

**Adina's Jewels Inc. v Shashi, Inc.**

2022 NY Slip Op 33054(U)

September 8, 2022

Supreme Court, New York County

Docket Number: Index No. 653588/2020

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

ADINA'S JEWELS INC.,

Plaintiff,

- v -

SHASHI, INC.,

Defendant.

-----X

INDEX NO. 653588/2020

MOTION DATE 09/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 7, 8, 9, 10, 11, and 12

were read on this motion to DISMISS

Upon the foregoing documents, defendant's motion to dismiss the complaint (motion seq. no. 001) is granted.

The Allegations of the Complaint

In this action, plaintiff Adina's Jewels Inc. ("Plaintiff") asserts four causes of action: fraudulent misrepresentation (first cause of action); breach of contract (second cause of action); breach of implied covenant of good faith and fair dealing (third cause of action); and declaratory judgment (fourth cause of action) against defendant Shashi, Inc. ("Defendant"). Defendant now moves to dismiss the complaint.

Plaintiff is an e-commerce women's jewelry company (Complaint [NYSCEF Doc. No. 1] ¶ 3). Plaintiff "offers a variety of jewelry lines, including, but not limited to: earrings, necklaces, rings, bracelets, anklets, and other jewelry types" (id.). Plaintiff alleges that Defendant is "a jewelry wholesaler and retailer, but the Shashi jewelry is of an inferior quality to Adina's, and, being of such inferior quality, Defendant is able to offer its jewelry to, among others, Adina's customers, and others at prices less than Adina's" (id. ¶ 5). Plaintiff identifies Defendant's

principal place of business as 209 W 38<sup>th</sup> Street, Suite 703, New York, New York 10018 (*id.* ¶ 2), an alleged fact of particular relevance to this motion, to be noted.

Plaintiff alleges that beginning on March 14, 2018, through July 24, 2019, Defendant engaged in a “scheme” involving the Defendant ordering jewelry through Plaintiff’s website (NYSCEF Doc. No. 1 ¶ 6). Plaintiff claims that Defendant made such orders through certain individuals operating on its behalf (*id.* ¶ 9). Plaintiff claims that Defendant ordered at least 68 pieces of jewelry (NYSCEF Doc. No. 1 ¶ 7; NYSCEF Doc. No. 2). Plaintiff provides a copy of six such orders (NYSCEF Doc. No. 2). Four of the orders identify a “Marika Overvick” as the customer, listing a billing address that is Defendant’s aforesaid principal place of business (*see*, NYSCEF Doc. No. 2). These four orders have the shipping address of two other individuals, Chris LaRocca and Danit Paulina Bretter (*id.*). The other two orders identify a “Jennifer Dise” as the customer and having a shipping and billing address belonging to Jennifer Dise (*id.*). Plaintiff alleges that the publicly accessible website “LinkedIn.com” identifies Danit Bretter as the Director of Design and Development of Defendant and identifies Jennifer Dise as the Wholesaler and PR Manager of Defendant (NYSCEF Doc. No. 1 ¶¶ 10-11). Plaintiff alleges that “Defendant utilized the residential addresses in order to cover up that it was ordering Adina’s line of jewelry for its own use, receipt, and benefit” (NYSCEF Doc. No. 1 ¶ 12).

Plaintiff noticed that some of the addresses on orders matched Defendant’s principal place of business when Defendant’s company name was openly included in the billing address on a July 14, 2019, order that included Danit Bretter’s name in the shipping address (NYSCEF Doc. No. 1 ¶¶ 22-23; NYSCEF Doc. No. 2). As noted, from March 14, 2018, through July 24, 2019, Defendant allegedly purchased 68 pieces of jewelry from Plaintiff (NYSCEF Doc. No. 1 ¶ 25). Plaintiff alleges that Defendant was “offering jewelry that was the same or substantially

similar to the inventory ordered from Adina's" for sale on its website (*id.* ¶ 27). As a possible theory of damages, Plaintiff proffers the allegation that, as a result of the aforesaid orders made presumably on Defendant's behalf by the individuals, Plaintiff decided to prevent such purchasing in the future by "implement[ing] policies and procedures for vetting orders" such as banning suspected competitors' accounts, which has cost Plaintiff "a substantial amount of time, money, and resources" (*id.* ¶¶ 28, 29, 31).

Plaintiff alleges that all orders are subject to the "Terms of Service" on its website, "Adinasjewels.com" (NYSCEF Doc. No. 1 ¶ 14). Plaintiff exhibits its Terms of Service (NYSCEF Doc. No. 3) which, at Section 6, provides: "You agree to provide current, complete and accurate purchase and account information for all purchases made at our store." Section 12 provides: "you are prohibited from using the site or its content: . . . to submit false or misleading information." Plaintiff asserts that Defendant violated the Terms of Service by submitting "misleading and inaccurate account information to Adinasjewels.com" because Defendant allegedly "submitted account information that does not accurately reflect and/or misrepresents its business address information" (NYSCEF Doc. No. 1 ¶¶ 18-19).

Prior to the present action, Plaintiff commenced a substantially similar action against Defendant on August 5, 2019, titled *Adina's Jewels Inc. v Shashi, Inc.* (index No. 654454/2019 [Sup Ct NY County]), which Defendant removed to the United States District Court for the Southern District of New York (NYSCEF Doc. No. 1 ¶¶ 32-33). The action was dismissed by the U.S. District Court on February 27, 2020, concluding that:

It is possible that Adina may have a non-preempted basis to state a cause of action under New York law, e.g., an action based, **not on copying or deception based on nothing more than copying**, but on deception based on other facts. Today's ruling is not intended to foreclose the possibility of such a pleading in the New York Supreme Court.

(*Adina's Jewels, Inc. v Shashi, Inc.*, 442 F Supp 3d 766, 774 [SD NY 2020] [emphasis added].)

### Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*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]). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

### Discussion

Plaintiff’s first cause of action asserts fraudulent misrepresentation (NYSCEF Doc. No. 1 at 7). The elements required to establish a fraud claim are: “(1) misrepresentation of a material fact; (2) scienter; (3) justifiable reliance; and (4) injury or damages (*P. Chimento Co., Inc. v Banco Popular de Puerto Rico*, 208 AD2d 385, 385 [1st Dept 1994]). Plaintiff alleges that “through the use of various individuals, [Defendant] made false representations and/or omissions in connection with Defendant’s purchase of Adina’s jewelry” (NYSCEF Doc. No. 1 ¶ 38). Plaintiff attempts to assert that because the individuals did not identify the orders as being

connected with Defendant's business, this is a misrepresentation of a material fact. However, as Defendant observes "the Complaint alleges no 'misrepresentation' because the individuals identified in the Complaint accurately disclosed their identities and the payment information in purchasing Adina's products" (Defendant's Mem. [NYSCEF Doc. No. 8] at 6). Viewing it as evidence of misrepresentation, Plaintiff points out that some of the orders included Defendant's principal place of business as the billing address with one order's billing address containing the name "Shashi INC" (NYSCEF Doc. No. 1 ¶ 8; NYSCEF Doc. No. 2). Plaintiff further points to two of the individuals on the orders, Marika Overvick and Jennifer Dise, who have "LinkedIn" profiles stating they are employees of the Defendant (NYSCEF Doc. No. 1 ¶¶ 10, 11). Plaintiff does not allege that any of the individuals themselves are fictional for the means of deceiving Plaintiff. Instead, Plaintiff alleges that since the individuals did not overtly identify themselves as employed by, or connected to, Defendant, that this is a misrepresentation of material fact. However, without establishing that the individuals are themselves fictitious and orders were placed under false names or addresses, the court cannot find that the individuals' orders, even if made on behalf of Defendant, constituted material misrepresentations of fact.

Scienter and injury also cannot be established. As Defendant further notes, "nothing in the 'terms and conditions' on Adina's website required the individuals to disclose that they were purchasing the products on behalf of Shashi" (NYSCEF Doc. No. 8 at 6). There is no requirement that purchasers disclose their business affiliations or reasons for placing orders; hence, by not disclosing their affiliations, the individuals could not have knowingly deceived Plaintiff on their behalves or Defendant's behalf. Furthermore, Plaintiff does not allege an injury in connection to the fulfillment or shipment of orders, or receipt of payment for the products. Instead, the injury that Plaintiff alleges is cast as implementation of "policies and procedures for

vetting orders” that have “cost Adina’s a substantial amount of time, money, and resources” in order to prevent its competitors from placing orders (NYSCEF Doc. No. 1 ¶¶ 28-29). While the court might appreciate the possible reasons why Plaintiff would want to prevent a competitor from purchasing its products, it remains the case that the cost of prophylactic measures elected to be spent by Plaintiff in its attempt to shield itself from that in the future cannot be characterized as injury directly and proximately related to any fraudulent misrepresentation, given the circumstances of this case, and is too attenuated from any possible injury directly and proximately related to actual orders of the products (*see, e.g., Laub v Faessel*, 297 AD2d 28, 30-31 [1<sup>st</sup> Dept 2002] [“plaintiff must establish that the alleged misrepresentations . . . were the direct and proximate cause of the losses claimed”]). “When a claim sounds in fraud, the measure of damages is governed by the ‘out-of-pocket’ rule, which states that the measure of damages is ‘indemnity for the actual pecuniary loss sustained as the direct result of the wrong’” (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538 [1st Dept 2016], *affd* 29 NY3d 137 [2017]). Thus, even affording plaintiffs the benefit of every possible favorable inference, the court is unable to find a cognizable legal claim of fraud because the Plaintiff has failed to establish the essential elements.

Plaintiff’s second cause of action is for breach of contract, stating that “each order came with it an explicit contract to abide by the Terms of Service” which Plaintiff asserts was violated (NYSCEF Doc. No. 1 ¶ 50). To allege a breach of contract, the plaintiff must show, “(a) the existence of a contract, (b) the plaintiff’s performance thereunder, (c) the defendant’s breach thereof, and (d) resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff states, “As set forth in the Terms of Service, and by visiting and purchasing jewelry from Adina’s website, Shashi agreed to section 6, entitled ‘Accuracy of

Billing and Account Information,’ requiring it ‘to provide current, complete and accurate purchase and account information for all purchases made at our store’” (Plaintiff’s Mem. [NYSCEF Doc. No. 11] at 6, *see also* NYSCEF Doc. No. 3). Neither Plaintiff nor Defendant disagree that there was a contract as part of the purchases, but Plaintiff alleges that Defendant breached the Terms of Service by submitting “false and misleading order information” and “intentionally and surreptitiously utiliz[ing] individuals for purposes of buying jewelry, when in fact, the jewelry was destined for, and to be received by, Shashi” (NYSCEF Doc. No. 11 at 6).

As discussed in connection with the first cause of action, Plaintiff has not alleged that the individuals themselves are fictitious; but instead, that they are connected to the Defendant as indicated by their “Linkedin” profiles and their billing addresses (NYSCEF Doc. No. 1 ¶¶ 8, 10, 11). Plaintiff argues that because the individuals did not explicitly reveal themselves as employees or agents of Defendant, this violates the Terms of Service to provide accurate information. But there is no clause in the Terms of Service that requires a purchaser to disclose his or her employment status. Hence, Defendant cannot be liable for the absence of any such disclosure, even were the court to find that there *was* a lack of disclosure in this regard.<sup>1</sup>

Furthermore, Plaintiff has identified no damages associated with this supposed breach since Plaintiff never alleges that it wasn’t paid for each piece of jewelry purchased. Plaintiff cannot prove that the specific breaches of contract alleged in the complaint were the “proximate cause” of its supposed injury (*see, Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 [1st Dept 2018], *appeal dismissed* 32 NY3d 1191 [2019]; *Frydman & Co. v Credit Suisse First Boston Corp.*, 1 AD3d 274, 275 [1st Dept 2003]). The purpose of contract damages is to “put the aggrieved party in the same economic position he would have been if the contract had

