New Thinking Fashion USA, Inc. v ZG Apparel Group, LLC
2016 NY Slip Op 30524(U)
March 29, 2016
Supreme Court, New York County
Docket Number: 652186/15
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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NEW THINKING FASHION USA, INC.,

Plaintiff,

Index No. 652186/15

-against-

ZG APPAREL GROUP, LLC and SHAZDEH FASHIONS INC.,

Defendants.

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ELLEN M. COIN, J.:

Defendants ZG Apparel Group LLC (ZG) and Shazdeh Fashions Inc. (Shazdeh) move, pursuant to CPLR 3211 (a) (1), (7) and (10), to dismiss the complaint on the grounds that (1) plaintiff has failed and is unable to join a necessary party; (2) documentary evidence requires dismissal; and (3) the complaint fails to state a cause of action. Defendants also seek to impose sanctions, pursuant to 22 NYCRR § 130-1.1, for bringing a frivolous claim. Plaintiff New Thinking Fashion USA, Inc. (NTF) cross-moves for an order dismissing defendants' motion to dismiss on the grounds that it has met its prima facie burden regarding its breach of contract claim and its unjust enrichment claim; that neither FYC Apparel, LLC (FYC) nor Fergasam Garment Industries (PVT) Ltd. (Fergasam) is a necessary party to the action; and for sanctions for bringing a frivolous motion.

FACTS

The following facts are taken from the complaint. FYC, a garment manufacturer doing business under the label name of "Robbie Bee," ordered fabric from NTF in September 2014, under three separate purchase orders. The orders totaled nearly 14,500 yards of fabric at $2.70 per yard (the Fabric). The purchase orders directed NTF to ship the Fabric to Fergasam in Sri Lanka, where it would be cut and sewn into garments. The Fabric was shipped in October 2014 in two shipments. Complaint, ¶¶ 4, 6. The payment terms were net 60 days. In late December 2014, prior to payment on the invoices, FYC surrendered certain assets to its secured lender, Wells Fargo Trade Capital Services, Inc. (Wells Fargo). Those assets included FYC's contracts with customers for garments made with the Fabric. *Id.*, ¶¶ 6-7.

Shortly thereafter, ZG acquired certain property of FYC from Wells Fargo, including the Robbie Bee label and associated inventory. ZG decided to fill the Robbie Bee customer purchase orders by taking delivery of the finished goods from Fergasam, made with the Fabric.

Beginning in March 2015, NTF communicated with ZG about payment for the Fabric, but ZG denied any responsibility for payment. The total amount of the invoices for the Fabric was $39,268.80, which was due January 1, 2015. ZG allegedly transferred all of the garments made with the Fabric and Shazdeh

sold them through various retail stores.

The complaint in this action sets forth two causes of action, one for breach of contract, and the other for unjust enrichment. The breach of contract cause of action asserts that ZG and Shazdeh breached their agreement with NTF to pay for the Fabric. The unjust enrichment claim avers that, to the extent that NTF does not have an agreement with ZG or Shazdeh, it is entitled to payment for the Fabric that was used in the finished garments that they took possession of and sold to Robbie Bee customers.

Defendants contend that they did not know the history of the Fabric, or that the Fabric had not been paid for. They also point out that neither FYC nor Fergasam is affiliated with either defendant, nor are they alleged to be so affiliated.

ANALYSIS

Breach of Contract

In order to state a claim for breach of contract, a plaintiff must allege the existence of a contract between the parties, plaintiff's performance, defendant's breach and resulting damages. *Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 (1st Dept 2004); *Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986). Here, plaintiff has not alleged that there was any contract between it and either of the defendants. Rather, it alleges that it had a contract with FYC.

Further, plaintiff does not allege that there is any affiliation between defendants and FYC that could require defendants to take over responsibility for FYC's obligations.

In opposing the motion, NTF contends that defendants were not strangers to the contract. Rather, by virtue of the purchase of the Robbie Bee name and customer contracts, and thereafter selling the garments, defendants received the Fabric, thereby receiving the benefit of the Fabric. NTF argues that a contract between it and defendants was established by novation when ZG bought FYC's rights to the Robbie Bee name, to FYC's work in progress and its customer purchase orders, and by accepting delivery of the garments made with the Fabric. According to NTF, by taking delivery of the Fabric as part of the finished dresses, and selling the dresses to its customers, defendants acted in a manner inconsistent with NTF's ownership of the Fabric, and defendants are, therefore, bound by the offered terms. *See* Restatement of the Law of Contracts 2d, § 69; UCC § 2-606 (1) ©.

NTF's arguments are not persuasive because both the Restatement and the UCC are addressing situations where a seller has offered goods to a buyer. Here, NTF did not offer the Fabric to defendants. Rather, it sold the Fabric to FYC. There was no privity between NTF and defendants at the time the Fabric was purchased or transferred to FYC or Fergasam.

To the extent that NTF asserts that there was a novation, it

has failed to allege facts to support a novation. "[T]he requisite elements of a novation . . . include a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a valid new contract." *Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 954 (2d Dept 1985). Here, there is no question that there was no agreement of all the parties to a new obligation. In fact, ZG contends that it explicitly declined to enter into a new contract with NTF. Nor has NTF alleged the existence of a valid new contract. Consequently, NTF's argument that there was a novation, which would support its breach of contract claim, is without merit, and the breach of contract claim is dismissed.

