

Tooker v Whitworth
2018 NY Slip Op 30658(U)
April 11, 2018
Supreme Court, New York County
Docket Number: 653813/15
Judge: Jennifer G. Schechter
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NYSCEF DOC. NO. 70
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 57

RECEIVED NYSCEF: 04/12/2018

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TRACEY TOOKER and TT LTD.,

DECISION AND ORDER

Plaintiffs,

-against-

Index No.653813/15

BARBARA WHITWORTH, d/b/a WHITWORTH HATS
(on Facebook), d/b/a/ WHITWORTH DESIGNS
(on Facebook), d/b/a @WHITWORTHHATS (on Twitter),
d/b/a WHITWORTHHATS.COM (website), THE
STYLE STUDIO, INC., d/b/a WHITWORTH HATS
(on Facebook), d/b/a/ WHITWORTH DESIGNS
(on Facebook), d/b/a @WHITWORTHHATS (on Twitter),
d/b/a WHITWORTHHATS.COM (website) and
CHANDRA GOVINDEISAMI,
Defendants.

-----x
JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211(a)(1) and (a)(7), defendants
Barbara Whitworth, The Style Studio, Inc. (Style Studio) d/b/a
Whitworth Hats and Chandra Govindeisami move to dismiss
plaintiffs' complaint. The motion is granted in part.

Background

The facts alleged in the amended complaint are accepted
as true for purposes of this motion to dismiss.

Plaintiff Tracey Tooker is a couture milliner and the
owner and President of TT, Ltd, Inc. (Memorandum in Support
[Supp], Ex A Second Amended Complaint [SAC]) at ¶¶ 1-2). She
makes and sells hats primarily in New York and Florida.
Defendant Barbara Whitworth is also a professional milliner
with a studio on West 36th Street in Manhattan (SAC at ¶ 4).
She makes and sells hats under the name of Barbara Whitworth

and Whitworth Hats in addition to marketing hats under various names on Facebook, Twitter and her website (SAC at ¶ 3). Whitworth is also the sole owner of Style Studio. Plaintiffs allege that Whitworth conducts her business under Style Studio, but that it is "unclear [when] Barbara Whitworth was acting in her individual capacity or using one of the assumed names, corporations, or combinations of business entities" when dealing with them (SAC at ¶ 3). Defendant Chandra Govindeisami was employed by defendants and sews hats (SAC at ¶ 5).

In August 2014, plaintiff sought the services of "defendants" pursuant to a "verbal contract whereby [Tooker] would communicate orders and instructions for the manufacture of specific hats to defendants. The defendants would manufacture the hats to order, and deliver finished hats. [Tooker] would provide the raw materials at her own cost. When payment was due, defendants sent an email (or several) indicating the total amount due, and payment was arranged . . ." (SAC at ¶ 7). The parties communicated through email, text messages and phone calls regarding orders (SAC at ¶ 8). "Although defendants allege that the relationship was governed by a written contract, no written contracts were provided by defendants to [Tooker], nor signed by [Tooker] or her

corporation TT Ltd., Inc." (SAC at ¶ 9). Tooker asserts that during the course of a related federal litigation a January 26, 2015 invoice (2015 Invoice) was produced with contractual terms on the back (SAC at ¶ 10). Plaintiffs contend that they never received the 2015 Invoice in the normal course of business and never received anything from defendants with any terms or conditions (SAC at ¶ 10).

To manufacture the hats, defendants needed to use plaintiffs' one-of-a-kind, custom-made and unique wooden hat blocks,¹ which Tooker designed herself (SAC at ¶ ¶ 12, 14). In August 2014, Tooker's assistant Chelsea Phillips delivered 10 wood blocks and sample hats to defendants' studio (SAC at ¶ 18). Three additional blocks were delivered in January 2015 (SAC at ¶¶ 19, 24, 43; Supp at 5). Tooker "lent defendants her wood hat blocks . . . solely for the purpose of defendants making hats to [Tooker's] specifications" (SAC at ¶ 29).

Tooker alleges that, prior to delivery, she paid for the hats in full through TT Ltd. and that she would receive a receipt through email from Barbara Whitworth's personal Square account (credit card payment processing company) (SAC at ¶ 28).

¹Hat blocks are solid wood pieces shaped like a hat crown or brim used in the hat making process (SAC at ¶ 13).

