

**Rubin v Sabharwal**

2018 NY Slip Op 30293(U)

January 11, 2018

Supreme Court, New York County

Docket Number: 650839/2017

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

SHELLY RUBIN,

Plaintiff,

-against-

NISHA SABHARWAL, MOHIT SABHARWAL,  
VASTRA INC., OM VASTRA LLC, and  
OM VASTRA MIAMI LLC,

Defendants.

Index No.: 650839/2017  
**DECISION/ORDER**  
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants’ motion to dismiss the complaint.

<b>Papers</b>	<b>NYSCEF Documents Numbered</b>
Defendants’ Notice of Motion .....	5-10, 14
Defendants’ Memorandum of Law in Support .....	11
Plaintiff’s Opposition .....	22-28, 31-32
Defendants’ Memorandum of Law in Reply .....	34

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Gerald Lebovits, J.

Plaintiff, Shelley Rubin, is the co-founder and co-chair of a museum specializing in Himalayan and Indian art. She brings this action asserting seven causes of action: (1) fraud in the inducement; (2) fraud and conspiracy to commit fraud; (3) breach of contract; (4) unilateral mistake/recession; (5) unjust enrichment; (6) alter ego; and (7) fraudulent conveyance. These claims arise out of a series of transactions occurring over a five-year period during which Rubin and Nisha Sabharwal conducted approximately eighty transactions and Rubin purchased hundreds of pieces of jewelry amounting to approximately \$18,136,150. Rubin alleges that she was fraudulently induced in these transactions and was the victim of a “long con.” Defendants Nisha Sabharwal, Mohit Sabharwal, Vastra Inc., OM Vastra LLC and OM Vastra Miami LLC move to dismiss the complaint in its entirety under CPLR 3211 (a) (1), (5), (7), (8), and CPLR 3016 (b).

**I. CPLR 3211 (a) (7)**

Defendants’ pre-answer motion to dismiss under CPLR 3211 (a) (7) is granted in part and denied in part, as discussed below.

Under a CPLR 3211 (a) (7) motion, a court determines if the facts alleged by the plaintiff fit within any cognizable legal theory. (*See Nonnon v City of New York*, 9 NY3d 825, 827 [2007].) A court must accept alleged facts as true and construe any inferences in a light most favorable to the plaintiffs. (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *accord Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013] [finding plaintiffs cannot be penalized for failing to provide evidence in a facially sufficient complaint].)

Accordingly, a court may consider affidavits submitted by the plaintiffs to remedy any defects in a complaint. (*Rovello v Orofino Realty Co.*, 50 NY2d 633, 636 [1976] [finding that plaintiff's affidavits do not warrant dismissal unless they conclusively establish that plaintiff has no cause of action]; *accord Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010].)

A. Fraud, Fraud in the Inducement, and Conspiracy to Commit Fraud

Plaintiff does not sufficiently allege a cognizable claim for fraud. The elements of fraud are “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014].) Fraud claims must be pleaded with the heightened specificity required by CPLR 3016 (b). (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008].) This heightened specificity “imposes a more stringent standard of pleading than otherwise applicable.” (*DDJ Mgmt., LLC v Rhone Grp. L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010].) Thus, “conclusory allegations are insufficient” to make out a cause of action for fraud. (*Eurycleia Partners, LP*, 883 NYS2d at 559.) While there is no requirement of unassailable proof at the pleading stage, the complaint must have sufficient detail to inform defendants of the substance of the claim. (*Id.*; *Robinson v Day*, 103 AD3d 584, 587 [1st Dept 2013].) Sufficient detail requires that the facts suffice to permit a “reasonable inference of the alleged misconduct.” (*Id.*)

Although plaintiff need not provide every detail about every alleged fraudulent transaction, plaintiff must allege sufficient details about each transaction. (*Loreley Financing (Jersey) No. 3 Ltd. v Citigroup Global Markets Inc.*, 119 AD3d 136, 140 [1st Dept 2014] [“[T]he complaint describe[d] the alleged fraudulent conduct, as to each transaction.”]; *accord Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577 [1st Dept 2015] [holding dismissal inappropriate because although the complaint lacked details, it sufficiently informed defendant of the five specific fraudulent transactions].)

In her complaint, plaintiff alleges the following: “Nisha made numerous, repeated, material and knowing misrepresentations of fact concerning the merchandise that she sold to Rubin.” (Plaintiff complaint at ¶ 58.) After she bought hundreds of items from defendants, plaintiff had several of the items appraised. Plaintiff provides about ten instances where the appraised value of the items she purchased differs (in some instances substantially) from the original purchase price.

