SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ **J.S.C.** _____
Justice

PART 3

Index Number : 603914/2009
T. GLUCK & CO., INC
vs.
GRAIG DRAKE MFG INC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 603914/2009
MOTION DATE 3/22/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 3 **, were read on this motion to/for** Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6-4-13

Eileen Bransten **J.S.C.**

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

T. GLUCK & CO., INC.,
Plaintiff,

-against-

CRAIG DRAKE MFG., INC., CRAIG M. DRAKE and SOVEREIGN BANK,
Defendants.

Index No. 603914/2009
Motion Seq. No.: 004
Motion Date: 3/22/2013

EILEEN BRANSTEN, J.:

In this breach of contract action, defendant Sovereign Bank ("Sovereign") moves for summary judgment, pursuant to CPLR 3212, dismissing the Second Amended Complaint (the "Complaint") as against it. Plaintiff T. Gluck & Co. Inc. ("Gluck") opposes. For the reasons that follow, Defendant Sovereign's motion is granted.

I. Background

Plaintiff Gluck contracted to supply diamonds to defendant Craig Drake Mfg., Inc. ("CDM"), a jewelry manufacturer based in Pennsylvania, pursuant to a written amended consignment and security agreement, dated January 31, 1997 (the "Consignment Notice").[1] After executing the Consignment Notice, Plaintiff filed a UCC-1 Financing Statement with the Pennsylvania Department of State on February 24, 1997. *See* Sovereign Rule 19-a Statement ¶ 13; Plaintiff's Responses to Sovereign's Rule 19-a Statement ¶ 1.

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[1]The Consignment Notice was later amended on November 13, 2001.

At this time, Brown Brothers Harriman & Co. ("BBH") served as CDM's lender pursuant to a revolving credit agreement, dated July 17, 1989 ("Security Agreement"). (Affidavit of Dwight Fairfield ("Fairfield Aff."), Ex. C.) The Security Agreement granted BBH a security interest in CDM's current and future accounts and inventory, as well as CDM's proceeds, pursuant to the UCC. BBH perfected this security interest by filing a UCC-1 financing statement with the Pennsylvania Department of State, on July 27, 1989. *Id.*, Ex. D. BBH filed UCC continuation statements to protect its security interest in CDM's accounts and inventory on June 14, 1994, May 10, 1999, and March 11, 2004. *Id.*, Ex. E.

On or about October 13, 2006, BBH sold and assigned its security interest in CDM's collateral to Sovereign. *Id.*, Ex. F. The agreement between BBH ("Seller") and Sovereign ("Purchaser") states, in pertinent part,

> Seller hereby assigns, sells, transfers and conveys to Purchaser, and Purchaser hereby purchases, all of Seller's right, title and interest in and to the Secured Note and the Security Documents, including, but not limited to the Security Agreement and all UCC financing statements filed by Seller in accordance with said Security Agreement . . . . Upon satisfaction of the terms and conditions set forth herein, Purchaser shall be and hereby is authorized to file UCC amendments indicating the assignment to Purchaser of all UCC financing statements filed by Seller against Debtor.

Id., Ex. F. ¶ 1(a).

Sovereign claims that it fulfilled all of the preconditions in its agreement with BBH; filed an amended UCC financing statement with the Pennsylvania Department of

State, on January 2, 2007 (*Id.*, Ex. G); and filed a UCC continuation statement on April 6, 2009 (*Id.*, Ex. H). Under these circumstances, Sovereign now contends that it "maintains a first priority, perfected security interest in all of CDM's assets and personal property prior in right and time to that of Plaintiff." (Fairfield Aff. ¶ 16.)

On October 13, 2009, CDM engaged Silverman Consultants, LLC ("Silverman"), to conduct a going-out-of-business sale. Silverman conducted the sale over the next several months, remitting most of the funds collected to Sovereign.

Plaintiff commenced this action on December 31, 2009 with the filing of the original complaint. The instant Second Amended Complaint ("Complaint") was filed on or about March 29, 2010. In the Complaint, Plaintiff alleges that CDM sold its consigned diamonds without paying plaintiff the agreed-upon proceeds. Plaintiff also claims that it "properly secured its first priority, perfected security interest in the consigned goods [the diamonds] by making all requisite filings under the New York Uniform Commercial Code." (Compl. ¶ 10.) Additionally, Plaintiff charges that "Sovereign directed the other defendants to transfer, or exercised self-help to seize, the proceeds of the sale of the consigned goods in disregard of plaintiff's first priority secured interest." *Id.* ¶ 25. Plaintiff maintains that it is owed no less than $307,616.17, plus costs, expenses and legal fees.

Accordingly, Plaintiff asserts claims for: (1) breach of contract against CDM; (2) breach of guaranty against Drake; (3) an accounting against all defendants; (4) conversion against all defendants; (5) violation of New York's Uniform Commercial Code ("UCC") against all defendants; and, (6) fraudulent conveyance, pursuant to New York's Debtor and Creditor Law §§ 276 and 276-a, against all defendants.

After Defendants CDM and Craig M. Drake failed to respond to the Complaint, the Court granted Plaintiff's motion for default judgment against CDM and Drake on May 31, 2011. Accordingly, Sovereign is the only defendant remaining in the action.

Sovereign now seeks summary judgment as to the claims asserted against it – counts three, four, five, and six.

II. Analysis

Sovereign argues for summary judgment as to all counts asserted against it for two reasons: (1) plaintiff's security interest in the consigned goods expired more than eight years ago; and, (2) plaintiff's security interest in the consigned goods did not have priority over Sovereign's security interest in CDM's accounts receivable. Accordingly, Sovereign maintains that Plaintiff's claims for conversion, fraudulent conveyance, violation of the UCC, and an accounting fail, as Plaintiff did not hold a security interest in the goods that trumped Sovereign's interest.

A. *Summary Judgment Standard*

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dep't 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008) (quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dep't 2002).

B. *Plaintiff's Security Interest Expired in 2002*

Sovereign first argues that plaintiff's security interest in the consigned goods terminated five years after the date of the Consignment Notice to BBH, dated January 31, 1997. Plaintiff responds by contending that this action is not "limited solely to UCC claims." (Pl.'s Br. at 1.) Plaintiff's argument, however, misses the point.

Under UCC § 9-103, Plaintiff had a "purchase money security interest" in the goods consigned pursuant to the Consignment Notice. *See* UCC § 9-103(d) ("[t]he

security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.")

UCC § 9-324(b) discusses the priority of purchase money security interests:

> [A] perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, . . . [and] also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:
> (1) the purchase-money security interest is perfected when the debtor receives possession of the inventory;
> (2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
> **(3) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and**
> (4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

There is evidence of only one consignment notice in the record – the Consignment Notice dated January 31, 1997. In fact, the parties agree that this is the only consignment notice received by either BBH or Sovereign regarding Plaintiff's alleged competing security interest in the consigned goods. *See* Sovereign Rule 19-a Statement ¶ 14; Plaintiff's Responses to Sovereign's Rule 19-a Statement ¶ 2; Affirmation of Robert J. Mastrogiacomo, Ex. 2 ¶¶ 24 & 25 and Ex. 3. Accordingly, pursuant to UCC § 9-324(b), the priority of plaintiff's security interest in the consigned goods, the diamonds shipped to

CDM, and/or the proceeds of their sale, expired on January 30, 2002, five years after the consignment notice to BBH.

Beyond the expiration date of Plaintiff's priority security interest, conflicting security interests are resolved by the general priority rule of first-to-file, first-in-line, which puts Sovereign first-in-line. *See* UCC § 9-322. Therefore, the causes of action asserted against Sovereign must be considered in this context – i.e. that Sovereign had a priority interest in the consigned goods.

B. *Sovereign Had a Superior Interest in Receivables from CDM's Collateral*

Moreover, even if plaintiff's priority interest had not expired on January 30, 2002, Sovereign next argues that Plaintiff's interest in the consigned goods did not extend to the accounts containing funds generated from the sale of those goods. Plaintiff's perfected purchase-money security interest in inventory had priority in identifiable cash proceeds of the inventory only to the extent that the identifiable cash proceeds were received on or before the delivery of the inventory to a buyer, pursuant to UCC § 9-324(b). Sovereign distinguishes between the identifiable cash proceeds of the sale of inventory, contemporaneous with the transaction, where plaintiff's perfected purchase money security interest in inventory had priority, and the generation of accounts receivable as a result of the transaction, where its security interest in CDM's collateral had priority.