Plaintiffs contend that in November 2014, while in possession of the hat blocks, defendants used the blocks to copy Tooker's hat styles and marketed them at trade shows and on the internet as if they were defendants' own styles (SAC at ¶¶ 30-33, 39, 41, 83). Plaintiffs claim that Tooker's hats are identifiably different from defendants' pre-existing hat styles (SAC at ¶ 34).

The parties' business relationship was mutually satisfactory until February or March of 2015 when Tooker discovered defects--including, faulty sewing, uneven stitching and streaks on the materials--in approximately half of the hats defendants produced (Supp at 5; SAC at ¶¶ 44-45, 51). Hats containing defects had to be redone (SAC at ¶ 46). Plaintiffs contend that the defects "appeared deliberately and maliciously inflicted by defendants" and that Chandra Govindeisami, who was familiar with the quality that Tooker expected, was principally responsible for the defects because most occurred during the sewing stage (SAC at ¶¶ 47-48). Plaintiffs believe that the defects were obvious and that Whitworth, who would have supervised and inspected production, failed to ensure that plaintiffs received quality hats (SAC at ¶ 49). Tooker alleges that when she complained to Whitworth about the defects she replied "the customers won't notice"

(SAC at ¶ 52). The defects caused plaintiffs additional expenses in production, delivery delays, shortage of inventory and "considerable angst for Ms. Tooker" (SAC at ¶¶ 51, 53-54).

Despite the defects, Tooker continued to place orders with defendants through April 2015 (SAC at ¶ 55). Around May 2015, Tooker asked defendants to return three blocks (SAC at ¶ 57). Whitworth informed Tooker that neither she nor Govindeisami would be at the studio that week but that the blocks would be left in the hallway for Tooker to pick up (SAC at ¶ 59). Tooker was unable to get the blocks on May 5, 2015 and claims that she was caused "considerable anxiety" believing that the blocks would be left unattended (SAC at ¶ 60). More than a month later, on June 15, 2015, Tooker and her assistant Lisa McLellan went to Whitworth's studio where some, but not all, of plaintiffs hat blocks were left in a pile by the door (SAC ¶¶ 63-64). Tooker noticed that "some of her blocks were still visibly sitting on defendants' shelves" and that some appeared "as if attempts had been made to sand them down" (SAC at ¶¶ 66, 68). She further contends that she saw that her wood blocks were being copied and that defendants used her wood blocks to make exact reproductions (SAC at ¶ 69).

Tooker attempted to take what she claims were her blocks from defendants' shelves at which point Whitworth and then Tooker called the police (SAC at ¶¶ 70-71). One officer arrived and asked Tooker and her assistant to step in the hallway while the police spoke to Whitworth and Govindeisami inside the studio (SAC at ¶ 72). The police then went to speak to Tooker and McLellan in the hallway (SAC at ¶ 72). Tooker and McLellan were allowed back into the studio to take the blocks in the pile by the door and left (SAC at ¶¶ 73-74). Tooker asserts that the pile contained fewer items when she picked them up than when she had originally arrived at the studio and that regardless, defendants retained possession of many of her hat blocks, samples, crowns and brims disrupting production of 11 of Tooker's hat styles (SAC at ¶¶ 74-77, 81).

Tooker commenced a small-claims action in July 2015. At a September 2015 hearing, Whitworth told the judge that she did not have any of Tooker's property in her possession (SAC at ¶ 85).

In November 2015, plaintiffs began this case. They assert 14 causes of action against defendants, seeking recovery for: (1) conversion, (2) unfair competition and misappropriation of trade secrets, (3) copyright infringement

of unregistered copyright, (4) unjust enrichment, (5) breach of fiduciary duty, (6) aiding and abetting a breach of fiduciary duty, (7) breach of contract, (8) breach of implied covenant of good faith and fair dealing, (9) breach of implied warranty for fitness of purpose, (10) civil conspiracy, (11) "tortious interference with advantageous business relationships," (12) intentional infliction of emotional distress, (13) prima facie tort and (14) unfair competition under the Florida Deceptive and Unfair Trade Practices Act.

