SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
**Justice**

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HYAT MASUDI, Individually,

Plaintiff,

- against -

MAXIMO COUTURE INC., a New York Corporation, SHOEHYPE.COM LLC, a Domestic Limited Liability Company, JOHN TASKASAP, corporation counsel of both MAXIMO COUTURE INC. and SHOEHYPE.COM LLC in his capacity as corporation counsel, and individually LEVENT SAPMAZ, corporation counsel of both MAXIMO COUTURE INC. and SHOEHYPE.COM LLC in his capacity as corporation counsel, an individually, PALISADES CENTER LLC, a New York Corporation, PRYAMID MANAGEMENT GROUP, INC., a New York Corporation,

Defendants.

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Index No.: 20015/10

Motion Date: 12/6/12

Motion No.: 13

Motion Seq.: 2

The following papers numbered 1 to 8 read on this motion by defendant Palisades Center, LLC and defendant Pyramid Management Group, Inc. for, inter alia, summary judgment dismissing the complaint against them and on this cross motion by defendant JohnTaskasap, defendant Levent Sapmaz, defendant Shoehype.com LLC, and defendant Maximo Couture, Inc. (collectively the Maximo defendants) for summary judgment dismissing the complaint against them and on this cross motion by plaintiff Hayat Masudi for, inter alia, summary judgment on his complaint.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits | 1-3 |
| Notice of Cross Motion - Affidavits - Exhibits | 4-6 |

Answering Affidavits - Exhibits 7
Reply Affidavits
Memoranda of Law 8

Upon the foregoing papers it is ordered that the motion and the cross motion are determined as follows:

On or about August 11, 2010, John Taskasap brought an action against Hayatai Masudi in the New York State Supreme Court, County of Queens (*Taskasap v. Masudi*, Index No. 20377/10). The complaint alleged that on or about March 22, 2010 and again on April 1, 2010, Taskasap sold to Masusdi shoes and clothing and that the latter had failed to pay a balance owed amounting to $50,153. Masudi served a verified answer, asserting as the fifth affirmative defense that "[t]he goods or products sold to Defendant by Plaintiff were defective and counterfeit." On October 6, 2011, the Honorable Marguerite Grays issued an order directing the entry of a default judgment against Masudi in the amount of $50,153 plus interest. On July 16, 2012, Judge Grays refused to sign an order to show cause brought by Masudi seeking to vacate the default judgment, noting: "Defendant has failed to satisfactorily explain why he failed to respond to the notice of motion dated April 4, 2011, the Compliance Conference Order dated February 1, 2011 or the Preliminary Conference Order dated November 10,2010."

Masudi, acting pro se, began the instant action on August 6, 2010. The complaint alleges that he opened a store in the Dominican Republic for the purpose of selling apparel and footwear. After allegedly discovering that Taskasap had sold him counterfeit jeans, Masudi refused to make payment. The first cause of action is for breach of contract, the second for breach of warranty, the third for fraudulent inducement, the fourth for unjust enrichment, the fifth for violation of New York Real Property Law § 231, the sixth for negligence, the seventh for gross negligence, the eighth for "stalking" (NY PL 120.40), and the ninth for the intentional infliction of emotional distress.

The motion by defendant Palisades Center LLC and defendant Pyramid Managment Group, Inc. for summary judgment dismissing the complaint against them is granted. The fifth cause of action, the only claim asserted against defendant Palisades and defendant Pyramid, alleges that they respectively own and operate Palisades Mall and that they leased commercial space on the premises to defendant Maximo Couture, defendant Taskasap, and defendant Levent Sapmaz. The plaintiff alleges that defendant Palisades and

