

**Triad Intl. Corp. v Cameron Indus., Inc.**

2013 NY Slip Op 32099(U)

September 3, 2013

Sup Ct, New York County

Docket Number: 652744/2012

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. EILEEN BRANSTEN  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 3

Index Number : 652744/2012  
TRIAD INTERNATIONAL CORP.  
vs.  
CAMERON INDUSTRIES, INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. 652744/12  
MOTION DATE 6/18/13  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2, 3  
Replying Affidavits \_\_\_\_\_ | No(s). 4

Cross-motion  yes —  no  
Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9-3-13

  
EILEEN BRANSTEN  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
TRIAD INTERNATIONAL CORP.,

Plaintiff,

-against-

Index No. 652744/2012  
Motion Date: 6/18/2013  
Motion Seq. No.: 001

CAMERON INDUSTRIES, INC. and SOHEIL  
KHAYYAM,

Defendants.

-----X

**Eileen Bransten, J.:**

Defendant Cameron Industries, Inc. (“Cameron”) and its president, defendant Soheil Khayyam, seek dismissal of plaintiff Triad International Corp.’s (“Triad”) fraud claim. Plaintiff Triad cross-moves for summary judgment on its sale and delivery of goods claim , and to disqualify Cameron and Khayyam’s attorneys, Schlacter & Associates, from representing defendants in this action. Each motion is opposed. For the reasons that follow, Defendants’ motion to dismiss is granted, and Plaintiff’s cross-motion is denied in its entirety.

**I. Procedural and Factual Background**

Plaintiff Triad is a manufacturer and exporter of fabrics, while Defendant Cameron is a purchaser and importer of textile fabrics. (Compl. ¶¶ 1, 2.) Triad and Cameron have done business with one another since 1998. *Id.* ¶ 7. Broadly speaking, these business

interactions involve Cameron ordering goods from Triad. (Compl. ¶ 7.) Cameron's purchase orders generally reflect the quantity and purchase price for the order, the type of fabric ordered, the method of payment for the purchase and the port of entry for the shipment of the goods to be delivered. *Id.*

According to the complaint, when Triad received Cameron's purchase orders, Triad would issue corresponding pro forma invoices to Cameron, which specified prices, trade terms and the declared value of the trade. *Id.* ¶ 8. These invoices also set forth the weight of the fabrics to be manufactured, the quantity and selling price for the fabric, the shipment method and the terms and conditions for payment and the release of the shipment. *Id.* Triad then would issue commercial invoices for each shipment, which only would be released upon Cameron's payment for the shipment. *Id.* ¶ 9. At the point of Cameron's payment, Triad would issue bill of lading documents so that the goods could be released at the port of entry. *Id.*

Between September 2008 and November 2008, Cameron ordered, and Triad sold and delivered, fabrics at an agreed upon price of \$217,259.35. *Id.* ¶ 15. There are 12 purchase orders at issue. *Id.* They are numbered: 36092, 36093, 36357, 36358, 36359, 36360, 36361, 36361A, 36387, 36388, 36535 and 36555. *Id.* Ex. A. Triad alleges that Cameron did not pay for these orders. *Id.* ¶¶ 16-17.

With respect to its fraud claim, alleged in the seventh cause of action, Triad alleges that, on December 24, 2008, the goods referenced in invoices numbered 36357, 35359, 36360 and 36361 arrived at the port, and that each required payment by Cameron before Triad sent out the original bill of lading documents to Cameron for release of the goods. *Id.* ¶ 65. According to the complaint, on or about December 31, 2008, Cameron and Khayyam issued by mail a check payable to Triad, numbered 36374, in the amount of \$83,038.65. *Id.* ¶ 66. The check was for payment required for the goods associated with invoices numbered 36092 and 36093, and partial payment for 36357, 36359, 36360 and 36361. *Id.*

In the complaint, Triad further alleges that on or about January 8, 2009 and January 14, 2009, Cameron and Khayyam issued two additional checks, in the amounts of \$23,206.96 and \$38,353.06, representing partial payment for goods to be delivered under other invoices. *Id.* ¶ 68. Triad alleges that, in reliance on the payments made in the form of these checks, Triad released the goods to Cameron. *Id.* ¶ 76. Subsequently, however, on or about January 16, 2009, Triad was notified by its bank that the December check was returned for insufficient funds. *Id.* ¶ 77. On or about January 17, 2009, Cameron sent Triad a copy of a letter, signed by Khayyam, indicating that Cameron instructed its bank to wire transfer payment to Triad's bank to cover the December check. *Id.* ¶ 79. Further,

the January checks were returned by Triad's bank due to Cameron's direction to the bank to stop payment on the checks. *Id.* ¶ 81.