Comment 9 for UCC § 9-324(b) addresses this issue:

> "Example 1: Debtor creates a security interest in its existing and after-acquired inventory in favor of SP-1, who files a financing statement covering inventory. SP-2 subsequently takes a purchase-money security interest in certain inventory and, under subsection (b), achieves priority in this inventory over SP-1. This inventory is then sold, producing accounts. Accounts are not cash proceeds, and so the special purchase-money priority in the inventory does not control the priority in the accounts. Rather, the first-to-file-or-perfect rule of Section 9-322 (a) (1) applies. The time of SP-1's filing as to the inventory is also the time of filing as to the accounts under Section 9-322 (b). Assuming that each security interest in the accounts proceeds remains perfected under Section 9-315, SP-1 has priority as to the accounts."

N.Y. U.C.C. Law § 9-324, Official Comment 9.

Here, Sovereign was the "first-to-file-or-perfect". Under the terms of the July 17, 1989, Sovereign (through its predecessor in interest BBH) was granted a security interest in all of CDM's assets and personal property, including its accounts receivable and inventory. *See* Fairfield Aff. Ex. K, § 4.1. Sovereign perfected its security interest through the filing of a UCC-1 Financing Statement on July 27, 1989. *See* Sovereign Rule 19-a Statement ¶ 4; Plaintiff's Responses to Sovereign's Rule 19-a Statement ¶ 1. Meanwhile Plaintiff was granted its security interest in CDM's collateral on January 31, 1997, and perfected this interest on February 24, 1997 – nearly eight years after Sovereign filed and perfected. *See See* Sovereign Rule 19-a Statement ¶ 13; Plaintiff's Responses to Sovereign's Rule 19-a Statement ¶ 1. Accordingly, consistent with Comment 9 to UCC §

9-324(b), Sovereign was first to file and perfect and thus holds the superior interest here. Thus, again, the causes of action asserted against Sovereign must be assessed in light of Sovereign's superior interest in the consigned goods and related accounts.

E. *Conversion*

Plaintiff's cause of action for conversion is based on its unanswered demand for payment for, or return of, the consigned goods. In its Complaint, Plaintiff asserts that "despite [its] superior rights in the consigned goods and any proceeds derived therefrom, defendants exercised and continued to exercise dominion and control over the proceeds from the sale or transfer of the consigned goods in a manner inconsistent with plaintiff's rights..." Compl. ¶ 33.

Sovereign contends that Plaintiff's conversion claim fails since after January 30, 2002, Sovereign possessed a priority security interest in the consigned goods – an interest superior to Plaintiff's.

To establish a conversion claim, "a plaintiff must show legal ownership or an immediate superior right of possession to specifically identifiable property, and must demonstrate that the defendant exercised unauthorized dominion over that property to the exclusion of the plaintiff's rights." *NY Medscan, LLC v. JC-Duggan Inc.*, 40 A.D.3d 536,

537 (1st Dep't 2007); *see also Independence Disc. Corp. v. Bressner*, 47 A.D.2d 756, 757 (1975).

For the reasons discussed above, Plaintiff did not possess an "immediate superior right of possession" to either the consigned goods or the accounts containing the receivables from the sale of the goods. Plaintiff lost its superior right to the proceeds from the sale of the consigned goods when its Consignment Notice lapsed in January 2002. Following the expiration of its priority interest, Plaintiff was relegated to the position of a subordinate secured creditor. Thus, at the time the goods were sold in 2009, Sovereign's perfected secured interest trumped Plaintiff's interest. Thus, Plaintiff's conversion claim fails.[2]

Plaintiff's arguments as to Sovereign's "control" over the payment of CDM's operating expenses is beside the point. The salient issue with regard to Plaintiff's conversion claim is the scope of Plaintiff's rights over the property at issue, i.e. whether Plaintiff had an immediate superior interest and whether Sovereign exercised unauthorized dominion over the property to the exclusion of Plaintiff's rights. Plaintiff's arguments regarding Sovereign's notice of Plaintiff's consignment and Sovereign's

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[2] While Plaintiff does not state in its papers that its conversion claim pre-dates the expiration of its priority perfected security interest in 2002, to the extent that Plaintiff makes such a claim, it is barred by the three-year statute of limitation for conversion since this action was filed in 2009. *See* CPLR § 214(3); *Vigilant Ins. Co. of Am. v. Hous. Auth. of City of El Paso*, 82 N.Y.2d 36, 44 (1995).

control over CDM's deposit account pursuant to CDM's Loan Agreement with Sovereign have no bearing on these issues. Therefore, Sovereign's motion for summary judgment as to the conversion claim is granted.

