

**A Base IX Co., LLC v Rainbow Apparel Distrib. Ctr.
Corp.**

2018 NY Slip Op 30641(U)

April 11, 2018

Supreme Court, New York County

Docket Number: 655828/2017

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----x
A BASE IX CO., LLC, and CSCO LLC, d/b/a
CHERRY STIX/EXTRA TOUCH,

Index No. 655828/2017

Plaintiffs,

-against-

RAINBOW APPAREL DISTRIBUTION
CENTER CORP. and THE NEW5-7-9 AND
BEYOND, INC.,

Defendants.

-----x

Hon. David B. Cohen:

Defendants, Rainbow Apparel Distribution Center Corp. (Rainbow) and The New 5-7-9
And Beyond, Inc. (579), move for an order, pursuant to CPLR 3211 (a) (1) and (a) (7),
dismissing the verified complaint as to 579, on the ground that it is not a proper party to this
action, as allegedly demonstrated by the documentary evidence, and, dismissing the verified
complaint's first, second, third, fourth, seventh and/or eighth causes of action as to Rainbow on
the ground that three of the causes of action asserted by plaintiff A Base IX Co., LLC (A Base)
are allegedly identical, as are three of the causes of action asserted by plaintiff CSCO LLC, d/b/a
Cherry Stix/Extra Touch (CSCO), and that the complaint, therefore, fails to state a cause of
action as to Rainbow with respect to the duplicative causes of action.

Plaintiffs A Base and CSCO oppose the motion and cross-move for an order, pursuant to
CPLR 3025, accepting plaintiffs' amended verified complaint as of right, or granting them leave

to serve the amended verified complaint and thereafter accepting it.

The Complaint

Plaintiffs, entities which share a common ownership, manufacture and sell women's clothing. The verified complaint alleges that defendants ordered, received, and failed to pay for, and, in one instance, ordered, and improperly cancelled, and refused to take delivery of, clothing manufactured and sold by plaintiffs. The verified complaint sets forth nine causes of action against both defendants. The first, and second causes of action allege, respectively, on behalf of A Base and CSCO, claims based on defendants' failure to pay for goods sold and delivered "to, or on behalf of Defendants," at an agreed upon and reasonable price. Verified complaint, ¶¶ 2, 11. The third and fourth causes of action each allege, respectively, on behalf of A Base and CSCO, a breach of contract claim, arising out of the sale of the same goods sold and delivered, respectively, under the first and second causes of action, and resulting in the same damages, adding, under each cause of action, that the parties entered into written "agreements," in or about in February 2017, which defendants breached by failing to pay for the goods after acceptance. *Id.*, ¶¶ 16, 18, 22, 24. The fifth and sixth causes of action each assert a claim, respectively, on behalf of A Base and CSCO, for an account stated, as to the aforementioned goods sold and delivered, resulting in the same damages sought, respectively, by A Base and CSCO, under the prior causes of action applicable to each of them, adding that each plaintiff sent defendants invoices for the goods sold and delivered to them, and that defendants received those invoices without objection. The seventh and eighth causes of action each allege, respectively, on behalf of A Base and CSCO, a claim for the sale and delivery of goods "[p]ursuant to CPLR 3016 (f)," as to the same goods sold and delivered, and the same damages sought by, A Base and CSCO,

under the prior causes of action applicable to each of them. Added to the seventh and eighth causes of action are the applicable invoice numbers and dates, the goods' descriptions as all of the items under the seventh cause of action and as to some of the items under the eighth cause of action, the quantities, the unit prices, and the amount due under each invoice.

CSCO asserts, under the ninth cause of action, a claim for anticipatory breach of contract, alleging that the defendants placed orders for specially manufactured goods, pursuant to their specifications, which they agreed to accept and pay for at an agreed upon price. CSCO further alleges that, as per the purchase orders, it manufactured the goods in accordance with the parties' agreement, but that, thereafter, defendants' authorized representative advised that defendants would not accept the goods and that CSCO should not ship them. CSCO, therefore, seeks damages in the amount of the agreed upon price, with interest and counsels' fees. Appended to the verified complaint are exhibits A, B, and C, each of which contains purchase orders, invoices, and/or a few other documents relevant to plaintiffs' claims. Specifically, exhibit A is relevant to A Base's first, third, fifth, and seventh causes of action, exhibit B is relevant to CSCO's second, fourth, sixth, and eighth causes of action, and exhibit C is relevant to CSCO's ninth cause of action.