The complaint alleges seven causes of action. The first six are alleged against Cameron only; those are: (1) goods sold and delivered; (2) breach of contract; (3) account stated; (4) sale and delivery of goods pursuant to CPLR 3016(f); (5) quantum meruit; and (6) unjust enrichment. The seventh cause of action, for fraud, is alleged against both Cameron and Khayyam.

## II. Discussion

### A. *Defendants' Motion to Dismiss*

Defendants move pursuant to CPLR 3211(a)(7) to dismiss the seventh cause of action, which is alleged as against both defendants. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is to determine whether the complaint states a cause of action. *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003). "[T]he complaint 'is to be afforded a liberal construction (*see*, CPLR 3026).'" *Thomas v. Thomas*, 70 A.D.3d 588, 590 (1st Dep't 2010) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). The court must deem as true the facts alleged in the complaint, and must "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.*

The seventh cause of action sounds in fraud and spans several pages of Triad's complaint. Defendants principally argue that, although plaintiff has alleged seven causes of action, this is essentially an action for breach of contract. According to defendants, Triad's fraud claim does not allege any particular time, transaction or place where the defendants knowingly misrepresented a material fact to induce plaintiff's reliance. Defendants contend that Triad's fraud claim seeks to enforce defendants' contractual duties and therefore is simply redundant of that claim.

Triad opposes defendants' motion and argues that defendants' fraud arises from their issuance of three checks to Triad, knowing the checks were worthless or would be dishonored on presentation. Triad argues that one who draws and delivers a check with knowledge that there are insufficient funds in the account commits fraud, *Societe Generale Alsacienne De Banque, Zurich v. Flemington Dev. Corp.*, 118 A.D.2d 769 (2d Dep't 1986), and that, in its complaint, Triad sets forth this fraudulent action in sufficient detail. According to Triad, the fraud claim is not duplicative of its breach of contract claim because it is composed of facts that are not simply promises of future performance.

A plaintiff who argues that defendants actually never intended to fulfill their obligations under an agreement does not sufficiently state a claim of fraud. See *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988); see also *Fairway Prime Estate Mgmt. v. First Am. Int'l Bank*, 99 A.D.3d 554, 557 (1st Dep't 2012) ("if the

promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract.”). “It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1995).

“A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.” *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607, 607 (1st Dep’t 1985). Accordingly, a court might find tort liability when the defendant has “breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations.” *New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995). Consequently, “where a party is merely seeking to enforce its bargain, a tort claim will not lie.” *Id.*

Here, the allegedly fraudulent act – defendants’ issuance of a check, drawn on an account with insufficient funds, and defendants’ acts of stopping payment on two other checks – directly relate to defendants’ alleged breach of the contract. Because payment for the goods is a duty created under the contract between the parties, failure to make payment is a breach of that duty.

Through its fraud claim, Triad seeks payment for those goods that were shipped, which is precisely the benefit of its bargain under its agreement with Cameron. These same facts form the basis for Triad's breach of contract claim; Cameron received the goods based upon its promises to Triad concerning payment, but then did not make those payments. Moreover, Triad seeks the same damages for its fraud and breach of contract causes of action – \$246,870.00. While Triad also throws in a request for punitive damages for its fraud claim, an “unelaborated request for punitive damages on the fraud claim” does not render its alleged fraud damages distinct from its breach of contract claim. *See Krantz v. Chateau Stores of Canada Ltd.*, 256 A.D.2d 186, 187 (1st Dep't 1988) (“Moreover, with the exception of the unelaborated request for punitive damages on the fraud claim, plaintiff has not claimed any special damages proximately caused by the false representation that are not recoverable under the contract measure of damages. This is further evidence that the causes of action are duplicative.”).

Triad's inability to collect on the three checks and its agreement with Cameron for the sale of the goods are all part of the same transaction and, therefore, the fraud claim is duplicative of the breach of contract claim. Accordingly, plaintiff's fraud claim is dismissed as to both defendants.

