Hershenson v Adorama Inc.
2026 NY Slip Op 31540(U)
April 2, 2026
Supreme Court, New York County
Docket Number: Index No. 654538/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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INDEX NO. 654538/2021

EVAN HERSHENSON,
Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

ADORAMA INC., KITCHEN WINNERS NY INC., YOSSI MENDLOWITZ, and JOSEPH HERSHEY WEINER,
Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 54, 56, 58, 59

were read on this motion to/for **SUMMARY JUDGMENT**.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 57, 60, 61, 62, 63

were read on this motion to/for **DISMISSAL**.

In this action, plaintiff moves the court, (i) pursuant to CPLR 3212(a), for summary judgment in his favor as against defendants with respect to his third (breach of contract), fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action; (ii) to dismiss the counterclaim asserted by defendants; and (iii) to award any further relief deemed just or appropriate including, without limitation, attorneys' fees, costs and disbursements (NYSCEF Doc No. 24, *plaintiff's Notice of Motion*) (Mot. Seq. 001).

Defendants also move the court, (i) pursuant to CPLR 3211(a)(7), to dismiss each of the causes of action in plaintiff's complaint as against defendants YOSSI MENDLOWITZ and JOSEPH HERSHEY WEINER (collectively, "Individual Defendants"); (ii) pursuant to CPLR 3016(b), to dismiss the first (fraud) and second (promissory fraud) cause of action against all defendants; (iii) to dismiss the fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action on the basis that each of these quasi-contract claims are barred; and (iv) to grant any other relief as deemed just and proper (NYSCEF Doc No. 44, *defendant's Notice of Motion*) (Mot. Seq. 002).

The motions are hereby consolidated for disposition.

At the outset, the overlapping nature of these motions should be clarified. The first branch of defendants' motion seeks dismissal of each of plaintiff's causes of action against all defendants. In his memorandum of law in opposition to this motion, plaintiff concedes that he "asserts claims of fraud and promissory fraud (first and second causes of action) only [as] against

[the individual defendants]. The remaining causes of action are against [d]efendants Adorama, Inc. and Kitchen Winners NY Inc. only" (NYSCEF Doc No. 60 ¶ 5, *plaintiff's Memorandum of Law in Opposition to defendants' Motion to Dismiss*). Accordingly, the first branch of plaintiff's summary judgment motion, notwithstanding the reference to defendants generally, is a request for summary judgment against defendants ADORAMA, INC. ("Adorama") and KITCHEN WINNERS NY, INC. ("Kitchen Winners") (collectively, the "Company Defendants"). Thus, the request in the second branch of defendants' motion to dismiss is likewise limited given that the causes of action referred to therein are only as against the Company Defendants.

In light of plaintiff's clarification above, the requests for relief under the motions are set forth as follows. Plaintiff moves the court (i) for summary judgment in his favor as against Company Defendants with respect to his third (breach of contract), fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action; (ii) to dismiss the counterclaim asserted by defendants; and (iii) to award any further relief deemed just or appropriate including, without limitation, attorneys' fees, costs and disbursements. As to defendants, their motion seeks: (i) to dismiss the first (fraud) and second (promissory fraud) cause of action against the Individual Defendants; (ii) to dismiss the fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action against the Company Defendants on the basis that each of these quasi-contract claims are barred; and (iii) to grant any other relief as deemed just and proper.

The background facts giving rise to this dispute are as follows. On or about February 5, 2021, plaintiff and the Company Defendants entered into an agreement under which the Company Defendants would supply to plaintiff 250,000 boxes of medical-grade examination gloves with ASTM 6319 and FDA 510(k) certifications for a total purchase price of $2,750,000.00 (NYSCEF Doc. Nos. 26 ¶ 10, *Hershenson affidavit*; 27, *agreement dated February 5, 2021*). On or about February 16, 2021, plaintiff remitted a deposit of $275,000.00 to Adorama (NYSCEF Doc. Nos. 28, *wire transfer*; 37 ¶ 15, *Weiner affidavit*). At or around this time, plaintiff received a sample box of gloves which appeared to be manufactured by "MedCare". Plaintiff contends that these gloves did not meet the certification requirements under the contract on the basis that they did not, at the time, have an FDA 510(k) certification (*Hershenson affidavit* ¶ 18-20). Plaintiff claims he advised defendants by e-mail that the gloves did not comply with the requirements under the contract. Defendants insisted that the goods did comply but alternatively, offered to replace the goods although it noted that the replacement would not be by the required delivery date under the contract (*Hershenson affidavit* ¶ 23). Plaintiff contends that because defendants were therefore unwilling or unable to produce goods by the required delivery date, his counsel terminated the agreement and demanded a refund of the deposit which was refused by defendant's counsel (*Hershenson affidavit* ¶ 24-25).

Plaintiff now moves for summary judgment on his third, fourth, fifth, sixth, seventh, and eighth causes of action, pursuant to CPLR 3212(a), on the basis that the Company Defendants did not and could not provide gloves which conformed to the requirements specified under the contract. Defendants, in opposition, argue that plaintiff's failure to annex to his motion papers a statement of material facts and his failure to attach copies of pleadings to his motion constitute

procedural defects requiring this court to dismiss the motion for summary judgment. Defendants also argue that plaintiff's motion for summary judgment should be denied as premature and even if not, he has failed to satisfy his burden for summary judgment.

It is well-established that summary judgment may be granted only when it is clear that no triable issue of fact exists. (See *Alvarez v Prospect Hosp.,* 68 NY2d 320,324 [1986]; see also *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851,853 [1985].) The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. (See *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 NY2d 1065,1067 [1979].) Failure to make such *a prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. (See *Ayotte v Gervasio,* 81 NY2d 1062, 1063 [1993].)

The court turns first to defendants' arguments regarding procedural defects in plaintiff's motion. First, defendant argues that plaintiff was required to annex to its motion papers a separate, short, and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried pursuant to 22 NYCRR § 202.8-g. Defendant contends that plaintiff's failure to do so is not a mere technical violation but rather a substantive defect requiring the court to dismiss the motion. Defendants describe the rule as "unequivocal in its requirement". However, § 202.8-g was repealed, effective July 7, 2025 and accordingly, defendants' argument relying on a failure to annex a statement of material facts based on that section lacks merit.

Next, defendants contend that plaintiff's failure to append a complete set of pleadings to his motion is fatal, referring to CPLR 3212(b). However, CPLR 2214(c) makes clear that this requirement does not apply in an e-filed proceeding, such as here, where the papers have been previously filed. Accordingly, failure to append pleadings does not defeat plaintiff's motion.

Turning now to defendants' contention that the motion for summary judgment is premature. Defendants argue that summary judgment would be premature on the basis that discovery has not been completed and defendants have not had an opportunity to depose plaintiff on issues subject to his summary judgment motion. It is accepted at the outset that a party may move for summary judgment at any point after issue has been joined, including before discovery has been taken (see *Harman Agency, Inc v Wilhelmina Licensing LLC,* 211 AD3d 470, 471 [1st Dept 2022]). While it is true that in some cases, summary judgment motions are dismissed as premature when the movant's deposition has not yet been taken, it is incumbent upon the opposing party — here, defendant — to submit an affidavit which specifies *details* which convince the court that "facts essential to justify opposition may exist but cannot be stated" (CPLR 3212(f)). Nothing in the affidavit in opposition to the motion (*Weiner affidavit*) provides those details.

It is also important to note that in this case, issue was joined in July 2021, almost four years before the filing of the present motion. In that period, defendant did not make meaningful attempts to seek the complete discovery it now complains of not having received. Nor have defendants made efforts to seek discovery from any third party which it now claims might have evidence which could contradict plaintiff's assertions. Under these circumstances, opposing

defendants' assertions as to a lack of discovery are unavailing. (See *Singh v New York City Hous. Auth.*, 177 AD3d 475, 476 [1st Dept 2019]).

