

**Wide Win Am., Inc. v One Mountain Imports LLC**

2013 NY Slip Op 32423(U)

October 3, 2013

Supreme Court, New York County

Docket Number: 151512/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: How Joan A. McElw  
Justice

PART 11

Index Number : 151512/2012  
WIDE WIN AMERICA, INC.  
vs  
ONE MOUNTAIN IMPORTS LLC  
Sequence Number : 005  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the attached Memorandum Decision + Order.*

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

Dated: October 3, 2013

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
WIDE WIN AMERICA, INC.,  
Plaintiff,

INDEX NO. 151512/12

-against-

ONE MOUNTAIN IMPORTS LLC doing business  
as FASHION MOUNTAIN LLC, MERCHANT  
FACTORS CORPORATION, and COLDWATER  
CREEK, INC.,  
Defendants.

-----X  
JOAN A. MADDEN, J.:

Defendant Merchant Factors Corporation (“Merchant Factors”) moves for an order dismissing the complaint against it pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff Wide Win America, Inc. (“Wide Win”) opposes the motion, which is granted for the reasons stated below.

Background

Wide Win is in the business of importing clothing from Chinese factories for sale in America. One Mountain Imports LLC (“One Mountain”) placed orders with Wide Win for over \$1,001,206.56 worth of clothing. Wide Win delivered the clothing to One Mountain; however, One Mountain did not pay for the clothing. Defendant Merchant Factors Corporation (“Merchant Factors”) loaned money to One Mountain against One Mountain’s accounts receivable, pursuant to a contract (the “Discount Factoring Agreement”).

One Mountain and defendant Coldwater Creek, Inc. (“Coldwater”) entered into a Master Vendor Agreement on April 24, 2006 (the “Vendor Agreement”), which includes a chargeback provision that allows Coldwater Creek to “set off and deduct against any [sums paid for

merchandise, pursuant to the Vendor Agreement,] any indebtedness of ...[One Mountain] to ...[Coldwater Creek].” Vendor Agreement, Sections 2-33/34(3) and 12.1. Wide Win asserts that during the period from October 10, 2009, through March 2012, Coldwater Creek wrongfully charged back certain purchases from One Mountain that were obtained from manufacturers other than Wide Win. Wide Win alleges that as a result of the chargeback policy with Coldwater Creek, as outlined in the Vendor Agreement and the Vendor Handbook (the “Chargeback Policy”), One Mountain was unable to pay Wide Win for the Clothing.

On or around April 3, 2012, Wide Win initiated this action by the filing of a summons and complaint. Before answering the complaint, Coldwater Creek and One Mountain Imports LLC doing business as Fashion Mountain LLC (“Fashion Mountain”) separately moved to dismiss the claims against them for failure to state a cause of action and/or based on documentary evidence . By decision and order dated January 24, 2013 (“the prior decision”), the court granted these motions, but did not address the claim against Merchants Factors.

Merchants Factors now moves to dismiss the only claim explicitly asserted against it which is for breach of contract. The complaint asserts that the chargeback policy in the Vendor Agreement is unlawful, and Paragraph 18 of the complaint specifically asserts that:

“[t]he wrongful ‘chargeback’ policy of ... Coldwater Creek caused a breach of contract between ... Merchant Factors and ... One Mountain causing ... Merchant [Factors] to stop advancing funds to ... One Mountain against its accounts receivable from ... Coldwater Creek, thus causing ... One Mountain to withhold payment from [Wide Win].”

Merchant Factors now moves to dismiss the complaint against it, pursuant to CPLR 3211(a)(1) and (a)(7). Merchant Factors argues that the complaint does not assert a claim for breach of contract against it as based on allegations that Coldwater Creeks’ wrongful charge

back policy caused Merchant Factors to stop advancing funds. Furthermore, Merchant Factors argues that, even if it had breached its contractual obligations, the documentary evidence shows that Wide Win was not a party to the Discount Factoring Agreement, and there are no facts asserted in the complaint, which show that Wide Win was an intended third-party beneficiary of that agreement.

