

**Anaka Design, Ltd. v Birnbaum**

2007 NY Slip Op 30614(U)

January 26, 2007

Supreme Court, New York County

Docket Number: 0101333/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ANAKA DESIGN, LTD., ARON KNOBLOCH, INC.,  
DIATRACO CORP., KWIAT, INC., HOROWITZ  
TRADING, RAMA MANUFACTURING CO., ALONI  
DIAMONDS LTD., ANDIAMOND, ANTWERP DIAMOND  
DISTRB., INC., CLEAR LIGHT INC., E.  
DIAMONDS, INC. (ECKNAM), ESSKAY GEM, INC.,  
IDEAL BRILLIANT CO., INC., INDENBAUM & CO.,  
LLC, PACIFIC M. INT. CORP. SHENOA CO.,  
INC., WALDMAN DIAMONDS COMPLETE, LLC., SUN  
DIAMOND, INC.,

Index No.: 101333/2006

Motion Date: 09/19/06

Motion Seq. No.: 06

Motion Cal. No.: \_\_\_\_\_

Plaintiffs,

- v -

IRVING BIRNBAUM aka IRWIN BIRNBAUM, RICHARD  
KEATS, MAURICE RICO, WOLF DREW, TOVIA DREW,  
RAICHMINOV DIAMOND INTERNATIONAL CORP.,  
GIORA RACHMINOV, PHILLIPE DIAMONDS CORP.,  
NATHAN A. LITKOWSKI aka LITKOWSKY aka  
NATHAN or NAHUM FISCHER, DAVID MALIDANI,  
MALIDANI JEWELRY CORP., JOHN SAMPIERI  
DIAMONDS, INC., JOHN SAMPIERI, SR., VINCENT  
SAMPIERI, ELAN KRETlich,

Defendants.

**FILED**  
FEB 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 5 were read on this motion to dismiss the complaint against defendant Wolf Drew.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED
1
2, 3, 4
5

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendant Wolf Drew moves to dismiss the Amended Complaint in this action pursuant to CPLR 3211(a)(7) on the grounds that it

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

fails to state a cause of action against Wolf Drew. Defendant Wolf Drew also argues that the action is barred by the statute of limitations, which ground is stated under CPLR 3211(a)(5). Plaintiffs oppose the motion.

The court shall GRANT the motion and dismiss the complaint only to the extent that it alleges claims of conversion, forensic accounting and goods sold and delivered against Wolf Drew. The motion must otherwise be DENIED.

A summary of the Complaint's allegations follows.

The plaintiffs are "wholesale diamond dealers trading on 47<sup>th</sup> Street", New York City. Anaka Design Ltd. ("Anaka"), also a plaintiff; Ariel Schonfeld, Norman Schonfeld ("Schonfeld"), and Irving Birnbaum, who are non-parties; and defendant Maurice Rico committed fraudulent acts whereby they stole diamonds valued at over \$6 million from the plaintiffs other than Anaka Design, Ltd. In a larcenous scheme known as "a bust out", Anaka, a domestic corporation was formed for "the sole purpose of stealing diamonds from the plaintiffs," other than Anaka. Non-party Norman Schonfeld, an officer of Anaka Design, Ltd., built Anaka's credit worthiness to a point where Anaka caused the plaintiffs, based on that credit, to sell it diamonds valued at more than \$6 million. Defendant Maurice Rico created a dummy corporation named Flex-Trade, to whom Anaka purportedly sold the diamonds. Anaka, by Schoenfeld, actually sold the diamonds at a discounted price to

his friends, including defendants Wolf Drew and his son Tovia Drew, who knew and helped plan the scam. When the checks presented to the plaintiffs were returned to Anaka for insufficient funds, Anaka defaulted on its loan from plaintiffs, citing Flex-Trade's failure to pay.

Non-party Norman Schonfeld was convicted and sentenced to 16-32 years in prison for committing the felonies of Grand Larceny, Scheming to Defraud, Perjury, Forgery, Criminal Possession of a Forged Instrument, Tampering with Evidence, and Criminal Possession of Stolen Property. Defendants Maurice Rico, who is also incarcerated, and Vincent Sampieri and Ariel Schonfeld, were also convicted for their roles in the diamond scam.

In separate actions, plaintiffs have obtained civil judgments dated February 2005 in the amount of \$6,277,555.19 and \$404,076.98 against non-party Schonfeld and dated March 2005 against Anaka and non-party Ariel Schonfeld, the son of Norman Schonfeld in the amount of \$3,500,000.

Defendant Wolf Drew moves to dismiss the Amended Complaint arguing that the cause of action for conversion is barred by a three year statute of limitations, and that the allegations against him are insufficient to state causes of action for fraud and aiding and abetting fraud.

[\* 4]

Defendant Wolf Drew asserts that the cause of action for conversion must be dismissed as time barred. "While a statute of limitations defense may be raised in a motion to dismiss...such a motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Weizmann Institute of Science v. Neschis, 229 F.Supp. 2d 234, 252 (S.D.N.Y. 2002), quoting Ortiz v. Cornetta, 867 F.2d 146, 148 (2d Cir. 1989).

The statute of limitations for conversion, which constitutes a tort, is three years. CPLR § 214(3); see Cockshaw v Guaranty Trust Company of New York, 282 AD 688 (1<sup>st</sup> Dept. 1953), Cockshaw v Guaranty Trust Company of New York, 283 AD 862 (1<sup>st</sup> Dept. 1954), *aff'd* 308 NY 656 (1954). The limitations period on a conversion claim begins to run from the time of the "unauthorized assumption and exercise of rights of ownership over goods belonging to another to the exclusion of the owner's rights" (Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Tex., 87 N.Y.2d 36, 44 [1995]). Songbyrd, Inc. v. Estate of Grossman, 23 F.Supp.2d 219, 222 (S.D. 1998). In opposing the motion, plaintiffs' counsel concedes that the statute of limitations period has expired, though she asserts that her clients would have brought a timely claim but for defendant Wolf Drew's silence about his purchase of the diamonds after the arrest of non-party Schonfeld for having stolen the diamonds.

The Complaint alleges that the relevant time period for the transactions involving Wolf Drew was from October 2000 to May 2001. The statute of limitations for any conversion claims would have expired no later than June 1, 2004. It is therefore beyond doubt that plaintiffs are unable to establish a timely claim for conversion.

Defendant Wolf Drew argues that the complaint against him must be dismissed as it does not state the requisite elements of a cause of action for fraud and/or aiding and abetting fraud. Defendant Drew also argues that the complaint does not set forth the allegations with the particularity required for fraud claims under CPLR 3016(b).

With respect to those claims, the Complaint alleges that defendant Wolf Drew purchased the diamonds below their value and below what plaintiffs charged Anaka for them, notwithstanding that he knew or should have known that the diamonds were stolen. According to plaintiffs, defendant Wolf Drew was involved from its inception in the "bust out" scam. He provided Schonfeld with the names of the plaintiffs upon whom Anaka and Schonfeld would perpetrate the fraud. Defendant Wolf Drew also provided Schonfeld with descriptions of the specific stones that were in plaintiffs' inventories and negotiated with Schonfeld which diamonds and at what price below Schonfeld's price he would purchase the same. Defendant Wolf Drew even coached Schonfeld

about the physical set up of Anaka's offices so as not to raise plaintiffs' suspicions. Plaintiffs claim that defendant Wolf Drew also advanced Anaka funds in order to assist Schonfeld in establishing credit with plaintiffs. The stones purchased by Anaka were delivered to defendant Wolf Drew at prices substantially below market value and for less than Anaka paid the plaintiffs. Defendant Wolf Drew knew that the cash price he paid was well below the price that Anaka paid for the diamonds and that Anaka never planned to pay plaintiffs for the diamonds. Finally, at all times, including the arrest of Norman Schonfeld, defendant Wolf Drew remained silent about his participation in the scam and the whereabouts of the diamonds.

Defendant Wolf Drew argues that the third and fifth causes of action for fraud and for aiding and abetting a fraud fail to state causes of action because (1) they are based on the "recanted" testimony of Schonfeld, a convicted felon; (2) silence alone is insufficient to establish a claim for fraud.

Plaintiffs are correct that defendant Wolf Drew fails to append a transcript of any testimony of Norman Schonfeld, which makes it impossible to assess its consistency with the Verified Complaint. In any event, on a motion to dismiss pursuant to CPLR 3211(a)(7), it is axiomatic that the court must accept the allegations of the complaint as true and afford plaintiff every favorable inference which may be drawn from those allegations.

[\* 7]

Cron v Hargro Fabrics, Inc. , 91 NY2d 362, 366 (1998). Even were transcripts attached to defendant Wolf Drew's papers, any inconsistency with the Verified Complaint would go to the credibility of Schonfeld, which would not be a consideration on a motion directed at the pleadings. The court disagrees with defendant Wolf Drew that Leder v Spiegel, 31 A.D.3d 266, 268 (1<sup>st</sup> Dept. 2006) is apposite, since the court does not find the allegations in the Amended Complaint to be inherently incredible or unequivocally contradicted by documentary evidence.

Nor is defendant Wolf Drew correct that silence may not be the basis of a claim of fraud. "Concealment of facts one has an obligation to disclose with the intent to defraud has the same legal effect as an affirmative misrepresentation. (See, Quadrizzi Concrete v. Mastroianni, 56 AD2d 353 [1977]."  
Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc.2d 182, 190 (Supreme Court, New York County 1996). As in Banco Nacional, "the heart of the allegation" of the Complaint at bar is that defendant Wolf Drew "was part of a conspiracy" and "willingly took part in the conspiracy" to defraud plaintiffs, which allegations are equivalent to claims of misrepresentation. Nor do these allegations lack the specificity necessary to raise claims of fraud. The Complaint goes beyond notice pleading in providing extremely detailed allegations of how defendant Wolf Drew plotted with Anaka and Schonfeld and identified the merchants and

provided the funds and knowledge that were the tools used in carrying out the deception.

Defendant Wolf Drew's argument that its alleged participation is inconsistent with the "bust out" regime in that Schonfeld would receive no benefits if Drew purchased the diamonds for less than the price Anaka was to pay plaintiff is a non sequitur. Defendant Drew would realize a profit in the amount of the difference between its sales price and the discount price it paid Anaka, and Schonfeld would benefit to the full extent of the discounted price defendant Drew paid him for the stolen diamonds.

Plaintiffs have also made allegations sufficient to state a cause of action against defendant Wolf Drew for aiding and abetting a fraud. Rizel v. Bodner, 225 A.D.2d 410 (1<sup>st</sup> Dept. 1996).

However, the court dismisses the sixth causes of action for a "forensic accounting" and goods sold and delivered.

As to the accounting, the court possesses the jurisdiction to order an accounting when four factors exist (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting. In re Mary XX, 33 AD3d 1066 (3d Dept. 2006). The Complaint does not allege any fiduciary relationship between the parties. Further, plaintiffs have an adequate remedy at law in the form of ordinary

damages for actual pecuniary loss. Kensington Publishing Corp. v. Kable News Company, Inc., 100 A.D.2d 802, 803 (1<sup>st</sup> Dept. 1984); Lama Holding company v. Smith Barney Inc., 215 A.D.2d 314, 315 (1<sup>st</sup> Dept. 1995). Therefore, the Complaint states no cognizable claim for an accounting.

As to the cause of action sounding in "goods sold and delivered", none of the plaintiffs, except for Anaka, allege that they ever sold diamonds to either defendants Wolf Drew or Tovia Drew. As to plaintiff Anaka, its allegations are that defendant Wolf Drew and/or Tovia Drew paid the discounted price that Anaka and those defendants negotiated. Accordingly no cause of action for goods sold and delivered lies against defendant Wolf Drew.

Accordingly, it is hereby

ORDERED that defendant Wolf Drew's motion to dismiss is GRANTED only to the extent of dismissing the causes of action for conversion, forensic accounting, and goods sold and delivered as to defendant Wolf Drew; and it is further

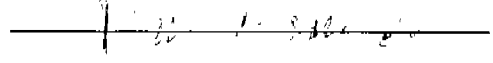
ORDERED that defendant Wolf Drew's motion to dismiss the causes of action for fraud and aiding and abetting fraud is DENIED; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 20, 2007, 9:30 AM in IAS Part 59, 111 Centre Street, Room 1254.

This is the decision and order of the court.

Dated: January 26, 2007

ENTER:



DEBRA A. JAMES <sup>J.S.C.</sup>  
J.S.C.

**FILED**  
FEB 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE