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

PRESENT: J.S.C. PART 2

Index Number : 112069/2010

BIALLAS, MARTIN

VS

JACK SIMPSON LLC.

Sequence Number : 002

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

FILED

JUN 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 6/7/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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MARTIN BIALLAS,

Index No. 112069/10

Plaintiff,

-against-

JACK SIMPSON LLC, JACK SIMPSON, and L&S CUSTOM TAILORS LLC

Defendants.

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LOUIS B. YORK, J.:

This decision addresses the Motion to Dismiss (Sequence Number 002) pursuant to NY CPLR §§ 3211(a)(1), 3211(a)(7) and CPLR § 3016(b) by defendant L&S Custom Tailors LLC (hereafter L&S). For the reasons discussed *infra*, the Motion to Dismiss is granted in part and denied in part.

Facts

The present controversy involves the failure of a tailor, Jack Simpson and Jack Simpson LLC (collectively referred to as "Simpson"), to deliver suits ordered and paid for by the plaintiff Martin Biallas (hereafter "Biallas"). In or about September 2009, Biallas was contacted by Simpson regarding the purchase of some new custom tailored suits and other apparel (Verified Complaint dated September 7, 2010 [hereafter "Verified Complaint"], ¶ 11). Roughly 10 years prior to that, Biallas had purchased 25 suits and other apparel from Simpson costing approximately $200,000 without apparent incident (Verified Complaint, ¶ 10). On November 27, 2009, Biallas met with Simpson at the shop of defendant L&S Custom Tailors LLC (hereafter "L&S"), located at 138 East 61st Street, New York, NY (Verified Complaint, ¶ 12). Biallas was buzzed into the shop by an L&S employee and while there was attended to by

Simpson and other L&S employees (Affidavit of Martin Biallas dated February 22, 2011 [hereafter "Biallas Affidavit"], ¶¶ 8-9). During the appointment, Simpson took measurements of Biallas for preparation of new clothing items, using materials provided by L&S including tape measures, brochures, and cloth samples (Biallas Affidavit, ¶¶ 11-12).

Three days later, on November 30, Biallas states that he entered into an agreement with the defendants Simpson and L&S to create and deliver to him fifteen items of men's apparel (Verified Complaint, ¶ 14). The clothes were to be delivered by the end of January 2010 (Biallas Affidavit, ¶ 17). Biallas paid the sum by wire transfer on December 2, 2009 and Simpson acknowledged receipt of the payment (Biallas Affidavit, ¶ 18).

By January 31, 2010, the clothes had not been delivered and Biallas began corresponding via e-mail with Simpson. After a series of excuses by Simpson, by an email on June 28, 2010, Biallas demanded the return of the $21,515.00 that had been paid for the suits. (Biallas Affidavit, ¶¶ 19-24). After continued silence by Simpson, the present action was commenced against Simpson and L&S. The complaint alleges causes of action for breach of contract, fraud, and unjust enrichment against all defendants.

Defendant's Contentions

L&S contends that all claims against it should be dismissed pursuant to NY CPLR §§ 3211(a)(1) & 3211(a)(7). To support its motion to dismiss, L&S has presented the court with the following documents: (1) a copy of an invoice dated November 30, 2009, from Jack Simpson LLC, 293 Laurel Rd, New Canaan, CT, and addressed to Biallas, which lists fifteen items costing a total of $21,515.00 (Affirmation of Thomas M. Mullaney in Support of Motion to Dismiss [hereafter "Mullaney Affirmation"], Ex. B); (2) a copy of a Wire Transfer Activity Detail Report from Wells Fargo showing a wire transfer of $21,515.00 made on December 2,

2009 with an originating account belonging to SEE Family Entertainment, Inc. and the receiving account belonging to Jack Simpson LLC (Mullaney Affirmation, Ex. C); and (3) a series of emails between Biallas and Simpson discussing the delivery (or lack thereof) of the custom apparel (Mullaney Affirmation, Ex. D & Ex. E).

With respect to the claim for breach of contract, L&S claims that it was never a party to the agreement to produce the apparel. It points to the invoice, arguing that it is the only written evidence presented of the contract and that it makes no mention of L&S. L&S further points out that during the email exchange with Simpson, Biallas at no point mentioned or contacted L&S about the suits. L&S also argues that the complaint fails to allege that L&S received any money from Biallas nor that it in anyway performed any part of the contract supported by the Wire Transfer Activity Detail Report which shows that payment went to Jack Simpson LLC and not L&S.