B. *Triad's Cross Motion for Summary Judgment on the Fourth Cause of Action*

Triad moves for summary judgment on its fourth cause of action, "Sale and Delivery of Goods Pursuant to CPLR 3016(f)," arguing that it has provided ample proof that it sold and delivered goods to Cameron, and that the goods were accepted without payment. Further, Triad maintains that Cameron failed to comply with CPLR 3016(f), by providing a general denial in its answer, rather than disputing each item set forth in the complaint.

In support of its motion, Triad offers a chart annexed to its verified complaint as exhibit A, which sets forth the following information with respect to each item allegedly delivered to Cameron: the purchase order numbers, the pro forma invoice numbers, the PI date/PI revision dates, quantity ordered in yards, PO/PI prices, quantity shipped, balance due on shipped goods and payment terms. Triad did not attach the invoices to the complaint. Triad argues that this chart satisfies its burden under CPLR 3016(f), and shifts the burden to defendants to respond specifically to each item in the chart, rather than simply provide a general denial.

Pursuant to CPLR 3016(f):

[i]n an action involving the sale and delivery of goods ..., the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer shall indicate specifically those items he disputes and

whether in respect of delivery or performance, reasonable value or agreed price.

Here, plaintiff has set forth, in the annexed chart, the items of its claim and the reasonable value or agreed upon price. In their verified answer, defendants have provided a general denial, disputing the timeliness of the delivery of the goods and the quality of the goods.

The court, however, does not conclude that Triad is entitled to summary judgment pursuant to CPLR 3016(f). New York courts frequently permit defendants to remedy their noncompliance with CPLR 3016(f) in their answers by including the itemized denials in their papers opposing plaintiff's motion for summary judgment. *Shapiro v. Fox-Rich Textiles*, 209 A.D.2d 364, 365 (1st Dep't 1994); Further, "[w]hen a party's defense goes to the entirety of the parties' dealings rather than to the individual contents of the account, specific denials addressed to the account's items are not required." *Jaffe Ross & Light, LLP v. Mann*, 39 Misc.3d 1231(A), at \*2 (Sup. Ct. N.Y. Cnty. 2013) (citations omitted).

Here, defendants include in their opposition to Triad's motion an amended answer and an affidavit from defendant Khayyam, which includes those items disputed by defendants and the reasons therefore. In his affidavit, Khayyam explains that the items related to purchase orders 36361A, 36387 and 36388 were delayed, and that Cameron cancelled the goods related to purchase order number 36359, which were nonconforming.

(Affidavit of Soheil Khayyam (“Khayyam Aff.”) ¶¶ 18, 20.) Further, Khayyam avers that each item was shipped later and, to support this statement, included in his affidavit is a chart indicating all twelve purchase orders, the dates that the items were supposed to be shipped, and the actual shipment dates. *Id.* ¶ 28. Additionally, Khayyam states that all the items, except those associated with purchase order 36093, were improperly shipped at multiple times and had quality problems. *Id.* ¶ 35. Further, although Khayyam notes that Cameron was able to use and sell some of the goods purchased from Triad, he does not identify with which purchase orders those items are associated.

Additionally, attached to Khayyam’s affidavit are emails sent from a Cameron employee to an employee at Triad. The emails pertain to some of the purchase order numbers listed in Triad’s complaint and reflect Cameron’s disputes with those items. For example, in an email dated October 9, 2008, regarding purchase order numbers 36093 and 36106, Cameron’s employee wrote: “We just find [sic] a problem for these two order [sic] to match with PO#36092 today ... Pls kindly recfm ur u/stding and wl able to get s/smpl from 1<sup>st</sup> lot to send you this Saturday for ur ref. But this is a problem which can not settle well.” (Khayyam Aff. Ex. 1 at 2.) Additionally, in a November 19, 2008 email, with respect to purchase orders numbered 36092 and 36106, Cameron’s employee writes: “This is over 3 weeks late ... . If you keep delaying this not arranging to Air out ASAP, you are jeopardizing yourself into causing this whole order to be cxl.” *Id.* Ex.1 at 6.

Moreover, in an email also dated November 19, 2008, with respect to purchase order numbered 36555, Cameron's employee writes: "We received the bulk production today and the goods are feeling much too light—too much weight reduction ... please resubmit the s/s for approval—goods need to be resubmitted." *Id.* Ex. 1 at 8. In a December 8, 2008 email, regarding purchase order number 36387 from a Cameron employee to Triad states: "Goods failed inspection. Do not ship the goods." *Id.* Ex. 1 at 14. Likewise, a December 9, 2008 email regarding purchase order number 36388 states: "... stop playing game [sic] and replace goods." *Id.* Ex. 1 at 16.

