

**Acosta Tequila, Inc. v Options Group**

2024 NY Slip Op 30453(U)

February 8, 2024

Supreme Court, New York County

Docket Number: Index No. 653542/2023

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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ACOSTA TEQUILA, INC.,

Plaintiff,

- v -

THE OPTIONS GROUP, NORJKA Y. FARRERAS

Defendant.

-----X

INDEX NO. 653542/2023

MOTION DATE 10/03/2023, 10/03/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 35, 36, 37, 43

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 38, 39, 40, 44

were read on this motion to/for DISMISSAL

Upon the foregoing documents, defendants' The Options Group d/b/a TOG USA, Inc., and Norjka Farreras, motions to dismiss the complaint are granted in part.

The instant action arises out of allegations that defendants breached a contract to produce closures for plaintiff's tequila bottles. Defendants move separately to dismiss the complaint on the grounds that the complaint fails to state a cause of action. Plaintiff opposes the instant motion.

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. Leon v. Martinez, 84 NY2d 83 [1994]. On a motion to dismiss the court "merely examines the adequacy

1 Defendants TOG INTERNATIONAL SERVICES LTD. and TOG CA have not appeared.

of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 NY3d 262, 268

Plaintiff’s complaint contains seven causes of action against the defendants: fraud, fraudulent inducement, unjust enrichment, breach of contract, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, and conversion. The Court will address each in turn.

The crux of defendant Norjka Farreras’ motion to dismiss contends that Farreras is an officer of the corporation and was not acting in her individual capacity. Further defendant Farreras contends that she is not a party to the contract, and said contract is between plaintiff and the corporation.

Defendant The Options Group d/b/a TOG USA, Inc., contends that the complaint impermissibly uses group pleadings and fails to adequately allege any cause of action as against it.

#### *Fraud*

“To establish fraud, a plaintiff must show a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 at 85 [1st Dept 2017]. “The element of justifiable reliance is ‘essential’ to any fraud claim” [internal citations omitted]. *Id.* Further, CPLR § 3016(b) provides that when a cause of action is based upon fraud “the circumstances constituting the wrong shall be stated in detail.”

Here, the Court finds that the complaint lacks the requisite factual allegations to state a claim for fraud as against any defendant. Accordingly, this cause of action is dismissed in its entirety.

#### *Fraudulent Inducement*

“For a fraudulent inducement cause of action to be viable, it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made *justifiably* relied on it and was damaged. *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 495 [1st Dept 2011].

Here, the Court finds that plaintiff failed to plead a sufficient fraudulent inducement claim. The complaint and the opposition to the instant motion contain conclusory allegations that defendants misrepresented material facts. The complaint is devoid of any factual allegations as to the alleged misrepresentations made as well as whether plaintiff was justified in its reliance of the alleged misrepresentations. Accordingly, plaintiff’s claims for fraudulent inducement are dismissed pursuant to CPLR § 3211 (a)(7).

#### *Unjust Enrichment*

“A claim for unjust enrichment is available when the defendant has not breached a contract nor committed a recognized tort, [but] circumstances create an equitable obligation running from the defendant to the plaintiff” (*Is. Stars 21 Inc. v Buccaria*, 221 AD3d 531, 532 [1st Dept 2023] internal quotations and citations omitted).

Here, it is undisputed that the parties entered into an agreement where plaintiff made payments to defendants and defendants were to provide closures for plaintiff’s tequila bottles. The complaint fails to allege any facts, other than those stated to support its breach of contract allegation, thus the Court finds that as the parties both agree that there was a contract to produce

and provide bottle closures, and subsequent modifications to the initial contract, a cause of action for unjust enrichment cannot survive. Accordingly, the cause of action of unjust enrichment is dismissed as against the moving defendants only.

*Breach of Contract*

It is well established to recover damages for breach of contract, plaintiff must show (1) the existence of a valid, enforceable contract between the parties (2) the plaintiff's full performance thereunder (3) the defendant's breach of the contract and (4) resulting damages. *see Detringo v South Island Family Medical LLC*, 158 AD3d 609 [2nd Dept 2018]. To establish the existence of an enforceable contract, plaintiff must demonstrate the existence of an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound. *Kowalchk v Stoup*, 61 AD3d 118 [1st Dept 2009].

Here, plaintiff alleges that it paid defendants for a product and did not receive the entirety of the items ordered and that many of the closures it did receive were defective. The Court finds that the complaint sufficiently alleges a cause of action for breach of contract.

*Breach of Warranty of Fitness for a Particular Purpose and Breach of Implied Warranty of Merchantability*

A claim for breach of implied warranty of fitness for a particular purpose “requires allegations that defendants had reason to know any particular purpose for which the goods are used, and that plaintiff relied on defendants’ skill or judgment to select or furnish those suitable goods.” (*Fiuzzi v Paragon Sporting Goods Co., LLC*, 212 AD.3d 431, 433 [1st Dept 2023] (quoting UCC § 2-315)).

‘To plead a breach of the implied warranty of merchantability, a plaintiff must allege that goods are defective such that they were not reasonably fit for the ordinary purpose for which

they were used, that the defect in the goods was a substantial factor in causing the injury, and line of distribution” (*Id* at 433, internal citations omitted).

The Court finds that, at this procedural posture, giving the complaint every favorable inference as required, plaintiff’s fifth and sixth causes of action are adequately pled and are not duplicative of the breach of contract cause of action. The complaint alleges that the bottle closures were damaged and defective and were not usable for their intended use, keeping the tequila bottles closed. These allegations are sufficient to survive the instant motion to dismiss.

#### *Conversion*

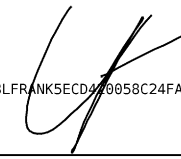
Plaintiff’s seventh cause of action alleges conversion on the basis that defendants have retained the funds despite its failure to deliver the required goods. Here, the Court finds that this claim is duplicative of the breach of contract claim. The complaint does not contain any factual allegations, apart from the facts to support its breach of contract claims to sustain a claim for conversion. Accordingly, plaintiff’s seventh cause of action is dismissed in its entirety.

#### *Claims as to defendant Norjka Farreras*

At this juncture dismissal of the complaint as to Farreras is premature. Defendant Farreras has not established as a matter of law that dismissal is warranted on the pleadings. Accordingly, it is hereby

ORDERED that plaintiff’s first, second and seventh causes of action are dismissed in their entirety; and it is further

ORDERED that plaintiff’s third cause of action, unjust enrichment, is dismissed as against defendants The Options Group d/b/a TOG USA, Inc., and Norjka Farreras only.

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2/8/2024  
DATE

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LYLE E. FRANK, J.S.C.

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