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<sup>1</sup> As touched on earlier, the allegation of non-disclosure seems discredited by indicia contained in the orders themselves, which include Defendant’s business address and, in one instance, explicit reference to “Shashi INC.”

been performed” (*Inchaustegui v 666 5th Ave. Partnership*, 268 AD2d 121, 126 [1st Dept 2000], *affd* 96 NY2d 111 [2001]). Even if there was a breach of the terms and conditions, the Plaintiff is in the same economic position absent alleging nonpayment for the orders. Any added cost entailed in implementing new policies and procedures, as similarly discussed above in connection with the first cause of action, cannot be characterized as contract damages under that standard. “[D]amages for a breach of contract are restrictive, limited to the economic injury actually caused to the claimant as a consequence of the other party’s breach” (*id.*). Implementing new policies and procedures was the Plaintiff’s own business choice, rather than an economic injury actually caused by the Defendant. The court is unable to find a cognizable breach of contract claim, given the absence of a breach and any injury proximately resulting from a breach.

The third cause of action is for breach of an implied covenant of good faith and fair dealing (NYSCEF Doc. No. 1 at 9). “Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that – although not expressly forbidden by any contractual provision – would deprive the other party of receiving the benefits under their agreement” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *lv denied* 12 NY3d 748 [2009]). An implied covenant of good faith and fair dealing means that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). As Defendant points out, “Adina received payments for the full purchase price for all goods sold, which were the ‘fruits of the contract’” (NYSCEF Doc. No. 8 at 9). Plaintiff has not otherwise alleged injury resulting from an alleged breach of the covenant. The plaintiff attempts to characterize “significant costs, relating to the expense of the investigation relating to Defendant’s Orders” as an injury, compensable from Defendant. However, the court

cannot characterize these costs as an injury for breach of implied covenant since the Plaintiff received the fruits of the contract – the purchase price – for the orders (*see, Kirke La Shelle Co., supra*).

In its fourth cause of action, Plaintiff asks for a declaratory judgment “finding that Defendant must stop utilizing individuals to carry out its Scheme” (NYSCEF Doc. No. 1 ¶ 69). The “Scheme” that Plaintiff perceives is that Defendant was secretly placing orders through individuals and Defendant was then offering on its website jewelry that was the same or substantially similar to the jewelry ordered by those individuals from Plaintiff (NYSCEF Doc. No. 1 ¶¶ 22-27). In the prior federal court action, Plaintiff attempted to allege “claims of unfair competition, unjust enrichment, and deceptive acts and practices unlawful” (NYSCEF Doc. No. 8 at 16). Granting Defendant’s motion to dismiss and denying Plaintiff’s motion to remand, the federal district court held: “Adina may have a non-preempted basis to state a cause of action under New York law, e.g., an action based, not on copying or deception based on nothing more than copying, but on deception based on other facts” (NYSCEF Doc. No. 1 ¶ 36; NYSCEF Doc. No. 8 at 23; *see, Adina’s Jewels, Inc. v Shashi, Inc.*, 442 F Supp 3d 766, 774 [SD NY 2020]). Plaintiff is essentially alleging the same “scheme” as it did before the federal district court, which granted Defendant’s motion to dismiss and held that an action based on “copying” is preempted. Without “deception based on other facts,” the alleged “scheme” is incognizable and cannot form the basis for a declaratory judgment enjoining individuals allegedly linked to the Defendant from ordering jewelry from Plaintiff.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted and, accordingly, the complaint is dismissed.

This will constitute the decision and order of the court.

ENTER:

*Louis L. Nock*

<u>9/8/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
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			<input type="checkbox"/> NON-FINAL DISPOSITION
			<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> SUBMIT ORDER
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			<input type="checkbox"/> REFERENCE