

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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ARTHUR EDELSON,

Index No.: 22981/07

Plaintiff,

-against-

HOME DEPOT U.S.A., INC.,

Defendant,

-----X

**HOME DEPOT'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Home Depot, by its attorneys Simmons, Jannace & Stagg L.L.P., respectfully submits this Memorandum of Law in support of its motion for an order pursuant to CPLR 3212: (1) awarding Home Depot summary judgment and dismissing plaintiff's complaint; and (2) granting Home Depot such other and further relief as this Court deems proper.

PRELIMINARY AND FACTUAL STATEMENT

Plaintiff purchased a kitchen from Home Depot in September 2005 pursuant to a written agreement (the "Kitchen Agreement"). (Anthony Venezia Affidavit in Support ("Venezia Aff") at ¶ 5) Plaintiff admits Home Depot provided and installed all materials in accordance with the Kitchen Agreement.¹ (Levy Affirmation in Support ("Levy Aff."), Exhibit "9", p. 135, ll. 19 - p. 136, ll. 2)

¹ Plaintiff's only dissatisfaction with the new kitchen concerns Home Depot's mending of small, cosmetic imperfections on the inside of a cabinet underneath the kitchen sink.

Plaintiff sued merely because the kitchen was not completed as quickly as plaintiff desired. For plaintiff, a "one month interval is not a big deal," so he was not "dicking around with one month." (Id., p. 88, ll. 14-18) But, in his mind, a four month inconvenience warrants \$25,000 in payback from Home Depot.

Plaintiff was unwilling to eat "take out from a Chinese food place" during the renovation, stating, "I don't have to change my lifestyle because there is a kitchen being put in." (Id., p. 95, ll. 4-8) Armed with this attitude, plaintiff promptly sued Home Depot for \$25,000 simply because he could not cook or use portions of his home for four months longer than he anticipated. He wants Home Depot to foot the bill to the tune of \$12,300 for his restaurant expenses and seeks an additional \$12,700 for the alleged loss use of areas in his house. (Levy Aff., Exhibit "4", pp. 4-5) Plaintiff's discontent, however, is not a basis for a cause of action.

Indeed, plaintiff's Complaint should be dismissed because plaintiff fails to provide any evidence whatsoever of his alleged "damages". Despite purportedly spending approximately \$100 per day in restaurants, plaintiff could not recall the cost of a single meal. He could not even recall where he and his wife dined on Valentine's Day. He testified:

- Q: On February 13th, where did you eat?
A: *The name of the restaurant?*

Q: Yes.
A: You would have to show me a calendar. I don't know what day February 13th was.

Q: So you don't recall?
A: I can't say exactly, no.

Q: Can you recall how much you spent?
A: On February 13, no.

Q: February 14th was Valentine's Day. Do you normally eat out on Valentine's Day?
A: Normally, not necessarily. Possibly.

Q: You have in the past though?
A: Yeah.

Q: Did you eat out on Valentine's Day in 2006?
A: I don't know.

Q: Do you recall what you spent on February 14, 2006?
A: February 14, no.

(Levy Aff, Exhibit "9", p. 109, ll. 13 - 25)

He could not remember information for any other date either. He testified:

Q: Which days do you remember?
A: Oh, I can't give you the date. I have no idea about the date.

(Id., p. 110, ll. 7 - 9)

Q: So ...between February 13 and 123 days thereafter, you cannot recall where you ate on any given day nor what you spent on any of the meals within that time?
A: On a specific date, no. Not on a specific date.

Q: What do you remember?

A: *I spent on dinners, I spent on lunches, I spent on breakfasts. The sum of money is an average.*

(Id., p. 110, l. 24 - p. 111, l. 16)

Moreover, plaintiff lacks any evidence that would enable the court to deduct from his alleged restaurant expenses: (1) the daily cost for groceries plaintiff would have incurred if the delay had not occurred; and (2) the restaurant expenses plaintiff would have incurred had the delay not occurred. When asked to produce evidence, plaintiff testified:

Q. Does that mean you don't have any receipts with you reflecting your purchase of food from the period December 2005 through June of 2006?

A. *No, I have no receipts.*

Q. Do you have any credit card statements that would reflect the purchases?

A. *No.*

Q. Do you have any documents that would support your claim that you were forced to eat outside of your house between December 2005 and June of 2006?

A. *The fact that I had no kitchen ...*

Q. Do you have any documents to support that? That is my question.

A. *I am alive today, so I ate. That's my proof.*

(Id., p. 33, l. 23 to p. 34, l. 22)

Q. Do you have documents to support the claims?

A. *What claims?*

Q. That you ate out every meal between December of [2005] when they started

the kitchen renovation and June of 2006?

A. *I have no cash receipts, no.*

Q. Do you have any other documents.

A. *No.*

(Id., p. 35, ll. 8-20)

Plaintiff's remaining claim for \$12,700 in "general damages for delay and breach" is similarly deficient. (Levy Aff, Exhibit "4", p. 5) Plaintiff bases these damages on his inability to use certain rooms in his home during the delay. (Levy Aff., Exhibit "9", p. 132, l. 3 - 133 l. 7) Once again, plaintiff proffers no evidence to support this claim.

In short, a plaintiff alleging breach of contract must prove he suffered measurable damages from the breach. Plaintiff's calculation of damages, however, springs solely from his own mind. He offers no supporting evidence. His calculation is mere conjecture and guess work. Because there is no evidence of measurable damages, plaintiff's complaint should be dismissed.

ARGUMENT

Plaintiff Lacks Any Evidence of Measurable Damages

To maintain a breach of contract claim, plaintiff must provide evidence of calculable damages. See Alpha Auto Brokers, Ltd. v. Continental Ins. Co, 286 A.D.2d 309, 310, 728 N.Y.S.2d 769, 770 (2d Dep't 2001) (failure to prove damages resulting

from breach of contract is "fatal"); Mohawk Nat'l Bank of Schenectady, NY v. Citizens Trust Co., 38 Misc.2d 222, 225, 237 N.Y.S.2d 956, 959 (Schenectady County Ct. 1963) ("It is fundamental in the law of damages that damages must be proved, and will not be presumed, even though a wrong, such as a breach of contract, is shown.").

Where, as here, a plaintiff is unable to provide evidence of damages due to an alleged delay, the action should be dismissed. See Diversified Fuel Carriers Corp. v. Coastal Oil NY, Inc., 280 A.D.2d 448, 449, 720 N.Y.S.2d 169, 170 (2d Dep't 2001) (affirming order dismissing complaint where plaintiff failed to provide evidence that breach resulted in damages); Lexington 360 Assocs. V. First Union Nat'l Bank of Carolina, 234 A.D.2d 187, 189, 651 N.Y.S.2d 490, 492 (1st Dep't 1996) (reversing trial court's denial of summary judgment where plaintiff failed to prove calculable damages as a result of defendant's breach).

Moreover, damages must be "reasonably certain" and cannot be awarded "...on the basis of conjecture or guess work." Schneider v. State, 38 A.D.2d 628, 628, 327 N.Y.S.2d 60, 61 (1st Dep't 1971). They may not be speculative, possible or imaginary. See Wai Ming Ng v. Tow, 260 A.D.2d 574, 575, 688 N.Y.S.2d 647, 649 (2d Dep't 1999).

Damages which are uncertain, speculative or not reasonably capable of computation are insufficient. See Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986). See also Peak v. Northway Travel Trailers, Inc., 27 A.D.3d 927, 927-929, 811 N.Y.S.2d 798, 799-801 (3d Dep't 2006) (affirming dismissal of action where plaintiff's estimation of damages was uncertain and speculative).

A. Plaintiff Fails to Provide any Evidence to Calculate His Alleged Restaurant Damages

To recover for restaurant expenses, plaintiff must prove, through admissible evidence, that he spent \$12,300 more than he would have spent but for the delay. See Berley Indus., Inc. v. City of New York, 45 N.Y.2d 683, 687, 412 N.Y.S.2d 589, 591 (1978) (recovery will be limited to damages actually sustained).

Here, plaintiff fails to provide any proof that he spent \$12,300, or any other amount, on restaurants. He lacks any receipts, credit card statements, checks, or other documents reflecting his alleged expenses. Plaintiff's claim that he spent \$100 per day on meals during the delay is therefore an "unreliable approximation" and insufficient to prove damages. See Northway Travel Trailers, 27 A.D.3d at 928-929, 811 N.Y.S.2d at 800 (plaintiff's estimation of damages is inadequate basis for computing damages); Volkmar v. Third Ave. R. Co., 28 Misc. 141, 142, 58 N.Y.S. 1021, 1021-1022 (Appellate Term 1899)

(evidence consisting solely of plaintiff's own testimony of uncertain data is insufficient to sustain burden); Wolff & Munier, Inc. v. Whiting-Turner Contract, Co., 946 F.2d 1003, 1010 (2d Cir. 1991) (damages claim was an "unreliable approximation" where not substantiated by competent proof).

Nor does plaintiff have any evidence that would enable the court to deduct from plaintiff's alleged damages: (1) the amount plaintiff would have spent on groceries had the delay not occurred; and (2) the amount plaintiff would have spent on restaurant expenses even if the delay did not occur.

