

Q-Plus USA, Inc. v Eastern Original Inc.

2011 NY Slip Op 33943(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 118298/06

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

Q-PLUS USA, INC, as Assignee of CONTRACTUAL RIGHTS of ROGINI GARMENTS,

Plaintiff,

- v -

EASTERN ORIGINAL INC,

Defendant.

and a first and second third party action

Index No.: 118298/0**6**

Motion Date: 10/04/11

Motion Seq. No.: 004

590278/08

590195/10

The following papers, numbered 1 to 3 were read on this motion to dismiss /cross motion to amend second third party complaint

Notice of Motion/ -Affidavits -Exhibits

Notice of Cross Motion/ -Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

FILED

No (s) . 1

No (s) . 2

JAN 10 2012 No (s) . 3

Cross-Motion: Yes No

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Upon the foregoing papers, it is ordered that this motion and cross motion are granted in part.

The papers raise issues of fact whether second third party defendant's alleged part performance entitles defendant/third party plaintiff to enforcement of the oral agreement by which it contends that third party defendant was its exclusive agent and whether the actions of third party defendant "can be characterized as 'unequivocally referable' to the agreement alleged" *Steele v Delverde SRL*, 242 AD2d 414 (1st Dept

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

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

1997). A duty of good faith and fair dealing is implicit in any agreement, though it is not a claim separate from one for breach of contract. *American Assur Underwriters Group v MetLife Gen Insurance Agency*, 154 AD2d 206 (1st Dept 1990).

Third party defendant is correct that the tort claim is insufficiently plead as well as untimely brought, as all the complained about acts occurred "prior to 2005", which is more than three years before this action was brought.

Likewise, third party plaintiff failed to commence its action for conversion within three years after such claims accrued. Moreover, its conversion claims lack the requisite specificity.

Third party plaintiff's claim that third party defendant began unfairly competing with it in July 2006, at the time of Gloria Lai's resignation, is timely. The court disagrees with third party defendant that such claim sounds in property damage. Rather, such claims sounds in breach of contract and therefore the six year statute of limitations, which had not expired at the commencement of this action, applies. *Katz v Bach Realty*, 192 AD2d 307 (1st Dept 1993).

The proposed amended third party complaint does not make the requisite allegations of a claim for a constructive

trust. Nor are the allegations of the proposed amended complaint sufficient to state an accounting, since third party defendant is likewise correct that the requisite relationship is not claimed.

However, the court disagrees that Labor Law § 193 bars an action against an employee for breach of fiduciary duty seeking a disgorgement of compensation, and therefore the amendment to the third party complaint is permissible in that regard. *Western Electric Co v Brenner*, 41 NY2d 291 (1977).

Some of the allegations of the third party plaintiff's proposed amendments constitute claims that are dismissed herein. The court therefore grants third party plaintiff's motion only to the extent of granting it leave to serve and file an amended third party complaint consistent with this decision.

Accordingly, it is

ORDERED that third party defendant's motion to dismiss the tenth (tort), twelfth (conversion), and thirteenth (unfair competition) causes of action is granted and such causes of action are dismissed; and it is further

ORDERED that third party plaintiff's cross motion to amend its third party complaint is granted, only to the extent that within twenty days of service of a copy of this order with notice of entry, third party plaintiff shall serve and file an

amended third party complaint to the extent that it is consistent with the foregoing decretal paragraph, i.e. that separately captions each remaining cause of action against third party defendant and that alleges when the acts comprising the cause of action occurred; and it is further

ORDERED that third party defendant shall serve his answer to the amended third party complaint within 30 days of service of such amended third party complaint.

This is the decision and order of the court.

Dated: December 23, 2011

ENTER:

~~Richard A. ...~~
DEBRA A. JAMES J.S.C.

FILED
JAN 10 2012
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COUNTY CLERK'S OFFICE