

**Quanzhou Huixin Bags Co., Ltd. v Fashion  
Accessory Bazaar LLC**

2022 NY Slip Op 31550(U)

May 11, 2022

Supreme Court, New York County

Docket Number: Index No. 652628/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAKOTA D. RAMSEUR PART 34M**

*Justice*

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QUANZHOU HUIXIN BAGS CO., LTD.,  
Plaintiff,

INDEX NO. 652628/2020

MOTION DATE 01/21/2021

MOTION SEQ. NO. 001

- v -

FASHION ACCESSORY BAZAAR LLC, STEVEN RUSSO  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36 were read on this motion to/for DISMISS.

Plaintiff, Quanzhou Huixin Bags Co., Ltd. (plaintiff), commenced this action for breach of contract, unjust enrichment, promissory estoppel, account stated, and conversion, stemming from defendants, Fashion Accessory Bazaar LLC (FAB) and Steven Russo (Russo) (collectively, defendants), alleged unpaid invoices. Defendants now move pre-answer pursuant to CPLR 3211(a)(1) and (7) to dismiss plaintiff's claims for promissory estoppel, conversion, and account stated. Plaintiff opposes the motion, and cross-moves pursuant to CPLR 3025 for leave to amend the complaint to add certain factual allegations. The motion and cross-motion are opposed. For the following reasons, both defendants' motion and plaintiff's cross-motion are granted in part.

According to the amended complaint, plaintiff entered into purchase agreements wherein plaintiff would supply, and defendants would purchase, certain goods from plaintiff, as set forth in the purchase agreements. Plaintiff alleges that plaintiff first began taking purchase orders from defendants through non-party Pacific Sourcing Group (PSG) in 2007. The amended complaint further alleges that defendants would send orders to PSG, and plaintiff would fulfil the confirmed orders from PSG. Specifically, plaintiff would manufacture the goods, defendants would inspect the goods and note any defects in the samples to PSG. Defendants would then accept or reject the shipment. Sometimes defendants would take sixty to ninety days from the time the goods were shipped to pay plaintiff as opposed to the agreed upon forty-five-day period.

According to plaintiff, between 2017 and 2018, defendants placed separate purchase orders for goods totaling \$2,756,654.15 (collectively, the agreement). Plaintiff fulfilled each of the purchase orders at various times from March 12, 2018 through June 28, 2018. During the same time, plaintiff sent defendants invoices requesting payment for the fulfilled purchase orders. Plaintiff claims that defendants failed to pay the purchase order invoices despite accepting the goods and without making an objection. Plaintiff alleges that defendants represented they would pay plaintiff in full after FAB accepted the goods. Plaintiff also alleges that it would not have shipped the goods to defendants but for defendants' representation that

defendants were financially capable to pay for the goods and that defendants would pay the full amount of plaintiff's invoices within a reasonable time of inspection.

## DISCUSSION

At the outset, the court applies the allegations contained in the proposed amended complaint to the instant motion to dismiss (*Ferguson v Sherman Square Realty Corp.*, 30 AD3d 288 [1st Dept 2006]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 [1st Dept 1998]).

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, “factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration” (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*London v Kroil Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013] [internal quotation marks and citation omitted]).

### *Promissory estoppel*

In support of the branch of their motion to dismiss plaintiff's promissory estoppel claim against Russo, defendants argue that the amended complaint fails to allege that Russo agreed to be liable for FAB's debt. Further, defendants contend that plaintiff fails to allege that the agreement for Russo to pay was not reduced to writing, as required by the statute of frauds.

Initially, as plaintiff alleges that Russo promised to pay “[p]laintiff for the [g]oods in full” after FAB inspected the goods, such promise is governed by the state of frauds, and thus must be in writing (*see* General Obligations Law § 5-701[a][2]). Plaintiff does not dispute that Russo's alleged promise to pay for the goods was not reduced to writing.

“If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise” (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]; *Matter of Estate of Hennel*, 29 NY3d 487, 404-495 [2017] [“promissory estoppel may preclude enforcement of the statute of frauds if application of the statute would result in unconscionability”]). To state a claim for promissory estoppel, a plaintiff must allege: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011]).

Here, plaintiff's claim for promissory estoppel fails to allege the “[i]nfliction of unconscionable injury on plaintiff as a result of any reliance he placed on defendant's alleged promises” (*Melwani v Jain*, 281 AD2d 276, 277 [1st Dept 2001]). Notably, plaintiff's amended

complaint only alleges damages related to money that should have been paid pursuant to the agreement for the sale of goods. Plaintiff's claim that Russo requested—at least three years before plaintiff delivered the subject goods to defendants—that plaintiff devote a major part of their “[r]esources to the orders which underlie this [] claim and place a sign confirming the dedication of the Quanzhou factory toward production of FAB Starpoint goods” (amended compl at ¶ 62), is insufficient to constitute unconscionable injury (see *Castellotti*, 138 AD3d at 205; *Foster v Kovner*, 44 AD3d 23; 29 [1st Dept 2007]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 794 [3d Dept 2002]).

In opposition, plaintiff argues in a conclusory fashion that the Convention on the International Sale of Goods (CISG) governs the agreement, including Russo's promise to pay for the goods. “In the absence of an agreement to the contrary, the CISG governs contracts for the sale of goods between parties in different countries that are signatories to the convention” (*Microgem Corp., Inc. v Homecast Co., Ltd.*, US Dist Ct, SD NY, 10 CIV 3330 at \*7, Sullivan, J, 2012). Where parties wish to exercise their right to derogate from the CISG, they must do so expressly (*Rienzi & Sons, Inc. v Puglisi*, 638 F Appx 87, 89 [2d Cir 2016]; *Hanwha Corp. v Cedar Petrochemicals, Inc.*, 760 F Supp 2d 426, 430 [SD NY 2011]). The parties do not dispute that the United States and China are signatories to the CISG and that the parties' agreement for the sale of goods does not exclude the CISG.