Unjust Enrichment

NTF contends that defendants knew that the Fabric came from NTF, knew the cost of the Fabric, and knew that the Fabric was not paid for, but received and sold the finished garments to the same customers that FYC was supposed to supply. Further, NTF maintains that to the extent that defendants claim that they paid Fergasam $1.50/garment for the Fabric (which NTF disputes), that price is not a bona fide price. Defendants knew that the Fabric was supplied by NTF, and also knew the $2.70/yard price of the Fabric. Therefore, what they did was, in effect, take NTF's Fabric without paying for it.

Defendants maintain that NTF has no substantive

transactional relationship and no expectation of payment from defendants, and that, therefore, its claim for unjust enrichment must fail.

To adequately plead a claim for unjust enrichment, a plaintiff must allege that the other party was enriched at the plaintiff's expense, and that it is against equity and good conscience to permit the other party to retain the benefit without compensating the plaintiff. *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012). Further, in order to succeed on such a claim, although privity is not necessary, the plaintiff must have a sufficiently close relationship with the defendant. Thus, in *Sperry v Crompton Corp.* (8 NY3d 204, 216 [2007]), the Court of Appeals concluded that the plaintiff, a purchaser of car tires, could not maintain an action against the producers of chemicals used by tire manufacturers on the ground that they overcharged the tire manufacturers who then passed the cost on to the plaintiff. The Court found that the relationship between the plaintiff and the chemical producers was too attenuated to permit an action for unjust enrichment.

Similarly, in *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173 [2011]), the Court of Appeals found that the plaintiff did not have a sufficient relationship with the defendant to permit the case to go forward, because there were no facts to cause reliance or inducement. There, the plaintiff relied on a letter

written by the defendant to a third party estimating the value of a painting without disclosing the defendant's ownership interest in the painting. The Court held that "the mere existence of a letter that happens to find a path to a prospective purchaser does not render this transaction one of equitable injustice requiring a remedy to balance a wrong." *Id.* at 182-183.

Here, however, unlike in *Sperry, Georgia Malone,* or *Mandarin*, defendants knew that NTF provided the Fabric to FYC, and through it, to Fergasam, and that it had not been paid. Additionally, NTF asserts that the payments made to Fergasam did not include payment for the Fabric. While defendants dispute that allegation, it is not something that can be determined on a motion to dismiss. Although the parties include copies of invoices, the invoices are not self-explanatory, and therefore do not constitute conclusive documentary evidence. *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002).

This matter is also not comparable to the type of attenuated relationship at issue in *Sperry*. Here, according to the allegations in the complaint, NTF provided the Fabric, defendants knew about it and knew NTF was not paid, and, in fact, discussed the matter. Then defendants accepted delivery of the garments, knowing that the Fabric was not paid for, and sold the garments to customers of FYC, thereby directly and knowingly benefitting from the Fabric without paying for it. Under these circumstances

it cannot be said that the pleading fails to state a claim, or that the claim is conclusively refuted by the documentary evidence.

Necessary Parties

Defendants maintain that dismissal is required for failure to join a necessary party. Since NTF contracted with FYC for the Fabric, defendants argue that FYC is a necessary party. Additionally, because Fergasam held and resold the Fabric, which it did not own, defendants assert that it, too, is a necessary party.

NTF contends that because Fergasam did not own the Fabric, and a company that cuts the fabric and sews it into garments generally does not own the fabric it uses, there is no reason for Fergasam to be a party to this action. NTF further maintains that because ZG had control of the Fabric, the Robbie Bee dress label, and the former customers for the garments, defendants have full responsibility to pay for the Fabric, and FYC is not a necessary party.

CPLR § 1001 (a) provides in pertinent part:

> "**Parties who should be joined.** Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants...."

In this action NTF is seeking relief on the basis of unjust enrichment as against defendants. In order for complete relief

to be accorded between NTF and defendants, there is no need for FYC to be involved. Defendants took possession of the Fabric, and must now deal with NTF's claim. If defendants believe that they can look to FYC for compensation, they can commence a third-party action against FYC. But there is no basis for NTF to name FYC in this action for unjust enrichment. Further, there is nothing in the complaint or in the additional facts alleged by the parties that indicate that FYC could be inequitably affected by a judgment in this action. Similarly, there is no allegation that Fergasam was ever in a position where it would be liable for payment for the Fabric, so it, too, is not a necessary party.

Sanctions

Both defendants and plaintiff seek sanctions against the other for frivolous conduct. Since the outcome is not completely in favor of either side, it is apparent that the conduct of neither side was completely frivolous. It is also worth reminding the parties that repeated motions for sanctions, absent firm support, may subject the movant to sanctions by this court.

The court also notes that so much of plaintiff's cross-motion as seeks to dismiss the motion to dismiss is procedurally improper.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is

granted only to the extent that the first cause of action for breach of contract is dismissed, and it is otherwise denied; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on May 11, 2016, at 2:00 p.m.

Dated: March 29, 2016

ENTER:

Ellen M. Coin, A.J.S.C.