Millwork v. Swenson, 2003 WL 22080511 (Conn. Super. Aug. 25, 2007) is on point. In Millwork, a consumer claimed he and his family were forced to eat out and order takeout food as a result of a contractor's delay in renovating their kitchen. Id. at * 1. The court dismissed the complaint because the consumer "failed to offer any proof as to the damages they are seeking, namely the cost of feeding a family of three [during the delay] with take out food or restaurant food." Id. at * 2. The court cited the consumer's failure to indicate "... whether that figure takes into account the deduction for the cost of groceries ... during that same period" Id.

Here, plaintiff does not allege he spent \$12,300 more than what he would have spent but for the delay. Instead, plaintiff merely alleges he spent "approximately" \$100 per day on meals

for himself and his wife. (Levy Aff, Exhibit "4", p. 5) Since plaintiff fails to allege, let alone proffer any evidence, of the amount he spends on groceries when his kitchen was fully functional, the court cannot calculate plaintiff's alleged damages. See Kessel v. The Long Island Railroad Co., 107 Misc.2d 1067, 1076, 436 N.Y.S.2d 684, 690 (Dist. Ct. Nassau Co. 1981) (plaintiff must supply some evidentiary basis of computation for determining the amount of the damages).

Moreover, plaintiff was given several opportunities, and was ordered by this court, to proffer additional evidence of his damages. (Levy Aff., Exhibit "5", ¶ 1; Exhibit "6" ¶ 1; Exhibit "7", ¶ 1; Exhibit "8") Plaintiff failed to do so. Indeed, he failed to provide a single receipt, credit card bill or any other document reflecting any of his alleged expenses.

As such, his damages claim for restaurant expenses is unsubstantiated and immeasurable and his complaint should be dismissed.

**B. Plaintiff Lacks To Any
Evidence Supporting His
\$12,700 Claims For Lost Room Use**

Plaintiff also seeks to recover \$12,700 for his alleged loss of use of certain rooms in his home during the construction. He calls these "damages" "general damages for delay and breach" (Levy Aff, Exhibit "4", p. 5) Once again, plaintiff fails to provide any evidence supporting this claim.

For instance, he fails to provide a single document or other evidence demonstrating the value of the rooms he allegedly could not use. (Levy Aff., Exhibit "5", ¶ 1; Exhibit "6" ¶ 1)

Accordingly, plaintiff's claim for these damages should be dismissed. See Jenkins v. Etlinger, 55 N.Y.2d 35, 40, 447 N.Y.S.2d 696, 698 (1982) (reversing award of damages for loss of use of pond during summer months because claimant failed to establish the pecuniary value of such loss); Volkmar, 28 Misc. at 142, 58 N.Y.S. 1021-1022 (plaintiff must proffer proof of loss of usable value of property so that fact finder will not be required to guess or speculate); Wamsley v. Allas S.S. Co., 50 A.D. 199, 63 N.Y.S.761, rev'd on other grounds, 168 N.Y. 533 (1901) (plaintiff cannot recover for loss of use unless he can prove its reasonable worth with fair certainty).

Therefore, plaintiff's \$12,700 claims for "general damages for delay and breach" must be dismissed.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court issue an order: (1) awarding Home Depot summary judgment and dismissing plaintiff's complaint; and (2) granting Home Depot such other and further relief as this Court deems proper.

Dated: Syosset, New York
November 5, 2008

Respectfully submitted,

SIMMONS, JANNACE & STAGG, L.L.P.

By: _____

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**AFFIDAVIT OF SERVICE
VIA U.S. MAIL**

RE: ARTHUR EDELSON v. HOME DEPOT U.S.A., INC.
Civil Court of the City of New York
County of New York
Index No.: 22981/07

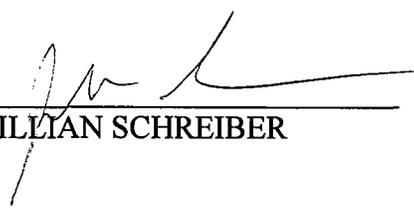
STATE OF NEW YORK)
 : ss.:
COUNTY OF NASSAU)

JILLIAN SCHREIBER, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, and reside at East Rockaway, New York.

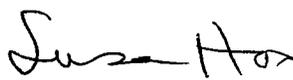
On November 5, 2008, I served the within **HOME DEPOT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION OF SUMMARY JUDGMENT** by depositing a true copy thereof, enclosed in a post-paid wrapper, into the exclusive care and custody of the U.S. Postal Service within New York State, addressed as shown below:

To: SPECTOR & FELDMAN LLP
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JILLIAN SCHREIBER

Sworn to before me on this
5th day of November, 2008.



NOTARY PUBLIC

SUSAN HONS
Notary Public, State Of New York
No. 30-4772896
Qualified In Nassau County
Commission Expires August 31, 20