

**Randibags, LLC v Essex Mfg., Inc.**

2024 NY Slip Op 32679(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 656670/2019

Judge: Debra A. James

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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. DEBRA A. JAMES**

**PART 59**

*Justice*

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RANDIBAGS, LLC, HOWARD GINSBURG, and RANDI  
GINSBURG,

Plaintiffs,

- v -

ESSEX MANUFACTURING, INC.,

Defendant.

-----X

ESSEX MANUFACTURING, INC.,

Third-Party Plaintiff,

-against-

ALLAN GINSBURG,

Third-Party Defendant.

-----X

INDEX NO. 656670/2019

MOTION DATE 04/20/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595020/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 90, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 111, 113

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 91, 94, 104, 112

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks to compel plaintiff to respond to the discovery demands of defendant, the cross motion of defendant (motion sequence number 001) is

granted, and counsel shall appear for a preliminary discovery conference (see 22 NYCRR §202.12[h]); and it is further

ORDERED to the extent that it seeks to strike the complaint, the cross motion pursuant to CPLR § 3126 of defendant (motion sequence number 001) is denied; and it is further

ORDERED that motion of the third-party defendant Allan Ginsburg for summary judgment dismissing the third-party complaint against him (motion sequence number 002) is granted, without opposition, and the third-party complaint is severed and dismissed, with costs and disbursements to the third-party defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of the plaintiffs Randibags, LLC, Howard Ginsburg, and Randi Ginsburg for summary judgment on their complaint and for summary judgment dismissing the counterclaim for breach of contract, interposed in the answer of defendants (motion sequence number 001), is denied; and it is further

ORDERED that counsel in the first-party action are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two days before August 15, 2024, on which date counsel shall

appear via Microsoft Teams, unless such appearance be waived by the court.

#### DECISION

In this action for breach of consulting services agreement between plaintiffs and defendant Essex Manufacturing, Inc. ("Essex"), dated March 15, 2017 ("the Agreement") (NYSCEF Doc. No. 44, plaintiffs Randibags, LLC, Howard Ginsberg, and Randi Ginsburg (collectively, "Randibags") move for summary judgment to recover unpaid consulting commissions thereunder.

Randibags alleges that, under the Agreement, it is entitled to a 7% consulting commission on Essex's net sales of handbags, based on orders invoices and shipped, in exchange for consulting services. (Id. at 2.2).

Essex opposes the motion for summary judgment and cross-moves, pursuant to CPLR § 3126, for an order compelling Randibags to comply with discovery demands, or to strike the complaint of plaintiffs.

It is undisputed that Randibags received commissions from March 2017 to March 2018, at the rate of 7.0% of net sales. However, between April 2018 and May 2019, Randibags received only a 3.5% commission on Essex's net sales.

On June 1, 2019, Essex sent correspondence to Randibags, which stated that, based on plaintiff's failure to provide services as

set forth in the Agreement, it was terminating the Agreement. (NYSCEF Doc. No. 74).

Randibags commenced this action seeking the balance of 3.5% in unpaid commissions for the period of April 2018 to May 2019.

In opposition to Randibags' motion, by affidavit of its principal Peter Baum, Essex contends that the Ginsburgs, principals of Essex and signatories, breached the Agreement by "not adding value to Essex" in its consulting services and specifically, by failing to maintain the Walmart account, resulting in substantial losses in Essex's business in the first year of the Agreement. Deponent Baum also alleges that the Ginsburgs fraudulently induced Essex to enter into the Agreement, by misrepresenting their skills, expertise and consulting and business abilities with respect to handbag design and manufacturing.

By e-mail dated April 17, 2018 sent to the Ginsburgs, Baum set forth a "Change in Commission Structure", which purported to reduce the commission under the Agreement to 3.5% based on such losses.

In reply, Randibags stated that such proposed "Change in Commission Structure" was not effective, as the Agreement required any amendments to be made only "in writing signed by both parties". (NYSCEF Doc. No. 44 , 4.7).

This court agrees with Essex that as Randibags accepted the reduced commissions, without objection, never rejecting such reduced commissions, there is an issue of fact whether there was a meeting of the minds between the parties on the proposed "Change in Commission Structure". Such evidence raises an issue of fact as to whether the reduced payments were unequivocally referable to the proposal that Baum sent by e-mail to the Ginsburgs on April 17, 2018. See Sarcona v DeGiaino, 226 AD2d 1143, 1144 (4<sup>th</sup> Dept 1996).

With respect to the counterclaim for breach of Agreement, this court agrees with Essex that its submissions raise issues of fact "whether [the Ginsburgs] failed to provide consulting services, meet deadlines and provide useful ideas to be incorporated into [Essex's business]", Smolev v Hochman Design Group, Inc., 79 AD3d 540, 541 (1<sup>st</sup> Dept 2010).

Finally, Essex, as third-party plaintiff, submits no opposition to the third-party defendant Allan Ginsburg ("Allan") motion for summary judgment to dismiss Essex's third-party

complaint against is him. In addition, as it is unrefuted that Allan is not a signatory to the Agreement, there is no merit to Essex's third-party complaint against Allan for liability and such action must be dismissed.

*Debra A. James*

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7/2/2024  
DATE

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DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE