Zhangjiagang Sunrise Home Textile Co., Ltd. v Dream Modes, Inc.
2013 NY Slip Op 32833(U)
November 1, 2013
Supreme Court, New York County
Docket Number: 651935/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651935/2011
ZHANGJIAGANG SUNRISE HOME
vs.
DREAM MODES INC.
SEQUENCE NUMBER : 004
DISMISS ACTION

INDEX NO. _____
MOTION DATE 8/26/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 60-64

Answering Affidavits — Exhibits _____ | No(s). 65

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/1/13

SHIRLEY WERNER KORNREICH
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

ZHANGJIAGANG SUNRISE HOME TEXTILE CO., LTD.,

Index No: 651935/2011

DECISION & ORDER

Plaintiff,

-against-

DREAM MODES, INC., RALPH TAWIL, and VICTOR E. SETTON,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Defendants Dream Modes, Inc. (DMI), Ralph Tawil, and Victor E. Setton move to dismiss the third cause of action in the Second Amended Complaint (the SAC) pursuant to CPLR 3211 and 3016(b). Defendants' motion is granted for the reasons that follow.

I. Factual Background and Procedural History

As this is a motion to dismiss, the facts recited are taken from the SAC.

Plaintiff Zhangjuagang Sunrise Home Textile Co., Ltd. (Sunrise), a company incorporated and located in China, sells and ships merchandise to purchasers around the world. SAC ¶¶ 1, 9. DMI, a closely-held company located in New York, has purchased goods from Sunrise since 2007. ¶¶ 2, 9. Tawil and Setton are the principles of DMI. ¶ 3.

On July 14, 2011, Sunrise commenced this action against DMI and Tawil, alleging that DMI owed approximately $270,000 for goods Sunrise shipped to DMI. Sunrise moved to amend its complaint to allege, *inter alia*, fraud against DMI and Tawil, and the court granted the motion at a hearing on May 10, 2012. *See* Dkt. 11 & 66 (grey sheet & transcript). However, in

permitting Sunrise to assert fraud claims, the court cautioned that such claims must be pled with the requisite specificity required by CPLR 3016(b). *See* 5/10/12 Tr. at 11. The court did not rule on the viability of the fraud claim; it merely found Sunrise had laid a sufficient foundation warranting leave to amend.

Sunrise filed an Amended Complaint on June 5, 2012. On September 30, 2012, Sunrise filed a motion for a default judgment. DMI and Tawil cross-moved for sanctions. Sunrise then filed a further cross-motion for judgment on the pleadings. After that set of motions was briefed, Sunrise filed another motion by order to show cause: (1) to compel certain discovery from DMI and Tawil; and (2) for leave to file a second amended complaint to add fraud claims against Setton. On February 22, 2013, oral argument was held on all of the motions. *See* Dkt. 58 (transcript). The court, on the record, decided the discovery motions and granted Sunrise further leave to amend to assert fraud claims against Setton. Again, the court did not (and could not) assess the merits of the claim because a proposed amended pleading was not provided. Thus, to date, despite Sunrise's contentions to the contrary, there is no "law of the case" regarding the fraud claims against Tawil and Setton, since the court has yet to assess the merits of such claims.

Sunrise's current, operative pleading, the SAC, was filed on March 7, 2013. The SAC lists three causes of action. The first two, breach of contract and account stated, are asserted only against DMI and seek payment for goods shipped to DMI, totaling $285,608.34. Defendants have not moved to dismiss these claims. The third cause of action, fraudulent misrepresentation or inducement, is asserted against all three defendants. On May 1, 2013, defendants moved to dismiss this fraud claim on three grounds: (1) lack of specificity; (2) failure to state a claim; and (3) failure to identify a representation made by Setton.

The eight alleged fraudulent representations are listed in paragraph 87 of the SAC. The representations are statements made by Tawil to Shirley Wu, a Sunrise employee who corresponded with Tawil about the subject shipments.[1] In short, the shipments worked as follows: (1) DMI would place an order with Sunrise; (2) Sunrise would ship the goods from China to New York; (3) upon arrival, DMI would request the shipment be released to it; and (4) if Sunrise received the relevant payment, it would release the goods to DMI.

By the end of the summer of 2010, DMI owed $280,000 to Sunrise for merchandise that was sitting on a New York dock, waiting to be released to DMI upon payment. SAC ¶ 15. On September 2, 2010, Tawil began sending Wu a series of emails, requesting release of the goods, despite not having paid for them. ¶¶ 15-20. Wu refused, insisting on payment. *Id.* In October 2010, Tawil and Wu negotiated a payment plan, but DMI still did not make all of the required

[1] The SAC discusses all of the communications between Tawil and Wu. Paragraph 87 of the SAC summarizes the 8 categories of representations, reproduced below. Tawil's representations included:

"(1) requesting a net 30-days payment term on the basis of their long-standing relationship ("We have been doing nice business together and we have proven to you that we can work well together in order to grow our business"); (2) requesting a telex release on a 649-container shipment, stating that he was "out of the office traveling" but would "be back in next week" and that the shipment needed to be picked up and released as soon as possible or it would go into demurrage; (3) requesting another telex release on two case shipments, stating that he was "in the middle of switching banks;" (4) requesting approval for the telex releases, promising to have all of his finances in order "by the end of the month" and stating that Dream Modes would be able to pay open balances at that time, and that it would make it up to Sunrise "with future business;" (5) requesting release of the shipments, stating "I will have fund after next week;" (6) again requesting telex releases based on a payment schedule for September 30 to October 30, 2010; (6) justifying the failure to make payments according to the payment schedule on the basis that he had been traveling and promising again that he would make payment arrangements; (7) promising repeatedly to work on a payment schedule "shortly" and "as soon as possible" and "in the next two weeks once he got finances in order with a new bank," and (8) promising to make payments as soon as additional goods were shipped, while threatening to cancel orders altogether (even though the goods had already been manufactured for defendants pursuant to their orders) if they were not shipped by a certain date or immediately."

payments. ¶¶ 21-30. On October 16, 2010, Tawil began sending Wu emails insisting on the immediate release of the goods and threatened to renege on their sales contracts if she did not comply. ¶¶ 31-50. Tawil offered less money than originally agreed to, and each time Wu reluctantly acquiesced, Tawil attempted to renegotiate for an even lower price. *Id.* Ultimately, Wu gave in, due to economic pressure, resulting not only from the recession, but from the fact that, if DMI refused to pay, Sunrise's goods would be stuck halfway around the world on a New York dock. After receipt of a small percentage of the monies owed, Wu eventually released the goods to DMI.

As this court has repeatedly remarked at the hearings in this case, Sunrise has a strong claim for breach of contract against DMI for the original agreed-upon contract price for all of the shipped goods, which exceeds $280,000. However, DMI has apparently been defunct since early 2011. Consequently, Sunrise seeks to hold DMI's principles, Tawil and Setton, liable for DMI's debt via a fraud claim. Additionally, though not pled in the SAC, Sunrise also seeks to hold Tawil and Setton, and their new company, Pajama Drama LLC (which may be an alter ego of DMI, as it allegedly is a mere successor to DMI's business under a new corporate name), liable for DMI's debt. As ordered below, Sunrise has leave to file a third amended complaint, in which it may assert veil piercing/alter ego/successor liability claims against the new company to enforce DMI's contractual obligations. But, such claims, if asserted, must be pled with the requisite specificity. Alternatively, as discovery in this action is nearly complete, Sunrise may seek summary judgment against DMI and then attempt to enforce such judgment against the new company under Article 52 of the CPLR. Regardless, for the reasons discussed below, Sunrise cannot maintain its fraud claim.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

To properly plead a claim of fraud, the complaint must contain allegations of a material misrepresentation, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011) (to maintain a claim of fraudulent inducement, a complaint must allege "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."), citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996). Additionally, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

Conduct "which relates solely to the underlying breach of contract[] does not give rise to a separate cause of action for fraud." *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995). Where the alleged fraud arises from a contractual duty, such claim is only viable when "the alleged misrepresentation [is a fact] extraneous to the contract and involve[s] a duty separate from or in addition to that imposed by the contract." *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 (1986). However, "[a] cause of action sounding in fraud is not duplicative of a cause of action to recover damages for breach of contract where the plaintiff sues individuals who were not parties to the contract, *and seeks compensatory damages which are not recoverable for breach of contract*." *Introna v Huntington Learning Centers, Inc.*, 78 AD3d 896, 898-99 (2d Dept 2010) (emphasis added). The First Department has explained:

> Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant "to place the nonbreaching party in as good a position as it would have been had the contract been performed"; the damages recoverable for being fraudulently induced to enter a contract are meant to "indemnify for the loss suffered through that inducement", e.g., damages for foregone opportunities.

Manas v VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008) (internal citations omitted).

Here, the fraud claim is duplicative because Sunrise merely seeks to collect its breach of contract damages from DMI's principles. However, even if the claim was not duplicative, it

fails anyway since Sunrise has not identified an actionable representation. In essence, Tawil's communications with Wu evidence a shakedown, whereby Tawil threatened not to pay Sunrise anything if the goods were not released to DMI for a reduced price. This is not fraud. At most, it is duress that does not discharge DMI's contractual obligation to pay the original, full purchase price. *See Goncalves v Regent Int'l Hotels, Ltd.*, 58 NY2d 206, 220 (1983) (promise to perform a pre-existing legal obligation is not adequate consideration upon which new contract can be based). But, Tawil's alleged lies about DMI's intent to pay are the very sort of promises of future performance that do not give rise to a fraud claim. *See N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995) ("allegations that defendant entered into a contract while lacking the intent to perform it are insufficient"). Additionally, as all of the representations came from Tawil, there is no basis to asset a fraud claim against Setton. *See Raytheon Co. v AES Red Oak, LLC*, 37 AD3d 364, 365 (1st Dept 2007).

That being said, and as discussed earlier, if defendants' new company is subject to veil piercing or a fraudulent transfer claim, or, depending on what Tawil and Setton did with the proceeds from the sale of Sunrise's goods, Tawil, Setton, and Pajama Drama may be subject to liability for DMI's breach of contract. Nonetheless, fraud is not the proper claim in this case. Accordingly, it is

ORDERED that the motions by defendants Dream Modes, Inc. (DMI), Ralph Tawil, and Victor E. Setton to dismiss the third cause of action (fraud) in the Second Amended Complaint is granted (Tawil and Setton are hereby dismissed from this action since the remaining breach of contract and account stated claims are asserted only against DMI); and it is further

ORDERED that plaintiff Zhangjuagang Sunrise Home Textile Co., Ltd. has leave to file a third amended complaint in accordance with this decision, and, if it chooses to do so, must file it within 30 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that a telephone conference will be held on December 16, 2013 at 3:00 pm, during which (1) a discovery schedule will be issued if plaintiff files a third amended complaint (further discovery will be limited to the new allegations, such as veil piercing); or (2) a summary judgement briefing schedule will be set if plaintiff does not file a third amended complaint; and it is further

ORDERED that the Note of Issue deadline is extended to December 31, 2013.

Dated: November 1, 2013

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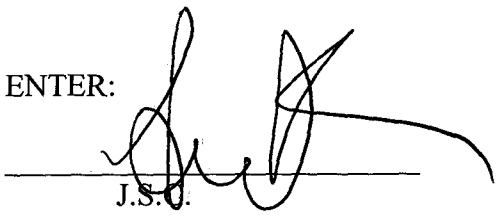

J.S.C.