Analysis

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded liberal construction and the facts as alleged are accepted as true (*León v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiffs are given the benefit of every possible inference and the court only determines whether the facts as alleged fit within any cognizable legal theory (*id.*). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law . . . In assessing a motion under CPLR 3211(a)(7), however, . . . the criterion is whether the proponent of the pleading has a cause of action, not whether [one was] stated'" (*id.* at 88 citing *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Individual Defendants

Defendants urge that Barbara Whitworth and Chandra Govindeisami should be dismissed from the action because plaintiffs contracted with Style Studio and therefore neither defendant can be held individually liable (Supp at 8-9).

Plaintiffs contend that there was only an oral agreement between the parties and that they were not even aware of Style Studio until after commencement of the lawsuit (SAC at 1, ¶ 3). Plaintiffs further urge that because Whitworth did not use corporate formalities (for example, payments were made through a personal Square account and materials were ordered under her personal name) it was never clear if plaintiffs were dealing with Whitworth or a company (Opposition [Opp] at 2).

An individual who signs a corporate contract and indicates the name of the corporation and the nature of his representative capacity on the contract is generally not subject to personal liability (see *Diaz v Siegel*, 23 AD3d 251 [1st Dept 2005]; *Thunderball Marketing, Inc. v Riemer*, 273 AD2d 29 [1st Dept 2000]). Because it is unclear at this stage of litigation precisely what the agreement was, the form it took or which Whitworth parties were involved and because the manner in which Whitworth and/or Style Studio conducted their business is unclear, the motion to dismiss as to Whitworth is

denied (*Diaz v Siegel*, 23 AD3d 251 [1st Dept 2005]; *McCarthy v Young*, 57 AD3d 955 [2d Dept 2008] [dismissal denied as contract did not clearly state that it was entered into between plaintiffs and corporate defendant]).

The motion to dismiss is granted as to Chandra Govindeisami. Plaintiffs simply allege that she was an employee of defendants. They do not assert that they had any agreement with her personally or set forth any allegations against her for which she can be held personally liable (SAC at ¶¶ 5, 48).

Breach of Contract

Defendants seek dismissal of the breach of contract claim. They assert that the parties had a valid written agreement governing their relationship (specifically, the terms and conditions on the back of invoices) and that the written contract precludes plaintiffs' claims (Supp at 11). Because Tooker alleges that there is no invoice that served as the basis for the parties' agreement and disputes receiving any terms and conditions, there is no documentary evidence that refutes plaintiffs' cause of action and dismissal is denied (see *Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 112 AD3d 486 [1st Dept 2013] [dispute over validity of written agreement and alleged oral agreement

raise factual issues that cannot be resolved on motion to dismiss]; Opp at 5, 18; SAC at 27-28).

Breach of Implied Covenant of Good Faith and Fair Dealing

The breach of implied covenant of good faith and fair dealing claim is dismissed because it duplicates the breach of contract cause of action. Both claims arise out of the exact same pleaded facts (*Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 [1st Dept 2018]).

Breach of Implied Warranty

Defendants seek dismissal of the claim for breach of implied warranty of fitness for a particular purpose solely on the ground that the parties' written agreement--the 2015 Invoice--excludes implied warranties of any kind (Supp at 12). Because, as set forth above, Tooker alleges that the invoice was not the parties' contract and denies receiving it while the parties did business, defendants' motion to dismiss the claim is denied.

Conversion

Defendants urge that, despite plaintiffs' "mistaken[] [thinking], they are not in possession of plaintiffs' wood blocks or samples and that once the parties' relationship ended plaintiffs were given an opportunity to collect their items. Defendants argue that the conversion

claim is "inherently incredible" and should be dismissed (Supp at 13-15). Accepting as true the facts alleged, the motion to dismiss is denied because plaintiffs plead that not all of their property was returned (see *Cutler-Hammer, Inc. v Troy*, 283 AD 123 [1st Dept 1953]; SAC at ¶¶ 77-81). Credibility issues cannot be resolved at this early pleading stage.

Civil Conspiracy

Plaintiffs' claim for civil conspiracy is dismissed as New York does not recognize it as an independent cause of action (*Oparaji v Yablon*, 126 AD3d 443 [1st Dept 2015], lv denied 25 NY3d 907 [2015]).

