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

PRESENT: **MARCY S. FRIEDMAN** PART 57

Justice

Hemolocycal Inst

INDEX NO. 600040/06

- v -

MOTION DATE

MOTION SEQ. NO. 03

Krevine, D

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memos of law M1, M2

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined pursuant to this Court's decision/order dated 7-9-08.

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7-9-08

MARCY S. FRIEDMAN J.S.C.

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

GEMOLOGICAL INSTITUTE OF AMERICA,

Plaintiff(s),

- against -

DAVID ANDREW KRIVINE, et al.

Defendant(s).

Index No.: 600040/2006

DECISION/ORDER

In this interpleader action, the parties dispute ownership of a diamond currently in the possession of plaintiff Gemological Institute of America ("GIA"). Defendant Hanover Insurance Company ("Hanover") moves for summary judgment against co-defendants David Andrew Krivine and Ofer Mimouni declaring that Hanover is the owner of the diamond and that co-defendants were not good faith purchasers for value and did not acquire title to the diamond; and directing GIA to deliver the diamond to Hanover.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

The following relevant facts are undisputed: Non-party Louis Glick owned a 10.65 carat radiant cut diamond ("Glick diamond"), which he submitted to GIA for grading and analysis on

October 24, 2001. (Glick Aff. In Support, ¶¶ 3-4.) GIA issued a report and returned the diamond to Glick. Glick thereafter delivered the diamond to non-party Belcorso Jewelry Manufacturing ("Belcorso"), with instructions to mount the diamond on a ring. Belcorso lost Glick's diamond or it was stolen. After reporting the loss to GIA, Hanover, Belcorso's insurer, paid Glick over $157,000.00 for the diamond. Upon payment, Glick gave up any claim to ownership of the diamond in favor of Hanover.

Krivine and Mimouni submitted a 10.58 carat diamond ("Krivine diamond") to GIA for analysis on or about July 29, 2005. (Mimouni Aff. In Opp., ¶ 8.) After examining the diamond, GIA determined that the Glick and Krivine diamonds were the same. (See Dep. of Ivy Cutler [GIA's grading development coordinator] at 52, 54, 76.) GIA subsequently commenced this interpleader action against Hanover and Krivine to determine ownership of the diamond.[1]

In moving for summary judgment, Hanover argues that it is undisputed that the Glick and Krivine diamonds are the same, and that its rights to the diamond are superior to those of Krivine and Mimouni. In opposition, Krivine and Mimouni argue that the diamonds are not the same. Hanover relies exclusively upon co-defendants' failure to answer Hanover's Second Notice to Admit dated June 13, 2007. Paragraph 12 of this Notice to Admit seeks an admission that Mimouni did not pay value for the diamond. Paragraph 34 seeks an admission that the Krivine "diamond is the same diamond as the Glick diamond." (See Puchalsky Aff. In Support, Ex. 2.)

CPLR 3123(a) provides in pertinent part that "[e]ach of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof

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[1] Defendants Krivine and Mimouni commenced an action against GIA for return of the diamond. (Index No. 117895/05 ["Krivine action"].) GIA subsequently commenced the instant interpleader action. By so-ordered stipulation dated September 27, 2006 (Lowe, J.), the parties discontinued the Krivine action and all claims against GIA. GIA has retained possession of the diamond pending resolution of the parties' claims in this action.

or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters." However, it is well settled that "[a] notice to admit, pursuant to CPLR 3123 (a), is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." (Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 324 [1st Dept 2004]. See Scavuzzo v City of New York, 47 AD3d 793 [2d Dept 2008].) Contrary to Hanover's contention, the factual issue of whether the Glick and Krivine diamonds are the same is fundamental to Hanover's claim to ownership of the stone. As Hanover's demand for an admission as to this fundamental fact was palpably improper, Krivine and Mimouni had no obligation to furnish the admission in response to Hanover's Notice. (See Meadowbrook-Richman, Inc. v Cicchiello, 273 AD2d 6 [1st Dept 2000]; National Union Fire Ins. Co. v Allen, 232 AD2d 80 [1st Dept 1998]; Orellana v City of New York, 203 AD2d 542 [2d Dept 1994].) Co-defendants' failure to respond to plaintiff's Notice to Admit therefore cannot support summary judgment in plaintiff's favor.

On the merits, Hanover also fails to eliminate triable issues of fact as to whether the diamonds are the same. There is no dispute that after its examination of the Krivine diamond and its review of its records of the Glick diamond, GIA determined that they were the same. (See Dep. of Ivy Cutler [GIA's grading development coordinator] at 52, 54, 76.) While Hanover seeks an admission that defendant's own expert, Kenneth Lejman, determined that the diamonds were the same (see Hanover's Notice to Admit, ¶¶ 32-33), this admission also goes to the ultimate factual issue in this case. Moreover, Lejman submits an affidavit in opposition to the instant

motion in which he opines that the GIA reports of the two diamonds do not contain information about the characteristics of the diamonds sufficient to support the conclusion that they are the same. Moreover, contrary to Hanover's contention, co-defendants have not conceded that the diamonds were the same. In light of the conflicting evidence regarding the identity of the diamonds, Hanover's motion for summary judgment should be denied.

The court has considered Hanover's remaining claims and finds them without merit.

It is accordingly hereby ORDERED that defendant Hanover's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2008

MARCY FRIEDMAN, J.S.C.