Addressing the cause of action for unjust enrichment, L&S argues that Biallas has again failed to state a claim as there is no allegation that L&S received any of the funds that were paid to Simpson. L&S also argues that the claim for unjust enrichment is duplicative of the breach of contract claim as the presence of an enforceable contract precludes recovery in quasi contract for events arising out of the same matter. Moreover, in its reply affirmation, L&S raises the point that the bank transfer showing payment to Simpson for the apparel is made from an account belonging to non-party SEE Family Entertainment, Inc., rather than Biallas.

Regarding the claim for fraud, L&S argues that Biallas failed to plead any facts relating to statements made by L&S to him, false or otherwise which at the very least fails to satisfy the pleading requirements of CPLR § 3016(b). L&S further argues that Biallas failed to plead that

he reasonably relied on any statements made by L&S. In addition, L&S argues that the claim of fraud should be dismissed because it is duplicative of the breach of contract claim.

Plaintiff's Contentions

In response, Biallas makes several arguments. First, Biallas argues that dismissal under CPLR 3211(a)(1) is not warranted because the documents relied on by L&S in its motion are not of the type intended by the statute. In addition, Biallas argues that the allegations in the complaint are sufficient to show that L&S exercised supervision and control over Simpson and so an employer/employee or principle/ agent relationship between L&S and Simpson can be inferred. Biallas points to indicia of such a relationship including: Simpson's statement in an email that "[w]e are L&S Tailors" (Biallas Affidavit, Ex. 2); similarities between the web pages of Simpson and L&S (Biallas Affidavit, Ex. 3); and the apparent relationship that Biallas observed at the L&S shop on November 27, 2009. As such, L&S would be vicariously liable for Simpson's tort and liable under the agreement based on either actual or apparent authority L&S gave to Simpson to bind L&S to the contract with Biallas. Biallas also argues that the unjust enrichment claim is not duplicative but is rather a necessary alternative pleading should the court find that no contract exists between Biallas and L&S. Finally, Biallas argues that dismissal would be premature as discovery, necessary to obtain information regarding the relationship between Simpson and L&S, has not yet taken place.

Discussion

A. Legal Standard for Motion to Dismiss

When considering a motion to dismiss pursuant to CPLR § 3211, pleadings must be construed liberally (NY CPLR § 3026). Thus in a determination of legal sufficiency under 3211(a)(7), the facts alleged in the complaint will be assumed to be true, given all favorable

inferences, and only then considered to see if they fit "within any cognizable legal theory"(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In addition, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Id.* at 88). However, "factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration" (Leder v Spiegel, 31 AD3d 266, 267 [1st Dept 2006]).

With respect to a motion pursuant to CPLR § 3211(a)(1), dismissal is granted only if the documentary evidence presented conclusively establishes a defense to the claims as a matter of law (*Leon*, 84 NY2d at 88). "[T]he defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

In addition, NY CPLR § 3016(b) requires that in pleading a cause of action for misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail."

B. Cause of Action for Breach of Contract

The elements for a cause of action for breach of contract include the existence of an enforceable contract between the parties, performance by the plaintiff, breach by the defendant, and resulting damages (*see e.g. Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In the Verified Complaint, Biallas has alleged all these elements, stating that: he entered into a contract with Simpson and L&S for the sale of custom men's apparel; he paid $21,515.00, which was the agreed upon price for the apparel; and to date, he has received neither the apparel nor a refund of his payment (Verified Complaint, ¶ 24-32). However, L&S argues that the breach of contract claim against it must be dismissed as it was a stranger to the contract and therefore the first element of the claim has not been satisfied. The documents presented by L&S,

especially the invoice, paint a compelling picture of an agreement solely between Biallas and Simpson, making no mention of L&S. As such, the documents appear to flatly contradict Biallas' allegation that he made an agreement with both Simpson and L&S (*see Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220-221 [1st Dept 2001]).

In response, Biallas argues that sufficient facts have been presented that it could be inferred that Simpson was acting as an agent for L&S when Simpson entered into the agreement with Biallas. Generally a principal is only liable for the acts of an agent who is acting within the scope of his authority, however a principal may be liable for the acts of an agent who exceeds his actual authority if "it is demonstrated that the party reasonably relied on such misrepresentations because of some misleading conduct on the part of the principal" (*McGarry v Miller*, 158 AD2d 327, 328 [1st Dept 1990]).

Here, the affidavit of Martin Biallas does present facts indicating some sort of relationship between Simpson and L&S (Biallas Affidavit, ¶¶ 7-15).[1] Furthermore, L&S has presented no facts that flatly contradict the inference that Simpson was agent or employee of L&S. While Court admits it seems unlikely that Simpson was an employee of L&S, where "'the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope . . . are questions of fact'" (Bostany v Trump Org. LLC, 73 AD3d 479, 480 [1st Dept 2010] *quoting Fogel v Hertz Intl.*, 141 AD2d 375, 376 [1st Dept 1988]). Furthermore, while the reasonableness of Biallas' reliance on any apparent authority may be questionable at best given that payment was going solely to Simpson (see Edinburg Volunteer Fire Co., Inc v Danko Emergency Equip. Co., 55

[1] While Biallas also points to statements made by Simpson especially his email stating "[w]e are L&S," these are less useful in establishing Simpson had authority to enter into a contract on behalf of L&S. These shed little light on any actual authority that L&S may have given Simpson and are not evidence of apparent authority as an "agent cannot by his own acts imbue himself with apparent authority" (*Hallock v State*, 64 NY2d 224, 231 [1984]).

AD3d 1108 [3d Dept 2008]), again, this is a factual determination unsuited to a motion to dismiss. Thus, Biallas has successfully stated a cause of action for breach of contract. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 [2005]). Therefore, the motion to dismiss is denied with respect to the claim for breach of contract.

C. Cause of Action for Unjust Enrichment

As an initial matter, the claim for unjust enrichment is a valid alternative at the present time. The existence of a valid written contract "ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). However given that the existence and terms of a contract between Biallas and L&S has not yet been established, it is too early to deem such a claim duplicative (see Sebastian Holdings, Inc. v Deutsche Bank AG., 78 AD3d 446, 448 [1st Dept 2010]).

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). Here, Biallas' allegations—that he paid $21,515.00 to defendants Simpson and L&S and has received neither a refund of the money nor the clothes that were promised to him—are certainly sufficient to meet this pleading requirement. While the bank transfer record raises serious doubts as to whether L&S actually received the sum or even if Biallas rather than SEE Family Entertainment, Inc. is the appropriate plaintiff for such a claim, such evidence alone is insufficient in the context of a motion to dismiss (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Therefore, the motion to dismiss is denied with respect to the claim for unjust enrichment.

D. Cause of Action for Fraud

Biallas fails to state a claim for fraud with the requisite specificity. "In order to maintain a cause of action for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance, and damages" (*Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). Due to the heightened pleading requirements required by CPLR § 3016(b), "[a]llegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings" (*Callas*, 192 AD2d at 350).

In his Verified Complaint against Simpson and L&S, Biallas alleges that Simpson and L&S "made specific representations in their correspondence and related marketing materials concerning their ability to produce and deliver the items of apparel to Biallas" and that those representations were false when they were made (Verified Complaint, ¶ 34-35). This broad and conclusory allegation not only fails to specify what the false and misleading statements were but also which defendant made them.

Furthermore, the claim that the defendants misrepresented their ability to produce and deliver the clothing is confusing at best. Presumably the language was chosen to avoid the more logical conclusion that defendants promised to make the clothing despite lacking the intent to do so. "A fraud based cause of action is duplicative of a breach of contract claim 'where the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008], *quoting First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]). However the allegation that the defendants misrepresented their ***ability*** to produce and deliver the clothing is contradicted by the fact that Simpson had previously created and delivered custom men's suits for Biallas without any apparent incident (Verified Complaint, ¶ 3).

Therefore, for the reasons stated above, the Motion to Dismiss by L&S is granted in part and denied in part.

Based on the foregoing, it is

ORDERED that the Motion to Dismiss as to the second cause of action against L&S is granted; and it is further

ORDERED that the Motion to Dismiss as to the first and third causes of action against L&S is denied.

Dated: 6/7/11

Louis B. York, J.S.C.