Here, plaintiff has established through his affidavit and photographs that the gloves he was provided are branded under the brand name "MedCare" (*Hershenson affidavit* ¶ 18-20; NYSCEF Doc. No. 29, *photographs of MedCare Box*). That box indicates two manufacturers which appear to be involved in the production of the gloves — Global Tooling Service s.r.o. ("Global Tooling") and Dongguan Grinvald Technology Co. Ltd. ("Grinvald"). A copy of a search of the FDA's website conducted by plaintiff indicates that Grinvald obtained its 501(k) certification to market a product branded as "Medcare Powder-Free Blue Nitrile Patient Examination Gloves" on March 4, 2022, one year after the gloves were provided to plaintiff (*Hershenson affidavit* ¶ 21; NYSCEF Doc. No. 30, *FDA approval letter dated March 4, 2022*). A search of FDA's website indicates that Global Tooling has not obtained its 501(k) certification (*Hershenson affidavit* ¶ 22).[1]

Defendants raise two arguments in response. First, defendants argue that the term in the agreement referring to 510(k) certification is ambiguous and can mean that the gloves may not be certified so long as the manufacturer is certified. This is of importance because defendants also argue that the gloves were manufactured by a company that was 510(k) certified — Zhonghong Pulin Medical Products Co. Ltd. ("Pulin"). Defendants contend that "a 510k certification can be attached to either the product from the manufacturer or on the box of the products… [and because] here, the 510k certification was on the manufacturer … the designations on the box or the lack thereof, are of no matter." (*Weiner affidavit* ¶ 11).

As to this argument, defendants contend that discovery is required to determine the parties' understanding of the term in the agreement referring to 510(k) certification. However, where the meaning of a contractual provision is clear on its face, it must be interpreted accordingly (see *South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005].) While extrinsic materials may be relevant where there is ambiguity, (*Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]) this term in the agreement does not present that ambiguity. The agreement clearly provides that the "Sellers agree to sell to Buyer and Buyer agrees to purchase from Sellers the 'Products' described below" and those products are described as "Nitrile Gloves (Box 100) Color: Blue, Medical exam grade *with* ASTM 6319 and *FDA 510K*" (*Agreement dated February 5, 2021*) (emphasis added). The conjunction "with" in the product description clearly links the certification to the specific product provided. The term is not ambiguous, and no discovery is required to ascertain its meaning, which is clear on its face.

Defendants provide some evidence that the gloves were actually manufactured by Pulin which did have a 510(k) certification. Two issues arise in relation to that argument. First, the only evidence in support of that contention is a letter purportedly from Pulin which includes a single sentence stating that "[t]his is to confirm that the glove (Bulk) we supply to global tooling service Ltd is made in our factory, ZhongHong Pulon Medical Products Co., Ltd" (NYSCEF Doc. No. 41, *Zhonghong Pulin confirmation*). The letter is stamped and dated November, 13,

[1] Here, the court in its discretion, takes judicial notice of material derived from government websites. (See *LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011]).

2020. This letter, although relied upon by defendants as evidence that Pulin produced the gloves provided to plaintiff, refers to Zhonghong *Pulon* Medical Products Co. It is unclear whether this is simply a typo and is the same company as Pulin or whether it is a different company altogether. In any case, and more importantly, the letter refers to gloves generally and not MedCare gloves specifically. This is of significance because the letter purportedly evincing Pulin's 510(k) certification refers to "Nitrile Powder Free Patient Examination Gloves, Blue Color." (NYSCEF Doc No. 40, *Medicare brochure & supporting docs*). No reference in Pulin's 501(k) certification letter refers to MedCare gloves. However, 21 CFR 807.87(a) requires that all submissions to the FDA requesting 510(k) certification include the "device name, *including both the trade or proprietary name* and the common or usual name or classification name of the device" (emphasis added). Indeed, Grinvald's 501(k) certification granted on March, 4, 2022 (one year after the gloves were delivered to plaintiff), refers to "Medcare Powder-Free Blue Nitrile Patient Examination Gloves" (*FDA approval letter dated March 4, 2022*). This reflects the fact that the 501(k) certification attaches to each product bearing a different trade name.

