

<b>Free Tex for Garment &amp; Indus. v Armouth Intl. Inc.</b>
2020 NY Slip Op 33836(U)
November 19, 2020
Supreme Court, New York County
Docket Number: 154923/2020
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

*Justice*

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FREE TEX FOR GARMENT AND INDUSTRY,

Plaintiff,

- v -

ARMOUTH INTERNATIONAL INC. and  
CHARLES ARMOUTH

Defendants.

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INDEX NO. 154923/2020

MOTION DATE 11/16/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9 were read on this motion to/for DISMISSAL.

In this action seeking \$315,780.00 as damages for breach of an agreement to purchase garments described as “men’s pants made of the finest Egyptian cotton”, the defendants, Armouth International, Inc. and its principal, Charles Armouth, move pursuant to CPLR 3211(a)(7) and (a)(1) to dismiss all causes of action of the complaint save for the breach of contract claim as alleged against the corporate defendant. No opposition is submitted. The motion is granted.

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1<sup>st</sup> Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1<sup>st</sup> Dept. 2014). Here, the complaint includes causes of action for breach of contract, account stated, unjust enrichment, conversion, promissory estoppel, false pretenses and fraud in the inducement. The

complaint essentially alleges that, pursuant to a written contract dated September 6, 2018, and a shipping invoice dated September 26, 2018, the plaintiff manufactured and delivered \$315,780.00 worth of pants to the corporate defendant, and the defendant failed to pay that sum although demanded. These allegations establishes, *prima facie*, all elements of the first cause of action, breach of contract, by alleging (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). However, the remaining causes of action are not viable.

Since the existence of an express agreement between the plaintiff and defendant corporation is not disputed by the defendants, the cause of action for account stated must be dismissed. See Martin H. Bauman Assocs., Inc. v H&M Inter. Transport, Inc., 171 AD2d 479 (1<sup>st</sup> Dept. 1991). Furthermore, "[t]he existence of a valid and enforceable written contract governing a particular subject matter 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). That is, " 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra* [citation omitted]. Indeed, where such additional claims arise from the same facts and seek the same damages for the alleged breach, dismissal is warranted. See Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423 (1<sup>st</sup> Dept. 2010); see Netologic, Inc. v Goldman Sachs Grp., Inc., 110 AD3d 433 (1<sup>st</sup> Dept. 2013). Similarly, "the conversion claim also fails because such a cause of action cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability [citation omitted]." Kopel v Bandwidth Technology Corp., 56 AD3d at 320 (1<sup>st</sup> Dept. 2008); see Markov v Spectrum Group Intern., Inc. 136 AD3d 413 (1<sup>st</sup> Dept. 2016); Yeterian v Heather Mills N.V. Inc., 183 AD2d 493 (1<sup>st</sup> Dept. 1992).

Nor can the cause of action for fraud in the inducement remain. To the extent the plaintiff is alleging that the corporate defendant promised to pay for the pants, this is merely a statement of future performance, and does not amount to a misrepresentation of a present fact extraneous to the contract, as required to sustain a separate cause of action based on a fraud in the inducement. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1<sup>st</sup> Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1<sup>st</sup> Dept. 1999). In that regard, "[i]t 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.” Dormitory Auth.v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted).” See North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968). No independent legal duty is alleged here.

The complaint must be dismissed in its entirety as against defendant Charles Armouth. “A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation’s business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal.” Worthy v New York City Housing Authority, 21 AD3d 284, 286 (1<sup>st</sup> Dept. 2005). Even though the individual defendant may be the sole shareholder of the corporate defendant, the plaintiff has nonetheless failed to allege facts sufficient to warrant piercing the corporate veil to impose personal liability upon him. See generally Matter of Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135 (1993); Sutton Apartments Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646 (1<sup>st</sup> Dept. 2013). As correctly observed by the defendants, the documentary evidence submitted by the plaintiff with its complaint and resubmitted by the defendants on the motion - a Commercial Invoice and a Bill of Exchange - do not include any language or indicate any intent to hold Charles Armouth personally liable for the corporation’s obligations. Thus, these documents “resolve[] all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” against the individual defendant. Fortis Financial Services, LLC v Fimat Futures USA, *supra* at 383. To the extent the plaintiff is seeking to pierce the corporate veil, it has not alleged that (1) Charles Armouth exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” Ciavarella v Zagaglia, 132 AD3d 608, 608-609 (1<sup>st</sup> Dept. 2015) (quotation and citation omitted); see also Fantazia Int’l Corp. v CPL Furs New York, Inc., 67 AD3d 511 (1<sup>st</sup> Dept. 2009).

Finally, having failed to oppose the motion, the plaintiff has not raised any arguments to the contrary.

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that all causes of action except for the first cause of action, breach of contract, as alleged against defendant Armouth International, Inc., are dismissed pursuant to CPLR 3211(a)(1) and (7); and it is further

ORDERED that the Clerk shall mark the file accordingly, and it is further

ORDERED that the plaintiff and defendant Armouth International, Inc. shall (1) confer and commence discovery, in a cooperative fashion, employing remote technology whenever possible (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20), and (2) jointly contact the court on or before January 15, 2021, to schedule a preliminary conference.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

11/19/2020  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE