

**Due Peci, Inc. v Eva Franco, Inc.**

2014 NY Slip Op 33129(U)

December 2, 2014

Sup Ct, New York County

Docket Number: 650025/2012

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

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DUE PECI, INC. d/b/a AGENT R.E.D.  
INTERNATIONAL,

Plaintiff,

**DECISION and ORDER**  
Index No. 650025/2012  
Mot. Seq. Nos. 002 & 003

- against -

EVA FRANCO, INC.,

Defendant.

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**SALIANN SCARPULLA, J.:**

Plaintiff Due Peci, Inc., which does business as Agent R.E.D. International (“Due Peci”), is a fashion industry sales representative and operates a sales office and showroom in New York. Due Peci markets to companies both domestically and internationally. Eugenia Parada Fishman (“Fishman”) is a shareholder, director and President of Agent RED.

On April 5, 2011, Due Peci and defendant Eva Franco, Inc. (“Franco”) entered into an agreement pursuant to which Due Peci would act as an exclusive sales representative and independent selling agent for Franco’s clothing Line (the “Sales Agreement”) (Ex. A to Walters Aff. in Support).

The Sales Agreement provides in Section 1 that

[Due Peci] does hereby agree to act as an independent sales representative of Eva Franco for (1) year from the date hereof, which term shall automatically renew in the ninth month of this agreement for a period of two years, unless and until either party shall terminate this agreement pursuant to the provisions contained in paragraph (7). After the first year, this agreement will continue to automatically renew in the twenty first month of this agreement.

Section 7, entitled Termination, provides in pertinent part that “either party may terminate this Agreement by giving the other party notice in writing of termination within sixty (60) days prior to the end of the current term.”

By email dated December 15, 2011 (the “Termination Notice”), Amanda Parenti (“Parenti”), Franco’s Director of Sales, informed Due Peci that:

**[w]e would like to terminate our contract as of today, Dec. 15th 2011 officially ending February 15, 2012, (60 days) in writing in accordance to [sic] our contract as stated in section 7. As discussed we will be participating in the NYC Intermezzo Show with you and your team and then wish to remove the samples after the show. (Emphasis added).**

Due Peci objected to Franco’s termination of the Sales Agreement, advised Franco that it was in default thereunder, and that it had failed to render statements and pay commissions and other charges to Due Peci pursuant to the Sales Agreement. Due Peci alleges that despite its demand that Franco perform under the Sales Agreement, Franco has allegedly failed to do so and continues activities in breach of the Sales Agreement.

In its complaint, Due Peci, asserted causes of action for (1) injunctive relief;<sup>1</sup> (2) unjust enrichment; (3) breach of contract; (4) accounting; (5) tortious interference with prospective business relations; (6) violation of New York Labor Law (“Labor Law”) §§ 191-b and 191-c<sup>2</sup>; and (7) attorneys’ fees.

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<sup>1</sup> Due Peci has withdrawn its injunctive relief cause of action. 1/9/14 Tr. at 2:18-20.

<sup>2</sup> Labor Law § 191-b, entitled Contracts with Sales Representatives, provides as follows:

Franco filed an Answer with Counterclaims, dated September 4, 2012, asserting numerous affirmative defenses and the following counterclaims: (1) breach of contract; (2) breach of fiduciary duty; (3) tortious interference with contractual relations; (4) breach of the implied covenant of good faith and fair dealing; and (5) injunctive relief.

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1. When a principal contracts with a sales representative to solicit wholesale orders within this state, the contract shall be in writing and shall set forth the method by which the commission is to be completed and paid.
2. The principal shall provide each sales representative with a signed copy of the contract. The principal shall obtain a signed receipt for the contract from each sales representative.
3. A sales representative during the course of the contract, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract, but not later than five business days after the commission had become earned.

Labor Law § 191-c provides that:

1. When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated.
2. The earned commission shall be paid to the sales representative at the usual place of payment unless the sales representative requests that the commission be sent to him or her through the mails. If the commissions are sent to the sales representative by mail, the earned commissions shall be deemed to have been paid as of the date of their postmark for purposes of this section.
3. A principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements.

Due Peci now moves, under motion seq. no. 002, for an order granting partial summary judgment in its favor and against Franco on liability only on its breach of contract cause of action, and on each of Franco's counterclaims and affirmative defenses, and striking Franco's counterclaims for failure to respond to discovery demands. Franco moves, under motion seq. no. 003, to dismiss the Complaint pursuant to CPLR 3211(a)(5) and (a)(7) and to disqualify Due Peci's counsel.

On the record during oral argument held on January 9, 2014, this Court (Kapnick, J.) dismissed Due Peci's causes of action for accounting and tortious interference, (1/9/14 Tr. at 35:24-26, 36:6-11), denied Franco's motion to dismiss as to the unjust enrichment and Labor Law claims, (*id.* at 36:12-14), denied Franco's request to disqualify Due Peci's counsel (*id.* at 27:17-20), and otherwise reserved judgment on Due Peci's breach of contract cause of action and Franco's counterclaims and affirmative defenses.

### **Discussion**

A party seeking summary judgment "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." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (internal citations omitted). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"

to defeat a summary judgment motion. *Id.* A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of material fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Franco argues that the summary judgment motion is premature because depositions have not yet been taken. *Dilimetin Aff.*, ¶ 5. However, I note that by so-ordered stipulation dated May 1, 2013, which is still in effect, the parties agreed that all depositions would be conducted on or before September 23, 2013 and that the end date for all discovery would be December 6, 2013. The parties have had ample time to complete depositions and did not seek to extend the discovery cut-off date. As such, this summary judgment motion is not premature.

***Due Peci's Breach of Contract and Unjust Enrichment Causes of Action***

To prevail on a breach of contract cause of action, a plaintiff must establish “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.” *See U.S. Bank Natl. Assoc. v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep’t 2012)(citation omitted).

The parties agree that they are bound by the terms of the Sales Agreement. However, they dispute the meaning of the auto-renewal and termination language of that Sales Agreement. According to Due Peci’s calculations, the initial term of the Sales Agreement was from April 15, 2010 to April 4, 2011 and, by operation of contract, the term was

extended to January 4, 2013. As such, Due Peci argues that Franco had no contractual right to terminate the Sales Agreement on December 15, 2011. Walters Aff., ¶¶ 25-26.

Franco, by contrast, argued at the oral arguments held on November 20, 2013 and January 9, 2014 that the termination clause of the Sales Agreement is ambiguous because it is impossible to determine the meaning of “current term,” which is not a defined term in the Sales Agreement. Further, Eva Franco states that her understanding of the Sales Agreement was that it was for a one-year term and that either party could terminate the Sales Agreement at any time with 60 days’ notice. Eva Franco Aff., ¶¶ 3, 15.

Under New York law, a contract is ambiguous if “on its face [it] is reasonably susceptible of more than one interpretation.” *Telerep, LLC v. U.S. Intl Media, LLC*, 74 A.D.3d 401, 402 (1st Dep’t 2010)(internal citation omitted); see also *Brad H. v. City of New York*, 17 N.Y.3d 180, 185-86 (2011). “A contractual provision is not ambiguous merely because the parties urge different interpretations of it.” *Pfizer, Inc. v. Stryker Corp.*, 348 F.Supp.2d 131, 142 (S.D.N.Y. 2004) (applying New York law). If the contract is unambiguous, summary judgment is appropriate. *Id.*

I find that the Sales Agreement, while inartfully drafted, is unambiguous. Paragraph 1 provides that the Sales Agreement was to be for the original “term” of one year, meaning it was to expire in April 2011. In the ninth month of the Sales Agreement (i.e., January 2011), it would automatically renew for a new term of two years, from April 2011 to April

2013.<sup>3</sup> Because Franco's December 15, 2011 Termination Notice was not tendered "within sixty (60) days prior to the end of the current term," which would have been the sixty day period from February to April 2013, Franco's termination was not effective.<sup>4</sup> Therefore, summary judgment is granted on this cause of action for liability only in favor of Due Peci.

In light of the existence of the Sales Agreement, Due Peci's unjust enrichment cause of action is dismissed. *See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1st Dep't 1987)("[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter").

#### ***Franco's Breach of Contract Counterclaim***

Franco alleges that Due Peci breached its contractual obligations by failing to perform at two trade shows, Intermezzo and Coterie, that took place during the 60-day period following Franco's purported termination of the Sales Agreement. Counterclaims, ¶ 17; Franco Aff., ¶¶ 6-7, 9. Franco further alleges that Due Peci breached its contractual obligations by failing to open major department store accounts, failing to hire qualified

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<sup>3</sup> The April 2013 termination date was confirmed in the December 21, 2011 email sent by Due Peci in response to the Termination Notice. That email plainly provides as follows: "[m]onths left on contract: 14 months (April 2013)."

<sup>4</sup> Franco's argument that this interpretation of the Sales Agreement leads to an unconscionable result and reflects unequal bargaining power, (see Franco's Memo. in Opp., p. 12), is meritless. The parties negotiated the Sales Agreement at arm's length and Franco has not shown how the circumstances surrounding its negotiation were unconscionable, nor has Franco sought its rescission.



employees to represent Franco's brand, failing to meet stated sales goals, holding Franco's samples "hostage," putting the interests of Due Peci's own brand before those of Franco, and by failing to arbitrate this dispute. Counterclaims, ¶¶ 22-24; Eva Franco Aff., ¶¶ 10-13, 21-24, 27, 29, 32; Dilimetin Aff., ¶ 9.