In light of the above, plaintiff has demonstrated a *prima facie* entitlement to judgment on the breach of contract claim on the basis that he fulfilled his contractual obligations by paying the deposit of $275,000.00 and defendants failed to provide conforming goods and failed to refund him the deposit (see *Noto v Planck, LLC*, 228 AD3d 516, 516 [1st Dept 2024].) And, "[w]here the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation" (*Leggio v Gearhart,* 294 AD2d 543, 544 [2d Dept 2002]; see *Caraballo v Kingsbridge Apt. Corp.,* 59 AD3d 270, 270-1 [1st Dept 2009]). For the reasons set forth above, Company Defendants have not met that burden in this case.

The remaining claims subject to the summary judgment motion are rendered moot given the foregoing. Therefore, summary judgment as to plaintiff's fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action is denied.

The branch of plaintiff's motion seeking dismissal of the counterclaim asserted by defendants is also granted. Defendants' single counterclaim for breach of contract on the basis of plaintiff's failure to remit the total amount owing under the contract fails. Plaintiff lawfully exercised his right to terminate the agreement due to defendants' inability and unwillingness to fulfill their obligations under the agreement.

As to plaintiff's request, *inter alia*, for attorney's fees, no basis has been demonstrated to warrant entitlement to same as it is not addressed in plaintiff's memorandum of law nor is it the subject of any evidence in this motion. Accordingly, the request for attorney's fees is denied.

Turning now to defendants' motion to dismiss and the branch of the motion requesting the court, pursuant to CPLR 3016(b), to dismiss the first (fraud) and second (promissory fraud) cause of action against the Individual Defendants. Defendants contend that these causes of action should be dismissed on the basis that the pleading fails to state a cause of action or is insufficiently pleaded. In a motion to dismiss, the facts pleaded in the complaint are presumed to

be true but "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220, [1st Dept 1991].)

The facts pleaded by plaintiff in the complaint include facts concerning statements made by an authorized representative of Company Defendants, Simcha Klein. This forms the basis of the allegations that plaintiff was misled and that he relied on that misrepresentation and suffered damage. Nothing is pleaded as to Individual Defendants' involvement in the purported fraud — the statement said to constitute the fraud is expressly described as being made by a representative of Company Defendants. Accordingly, plaintiff has failed to properly plead the first or second cause of action as against Individual Defendants, who he concedes are the only parties against whom he alleges these causes of action.

Next, defendant seeks dismissal of the fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action on the basis that each of these quasi-contract claims is barred. In his memorandum of law in opposition to defendant's motion to dismiss, plaintiffs expressly describe these causes of action as permissible only on the basis that these causes of action provide an alternative path to recovery if he is unsuccessful on his breach of contract claim. In light of the foregoing discussion as to plaintiff's successful motion for summary judgment against Company Defendants on his breach of contract claim, and plaintiff's concession that these are alternate causes of action, this branch of defendant's motion is granted. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion (Mot. Seq. 001) seeking summary judgment against defendants ADORAMA INC. and KITCHEN WINNERS NY INC with respect to the third cause of action for breach of contract is granted solely as to liability but issues pertaining to damages shall be determined at the time of trial; and it is further

ORDERED that the branch of plaintiff's motion (Mot. Seq. 001) seeking dismissal of the counterclaim asserted by defendants is granted; and it is further

ORDERED that the branch of defendant's motion (Mot. Seq. 002) to dismiss the first (fraud) and second (promissory fraud) causes of action against defendants YOSSI MENDLOWITZ and JOSEPH HERSHEY WEINER is granted; and it is further

ORDERED that the branch of defendants' motion (Mot. Seq. 002) seeking dismissal of the fourth (unjust enrichment), fifth (money had and received), sixth (conversion), seventh (promissory estoppel), and eighth (breach of the implied covenant of good faith and fair dealing) causes of action against defendants is granted; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

April 2, 2026

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	X	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**