

**Oved Apparel Inc. v BT Supplies W., Inc.**

2023 NY Slip Op 31717(U)

May 22, 2023

Supreme Court, New York County

Docket Number: Index No. 650039/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

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OVED APPAREL INC.,

Plaintiff,

- v -

BT SUPPLIES WEST, INC., and STEVEN ODZER,

Defendants.

-----X

**INDEX NO.** 650039/2023

**MOTION DATE** 03/27/2023,  
05/22/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 5, 6, 7, 8, 9, and 10 were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Defendants move to dismiss the causes of action in the complaint apart from the first cause of action, for breach of contract.

Plaintiff, a manufacturer of apparel, sues the corporate defendant in connection with the allegation that it manufactured and delivered six million masks to the corporate defendant pursuant to purchase orders for a total price of \$1,680,000, and with a balance due of \$340,000. The first cause of action for breach of contract is accompanied by a second cause of action for account stated. The remaining causes of action sound in: unjust enrichment, fraud, “individual liability for check” (seeking to hold the individual defendant – the sole shareholder of the corporate defendant – liable on account of corporate checks he signed which were returned for insufficient funds), alter ego (seeking to hold the individual defendant liable for the corporate defendant’s liability), three causes of action for fraudulent conveyance under the Debtor Creditor

Law, alleging that the individual defendant transferred the corporation's assets to himself without adequate consideration and such that the corporation was insolvent or rendered insolvent thereby, and for attorneys' fees under the Debtor Creditor Law. Documents, bearing the legend "Proforma Invoice" and bearing a reference to Purchase Order No. 4272020, along with a schedule of charges and credits, are annexed to the complaint.

Defendants move to dismiss some of the causes of action on the ground that they are duplicative of the first cause of action for breach of contract (account stated, fraud, unjust enrichment, and "individual liability for check"). The causes of action for alter ego and fraudulent conveyance are asserted by defendants to be insufficiently pled. The cause of action for attorneys' fees, which tracks the causes of action under the Debtor Creditor Law, is likewise assailed.

The court, in theory, agrees with defendants' premise that causes of action for account stated, fraud, unjust enrichment, and "individual liability for check" cannot generally coexist with a cause of action for breach of contract, as they are duplicative of (or inconsistent with)<sup>1</sup> such cause of action (*see, Vanpoy Corp., S.R.L. v Soleil Chartered Bank*, 204 AD3d 486, 487-88 [1<sup>st</sup> Dept 2022] ["The account stated claim should be dismissed as duplicative of the breach of contract claim"]; *GSCP VI EdgeMarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 192 AD3d 454, 456 [1<sup>st</sup> Dept 2021] [affirming dismissal of an unjust enrichment claim that is "duplicative" of a breach of contract claim]; *MBIA Ins. Corp. v Credit Suisse Securities (USA) LLC*, 165 AD3d 108, 114 [1<sup>st</sup> Dept 2018] ["Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed"]; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142-43 ["this Court has "consistent[ly] refus[ed] to allow

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<sup>1</sup> In the case of fraud.

damages for fraud based on the loss of a contractual bargain”] [brackets in original]). However, no clear evidence has been presented by plaintiff as evidence of a contract or of a purchase order that reflects a contract. The documents annexed to the complaint appear, at first glance, to be internally prepared documents falling short of actual purchase orders alleged in the complaint (*see, Mobil Oil Corp. v Joshi*, 202 AD2d 318, 318-19 [1<sup>st</sup> Dept 1994] [“the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleading does not apply to . . . factual claims either inherently incredible or flatly contradicted by documentary evidence”]). Absent further proceedings, by way of discovery to ascertain the existence of a contract, it would be unfair for this court to dismiss the causes of action which would be duplicative of, or inconsistent with, breach of contract, purely on the grounds of duplicativeness or inconsistency. The better course would be to permit alternative pleading at this early stage (CPLR 3014 [“Causes of action . . . may be stated alternatively or hypothetically”]).

As for the causes of action for fraudulent conveyance (including for attorneys’ fees in connection with fraudulent conveyance), the court finds those allegations to be sufficiently pled. The complaint alleges that the individual defendant – a corporate insider (sole shareholder, director, and officer) – caused corporate assets to be transferred to himself in circumstances where the corporation was, or rendered to be, insolvent, and without fair consideration. Such allegations are sufficient to allege causes of action under the Debtor Creditor Law (§§ 273-75) and, as an incident thereof, for attorneys’ fees (*id.*, § 276-a). As for the cause of action for fraud, the predicate allegation is that the individual defendant knowingly induced continuing delivery by the plaintiff through his tender of several bad checks. The checks themselves are itemized in

paragraph 16 of the complaint, satisfying the law’s specificity requirement for fraud (CPLR 3016 [b]). Thus, those causes of action must be allowed to proceed to discovery.

As for alter ego: while a defendant’s status as the sole shareholder, officer, and director of a corporation may not, in and of itself, permit a piercing of the corporate veil, it can if it is alleged that his sole control was utilized as a vehicle for fraud and, thus, outside the purview of lawful corporate activity (*see, East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 16 NY3d 775 [2011]).

Thus, the motion to dismiss should be denied, and plaintiff should be allowed to develop the record through proof if it can.

Accordingly, it is

ORDERED that the defendants’ motion to dismiss the complaint is denied.

This will constitute the decision and order of the court.

ENTER:



<u>5/22/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
<b>DATE</b>				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE