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NO. 7692/04

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-18-05
Submission Date: 12-6-05
Motion Sequence No.: 004,005/MOT D

x

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,

x

COUNSEL FOR PLAINTIFF
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Bronx, New York 10459

COUNSEL FOR DEFENDANT
Goodman & Saperstein, Esqs.
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Garden City, New York 11530

ORDER

The following papers were read on Defendants' motion to dismiss, for summary judgment and sanctions and Plaintiff's cross-motion for summary judgment on liability:

Notice of Motion dated August 30, 2005;
Affirmation of Martin I. Saperstein, Esq. dated August 29, 2005;
Notice of Cross-motion dated September 29, 2005;
Affidavit of Robyn Notrica sworn to on September 29, 2005;
Affirmation of Joseph A. Altman, Esq. dated September 29, 2005;
Affidavit of Gary Goldstein sworn to on November 14, 2005;
Affirmation of Martin I. Saperstein, Esq. dated November 11, 2005;
Affidavit of Adam Swickle sworn to on December 5, 2005;
Affirmation of Joseph A. Altman, Esq. dated December 5, 2005.

Defendants Lonny's Wardrobe, Inc., ("Lonny's"), Ina Mae Corp. ("Ina Mae"), Gary Goldstein ("Gary") and Walter Goldstein ("Walter") move pursuant to CPLR 3211(a)(7) to dismiss or pursuant to CPLR 3212 for summary judgment dismissing the second, third and fourth causes of action against all Defendants. Walter and Gary move to dismiss pursuant to CPLR 3211(a)(7) or for summary judgment pursuant to CPLR 3212 dismissing the first cause of action. Defendants also seek sanctions pursuant to 22 NYCRR 130-1.1. Plaintiff cross-moves for summary judgment against all of the Defendants on the issue of liability and requests that the action be set down for an assessment of damages.[1]

BACKGROUND

Lonny's and Ina Mae (collectively "Lonny's") are retailers of women's clothing.

By written agreement dated June 13, 2003 ("Contract"), Lonny's sold a retail clothing store located at 1374 Old Northern Boulevard, Roslyn to Plaintiff DTA Holding Ltd. ("DTA"). Paragraph 11.2 of the Contract provided that Lonny's would purchase for DTA any and all clothing lines that Lonny's purchased for its other retail stores at "Transferor's (Lonny's) direct cost for same."

The Contract was executed on behalf of Lonny's by Walter, who was president of Lonny's. Gary, who was Lonny's Secretary/Treasurer, did not execute the Contract.

Between July 2003 and December 2003, Lonny's ordered and provided

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[1]By order of this court dated May 19, 2005, the Court dismissed the action against the Defendants Only Hearts, BillyBlues, Vertigo, Sweat Pea and Ticci Tonetto. ("manufacturer Defendants")

merchandise for DTA. Prior to December 2003, Lonny's had billed DTA only the manufacturer's invoice cost for the goods. In or about December 2003, Lonny's billed DTA in the sum of $14,294.05. This figure represented a percentage of fixed overhead expenses allocated by Lonny's to the goods purchased for and delivered to DTA. DTA asserted that these overhead expenses were not part of Lonny's direct cost and refused to pay same. As a result of DTA's failure to pay these charges, Lonny's refused to order or sell any more merchandise to DTA.

DTA commenced this action seeking to recover damages and to compel Lonny's to continue to sell merchandise to it in accordance with Paragraph 11.2 of the Contract. The complaint alleges six causes of action. By order dated May 19, 2005, this Court dismissed the fifth and sixth causes of action. The amended complaint served in accordance with the May 19, 2005 order alleges four (4) causes of action; to wit: breach of contract; breach of the implied covenant of good faith and fair dealing; fraud; and breach of fiduciary duty.

Defendants seek dismissal of the of the second, third and fourth causes of action as against all of them on the grounds that they fail to state a cause of action (CPLR 3211[a][7]) or summary judgment dismissing these causes of action. (CPLR 3212). Walter and Gary seek to dismiss the first cause of action pursuant to CPLR 3211(a)(7) or CPLR 3212. Defendants also seek sanctions pursuant to 22 NYCRR 130-1.1. Plaintiff cross-moves for summary judgment against all Defendants on the issue of liability.

DISCUSSION

A. First Cause of Action - Breach of Contract

The first cause of action alleges that the Defendants breached the Contract by failing and refusing to sell merchandise to DTA. DTA seeks to recover the purchase price paid on the purchase of the store and profits lost as a result of not having merchandise available for sale as a result of Lonny's refusal to sell merchandise to DTA.

In order to sustain a cause of action for breach of contract, DTA has to establish the existence and terms of the agreement, the consideration, performance by the Plaintiff, breach by the Defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986); and Sylmark Holdings Ltd. v. Silicone Zone International, Ltd., 5 Misc.3d 285 (Sup.Ct. New York Co. 2005).

One may not maintain an action for breach of contract against a party with whom they are not in privity. La Barte v. Seneca Resources Corp., 285 A.D.2d 974 (4th Dept. 2001); and M. Paladino, Inc. v. J. Lucchese & Sons Contracting Corp., 247 A.D.2d 515 (2nd Dept. 1998).

On this basis, Gary must be granted summary judgment dismissing the first cause of action. Gary is not a party to or a signatory of the Contract. He is not in privity with DTA.

When a corporate officer signs an agreement in his or her corporate capacity, the corporate officer will not be held personally liable on the contract unless he or she

personally binds him or herself. Metropolitan Switch Board Co., Inc. v. Amici Assocs., Inc., 20 A.D.3d 455 (2nd Dept. 2005); and Maranga v. McDonald & T. Corp., 8 A.D.2d 351 (2nd Dept. 2004).

A corporate officer is not subject to personal liability for action taken in furtherance of the corporation's business under the well settled rule "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal' (citations omitted).' Worthy v. New York City Housing Auth., 21 A.D.3d 284, 286 (1st Dept. 2005). See also, Metropolitan Switch Board Co., Inc. v. Amici Assocs, Inc., 20 A.D.3d 455 (2nd Dept. 2005);and Gordon v. Teramo & Co., Inc., 308 A.D.2d 432 (2nd Dept. 2004).

On this basis, the action must be dismissed against Walter. Walter signed the contract solely in his capacity as president of Lonny's. He did not sign individually.

It is clear from the record that any actions taken by Walter or Gary in regard to the Contract, the sale of goods by Lonny's to DTA and the charges for those goods were taken in their capacity as corporate officers of Lonny's. The record is devoid of any evidence establishing that Walter or Gary were acting in their individual capacity or that they substituted or added their personal liability for that of Lonny's when dealing with DTA.

The court should grant summary judgment when there are no issues of fact requiring a trial. Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Mosheyev v. Polevsky, 283 A.D.2d 469 (2nd Dept. 2001); and Akseizer v. Kramer, 265 A.D.2d 356 (2nd Dept. 1999).

The court may dismiss pursuant to CPLR 3211(a)(7) when the complaint fails to state a cause of action. When deciding such a motion, the court must read the complaint and decide whether Plaintiff has a cognizable cause of action, not whether the action has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); and Well v. Yeshiva Rambam, 300 A.D.2d 580 (2nd Dept. 2002); and Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (1st Dept. 2002). If from the facts alleged in the complaint, the inferences which can be drawn, and the facts alleged or established by any supplemental submissions the Court determines 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., 18 A.D.3d 461 (2nd Dept. 2005).

In this case, summary judgment is the appropriate remedy. Although neither plead nor properly plead, cognizable causes of action could exist against Walter and Gary. Thus, a motion to dismiss pursuant to CPLR 3211(a)(7) would have to be denied.

It is undisputed that Gary was not a party to the Contract and that Walter signed the Contract in his capacity as president of Lonny's and Ina Mae. There is no evidence which would establish that Walter or Gary intended to be personally bound or personally obligated to perform the obligations contractually imposed upon Lonny's. There are no

questions of fact to be determined at trial under which either Walter or Gary could be found liable for breach of contract. Therefore, the Walter and Gary's motion for summary judgment dismissing the first cause of action should be granted.

B. Second Cause of Action - Breach of the Implied Covenant of Good Faith

A covenant of good faith and fair dealing is implied in every contract. Dalton v. Educational Testing Service, 87 N.Y.2d 384 (1995); and Rowe v. Great Atlantic & Pacific Tea Company, Inc., 46 N.Y.2d 62 (1978); and Skillgames, LLC v. Brody, 1 A.D.3d 247 (1st Dept. 2003); and 1-10 Industry Assocs, LLC v. Trim Corporation of America, 297 A.D.2d 630 (2nd Dept. 2002).

However, no contractual provision can be implied that is inconsistent with the terms of the agreement. Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983). The implied covenant of good faith and fair dealing does not create any obligations beyond those stated in the contract. Sutton Assocs. v. Nexis-Lexis, 196 Misc.2d 30 (Sup.Ct., Nassau Co. 2003).

A cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of a cause of action for breach of contract. Jacobs Private Property, LLC v. 450 Park LLC, 22 A.D.3d 347 (1st Dept. 2005); and Cerberus International, Ltd. v. Banctec, Inc., 16 A.D.3d 126 (1st Dept. 2005).

The second cause of action asserts a claim for breach of the implied covenant of good faith and fair dealing. This is duplicative of the breach of contract action.

Therefore, the second cause of action fails to state a cause of action and must be dismissed. CPLR 3211(a)(7).

C. Third Cause of Action - Fraud

The elements of common law fraud are "representation of a material existing fact, falsity, scienter, deception and injury." Channel Master Corp. v. Aluminum Ltd. Sales Inc., 4 N.Y.2d 403, 407 (1958). See also Dalessio v. Kressler, 6 A.D.2d 57 (2nd Dept. 2004).

CPLR 3016(b) requires that fraud be plead with specificity. A complaint which does not allege fraud with sufficient specificity is dismissible as a matter of law. Wint v. ABN Amro Mortgage Group, Inc.,19 A.D.3d 588 (2nd Dept. 2005); and Cohen v. Houseconnect Realty Corp., 289 A.D.2d 277 (2nd Dept. 2001).

Where the alleged fraud is based upon a statement of future intention, the plaintiff must plead specific facts sufficient to establish that the promisor never intended to act upon the promise when the promise was made. Pope v. New York Property Ins. Underwriters Assoc., 112 A.D.2d 983 (1st Dept.), *aff'd.* 66 N.Y.2d 857 (1985); and Fink v. Citizens Mortgage Banking Ltd., 148 A.D.2d 578 (2nd Dept. 1989). The court may not infer that the statement was false when made simply because the contract was not performed. Abelman v. Shoratlantic Development Co., Inc., 153 A.D.2d 821 (2nd Dept. 1989).

A cause of action for fraud cannot be based upon a breach of contract unless the plaintiff pleads sufficient facts to establish that defendant did not intend to fulfil its contractual obligations when it entered into the contract. Affiliated Credit Adjustors, Inc. v. Carlucci & Legum, 139 A.D.2d 611 (2nd Dept. 1988). Nor can a cause of action for breach of contract cannot be converted into an action for fraud by alleging that defendant did not intend to perform the contract. Bamira v. Greenberg, 256 A.D.2d 237 (1st Dept. 1998): and Bencivenga & Co. v. Phyfe, 210 A.D.2d 22 (1st Dept. 1994).

The precise basis of the fraud claim is nearly impossible to determine. The fraud cause of action incorporates by reference the general factual allegations of the complaint and then alleges that the Defendants "...defrauded the Plaintiff by inducing Plaintiff to enter into the purchase of the subject business at a price that was...more than the actual value and then prevent the Plaintiff from conducting the business." (See, Amended complaint ¶19).

The complaint does not contain any factual allegations regarding any representations made by Walter, Gary or anyone else on behalf of Lonny's regarding the value of the business DTA was purchasing . To the extent that the fraud cause of action is premised upon the alleged misrepresentation of the value of the business it must be dismissed because that claim is not plead with the required specificity.

This deficiency in the pleadings is not remedied by the papers submitted in opposition to Defendant's motion. DTA does not place before this Court any evidence

regarding the actual value of the business it purchased from Lonny's or how that price deviated from the actual value of the business.

The other alleged fraud relates to the allegation that Defendants engaged in fraudulent activity which prevented DTA from operating the business. Although the precise nature of the claim is not clearly plead, the bases of this claim appears to be (1) Lonny's failed to provide DTA with merchandise; and (2) Lonny's, which is a major retailer, put pressure on manufacturers or distributors so that they would not sell merchandise to DTA.

When DTA purchased the Roslyn store, it was concerned about its ability to obtain merchandise. To allay this fear, Paragraph 11.2 of the Contract provided that Lonny's and Ina Mae would make available to DTA all clothing lines that they purchased for their other retail locations at Lonny's "direct cost for same."

The dispute which gives rise to this litigation is the meaning of the phrase "direct cost for same." DTA asserts that this means manufacturers invoice cost. Lonny's asserts that this phrase includes certain overhead expenses. The sum of $14,294.05 which is sought in the counterclaim involves charges for these overhead expenses.

Lonny's and Ina Mae's obligation to provide merchandise to DTA is established by the Contract. Any violation of this obligation gives rise to a cause of action for breach of contract; not fraud. *Id.*

The extent that the claim is premised on Lonny's, Walter and/or Gary engaging in some type of fraudulent activity to prevent manufacturers from selling to DTA, the

complaint must be dismissed for lack of specificity. CPLR 3016(b). The complaint does not allege that Walter, Gary or anyone else acting for or on behalf of Lonny's made any misrepresentations to any supplier or manufacturer which prevented DTA from obtaining merchandise.

In an effort to remedy this pleading deficiency, DTA submits an affidavit from Robyn Notrica ("Notrica"), one of DTA's principals. Notrica avers that after Lonny's refused to order or sell merchandise to DTA, she contacted Only Hearts and Vertigo in an effort to obtain merchandise directly from these manufacturers. She avers the representatives of these and other unnamed manufacturers advised her Lonny's was placing pressure on them so that they would not to sell to DTA.

The allegations in Notrica's affidavit are insufficient to raise questions of fact regarding a claim of fraud. Notrica never states that Walter, Gary or anyone of acting on behalf of Lonny's made any knowingly false or misleading statements or representations to any manufacturer or supplier which resulted in any manufacturer or supplier refusing to sell merchandise directly to DTA. A necessary element of a cause of action for fraud is a material misstatement of fact. Channel Master Corp. v. Aluminum Limited Sales, Corp., *supra*. General, conclusory and/or unsubstantiated allegations of fraud are insufficient to raise questions of fact. See, Udell v. Equitable Life Assurance Society of the United States, -A.D.3d-, 2006 WL 237517 (2nd Dept. 2006); Re-Max Classic Realty, Inc. v. Berger, -A.D.3d-, 2006 WL 198087 (2nd Dept. 2006). See also, Aames Capital Corp. v. Davidsohn, 24 A.D.3d 474 (2nd Dept. 2005).

Since Defendants have made a *prima facie* showing of entitlement to judgment as a matter of law and Plaintiff has failed to establish the existence of any triable issues of fact, Defendants motion for summary judgment dismissing the third cause of action as to all Defendants must be granted.

D. Fourth Cause of Action - Breach of Fiduciary Duty

A fiduciary relationship exists when one party "...reposes confidence in another and relies on the other's superior expertise or knowledge (citations omitted)." *WIT* Holding Corp. v. Klein, 282 A.D.2d 527, 529 (2nd Dept. 2001). Arm's length business transactions do not give rise to fiduciary relationships. *Id.* at 529. See also, Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept. 1998).

In this case, the relationship between DTA and the Defendants was an arm's length business transaction. DTA purchased one of Lonny's retail stores. Lonny's, as part of that transaction, agreed to make available and purchase for DTA the clothing lines that they sold in their other retail stores. DTA paid for the goods it ordered. DTA decided the type, quantity, size and style of the goods purchased. DTA made all of the business decisions regarding the operation of the store in question. DTA fails to place before this court any evidence that it relied upon Lonny's expertise or knowledge in operating its business.

For these reasons, the Defendants should be granted summary judgment dismissing the fourth cause of action.

E. Plaintiff's Cross-Motion

DTA's cross-motion for summary judgment is premised exclusively upon an assertion that Gary submitted a perjurious affidavit in connection with a prior motion. Submission of perjurious affidavits by an adverse party is not a basis for the granting of a motion for summary judgment.

In order to obtain summary judgment, the party seeking such relief must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp. 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the party seeking summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law, summary judgment will be granted unless the party against whom summary judgment is sought establishes through proof in evidentiary form that the existence of triable issues of fact or demonstrates a reasonable excuse for its failure to do so. *Id.;* and Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

The dispute which gives rise to this action is the Defendant's interpretation or reinterpretation of meaning of the term "direct cost." Paragraph 11.2 of the Contract obligates Lonny's and Ina Mae to make available to DTA all of the clothing lines they sold in their other retail stores at "Transferor's (Lonny's) direct cost for same." For the first 5 to 6 months after DTA began operating the Roslyn store, Lonny's charged and billed DTA the manufacturers invoice cost for merchandise.

Gary testified at his deposition that when he met with Lonny's accountant to prepare the year end statement, the accountant raised issues regarding the sale of goods by Lonny's to DTA. The accountant advised Gary that Lonny's is not a wholesaler. Therefore, they were obligated to collect sales tax on the sale of all goods including the goods they were selling to DTA. Since they had not been collecting sales tax on the sale of these goods and since Lonny's was obligated to remit to the State of New York the sales tax due on these sales, Lonny's was actually losing money on the sale of goods to DTA. Despite this, Lonny's does not seek to recover from DTA the sales tax due on the sale of goods by Lonny's to DTA.

The accountant further indicated that Lonny's had certain fixed costs which should, for accounting purposes, be allocated to the goods being sold to DTA. Lonny's operated 6 stores. DTA was a seventh store. Therefore, based upon the advise of their accountant, Lonny's allocated one-seventh of certain fixed costs to DTA.

By letter dated December 24, 2003, Lonny's advised DTA that in its previous billings it had omitted from the direct costs administrative expenses, warehousing, accounting, freight, insurance, handling, payroll, phones, supplies and other common business charges. This letter then stated that the prior invoices were going to be adjusted to reflect these costs and DTA would be billed for these items as soon as the adjustments could be calculated.

Lonny's then sent DTA an invoice dated December 26, 2003 in the sum of $14,294.05 which Lonny's described as its "unbilled portion of direct costs." The bill requested that this sum be remitted "at once", interest on the unpaid balance would accrue at the rate of 2% per month and no additional credit would be extended until all balances including this amount were paid in full.

When this action was commenced, DTA moved for a preliminary injunction seeking to compel Lonny's to sell merchandise to DTA during the pendency of the action.[2] Gary submitted an affidavit in opposition to the motion in which he stated that based upon his 26 years of experience in the retail clothing industry the term "direct cost" as used in the Contract included an allocation for fixed overhead costs such as rent, freight, insurance, payroll, utilities, etc. He did not bill DTA for these additional costs because he did not have time to calculate these additional cost. Gary further averred that he told Adam Swickle ("Swickle"), a principal of DTA, that after about six months he would calculate these additional costs and bill DTA. Swickle is alleged to have agreed to this arrangement.

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[2] The order to show cause was resolved by Stipulation "So Ordered" on June 15, 2004. Pursuant to the terms of the Stipulation, Lonny's and Ina Mae would continue to provide DTA with merchandise during the pendency of this action provided that DTA paid the sum fo $14,294 into escrow with Defendants attorneys by June 30, 2004, paid for all merchandise purchase by cash, bank check or certified check within two (2) business days of receipt and paid the sum 15% of the purchase price of the merchandise into escrow with Defendants attorneys. The escrow sum would be paid to the appropriate party at the conclusion of the action. In the event DTA did not make any of the payments as provided for by the Stipulation, Lonny's was not obligated to order or sell merchandise to DTA.

DTA did not make the initial escrow deposit. Since DTA did not make the deposit, Lonny's did not provide DTA with any merchandise.

At his deposition, Gary testified that he did not realize that direct cost should include an allocation to fixed overhead costs until he met with his accountant in December 2003 to prepare Lonny's year end statements. Later in his deposition, Gary testified that he did not know what the term "Transferors direct cost" means.

DTA also suggests that Gary's testimony is perjurious because Lonny's fixed expenses did not change whether it did or did not purchase merchandise for DTA. Gary testified at deposition that the only real additional expense Lonny's might have incurred was in relation to employee expenses. Someone would have to sort and invoice the goods that were for DTA. However, Lonny's did not have to hire any additional employees to do this work.

While Gary's testimony may be inconsistent, it is not a basis for summary judgment. In order to obtain judgment as a matter of law, DTA had to establish that the term "direct cost" or "Transferors direct cost" as used in the contract is subject to only one interpretation.

An agreement that is clear and unambiguous will be enforced in accordance with its terms. South Road Assocs., LLC v. International Business Machines Corp., 4 N.Y.3d 272 (2005); Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990). Whether a contract is ambiguous is a question of law for the court. DiLorenzo v. Estate Motors, Inc., 22 A.D.2d 630 (2nd Dept. 2005); and Argento v. Argento, 304 A.D.2d 684 (2nd Dept. 2003).

An agreement is not ambiguous simply because the parties urge different interpretations. Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456 (1957); and Moore v. Kopel 237 A.D.2d 124 (1st Dept. 1997). A term or provision of an agreement is ambiguous when the term or provision is subject to different interpretations. See, Manchester Technologies, Inc. v. Didata (N.Y.) Inc., 303 A.D.2d 726 (4th Dept. 2003); Reiner v. Wenig, 269 A.D.2d 379 (2nd Dept. 2000); and Bamira v. Greenberg, 256 A.D.2d 237 (1st Dept. 1998).

The parties have advanced different, reasonable interpretations for the term "Transferors direct cost" or "direct cost" as contained in Paragraph 11.2 of the contract. The term is not defined or explained in the agreement. DTA seeks to have this term interpreted as meaning the amount Lonny's paid the manufacturer for the goods. Lonny's seeks to have this term interpreted as including a portion of overhead expenses. It is unclear to the Court whether the term "direct cost" is a term of art subject to a specific meaning in the retail garment industry or whether it is a term which is subject to interpretation.

Where a term or provisions of an agreement is ambiguous, it cannot be construed by the court as a matter of law and summary judgment should not be granted. Reiner v. Wenig, *supra*; and Bamira v. Greenberg, *supra*.

F. Sanctions

The court may award sanctions against an attorney for litigant who engages in frivolous conduct. 22 NYCRR 130-1.1. Frivolous conduct involves bringing and pursuing meritless claims or claims which cannot be supported by reasonable arguments for the extension, modification or reversal of existing law, is undertaken primarily to delay or prolong the litigation or to harass or maliciously harm the other party or asserts material factual statements that are false. 22 NYCRR 130-1.1(c).

The decision on whether to impose sanctions is one addressed to the discretion of the Court. Wagner v. Goldberg, 293 A.D.2d 527 (2nd Dept. 2002).

Sanctions are not warranted in this case. Dismissal of Plaintiff's causes of action do not automatically justify the imposition of sanctions. With the exception of the second cause of action, the causes of action plead in the complaint were not patently meritless.

The court is permitted to impose sanctions to permit a party to recover actual expenses incurred including reasonable attorneys fees resulting from frivolous conduct. 22 NYCRR 130-1.1(a). In this case, there was undeniably a dispute between DTA and Lonny's regarding the interpretation of the Contract. Sanctions should not be imposed upon an attorney who zealously represents a client by asserting all possible claims that might arise out of a transaction.

Accordingly, it is,

ORDERED, that Defendants motion for summary judgment is **granted** to the extent of dismissing the first cause of action against the Defendants Walter Goldstein

and Gary Goldstein and to the extent of dismissing the third and fourth causes of action as to all Defendants; and it is further,

ORDERED, that Defendant's motion to dismiss the second cause of action pursuant to CPLR 3211(a)(7) is **granted**; and it is further,

ORDERED, that Defendant's motion for sanctions is **denied**; and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment is **denied.**

This constitutes the decision and order of this Court.

Dated: Mineola, NY
February 9, 2006

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