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INDEX
NO. 7692/04

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 2/4/05
Submission Date: 2/14/05
Motion Sequence No.: 002,003/MOT D

DTA HOLDING LTD.
Plaintiff,

- against -

LONNY'S WARDROBE, INC., INA MAE CORP., GARY GOLDSTEIN & WALTER GOLDSTEIN, ONLY HEARTS, BILLYBLUES, VERTIGO, SWEAT PEA, TICCI TONETTO,
Defendants,

COUNSEL FOR PLAINTIFF
Altman & Altman, Esqs.
1009 East 163rd Street
Bronx, New York 10459

COUNSEL FOR DEFENDANT
Goodman & Saperstein, Esqs.
666 Old Country Road
Garden City, New York 11530

ORDER

The following papers were read on Defendants' motion to dismiss the fifth and sixth causes of action and Plaintiff's cross-motion for leave to replead and to serve an amended complaint:

Notice of Motion dated January 5, 2005;
Affirmation of Martin I. Saperstein, Esq. dated January 5, 2005;
Notice of Cross-motion dated January 28, 2005;
Affidavit of Robyn Notrica sworn to on January 27, 2005;
Affirmation of Joseph A. Altman, Esq. dated January 27, 2005;
Affirmation of Martin I. Saperstein, Esq. dated February 10, 2005;
Affidavit of Gary Goldstein sworn to on February 10, 2005;
Affirmation of Joseph A. Altman, Esq. dated February 12, 2005.

Defendants move for an order pursuant to CPLR 3211(a)(7) dismissing the fifth and sixth causes of action on the grounds that they fail to state a cause of action. Plaintiff, DTA Holding, Ltd. ("DTA"), cross-moves for an order granting it leave to replead and to serve an amended complaint.

BACKGROUND

By written agreement dated December 13, 2003 ("Agreement"), Defendants, Lonny's's Wardrobe, Inc. and Ina Mae Corp. (collectively "Lonny's") sold a retail clothing store located at 1374 Old Northern Boulevard, Roslyn to DTA. Pursuant to the terms of Paragraph 11.2 of the Agreement, Lonny's agreed to purchase the clothing lines Lonny's purchased for its other retail locations at "Transferor's direct cost" on behalf of DTA.

Defendants Gary Goldstein and Walter Goldstein (collectively "Goldstein") are the principals of Lonny's.

Defendants, Only Hearts, Billyblues, Vertigo, Sweat Pea and Ticci Tonetto (collectively "Manufacturers") are alleged to be wholesalers of clothing. In fact, they are all clothing manufacturers.

In the fifth cause of action, DTA alleges that Lonny's has a large presence in the retail clothing business and purchases a large volume of clothing from the Manufacturers for sale at Lonny's retail stores. DTA alleges that Lonny's advised the Manufacturers not to sell to DTA directly. Because of Lonny's size and buying power, the Manufacturers honored Lonny's request and did not sell directly to DTA.

The sixth cause of action seeks to enjoin the Defendants from engaging in the conduct which constitutes a violation of the anti-trust laws and which constitute unfair competition.

DTA claims that its ability to successfully operate its business was dependent upon it being able to obtain the clothing lines from the Manufacturers. The purpose of Paragraph 11.2 of the Agreement was to permit DTA to be able to purchase, and have available for sale, the clothing lines manufactured by the Manufacturers at a competitive price.

In addition to opposing Defendants' motion to dismiss the fifth and sixth causes of action, Plaintiff moves for leave to replead and to serve an amended complaint asserting a cause of action to recover legal fees in accordance with Paragraph 18 of the Agreement and a cause of action seeking to recover damages resulting from Defendants' actions which are claimed to have caused it to go out of business.

DISCUSSION

A. Defendants' Motion to Dismiss

1. *Fifth Cause of Action*

Defendants move to dismiss this cause of action pursuant to CPLR 3211(a)(7). However, the Court cannot determine from a reading of the complaint precisely what theory of recovery Plaintiff is asserting in the fifth cause of action. This cause of action is labeled "Tortious Interference with Contract/Business Relations". However, the substantive allegations set forth that the Manufacturers had a duty to sell to Plaintiff and

that the Defendants have conspired together not to sell to DTA causing DTA to go out of business. These allegations appear to mix five separate possible theories of recovery; to wit: (1) tortious interference with contract; (2) intentional interference with business relationship; (3) breach of the federal anti-trust laws; (4) breach of the New York State anti-trust laws; and (5) conspiracy.

When deciding a motion made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cause of action and not whether it has been properly pled. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976). If, from the facts alleged in the complaint and the inferences which can be drawn therefrom, it can be discerned that the pleader has a cognizable cause of action, the motion must be denied. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Stucklen v. Kabro Assocs., - A.D.3d -, 2005 WL 1022038 (2nd Dept. 2005).

In determining if the pleader has a cognizable cause of action, the court must accept as true all facts alleged in the complaint and any submissions made in opposition to the motion. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). While factual allegations contained in the complaint are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth. In re Loukoumi, Inc., 285 A.D.2d 595 (2nd Dept. 2001); and Doria v. Masucci, 230 A.D.2d 764 (2nd Dept. 1996).

a. *Tortious Interference with Contract*

A cause of action for tortious interference with contract requires the plaintiff to plead the existence of a contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendant's intentional inducement of the third party to breach the contract and damages sustained by plaintiff as a result of the breach. Kronos , Inc. v. AVX Corp., 81 N.Y.2d 90 (1993); and Bernberg v. Health Management Systems, Inc., 303 A.D.2d 348 (2nd Dept. 2003).

In this case, Plaintiff fails to allege the first element of the cause of action; the existence of a contract between DTA and the Manufacturers. DTA never entered into a direct contract with any of the Manufacturers pursuant to which the Manufacturers agreed to directly sell clothing to DTA. Since DTA did not have a contract with the Manufacturers, Lonny's and Goldstein could not interfere with that contract or induce any of the Manufacturers to breach that contract.

This defect is not remedied by any of the submissions made by DTA in opposition to the motion.

DTA had a contract with Lonny's pursuant to which Lonny's agreed to make available to DTA all clothing lines Lonny's purchased for its other retail stores. In order to sustain a cause of action for tortious interference with contract, the Plaintiff must allege that the party inducing the breach had actual knowledge of the existence of the underlying agreement. Roulette Records, Inc. v. Princess Production Corp., 15 A.D.2d

335 (1st Dept.), *aff'd.*, 12 N.Y.2d 815 (1962); and A A Test Tubing Co., Inc. v. Sohne, 20 A.D.2d 639 (2nd Dept. 1964).

Plaintiff must also allege that Lonny's engaged in some intentional act to procure the breach of contract. Gold Medal Farms, Inc. v. Rutland County Co-Operative Creamery, Inc., 9 A.D.2d 473 (3rd Dept. 1959), *amended,* 10 A.D.2d 584 (3rd Dept. 1960). DTA fails to allege that any of the Manufacturers had actual knowledge of the contract between DTA and Lonny's or that the Manufacturers engaged in any intentional act to procure Lonny's breach of its contract to make available all of the clothing lines it purchased for its other retail locations from them to DTA.

This defect is not remedied by the affidavits or any of the other factual material submitted by DTA in opposition to the motion. The complaint fails to state a cause of action for tortious interference with contract. To the extent that the fifth cause of action seeks recovery on this basis, it must be dismissed.

b. *Intentional Interference With Business Relationship*

The elements of a cause of action for intentional interference with prospective business advantage are (1) the defendant knew of the proposed contract between the plaintiff and a third party; (2) the defendant intentionally interfered with the proposed contract; (3) the proposed contract would have been entered but for the defendant's interference; (4) the defendant's interference was done in a wrongful manner; and (5) plaintiff sustained damages. NBT Bancorp. v. Fleet/Norstar Financial Group, Inc., 87

N.Y.2d 614 (1996); and Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183 (1980).

The complaint fails to allege that DTA was about to enter into a contract with any of the Manufacturers, that Lonny's or Goldstein intentionally interfered with such proposed contract, that DTA would have entered into the contract but for the Goldstein or Lonny's interference or that Goldstein or Lonny's interference was wrongful.

For the purposes of a cause of action for intentional interference with prospective business advantage, a plaintiff must establish that the defendant's interference with the proposed conduct was a result of physical violence, fraud or misrepresentation or civil suits or criminal prosecution. Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., *supra.* See also, BGW Development Corp. v. Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc., 247 A.D.2d 565 (2nd Dept. 1998). Alternatively, the wrongful conduct can be a breach of fiduciary duty such as that owed by an employee to an employer. Hayes v. Case-Hoyt Corp., 262 A.D.2d 1018 (4th Dept. 1999).

DTA has failed to allege that the sole purpose of the allegedly wrongful conduct was to harm it. See, Newport Services & Leasing, Inc. v. Meadowbrook Distributing Corp., – – A.D.3d – – , 2005 WL 1022438 (2nd Dept. 2005).

There are no allegations that Lonny's or Goldstein threatened the Manufacturers with physical violence, made any fraudulent misrepresentations to the Manufacturers or threatened the Manufacturers with civil suits or criminal prosecution if the did business

directly with DTA. The relationship between Lonny's and DTA was contractual; not fiduciary. DTA's failure to make the required allegations in the complaint is not cured in its submissions made in opposition to the motion.

For these reasons, the complaint fails to state a cause of action for intentional interference with prospective business advantage. To the extent that the fifth cause of action purports to allege a cause of action for intentional interference with prospective business advantage, must be dismissed.

c. *Violation of Federal Anti-Trust Laws.*

The complaint alleges simply that the Manufacturers have an obligation to sell to DTA and have conspired either with each other or with Lonny's and/or Goldstein in violation of the anti-trust laws not to sell to DTA. The complaint does not allege specifically which anti-trust laws the Defendants conspired to violate.

If DTA seeks to recover damages or to enjoin a violation of the federal anti-trust laws, the cause of action must be dismissed since this Court lacks subject matter jurisdiction to hear this case. The United States District Court has exclusive jurisdiction over claims for violation of the federal anti-trust laws. General Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261 (1922). See also, Simpson Electric Corp. v. Leucadia, Inc., 72 N.Y.2d 450 (1988); and Matter of Commonwealth Electrical Inspections Services, Inc. v. Town of Clarence, 6 A.D.3d 1185 (4th Dept. 2004).

Thus, to the extent that the fifth cause of action seeks recovery for violation of the federal anti-trust laws, the complaint must be dismissed.

d. *New York State Anti-Trust Laws*

The Donnelly Act, General Business Law § 340 *et seq.* is New York State's anti-trust law. General Business Law § 340 (1) states that "...every contract, agreement, arrangement or combination restricting competition or the free exercise of trade, business or commerce in the state is illegal and void as against public policy.

The Donnelly Act prohibits only unreasonable restraints on trade. Anheusser-Busch, Inc. v. Abrams, 71 N.Y.2d 327 (1988). The purpose of the act is to promote competition in the marketplace. Columbia Gas of New York, Inc. v. New York State Electric & Gas Corp., 28 N.Y.2d 117 (1970); and International Services Agency v. United Way of New York State, 108 Misc.2d 305 (Sup.Ct. Albany Co. 1981).

DTA's action is based upon the flawed premise that the Manufacturers had a duty to sell to DTA. The Manufacturers did not have duty to sell their clothing to DTA. A person may chose to do business or refuse to do business with whomever it chooses. Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 710 F.2d 87 (2nd Dept., 1983); and Lopresti v. Massachusetts Mutual Life Ins. Co., 5 Misc.3d 1006(A) (Sup.Ct. Kings Co. 2004). The Donnelly Act protects competition; not individual competitors. See, Watts v. Clark Assocs. Funeral Homes, Inc., 234 A.D.2d 538 (2nd Dept. 1996); and Lopresti v. Massachusetts Mutual Life Ins. Co., *supra.*

To violate the Donnelly Act, two or more entities must engage in concerted action to unreasonably restrain trade or competition. Bello v. Cablevision Systems Corp., 185 A.D.2d 262 (2nd Dept.), *lv. app. den.,* 80 N.Y.2d 781 (1992).

To establish a claim under the Donnelly Act, the Plaintiff must "(1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities (citation omitted)." Newsday, Inc. v. The Fantastic Mind, Inc., 237 A.D.2d 497 (2nd Dept. 1997). See also, Home Town Muffler, Inc. v. Cole Muffler, Inc., 202 A.D.2d 764 (3rd Dept. 1994).

The failure to allege any of the elements of the Donnelly Act renders the complaint defective requiring dismissal of the complaint. Watts v. Clark Assocs. Funeral Homes, Inc., *supra*; and Constant v. Hallmark Cards, Inc., 172 A.D.2d 641 (2nd Dept., 1991).

The complaint and the proposed amended complaint do not contain any allegations regarding the relevant market or product area. While deficiencies in the complaint relating to the failure to plead necessary facts may be cured by an affidavit of the Plaintiff, this has not been done. Components Direct, Inc. v. European American Bank and Trust Co., 175 A.D.2d 227 (2nd Dept., 1991).

Plaintiff's counsel attempts to correct this fatal defect by asserting in his affirmation in opposition that the relevant product market is "Roslyn/Long Island." This purported clarification is insufficient to remedy this defect. Allegations contained in an affidavit or affirmation of an attorney who has no personal knowledge of the facts and which state bald conclusions do not remedy this pleading defect. Tarzia v. Brookhaven

National Laboratory, 247 A.D.2d 605 (2nd Dept., 1998); and Gorman v. Gorman, 88 A.D.2d 677 (3rd Dept. 1982).

Plaintiff has failed to allege any facts supporting its allegation that the Defendants entered into a conspiracy in restraint of trade. Conclusory allegations of the existence of a conspiracy are legally insufficient to state a claim under the Donnelly Act. Creative Trading Co, Inc. v. Larkin-Pluznick-Larkin, Inc., 75 N.Y.2d 830, (1990); Sands v. Ticketmaster-New York, Inc., 207 A.D.2d 687 (1st Dept. 1994); and Yankee Entertainment and Sports Network, LLC v. Cablevision Systems Corp., 224 F.Supp2d 657 (S.D.N.Y. 2002). DTA fails to make any allegation that it attempted to purchase directly from the Manufacturers and that they refused; that the Manufacturers prevented Lonny's to sell their merchandise to DTA; or that any of the Manufacturers engaged in any concerted action which prevented DTA from obtaining the clothing they manufactured.

Finally, to recover under the Donnelly Act, DTA must establish that the actions of the Defendants had an actual adverse effect on competition in the market and simply that their actions harmed a competitor. Capital Imaging Assocs, P.C. v. Mohawk Valley Medical Assocs, Inc., 996 F.2d 537 (2nd Cir. 1993); Lopresti v. Massachusetts Mutual Life Ins. Co., *supra;* and Rubin v. Nine West Group, Inc., 1999 WL 1425364 (Sup.Ct. Westchester Co. 1999). Plaintiff has failed to allege that competition has been affected by the alleged actions of the Defendants. DTA specifically alleges that the Defendants' actions caused it to go out of business. The complaint does not allege that competition

in the goods sold by the Manufacturers has been affected in any way by the actions of the Defendants.

In an effort to save this cause of action, DTA asserts that it was the only retailer of Only Hearts merchandise in the area other than Lonny's. By forcing DTA out of business, Lonny's has created a monopoly for this clothing line in this area for itself.

This allegation is contradicted by Lonny's which established that there are at least ten other retail outlets selling Only Hearts merchandise in the immediate area, three in Great Neck, two in Manhasset, one in Glen Cove, two in Greenvale, one in East Hills and one in Port Washington. Additionally, Lonny's asserts, and DTA does not deny, that Only Hearts has a web site from which consumers can purchase Only Hearts clothing directly. Lonny's also alleges that Only Hearts clothing is sold at at least another eleven stores in Nassau County. Even assuming Lonny's and Only Hearts engaged in a conspiracy to prevent DTA from obtaining Only Hearts clothing, this did not result in Lonny's having a monopoly in the market of Only Hearts clothing in the area.

While the court must assume as true all allegations made in the complaint as true and must afford the pleader every favorable inference, facts that are contradicted on the record are not entitled to such consideration. Mohan v. Hollander, 303 A.D.2d 473 (2nd Dept. 2003); and Mayer v. Sanders, 264 A.D.2d 827 (2nd Dept. 1999). DTA's allegation that Only Hearts and Lonny's conspired to give Lonny's a monopoly in the area having been contradicted is not subject to the presumption of truth.

Thus, the fifth cause of action fails to state a cause of action for violation of the Donnelly Act.

e. *Conspiracy*

To the extent that the Fifth Cause of Action seek to recover damages for conspiracy, it must be dismissed. New York does not recognize a separate cause of action for civil conspiracy. Ward v. City of New York, -A.D.3d-, 789 N.Y.S.2d 539 (2nd Dept. 2005).

2. *Sixth Cause of Action*

To the extent that the sixth cause of action seeks to enjoin the Defendants from engaging the actions which violate the Donnelly Act, the complaint fails to state a cause of action. Only the Attorney General can obtain injunctive relief under the Donnelly Act. General Business Law § 342. See, Gill Engraving Co. v. Doerr, 214 F. 111 (S.D.N.Y. 1914); and 103 NY Jur2d *Trade Regulations* §57. Thus, the sixth cause of action must be dismissed.

B. Plaintiff's Motion for Leave to Amend

Although designated as a motion for leave to amend the complaint, DTA is actually seeking leave to replead its Donnelly Act claim – – the fifth cause of action (CPLR 3211[e]) and leave to serve an amended complaint, to add a seventh and eighth cause of action (CPLR 3025 [b]).

1. *Leave to Replead*

The party seeking leave to replead must demonstrate to the satisfaction of the court that it has "...good grounds to support his cause of action." CPLR 3211(e). The evidence establishing the existence of good grounds should be in the form of an affidavit from one with direct knowledge of the facts. Lesesne v. Lesesne, 292 A.D.2d 507 (2nd Dept., 2002); Cushman & Wakefield, Inc. v. David, Inc., 25 A.D.2d 133 (1st Dept., 1966); and Young v. Nelson, 23 A.D.2d 531 (4th Dept. 1965). While Plaintiff submits an affidavit made by Robyn Notrica, one of the principal's of Plaintiff, it does not contain any facts establishing the existence of a viable Donnelly Act claim.

The factual allegations alleged in the affirmation of Plaintiff's attorney are insufficient to support an application for leave to replead since factual assertions contained in an affidavit of an attorney who lacks personal knowledge of those facts are insufficient grant leave to replead. Lesesne v. Lesesne, *supra.*

Therefore, Plaintiff's application for leave to replead the fifth cause of action must be denied.

2. *Leave to Amend*

DTA seeks to serve an amended complaint adding a seventh and eighth cause of action. The proposed seventh cause of action seeks legal fees in accordance with Paragraph 18 of the Agreement between DTA and Lonny's. The proposed eighth cause of action seeks money damages arising from Lonny's breach of contract which is alleged to have caused DTA to go out of business. As best the Court can determine,

the proposed eighth cause of action alleges that, as a result of Lonny's having breached its contract with DTA, DTA went out of business. DTA thereby seeks to recover its future profit.

A plaintiff should be freely granted leave to serve an amended complaint absent a showing of prejudice or surprise resulting from delay. CPLR 3025(b). Fahey v. County of Ontario, 44 N.Y.2d 934 (1978); and Northbay Construction Co. Inc. v. Bauco Construction Co., 275 A.D.2d 310 (2nd Dept. 2000).

The decision as to whether to permit plaintiff to serve an amended complaint is addressed to the discretion of the court. Liendo v. Long Island Jewish Med. Ctr., 273 A.D.2d 445 (2nd Dept. 2000); and Henderson v. Gulati, 270 A.D.2d 308 (2nd Dept. 2000). The court should not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit. Sunrise Plaza Assocs, L.P. v. International Summit Equities Corp., 288 A.D.2d 300 (2nd Dept. 2001); and Norman v. Ferrara, 107 A.D.2d 739 (2nd Dept. 1985). See, Siegel, *New York Practice 3d* §237.

a. *Proposed Seventh Cause of Action*

Paragraph 18 of the Agreement provides that either party shall be entitled to recover legal fees to a party who successfully maintains an action for breach of the Agreement. DTA seeks to amend the complaint to allege a cause of action for legal fees. Lonny's sole opposition is that a claim for legal fees is not a separate item of

damages, but would be awarded as part of DTA's damages should it be successful on its breach of contract claim.

Regardless of whether it is pled as a separate cause of action or as part of the breach of contract claim, if DTA is successful on its breach of contract claim, it is entitled to recover legal fees. Therefore, leave to serve an amended complaint to assert its claim for legal fees should be granted.

b. *Proposed Eighth Cause of Action*

The proposed eighth cause of action seeks to recover those damages DTA sustained as a result of being forced out of business. DTA seeks to recover the profit it claims it lost as a result of being forced to close its operation.

A party may not recover for profit lost as a result of a breach of contract unless such lost profit was in the contemplation of the parties when they entered into the contract and the lost profit is capable of being calculated with a reasonable degree of certainty. Ashland Management, Inc. v . Janien, 82 N.Y.2d 395 (1993); and Kenford Co., Inc. v. County of Erie, 67 N.Y.2d 257 (1986).

With a new business, the standard of proof required to establish lost profit is extremely high since there is no reasonable basis upon which to base the prospective lost profit with a reasonable degree of certainty. Kenford Co., Inc. v. County of Erie, *supra*. See also, Trademark Research Crop. v. Maxwell Online, Inc., 995 F.2d 326 (2nd Cir., 1993); and Suffolk Sports Center, Inc. v. Belli Construction Corp., 212 A.D.2d 241 (2nd Dept. 1995).

A motion to amend a complaint must be supported by an affidavit establishing the merits of the proposed amendment. Morgan v. Prospect Park Associates Holdings, L.P., 251 A.D.2d 306 (2nd Dept. 1998); and Frost v. Monter, 202 A.D.2d 632 (2nd Dept. 1994). In this circumstance, DTA has failed to place before the Court any evidence establishing any basis for determining that it lost any future profit as a result of Lonny's action. DTA fails to place before the Court any evidence regarding its sales of the Manufacturers' clothing lines prior to the time that Lonny's no longer sold to DTA, the profit it made on the sale of those items, the percentage of DTA's business that involved the sale of Manufacturers' clothing or DTA's operating expenses or other sources of revenue.

Additionally, DTA concedes that it was a new business. Although DTA purchased a location from Lonny's, DTA's principals acknowledge that they were novices in operating a clothing business. DTA has failed to place before the Court any basis by which DTA could be awarded damages for future loss of profits. Such a claim is totally speculative and insufficient as a matter of law and totally devoid of merit.

This is not a situation in which Manufacturers clothing lines were unavailable to DTA. This action arose from a dispute regarding Paragraph 11.2 of the Agreement.

In 2004, Lonny's invoiced DTA in the sum of $14,000 for expenses Lonny's claimed represented "direct costs" of providing Manufacturers clothing lines to DTA. DTA disputed, and refused to pay, this invoice. Based upon this claimed breach of contract by DTA, Lonny's refused to furnish DTA with any of the Manufacturers clothing.

When DTA commenced this action, it moved for a preliminary injunction seeking to compel Lonny's to provide it with Manufacturers clothing during the pendency of this action. As a result of this motion, the Court directed DTA to post the sum of $14,000 in escrow with its attorney during the pendency of the action. If DTA posted this sum in escrow, Lonny's would continue to provide DTA with Manufacturers clothing on a cash on delivery basis. DTA never posted the undertaking. As a result, Lonny's did not provide DTA with Manufacturers clothing. Thus, DTA's inability to obtain access to Manufacturers clothing was, in part, a result of DTA's failure to comply with a Court directive.

Additionally, the unavailability of Manufacturers clothing lines did not prevent DTA from operating its business. DTA was apparently purchasing and was selling at least 37 other clothing lines that it was obtaining from sources other than Lonny's.

Therefore, DTA must be denied leave to serve an amended complaint adding the proposed eighth cause of action.

Accordingly, it is,

ORDERED, that Defendants' motion to dismiss the fifth and sixth causes of action is **granted**; and it is further,

ORDERED, that Plaintiff's cross-motion for leave to replead the fifth cause of action is **denied**; and it is further,

DTA HOLDING LTD. v. LONNY'S WARDROBE, INC., *et al.*,
Index No. 7692/04

ORDERED, that Plaintiff's cross-motion for leave to serve an amended complaint is **granted** to the extent of permitting Plaintiff to serve an amended complaint alleging the seventh cause of action as contained in the proposed amended complaint and is, in all other respects, **denied**; and it is further;

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
May 19, 2005

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

MAY 24 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE