[* 1]

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

PRESENT: _____ **PART** 54

Index Number : 103463/2006

J.D.M. IMPORT

VS

HARTSTEIN, MARVIN

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 103463/06

MOTION DATE _____

MOTION SEQ. NO. # 2

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 3/7/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

J.D.M. IMPORT CO., INC., d/b/a INSTOCK PROGRAMS,

Plaintiff, INDEX NO. 103463/2006

- against -

MARVIN HARTSTEIN and MARVIN HARTSTEIN DIAMONDS INC., trading as M.H.D. COMPANY, DECISION AND ORDER

Defendants.

KORNREICH, SHIRLEY WERNER, J.:

Plaintiff in this action, J.D.M. Import Co., Inc., d/b/a, Instock Programs (JDM/Instock), has brought a motion for summary judgment against defendants, Marvin Hartstein and his company (collectively "Hartstein"). JDM/Instock seeks summary judgment, alternatively, as to its three causes of action, respectively fraud, conversion and unjust enrichment. In support of its motion, JDM/Instock has submitted a Memorandum of Law and the following documents: an affidavit of its president, Michael Kriss; its attorney's affirmation; the verified complaint and answer; a sworn statement of a JDM/Instock employee admitting her theft of jewelry; the transcript of the employee's sentencing; an invoice for Hartsein's sale of JDM/Instock's stolen jewelry; the deposition transcript of a woman who served as the intermediary for sales to Hartstein; an affidavit of Marvin Hartstein filed pursuant to the court's order entered February 8, 2007; and other exhibits. In opposition to the summary judgment motion Hartstein has submitted an affidavit of his attorney (containing extensive legal argument) and an affidavit of an "experienced jewelry appraiser." Hartstein also has filed a motion seeking reargument or renewal

of the court's June 21, 2007 order precluding Marvin Hartstein's trial testimony, which the court issued as a discovery sanction. JDM/Instock opposes this motion. The two motions are consolidated for disposition.

I. *Summary of Undisputed Facts.*

JDM/Instock is a manufacturer and wholesale seller of distinctive gold and diamond jewelry. Hartstein's company sells jewelry. Both are New York corporations. JDM/Instock's former employee Sophia Roberts (Roberts) pled guilty and was sentenced to imprisonment for stealing jewelry from JDM/Instock Roberts signed a sworn statement admitting that: she repeatedly stole jewelry from JDM/Instock beginning at the end of 2003 until 2004; she exchanged the jewelry for cash with a woman she knew as "Bibi,"meeting her in public on the sidewalk; the cash for each exchange was anywhere from $2,000 to $10,000; Bibi was procuring the jewelry for a man who determined the amount he was willing to pay for it; Roberts received in excess of $200,000; and she was told plaintiffs had lost approximately $1.4 Million. Exh. F, Summary Judgment [SJ] Motion.

A woman named Zalemoon Harichand (Harichand) testified at her deposition that she was the "Bibi" who exchanged cash for jewelry with Roberts. EBT, Exh. G, SJ Motion. Harichand worked in the fashion industry, grading and marking clothing patterns, and had no special knowledge of jewelry. She was not in the jewelry business. EBT at 29. Harichand met Roberts in February 2004. A woman she knew named Basanti introduced them after Harichand said she was looking to buy a diamond ring. Basanti told Harichand about Roberts and that she could buy jewelry at discount from the company where she worked. After that Harichand told a woman named Debbie who worked for one of Harichand's customers that she could get jewelry

at a discount from Roberts. Harichand had known Debbie for a long time. EBT at 26-28. Debbie said that she and her "brother," Hartstein (actually her brother-in-law), would be interested in buying jewelry through Harichand. Harichand called Roberts, and they met in the lobby of the building where she worked. Roberts told Harichand she was buying the jewelry at discount, and to meet her again later that day and to bring $4,000 in cash. They met outside in front of the Port Authority later that day and Harichand gave Roberts $4,000 in cash. She did not ask for and did not receive a receipt. Harichand told Roberts that she was looking for multiple pieces of jewelry that were big and of good quality, as Debbie had instructed that was what Hartstein wanted. Hartstein said he wanted to buy rings and earrings. EBT at 47. The next day, at another meeting in front of the Port Authority, Roberts gave Harichand five pieces of jewelry.

After that first meeting, on fourteen or fifteen occasions, Harichand personally met with Hartstein on the street where, in return for cash, she gave him the jewelry with accompanying invoices showing the company name Instock Programs, its address and telephone number. EBT at 83. Harichand testified inconsistently that she met with *Roberts* approximately ten times, giving her up to $4,000 in each exchange for four to six pieces of jewelry, mostly rings but also earrings. EBT at 48-50. Hartstein never asked Harichand about the source of the jewelry. Harichand never gave Hartstein a receipt for their financial transactions, nor did he ask for one. Harichand estimated that she gave Hartstein approximately twenty (20) to twenty-five (25) items between February and June of 2004, but she was not certain.

Michael Kriss, JDM/Instock's President, attested to the following facts in his Affidavit. JDM/Instock discovered the theft after learning that Hartstein had sold some Instock jewelry to one of its customers. The customer knew the jewelry was JDM/Instock's because of its

trademark and distinctive styling. Copies of the customer's check and a receipt from Hartstein show the latter sold JDM/Instock's jewelry for $26,000. JDM/Instock's records show that the company had not sold any jewelry to Hartstein and that the missing inventory was valued at approximately $1,700,000. JDM/Instock was able to recover the twenty pieces of jewelry worth approximately $13,300 from its customer. In interrogatory responses and his affidavit, Hartstein denies that he possesses any records, either of the purchases from Harichand or of the corporate defendant's business. He claims that the records were lost when he moved his office. In the interrogatory responses Hartstein states that the purchases from Harichand took place from January to June 2004, and that he did not receive any documents from Harichand or keep any records relating to the purchases.

In his affirmation opposing the summary judgment motion, defendants' counsel makes extensive legal argument and notes that the District Attorney, who prosecuted the matter, investigated Marvin Hartstein, but that the Grand Jury failed to return an indictment. The jewelry appraiser David Wolf, in his affidavit, attests that "it is common for gem and jewelry dealers to conduct transactions involving thousands and tens of thousands of dollars on the street and often avoid paperwork." Wolf Aff., ¶7.

II. *Legal Discussion and Rulings*

A. *The Motion for Reargument or Renewal*

Hartstein seeks reargument or renewal of the court's preclusion order claiming that the court "overlooked" evidence in the record showing `that the failure of Mr. Hartstein to appear at his deposition on June 8 was not the result of "willful and contumacious" conduct or any intent to flout this Court's orders, but rather resulted from mistakes by defendants' counsel.' Motion at

pg. 2), *citing Rankin v. Miller*, 252 A.D.2d 863, 864 (3d Dept. 1998). Hartstein's motion is denied.

At the outset, the moving papers are insufficient because they fail to include a copy of the initial moving and opposing papers and the order for which reargument or renewal is being sought. C.P.L.R. 2214(c). Hartstein submitted only an attorney's affirmation and a memorandum of law in support of the motion, which renders the moving papers defective. C.P.L.R. 2214(c) provides, in pertinent part, that "[t]he moving party shall furnish ... all other papers not already in the possession of the court necessary to the consideration of the questions involved." The court does not retain the papers following the disposition of an application "and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions." *Sheedy v. Pataki*, 236 A.D.2d 92, 97 (3d Dept.), *lv. den.*, 91 N.Y.2d 85 (1998). Rather, it is the responsibility of a moving party to assemble complete papers documenting the procedural history of the motion and provide a proper foundation for the relief requested. *See generally Fernald v. Vinci*, 13 A.D.3d 333 (2d Dept. 2003). A court may refuse to consider improperly submitted papers. *Loeb v. Tanenbaum*, 124 A.D.2d 941, 942 (3d Dept. 1986); *see Wells Fargo Home Mtge., Inc. v. Mercer*, 35 A.D.3d 728 (2d Dept. 2006).

However, even if Hartstein had provided the court with the necessary supporting paperwork, the motion would fail. C.P.L.R. § 2221(d) and (e) provide, in pertinent part:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

> 3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry....
>
> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Hartstein has not submitted any new facts or legal arguments to support the motion for renewal. Nor has he established that the court overlooked evidence showing that the failure to appear for depositions, contrary to the court's prior orders, was anything less than dilatory and willful. Both motions, therefore, are denied.

As set forth in *plaintiff's* opposition and exhibits, its motion to preclude was briefed extensively by both sides and the court entertained a lengthy oral argument at which two attorneys appeared on behalf of defendants. In a prior Compliance Conference Order, dated May 17, 2007, the court warned counsel that "EBTs shall take place on or before 6/18/07 or the non-appearing party will be precluded from testifying at trial." Exh. B, SJ Motion. The court also ordered that "If the parties do not agree on dates for EBTs by 5/21/07, the EBT of Marvin Hartstein shall be taken on 6/8/07 at 10 AM & the EBT of Michael Kriss shall be held on 6/7/07 at 10 AM at the offices of ...[defendants'] counsel." Exh. B, Devack Aff. Plaintiff appeared pursuant to the order, but defendant did not. Plaintiff also submitted letters from defendant's counsel in which the latter flatly refused to appear for the depositions on June 7th or 8th at 10:00

A.M., or to appear any time before June 20th. Exhs. E, F, Devack Aff..

The preclusion order was not issued lightly by the court, which by then had set three dates for completion of depositions, with the earliest order issued November 9, 2006. Defense counsel's affirmation contains only self-serving statements that his failures were instead mistakes that should not be attributable to his client, facts not supported by the record. Marvin Hartstein remains precluded from testifying at trial.

B. *Motion for Summary Judgment*

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. C.P.L.R. 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. C.P.L.R. 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989). Viewed according to these guiding principles, plaintiffs' motion for summary judgment is denied as to the first cause of action for fraud, granted in plaintiff's favor as to the second cause of action for conversion, and granted against plaintiff as to the third cause of action for unjust

enrichment.

(1) *Conversion*

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *State of New York v. Seventh Regiment Fund*, 98 NY2d 249 (2002). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt*, 260 N.Y. 26 [1932]; *Seventh Regiment Fund, supra*, 98 N.Y.2d at 259), and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Employers' Fire Ins. Co. v Cotten*, 245 N.Y. 102 [1927]; *see also Restatement [Second] of Torts* §§ 8A, 223, 243; *Prosser and Keeton, Torts* § 15, at 92, 102 [5th ed]). .

Hartstein claims that JDM/Instock should have made a demand for the jewelry. New York law does not, however, always require that a demand be made and be met by a refusal to make out a claim of conversion. Instead, a demand is necessary only where the property is held lawfully by the defendant. *White v. City of Mount Vernon*, 221 A.D.2d 345, 633 N.Y.S.2d 369, 370 (2d Dept. 1995) ("If possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand or sooner disposes of the property...."). For example, since an innocent purchaser of stolen goods is not a wrongdoer, she is not liable in conversion unless and until she refuses the true owner's demand for a return of the property.

Plaintiff has submitted undisputed material facts showing that Hartstein was *not* an innocent purchaser. Harichand testified that she gave Hartstein paperwork showing that the jewelry was from JDM/Instock. Plaintiff has also presented the affidavit of its President Michael

Kriss attesting to the facts that one of their customers had purchased their jewelry from Hartstein, but they had not sold Hartstein any jewelry. An inventory of the sold items is attached along with a sales receipt. Further, the circumstances under which Hartstein purchased the jewelry from Harichand are suspicious and questionable, leading any reasonable person to infer that the jewelry had been or *could have been* stolen: Cash only transactions on the street with someone who did not work in the jewelry business; Hartstein never asking where the jewelry came from; and Hartstein's lack of any paperwork to document the purchase or later sale of the jewelry. This should have, at least, raised a duty of inquiry into the source of the jewelry. Moreover, because Hartstein asserts that he does not have any of plaintiffs' jewelry in his possession a demand would have been futile.

Hartstein opposes summary judgment with an attorney's affirmation and an affidavit of a purported "expert" to the effect that cash-only street transactions without paperwork is the ordinary course for the jewelry business. At the outset, affidavits supporting or opposing summary judgment must be "by a person having knowledge of the facts." C.P.L.R. 3212 (b). Summary judgment cannot be granted or denied based solely on hearsay. *David Graybeard, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 559 (1979) (counsel's affidavit not sufficient because not based on personal knowledge). *See Di Sabato v. Soffes*, 9 A.D.2d 297, 301 (1st Dept. 1959) (finding that opposing affidavit by attorney without personal knowledge of facts has no probative value and should be disregarded). Counsel's affirmation is not based on personal knowledge. In any event, the "expert's" description of the jewelry business' custom and practice, as including sales on the street for cash, does not obviate the fact that the jewelry here was bought from a non-jeweler in the garment business at a price suggested by the buyer, not the seller. Nor does it rule

out the obvious inference that distinctive, trade-marked jewelry bought in such a clandestine manner could likely have been stolen.

Hartstein, in interrogatory responses that plaintiff attached to its moving papers, denies that Harichand gave him any paperwork with the jewelry. But this does not relieve Hartstein from the suspicious circumstances of the sale. If anything, the statement confirms that the sale was suspicious because it was undocumented. Nor does a dispute regarding Harichand's provision of paperwork require denial of summary judgment. Plaintiff does not have to establish that Hartstein knew the jewelry was theirs when he bought it from Harichand. Plaintiff has shown that Hartstein was buying stolen jewelry from Harichand under circumstances that should have put Hartstein on notice of potential illegality. This is enough.

Hartstein claims also that he was a buyer "in the ordinary course of business." UCC 1-201(9) provides, in pertinent part, that a "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind .. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the *kind of business in which the seller is engaged or with the seller's own usual or customary practices."* (Emphasis added.) UCC 2-103(b) provides that,`"Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Harichand's sales to Hartstein were not in the ordinary course of her business as she was not in the jewelry business. Nor were the sales by Roberts to Harichand in the ordinary course of Roberts' business as she was obtaining the jewelry through theft.

The circumstances here are strikingly similar to the case of *Porter v. Wertz*, 68 A.D.2d 141 (1st Dept.), *aff'd* 53 N.Y.2d 696 (1981). In the *Porter* case, Plaintiff owners of a painting entrusted it to an art merchant. Defendant art gallery purchased the painting from defendant seller, an employee at a delicatessen that the art merchant frequented. Plaintiffs sued to recover possession of the painting or the value of it from defendants. Defendants asserted the affirmative defenses of statutory, U.C.C. §2-403, and equitable estoppel. The trial court dismissed the complaint. The appellate division reinstated the complaint and directed entry of judgment in plaintiffs' favor, concluding that plaintiffs were not barred by either defense. Defendants sought review. The court found that U.C.C. 2-403 did not apply because defendant seller was not an art dealer/merchant and the sale was not within defendant seller's ordinary course of business. Since defendant art gallery had not relied on defendant seller's apparent authority to sell the painting, the court concluded that estoppel would not bar plaintiffs' recovery. Therefore, the court affirmed. Although the Court of Appeals chose not to reach the issue of "good faith," the Appellate Division did, using language that resonates here. In finding that the purchaser had a duty to inquire into the true ownership of the art being purchased, the court observed,

> The ...[buyer's] claim that the failure to look into...[the seller's] authority to sell the painting was consistent with the practice of the trade does not excuse such conduct. This claim merely confirms the observation of the trial court that "in an industry whose transactions cry out for verification of * * * title * * * it is deemed poor practice to probe". Indeed, commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art. Commercial indifference diminishes the integrity and increases the culpability of the apathetic merchant.

68 A.D.2d at 149.

Here, the undisputed evidence submitted by J.D../Instock shows that: Harichand was not in the jewelry business and Hartstein was probably aware of that fact; Roberts admittedly stole

the jewelry from JDM/Instock who did not do anything to imbue Roberts with authority to sell the jewelry; the jewelry was sold for cash on the street; Hartstein was a jewelry dealer; Hartstein did not inquire about the source of the jewelry and claimed he never received any documentation; and the jewelry had obvious indicia of its source being JDM/Instock. The court finds that Hartstein was *not* a good faith buyer and grants summary judgment against Hartstein on the conversion claim.

(2) *Fraud*

To maintain an action based on fraudulent representations, "it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the Plaintiff of a benefit and that the Plaintiff was thereby deceived and damaged....The essential constituents of the action are fixed as representation of a material existing fact, falsity, *scienter*, deception and injury." *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 407 (1958). *See Lama Holding Company v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996) (discussing pleading standard for fraud). Actionable fraud may also be committed by trick, device or scheme calculated to injure another. *Security Trust Co. v. Voxakis,* 67 Misc.2d 143 (Sup. Ct. Monroe Cty. 1971), *citing,* 24 N.Y. Jur., Fraud & Deceit, § 26.

It is undisputed that Roberts engaged in an ongoing scheme to steal jewelry from plaintiff, and that she committed fraud (inflating the number of items being purchased by Macy's) in the process. Material issues of fact remain, however, as to whether Hartstein knowingly agreed to cooperate in that fraudulent scheme. The evidence suggests that Hartstein should or could have been aware of the jewelry's source and that it was stolen. Harichand testified that she gave Hartstein paperwork identifying the jewelry as plaintiff's, and the customer

who bought jewelry from Hartstein said that he recognized it as plaintiff's by the trademark and its distinctive styling. Hartstein denies receiving any paperwork, but he will be precluded from testifying to that effect at trial. There is also of course the undisputed clandestine circumstances of the sales. Regardless, the plaintiff's evidence is insufficient as a matter of law to establish fraud, which requires *scienter*. A jury will have to determine that issue.

(3) *Unjust Enrichment.*

The court finds that no view of the evidence submitted by plaintiff supports a claim for unjust enrichment, which requires proof of a relationship between the parties, conferral of a benefit by one party on the other, and that retention of the benefit would be unjust in the equitable sense. *Restatement, Restitution, § 1, Comments a. See Weiner v. Lazard Fieres & Co.*, 241 A.D.2d 114, 119 (1st Dept. 1998). The parties here did not have any direct relationship. JDM/Instock did not confer a benefit on Hartstein, or on anybody for that matter. What occurred here was an inside operation to embezzle jewelry and then sell it for cash, a scheme in which Hartstein participated. The evidence shows conversion, and possibly fraud, but not unjust enrichment. Summary judgment is granted against plaintiff on the third cause of action for unjust enrichment. C.P.L.R. 3212(b) ("If it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment"). Accordingly, it is

ORDERED that defendants' motion for reargument or renewal of the court's preclusion order is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied as to the first cause of action for fraud; and it is further

ORDERED that plaintiff's motion for summary judgment is granted in plaintiff's favor

and against defendants as to the second cause of action for conversion; and it is further

ORDERED that plaintiff's motion for summary judgment is granted in defendants' favor and against plaintiff as to the third cause of action for unjust enrichment.

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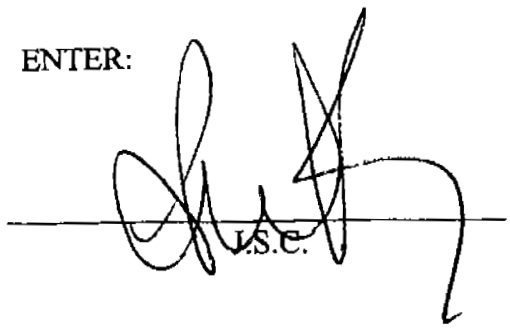

J.S.C.

Date: March 7 , 2008
New York, N. Y.