

Gemelody Inc. v N.Y. Diamond & Gems LLC
2009 NY Slip Op 31782(U)
August 6, 2009
Supreme Court, New York County
Docket Number: 100330/09
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PRESENT:

PART 35

Index Number : 100330/2009

GEMELODY INC.

vs

N.Y. DIAMOND & GEMS LLC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
PAPERS NUMBER
AUG 07 2009
COUNTY CLERKS OFFICE
NEW YORK

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of plaintiff Gemelody Inc. for an order, pursuant to CPLR §3212, granting it summary judgment against defendant N.Y. Diamond & Gems LLC in the amount of \$50,162.55, plus interest from December 3, 2008 is granted; and it is further

ORDERED that the motion of plaintiff for an order, pursuant to CPLR §3212, granting it summary judgment against defendant Auraham Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov in the amount of \$50,162.55, plus interest from December 3, 2008 is denied; and it is further

ORDERED that defendants' cross-motion for an order, pursuant to CPLR §3212, granting them summary judgment and dismissing the complaint as against defendant Auraham Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov is denied; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

ORDERED that an assessment of interest owed by defendant N.Y. Diamond & Gems LLC shall be held on Monday, September 14 at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman; and it is further

ORDERED that counsel for plaintiffs and counsel for defendant Auraham Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on September 1, 2009 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Page 2 of 2

FILED
AUG 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL EDMEAD

Dated 8/6/09

ENTER: [Signature], 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 35

-----X
GEMELODY INC.,

Index No. 100330/09

Plaintiff,

-against-

N.Y. DIAMOND & GEMS LLC and AURAHAM
YOSOPOV a.k.a. AVRAHAM YOSOPOV a.k.a.
AVI YOSOPOV,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

DECISION/ORDER

FILED

AUG 07 2009

COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action, plaintiff Gemelody Inc. ("plaintiff") seeks to recover against defendants N.Y. Diamond & Gems LLC ("NYDG") and Auraham Yosopov a.k.a. Avraham Yosopov a.k.a. Avi Yosopov ("Mr. Yosopov") (collectively "defendants") for breach of contract.

Plaintiff now moves for an order, pursuant to CPLR §3212, for summary judgment against defendants in the amount of \$35,235, plus \$14,927.55 in attorneys' fees and interest from December 3, 2008.

Defendants cross move for an order, pursuant to CPLR §3212, granting Mr. Yosopov summary judgment and dismissing the Complaint as against him.¹

Background²

Plaintiff contends that in or about November 2008, plaintiff and defendants entered into

¹ Plaintiff's motion, bearing Sequence #001, and defendants' cross-motion, bearing Sequence #002, are consolidated for joint disposition herein.

² Information is taken from plaintiff's motion, which comprises an affirmation from plaintiff's attorney Byron Hakimi, Esq. and an affidavit by Jonathan Kavakeb ("Mr. Kavakeb").

written agreements by which defendants accepted two loose diamonds worth \$45,235 for resale to a third party. The agreements comprise three documents: a November 5, 2008 agreement (the "Nov. 5 Agreement"), an invoice for a \$10,000 deposit dated November 5, 2008 (the "Invoice"), and a November 26, 2008 agreement (the "Nov. 26 Agreement") (collectively, the "Agreements"). In consideration for the Agreements, plaintiff was given a check for a deposit of \$10,000. In accordance with the Agreements, the balance on the diamonds (\$35,235) became due and owing to plaintiff on December 3, 2008.

Plaintiff's Motion

Plaintiff contends that on December 3, 2008, and several times thereafter, plaintiff demanded payment of the balance due on the diamonds. Alternatively, plaintiff requested the return of the diamonds. Despite plaintiff's demands, payment has not been made, and the diamonds have not been returned. In addition, the Agreements provide for attorneys' fees equaling 33% of the total value of the diamonds, plus applicable court costs if plaintiff is required to bring any action against defendants. Said attorneys' fees equal the sum of \$14,927.55, plaintiff contends. Therefore, plaintiff should be granted summary judgment against defendants for breach of contract in the amount totaling \$50,162.55, plus interest from December 3, 2008, plaintiff argues.

Defendants' Opposition and Cross-Motion

Defendants argue that there is no basis for personal liability against Mr. Yosopov. The Invoice for the diamonds is the "governing document," they argue, and there is no basis to impose personal liability on that document. Further, defendants contend that plaintiff omitted from its moving papers a copy of the Nov. 5 Agreement, which also provides no basis for

personal liability against Mr. Yosopov. The Nov. 5 Agreement does not “boldly specify” that Mr. Yosopov is personally liable for a sale or a consignment, and there is no specificity as to who is liable, defendants argue. Defendants contend that plaintiff cites only to the Nov. 26 Agreement as the basis for corporate and personal liability, while conceding the existence of the Nov. 5 Agreement and a \$10,000 payment made against the Invoice. A review of those documents establishes that Mr. Yosopov is not liable under the Statute of Frauds, the terms of the Agreements and prevailing law, defendants contend.

Defendants argue that the Invoice clearly refers only to NYDG and does not impose personal liability on Mr. Yosopov. The same is true of the Nov. 5 Agreement and Nov. 26 Agreement. The Agreements provide for one signature to be affixed on the front, defendants contend. There is clearly no place for two signatures to be affixed, one in a corporate capacity, and one in an individual capacity. There is no personal-guarantee language or other language on the front of either Agreement indicating that the signor was agreeing to personal liability. The law clearly requires more in order to hold personal liability, defendants argue.

Further, the Agreements do not meet the requirements of the Statute of Frauds, defendants argue. The back of the Agreements contain many provisions, all concerning the obligations of the corporate obligor, except for a clause at the end that purportedly states that if the corporation fails to honor the commitments “the officers” of the corporation will personally honor those obligations, without specifically identifying the nature of those obligations. New York’s Statute of Frauds provides that an agreement that purports to be a special promise to answer for the debt, default or miscarriage of another person is void unless it is in writing and subscribed by the party to be charged therewith, defendants contend, citing New York General

Obligations Law Section §5-701. Further, the writing must designate the parties, identify and describe the subject matter and state all the essential and material terms of the contract, defendants contend. Defendants argue that the Agreements do not identify the name and identity of the guarantor, the name and identity of the obligor whose debts to the guaranteed party are being guaranteed, and the guaranteed party. Therefore, the Agreements here are clearly insufficient as a matter of law under the requirements of the Statute of Frauds, defendants contend.

Plaintiff's Reply

First, plaintiff argues that defendants' opposition/cross-motion papers include an admission that necessitates the Court grant summary judgment in favor of plaintiff as against NYDG. In attempting to distinguish himself from his corporate identity, Mr. Yosopov admits in his affidavit (the "Yosopov Aff.") that "plaintiff clearly is owed money by N.Y. Diamond but I personally have no obligations to the Plaintiff" (Yosopov Aff., ¶ 9). This admission clearly demonstrates that plaintiff's motion for summary judgment as against NYDG should be granted, and the only issue remaining is whether Mr. Yosopov himself is personally liable to plaintiff.

Second, plaintiff argues that the guaranty on the back of the Agreements clearly establishes that Mr. Yosopov is personally liable, as well. Yosopov's admission also raises the question of whether NYDG was merely "a shell of a corporation" set up to protect Mr. Yosopov or whether it was a legitimate business operation. Whether NYDG was a genuine corporate entity or a veil to deceive vendors in the diamond business is a matter for trial. Thus, even if the Court denies plaintiff's motion for summary judgment as against Mr. Yosopov individually, Yosopov's motion for summary judgment should also be denied, and plaintiff should be given

the opportunity to pierce the corporate veil of NYDG, plaintiff argues.

Plaintiff contends that defendants' argument that the Statute of Frauds precludes a claim as against Mr. Yosopov lacks merit. Mr. Yosopov executed "the Agreement" (*i.e.* the Nov. 26 Agreement)³ personally and not as a corporate officer of NYDG, plaintiff argues, and the Agreement on its face lists "Avi Yosopov." Mr. Yosopov should be personally liable for three major reasons, plaintiff contends: (1) the face of the Agreement names "Avi Yosopov" individually; (2) Mr. Yosopov executed the Agreements in his personal capacity without any corporate title; and (3) below Mr. Yosopov's signature are the terms, "I hereby agree to the terms and conditions on the reverse side of this memorandum agreement." The combination of the above elements clearly show that both parties undisputedly understood that Mr. Yosopov would be personally liable for the value of the diamonds, plaintiff contends.

Plaintiff further contends that where a signature on a document containing a personal guaranty purports to be a corporate signature, the Statute of Frauds is nonetheless satisfied where there is "some direct and explicit evidence of actual intent" to be personally bound. Here, the Agreements were made and entered into by and between plaintiff, NYDG, and Mr. Yosopov. The name of the individual defendant "Avi Yosopov" appears directly next to the name, address and phone number of NYDG. Mr. Yosopov affixed his signature to the Agreement on the line that expressly states, "I hereby agree to the terms and conditions on the reverse side of this memorandum agreement." That statement is "direct and explicit evidence" of Mr. Yosopov's "actual intent" to be personally bound, plaintiff argues.

Plaintiff further contends that under the Uniform Commercial Code ("UCC"), trade

³Plaintiff appears to refer to the Nov. 26 Agreement, The Nov. 5 Agreement is not signed.

usages are presumed to be within the knowledge of parties regularly engaged in that business, and all contracts of such parties are presumed made with reference to such trade usages and practice. Mr. Yosopov, who has been in the business of the sale and purchase of diamonds for nine years (Yosopov Aff., ¶ 1), surely understood that personal liability was standard practice in the diamond trade industry, plaintiff argues. As such, there can be no disputing the fact that Mr. Yosopov was personally obligated by the Agreement.

Finally, plaintiff argues that Mr. Yosopov is also personally liable under UCC §3-403(2)(b), which provides that an authorized representative who signs his own name to an instrument is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity. Mr. Yosopov, an authorized representative of NYDG executed the Agreement in his personal capacity without any corporate title. Further, the Agreement can be considered a negotiable instrument under UCC §3-403(2)(b), because it (1) is signed by Mr. Yosopov, (2) contains a promise to pay a sum certain in money, (3) is payable at a definite time, and (4) is payable to plaintiff. "Clearly, under these circumstances, the requirements of UCC §3-403(2)(b) have been fulfilled," plaintiff argues. As such, Mr. Yosopov is clearly personally obligated by the Agreement, pursuant to the UCC.

Defendants' Reply

First, defendants contend that plaintiff's argument that Mr. Yosopov should be personally liable because NYDG is a "shell" and the "veil" should be pierced to hold him liable should be barred because such a claim was never pleaded in plaintiff's Complaint. Further, plaintiff provides no evidentiary basis for the claim. This Court should not permit a speculative argument by an attorney to prevent summary judgment where it is warranted, defendants argue.

Second, defendants maintain that there is no explicit intention or evidence that Mr. Yosopov intended to be personally liable on the Agreements. The Agreements clearly describe the purchaser as NYDG. Further, the Agreements are addressed only to NYDG, and there is no “explicit” intention by Mr. Yosopov to undertake personal liability “by signing a receipt that the Company received the merchandise.” The front page of the Agreements do not call for personal liability. Mr. Yosopov’s name is, in fact, “set to the side and is clearly not distinguished as a purchaser but only as a contact person of the purchaser,” NYDG, defendants contend.

Moreover, the language on the back of the Agreement does not confer liability, defendants argue. The “personal guaranty” provides only that “the officers of the consignee will personally honor” the Agreements, defendants contend. “This unspecified attempt to deceive an individual into personal guarantees is precisely the kind of attempts that have been rejected by the Court in the cases cited in the Defendants’ Motion,” defendants argue. In short, no evidence or issue has been raised which should preclude summary judgment being granted dismissing the claims against Mr. Yosopov, defendants contend.

Analysis

Summary Judgment

It is well settled that where a plaintiff is the proponent of a motion for summary judgment, pursuant to CPLR §3212, the plaintiff must establish that the cause of action has no merit, sufficient to warrant the Court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire s Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [NY Sup 2003]). This standard requires that the proponent of a motion for summary judgment make a

prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.* at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR §3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman at 560, 562; Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman at 562*). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Liability as to NYDG

To state a cause of action for breach of an agreement, the proponent of the pleading must specify the making of an agreement, the performance by that party, a breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497 [U] [NY Sup 2006], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The essential terms of the parties’ purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged” (*Volt Delta Resources LLC v Soleo Communications Inc.*, citing *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; see also *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006]), citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987], accord *Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [4d Dept 1987]).

Here, the evidence in the record establishes a *prima facie* case that NYDG breached the Agreements with plaintiff. Plaintiff provides a copy of the Agreements, which contains the name and address of NYDG. The following facts are undisputed: Under the terms of the Agreements,

NYDG owed plaintiff a balance of \$35,235 for the two loose diamonds, payable by December 3, 2008. Defendants failed to pay the balance or return the diamonds to plaintiff. The Agreements further provide that if plaintiff is required to bring any legal action against defendants, defendants are to be liable for attorneys fees equaling 33% of the total value of the diamonds (\$14,927.55), plus court costs. Further, in his affidavit, Mr. Yosopov, president of NYDG, concedes that plaintiff "clearly is owed money by [NYDG]" (Yosopov, Aff., ¶ 9).

As there are no issues of material fact as to NYDG's liability or damages on the Agreements, summary judgment against NYDG in the amount of \$50,162.55, plus interest from December 3, 2008 is granted.

Liability as to Mr. Yosopov

Although plaintiff has established a *prima facie* case of liability against Mr. Yosopov on the ground that his name appears on the Agreements and that he signed the Nov. 26 Agreement, defendants raise an issue of fact as to Mr. Yosopov's intent when he signed the Nov. 26 Agreement. In interpreting a contract, the Court must "enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway NY Associates, L.P. v Bodner*, 784 NYS2d 63, 66 [1st Dept 2004]). The test for ambiguity in a written agreement is well settled: "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). Further, the Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 269 [1st Dept. 2002]). The fundamental, neutral precept of contract interpretation is that agreements are

construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]).

Here, defendants' argument that the Invoice is the "governing document" in this action lacks merit. New York Courts have held that, under certain situations, individual agreements can and should be read as one unified agreement. "A contract can be comprised of separate writings or documents if the writings make it clear that they are to be read in conjunction with other writings to determine the intent of the parties" (*Dietrich v Chemical Bank*, 115 Misc 2d 713, 715 [1981]); *Nausch v AON Corp.*, 2 AD3d 101, 101-102 [1st Dept 2003], *citing Crabtree v Elizabeth Arden Sales Corporation*, 305 NY 48, 55 [1953]). In *Crabtree*, the New York Court of Appeals held that "this court has on a number of occasions approved the rule, and we now definitively adopt it, permitting the signed and unsigned writings to be read together, provided that they clearly refer to the same subject matter or transaction."

Here, the evidence in the record indicates that the Agreements comprise three documents: the Nov. 5 2008 Invoice, the Nov. 5 Agreement, and the Nov. 26 Agreement. The Invoice, the Nov. 5 Agreement and the Nov. 26 Agreement all deal with the same subject matter and transaction – the sale of the two diamonds. Accordingly, the Court will examine all of these documents to determine the intent of parties.

The evidence in the record fails to support plaintiff's contention that Mr. Yosopov is personally bound the Agreements.

The Nov. 5 Agreement and the Nov. 26 Agreement are nearly identical, except that they have different due dates and the Nov. 5 Agreement is unsigned. So, the Court will focus on the Nov. 26 Agreement, which is signed by Mr. Yosopov.

The very top of the Nov. 26 Agreement contains the names of plaintiff and Mr. Kavakeb,

who states in his Affidavit that he has authority to enter into contracts on behalf of plaintiff ("Kavakeb Aff., ¶ 1). The Agreement is titled "Customer Memo." After the word "To," is a phone number, Mr. Yosopov's name, and NYDG's name and address. At the bottom of the Nov. 26 Agreement is a signature line containing Mr. Yosopov's signature, under which is this statement: "I hereby agree to the terms and conditions on the reverse side of this memorandum agreement."

The reverse side of the Agreement contains the following statement:

Consignment Agreement

This agreement is binding on the consignee, whether goods under this memorandum are accepted by the consignee its officer's or it's agent's [*sic*]. The goods described, listed and valued on the front of this memorandum are delivered to the consignee for examination and inspection only and are the property of Gemelody, Inc. In accepting said goods, consignee agrees that until payment for the goods is made in full or until the goods are returned in original form and actually received by consignor [plaintiff] title shall remain with the consignor and all the risk of loss shall be that of the consignee. . . . In respect to litigation by consignor against consignee hereunder, the parties agree to the jurisdiction of the courts in New York and New York law applies. In any such action or proceeding by consignor against the cosignee, the consignee agrees that it will at the option of consignor waive trial by jury. If the consignor is required to bring any action hereunder against the consignee, the consignee agrees to pay the consignor an additional amount due under this memorandum in and for consideration of attorney's fees to be liquidated in the amount of 33% of the total value of all the goods listed on this memorandum plus any applicable court costs. *The consignee's officers hereby agree that, if the consignee fails to honor the commitments made under this agreement, the officers of the consignee will personally honor the same.* Until payment is received hereunder, as above set forth, consignee has no right, power or authority to sell, pledge, hypothecate or otherwise dispose of the goods, regardless of prior transactions.

(Emphasis added)

First, contrary to plaintiff's arguments, it is not clear from the face of the Nov. 26 Agreement whether Mr. Yosopov signed in his capacity as an individual or as president of NYDG. The Nov. 26 Agreement does not contain any words after Mr. Yosopov's signature to indicate that he was signing as either an individual or as president of NYDG. Signatures on a contract "must be read, like any other portion of the instrument, not in isolation, but in the

context of the instrument as a whole” (*150 Broadway NY Associates, L.P. v Bodner*, 784 NYS2d 63, 66 [1st Dept 2004]). Generally, “officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually” (*PNC Capital Recovery v Mechanical Parking Systems, Inc.*, 283 AD2d 268, 270 [1st Dept 2001], *lv dismissed* 96 NYS2d 937 [2001], *appeal dismissed* 98 NYS2d 763 [2002]). However, if the clear, unambiguous terms of the agreement indicate a personal obligation for a debt, then the officer signing the agreement can be held personally liable (*PNC Capital Recovery v Mechanical Parking Systems, Inc.* at 270); *see also 150 Broadway N.Y. Associates, L.P. v Bodner* at 67 [“Our decision in [*PNC Capital Recovery*] illustrates the principle that the presence or absence of a reference to corporate office above or below a person’s signature on an instrument does not necessarily determine the capacity in which the person signed the instrument”]).

Here, as discussed above, terms of the Agreements are not clear and unambiguous; they contain the names of both NYDG and Mr. Yosopov. Further, the evidence in the record does not establish that Mr. Yosopov intended to be held personally liable for NYDG’s debt when he signed the Nov. 26 Agreement. In fact, Mr. Yosopov vigorously disputes that he signed in the agreement in an individual capacity, raising an issue of material fact as to the parties’ contentions at the time they contracted.

Second, the one line in the paragraph on the reverse of the Nov. 26 Agreement, which plaintiff attempts to characterize as a personal guaranty (plaintiff’s reply, ¶ 7), is insufficient, as a matter of law, to bind Mr. Yosopov as a personal guarantor. In *Salzman Sign Co. v Beck* (10 NY2d 63 [1961]), the New York Court of Appeals dealt with a similar case. The plaintiff in *Salzman* attempted to personally bind the officer of a corporation as a guarantor with a paragraph in the contract stating: “Where the Purchaser is a corporation, in consideration of extending

credit to it, *the officer or officers signing on behalf of such corporation, hereby personally guarantee the payments hereinabove provided for*" (*Salzman* at 65). The Court held that the contract clause was insufficient to charge the signing officer as a guarantor.

In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements *unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice once as an officer and again as an individual*. There is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer. In many situations the signing officer holds little or no stock and if the language of the agreement makes him individually liable his estate may be stuck for a very large obligation which he never dreamed of assuming. We think the better rule is the one used here that is, that the statement in the contract purporting to bind the signing officer individually is not sufficient for Statute of Frauds purposes without some direct and explicit evidence of *actual intent*.

(*Salzman* at 67) (*emphasis added*)

The First Department came to a similar conclusion in *Warren-Connolly Co. v Saphin*, 283 AD 391 [1st Dept 1954], a case cited by *Salzman*:

Here, the contract was made between plaintiff and the dealer corporation. . . . An attempt is being made to predicate liability upon an obscure sentence in a contract bearing the inscription at the top in bold type 'Authorized Dealer Franchise Agreement.' All of its provisions except the paragraph in question relate to the duties and obligations of the contracting parties. The original Statute of Frauds was enacted for the 'prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury.' 29 Car. II, chap. 3. The procedure here followed would in effect thwart the purpose of the statute. The contract provision did not constitute a personal guarantee enforceable against the defendant.

(*Warren-Connolly Co.* at 393)

Third, defendants raise an issue as to whether the Agreements meet the requirements of the Statute of Frauds (General Obligations Law §5-701). According to the First Department, "[t]o be considered a sufficient memorandum within the ambit of the Statute of Frauds, a writing "must designate the parties, identify and describe the subject matter and state all the essential or material terms of the contract" (*Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc.*, 206

AD2d 166, 168 [1st Dept 1994], *citing Villano v G & C Homes*, 46 AD2d 907 [2d 1974], *citing Tobias v Lynch*, 192 AD 54, 182 NYS 643 [2d Dept 1920], *aff'd* 233 NY 515 [1922]; 56 NY Jur, Statute of Frauds, §165). Here, the actual purchaser of the diamonds – either NYDG or Mr. Yosopov – is not sufficiently identified on the Agreements.

Finally, the Court will not consider plaintiffs' arguments that Mr. Yosopov is personally liable under UCC §3-403(2)(b), because plaintiff raised this argument for the first time in its reply. As the First Department explained in *Dannasch v Bifulco* (184 AD2d 415, 417 [1st Dept 1992]): "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." Here, neither the Complaint nor plaintiff's motion contains any allegations that any of the Agreements herein meet the requirements of a negotiable instrument, or any facts or evidence supporting a theory of recovery on a negotiable instrument.

Therefore, as defendants raise an issue of material fact as to Mr. Yosopov's personal liability on the Agreements, plaintiff's motion for summary judgment as to Mr. Yosopov is denied.

Defendants' Cross-Motion for Summary Judgment

Because of the ambiguity of the documentary evidence attached to the moving papers herein, defendants have failed to establish a *prima facie* case that Mr. Yosopov is not liable for the amounts due plaintiff under the Agreements. As discussed above, on their face, the documents fail to shed light on Mr. Yosopov's intent when he signed the Nov. 26 Agreement.

By way of reply, plaintiff seeks to raise a new argument that NYDG was merely "a shell of a corporation" set up to protect Mr. Yosopov; thus, the Court should deny defendants' cross-motion because whether NYDG was a genuine corporate entity or a veil to deceive vendors is a

matter for trial, plaintiff argues. However, not only does plaintiff improperly raise the issue of piercing the corporate veil for the first time in reply (see *Dannasch v Bifulco*), but also plaintiff's Complaint fails to contain any factual allegations concerning this theory of liability. Further, the plaintiff's submissions contain no facts indicating that Mr. Yosopov abused the corporate form, so as to support a claim for piercing the corporate veil (*WorldCom, Inc. v Segway Marketing Ltd.*, 262 AD2d 164 [1st Dept 1999]; *P.A. Bldg. Co. v Elwyn D. Lieberman, Inc.*, 227 AD2d 277 [1st Dept 1996] [status as president and sole shareholder of the Corporation is insufficient to pierce the corporate veil absent a showing that corporate formalities were not observed]). Therefore, plaintiff's claim of piercing the corporate veil is insufficient to raise an issue of fact as to Mr. Yosopov's liability under the Agreements.

As the evidence in the record fails to establish that Mr. Yosopov is not personally liable on the Agreements, defendants' cross-motion for summary judgment in their favor is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff Gemelody Inc. for an order, pursuant to CPLR §3212, granting it summary judgment against defendant N.Y. Diamond & Gems LLC in the amount of \$50,162.55, plus interest from December 3, 2008 is granted; and it is further

ORDERED that the motion of plaintiff for an order, pursuant to CPLR §3212, granting it summary judgment against defendant Auraham Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov in the amount of \$50,162.55, plus interest from December 3, 2008 is denied; and it is further

ORDERED that defendants' cross-motion for an order, pursuant to CPLR §3212, granting them summary judgment and dismissing the complaint as against defendant Auraham

Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov is denied; and it is further

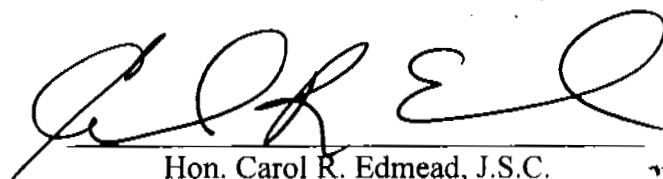
ORDERED that an assessment of interest owed by defendant N.Y. Diamond & Gems LLC shall be held on Monday, September 14 at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman; and it is further

ORDERED that counsel for plaintiffs and counsel for defendant Auraham Yosopov A.k.a. Avraham Yosopov a.k.a. Avi Yosopov appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on September 1, 2009 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: August 6, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMead

FILED

AUG 07 2009

**COUNTY CLERK'S OFFICE
NEW YORK**