Based upon this affidavit and the annexed emails, defendant Cameron has met its burden with respect to CPLR 3016(f), by responding to each purchase order listed in Triad's complaint, and setting forth an explanation for nonpayment for those goods. Further, Khayyam's affidavit, and the emails annexed thereto, create questions of fact concerning whether Cameron accepted some of the goods, or paid for some of the goods, and whether defendants inspected and timely rejected the allegedly nonconforming goods, pursuant to UCC 2-602 and 2-607. *See Flick Lumber Co. v. Breton Indus.*, 223 A.D.2d 779, 781 (3d Dep't 1996); *Shevy's Custom Wigs, Inc. v. Halon*, 35 Misc.3d 1244(A), at \*4 (Sup. Ct. Kings Cnty. 2012) ("[a] buyer may defeat or diminish the seller's action for goods sold and delivered by alleging a breach of the underlying sales agreement or raising issues regarding the nonconformity of the goods, which, if established, could diminish or

negate a seller's recovery"). Accordingly, Triad's cross-motion for summary judgment on count four is denied.

C. *Triad's Cross Motion to Disqualify Defendants' Counsel*

Triad also argues that Defendants' attorney, Jed. R. Schlacter ("Schlacter"), and the law firm of Schlacter & Associates ("Schlacter Firm"), should be disqualified from representing defendants in this action because Schlacter and the Schlacter Firm represented Triad in an earlier action against Land N' Sea, Inc. According to Triad, the issues in that action are "identical" to the issues here and, in its representation of Triad in that action, Schlacter received confidential information, documents and communications from Triad "relating to, *inter alia*, Triad's business practices." See Triad's Mem. of Law in Opp. to Defs.' Motion and in Support of Cross-Motion at 17. Triad contends that that information will provide defendants "with an unfair advantage in this Action." *Id.* at 18.

A party who seeks to disqualify an attorney under Disciplinary Rule 5-108(a)(1) must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dep't 2008) (internal quotation marks and citation omitted). "To obtain disqualification

of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice.” *Greene v. Greene*, 47 N.Y.2d 447, 453 (1979). Yet, New York courts find that disqualification is inappropriate where “the party seeking disqualification fails to identify any specific confidential information imparted to the attorney.”

*Pellegrino*, 49 A.D.3d at 98 (internal quotation marks and citation omitted).

Here, Triad has not met its burden to disqualify defendants’ counsel. Triad has not established a reasonable probability that Schlacter will disclose any of its confidential information. Moreover, Triad has not even identified the specific confidential information that it imparted to Schlacter, about which it is now concerned. Further, although Triad has submitted the complaint from the previous action, which is similar to this action in that it seeks payment for goods sold and delivered, Triad has not offered proof that there is a substantial relationship between the issues in this litigation and those in the previous litigation. The mere fact that the claims are similar is not de facto proof of such a relationship. Without facts establishing these factors, this court will not disqualify Schlacter in its representation of defendants.

**III. Conclusion**

In accordance with the foregoing, it is

ORDERED that the cross motion of plaintiff Triad International Corp. is denied in its entirety; and it is further

ORDERED that defendants Cameron Industries, Inc. and Soheil Khayyam's motion to dismiss the seventh cause of action pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED that the complaint is dismissed as against defendant Soheil Khayyam with costs and disbursements to said defendant as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that the action is severed and continued against the remaining defendant Cameron Industries, Inc.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support

*Triad International Corp. v. Cameron Industries, Inc.*

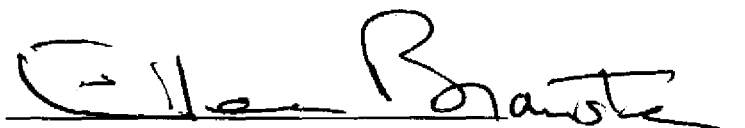
Index No. 652744/12

Page 15 of 15

Office (Room 158) and the Clerk of the E-file Support Office (Room 119) who are directed to mark the court's records to reflect the change in the caption herein.

Dated: New York, New York  
September 3, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.