Tortious Interference With Business Relations

The motion to dismiss the tortious interference claim is granted (SAC at 30; Opp at 20). Plaintiffs merely allege that defendants knew of plaintiffs' unidentified business relationships and maliciously intentionally interfered with them (SAC at 30). These bare allegations are insufficient. The complaint does not allege how defendants interfered with these relationships, why it was malicious or how plaintiffs were damaged (see *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009], lv denied 14 NY3d 736 [2010]; *Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332 [1st Dept 2006] [plaintiff's allegation that defendant interfered with

its supplier to advance its own interest deemed insufficient)).

Fiduciary Duty Causes of Action

Defendants' motion to dismiss the breach of fiduciary duty related causes of action is granted. Plaintiffs' allegations do not establish the existence of any fiduciary duty between the parties based on either common law or the terms of their agreement. Accordingly, the breach of fiduciary duty and aiding and abetting a breach of fiduciary duty causes of action are dismissed.

Unfair Competition: Misappropriation of Trade Secrets

To prevail on a claim for misappropriation of trade secrets, a plaintiff must allege that:

"(1) it possessed a trade secret and (2) that defendant used the trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.' A trade secret is 'any formula, pattern, device or compilation of information which is used in one's own business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.' In determining whether information constitutes a trade secret 'several factors should be considered: (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and

[its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others"

(*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015]; *Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, 5 Misc 3d 285, 297-98 [Sup Ct, New York County 2004]). Plaintiffs allege that by converting the wood hat blocks, marketing Tooker's unique styles at trade shows and reproducing the wood blocks, defendants misappropriated her trade secrets and engaged in unfair competition (SAC at 22). Plaintiffs allege that the wood hat blocks are "very useful to any hat maker . . . [and] had unique elements of style, shape angle, height, width and/or slant" (SAC at 23; Opp at 10). Tooker claims that the "wood blocks themselves are the 'secret process'" (Opp at 12; SAC at 23).

In their motion, defendants failed to establish that plaintiffs do not have a cause of action for misappropriation of trade secrets under New York law and that the facts alleged do not constitute an unfair method of competition covered by Florida's unlawful acts and practices law. Their motion to dismiss the claims is therefore denied.

Unjust Enrichment

Unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an agreement between the parties concerned" (*Georgoa Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). Here, both parties contend that there was an agreement but dispute the terms and nature of the agreement. Because any contract between the parties would govern the particular subject matter, plaintiff cannot recover under a quasi-contract theory and the unjust enrichment claim is dismissed (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-89 [1987]; *Sivin-Tobin Associates, LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 618 [1st Dept 2009]; *Stephen Pevner, Inc., v Ensler*, 309 AD2d 722 [1st Dept 2003]).

Intentional Infliction of Emotional Distress

Plaintiffs have insufficiently pleaded a cause of action for intentional infliction of emotional distress and defendants' motion to dismiss the claim is granted (*Howell v New York Post Co., Inc.*, 81 NY2d 155, 122 [1993]; *Freihofer v Hearst Corp.*, 65 NY2d 135, 143-44 [1985]).

Copyright Infringement of Unregistered Copyrights

Plaintiffs do not oppose dismissal of this claim; accordingly, it is dismissed (SAC at 24).

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Prima Facie Tort

The prima facie tort claim is dismissed as plaintiffs have not alleged "specific and measurable loss, which requires an allegation of special damages" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43 [1985] [defining special damages]; *Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979] [damages alleged by plaintiff require particularity and cannot be general in nature]; SAC at ¶¶ 31-32).

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint as to Chandra Govindeisami is granted and the complaint is dismissed in its entirety against Chandra Govindeisami with costs and disbursements to said defendant as taxed by the Clerk of the Court and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; 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) and the Clerk of the Trial Support Office (Room 158), who are directed to amend the court's records to reflect the dismissal as to defendant Chandra Govindeisami and she is to be removed from the caption; and it is further

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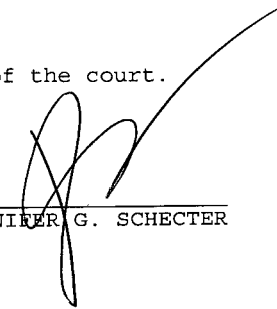
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ORDERED that defendants' motion to dismiss is granted to the extent that the third, fourth, fifth, sixth, eighth, tenth, eleventh, twelfth and thirteenth causes of action are dismissed; and it is further

ORDERED that defendants are to answer in accordance with the CPLR.

This is the decision and order of the court.

Dated: April 11, 2018



HON. JENNIFER G. SCHECTER