The Motion and Cross Motion

Defendants move for an order dismissing the complaint as to 579 on the ground that the documentary evidence, namely the purchase orders, invoices, and other documents supporting the verified complaint establish that the only defendant involved in the transactions was Rainbow. Defendants, who apparently assume that the complaint will be dismissed as to 579, also move to dismiss various causes of action only as to Rainbow on the ground that some of

those causes of action allegedly plead identical claims. In particular, Rainbow urges that the first (goods sold and delivered), third (breach of contract), and seventh (sale and delivery of goods, pursuant to CPLR 3016 [f]) causes of action pleaded on A Base's behalf are "identical," as are the second (goods sold and delivered), fourth (breach of contract), and eighth (sale and delivery of goods, pursuant to CPLR 3016 [f]) causes of action pleaded on CSCO's behalf, because, under each of those three causes of action, as to each plaintiff, the same goods are involved and the same damages are sought. Schlacter moving affirmation, ¶¶ 10-12. Thus, Rainbow contends that two unspecified causes of action of each of the three allegedly identical causes of action asserted on behalf of each plaintiff must be dismissed as to Rainbow. *Id.*, ¶¶ 11, 14. No relief is sought by Rainbow in connection with the fifth and sixth (account stated) or ninth (anticipatory breach) causes of action, nor is it asserted that any of the causes of action sought to be dismissed as duplicative are duplicative of the fifth and sixth causes of action.

Plaintiffs dispute Rainbow's contention that the three causes of action, applicable to each of the plaintiffs, are the same, noting that each cause of action has its own elements. In addition, plaintiffs assert that they are entitled to plead in the alternative. Further, plaintiffs ask the court, in the event that it decides, pursuant to CPLR 3211 (a) (1), to convert defendants' application into a summary judgment motion, to grant plaintiffs summary judgment on all causes of action, asserting that the invoices attached to the complaint and defendants non-denials are adequate to entitle plaintiffs to such relief, citing *Cibro v Petroleum Prods. v Onondaga Oil Co.* (144 AD2d 152 [3d Dept 1988]). Plaintiffs also oppose the branch of the motion which seeks to dismiss the complaint as to 579, asserting that within the four corners of the complaint a claim is stated against 579. Plaintiffs further maintain that the lack of documentary evidence is not a reason to

dismiss the complaint as to 579. Nevertheless, plaintiffs' counsel asserts that he has provided, out of an "abundance of caution" (Kornfeld affirmation, ¶ 11), a copy of a form letter agreement (Agreement), addressed to CSCO, which is on letterhead comprising Rainbow's name followed by the words, "and/or" followed by 579's name, with both entities listed as having the same address and telephone and fax numbers. Kornfeld affirmation, exhibit A. Plaintiffs note that the Agreement defines the words "We" and "Us" as Rainbow/ 579/ Marianne¹ and recites that "we enter into" this Agreement with certain considerations in mind.

The Agreement, which was for the period of February 1, 2015 through January 31, 2016, and automatically repeatedly renewed for the following 12 month period, unless terminated by either side, pertains to CSCO's agreement to guarantee to "us" a minimum maintained markup percentage on sales of merchandise on hand at the beginning of the Agreement's term, and sold thereafter. The failure to achieve the minimum maintained markup percentage on sales required CSCO to reimburse "us" the difference of what "we" would have needed to achieve the minimum maintained markup percentage, and such difference was at "our" option to be deducted from open invoices, future purchases, or by direct payment from CSCO. *Id.* The Agreement also recites that if it is renewed, Rainbow will calculate and reconcile the account at an appropriate time decided by Rainbow. In the event that the Agreement is not renewed, the Agreement provides for when Rainbow is to calculate and reconcile accounts for "merchandise sold by Rainbow," depending on when that merchandise is sold. The Agreement does not contain any parallel language about merchandise sold by 579 or Marianne. The Agreement concludes with "Very truly yours," followed by Rainbow "and/or" 579, after which is a blank signature line

¹ Marianne is evidently a related clothing store chain.

where Rainbow and/or 579 was to sign. *Id.* The copy of the Agreement appended to the complaint was executed only by CSCO. The Agreement did permit execution in counterpart, however, and whether either defendant signed the Agreement is not revealed.

Plaintiffs also cross-move for an order “accepting [their] amended complaint as of right” or, if necessary, granting them leave to amend their complaint in the form annexed to their cross-moving papers as exhibit B, and, thereafter accepting it. The amended verified complaint is identical to the original complaint, except that it adds two causes of action, a tenth cause of action on CSCO’s behalf and an eleventh cause of action on A Base’s behalf, each of which alleges that between specified dates, at defendants’ request, the plaintiff in issue shipped merchandise, at an agreed upon and reasonable specified price, to defendants, which received and retained such merchandise without objection. Each such cause of action further alleges that defendants unilaterally, without the consent of the plaintiff in issue, and without proffering any reason “related to the sale of the merchandise,” improperly deducted, or “charg[ed]-back,” part of the total amount due for such merchandise as set forth in the invoices, thereby owing each plaintiff the specified balance. Kornfeld affirmation, exhibit B, ¶¶ 52, 53, 57, 58. The amended verified complaint recites that appended to it, as to each of the new causes of action, is a chart reflecting the relevant invoices and “charge-backs.” *Id.*, ¶¶ 53, 58. However, no such charts are appended to the cross-moving papers, nor were they attached to the e-filed version of the amended verified complaint.

In reply, defendants add a new ground for dismissal of the two breach of contract causes of action set forth in the original complaint, namely, that plaintiffs have failed to identify the contracts which were allegedly breached, and that, therefore, those causes of action are

impermissibly vague. Schlacter affirmation, ¶ 17. As for the branch of the motion which seeks dismissal of the verified complaint as to 579, defendants observe that the very documents upon which the complaint is based are plaintiffs' own invoices (*see* verified complaint, ¶¶ 6, 11, 13, 19, 25, 28, 32, 36, 40), as referenced in the first through the eighth causes of action, and as attached as exhibits A and B to the first and second causes of action, and which indicate that the merchandise was both billed and shipped to Rainbow at its Brooklyn address, and Rainbow's form purchase orders which were appended to plaintiffs' complaint. Each purchase order is headed with Rainbow's name, and recites that the order is to be shipped to "our warehouse," and is to be both billed and shipped to Rainbow at its Brooklyn distribution center address, and which further states that the "Conditions of sale and Routing Guide on www.Rainbowshops.com are incorporated herein by this reference." *See* verified complaint, exhibit C, as referenced in ¶ 45, under the ninth cause of action. In addition, the verified complaint's exhibit A, which relates to the first, third, fifth, and seventh causes of action, also contain Rainbow's purchase orders, with the same Rainbow provisions previously set forth as to those in exhibit C, as well as a bill of lading, which indicates that the goods were to be shipped to Rainbow. Further, both exhibits A and C contain what appears to be preliminary, non-binding potential orders from Rainbow on its preprinted form, each of which recites that it is not a purchase order and that it is subject to confirmation. Defendants note that none of plaintiffs' documents attached as exhibits to their verified complaint is a copy of an invoice billed or sent to 579 or a copy of a purchase order in 579's name.

Furthermore, defendants observe that the Agreement's letterhead simply provides that it relates to Rainbow "and/or" to 579, as does the Agreement's conclusion between "Very truly

yours” and the blank signature line, and does not establish the existence of any agreement with 579. Defendants maintain that the documentary evidence provided by plaintiffs as attachments to their verified complaint fails to set forth any evidence demonstrating a cause of action against 579, thereby warranting the dismissal of the complaint as to it. Thus, defendants assert that the Agreement fails to establish that 579 is a proper party to this action. Defendants then take the position that, because the amended verified complaint “contains the same defect,” plaintiffs’ application to amend their complaint in the form annexed should be denied. Schlachter reply affirmation, ¶¶ 4, 13. In their reply papers, defendants add that, because the verified complaint must be dismissed as to 579, plaintiffs’ cross motion to amend that complaint must be denied, because the amended verified complaint allegedly repleads the same allegations as in the original complaint, except for the addition of the two new causes of action. *Id.*, ¶ 23.

Discussion

Initially, it should be noted that the court is not converting defendants’ motion to one for summary judgment. With respect to the branch of the motion which seeks an order dismissing the verified complaint as to 579 on the basis of documentary evidence, namely the documents appended to the complaint, such a motion may properly be granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *see also Constellation Energy Servs. of N.Y., Inc. v New Water St. Corp.*, 146 AD3d 557, 557 (1st Dept 2017); *North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827 (2d Dept 2013); *Norment v Interfaith Ctr. of N.Y.*, 98 AD3d 955, 955-956 (2d Dept 2012). Documents which are indisputable, unambiguous, and “essentially unassailable” constitute documentary

evidence under CPLR 3211 (a) (1). *Id.* at 955; *see also Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 (2d Dept 2010); *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 (2d Dept 2010). Deposition transcripts, affidavits, and trial testimony are not documentary evidence, but judicial records and instruments which reflect out-of-court transactions, for instance deeds and contracts, are documentary evidence. *Id.* at 83-87; *see also Tsimerman v Janoff*, 40 AD3d 242, 242 (1st Dept 2007).

The documents upon which 579 seeks dismissal of the verified complaint indisputably demonstrate that CSCO and A Base were involved in commercial transactions only with Rainbow, given that they were the documents provided by plaintiffs as exhibits to their verified complaint to substantiate each of their causes of action. These documents, whether they were created by plaintiffs, namely the invoices, or were created by Rainbow, i.e., the purchase orders and the documents preliminary to them, show that the transactions were all between Rainbow and either CSCO or A Base. All goods were shipped and billed to Rainbow, as reflected in the purchase orders and in the invoices, the latter of which identified the “Customer” as Rainbow. The purchase orders provided that the shipped goods were to be delivered to Rainbow at “[its] warehouse,” required plaintiffs to comply with the “Conditions of sale and Routing Guide” at www.Rainbowshops.com. All of the documents attached to plaintiffs’ verified complaint at exhibits A through C, including the bill of lading, indicate that the goods were to be shipped to Rainbow. None of the documents upon which the verified complaint relies mentions 579, or for that matter Marianne, another entity which was part of the Agreement’s “We or Us.” That these three entities used the same form Agreement does not refute that the transactions were only with Rainbow or raise any issue regarding 579’s involvement in any of the transactions, given the lack

of any mention of 579 in the documents attached to the complaint. Plaintiffs, in opposing the motion, have not provided any unambiguous evidence, including, for example, an affidavit from any individual involved in these transactions, demonstrating that he or she was led to believe that any of the transactions involved in the verified complaint were with 579. There is no evidence that either plaintiff ever billed 579 or communicated with a 579 representative in connection with any of the transactions involved in the first through the ninth causes of action. Additionally, plaintiff A Base fails to provide any evidence that 579 signed the Agreement. In view of the foregoing, the branch of the motion which seeks an order dismissing the verified complaint as to 579 is granted, and the nine causes of action set forth in the verified complaint are dismissed as to 579.

Turning to the branch of the motion which seeks an order dismissing various causes of action as to Rainbow on the ground of redundancy, it should initially be noted that CPLR 3016 (f) does not create a cause of action. Rather, it simply affords a plaintiff an optional mode of pleading in actions “involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials,” whereby the plaintiff can “set forth and number in [its] verified complaint the items of [its] claim and the reasonable value or agreed price of each.” CPLR 3016 (f). When a plaintiff complies with this pleading option, the defendant is required, in its verified answer, to specifically set forth, “those items [it] disputes and whether in respect of delivery or performance, reasonable value or agreed price.” *Id.* Irrespective of the nature of the cause of action, if it relates to the sale and delivery of goods, or the performance of labor or services, or the furnishing of materials, the plaintiff has the option of complying with CPLR 3016 (f). *See Summit Sec. Servs., Inc. v Main St. Lofts Yonkers, LLC*, 73 AD3d 906, 906 (2d Dept

2010) (as applied to cause of action for breach of contract to pay for security services provided by plaintiff to defendant); *Duban v Platt*, 23 AD2d 660, 660 (2d Dept 1965), *affd* 17 NY2d 526 (1966) (as applied to causes of action based on quantum meruit and unjust enrichment seeking to recover for the reasonable value of work and legal services provided by plaintiffs to defendants).

If a plaintiff fully complies with CPLR 3016 (f)'s pleading requirements, but the defendant fails to specifically comply with this provision's mandates for answering, and merely offers general denials in its answer, the plaintiff, on a summary judgment motion on such causes of action, may be granted relief, where the defendant fails to otherwise offer proof in opposition. *See Cibro Petroleum Prods. v Onondaga Oil Co.*, 144 AD2d at 152-153; *Adam Lyon Indus. v Pershing Casuals*, 66 AD2d 715, 715-716 (1st Dept 1978); *Duban v Platt*, 23 AD2d at 660. If the plaintiff fails to properly comply with CPLR 3016 (f)'s requirements, the defendant's answer's general denials may be enough to resist summary judgment. *See Summit Sec. Servs., Inc. v Main St. Lofts Yonkers, LLC*, 73 AD3d at 907; *Slavenberg Corp. v Rudes*, 86 AD2d 517, 518 (1st Dept 1982).

Since CPLR 3016 (f) does not create any cause of action, there is redundancy between the first cause of action for A Base's goods sold and delivered and its seventh cause of action for sale and delivery of the same goods pursuant to CPLR 3016 (f), and between the second cause of action for CSCO's goods sold and delivered and its eighth cause of action for sale and delivery of the same goods pursuant to CPLR 3016 (f). Nevertheless there are some allegations set forth in the seventh cause of action that are not set forth in the first cause of action, and there some allegations set forth in the eighth cause of action that are not set forth in the first cause of action. To ensure that plaintiffs have the benefit of all allegations, paragraphs 36, including its schedule

of goods, and 37 of the seventh cause of action are deemed part of the first cause of action, and the balance of the seventh cause is hereby dismissed. Similarly, paragraphs 40, including its schedule of goods, and 41 of the eighth cause of action are deemed part of the second cause of action, and the balance of the eighth cause of action is hereby dismissed.

As for those of the remaining causes of action, which Rainbow seeks to have dismissed on the ground of redundancy, there is clearly none between the first and second causes of action, both sounding in goods sold and delivered, respectively, on behalf of A Base and CSCO, and the breach of contract causes of action, asserted, respectively, under A Base's third cause of action, and CSCO's fourth cause of action, since there is no breach of contract allegations under the first and second causes of action. Therefore, to the extent that Rainbow seeks an order dismissing another of these causes of action alleged against it by each plaintiff, Rainbow's motion is denied. Further, as previously noted, Rainbow does not seek dismissal of the account stated causes of action on the ground that they are duplicative of any other causes of action.

In any event, in an action of this sort, causes of action for goods sold and delivered, breach of contract, and account stated are commonly all alleged in the complaint. *See C. Mahendra (NY), LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 455 (1st Dept 2015); *Triad Intl. Corp. v Cameron Indus., Inc.*, 2013 NY Slip Op 32099 [U] (Sup Ct, NY County 2013), *affd* 122 AD3d 531 (1st Dept 2014); *Hartz Mtn. Corp. v Allou Distribs.*, 173 AD2d 440, 440 (2d Dept 1991); *see also Trans Intl. Corp. v P.T. Imports*, 240 AD2d 398, 399 (2d Dept 1997) (plaintiff entitled to summary judgment on its causes of action for goods sold and delivered, account stated, breach of contract, and breach of guaranty). Also, a plaintiff is entitled to plead in the alternative. *See e.g. Cibro Petroleum Prods. v Onondaga Oil Co.*, 144 AD2d at

152-153 (plaintiff pled in the alternative two causes of action, one grounded in contract and the other alleging an account stated). To the extent that Rainbow urges, for the first time in its reply papers, that the breach of contract causes of action should be dismissed because they do not set forth more information about the agreements that it allegedly breached, dismissal on such ground is denied, because, as a general matter, reply papers are not the appropriate means of raising new arguments, grounds, or evidence in support of the motion. *USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704, 706 (2d Dept 2016); *Dannasch v Bifulco*, 184 AD2d 415, 416-417 (1st Dept 1992). Rainbow is always free, if it is so advised, to serve a demand for a verified bill of particulars regarding these alleged agreements. *See* CPLR 3041; CPLR 3044.

With respect to the branch of plaintiffs' cross motion, which seeks an order, pursuant to CPLR 3025, accepting their amended verified complaint as of right or granting them leave to amend their verified complaint, and, thereafter, accepting their amended verified complaint, as is relevant, a party may amend its pleading without leave of court, "at any time before the period for responding to it expires." CPLR 3025 (a). CPLR 3211 (f) provides, in relevant part, that service of a motion to dismiss under CPLR 3211 (a) before service of a "pleading responsive to the cause of action . . . sought to be dismissed extends the time to serve the pleading until ten days after service of entry of the order." Because defendants have made the instant motion to dismiss, that 10-day period in which to serve an answer has not yet begun to run. Therefore, plaintiffs were free to serve an amended verified complaint on the defendants as of right, adding their tenth and eleventh causes of action. The amended complaint purports to assert two "cause[s] of action," respectively, on behalf of CSCO and A Base, against Rainbow and 579, alleging "improper charge-backs." Because plaintiffs are entitled to serve an amended complaint

as of right, this court does not comment on the adequacy of the two new purported causes of action, each of which seems to be an amalgam of allegations similar to those alleged under the goods sold and delivered and the account stated causes of action, albeit in connection with seemingly different goods than those set forth in the original. It is unclear from the amended verified complaint's allegations whether the defendants allegedly simply failed to fully pay those bills or whether defendants have withheld full payment for a reason unrelated to the sale of the merchandise, for example with respect to CSCO, pursuant to the aforementioned Agreement provision which permits deductions on future orders.

Because exhibits D and E, respectively, to the tenth and eleventh causes of action, each allegedly a chart reflecting the new cause of action's invoices and allegedly improper charge-backs, have not been appended as asserted in the amended verified complaint, it is not apparent whether the invoices relating to the new causes of action pertain to Rainbow and/or to 579.

Because 579's application to dismiss based on the documentary evidence, relied on the original complaint's exhibits A through C, that documentary evidence has no bearing on whether 579 is a proper defendant in connection with the two new causes of action. Thus, 579 is still, at this point in the litigation, a defendant with respect to the tenth and eleventh causes of action.

Nevertheless, in light of the resolution of this court's determination of the instant motion, the amended verified complaint's first through ninth causes of action are dismissed as to 579, and its seventh and eighth causes of action are dismissed, except for the allegations of paragraphs 36 and 37 of the amended verified complaint's seventh cause of action, which are hereby deemed part of the first cause of action, and paragraphs 40 and 41 of the amended verified complaint's eighth cause of action, which are hereby deemed part of the second causes of action. Within 20

days of service of a copy of this order with notice of entry, Rainbow and 579 are directed to serve plaintiffs with their verified answer(s)² to the amended verified complaint.

Accordingly, it is

ORDERED that the branch of plaintiffs' cross motion, which seeks an order accepting their amended verified complaint, which seeks to assert two new causes of action against defendants, is granted, and the amended verified complaint is accepted, and defendants are directed to serve their verified answer(s) to the amended verified complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the motion which seeks an order dismissing the first through the ninth causes of action as to defendant The New 5-7-9 And Beyond, Inc. from the verified complaint, is granted, and those causes of action are dismissed as to defendant The New 5-7-9 And Beyond, Inc. in both the verified complaint and the amended verified complaint, and it is further

ORDERED that the branch of the motion which seeks an order dismissing, as to Rainbow Apparel Distribution Center Corp., two of the first, third, and seventh causes of action as redundant, is granted only to the extent that, with respect to both the verified complaint and the amended verified complaint, the allegations of paragraphs 36, including the schedule of goods sold, and 37 of the seventh cause of action are deemed part of the first cause of action, and the balance of the seventh cause of action is dismissed as to Rainbow Apparel Distribution Center Corp.; and it is further

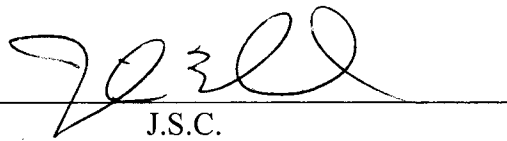
² It is unclear whether defendants will serve a joint answer to the amended verified answer, as they did in response to the verified complaint, or serve separate answers, now that 579 is only involved in the two new causes of action.

ORDERED that the branch of the motion which seeks an order dismissing, as to Rainbow Apparel Distribution Center Corp., two of the second, fourth, and eighth causes of action as redundant, is granted only to the extent that, with respect to both the verified complaint and the amended verified complaint, the allegations of paragraphs 40, including the schedule of goods sold, and 41 of the eighth cause of action are deemed part of the second cause of action, and the balance of the eighth cause of action is dismissed as to Rainbow Apparel Distribution Center Corp.; and it is further

ORDERED that counsel shall appear for a preliminary conference in Part 58, Room 574, 111 Centre Street, on June 13, 2018 , at 9:30 AM.

Dated: April 11, 2018

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.