Rubin's complaint does not describe the alleged fraudulent conduct in each alleged fraudulent transaction. Viewing the facts most favorable to the plaintiff, the court cannot reasonably infer there was fraudulent conduct in 80 transactions from a complaint containing conclusory allegations regarding ten transactions. The complaint contains only conclusory allegations relating to approximately ten transactions. And even in the alleged ten transactions, plaintiff does not provide sufficient facts.

In opposition, plaintiff submits a supplementary affidavit in an attempt to cure the defects in her complaint. In assessing a motion to dismiss for failure to state cause of action, the court may freely consider affidavits submitted by plaintiff to remedy any defects in a complaint. (*See Leon*, 84 NY2d at 88.) Affidavits may be considered as supplementary to the complaint to show that a cause of action is valid. (*L. Magarian & Co., Inc. v Timberland Co.*, 245 AD2d 69, 69 [1st Dept 1997].)

Plaintiff's supplementary affidavit does not cure the deficiencies in her complaint. In Rubin's affidavit, she alleges that the "allegations that are attributable to Nisha . . . are false and were known to Nisha to have been false when made." (Rubin aff. at ¶ 4). The affidavit, like the complaint, fails to provide facts relating to the purchase of hundreds of pieces of jewelry. Plaintiff concludes that "all of the allegations [by defendants] are false." In her affidavit, plaintiff mentions approximately twelve invoices that cover a five-year period; plaintiff concludes that she was defrauded. Plaintiff's supplemental affidavit is insufficient: It fails to establish facts which would allow a "reasonable inference" that plaintiff was defrauded in each of these 80 transactions.

Plaintiff does not sufficiently make out a fraud claim. In her complaint and affidavit, plaintiff alleges the defendants' material misrepresentations were that pieces of jewelry were from the "same set" as ones in a magazine, that the jewelry has "significance," that the jewelry came from a "friend or family's" collection, and that the pieces were "museum quality" or "generational." (Plaintiff complaint at ¶¶ 22, 44). Plaintiff's allegations do not satisfy the heightened pleading standard because complaints of a general nature are insufficiently specific to state a claim of fraud and fraudulent inducement. (*Beta Holdings, Inc. v Goldsmith*, 120 AD3d 1022, 1022-1023 [1st Dept 2014].) Although her statements — that the jewelry was represented as "generational" — may be fact-specific, these general statements alleged without referring to when, where, or how defendants made the statements is insufficient to satisfy the heightened pleading requirement. (CPLR 3016 [d]; *Riverbay Corp. v Thyssenkrupp N. Elevator Corp.*, 116 AD3d 487, 488 [1st Dept 2014].)

The complaint fails to plead with the required specificity a cognizable claim for fraud. Considering the complaint and the affidavit together, plaintiff fails to plead facts and specific misrepresentations in each transaction. Thus, the motion to dismiss the fraud claim is granted.

Plaintiff also alleges fraud in the inducement and conspiracy to commit fraud. These causes of action are subject to the same heightened pleading standard as fraud. (*Abrahami v. UPC Const. Co., Inc.*, 176 AD2d 180, 181 [1st Dept 1991].) Thus, the fraud in the inducement and conspiracy to commit fraud claims are dismissed.

### B. Alter Ego

Plaintiff's cause of action for "alter ego" is dismissed for failure to state a cause of action. Plaintiff concedes that there is no separate cause of action for "alter ego"; thus this cause of action is dismissed.

### C. Fraudulent Conveyance

Plaintiff alleges a cause of action for fraudulent conveyance under DCL § 276 which provides, in relevant part that every conveyance "made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent." To adequately plead a claim of fraudulent conveyance, plaintiffs must allege that the conveyance was made without fair consideration and that it will render the conveying party insolvent, or that the property remaining after the conveyance is insufficient to pay conveying party's probable liabilities on existing debts. (*Fromer v Yogel*, 50 F Supp 2d 227 [SD NY 1999] [applying New York state law]; accord *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999].) Plaintiffs fail to plead that the conveyance rendered defendant insolvent. Therefore, the fraudulent conveyance cause of action is dismissed.

### D. Breach of Contract

Plaintiff alleges a cause of action for breach of contract. To set forth a breach of contract claim, plaintiff must allege the existence of a contract, performance by plaintiff, failure to perform by defendant, and damages. (*Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303, 304 [1st Dept 2004].) Plaintiff alleges that each transaction between her and defendant constitutes a separate contract. These contracts are memorialized in invoices and referred to by invoice number. Although plaintiff fails to allege details of each transaction, plaintiff alleges that all these contracts were breached. Plaintiff has sufficiently pleaded a cause of action for breach of contract. Therefore, the motion to dismiss the breach of contract claims is denied.

### E. Rescission

Defendant moves to dismiss plaintiff's cause of action for rescission on the same ground as plaintiff's breach of contract claim. In opposition, plaintiff argues that defendant's moving papers failed to make any substantive arguments regarding the rescission cause of action.

Rescission, however, is an equitable remedy for a breach of contract claim and as such is interrelated to the breach of contract cause of action. In their moving papers, defendants sufficiently assert substantive arguments addressing both the breach of contract and the rescission claim. Defendants' arguments, however, are insufficient to warrant dismissal of the rescission claim at this preliminary phase. Because the motion to dismiss the breach of contract claims is denied, the rescission cause of action is denied as well.

## F. Unjust Enrichment

Plaintiff alleges a cause of action for unjust enrichment. To set forth a cause of action for unjust enrichment, plaintiff must demonstrate an enrichment, that was made at plaintiff's expense, and that good conscience and equity warrant the return of the money. (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 407 [1st Dept 2011].) Defendants do not explain how plaintiff has failed to state a cause of action under 3211 (a) (7). Defendants' only argument is that plaintiff's claim is time-barred, as discussed below.

## II. CPLR 3211 (a) (5)

The court addresses the remaining aspects of defendants' motion, namely, whether plaintiff's breach of contract, rescission and unjust enrichment claims are beyond the statute of limitations period. (CPLR 3211 (a) (5)).

### A. Breach of Contract

Defendant argues that the breach of contract and rescission claims are partially time barred by the statute of limitations. An action for breach of contract involving the sale of goods must be commenced within four years of the date the cause of action accrued. (NY UCC § 2-725.) In opposition, plaintiff argues the breach of contract claim is not time-barred because there has been no testimony regarding when she received the invoices. This is unpersuasive. A cause of action for breach of contract accrues when the breach occurs, not when plaintiff receives a memorialization of the contract. (NY UCC § 2-725 [2].) Therefore, the motion to dismiss the breach of contract claim is granted in part and denied in part. All of plaintiff's claims accruing under a theory of breach of contract from February 16, 2013, onwards survive this motion to dismiss, all claims accruing prior are time barred and dismissed.

### B. Unjust Enrichment

Defendants argue that the unjust enrichment claim is time-barred based on the four-year statute of limitation period. Defendant alleges that when a claim for unjust enrichment is based on the same facts as a breach of contract claim, the same statute of limitations applies to both. Although there is no identified statute of limitations period within which to bring a claim for unjust enrichment, "where unjust enrichment and breach of contract claims are based on the same facts and pled in the alternative, a six-year statute of limitations applies." (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013].) Plaintiff pleads unjust enrichment in the alternative, thus the six-year statute of limitations applies. Therefore, all of plaintiff's claims accruing under a theory of unjust enrichment from February 16, 2011, onwards survive this motion to dismiss. Defendant's motion to dismiss is granted to the extent that plaintiff's causes of action that occur before February 16, 2011, are dismissed.

### C. Rescission

As discussed above, rescission is an equitable remedy for breach of contract and the claims are interrelated. Because the motion to dismiss the breach of contract claim under CPLR

3211 (a) (5) is granted in part and denied in part, the motion to dismiss the rescission claim under CPLR (a) (5) is granted in part and denied in part. All of plaintiff's claims accruing under a theory of rescission from February 16, 2013, onwards survive this motion to dismiss, all claims accruing prior are time barred and dismissed.

### III. CPLR 3211(a) (8)

Defendant argues that the motion to dismiss should be granted for lack of personal jurisdiction over OM Vastra LLC and OM Vastra Miami LLC. Neither OM Vastra LLC nor OM Vastra Miami LLC are parties to the sales contracts at issue. Further, plaintiff makes no argument opposing the dismissal of OM Vastra LLC or OM Vastra Miami LLC. Therefore, the motion to dismiss plaintiff's claims against OM Vastra LLC and OM Vastra Miami LLC for lack of personal jurisdiction is granted.

### IV. CPLR (a) (1)

Defendants argue that the motion to dismiss should be granted because a defense is founded upon documentary evidence. Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].) The documentary evidence must resolve all factual issues and conclusively dispose of plaintiff's claims. (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005].) Defendants' evidence fails to decisively establish a defense and does not conclusively dispose of plaintiff's claims. Thus, the motion to dismiss for a defense is founded upon documentary evidence is denied. Accordingly it is

ORDERED that defendants' motion to dismiss is granted in part and denied in part: plaintiff's causes of action for fraud, fraud in the inducement, fraudulent conveyance, conspiracy to commit fraud, and alter ego are dismissed; the remaining causes of action survive; and it is further

ORDERED that plaintiff serve a copy of this decision and order on defendants and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

ORDERED that defendants have 20 days from service of this decision and order to answer; and it is further

ORDERED that all parties must appear for a preliminary conference in Part 7, at 60 Centre Street, room 345, on March 28, 2018, at 11:00 a.m.

Dated: January 11, 2018



J.S.C.