

Fishman & Son Jewelry, Inc v Taub
2011 NY Slip Op 32922(U)
November 3, 2011
Supreme Court, New York County
Docket Number: 602155-2007
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
HON. BERNARD J. FRIED *Justice*

PART 60

A. Fishman, et. al,

PLAINTIFFS

- v -

Alfred Avi Taub, et. al.,

DEFENDANTS

INDEX NO. #602155-2007

MOTION DATE _____

MOTION SEQ. NO. #011

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED

NOV 04 2011

NEW YORK
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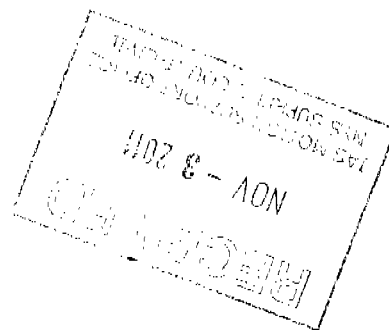
Dated: 11/3/2011

J.S.C.

HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [] REFERENCE



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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X

A. FISHMAN & SON JEWELRY, INC.; ALONI
DIAMONDS, LTD.; DIAMOND BASICS, INC.;
EDIAMOND INTERNATIONAL (USA) INC.; NICE
DIAMOND; M.F. McTEIGUE LLC, INC.; AURA
INTERNATIONAL INC.; AVROC INTERNATIONAL
INC.; BADER AND GARRIN DIAMOND CO.; BBU
CUTTING INC.; DIAMOND DEAL CORPORATION;
DIAMONDSTAR INC.; ELEFANT DIAMONDS, LLC;
HARRY WEISS, INC.; H B S TRADING INC.;
HERSHEL HOROWITZ CORP.; INDENBAUM & CO.,
LLC; ISAAC DAVIDOWITZ LLC; KARMILY GEN
CORP.; KASHI 4 C'S INC.; KELSOL DIAMOND
CO. INC.; LIPWORTH DIAMOND CORP.; S.
HAZAN & SONS COMPANY, LLC; SAMUEL SCHICK
INTERNATIONAL LTD.; SAGAR STAR, CORP.;
SALICO GEM CORP.; S-DIAM CORP.; SN ASIA
(USA) INC.; T. GLUCK & CO., INC.; T.M.W.
DIAMONDS MFG. CO., INC.; WELDIAM, INC.;
Y. ENAYATIAN & SONS GEM CORP.

Plaintiffs,

Index No. 602155/07

-against-

ALFRED AVI TAUB (DOB: ISRAELI FOREIGN
NATIONAL)
SHALOM S. TAUB (ISRAELI FOREIGN NATIONAL)
OREN TAUB (aka ORAN TAUB) (DOB 9/9/81)
SHIRAN ATIAS
HOLDING THEMSELVES OUT AS "A TAUB
DIAMONDS CORP."

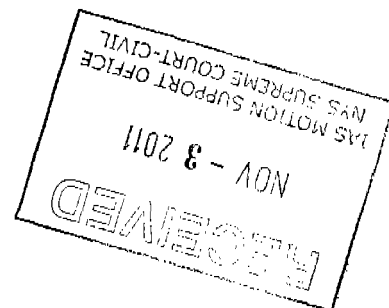
AND ALL JOHN DOE ALIAS USED BY THE
DEFENDANTS ALFRED AVI TAUB AND SHALOM S.
TAUB SINCE JANUARY 1, 2001

AND ALL JOHN DOE CORPORATIONS ALFRED AVI
TAUB AND SHALOM S. TAUB HAVE BEEN
ASSOCIATED WITH SINCE JANUARY 1, 2001;

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NOV 04 2011

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INCLUDING, A. TAUB DIAMONDS CORP.; ORAN
DESIGNS

AND ORA TAUB AND ALL OTHER JOHN DOE'S WHO
HAVE RECEIVED MONIES BELONGING TO
PLAINTIFFS AND/OR HIDDEN ASSETS ON
DEFENDANTS' BEHALF OR HELD PROPERTY IN
THEIR NAME/S WHICH WAS PURCHASED WITH
MONIES CONVERTED BY THE DEFENDANTS,

Defendants.

-----X

APPEARANCES:

For Plaintiffs:

Tratner, Molloy & Goodstein LLP
551 Fifth Avenue
New York, New York 10176
Tel: 212 867-1100
Fax: 212 972-1787

By Cindy E. Molloy

For Defendants Shalom S. Taub, Ora
Taub and Oren Taub:

Hurwitz Stampur & Roth
299 Broadway, Suite 800
New York, New York 10007
Tel: 212 619-4240

By James Roth

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FRIED, J.:

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment against defendant Shalom Taub on the first (fraud/fraud in the inducement), second (conversion), fourth (guaranty), seventh (pierce the corporate veil) and eighth (aiding and abetting fraud) causes of action. That portion of their motion that sought partial summary judgment against defendants Alfred Avi Taub and A Taub Diamonds on the first (fraud/fraud in the inducement), second (conversion), third (civil fraud and aiding and abetting fraud) and

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seventh (pierce the corporate veil) causes of action was granted as to liability by order of this court dated July 25, 2011, and severed from the remainder of the action.

Defendants Shalom Taub, Ora Taub and Oren Taub cross-move for summary judgment dismissing the first (fraud/fraud in the inducement), second (conversion), seventh (pierce the corporate veil) and eighth (aiding and abetting fraud) causes of action against Shalom Taub, and dismissing the 10th (aiding and abetting fraud against Oran Taub), 11th (aiding and abetting fraud against Ora Taub), and 12th (set aside fraudulent transfers of property) causes of action against Oren Taub and Ora Taub.

This action involves a scam by a diamond dealer, Alfred Avi Taub (Avi), in which he created a company, A. Taub Diamonds Corp., and began to establish himself as a reputable dealer among wholesale diamond dealers. He took various diamonds on consignment, and either returned them or converted the consignment memo to an invoice and paid for them according to the terms of the agreements with the various companies. He continued in this manner over the course of approximately 11 months, building up his reputation for being trustworthy. Then, in May and June of 2007, he took many very valuable diamonds from approximately 90 different dealers, and failed to return or pay for any of them, and also tendered checks which were returned for insufficient funds. During this time, he also reported to the police that he had been the victim of a robbery in Chinatown, and that \$1 million worth of diamonds was stolen from him. He told the dealers from whom he had taken diamonds that he had insurance for the loss. In fact, he did not have a \$1 million dollar policy, as he claimed; he had no insurance. Since he was not actually robbed, but filed a false claim, the fact that he did not carry insurance is only relevant insofar as it demonstrates

his plans regarding the diamonds. Avi eventually pled guilty to grand larceny in the third degree, and on September 16, 2009 was sentenced to one to three years in state prison.

Shalom Taub (Shalom) is Avi's father, and participated in the business with him. Shalom often picked up diamonds and signed for them. While it is clear that he worked with his son, the affidavits of the plaintiffs, the wholesale dealers whose goods were not returned or paid for, do not distinguish between the father and son. In fact, many of the affidavits refer to "Avi/Shalom" rather than to a specific person.

Ora Taub (Ora) is Avi's mother and Shalom's wife. The complaint alleges that she received funds from the business and that she is hiding that money, thereby aiding and abetting fraud. Plaintiffs seek to attach any such assets.

Oren (or Oran) Taub (Oren) is Avi's brother, and Shalom and Ora's son. He is a graphic artist who designed A. Taub Diamond Corp.'s business cards, and, according to plaintiffs, set up its web site. Plaintiffs allege that the web site was used to perpetrate the fraud, and that Oren was listed as an administrative contact for the web site. Plaintiffs further allege that Oren had actual knowledge of the fraud, as purportedly demonstrated by the fact that he set up the web site and posted diamonds for resale on it. Additionally, plaintiffs allege that Oren shared in the proceeds of the fraud. Plaintiffs seek to set aside any transfers to Oren as fraudulent.

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law. *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). Only once such a showing has been made must the opposing party bring forth evidence to raise a material issue of fact. *Mazurek v Metropolitan Museum of Art*, 27

AD3d 227, 228 (1st Dept 2006). Here, plaintiffs met their burden only with respect to the fourth cause of action as against Shalom, for a personal guaranty in the amount of \$23,040.00. Cross movants met their burden only with respect to Oren.

Plaintiffs seek summary judgment as against Shalom for fraud, fraud in the inducement, conversion, aiding and abetting fraud, and based upon piercing the corporate veil. However, plaintiffs have failed to set forth evidence that Shalom was also responsible for the scam for which his son is now serving time. While it is true that Shalom was involved in the business, and picked up and returned diamonds for the business, that is insufficient to connect him, as a matter of law, to the fraudulent schemes in which the business was involved. The fact that it may be highly unlikely that Shalom would have been unaware of the machinations of his son does not create liability as a matter of law.

Plaintiffs rely heavily on the fact that Avi refused to be deposed, and his counsel stated that if Avi were forced to appear for deposition, he would plead the Fifth Amendment. While this certainly would result in the strongest possible inference as against Avi, there is nothing in the record stating that Shalom also refused to be deposed, or that he pleaded the Fifth Amendment. Therefore, the inferences that could be drawn regarding Avi cannot be drawn regarding Shalom. Since Shalom denies the allegations made against him, and plaintiffs have not offered undisputed evidence unequivocally that Shalom was involved in the fraud, plaintiffs' motion is denied with respect to the first, second, seventh and eighth causes of action.

With respect to the fourth cause of action, based upon a personal guaranty, plaintiffs have produced a written guaranty signed by Shalom in the amount of \$23,040.00. Shalom

has not produced any evidence to dispute the validity of the guaranty, and has not addressed that guaranty in his papers. Therefore, plaintiffs are granted summary judgment on the fourth cause of action as against Shalom.

While I am declining to grant plaintiffs summary judgment, I also decline to grant Shalom summary judgment on the first, second, seventh and eighth causes of action.

Shalom argues that he is not personally responsible for the items for which he signed on behalf of the company. However, that does not address the issue of whether Shalom participated with his son in the fraudulent scheme. If such participation is established at trial, Shalom could be held responsible along with Avi. Similarly, there is not enough evidence on the record at this time to determine whether the piercing of the corporate veil would implicate Shalom as well as Avi. Apparently, there are no employment records, or other documentation, that would establish each person's role in the enterprise. Thus, it would be premature at this time to determine whether or not Shalom had a stake in the company which would warrant finding him liable for the company's misdeeds. The fact that plaintiffs failed to establish their prima facie case on this issue, whether he aided and abetted the alleged fraud, does not mean that Shalom is entitled to summary judgment, merely that the matter must go to trial.

Oren seeks dismissal of the claims as against him. He provides an affidavit in which he attests that he designed business cards for A. Taub Diamonds Corp., but provided no other services for the company, was not employed by the company, had no knowledge of any transactions conducted by it, and was never given or received any money, property or anything of value from it. He has, thus, presented a prima facie showing for dismissal of the

claims against him. In response, plaintiffs merely point to his name being on the web site, and surmise that, because he was instrumental in maintaining the web site (which he denies), he must have been involved in the fraud. Such surmise is inadequate to defeat a motion for summary judgment. Plaintiffs have failed to produce any evidence that Oren was involved in the business. Providing business cards, or even maintaining a web site, is not sufficient to maintain an action based upon the wrongdoing of the underlying business which is being serviced. Having failed to present any evidence connecting Oren to the fraudulent activities of A. Taub Diamond Corp., plaintiffs' complaint, as against Oren, must be dismissed.

Ora also seeks summary judgment dismissing the complaint as against her. However, unlike Oren, Ora does not attest to not having received anything of value from A. Taub Diamond Corp. Rather, her affidavit states that she was never a salaried employee nor did she perform any services for A. Taub Diamond Corp. She also denies knowledge of "any particular diamond transactions" conducted by Shalom, Avi or A. Taub Diamond Corp. This denial is insufficient to relieve Ora of any potential liability. She did not deny knowledge of the fraudulent scheme - only of "any particular diamond transactions." Further, while she denies having been an employee of the company, she does not deny having received money or property or any other item of value from the company. Therefore, she has not denied the essential elements needed to dismiss the causes of action to set aside fraudulent transfers of property or for aiding and abetting fraud.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion for partial summary judgment is granted only to the extent of granting summary judgment in favor of plaintiff Bader and Garrin

Diamond Co. and against Shalom Taub as follows:

Plaintiff Bader and Garrin Diamond Co. is granted judgment on the fourth cause of action in the amount of \$23,040.00, together with interest at the rate of 18% per annum from the date of June 28, 2007 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the fourth cause of action is severed, and the Clerk is directed to enter judgment accordingly

and the motion is otherwise denied; and it is further

ORDERED that so much of the cross motion as seeks summary judgment dismissing the complaint as against Oren Taub is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the cross motion is denied.

DATED: 11/3/2011

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