

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
**HON. BERNARD J. FRIED** Justice

**E-FILE** PART 60

GERBER FINANCE, INC.,

Plaintiff,

- v -

OVED DIAMOND COMPANY, LTD., ET.AL.,

Defendant.

INDEX NO. #600304/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

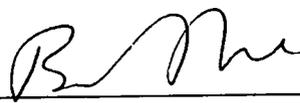
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with  
the accompanying memorandum decision.

SO ORDERED

Dated: 3/22/2011

  
\_\_\_\_\_  
J.S.C.

**HON. BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

----- X  
GERBER FINANCE, INC.,

Plaintiff,

- against -

Index No. 600304/2010

OVED DIAMOND COMPANY, LTD., AMERICAN  
DIAMOND JEWELRY, INC., AND YHONATHON  
OVED, a/k/a JONATHON OVED, a/k/a YONI  
OVED,

Defendants.  
----- X

**APPEARANCES:**

For Plaintiff:

Loeb & Loeb, LLP  
345 Park Avenue  
New York, New York 10154  
(William M. Hawkins, and  
Jon Hollis)

For Defendants:

Zimmet, Bieber, LLP  
437 Madison Avenue  
40<sup>th</sup> Floor  
New York, New York 10022  
(Bruce W. Bieber)

**FRIED, J.:**

In this action seeking damages and recovery of pledged collateral, plaintiff Gerber Finance, Inc. (Gerber) moves for partial summary judgment (CPLR 3212) on its first through fourth causes of action, seeking damages of \$3,833,067.21 against defendant, Oved Diamond Company, Ltd. (Oved Diamond), pursuant to a loan and security agreement dated March 9, 2007 (the loan agreement), as amended, between Gerber and Oved Diamond. The loan agreement established a revolving credit facility to finance Oved Diamond's operations as a diamond merchant. Yhonathon Oved (Oved), its president, personally guaranteed the loan

agreement, which terminated by its terms on January 2, 2010. The principal balance outstanding then became due. Defendant American Diamond Jewelry, Inc. (American) also pledged its collateral as security for the loan agreement. Gerber seeks a money judgment against Oved Diamond and American, but not against Oved personally.

Pursuant to a December 14, 2007 letter agreement, Oved Diamond agreed to have all receivables related to inventory sales paid either into a collateral account, under Gerber's control, or delivered to Oved Diamond at Gerber's office address.

By letter dated January 26, 2010, Gerber declared an event of default under the loan agreement.

By invoice dated January 28, 2010, Oved Diamond shipped a quantity of diamonds, that were subject to Gerber's security interest (the transferred collateral), to O.D.C. Diamonds, Ltd. (ODC), an alleged affiliate of Ovid Diamond, in Israel. The invoice lists a nominal total value of \$890,071 (ex. 14 to mov. aff.). On January 29, 2010, Ovid Diamond made two similar shipments with a nominal value of \$2,313,469 (ex. 16 to mov. aff.), and \$37,340 (ex. 18 to mov. aff.).

On February 4, 2010, I granted Gerber's application for an order of seizure and temporary restraining order,, directing defendants to turn over all collateral in their possession, and directing the Sheriff of New York County to seize all collateral.

Pursuant to that order, Gerber recovered possession of some collateral, specifically a quantity of diamonds and office equipment. The parties dispute the value of the collateral recovered. Defendants contend that the value of the seized collateral is sufficient to satisfy the outstanding balance on the revolving credit facility. Gerber argues that it is not. An

inquest will be necessary to determine the value of the seized collateral.

Ovid states that he advised Gerber on February 23, 2010, that Gerber's UCC-1 filing statements were defective because they are filed in the name of Gerber Trade finance, Inc., instead of Gerber Finance. Gerber filed amended and replacement UCC-1 filing statements on February 25, 2010. Gerber represents that Gerber Trade Finance is its former name.

In addition to money damages under the loan agreement, Gerber seeks possession of the remaining pledged collateral, including diamonds that were shipped to ODC in Israel. Those diamonds are now allegedly subject to a security interest in favor of Israel Discount Bank, Ltd., which is allegedly a secured creditor of ODC.

Gerber filed a series of UUC-1 forms on Ovid Diamond's collateral, starting in 2003, in the name of "Gerber Trade Finance, Inc.," as creditor, instead of Gerber Finance, Inc. Defendants argue that Gerber's UCC-1 filings are defective, and that UCC-1 filings by other creditors of Oved Diamond, including US Bancorp, Direct Capital Corp., and Lazard Kaplan International, Inc., have priority. None of these other allegedly secured creditors has appeared in this action.

Because "[t]he purpose of a UCC-1 filing is to alert a potential creditor to the possibility of a pre-existing security interest" (*In re Atlas Technologies, Inc.*, 78 BR 394, 399 [Bankruptcy Ct, EDNY [1987]]), it is immaterial as to Gerber's rights under the loan agreement against the defendants in this action whether or not its UCC-1 filings are valid.

