

59 A.D.3d 582  
Supreme Court, Appellate Division, Second  
Department, New York.

WARREN S. DANK etc., respondent,  
v.  
SEARS HOLDING MANAGEMENT  
CORPORATION, et al., appellants.

Feb. 17, 2009.

prices to match, and that plaintiff purchased television at third location at price offered by another retailer located 12 miles from location, but was denied \$400 lower price offered by another retailer located 8 miles from location. McKinney's General Business Law §§ 349, 350.

1 Cases that cite this headnote

### Synopsis

**Background:** Plaintiff brought purported class action against retailer, alleging fraud and violations of consumer protection laws. The Supreme Court, Nassau County, Bucaria, J., denied retailer's motion to dismiss. Retailer appealed.

**Holding:** The Supreme Court, Appellate Division, held that plaintiff sufficiently pled cause of action for fraud and violations of consumer protection laws.

Affirmed.

West Headnotes (1)

#### [1] Antitrust and Trade Regulation

⊖ Representations about prices; advertising and labeling

#### Fraud

⊖ Fraudulent representations or concealment as to particular facts

Plaintiff's allegations regarding retailer's published policy promising to match another local retailer's price on identical items were sufficient to state cause of action for common-law fraud and violations of consumer protection laws; complaint alleged that plaintiff requested at three different locations that retailer sell him a flat-screen television at the same price at which it was being offered by another retailer, that his request was denied at first two locations on basis that each store manager had discretion to decide what retailers were considered local and what

### Attorneys and Law Firms

\*\*188 Greenberg Traurig, LLP, New York, N.Y. (Loring I. Fenton of counsel), for appellants.

Warren S. Dank, Esq., for respondent.

ROBERT A. SPOLZINO, J.P., JOSEPH COVELLO, RUTH C. BALKIN, and ARIEL E. BELEN, JJ.

### Opinion

\*583 In a proposed class action to recover damages for violation of General Business Law §§ 349 and 350 and common-law fraud, the defendants appeal from an order of the Supreme Court, Nassau County (Bucaria, J.), entered August 28, 2007, which denied their motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

ORDERED that the order is affirmed, with costs.

The defendants, Sears Holding Management Corporation and Sears, Roebuck and Co. (hereinafter together Sears), are national retailers of consumer goods. The complaint alleges that Sears published a policy promising, in pertinent part, to match the "price on an identical branded item with the same features currently available for sale at another local retail store." The complaint further alleges that the plaintiff requested at three different locations that Sears sell him a flat-screen television at the same price at which it was being offered by another retailer. His request was denied at the first two Sears locations on the basis that each store manager had the discretion to decide what retailers are considered local and what prices to match. Eventually, he purchased the television at the third Sears at the price offered by a retailer located 12 miles from the store, but was denied the \$400 lower price offered by a retailer located 8 miles from the store.

\*\*189 “Affording the complaint a liberal construction, accepting as true all facts alleged therein, and according the plaintiff the benefit of every possible inference” (*Love v. Rebecca Dev., Inc.*, 56 A.D.3d 733, 733, 868 N.Y.S.2d 125; see *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 864 N.Y.S.2d 70; *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 795 N.Y.S.2d 68), the complaint states a cause of action under General Business Law §§ 349 and 350 (see *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608; *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741; *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 183–184, 726 N.Y.S.2d 60; *McGill v. General Motors Corp.*, 231 A.D.2d 449, 647 N.Y.S.2d 209;

*McDonald v. North Shore Yacht Sales*, 134 Misc.2d 910, 513 N.Y.S.2d 590) and for common-law fraud (see *Clearview \*584 Concrete Prods. Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461, 467, 453 N.Y.S.2d 750). Therefore, the Supreme Court properly denied the defendants’ motion to dismiss the complaint pursuant to CPLR 3211 (a)(7).

**Parallel Citations**

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