In opposition, Wide Win argues that the “defendants agreed among themselves to fail, neglect and refuse to pay ... [Wide Win] for the good faith delivery of \$1,001,206.56 worth of clothing.” Answering Affirmation, ¶2. Wide Win further argues that it is now the law of the case that Wide Win is a third-party beneficiary of the Discount Factoring Agreement since, the prior decision did not address Wide Win’s third-party beneficiary status with respect to the Discount Factoring Agreement and allowed the action to continue against Merchant Factors.

In reply, Merchant Factors points out that the issue of whether Wide Win was a third-party beneficiary of the Discount Factoring Agreement was not before the court when the prior decision was made and therefore the law of the case doctrine is inapplicable.

### Discussion

On a motion pursuant to CPLR 3211(7), to dismiss a pleading for legal insufficiency, the court “accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory.” Morone v. Morone, 50 N.Y.2d 481, 484 (1980) (citation omitted). However, claims consisting of bare legal conclusions, with no factual specificity, are insufficient to survive a motion to dismiss. Godfrey v. Spano, 13 N.Y.3d 358 (2009). Furthermore, where pleadings are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, and dismissal is appropriate pursuant

to CPLR 3211(a)(1). See Morgenthau & Latham v. Bank of New York Company, Inc., 305 A.D.2d 74, 78 (1st Dep't 2003).

Here, even assuming the truth of all Wide Win's allegations, the facts alleged in the complaint are insufficient to state a cause of action against Merchant Factors, since the complaint merely alleges that the chargeback policy in the Vendor Agreement caused a breach of the Discount Factoring Agreement which in turn caused "Merchant [Factors] to stop advancing funds to ... One Mountain against its accounts receivable from... Coldwater Creek." Complaint ¶18. These allegations are insufficient to state a claim for breach of contract as there are no facts regarding the terms of the Discount Factoring Agreement or how it was breached. See Caniglia v. Chicago Tribune–New York News Syndicate, Inc., 204 A.D.2d 233 (1st Dep't 1994)(dismissing breach of contract claim where plaintiffs failed to allege, in nonconclusory language...the essential terms of the contract and the provisions of the contract on which liability is predicated).

Furthermore, a review of the Discount Factoring Agreement shows no language that would indicate that Wide Win was an intended third-party beneficiary, such that it has standing to maintain an action based upon any alleged breach of the Discount Factoring Agreement by Merchant Factors. See Edge Management Consulting, Inc. v. Blank, 25 A.D.3d 364 (1st Dep't), lv dismissed, 7 N.Y.3d 864 (2006)(a person will not be considered a third-party beneficiary of an agreement, unless that party's right to performance is "appropriate to effectuate the intention of the parties to the contract"). Since it is well-established that a litigant is not entitled to demand enforcement of a contractual provision if it is neither a party to a contract nor a third-party

beneficiary (see Mendel v. Henry Phipps Plaza West, Inc., 6 N.Y.3d 783 (2006)), Wide Win's claim against Merchant Factors must be dismissed.

Additionally, to the extent that Wide Win argues that it has a cause of action against Merchant Factors since the "defendants agreed among themselves to fail, neglect and refuse to pay ... [Wide Win] for the good faith delivery of \$1,001,206.56 worth of clothing (Answering Affirmation, ¶2)," such an argument appears to be entirely speculative and is not based on any allegations in the complaint.

Finally, the dismissal of the claim against Merchant Factors is not barred by the doctrine of law of the case since the prior decision did not address the claim against Merchant Factors or otherwise make a finding that would establish the merit of the claim against it. In fact, the court dismissed the breach of contract claim against Coldwater Creek that appears to be central to Wide Win's claim against Merchant Factors.

In view of the above, it is

ORDERED that Merchant Factors Corporation's motion to dismiss the complaint against it is granted; and it is further

ORDERED that the caption is amended to reflect the dismissal of the complaint against Merchant Factors Corporation; and it is further

ORDERED that the caption is amended to reflect the dismissal of the claims and against Merchant Factors Corporation; and it is further

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

ORDERED that counsel for defendant Merchant Factors Corporation shall serve a copy

of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein.

Dated: ~~August~~ *October 3*, 2013

  
\_\_\_\_\_  
J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C.**