Franco argues that by failing to meet certain sales goals, Due Peci breached the first "whereas clause" of the Sales Agreement (Sales Representative has "the exclusive right to sell and market to retailers the Eva Franco collection [...]") as well as that part of Section 1 which provides that "Agent Red is being contracted by Eva Franco as a sales, marketing, and consulting organization whose duties shall include but not be limited to: Exclusive sales in the territories and for the stores outlined in clause 3 [...]"

The only evidence submitted indicating that the parties discussed specific sales goals is the December 21, 2011 email from Due Peci to Franco sent in response to the Termination Notice. However, even assuming, *arguendo*, that the sales goals mentioned in the December 21 email reflect an agreement of the parties, Franco fails to provide any evidence whatsoever of Due Peci's failure to meet these or any other purported sales goals. Because Franco has only articulated "mere conclusions" and "unsubstantiated allegations or assertions," it has failed to meet its summary judgment burden based on Due Peci's alleged failure to reach purported sales goals. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Next, Section 5 of the Sales Agreement, entitled Trade Shows, provides in relevant part that "Eva Franco agrees to support national tradeshowes such as Intermezzo and Coterie,

and any trade show agreed upon in writing by both parties.” However, the Sales Agreement by its terms does not bind Due Peci to participate in these shows; rather it delineates the payment of trade show expenses. Moreover, Franco does not allege any agreement subsequent to or apart from the Sales Agreement which might serve as a basis for Due Peci’s duty to participate in trade shows. In any event, Due Peci’s failure to attend the trade shows occurred after Franco had breached the Sales Agreement. Thus, as a matter of law, Due Peci’s nonparticipation at Intermezzo and Coterie does not support Franco’s breach of contract counterclaim.

With respect to Franco’s samples, Section 4 of the Sales Agreement provides that the “Sales Representative will not pay for any samples sent to it or it’s [sic] agents by Eva Franco, provided that such samples are returned to Eva Franco **within a reasonable time** after full use has been made by the Agent Red PR office.” (emphasis added.) Section 4.2 provides in relevant part that “Sales Representative shall return all samples at the end of each selling season[...].” Franco alleges that plaintiff held its samples “hostage,” but on this motion for summary judgment presents absolutely no detail or evidence to support this allegation or to show that the return of the samples was unreasonable. On the contrary, Due Peci submits an email exchange between counsel for the parties reflecting a delay of only about 24 to 48 hours between Franco’s formal written request for the return of its samples and Franco’s retrieval of same. This delay is far from unreasonable under the circumstances.

As to department store accounts, the Sales Agreement provides in Section 3 that “Agent R.E.D. International has the right to pursue Bloomingdales, Macy’s, Saks Fifth Ave., Belk, Barney’s Bergdorf’s, Lord & Taylor Sportswear dept., and also any department stores outside the technically designated territory as agreed between Eva Franco and AR.” This clause permits Due Peci to pursue certain department store accounts - presumably with the incentive of receiving sales commissions - but it was not bound to do so. Franco has failed to provide any support for its conclusory allegation that any failure on Due Peci’s part to secure department store accounts constitutes a breach of the parties’ Sales Agreement.

Franco also fails to explain how Due Peci’s purported assignment of an intern to its account was a “fail[ure] to be an exclusive sales representative” and, thus, constitutes a breach of the parties’ Sales Agreement. Memo in Opp., pp. 13-14.

Further, Franco does not explain how a purported assault or “scuffle” between Due Peci President, Eugenie Fishman, and an unidentified individual in another sales territory could possibly constitute a violation of paragraph 3 of the Sales Agreement, which governs commissions and territories. *Id.* at p. 14. Nor does Franco point to any clause of the Sales Agreement that was allegedly breached when Due Peci purportedly approached a store about holding an event for Due Peci’s own brand rather than Franco’s brand. See Franco Aff., ¶ 27.

Finally, Franco has been actively litigating this case since 2012 and has not made any attempt to compel arbitration or otherwise raised an objection to this litigation until now.

Thus, Franco has waived its right to arbitrate as provided for in the Sales Agreement and cannot now rely on Due Peci's failure to commence arbitration as a basis for its breach of contract counterclaim. *See Estate of Castellone v. JP Morgan Chase Bank, N.A.*, 60 A.D.3d 621, 623 (2d Dep't 2009) ("a Franco who utilizes the tools of litigation, or participates in litigation for an unreasonable period without asserting the right to arbitrate, may lose the right to compel arbitration"); *DeGraziano v. Verizon Communications, Inc.*, 325 F.Supp.2d 238, 244 ("A party may waive its right to arbitration by expressly indicating that it wished to resolve its claims before a court [...] or by impliedly waiving its right to enforce a contractual arbitration clause by engaging in protracted litigation that results in prejudice to the opposing party." [internal citation and quotation marks omitted]).