defendant Pyramid knowingly leased the store to Maximo Couture, Taskasap, and Sapmaz for the sale of counterfeit goods. RPL § 231, "Lease, when void; liability of landlord where premises are occupied for unlawful purpose," provides in relevant part: "2. The owner of real property, *knowingly* leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or *knowingly* permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business." The sale of counterfeit goods comes within the ambit of RPL §231. (*See*, *Midcenter Equities Associates v. Nghiem My Quack Tran*, 10 Misc.3d 141[A] [Table], 2006 WL 83514 [Text] [AT 1st] [sale of counterfeit goods]; *1165 Broadway Corp. v. Dayana of N.Y. Sportswear*, 166 Misc.2d 939 [sale of counterfeit goods].) "[T]he 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 demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Defendant Pyramid and defendant Palisades successfully carried this burden. Mark Rock, an employee of defendant Pyramid, has sworn the following: During the relevant time period, Palisades Center, a shopping mall located in Rockland County, New York, had approximately 230 tenants and approximately 20 holders of short term licenses. Maximo Couture, Inc. did not have a lease or license, but a company with a similar name, Maximo Leather New Jersey, Inc. d/b/a Maximo Couture, Inc. held a short term license to occupy space for the period March 15, 2010 to February 14, 2011. During the entire time period that Maximo Couture ran the store, the only complaint about the alleged sale of counterfeit goods from it came from plaintiff Masudi." The burden on this motion shifted to the plaintiff to produce evidence in admissible form showing that there is an issue of fact which must be tried. (*See*, *Alvarez v. Prospect Hospital*, *supra*.) The plaintiff failed to submit proof showing that defendant Palisades and defendant Pyramid had any knowledge that the other defendants were allegedly selling counterfeiting goods from the store.

The cross motion by the Maximo defendants for summary judgment dismissing the complaint against them is granted. The Maximo defendants are correct in asserting that the action brought by Taskasap against Masudi operates as a bar to this action, although the court finds that, contrary to their contention, the doctrine of collateral estoppel is not applicable and the doctrine of res judicata is not precisely applicable. Insofar as collateral estoppel is concerned, "[t]he *** doctrine of collateral estoppel or 'issue preclusion' is invoked when the

cause of action in the second matter is different from that in the first and applies only to a prior determination of an issue which was actually and necessarily decided in the earlier matter and not to those which could have been litigated ***." (*Koether v. Generalow*, 213 AD2d 379, 380; *see*, *Kaufman v. Eli Lilly and Co.*, 65 NY2d 449.) Although Masudi raised the issue of counterfeit goods in the Taskasap action as an affirmative defense, the judgment against him was entered on default. "An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation ***." (*Kaufman v. Eli Lilly and Co., supra*, 457; *47 Thames Realty, LLC v. Rusconie*, 85 AD3d 853.) In regard to the doctrine of res judicata, "a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding ***." (*Sterngass v. Soffer*, 27 AD3d 549-550; *see*, *Barbieri v. Bridge Funding, Inc.*, 5 AD3d 414.) However, since there is no compulsory counterclaim rule in New York, the doctrine of res judicata, does not bar claims that could have been raised as counterclaims in a previous action but were not actually raised. (*Pace v. Perk*, 81 AD2d 444; *Associated Financial Corp. v. Kleckner*, 2010 WL 3024746, [S.D.N.Y].) That is not the end of the matter. "While New York does not have a compulsory counterclaim rule (*see*, CPLR 3011), a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory ***." (*Henry Modell and Co., Inc. v. Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York* 68 NY2d 456, 461.) The permissive counterclaim rule "*** does not *** permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action" (*67-25 Dartmouth Street Corp. v. Syllman*, 29 AD3d 888, 889-890, quoting *Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y., supra*, 462 2 ; *see*, *Zion New York Lld. Partnership v. Silverberg*, 280 AD2d 432.) The rationale underlying this rule is similar to the rationale underlying the rule of res judicata: the state has an interest in the finality of litigation. (See, *Henry Modell and Co., Inc. v. Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York, supra.)* Plaintiff Masudi cannot raise causes of action arising out of the sale of the goods here because to do so might impair rights established in the Taskasap case and might render

the final judgment obtained in the Taskasap case of no force and effect. (*See, Zion New York Lld. Partnership v. Silverberg Stonehill & Goldsmith, P.C., supra.)* The court notes finally that to the extent that the eighth cause of action, purportedly for "stalking," which is based on Penal Law §120.40, might concern a different transaction than the sale of goods, the claim is not adequately supported by facts (*see*, CPLR 3211[a][7]), even assuming that a civil claim can be based on this penal statute.

The cross motion by the plaintiff for, inter alia, summary judgment on his complaint is denied. The court notes that the plaintiff has made a previous attempt — an unsuccessful one– to vacate the judgment in the Taskasap case.

Dated: Long Island City, NY
March 27, 2013

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**ROBERT J. McDONALD**
**J.S.C.**