unalp, who testified that “for all intents and purposes,” Villa Maria was its “representative to customers” and its “sole communicator” with customers in the United States (Unalp Dep., 35). Unalp also testified that Pastavilla had received orders from Wakefern through Villa Maria, and there was no “situation” in which Pastavilla got orders directly from the U.S. without getting it through Villa Maria (Unalp Dep., 32-33).

However, Unalp subsequently testified as to a “transaction between Pastavilla and Wakefern,” in which the goods were shipped directly to Wakefern (Unalp Dep. 39). Unalp testified that with respect to this transaction, “Villa Maria remained the agent of Pastavilla” (Unalp Dep. 39).

Unalp does not describe or identify any direct, pre-delivery discussions, communications or contacts between Pastavilla and Wakefern. Nor has Pastavilla produced an affiant who has described precisely how Pastavilla’s purportedly binding and direct agreement with Wakefern was concluded absent Villa Maria’s involvement. In any event, a mere request for payment does not establish that an actionable contractual arrangement had been reached directly with Wakefern.

It is settled that “[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based” (*Atkinson v. Mobil Oil Corp.*, 205 AD2d 719, 720 *see*, *Peters v. Accurate Bldg. Inspectors Div. of Ubell Ent., Inc.*, 29 AD3d 972, 973; *Rattenni v. Cerreta*, 285 AD2d 636, 637). “Vague and conclusory allegations” will not suffice (*Gordon v. Dino De Laurentiis Corp.*, 141 AD2d 435, 436 *see*, *Island Surgical Supply Co. v. Allstate Ins. Co.*, 32 AD3d 824; *Fowler v. American Lawyer Media, Inc.*, 306 AD2d 113). Nor will “[l]iability for breach of contract \* \* \* lie absent proof of a contractual relationship or privity between the parties” (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 AD3d 85; *Simplex Grinnell v. Ultimate Realty, LLC*, 38 AD3d 600; *M. Paladino, Inc. v. Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516).

Pastavilla’s opposing submissions similarly fail to support its fraud theories of recovery. To succeed on a fraud claim, a party must establish “a material

PASTAVILLA

Index no. 012016/06

misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance \* \* \* and damages” (see, Ross v Louise Wise Servs., Inc., 8 NY3d 478, 488 [2007]; Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]). Moreover, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)” (Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]; Financial Services Vehicle Trust v. Saad, \_\_\_ AD3d \_\_\_, 2010 WL 1716458 [2<sup>nd</sup> Dept. 2010]).

Nor will a fraud claim arise when the only fraud charged relates to a breach of contract or where it is merely alleged “that a defendant did not intend to perform a contract” when it was made (Gordon v. Dino De Laurentiis Corp., *supra*, 141 AD2d at 436 *see generally*, Biancone v Bossi, 24 AD3d 582, 583).

In the present case, the complaint’s fraud allegations are wholly conclusory and in relevant part, merely lump the defendants together “without any specification as to the precise” fraudulent conduct attributed to each (Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co., 84 AD2d 736), *i.e.*, without identifying the discrete, fraudulent acts supposedly committed by the separately named parties (*e.g.*, Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co., 84 AD2d 736; Henry v. City of New York, \_\_\_ F.Supp2d \_\_\_, 2007 WL 1062519 at 5 [E.D.N.Y. 2007] *cf.*, Daly v. Kochanowicz, 67 AD3d 78, 90-91).

Thus, the complaint alleges simply that the “defendants’ ” actions “in receiving products and failing to pay for them were fraudulent” – and – that the defendants’ “false statements” “were the result of fraudulent behavior” (Cmplt., ¶¶ 20, 23-24). Significantly, the complaint never actually identifies any specific fraudulent statements – much less “who made \* \* \* [them,] \* \* \* when they were made” (Daly v. Kochanowicz, *supra*, 67 AD3d 78, 90-91). Nor is it explained why, as to Wakefern in particular, these statements rise to the heightened level of fraud (*e.g.*, Moore v. Liberty Power Corp., LLC, \_\_\_ AD3d \_\_\_, 897 NYS2d 723, 725 [2<sup>nd</sup> Dept. 2010]; Morales v. AMS Mortg. Services, Inc., 69 AD3d 691; Daly v. Kochanowicz, *supra*) (Cmplt., ¶¶ 20, 23-24).

Although summary judgment is a drastic remedy (Andre v. Pomeroy, 35 NY2d 361 [1974]), nevertheless “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue of fact (see, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381, 383 [2004]). Accordingly, defendant Wakefern Food Corp.’s motion for summary judgment is **granted** to the extent of dismissing plaintiff’s fraud and breach of contract claims.

However, with respect to Invoices 243308 and Invoice 243535 described above,

PASTAVILLA

Index no. 012016/06

plaintiff has shown a triable issue of fact as to a cause of action for goods sold and delivered or quasi-contract. While defendant Wakefern previously dealt with Villa Maria, plaintiff appears to have expected payment with respect to the goods which were shipped to Wakefern directly. Although defendant claims to have paid all invoices rendered by Villa Maria, it has not established prima facie that its payments covered the invoices rendered by plaintiff. Moreover, because Wakefern's business relationship with Villa Maria terminated in early 2003, there is an issue of fact as to whether Wakefern reasonably believed that Villa Maria was authorized to receive payments on plaintiff's behalf.

Accordingly, defendant Wakefern's motion for summary judgment dismissing the complaint is **denied** as to plaintiff's quasi-contract or goods sold and delivered claim.

The foregoing constitutes the decision and order of the Court.

Dated 14 MAY 2010

  
J.S.C.

**ENTERED**  
MAY 18 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE