| **Micallef v Designs by Skaffles, Inc.** |
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| 2008 NY Slip Op 33711(U) |
| November 7, 2008 |
| Supreme Court, New York County |
| Docket Number: 100354/05 |
| Judge: Marcy S. Friedman |
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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KIM MICALLEF,

*Plaintiff,*

- against -

DESIGNS BY SKAFFLES, INC., LOTTA LUV, LLC and MY GENERATION, LLC,

*Defendants.*

Index No.: 100354/05
Action No. 1
DECISION/ORDER

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KIM MICALLEF,

*Plaintiff,*

- against -

DAVID SCHWEKY, STEVEN SCHWEKY a/k/a STEVEN SHWEKY, STEPHEN FOGELSON, KOFO LLC n/k/a LOTTA LUV LLC and CHARLES E. KOMAR,

*Defendants.*

Index No. 100313/08
Action No. 2

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NEW YORK

The above-captioned actions are related actions for allegedly unpaid sales commissions. In Action No. 1, defendant Lotta Luv, LLC ("Lotta Luv") moves for summary judgment dismissing the complaint against it.[1] In Action No. 2, defendants Fogelson, Kofo, LLC and Komar (the "Kofo defendants") move to dismiss the complaint against them, pursuant to CPLR

[1]The other two defendants in Action No. 1, Designs by Skaffles, Inc. and My Generation, LLC both filed for bankruptcy.

[* 2]

3211(a)(1) and (7). By separate motion in Action No. 2, defendants David Shweky and Steven Shweky (the "Shweky defendants") move to dismiss the complaint pursuant to CPLR 3211. The motions are consolidated for disposition.

Lotta Luv Motion for Summary Judgment in Action No. 1

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman v City of New York, supra, at 562.)

Here, Lotta Luv fails to demonstrate entitlement to judgment as a matter of law. Lotta Luv seeks summary judgment on the ground that all commissions due plaintiff for 2003 and January 2004 through her resignation in April 2004 have been paid. It is undisputed that through 2003, the agreement between plaintiff and Lotta Luv was that plaintiff's sales commissions were earned at the time merchandise was shipped, not at the time orders were booked. It is further undisputed that as of January 2004, the commission structure was modified such that no commissions would be paid on the first 10 million dollars of sales. While Lotta Luv asserts that all commissions due for 2003 were paid and that the commission structure was not modified retroactively (see D.'s Reply Memo. Of Law at 4), Lotta Luv does not make any showing that orders booked in 2003 but not shipped until 2004 were paid under the terms of the former

commission structure. On the contrary, it appears that Lotta Luv's position is that commission payments made in 2004 were "for 2003 booked and shipped sales. (Id. at 7 [emphasis supplied].)

Significantly, however, defendant "was entitled to change the terms of [plaintiff's] employment agreement only prospectively, subject to plaintiff's right to leave the employment if the new terms were unacceptable." (Gebhardt v Time Warner Entertainment-Advance/Newhouse, 284 AD2d 978, 979 [4th Dept 2001].) Moreover, the fact that plaintiff remained in her employment for four months after the new commission structure was imposed is not a waiver as to retrospective, as opposed to prospective, reduced commissions. (See id.) Lotta Luv's motion for summary judgment will accordingly be denied.

Defendants Motions to Dismiss in Action No. 2

After submission of the instant motions, defendants apprised the court by letter that plaintiff had served an amended complaint. Defendants also took the position that the amended complaint did not remedy the defects in the initial complaint.

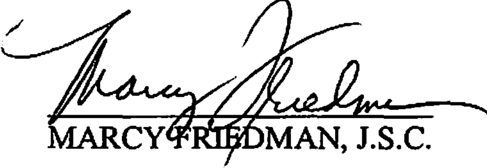
A defendant may elect to apply to an amended complaint a motion to dismiss that was addressed to the original complaint. (See Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35 [1st Dept 1998].) Here, however, defendants do not address the specific allegations of the amended complaint and do not set forth specific arguments as to why the pleading continues to fail to state a cause of action. The court accordingly holds that the motion to dismiss the original complaint should be denied as moot, but without prejudice to motions addressed to the amended complaint.

It is accordingly hereby ORDERED that the motion of Lotta Luv for summary judgment in Action No. 1 is denied; and it is further

ORDERED that the motions of the Kofo defendants and the Shweky defendants in Action No. 2 are denied without prejudice to new motions to dismiss the amended complaint, provided that such motions are served within 30 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
November 7, 2008



MARCY FRIEDMAN, J.S.C.

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