As defendants correctly argue, the CISG does not preempt claims for promissory estoppel (*Caterpillar, Inc. v Usinor Industeel*, 393 F Supp 2d 659, 675 [ND IL 2005]; *Geneva Pharms. Tech. Corp. v Barr Labys, Inc.*, 201 F Supp. 2d 236, 287 [SD NY 2002], *affd in part, revd in part and remanded*, 386 F3d 485 [2d Cir 2004]). Plaintiff does not cite to any caselaw demonstrating the application of the CISG to a claim sounding in promissory estoppel. Nor does plaintiff assert a claim for breach of contract against Russo. Accordingly, the CISG is inapplicable to plaintiff's claim sounding in promissory estoppel against Russo.

Defendants further argue that plaintiff's claim of promissory estoppel against FAB should be dismissed as duplicative of plaintiff's claim for breach of contract. A promissory estoppel claim will be dismissed as duplicative of a breach of contract claim “[u]nless a legal duty independent of the contract—i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself—has been violated” (*Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004]). Plaintiff does not dispute that the allegations for both claims are identical, and arise from the agreement to purchase goods itself, and thus, plaintiff's claim for promissory estoppel is also dismissed as against FAB.

#### *Account stated*

“An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due” (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250-251 [1st Dept 2007]). Further, “[a]n account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists” (*id.* at 251). Here, the amended complaint adequately states a claim for account stated. To wit, plaintiff alleges that Russo agreed to pay for the goods, that payments for prior goods were

made from a joint account held by FAB and Russo, that plaintiff sent FAB and Russo invoices for the subject goods, that neither FAB nor Russo disputed the invoices, and that the invoices remain unpaid.

### *Conversion*

In support of the branch of defendants' motion to dismiss plaintiff's claim for conversion, defendants contend that plaintiff does not have a possessory interest in the goods at issue. Specifically, defendants contend that title to those goods transferred to defendants when defendants accepted the goods. In opposition, defendants argue that the CISG, as opposed to the Uniform Commercial Code (UCC), governs plaintiff's conversion claim.

Initially, the court finds that state law is not supplanted by the CISG. Courts have uniformly held that the CISG does not apply to contract related tort claims (*Geneva Pharms. Tech. Corp.*, 201 F Supp 2d at 286; *Viva Vino Imp. Corp. v Farnese Vini S.r.l.*, US Dist Ct, ED PA, CIV A99-6384, at \*1, Aug. 29, 2000, Dubois, J.]; *Urica, Inc. v Pharmaplast S.A.E.*, US Dist Ct, CD Cal, CIV 11-02476, at \*20, Aug. 8, 2014], Morrow, J., *affd sub nom. Urica, Inc. v Medline Indus., Inc.*, 669 F Appx 421 [9th Cir 2016]), including claims sounding in conversion (*E. Concrete Materials, Inc. v Jamer Materials Ltd.*, US Dist Ct, DNJ, CV 199032, Oct. 25, 2019, Wettre, J., report and recommendation adopted, US Dist Ct, DNJ, No. 19-9032, Dec. 10, 2019, Wigenton, J.). Plaintiff fails to present any authority demonstrating that CISG governs its conversion claim. Accordingly, the court must analyze plaintiff's conversion claim under state law.

To establish a claim for conversion, “[a] plaintiff must show legal ownership or an immediate superior right of possession to specifically identifiable property, and must demonstrate that the defendant exercised unauthorized dominion over that property to the exclusion of the plaintiff's rights” (*NY Medscan, LLC v JC-Duggan Inc.*, 40 AD3d 536, 537 [1st Dept 2007]). “Under New York law, when a valid agreement governs the subject matter of a dispute between parties, claims arising from that dispute are contractual; attempts to repackage them as sounding in . . . , conversion . . . are generally precluded, unless based on a duty independent of the contract” (*Poplar Lane Farm LLC v Fathers of Our Lady of Mercy*, 449 F Appx 57, 59 [2d Cir 2011]).

Here, plaintiff's claims sounding in conversion allegedly arise from the same subject matter as in the alleged agreement. The amended complaint alleges that “[t]he promise to pay by Russo which was an essential part of the agreement for the production, shipment and purchase” of the goods and that defendants delivered the goods on the “[p]romise of the [d]efendants to pay and it is the breach of this essential promise underlying the contract, which is the gravamen of the instant conversion claim” (amended compl at ¶ 94). As plaintiff “alleges no independent facts sufficient to give rise to tort liability,” aside from “refusing to pay [for the goods,]” plaintiff's claim sounding in conversion is dismissed (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008] [holding that a claim for conversion cannot be predicated on a mere breach of contract]; *Brown v Kristal Auto Mall Corp.*, 149 AD3d 1025, 1025 [2d Dept 2017] [same]).

Accordingly, it is hereby


ORDERED that defendants' motion to dismiss pursuant to CPLR 3211(a)(7) is granted to the extent that plaintiff's claims sounding in promissory estoppel and conversion are dismissed; and it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3025 for leave to file the amended complaint is granted to the extent that plaintiff is permitted to amend the complaint as it relates to plaintiff's claim sounding in account stated, in the form annexed to plaintiff's moving papers; and it is further

ORDERED that the parties shall appear for a virtual preliminary conference on June 28, 2022 at 10:00 a.m.; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



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DAKOTA B. RAMSEUR, J.S.C.

5/11/2022  
DATE

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: