

**Arche, Inc. v Bob Ellis Shoe Store, Inc.**

2012 NY Slip Op 32951(U)

December 13, 2012

Sup Ct, New York County

Docket Number: 111860/10

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

ARCIE, INC.,

Plaintiff,

-v-

BOB ELLIS SHOE STORE, INC. and BARRY KALINSKY,

Defendants.

INDEX No. 111860/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 002

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits \_\_\_\_\_

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_

YES

NO



**FILED** 1, 5  
2  
DEC 17 2012 3, 4  
NEW YORK COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated:

12 / 13 / 12

*Donna M. Mills*

**DONNA M. MILLS, J.S.C.**

Check one:

\_\_\_\_ FINAL DISPOSITION



\_\_\_\_ NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 58

----- X  
ARCHE, INC.,

Plaintiff,

Index No.: 111860/10

-against-

DECISION AND ORDER

BOB ELLIS SHOE STORE, INC. and  
BARRY KALINSKY,

Defendants.

-----  
MILLS, J.

**FILED**

DEC 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**FACTUAL BACKGROUND**

This is a breach of contract action brought by Arche, Inc., to recover damages against defendants Bob Ellis Show Store Inc. ("Bob Ellis") and Barry Kalinsky.

The following facts are not in dispute. This action arises out of business dealings between plaintiff Arche, Inc., a shoe wholesaler, and defendant Bob Ellis Show Store, Inc., a retail shoe store. Defendant Barry Kalinsky is the registered agent and Vice President of Bob Ellis. Mr. Kalinsky has also acted as agent for the disclosed principal, Bob Ellis.

Defendant Barry Kalinsky moves for an Order granting summary judgment pursuant to CPLR §3212 on the grounds that the breach of contract claim against him is without merit. Plaintiff, Arche, Inc. opposes the granting of such Order on the grounds that defendant Kalinsky has failed to meet his burden to adduce sufficient proof to show that there are no material facts in

dispute as to Plaintiff's claims against him.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In support of their motion for summary judgment, Mr. Kalinsky in an affidavit states that he was an employee of Bob Ellis for approximately 22 years until 2009, after which time he took on the administrative duties of the corporation after the death of his father. He further states that Bob Ellis began business dealings, with Arche, Inc. in 2003, and he was only acting as an agent of Bob Ellis. Additionally, Mr. Kalinsky maintains that all orders placed by Bob Ellis to Arche were on company letterhead and did not contain any of his personal information. Mr. Kalinsky concludes by stating that he never individually entered into any agreement or contract with Arche,

Inc. And therefore should not be held personally liable for any transactions made between Arche, Inc. and Bob Ellis contained within the complaint in this action.

Defendant Kalinsky also relies on the deposition of Ms. Verbrugghen-Campeggi, the President of Arche, Inc., who when asked whether she had any factual basis for holding Barry Kalinsky personally responsible she replied that she did not. She also conceded that Barry Kalinsky never used his personal bank account to pay for any merchandise in the seven years that Arche, Inc. supplied Bob Ellis with merchandise.

It is quite apparent to the Court that Mr. Kalinsky has made a prima facie case in support of summary judgment. As cited earlier, the burden now shifts to plaintiff to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, at 228. However, in opposition to the defendant's motion for summary judgment, the plaintiff has totally failed to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact as to whether the defendant Mr. Kalinsky is personally responsible for the purported debt of Bob Ellis Shoe Store, Inc. (see, *Zuckerman v. City of New York*, at 562).

Accordingly, it is hereby

ORDERED that the defendant Barry Kalinsky's motion for summary judgment is granted and the Clerk is directed to enter

judgment in favor of said defendant and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 12/13/12

**FILED**

ENTER:

*DM*

DONNA M. MILLS, J.S.C.