F. *Fraudulent Conveyance*

Section 276 of New York's Debtor & Creditor Law provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Plaintiff here makes no showing of actual intent to hinder, delay or defraud CDM's creditors, let alone a showing sufficient to generate genuine issues of fact. Plaintiff contends that "Sovereign was aware that CDM was insolvent at the time Sovereign began a winding down process by making selective payments to CDM's creditors, including itself." Pl.'s Br. at 8. In support, Plaintiff cites to Exhibits D & E of the Affidavit of Mark Ellis, neither of which demonstrate that Sovereign's payments were "selective" or that Sovereign had any actual intent to defraud, hinder or delay CDM's creditors. Instead, Exhibit D is a field report, purported prepared by Sovereign, that: (1) notes in relevant part that CDM was unable to pay its debts and (2) lists $359,164 "less memo" under a tallying of CDM's inventory. Ellis Aff., Ex. D at SOV00002813, 2815. Exhibit E

contains a series of emails between a Sovereign employee and an unidentified individual discussing CDM and noting a consignment memo among CDM's inventory. *Id.* Ex. E.

Viewing this evidence in the light most favorable to Plaintiff, it nonetheless fails to establish any actual intent to defraud. Instead, it reflects Sovereign's knowledge that CDM was insolvent, which is consistent with CDM's wind down status. Moreover, Exhibits D and E show that CDM had remaining consignment items but does not specify that those consignment items were the consignment goods at issue in this litigation. And even if the consignment goods were the ones described in Plaintiff's complaint, Plaintiff's demonstration that Sovereign was aware of these items does not demonstrate actual intent to defraud, particularly where Sovereign had a superior perfected secured interest. Accordingly, Plaintiff has failed to demonstrate genuine issues of fact in dispute as to this claim, and Sovereign's motion is granted.

G. *Violation of the New York Uniform Commercial Code*

Plaintiff claims that it perfected its security interest in the goods consigned to CDM by filing UCC-1 statements with Pennsylvania's Secretary of State. It also correctly claims that it gave BBH, Sovereign's predecessor in interest, requisite notice as to CDM's position. However, it is undisputed that CDM's January 31, 1997 consignment notice was the last one served on BBH/Sovereign. Thus, CDM's perfected

purchase-money security interest lost its priority over BBH/Sovereign's conflicting security interest on January 31, 2002, pursuant to UCC § 9-324(b). Sovereign's ensuing conduct regarding CDM's financial affairs in 2009, therefore, was not in violation of the UCC. The Complaint's fifth cause of action, therefore, is dismissed as against Sovereign.

D. *Accounting*

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dep't 1986); *Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 217 (1st Dep't 2005) ("in the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for an accounting"). There is no evidence of a relationship between plaintiff and Sovereign, no less a confidential or fiduciary relationship. The relationship between plaintiff and CDM was contractual, consignee and consignor. Even if Sovereign "stepped into the shoes of CDM," that did not make Sovereign party to a confidential or fiduciary relationship with plaintiff. Generally, "arm's length" business relationships do not give rise to fiduciary obligations. "[T]he general rule [is] that fiduciary obligations do not exist between commercial parties

operating at arm's length . . . ." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005); *Rather v. CBS Corp.*, 68 A.D.3d 49, 55-56 (1st Dep't 2009).

In order to find a fiduciary relationship where the parties failed to provide for it in their written agreements, as is the case here, "a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122 (1st Dep't 1998). Plaintiff offers no evidence that it assumed such a posture in its dealings with CDM, or Sovereign by proxy. Accordingly, there is no basis for the cause of action for an accounting against Sovereign, and the third cause of action is dismissed.

(*Order follows on next page.*)

III. Conclusion

Accordingly, it is

ORDERED that defendant Sovereign Bank's motion for summary judgment, pursuant to CPLR 3212, dismissing the Second Amended Complaint as against it is granted, and the Second Amended Complaint as against Sovereign Bank is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is to enter judgment accordingly.

Dated: New York, New York
~~May~~ ___, 2013
June 4, 2013

ENTER:

Eileen Bransten

Hon. Eileen Bransten, J.S.C.