

**Les Collections Shan Inc. v Great Shapes of  
Albertson, Inc.**

2010 NY Slip Op 32507(U)

September 9, 2010

Supreme Court, Nassau County

Docket Number: 4596/08

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

HON. THOMAS P. PHELAN,

*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

LES COLLECTIONS SHAN INC.,

Plaintiff(s),

-against-

GREAT SHAPES OF ALBERTSON, INC.,

Defendant(s).

ORIGINAL RETURN DATE:06/24/10  
SUBMISSION DATE: 08/04/10  
INDEX No.: 4596/08

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Motion by plaintiff pursuant to CPLR 3212 for summary judgment in its favor and dismissal of defendant's counterclaim is granted to the following extent: defendant's counterclaim and affirmative defenses are dismissed and plaintiff is granted summary judgment on the issue of liability on its claim for breach of contract. The amount of plaintiff's damages shall be determined at trial.

This is an action for breach of contract. Plaintiff is a Canadian manufacturer of high-end swimwear. Defendant is a swimwear retailer, with a number of stores in New York. In March 2007, defendant issued purchase orders to Baltex, plaintiff's representative in New York, for plaintiff's swimwear (Sigouin affidavit, ¶ 5). Plaintiff filled the orders, and defendant signed for the merchandise without complaint. Defendant failed to pay the invoices submitted by plaintiff, whereupon plaintiff commenced this action. According to plaintiff the balance due is \$25,580.77, and this amount represents a 20% reduction pursuant to a percent discount policy.

Defendant denies that it has breached the contract, alleges six affirmative defenses and further alleges a counterclaim that the parties' agreement included the right to return unsold merchandise. Consequently, according to defendant's counterclaim, plaintiff has breached the contract by refusing to accept the return of unsold merchandise.

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*Id.*).

A cause of action for breach of contract requires proof of the following elements: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendant's breach of the contract; and (4) plaintiff's resulting damages (see *JP Morgan Chase v JH Elec of New York, Inc.*, 69 AD3d 802 (2d Dept. 2010)).

It is well established that essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction; the agent cannot by his own acts imbue himself with apparent authority (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *ER Holdings LLC v 122 WPR Corp.*, 65 AD3d 1275 [2d Dept. 2009]; *1230 Park Associates LLC v Northern Source, LLC*, 48 AD3d 355 [1<sup>st</sup> Dept. 2008]; *150 Beach 120<sup>th</sup> Street Inc. v Washington Brooklyn Ltd. Partnership*, 39 AD3d 722 [2d Dept. 2007]).

Defendant admits that it no longer has the email by which it placed the purchase order which is the subject of this action (Weinberg affidavit, Ex. E). This is not a problem, because it is undisputed that plaintiff delivered the goods at issue to defendant, and defendant admits that the goods were received in a satisfactory manner (Response to Interrogatories, #5). Accordingly, plaintiff has established a contract. Plaintiff has further established its performance under the contract. The issue presented is whether plaintiff granted defendant the right to return unsold merchandise as part of that contract or whether defendant has breached the contract.

Plaintiff's vice president testified that plaintiff accepts returns of its goods only if the goods are defective (Sigouin Transcript, pp. 15-19). It submits a document dated August 11, 2003, entitled AGREEMENT FOR 2004 COLLECTIONS (Movant's Ex. A). This document contains the following language:

Merchandise will not be exchanged or refunded under any circumstance apart for defective items which must be reported and approved by Shan within 8 days following reception of the merchandise.

This document is signed by defendant's president, Joel Weinberg. In addition, plaintiff testified that it never authorized Baltex to make deals for it (Sigouin transcript, p. 22).

While the AGREEMENT FOR 2004 COLLECTIONS is not conclusive as to its application in 2007, it is some evidence of plaintiff's policy, as well as evidence that defendant had some awareness of this policy in 2003. When supplemented by plaintiff's deposition transcript, plaintiff's evidence presents a *prima facie* case that its agreement with defendant did not include the right to return unsold merchandise, and therefore defendant is in breach.

In opposition defendant tries to raise a triable issue of fact based upon past experience with plaintiff, industry practice and representations by the president of Baltex. Unfortunately, no proof is presented. In his affidavit, notarized February 20, 2010 (Ex. E), defendant's president admits that defendant's records only go back to 2002, and that there are no records of any returns to plaintiff made during that period. Defendant's attempt to show an industry practice or custom (Def't's Ex. D) consists of nothing more than documents showing returns or exchanges without explanation. While some of the documents show returns to "Shan Studio," this was a separate entity controlled by Baltex (see Sigouin transcript, p. 31; Weinberg affidavit, ¶ 10).

As to alleged representations by Jim Post of Baltex in conversations and emails, such representations are inadmissible hearsay because they are out-of-court statements offered to prove the truth of the matter asserted (see *People v Goldstein*, 6 NY3d 119, 127 [2005], cert. den sub nom *New York v Goldstein* 547 US 1159 [2006]). Inadmissible hearsay, standing alone, is insufficient to raise a triable issue of fact (*Giulini v Union Free School District No. 1*, 70 AD3d 632 [2d Dept. 2010]; *Stock v Otis Elevator Co.*, 52 AD3d 632 [2d Dept. 2008]).

Finally, in its answer and counterclaim defendant never mentions Baltex or any claim that Baltex acted as plaintiff's agent. The Court understands that Baltex has filed for bankruptcy. In his email to plaintiff dated November 9, 2007 (annexed as an exhibit to defendant's response to interrogatories), Mr. Weinberg admits that the agreement for returns was with Baltex and "since Baltex was no longer able to offer any continuity of merchandise" and "we were left with broken groups which are not viable as a presentation in our stores," defendant sought a "compromise" with plaintiff. In short, defendant has failed to demonstrate that any words or conduct by plaintiff gave rise to its claim that Baltex was plaintiff's agent. Words and conduct by Jim Post of Baltex do not suffice.

For the record, in opposition to plaintiff's motion for summary judgment, defendant has failed to address its six affirmative defenses of failure to state a cause of action, payment, improper party, statute of frauds, lack of authority to do business in New York and failure to mitigate damages. In any event each affirmative defense is either inapplicable or without merit and would otherwise fail to create an issue of fact as to plaintiff's motion for summary judgment.

On the matter of damages, the Court has struggled to follow plaintiff's analysis without success. Because an assessment of damages requires proof of the line catalog price for various goods of

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the plaintiff, less the 20% discount, but not including goods from Baltex or "BE CREATIVE," the better course is for the issue of damages to be determined at trial.

Based on the foregoing, plaintiff is entitled to summary judgment as to defendant's liability for breach of the subject contract. Court records indicate that this matter is scheduled at the DCM Trial Part on September 15, 2010, and shall proceed on the issue of damages only.

This decision constitutes the order of the court.

Dated: 9-9-10

  
HON THOMAS P. PHELAN  

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THOMAS P. PHELAN, J.S.C.

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**ENTERED**  
SEP 10 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE