

Lyon-Wall v Contract Workroom, Inc.

2011 NY Slip Op 33864(U)

August 16, 2011

Sup Ct, New YorkCounty

Docket Number: 116312/2010

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWETZER
J.S.C. Justice

PART 45

Scott Lyon Wall, et al.

INDEX NO. 116312/10

- v -
Contract Workroom, Inc.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiffs to strike defendant's answer in its entirety and to impose sanctions, costs and attorneys fees is DENIED, but defendant is required to serve an amended answer within 30 days;

Defendant's cross-motion to voluntarily withdraw its counterclaim is GRANTED;

Defendant's cross-motion seeking to dismiss plaintiffs' complaint with respect to causes of action for fraud, injunctive relief, deceptive and unfair business practices (NYGBL § 349), tortious interference with business relations, tortious interference with contract and damage to business reputation is GRANTED;

Defendant's cross-motion to dismiss claims by Ariadne Corporation for lack of capacity to sue is DENIED

per the attached Decision and Order.

Dated: August 16, 2011

Melvin L. Schwetzer
MELVIN L. SCHWETZER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

fraud, injunctive relief, deceptive and unfair business practices in violation of New York General Business Law § 349, tortious interference with business relations, tortious interference with contract, damage to business reputation and all relief asserted by plaintiff Ariadne.

Background

This action arises out of an agreement between plaintiffs and defendant Contract Workroom, Inc. (CWI or defendant) for the purchase by Lyon-Wall of certain art designs produced by the defendant.

Lyon Wall is an individual engaged in business as an investor in, and exhibitor and publisher of, works of fine art. Ariadne is a New York corporation, alleged to have the sole rights to license works of art conferred upon Lyon-Wall. CWI is a New York corporation, owned by Janet Girard (Girdard) engaged in business as a vendor of specially-manufactured constructions for designers, artists and architects.

Plaintiffs allege that the parties entered into an agreement as of August 12, 2010 (the Agreement) whereby CWI agreed to manufacture and produce an edition of scrim designs inspired by the artist Guillermo Kuitca (Kuitca) (the Scrim). Plaintiffs further allege that the parties agreed that CWI would manufacture nine sets of scrim images, each set consisting of three scrim images (each set, a Scrim Set), totaling 27 Scrim in its entirety. (Complaint ¶9). In exchange, plaintiffs agreed to pay CWI \$2,700 per each Scrim Set, for a total price of \$21,600 for the entire 27 Scrim. (The Contract Price) (Complaint ¶15). Plaintiffs allege that the parties agreed plaintiffs would provide CWI with a deposit equal to 50% of the Contract Price before CWI commenced production of the Scrim Sets. Plaintiffs further allege that, on August 25, 2010, the parties modified the terms of the Agreement orally, agreeing (1) to reduce the initial deposit to \$1,350, representing 50% of the price of one Scrim Set; and (2) providing plaintiffs

with the right to approve the initial Scrim Set produced by CWI, on the condition that the manufacture of the remaining eight Scrim Sets would commence after plaintiffs' notified CWI of their approval of the initial Scrim Set. (Complaint ¶17).

The complaint further alleges that during a meeting on September 27, 2010, plaintiffs approved the initial Scrim Set manufactured by CWI and authorized CWI to commence production of the remaining eight Scrim Sets. Plaintiffs further allege that plaintiff paid CWI the remaining balance of \$1,350 for the initial Scrim Set, totaling \$2,700 for the entire initial Scrim Set. (Complaint ¶21). The complaint further alleges that on September 30, 2010, CWI breached the Agreement by advising plaintiffs in writing of its refusal to produce the remaining eight Scrim Sets unless plaintiffs agreed to pay \$7,500 for the production and manufacture of each remaining Scrim Set. (Complaint ¶25).

Plaintiffs further contend that CWI failed to return certain items and materials loaned by plaintiffs to CWI in contemplation of the Agreement. Such items are specified in the complaint as the following: (1) an authentic scrim produced by Kuitca (the Kuitca Maquette); (2) a replica of the Kuitca Maquette (the Kuitca Duplicate), allegedly manufactured by CWI; (3) three scrim produced by CWI for the benefit of plaintiffs (the Prototypes); (4) various raw and finished materials provided to CWI by plaintiffs, through its subcontractor Dye-Namix, Inc. for use in manufacturing the Scrim Sets (the Materials) and (5) a domestic item commissioned on behalf of the late artist Louise Bourgeois (the Bourgeois Window Blind). (Complaint ¶¶8-14).

Plaintiffs' first cause of action requests a declaratory judgment declaring that CWI be obligated to complete the manufacture and delivery of nine Scrim Sets in their entirety for a total value of \$21,600 and further directing CWI to return to the plaintiff, the Kuitca Maquette, the Kuitca Duplicate, the Prototypes, the Bourgeois Window Blind and the Materials. (Complaint

¶¶ 31-82). The second cause of action requests specific performance seeking a preliminary injunction directing CWI to perform its obligations under the Agreement. The third cause of action requests injunctive relief directing CWI, and all persons acting under its direction or control, to return to the plaintiffs, in good condition, the Kuitca Maquette, the Kuitca Duplicate, the Prototypes, the Bourgeois Window Blind and the Materials. The complaint lists two claims as a fourth cause of action: (1) a claim for return of chattel alleges CWI's wrongful retention of the Kuitca Maquette, the Kuitca Duplicate, the Prototypes, the Bourgeois Window Blind and the Materials; and (2) a claim alleging conversion concerning CWI's alleged unauthorized control and dominion over the Kuitca Maquette, the Kuitca Duplicate, the Prototypes, the Bourgeois Window Blind and the Materials. The fifth cause of action alleges breach of contract. The sixth cause of action alleges fraud. The seventh cause of action alleges that CWI's "broken contractual agreements and misrepresentations," that induced performance by plaintiffs, constitutes deceptive business practices under General Business Law § 349. The eighth cause of action alleges tortious interference with business relations. The ninth cause of action alleges tortious interference with contract. The tenth cause of action alleges damage to plaintiffs' business reputation.

CWI answered the complaint by denying the material allegations, and interposed 31 affirmative defenses, including alleging that CWI is not in breach of any contract with plaintiffs. CWI also interposed a counterclaim for defamation.

Discussion

Plaintiffs are seeking dismissal of CWI's counterclaim for defamation pursuant to CPLR 3211, contending that the counterclaim fails to comply with the specific pleading requirements of CPLR 3016(b). CWI cross moves for an order granting leave to withdraw the counterclaim

without prejudice. CWI, in its papers supporting the cross-motion, acknowledges that the counterclaim does not plead the defamatory statements alleged to have been made by Lyon-Wall with the required specificity. CWI offered to voluntarily withdraw the counterclaim, without prejudice to CWI's right to resubmit the counterclaim to comply with the pleading requirements of CPLR 3016(b). Plaintiffs oppose, and argue that CWI should not be permitted to withdraw its defective counterclaim. Plaintiffs argue that CWI twice rejected plaintiffs' good faith written requests to withdraw its counterclaim. Plaintiff requests costs and sanctions against CWI.

The court grants that branch of CWI's cross-motion to voluntarily withdraw its counterclaim for defamation, without prejudice. Plaintiffs have not shown that the withdrawal of the counterclaim for defamation will cause them prejudice, nor are there any other special circumstances warranting that CWI be compelled to pursue its counterclaim. *See Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31 (1st Dept 2001). Accordingly, that branch of plaintiff's motion seeking dismissal of CWI's counterclaim for defamation pursuant to CPLR 3211 has been rendered moot and is denied.

The court denies plaintiffs' request for costs and sanctions against CWI. Although plaintiffs contend that CWI frivolously failed to withdraw its counterclaim, plaintiffs have failed to demonstrate any basis for sanctions. Frivolous conduct has been defined as conduct "(1)...completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2)...undertaken primarily to delay or prolong the resolution of the litigation, or to harass, or maliciously injure another; or (3)...asserts material factual statements that are false." 22 NYCRR 130-1.1[c]. Plaintiffs have failed to demonstrate that CWI's refusal to withdraw its counterclaim was completely without merit, or

designed to harass or maliciously injure plaintiff. *See Alter v Levine*, 57 AD3d 923, 925 (2d Dept 2008) (court properly denied request for sanctions for failing to withdraw counterclaim).

That branch of plaintiff's motion which seeks to require that CWI serve an amended answer pursuant to CPLR 3014 is granted.

It is plaintiffs' contention that CWI alleges, in the "Statement of Facts" of its answer, ¶¶ 1-29, "well over one hundred separate purported facts, in nearly sixty often compound or run-on sentences." (Plaintiffs' Memorandum of Law, p. 2). The CPLR requires that pleadings consist of "plain and concise statements in consecutively numbered paragraphs." CPLR 3014. "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013; *see also Kramer v Carl M. Loeb, Rhoades & Co.*, 20 AD2d 634 (1st Dept 1964); *Foley v D'Agostino*, 21 AD2d 60 (1st Dept 1964). These requirements must be read in light of CPLR 3026 which provides for the liberal construction of pleadings and states that "[d]efects shall be ignored if a substantial right of a party is not prejudiced."

The format of a responsive pleading, however, must comply with the requirements of CPLR 3013 and 3014. Denials should be in separate paragraphs and consecutively numbered; affirmative defenses must always be stated and numbered. Denials and affirmative defenses should not be placed in the same paragraph. The preferred order for a responsive pleading is to set out the denials and admissions first, followed by affirmative defenses, and finally any counterclaims. *See The City of New York v Luckenbach Steamship Co.*, 34 Misc. 2d 56 (N.Y. Sup. 1962); *Brooklyn Trust Co. v Wheeler*, 81 NYS2d 762 (N.Y. Sup. 1948); *Koester v Koester*,

254 AD2d 756 (2d Dept 1938); *see generally* Weinstein, Korn & Miller, New York Practice CPLR § 3018.92 (2d ed).

Tested by these standards, the answer is poorly organized and fails to comply with CPLR 3013 and 3014. Paragraphs one through 29 of the answer does not make clear which allegations of the complaint are admitted and which are denied. *See Koester v Koester*, 254 AD2d at 756, *supra*. CWI failed to answer responsively to the numbered allegations of the complaint in paragraphs one through 29, “and thus renders the trial of the action more difficult for the court as well as counsel.” *See The City of New York v Luckenbach Steamship Co.*, 34 Misc. 2d at 57, *supra*. Moreover, the verbiage is so “prolix” that the court “would be compelled to scrutinize it line by line in quest for facts upon which to base a determination as to its sufficiency...the court should not be consumed in wading through this mass of verbiage in order to save the pleading.” *Meyers v Huschle Bros.*, 75 NYS2d 350, 353 (N.Y. Sup. 1947). The assertions in paragraphs one through 29 are “loosely drawn, verbose and poorly organized, and totally at variance with the requirements of CPLR 3014.” *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 (1st Dept 1981).

Where a party has failed to comply with the pleading requirements of CPLR 3014, the appropriate remedy is dismissal of the pleading with leave to replead. *See Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, *supra*; *Jaffe v Rubenstein*, 24 AD2d 752 (1st Dept 1965), *appeal dismissed*, 21 NY2d 72 1(1968); *see generally* Siegel, NY Prac. § 212, at 308 (2d ed.).

Accordingly, the answer is dismissed and CWI is granted leave to replead within 30 days of the entry of this Decision and Order.

That branch of plaintiffs' motion as it relates to striking paragraphs one through 29 of CWI's answer, as prejudicial pursuant to CPLR 3024(b), thus is moot, and is denied.

The branch of CWI's cross-motion seeking to dismiss plaintiffs' complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action with respect to causes of action asserted for fraud, injunctive relief, deceptive and unfair business practices in violation of New York General Business Law § 349, tortious interference with business relations, tortious interference with contract and damage to business reputation is granted.

When evaluating a motion to dismiss pursuant to CPLR 3211(a)(7), the court must construe the pleading liberally, "accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." *Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 (2d Dept 1999); *Leon v Martinez*, 84 NY2d 83 (1994). The court will deny the motion "if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). "The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Pepler v Coyne*, 33 AD3d 434, 435 (1st Dept 2006), citing *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990); *see also Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 (1st Dept 1978).

Turning to that branch of CWI's cross motion which seeks dismissal of Plaintiffs' third cause of action, although it is permissible to plead a cause of action for a permanent injunction (*see Elow v Svenningsen*, 58 AD3d 674 (2d Dept 2009)), permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted by plaintiffs.

Here, plaintiffs request injunctive relief directing CWI, and all persons acting under its direction or control, to return to plaintiffs, in good condition, the Kuitca Maquette, the Kuitca Duplicate, the Prototypes, the Bourgeois Window Blind and the Materials. The cause of action for injunctive relief is subsumed under, and duplicative of, plaintiffs' fourth cause of action for return of chattel. The claim for injunctive relief arose from the same facts and alleges similar damages as the cause of action for return of chattel. Accordingly, the third cause of action alleging injunctive relief is dismissed. *See Town of Wallkill v Rosenstein*, 40 AD3d 972 (2d Dept 2007); *In Kine Pharm. Co. v Coleman*, 305 AD2d 151 (1st Dept 2003).

"To plead a prima facie case of fraud the plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury. In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016[b] that the circumstances constituting the wrong shall be stated in detail when a cause of action based upon fraud is alleged." *Lanzi v Brooks*, 54 AD2d 1057, 1058 (3d Dept 1976), *aff'd* 43 NY2d 778 (1977); *see* CPLR 3016[b].

Here, plaintiffs have alleged that Girard knowingly misled them by making false representations that she would produce and manufacture the Scrim Sets and that, but for these representations, plaintiff would not have entered into the Agreement. However, the intent not to perform the conditions of a contract cannot survive a separate cause of action for fraud where the breach of the contract also has been alleged. *See Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). Since plaintiffs have interposed claims of breach of contract relating to the Agreement, the sixth cause of action for fraud based upon such breaches must be dismissed.

Regarding the seventh cause of action, under General Business Law § 349(a), deceptive acts or practices in the conduct of any business in this state are unlawful. *See Karlin v IVF Am.*,

93 NY2d 282 (1999); *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 (1995). The essential elements of a cause of action alleging consumer fraud in violation of General Business Law § 349 are that the defendant engaged in a consumer-oriented misleading practice and that the plaintiff was injured thereby. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 (1995); *Teller v Bill Hayes, Ltd.*, 213 AD2d 141 (2d Dept 1995), *appeal dismissed* 87 NY2d 937 (1996).

Here, plaintiffs' allegations, liberally construed, at best show a private contract dispute over the purchase by plaintiffs of certain art designs allegedly manufactured and produced by CWI, not conduct affecting the consuming public at large, and thus do not state a cause of action under General Business Law § 349. *See New York Univ. v Continental Ins. Co.*, 87 NY2d 308, *supra*; *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353, 354 (1st Dept 2005). Therefore, the seventh cause of action alleging deceptive business practices under General Business Law § 349 is dismissed.

With respect to plaintiffs' eighth cause of action for tortious interference with business relations, in order to state an actionable claim for tortious interference with business relations, a plaintiff must allege: (1) the existence of a business relationship with a third party; (2) that the defendant, having knowledge of such relationship, intentionally interfered with it; (3) that the defendant either acted with the sole purpose of harming the plaintiff or by means that were dishonest, unfair, or improper, and (4) a resulting injury to the plaintiff's business relationship. Furthermore, plaintiff must allege that defendant directly interfered with the business relationship by directing "some activities towards the third party and convinc[ing] the third party not to enter into a business relationship with plaintiff." *Fonar Corp. v Magnetic Resonance Plus, Inc.*, 957 F Supp 477, 482 (SDNY 1997) (citing *G.K.A. Beverage Corp. v Honickman*, 55

F3d 762 (2d Cir 1995); *see also Zdenek Marek v Old Navy [Apparel] Inc.*, 348 F Supp 2d 275, 279-280 (SDNY 2004); *McQueen v Kenyon & Kenyon*, 271 AD2d 511, 512 (2d Dept 2000).

“Conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship. *Carvel Corp. v Noonan*, 3 NY3d 182 (2004).

Here, plaintiffs do not allege any act by CWI directed toward any third party to induce them not to do business with plaintiff. The complaint fails to suggest that CWI took any actions directed at any third parties with the intent of interfering with plaintiffs’ business relationships with those third parties. *See Carvel Corp v Noonan*, 3 NY3d 182, *supra*; *Carl v Cohen*, 55 AD3d 478, 479 (1st Dept 2008); *Havana Cent. NY2 LLC v Lunney’s Pub. Inc.*, 49 AD3d 70, 74 (1st Dept 2007). Plaintiff’s eighth cause of action for tortious interference with business relations merely alleges that plaintiffs were damaged in their ability to conduct future business with third party clients. However, it does not allege any act by CWI directed towards the third-parties to induce them not to do business with plaintiffs. Thus, plaintiffs’ eighth cause of action fails to state a legally viable claim and is dismissed. *See CPLR 3211[a][7]*.

With respect to plaintiffs’ ninth cause of action, tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, the defendant’s knowledge of that contract, the defendant’s intentional procurement of the third party’s breach of the contract without justification, actual breach of the contract and damages resulting therefrom. *See Lama Holding Co. v Smith Barney*, 88 NY2d 413 (1996); *Avant Graphics Ltd. v United Reprographics, Inc.*, 252 AD2d 462 (1st Dept 1998); *M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488 (2d Dept 1995).

In a cause of action for tortious interference, the plaintiff must allege that the defendant had actual knowledge of the contract in question. An allegation that it “should have known” of the existence of the contract is insufficient. See *Burns Jackson Miller Summit & Spitzer v Lindner*, 88 AD2d 50 (2d Dept 1982), *affd* 59 NY2d 314 (1983). In addition, the plaintiff must specifically allege that the contract would not have been breached but for the defendant’s conduct. See *Israel v Wood Dolson Co.*, 1 NY2d 116 (1956); *Burrowes v Combs*, 25 AD3d 370 (1st Dept 2006); *Washington Ave. Assoc. v Euclid Equip.*, 229 AD2d 486 (2d Dept 1996).

Here, the plaintiffs’ mere contentions that third parties cancelled contracts with them because of CWI’s alleged breach of contract in failing to produce the eight Scrim Sets, offered with no factual basis to support the allegations, is insufficient to state a cause of action for tortious interference with contractual relations. In addition, there is no allegation that “but for” CWI’s actions said contract or contracts with third party Kuitca and Gallery Hauser & Wirth would not have been breached. See *M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, *supra*.

Accordingly, the plaintiffs’ ninth cause of action for tortious interference with contract is dismissed.

The tenth cause of action alleges that the business reputation of plaintiffs were harmed due to the CWI’s acts allegedly breaching the Agreement. The loss of business and damage to business reputation are not independent causes of action but, rather, they are items of special damages, *M.D.T. 1984 Duplications Ltd. v Mark IV Industries, Inc.*, 283 AD2d 1001, 1002 (4th Dept 2001). Here, plaintiff has not pleaded special damages in the complaint. The court therefore dismisses the tenth cause of action.

That branch of CWI's cross motion seeking to dismiss all claims brought by Ariadne against CWI for lack of capacity to sue under CPLR 3211(a)(3) and CPLR 3211(a)(7) is denied.

The record demonstrates that CWI waived the defense of lack of capacity with respect to plaintiff Ariadne. The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense. CPLR 3211[a][3]; *City of New York v State of New York*, 86 NY2d 286, 292 (1995). The statute is clear that the defense of lack of capacity must be raised in a pre-answer motion to dismiss or in the answer, or else it will be waived. CPLR 3211[e]; see *Security Pac. Natl. Bank v Evans*, 21 AD3d 278 (1st Dept 2006). Here, CWI never moved pre-answer to dismiss against plaintiff Ariadne based on lack of capacity and never included such an affirmative defense in its answer. Based on these undisputed facts, the defense is barred and CWI is waived from raising it in this action.

In motion sequence 002, CWI moves for summary judgment. CWI's motion is denied to the extent that it seeks summary judgment on claims dismissed in the decision above. CWI is directed to re-file any motion for summary judgment it wishes to pursue with respect to the remaining claims.

Conclusion

Accordingly, it is hereby

ORDERED that the plaintiffs' motion to strike defendant's answer in its entirety and to impose sanctions, costs and attorneys fees is denied; and it is further

ORDERED that defendant is required to serve an amended answer within 30 days of the entry of this Decision and Order; and it is further

ORDERED that defendant's cross-motion to voluntarily withdraw its counterclaim is granted; and it is further

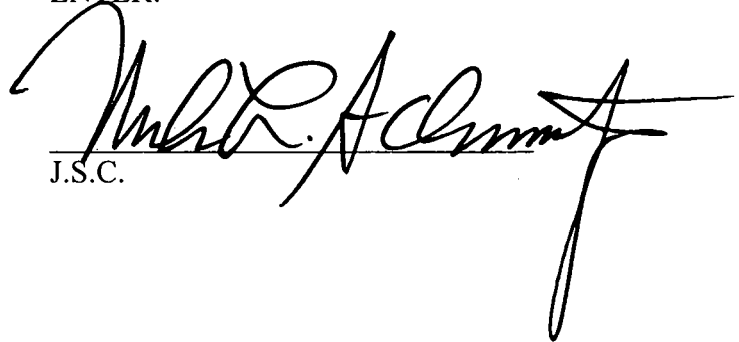
ORDERED that the motion by defendant seeking to dismiss pursuant to CPLR 3211 (a)(7) plaintiff's complaint with respect to causes of action asserted for fraud, injunctive relief, deceptive and unfair business practices in violation of New York General Business Law § 349, tortious interference with business relations, tortious interference with contract and damage to business reputation is granted; and it is further

ORDERED that the motion by defendant seeking to dismiss claims asserted by Ariadne for lack of capacity to sue pursuant to CPLR 3211(a)(3) is denied.

This shall constitute the decision and order of the court.

Dated: August 16 2011

ENTER:


J.S.C.