For all of the foregoing reasons, Due Peci has failed to carry its burden with respect to its breach of contract counterclaim and it is, therefore, dismissed.

***Franco's Breach of Fiduciary Duty Counterclaim***

This Court (Kapnick, J.) has already determined during oral argument held on January 9, 2014, that nothing in the arm's length transaction between the parties gave rise to a fiduciary duty. 1/9/14 Tr., 35:24-26. In any event, Franco's "breach of fiduciary duty" counterclaim, as alleged, is really a breach of contract counterclaim asserted under another name. Accordingly, this counterclaim is dismissed.

***Franco's Tortious Interference with Contractual Relations Counterclaim***

Franco alleges that following its purported termination of the Sales Agreement, Due Peci was contacted by a buyer for an unidentified retailer in New York for whom Due Peci had previously written an order for the purchase of Franco's apparel. Due Peci allegedly informed the buyer that its order was not in Due Peci's system and Due Peci did not know who the buyer should contact to follow up. Franco alleges that the buyer, thinking its order had been cancelled, later tried to reject the shipment and asked Franco for a significant discount on its order. Counterclaims, ¶ 34.

Franco has failed to provide any specific details, such as the identity of the store or its buyer, the value of the order involved, the date of shipment or delivery, or whether Franco did in fact provide for a discount on the order. Neither has Franco provided any documentary or testimonial evidence whatsoever to support this counterclaim. As a result, summary judgment is granted in favor of Due Peci on Franco's counterclaim for tortious interference, and that counterclaim is dismissed.

***Franco's Breach of the Implied Covenant of Good Faith and Fair Dealing Counterclaim***

Franco alleges that Due Peci's refusal to continue performing under the Sales Agreement breached that Sales Agreement's implied covenant of good faith and fair dealing. However, because Due Peci's alleged nonperformance took place after Franco's breach of the Sales Agreement, Due Peci's nonperformance does not constitute a breach of the implied covenant of good faith and fair dealing.

### ***Franco's Counterclaim for Injunctive Relief***

Franco alleges that Due Peci continues to hold itself out to the world as an agent of the Eva Franco brand through its company website. Counterclaims, ¶ 43. However, as of the date of this decision and order, all references to Franco or its brands appear to have been removed from Due Peci's web site.

Franco further alleges that Due Peci has turned away current and potential business for Franco, representing to those potential clients that it does not represent Franco and does not know how to reach Franco. *Id.* at 44. However, once again, Franco has failed to allege any details whatsoever and has not submitted any evidence to support this counterclaim. As such, Franco has failed to meet its burden on this motion for summary judgment and its counterclaim for injunctive relief is dismissed.

In addition, all of Franco's affirmative defenses are dismissed either for the reasons stated hereinabove, or because Franco has not addressed them in its papers or at oral argument, and has provided absolutely no evidence to support them. Accordingly, I do not address that portion of Due Peci's motion seeking to strike Franco's counterclaims for failure to respond to discovery demands.

In accordance with the foregoing, it is

ORDERED that Franco's motion for partial summary judgment is granted in its favor on its breach of contract cause of action on the issue of liability only, and with respect to Due Peci's affirmative defenses and counterclaims, which are dismissed; and it is further

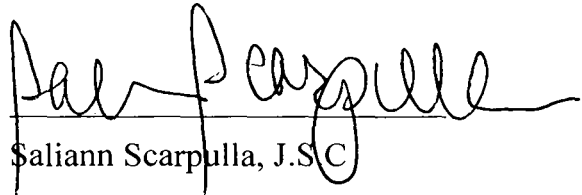
ORDERED that Franco's motion to dismiss and to disqualify Due Peci's counsel is granted with respect to Due Peci's causes of action for accounting and tortious interference in accordance with the decision stated on the record during oral argument held on January 9, 2014, and is otherwise denied; and it is further

ORDERED that the issue of damages only on Due Peci's breach of contract cause of action, and Due Peci's Labor Law and attorneys' fees causes of action are severed and continued; and it is further

ORDERED that counsel for the parties shall appear for a pre-trial conference in IA Part 39, 60 Centre St., Room 208 on January 14, 2014. 2:15 pm

This constitutes the decision and order of this Court

Date: New York, New York  
December 2, 2014

ENTER:  
  
Saliann Scarpulla, J.S.C