

Capigatti v Oriali

2023 NY Slip Op 31218(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 653218/2011

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREA MASLEY PART 48
Justice
-----X

FABRIZIO CAPIGATTI, INDEX NO. 653218/2011

Plaintiff,

- v -

ORIALI, SRL, ROBERTO MASCOLO

Defendant.
-----X

This is an action for nonpayment of commissions.¹ Plaintiff Fabrizio Capigatti seeks commissions of \$255,500 on sales of \$2,070,000 or 15%.² (NYSCEF 2, Amended Complaint.) However, at trial, the amount sought was reduced to \$100,519.

Capigatti testified that he has sold Italian handmade shirts in the United States since 1974 to retailers such as Bergdorf’s, Saks and Barneys for which he was paid 10%. (Trial Exhibit 1, Trial Affidavit.) Capigatti testified credibly that he worked for defendants as their sales agent, consultant, and brand ambassador from 2007 to 2009 for which he was paid a commission. He would be paid within 30 days of payment by a customer to defendants. He would fax his invoices to defendant Roberto Mascolo, who would wire payment the following day. The following wire payments, evidenced by Capigatti’s bank statements, from Oriali to Capigatti corroborate Capigatti’s testimony:

August 9, 2007 \$2,975
-

¹ Plaintiff alleges breach of contract and unjust enrichment. (NYSCEF 2, Amended Complaint.)

² 15% of sales is \$310,500 less \$55,000 paid by defendants leaving a balance of \$255,500. (NYSCEF 2, Amended Complaint ¶ 13.)

OTHER ORDER – NON-MOTION

October 26, 2007 \$4,975
 -
 December 3, 2007 \$3,975
 January 22, 2008 \$3,975
 February 19, 2008 \$3,975
 March 18, 2008 \$3,975
 April 8, 2008 \$3,175
 May 8, 2008 \$3,975
 May 29, 2008 \$3,175
 June 18, 2008 \$3,975
 July 21, 2008 \$3,975
 -
 September 26, 2008 \$3,975
 -
 November 13, 2008 \$3,975
 December 26, 2008 \$3,975

Total Received \$54,050. (NYSCEF 84, Trial Exhibit 5, Capigatti's Citibank bank records dated August 9, 2007-December 4, 2007; NYSCEF 85, Trial Exhibit 6, Capigatti's Citibank bank records dated January 10, 2008-January 9, 2009.)

Domenico Vacca, a clothing and fashion entrepreneur, testified for plaintiff, who Vacca has known for over 25 years. Vacca was credible and his testimony was relevant and helpful to the court. As an attorney in New York City, Vacca represented Italian manufacturers. He reviewed, drafted, and negotiated at least 50 of their contracts. Subsequently, Vacca developed Italian clothing brands in the US since 1997. Beginning in 2002, Vacca opened 15 retail clothing stores around the world. Vacca has been a party to at least 15 such contracts, which can be oral or written. He testified that Capigatti is responsible for developing the US market for luxury Italian goods and clearly reveres and respects Capigatti. Vacca met Oriali through Capigatti when Vacca was looking for a new manufacturer of shirts for his stores. Mascolo confirmed to Vacca that Capigatti is Oriali's agent. Vacca did business with Oriali for over 6 years during

which time he ordered 2,000-3,000 shirts per year or over \$2 million in revenue.³

Capigatti would write up and place the orders with Oriali. The traditional percentage of sales paid to agents is 10% which is either paid as an advance or paid when the customer pays. Vacca's relationship with Mascolo broke down when Vacca ordered 800 shirts for sale in Doha, Qatar in 2010-2011. Instead of handmade shirts, the shirts were machine made and the relationship ended.

Mascolo denies a contractual relationship with Capigatti. (NYSCEF 68, Roberto Mascolo Trial Affidavit [Mascolo Trial Aff] ¶ 5.) He testified that Capigatti was a PR agent for NYC and LA restaurants. Despite drinking a glass of wine during his virtual testimony from Florence, Italy, Mascolo's testimony was hostile in tone. His hostility toward Capigatti and Capigatti's attorney was palpable, raising his voice, even yelling once. Mascolo did not answer direct questions. Mascolo denied Capigatti's history in Italian fashion. Mascolo denied ever doing business with Capigatti, though he paid him \$54,050 over the course of three years. Mascolo only asked Capigatti for help once: to collect payment from Vacca since Capigatti had introduced them. Mascolo could not recall why he paid Capigatti. He did recall paying Capigatti \$3,975 on December 3, 2007 to help manage Vacca. Mascolo claimed Vacca stopped paying in 2009 and left a balance of over \$700,000.⁴ When Vacca paid Mascolo \$40,000, Mascolo paid Capigatti

³ Documentary evidence corroborates Vacca's testimony that he did business with Mascolo's companies (Level Group and Oriali) from 2004 to 2009 and paid Mascolo's companies over \$1.7 million. (NYSCEF 86, Trial Exhibit 7.)

⁴ However, Mascolo sued Vacca and others for \$306,298. (*Oriali srl v Chicissimo, LLC et al*, Index No. 652104/2010 [2010 Action], NYSCEF 22, Verified Complaint). The case was dismissed on April 17, 2019 for the reasons stated on the record on April 2, 2019, but the parties failed to file the transcript. (NYSCEF 134, Decision and Order dated April 17, 2019.)

\$4,975 by check the next day. Mascolo's testimony that his payments to Capigatti were charity is contradicted by the regular wire payments to Capigatti totaling \$54,050, which were sent regularly from 2007 to 2008. Mascolo's argument that the payments were gifts is undermined by the fact that they were made by Oriali srl (Oriali), Mascolo's corporation, not Mascolo personally. At trial Mascolo denied that he is the owner of Oriali. However, in both his trial affidavit in this action and an affidavit in the 2010 action, Mascolo said he was the owner of Oriali. (NYSCEF 68, Mascolo Trial Aff ¶ 2; 2010 Action, NYSCEF 11, Mascolo aff ¶ 1.) Mascolo was not credible and avoided answering questions. Therefore, the court does not credit Mascolo's testimony. (PJI 1:22.)

Scott Hill, a retail seller of luxury apparel in Beverly Hills and Hollywood who defendants supplied for 4-5 years, testified for defendants. His testimony was not particularly helpful as he had never been a party to the type of agreement at issue in this case, and had only limited exposure to six such agreements. He states in his Affidavit of Testimony that the \$54,050 defendants paid to Capigatti is a "perk," not a commission, which is not credible. (NYSCEF 69, Hill Aff ¶ 8.) The court does not credit Hill's testimony which was at times rude,⁵ contradictory, and unreliable

Capigatti seeks payment on the following invoices:

February 20, 2009 invoice #12 for \$5,000.06 covering the month of October 2008;
December 16, 2008 invoice #0196 for \$10,720 (converted from €8,000.00) covering the months of September and October 2008;
November 19, 2008 invoice #182 for \$4,000 covering the months of July/August 2008;

⁵ Hill informed the court that its question was not relevant, though he testified he is not an attorney, and told plaintiff's counsel to do his homework.

September 29, 2008 invoice #95 for \$4,000 covering the month of June 2008;
 August 4, 2008 invoice #45 for \$4,000 covering the month of May 2008;
 June 27, 2008 invoice #36 for \$4,000 covering the month of April 2008;
 May 22, 2008 invoice #25 for \$7,200 covering the month of March 2008;
 April 13, 2008 invoice #22 for \$7,200 covering the month of February 2008;
 March 7, 2008 invoice #18 for \$7,200 covering the month of January 2008;
 February 3, 2008 invoice #14 for \$7,200 covering the month of December 2007;
 December 17, 2007 invoice #125 for \$3,019.29 covering the month of November 2007;
 November 6, 2007 invoice #121 for \$4,000 covering the month of October 2007;
 July 31, 2007 invoice #35 for \$4,260 (converted from €3,000.00) covering the month of August 2007;
 December 8, 2007 invoice #125 for \$7,900 covering the month of November 2007.

Total \$79,699 (Trial Exhibit 2.)⁶

The court finds that Capigatti has certainly established an oral agreement with Oriali and that he is due \$79,699 in commissions. Effectively, defendants have no defense to the invoices. Indeed, since plaintiff credibly testified that he faxed the invoices to defendants and they failed to object, Capigatti would be entitled to this amount as an account stated.

Capigatti is due commissions of \$123,653 on Vacca's business with Oriali of \$1,236,530.14. (Trial Exhibit 7.) According to defendants' records, this total sales amount does not include the 2010 transaction which was never paid and thus Capigatti is not entitled to a commission on it. Since Oriali paid Capigatti \$54,050, there is a

⁶ Invoice #75 to Mascolo's Level Group srl (Level Group) dated September 19, 2005 for \$16,560 (converted from €13,800.00) was withdrawn. Invoice #35 for \$4,260 (converted from €3,000.00) dated July 30, 2007 covering the month of August 2007 to Level Group is omitted because Level Group is not a party. Plaintiff withdrew invoice 25 for \$3315 covering November 2007.

balance of \$69,603. However, damages are capped at \$100,519, the amount plaintiff requested. Therefore, as to Vacca's business, defendants shall pay plaintiff \$20,820 in damages.

Mascolo is personally liable. (In re Hartley, 458 BR 145 [Bkrtcy SDNY, 2011, aff'd, 479 BR 635 [SDNY 2012].) Having failed to inform this court of its bankruptcy filing in 2015 and the dissolution of the corporation in Italy in 2017,⁷ while this action was pending, Mascolo is not entitled to discharge of this debt. (*Id at 152.*) There is no evidence before this court that Capigatti's claim was discharged in Oriali's bankruptcy or that Capigatti was aware of the bankruptcy. Piercing the corporate veil not relevant here.

Finally, while defendants asked for an Italian interpreter to be present to assist defendant Mascolo, and one was provided, defendant Mascolo failed to appear—twice. On the third day of trial, Mascolo testified in response to plaintiff's subpoena. Mascolo testified in English and waived the interpreter. Mascolo clearly understood the questions and immediately responded in English. Likewise, Mascolo's trial affidavit is in English, not Italian with an English translation. Accordingly, defendant shall reimburse the court \$900. Within ten days of the date of this decision, defendant shall pay \$900 to the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance.

Accordingly, it is

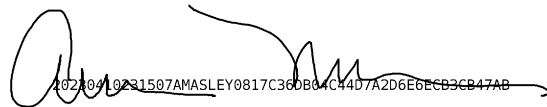
ORDERED and ADJUDGED that plaintiff Fabrizio Capigatti have judgment and recover on the first cause of action for breach of contract in the amount of \$100,519

⁷ *Oriali v Vaca*, Index No. 652104/2010, NYSCEF 132, Italian Bankruptcy documents; NYSCEF 131, February 15, 2019 letter to court from Vaca's attorney disclosing the bankruptcy.

against defendants Oriali, srl and Roberto Moscolo with interest from February 20, 2009; and it is further

ORDERED that plaintiff is directed to submit a proposed judgment to the Clerk of the Court with the above language on or before April 24, 2023; and it is further

ORDERED that Mascolo is directed to pay \$900 to the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance within ten days of this order.



402740419231507AMASLEY0817C360B84C44D7A2D6E6ECB3CB47AB

DATE: 4/10/2023

ANDREA MASLEY, JSC

Check One: Case Disposed Non-Final Disposition

Check if Appropriate: Other (Specify _____)