The amended verified complaint contains five causes of action. The first cause of action, which is stated against all defendants, is characterized as sounding in replevin, and seeks seizure of the diamonds that comprise the collateral, pursuant to CPLR Article 71, and

UCC 9-609.

The second cause of action, which is stated only against Oved Diamond and American Diamond, seeks a money judgment, both based on the failure to pay the balance due on the loan agreement, and the failure by Oved Diamond to direct payments from third-parties to purchase diamonds either to the collateral account or directly to Gerber, as required by an amendment to the loan agreement. The second cause of action also seeks attorney's fees pursuant to the loan agreement.

The third and fourth causes of action, pleaded respectively against Oved Diamond and American Diamond, seek damages for breach of the loan agreement for failure to pay the amounts due upon expiration of the loan facility, and for failing to direct payments to Gerber. These two causes of action, other than naming each defendant separately, are duplicative of the second cause of action.

Gerber has demonstrated its entitlement to judgment as a matter of law on the first cause of action pursuant to UCC 9-609, based on the Rule 19-a statement, Oved's admissions in his affidavit, and by submitting the UCC-1 filing statements filed by Gerber. The burden thus shifts to defendants to present evidence in admissible form demonstrating the existence of a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Gerber has not demonstrated its entitlement to judgment as a matter of law on its application for an order of seizure pursuant to CPLR Article 71, because Gerber has not submitted an affidavit in support of its application for an order of seizure that contains the factual allegations required by CPLR 7102 (c).

Ovid is personally liable on the first cause of action, the only one stated against him, because, as a corporate officer, he admittedly participated in the tortious conversion of Ovid Diamond's inventory by transferring it to ODC in violation of the terms of the loan agreement. "[A] corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit" (*Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 211 [1<sup>st</sup> Dept 2005]).

In opposition to Gerber's prima facie showing on the first cause of action, defendants have failed to demonstrate the existence of a triable issue of fact. Defendants have not demonstrated that the actions pending in Israel present a likelihood of inconsistent results. Also, there is no merit to defendants' contention that Gerber's UCC-1 filings are ineffective because the name listed is "Gerber Trade Finance, Inc." which was Gerber Finance's former name, instead of Gerber Finance, Inc. In order for an error in a filing statement to render the statement ineffective, the errors or omissions make the financing statement "seriously misleading" (*see* UCC 9-506 [a]) from the standpoint of the hypothetical creditor (*see* UCC § 9-506 [b]; *In re Copper King Inn, Inc.*, 918 F2d 1404, 1408 [9<sup>th</sup> Cir 1990]).

As the Official Comment to UCC 9-506 states: "[i]nasmuch as searches are not conducted under the secured party's name ... an error in the name of the secured party ... will not be seriously misleading." Any potential creditor reviewing the UCC filings relating to Oved, would see the filling in the name of Gerber Trade Finance Corp., and be put on notice to make further inquiry whether Oved's assets are encumbered (*see In re Excel Stores, Inc.* 341 F2d 961, 963 [2d Cir 1965]). Gerber's UCC-1 filings are valid as of the date first filed, in light of the continuation statements duly filed, because, as a matter of law, no potential

creditor could have been seriously misled by the error in the name. Therefore, there is no merit to defendants' argument that the UCC-1 filings that were filed after Gerber's UCC-1 statements have priority, inasmuch as Gerber's UCC-1 filings predated the perfection of the claimed liens by Oved Diamonds other creditors (*see Resner v Greeley*, 212 AD2d 619 [2d Dept 1995]).

Gerber is entitled to demand return of the collateral not only from defendants, but also from whatever entity is in possession of the transferred collateral. This court currently has no personal jurisdiction over Israel Discount Bank, Ltd., or any other entity allegedly in possession of the transferred collateral. Nonetheless, Gerber, as the secured party is entitled to delivery of the transferred collateral because "[t]he secured party's right to possession of the collateral upon default may be asserted against a third party in possession, which may not properly refuse upon the secured party's request for delivery" (*Bank of India v Weg and Myers, P.C.*, 257 AD2d 183, 191 [1<sup>st</sup> Dept 1999]).

On the second through fourth causes of action seeking damages, an inquest is necessary to determine the value of the collateral recovered by Gerber, in order to assess the net amount of Gerber's damages, if any. Any discovery needed can be handled in connection with that inquest.

Accordingly, it is

ORDERED that the motion for partial summary judgment of plaintiff Gerber Finance, Inc. is granted, awarding it on the first cause of action, an order of replevin pursuant to UCC-9-609, directing defendants to deliver the collateral shipped to ODC Diamond in Israel to Gerber; and on the second, third and fourth causes of action, as to liability only,

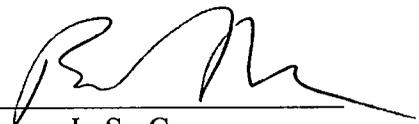
including an award of attorney's fees; and it is further

ORDERED that the issue of the amount of damages and plaintiff's reasonable attorney's fees is severed, and is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion for attorney's fees is held in abeyance, along with the claim for damages, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

DATED: 3/22/2011

E N T E R:



J. S. C.

**HON. BERNARD J. FRIED**