

One Step Up, Ltd. v M.A.X. Sports Enter. Inc.
2022 NY Slip Op 32507(U)
July 19, 2021
Supreme Court, New York County
Docket Number: Index No. 654548/2020
Judge: Louis L. Nock
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Amended

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

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X
ONE STEP UP, LTD., INDEX NO. 654548/2020
MOTION DATE 11/19/2020
Plaintiff, MOTION SEQ. NO. 001

- v -

M.A.X. SPORTS ENTERPRISE INC. and YOCO INC., DECISION + ORDER ON MOTION
Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendants M.A.X. Sports Enterprise Inc. and Yoco Inc. (together, "Defendants") to dismiss the third cause of action is granted, in accord with the following memorandum decision.

Background

Plaintiff One Step Up, Ltd. ("Plaintiff") commenced this action to recover funds owed in connection with the purchase of goods from Defendants (complaint ¶ 10, NYSCEF Doc 1). As alleged in the complaint, Defendants are New York corporations primarily engaged in the import and distribution of sportswear (*id.* ¶¶ 3, 5).¹ Plaintiff and Defendants entered into multiple agreements whereby Plaintiff "agreed to take in, pay for and accept certain apparel goods from Defendants of the particular quality and quantity and in the time periods required and specified

¹ The facts are recited here as alleged in the complaint and are accepted as true for the purposes of this motion, as required on a motion to dismiss, except where otherwise noted.

by [Plaintiff]" (*id.* ¶ 9). "In connection with [Plaintiff's] purchase and sale of [goods] from Defendants, Defendants from time to time would issue Debit Notes to [Plaintiff]" (*id.* ¶ 10). On April 3, 2019, Plaintiff received a debit note from Defendants in connection with the sale of 72,000 pieces of apparel (*id.* ¶ 12; Adjmi affidavit in opposition ¶ 10). On April 18, 2019, prior to receiving the goods, Plaintiff issued a check in the amount of \$356,400.00 to Defendants against the debit note (complaint ¶ 13). Defendants, in turn, purchased the goods from non-party CF2 CO., LTD ("CF2"), but did not pay CF2 for the purchase (*id.* ¶¶ 14-15). As a result, CF2 refused to release the goods to Defendants (*id.* ¶ 16). Because Plaintiff needed the goods to make timely delivery to its customers, it contacted CF2 directly and reached an agreement by which Plaintiff paid \$295,000 directly to CF2 for the goods, who then released the goods to Plaintiff (*id.* ¶¶ 18-19). Plaintiff and Defendants then reached an agreement whereby Plaintiff agreed to reimburse Defendants for freight, duty, and demurrage charges in the amount of \$32,030.95 incurred by Defendants in connection with the transaction, leaving a purported \$324,369.05 balance for the check that was issued to Defendants against the debit note (*id.* ¶ 22). The parties then reached an agreement that this amount would be further reduced by \$49,200 owed by Plaintiff to Defendants for a prior debt, leaving a balance of \$275,169.05 (*id.* ¶¶ 24-25). On June 7, 2019, Defendants issued a check for \$50,000 to Plaintiff to further reduce the balance to \$225,169.05 (*id.* ¶ 27). Plaintiff commenced this action to recover its losses as a result of Defendants' actions. The complaint interposes three causes of action for breach of contract, unjust enrichment, and conversion. In this pre-answer motion, Defendants move to dismiss the third cause of action for conversion as duplicative of the cause of action for breach of contract. Plaintiff opposes.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the 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] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

Discussion

“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” (*Dormitory Authority v Samson Construction Co.*, 30 NY3d 704, 711 [2018]). “But it is equally plain that a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract” (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 179 [1968]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). “A tort may arise from the breach of a legal duty independent of the contract, but merely alleging

that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort” (*Sommer*, 79 NY2d at 551)). “[W]here a party is merely seeking to enforce its bargain, a tort claim will not lie” (*New York University v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

In opposition to the motion, Plaintiff argues that its damages for conversion are distinguishable from those for breach of contract, arguing that Defendant had misappropriated the \$356,400.00 check used to pay for the goods, constituting a conversion, and that Defendants’ failure to repay the \$225,169.05 balance owed to Plaintiff is a separate breach of contract. This court is unpersuaded by this argument. As alleged in the complaint, Plaintiff contracted to purchase goods from Defendants, who then failed to deliver the goods. Therefore, Defendants’ duty to Plaintiff arises directly from their contractual relationship. Defendants’ alleged failure to provide the contracted-for goods, or to refund the amounts paid, are elements of Plaintiff’s cause of action for the breach of contract; not an independent tort. As alleged in the complaint, the difference between the alleged damages for conversion and the alleged damages for breach of contract is merely a result of an offset of the amounts owed by Defendants pursuant to certain subsequent agreements between the parties; not an independent duty owed by Defendants (complaint ¶¶ 22-27, NYSCEF Doc 1).

Plaintiff is also incorrect in its assertion that payment of the check to Defendants created a bailment, possibly setting the stage for a conversion of the bailed property (*see*, Plaintiff’s mem in opp [NYSCEF Doc. No. 19] at 5). “A bailment is defined as a delivery of personal property for some particular purpose, or a mere deposit, upon a contract express or implied, and that after such purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions or kept until he reclaims it, as the case may be.”

(*Herrington v Verrilli*, 151 F Supp 2d 449, 457 [SD NY 2001] [applying New York law]. See also, *Ellish v Airport Parking Co.*, 42 AD2d 174 [2d Dept 1973], *affd* 34 NY2d 882 [1974].)

No such arrangement is alleged here. Rather, Plaintiff alleges that it transferred the funds to Defendants in consideration for the purchase of certain goods, which were not delivered.

Plaintiff now seeks damages for Defendants' failure to deliver the goods; i.e., an alleged breach of contract. In short, Plaintiff seeks to enforce its bargain, and no independent cause of action for conversion is alleged. Therefore, the motion is granted and the third cause of action for conversion is dismissed.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the third cause of action is granted, and the third cause of action for conversion is severed and dismissed; and it is further

ORDERED that Defendants are directed to file an answer to the complaint within 20 days of the filing of this decision and order; and it is further

ORDERED that the parties are directed, within 30 days of the filing of defendant's answer, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf>, to the Principal Court Attorney of this Part (Part 38) at lfurdyna@nycourts.gov.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

7/19/2021
DATE

LOUIS L. NOCK, J.S.C.

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