

Afrodiam Ltd. v Elgo Diamonds Intl., Inc.

2011 NY Slip Op 30290(U)

February 3, 2011

Sup Ct, NY County

Docket Number: 113483/08

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 113483/2008

AFRODIAM LTD

vs

ELGO DIAMONDS INTERNATIONAL

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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	
_____	<u>1</u>
_____	<u>2</u>
_____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

FEB 09 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 2/9/11

HON. EILEEN A. RAKOWER
J.S.C.

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 15

-----X
AFRODIAM LTD. and JOSH KIRSCHENBAUM,

Index No.
113483/08

Plaintiffs,

- against -

**DECISION
and ORDER**

ELGO DIAMONDS INTERNATIONAL, INC.,
ELI GOTTLIEB, and HANAN ZARFATI, sued in error as
CHANAN EFRATI,

Mot. Seq.
003

Defendants.

-----X
ELGO DIAMONDS INTERNATIONAL, INC.,
ELI GOTTLIEB, and HANAN ZARFATI,

Counterclaim Plaintiffs,

- against -

FILED

FEB 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

AFRODIAM TRADING CORP.,

Additional Counterclaim Defendant.

-----X
HON. EILEEN A. RAKOWER

Plaintiff Afrodiam Ltd. is a New York corporation engaged in the diamond business. Plaintiff Josh Kirschenbaum is the President of Afrodiam Ltd. Defendants are also in the diamond business. According to plaintiffs' verified amended complaint, on or around September 12, 2003, Afrodiam Ltd. rendered a check payable to defendant Elgo Diamonds International, Inc. ("Elgo") in the amount of \$99,000.00. Plaintiffs state that defendants Elgo, Gottlieb and Zarfati, "each as individuals on behalf of the corporate Defendant, and acting in concert as a whole, accepted the payment and jointly agreed to supply plaintiffs with diamonds and/or precious stones equal to the amount tendered by Afrodiam." Thereafter, plaintiffs

state that the defendants provided diamonds to plaintiffs that were valued in the amounts of \$19,223.00 and \$37,659.36.

Plaintiffs allege that, despite repeated demands, they were neither provided with additional diamonds and/or precious stones covering the remaining balance of the \$99,000.00 paid by plaintiffs (a sum of \$42,117.64); nor were they refunded said amount. Although "Defendants promised on a number of occasions that they would provide acceptable product or return the funds, they did not follow through on such promises and they also often ignored demands and responded to demands with threats to ruin Plaintiffs' reputation, business and good name." Plaintiffs state that the defendants also threatened to cause physical harm to plaintiff Kirschenbaum.

Plaintiffs further allege that defendants "made defamatory statements of facts regarding Plaintiffs' reputation in the diamond industry, including representations and misrepresentations that Plaintiffs are not honest, are unscrupulous, are dishonest, are nothing, are inept and without contact in the diamond industry and other such untruths and slurs."

Presently before the court is defendants' motion for summary judgment dismissing plaintiffs' defamation claim (plaintiffs' sixth cause of action) as against all defendants, and dismissing the action in its entirety as against defendants Eli Gottlieb, President of Elgo, and Zarfati, an employee of Elgo. With respect to plaintiffs' defamation claim, defendants argue that plaintiffs fail to plead defamation with the requisite particularity required by CPLR §3016. Defendants refer the court to the sixth cause of action in plaintiffs' amended verified complaint, which is quoted above. Defendants also submit plaintiffs' bill of particulars and Kirschenbaum's deposition transcript. Plaintiffs' bill of particulars does not specify the statement or statements uttered by any or all of the defendants which constitute the alleged defamation. In his deposition, Kirschenbaum testified that he learned from a nonparty that Gottlieb had said "negative things" about him: "I don't recall the conversation but more or less that I was lying and I'm not trustworthy."

With respect to defendant Zarfati, defendants argue that Zarfati is not a proper party to this action because the complaint does not allege any facts, nor does the record contain any evidence establishing that Zarfati entered into any agreement or contract with plaintiffs individually. Further, in Kirschenbaum's deposition, Kirschenbaum testified that the basis for bringing Zarfati into the action was that

[* 4] ,

Kirschenbaum believed him to be “[o]wner and a part owner of [Elgo].”¹

Defendants similarly argue that Gottlieb must be dismissed from the action because there is no evidence in the record that Gottlieb was individually a party to any contract or agreement with plaintiffs.

Plaintiffs submit a seven-paragraph affirmation, which argues in conclusory terms that (1) “there remains materials highly relevant in this case that are exclusively in the possession and control of defendants;” and (2) “defendants have failed to submit any evidence, or the evidence submitted is clearly inappropriate and/or inadmissible.”

In reply, defendants note that the deadline for plaintiff to file a note of issue was September 15, 2010.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Here, defendants have demonstrated entitlement to dismissal of the amended verified complaint as against Gottlieb and Zarfati, as well as dismissal of the sixth cause of action as against Elgo. With respect to the defamation claim, “[t]he elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation

¹Defendants submit an affidavit from Zarfati stating that he is not and has never been a partner of Gottlieb in any business, nor has he ever been an officer or owner of Elgo. He states that he is and has been an employee of Elgo for the past seven years.

per se." CPLR 3016(a) requires that a plaintiff alleging defamation plead with sufficient particularity the actual allegedly defamatory words used by the defendant(s); in addition, the plaintiff must set forth the time, place, and manner of the communication (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]). Plaintiffs have failed to plead defamation with the requisite particularity required by CPLR §3016, and thus the claim must be dismissed.

As for Gottlieb and Zarfati, the record is wholly devoid of any evidence that would render these individuals personally liable to plaintiffs for actions that they took as President and employee of Elgo, respectively. Nor is there any evidence in the record that would permit the court to disregard the corporate form of Elgo.

Lastly, the court rejects plaintiffs' conclusory assertion that there remains additional information that is exclusively in defendants' possession that would support plaintiffs' claims.

CPLR 3212 (f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of that party exist but cannot be stated. (*Baldasano v Bank of N.Y.*, 199 AD2d 184, 185, 605 NYS2d 293 [1st Dept 1993], citing *Terranova v Emil*, 20 NY2d 493, 497, 231 NE2d 753, 285 NYS2d 51 [1967].) Under *CPLR 3212 (f)*, where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. (*Overseas Reliance Tours & Travel Serv. v Sarne Co.*, 17 AD2d 578, 580, 237 NYS2d 416, 418 [1st Dept 1963]; see also *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 533 NYS2d 143 [2d Dept 1988].)

The party invoking the section must provide a proper evidentiary basis supporting its request for further discovery. (See *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286, 287 [2d

Dept 1999], lv dismissed in part and denied in part 93 NY2d 956, 694 NYS2d 346, 716 NE2d 181 [1999]; Jones v New York City Tr. Auth., 166 AD2d 293, 562 NYS2d 402 [1st Dept 1990].)

(*Global Minerals and Metals Corp. v. Holme*, 2006 NY Slip Op 713, *7-8 [1st Dept. 2006]). Here, plaintiff merely states that “there remains materials highly relevant in this case that are exclusively in the possession and control of defendants.” Such a conclusory assertion cannot form the basis for denying summary judgment pursuant to §3212(f) (*see CVC Capital Corp. v. Weil, Gotshal, Manges*, 192 A.D.2d 324, 324,25 [1st Dept. 1993]). Moreover, the record indicates that plaintiffs had ample time to conduct discovery, and did in fact do so. Further still, the deadline to file a note of issue expired on September 15, 2010, and plaintiffs did not seek a further extension of time to conduct discovery.

Wherefore it is hereby

ORDERED that plaintiffs’ sixth cause of action is dismissed as against all defendants; and it is further

ORDERED that defendants’ motion to dismiss the complaint as against defendants Gottlieb and Zarfati is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court’s records to reflect the change in the caption herein.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 3, 2011



EILEEN A. RAKOWER, J.S.C.

FILED

FEB 09 2011

**NEW YORK
COUNTY CLERK'S OFFICE**