Jash Diamonds Inc. v Diamond Marquise
2016 NY Slip Op 31238(U)
March 24, 2016
Supreme Court, New York County
Docket Number: 652102/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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JASH DIAMONDS INC. a/k/a SONALI ENTERPRISES, SONALI ENTERPRISES INC. a/k/a AAA JEWELRY CO. and TAPTI DIAMONDS PVT LTD.,

Plaintiffs,

-against-

DIAMOND MARQUISE and DILIP MEWANI

Defendants.

-against-

TAPTI IMPORTS, INC., PANKAJ DESAI, MAULESH DESAI, NITISH DESAI, SONALI DESAI, JOHN DOES 1-5, JANE DOES 1-5, ABC CORP 1-5,

Counterclaim Defendants.

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DECISION AND ORDER

Index No. 652102/2014

HON. ANIL C. SINGH, J.:

Motion sequence 003, 004, and 006 are consolidated for disposition.

Plaintiffs Jash Diamonds Inc., Sonali Enterprises, Inc., and Tapti Diamonds Pvt Ltd., and counterclaim defendants Tapti Imports, Inc., Pankaj Desai, Maulesh Desai, Nitish Desai, and Sonali Desai have filed separate motions to dismiss the counterclaims asserted by defendants in this action pursuant to CPLR 3211(a)(7).

Defendants oppose the motion and cross-move for leave to file and serve a second amended verified answer with counterclaims pursuant to CPLR 3025(b).

In motion sequence 004, plaintiffs move for an order: 1) pursuant to CPLR 3212 granting summary judgment against defendants on the first cause of action of the verified complaint on an account stated; and 2) severing the second cause of action for breach of contract from the remainder of the action and permitting plaintiffs to enter judgments on the first cause of action and proceed to collection. Defendants oppose the motion.

Background

The complaint alleges that the plaintiffs entered into an agreement with defendants pursuant to which defendants would provide loose diamonds and other gemstones (the "diamonds"), and plaintiffs would manufacture finished jewelry by setting the diamonds in gold provided by plaintiffs. Pursuant to this alleged agreement, defendants would be responsible to pay for 20% of the total gold price as a fee, and defendants would be required to advance 100% of the cost of the gold.

Plaintiffs allege that they provided goods and services pursuant to the agreement and mailed invoices totaling $316,279.75 to defendants between 2010 and 2013. Plaintiffs contend that defendants never objected to the invoices.

Plaintiffs commenced the instant action alleging causes of action for breach of contract and an account stated.

Motions to Dismiss (Mot. Seq. 003 and 006)

Plaintiffs and the counterclaim defendants move to dismiss defendants' counterclaims on several grounds, including failure to state a cause of action, lack of specificity, and duplication of claims. Defendants oppose the motion and cross-move for leave to amend the answer and counterclaims.

The proposed second amended verified answer asserts counterclaims for breach of contract (first counterclaim); fraudulent misrepresentation (second counterclaim); conversion (third counterclaim); equitable accounting (fourth counterclaim); breach of fiduciary duty (fifth counterclaim); unjust enrichment (sixth counterclaim); tortious interference with business relations (seventh counterclaim); slander (eighth counterclaim); and declaratory judgment and equitable relief (ninth counterclaim).

At the outset, the Court notes that plaintiffs are not moving to dismiss the first counterclaim alleging breach of contract. Plaintiffs contend that several of the counterclaims are duplicative of the first counterclaim for breach of contract.

The first counterclaim (breach of contract) alleges that there was a valid agreement between defendant Chandra and the plaintiffs and the named

counterclaim defendants (Second Amended Verified Answer with Counterclaims, p. 18, para. 112). Defendant alleges that the plaintiffs and counterclaim defendants breached the agreement by:

- Failing to manufacture the loose diamonds provided by Chandra into finished jewelry;
- Failing to provide Chandra with any finished jewelry;
- Failing to provide Chandra with any portion of the proceeds from plaintiffs and the named counterclaim defendants' unauthorized sale of finished jewelry to defendant Chandra's customers that contained diamonds provided by defendant Chandra;
- Failing to return diamonds provided to plaintiffs and the named counterclaim defendants on consignment that were not manufactured into finished jewelry; and
- Failing to accurately account for the diamonds.

(Second Amended Verified Answer with Counterclaims, pp. 18-19, para. 114).

The counterclaim sounding in breach of contract seeks damages in the amount of $750,000.

Having set forth the specific allegations in defendants' first counterclaim alleging breach of contract, we are ready to address plaintiffs' contentions as to why the rest of defendants' counterclaims should be dismissed.

Under CPLR 3211(a)(7), the task of the Court is to examine a complaint in order to determine whether the complaint pleads a viable cause of action. It is

well settled that the Court must construe the complaint liberally in favor of plaintiff, accepting the facts alleged as true, and will determine whether the facts fit within any cognizable legal theory (see, for example, Sonne v. Board of Trustees of Village of Suffern, 67 A.D.3d 192 [2d Dept., 2009]). The plaintiff must be given every favorable inference that may be drawn from the facts (see Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 [1995]).

If the facts show that the plaintiff may be entitled to relief, the court's inquiry is over, and it must declare the complaint legally sufficient (id.). Ultimately, the test is whether the complaint, as corrected, gives adequate notice to the court and to defendant of the transactions or occurrences intended to be proved (cf. Sargiss v. Magarelli, 12 N.Y.3d 527 [2009]). Further, any additional facts submitted by plaintiff in its opposing affidavits will be accepted as true, to the extent that they correct any defects in the complaint (Mathurin v. Lost & Found Recovery, LLC, 65 A.D.3d 617 [2d Dept., 2009] (the amended complaint, supplemented by plaintiff's affidavit, stated a cause of action)).

Fraud

The second counterclaim alleges fraudulent misrepresentation.

The elements of a cause of action for fraudulent inducement are: 1) a false representation of material fact; 2) known by the utterer to be untrue; 3) made with

the intention of inducing reliance and forebearance from further inquiry; 4) that is justifiably relied upon; and results in damages (Urstadt Biddle Properties, Inc. v. Excelsior Realty Corp., 65 A.D.3d 1135, 1136-7 [2d Dept., 2009]); MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC, 32 Misc.3d 758, 773 [Sup. Ct., N.Y. County, 2011]).

Defendants' counterclaim sounding in fraud in the inducement is set forth at paragraphs 117 through 125 of the second amended verified answer with counterclaims. There, defendants allege that plaintiffs falsely represented to Chandra that, after receiving the diamonds, plaintiffs would manufacture jewelry and return it to Chandra; plaintiffs knew that such representations were false at the time they were made as they never had any intention of returning the loose diamonds to defendant Chandra as manufactured finished jewelry; such false representations were made in order to deceive defendant Chandra into providing them with the diamonds; defendant Chandra believed that the representations were true and acted in reliance on them in good faith and provided the diamonds to plaintiffs; there was no way defendant Chandra could have known that it would be deceived by plaintiffs; defendant Chandra was deceived as a result of its reliance on the misrepresentations; and Chandra suffered damages.

In short, the Court finds that the allegations state all of the elements of a

cause of action for fraudulent misrepresentation to satisfy CPLR 3211(a)(7), and the allegations are set out with sufficient particularity to satisfy the requirements of CPLR 3016(b).

Plaintiffs contend that the fraud counterclaim is duplicative of the first counterclaim for breach of contract.

A contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to honor its promise under a contract (Bronx Store Equip. Co. v. Westbury Brooklyn Assoc., 280 A.D.2d 352, 352 [1st Dept., 2001]). To constitute a valid fraud claim when the fraud cause of action is joined with one for breach of contract, a plaintiff must plead specific facts that tend to show that defendant knowingly misrepresented, or failed to disclose, material information collateral to the contract with the intent of deceiving plaintiff and inducing the agreement (see Schulman v. Greenwich Associates, LLC, 52 A.D.3d 234 [1st Dept., 2008]). Accordingly, where plaintiff alleges that it was induced to enter into a contract based on defendant's promise to perform and that defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the contract, such a promise constitutes a misrepresentation of present fact collateral to the terms of the contract and is actionable as fraud (see, for example, L&L Auto Distributors and

Suppliers Inc. v. Auto Collection, Inc., 23 Misc.3d 1139(A) [Sup. Ct., 2009]).

Defendant Dilip a/k/a Philip Mewani states in a sworn affidavit that plaintiffs entered into the contract with the intention of not meeting their obligations thereunder. Further, he contends that plaintiffs intentionally lied and made material misrepresentations of facts for the purpose of obtaining the diamonds and absconding with them.

Unlike the first cause of action for breach of contract, the second cause of action alleges that plaintiffs had no intention of performing, made misrepresentations, and lied. Because the allegations are entirely different, the second cause of action is not duplicative.

Conversion

We turn next to the third counterclaim sounding in conversion.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over property belonging to someone else, interfering with that person's right of possession" (Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 49-50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (id.) (internal citations omitted).

Defendants' counterclaim sounding in conversion is set forth in paragraphs 126 through 132 of the second amended verified answer with counterclaims. There, defendants allege that defendant Chandra entrusted plaintiffs with diamonds to be manufactured into finished jewelry and, thereafter, return the diamonds to Chandra; plaintiffs had no intention of returning the diamonds to Chandra, either as finished jewelry or otherwise; plaintiffs intentionally misrepresented to Chandra that it would return the diamonds as manufactured so as to obtain possession; and plaintiffs converted the diamonds, selling them solely for their own profit. Defendants seek damages in the amount of $750,000 on their conversion claim.

Plaintiffs' contend that the conversion claim is duplicative of the claim for breach of contract.

The opinion of the First Department in Rossetti v. Ambulatory Surgery Center of Brooklyn, LLC, 125 A.D.3d 548 [1st Dept., 2015], is instructive. An employee who was allegedly induced to make a loan to the medical center that employed him as director as a result of misrepresentation made by the center's owners filed suit to recover on fraudulent inducement and other theories, including breach of contract and conversion. The First Department held that although the allegations in the complaint stated a cause of action for fraudulent inducement, the

causes of action alleging breach of the implied covenant of good faith and fair dealing and conversion were based on the same allegations as underlie the breach of contract claims and had to be dismissed as duplicative.

Likewise, in Fesseha v. TD Waterhouse Investor Services, Inc., 305 A.D.2d 268 [1st Dept., 2003], the Court wrote:

> Plaintiff's cause of action for conversion was properly dismissed. A cause of action for conversion cannot be predicated on a mere breach of contract. Here, plaintiff's conversion claim alleged no independent facts sufficient to give rise to tort liability and, thus, was nothing more than a restatement of his breach of contract claim.

(Fesseha, 305 A.D.2d at 269)(internal citations and quotation marks omitted).

For similar reasons, we find that the counterclaim for conversion in the instant action must be dismissed.

Equitable Accounting

Defendants' fourth counterclaim (equitable accounting) is set forth in paragraphs 133-140 of the second amended verified answer with counterclaims. Defendants allege that a confidential and fiduciary relationship exists between the parties; such a relationship arose as a result of defendant entrusting the plaintiffs with diamonds based on plaintiffs' representation that they had knowledge and resources to manufacture defendant's diamonds into jewelry quickly because plaintiffs operated a factory in Surat, India which could handle such

manufacturing; defendant Chandra, which functions principally as a wholesaler, deferred to the plaintiffs' superior knowledge and experience in complex jewelry manufacturing and a confidential and fiduciary relationship resulted; the vast majority of the diamonds have not been returned to defendant as jewelry or otherwise; defendant has demanded that plaintiffs provide them an accounting but they have refused to do so; and there is no adequate remedy at law.

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge (Roni LLC v. Arfa, 18 N.Y.3d 846 [2011]). An arm's length business relationship does not give rise to a fiduciary relationship (Northeast Gen. Corp. v. Wellington Adv., 82 N.Y.2d 158 [1993]). In general, where parties have entered into a contract, a court will look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 [2005]).

In the first counterclaim alleging breach of contract, defendants allege that the parties entered into an agreement whereby defendants would provide diamonds to the plaintiffs, and plaintiffs would use the diamonds to manufacture jewelry. A manufacturing agreement based on a consignment of raw materials of this nature is a quintessential arm's length business transaction involving sophisticated

business people. It is important to note that the alleged written agreement does not expressly state that plaintiffs possess superior knowledge. Although defendant Mewani contends in a sworn affidavit that plaintiffs possess superior knowledge and experience in jewelry manufacturing, Mewani concedes in a footnote, "Defendant Chandra does perform some manufacturing in the United States but nothing on the scale and complexity purportedly performed by the [plaintiffs and counterclaim defendants] in Surat, India" (NYSCEF Doc. No. 182, p. 7, para. 17, footnote 4).

Based on the above facts, this Court finds that defendants' have failed to state facts sufficient to show the existence of a fiduciary relationship. Accordingly, the fourth counterclaim fails to state a cause of action for equitable accounting.

Breach of Fiduciary Duty

Defendants' fifth counterclaim asserting a cause of action for breach of fiduciary duty is set forth at paragraphs 141-152 of the second amended answer with counterclaims.

The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary relationship; 2) misconduct that induced the plaintiff to engage in the transaction in question; and 3) damages directly caused by that

misconduct (Barrett v. Freifeld, 64 A.D.3d 736, 739 [2d Dept., 2009]).

No claim for breach of fiduciary duty exists when it is based on the same facts and theories as a breach of contract claim (Brooks v. Key Trust Co. Natl. Assn., 26 A.D.3d 628 [3d Dept., 2006]). In order to be actionable, a cause of action for breach of fiduciary duty must be separate, distinct and independent of the contract itself (Kassover v. Prism Venture Partners, LLC, 53 A.D.3d 444 [1st Dept., 2008]). A fiduciary relationship cannot be found to exist if the complaint only alleges an arm's-length business relationship involving sophisticated business people (Troy v. Slawski, 2009 WL 4026772 [N.Y. Sup., 2009]).

The Court finds that the cause of action alleging breach of fiduciary duty is duplicative of the breach of contract cause of action, since the claims are based on the same facts and seek identical damages (Canzona v. Atanasio, 118 A.D.3d 841, 843 [2d Dept., 2014]). Accordingly, the fifth counterclaim must be dismissed with prejudice.

Unjust Enrichment

Defendants' sixth counterclaim asserting a cause of action for unjust enrichment is set forth at paragraphs 153-159 of the second amended verified answer with counterclaims. Defendants allege that defendant Chandra provided diamonds to plaintiffs; defendant has not been compensated; the diamonds have

not been returned; equity requires that plaintiffs provide appropriate compensation; plaintiffs have been unjustly enriched; and defendant is entitled to recover the sum of $750,000 from the plaintiffs and/or the counterclaim defendants.

"The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (GFRE, Inc. v. U.S. Bank, N.A., 130 A.D.3d 569, 570 [2d Dept., 2015]) (internal quotation marks and citation omitted).

An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 790 [2012]; (El-Nahal v. FA Management, Inc., 126 A.D.3d 667 [2d Dept., 2015]).

Here, the cause of action for unjust enrichment is based on the same underlying facts as the cause of action for breach of contract and seeks the same amount of damages. Accordingly, the Court finds that the unjust enrichment claim is duplicative and must be dismissed with prejudice.

Tortious Interference With Contractual Relations

Defendants' seventh counterclaim asserting a cause of action for tortious

interference with existing and prospective business relations is set forth at paragraphs 160-169 of the second amended verified answer with counterclaims. Defendants alleges that plaintiffs knew that defendant Chandra had relations with companies that were members of the Jewelers Board of Trade ("JBT") and also relied on JBT to develop new business relationships; plaintiffs knew that the filing its frivolous claim would result in the claim subsequently being reported in the claim report issued by JBT and also listed on the credit report prepared by JBT; plaintiffs knew that being listed on such reports would interfere with defendant Chandra's business relations; plaintiffs' sole purpose in filing the claim was to harm defendant Chandra; plaintiffs' knew that it was false; defendant Chandra's business relations were injured; JBT members GM Diamond, LowCost Jewelry, and Belgium Diamonds stopped doing business with defendant Chandra and JBT member Paramount Gems drastically reduced the amount of business which it does with defendant Chandra and eventually ceased all business with Chandra; defendant Chandra has been precluded from doing business with JBT member AV Diamonds, a prospective client and JBT member that refused to do business with Chandra upon learning of the claim through the JBT claim report; and the filing of the claim was the proximate cause of damages.

The essential elements of a cause of action for tortious interference with an

existing contract are: 1) a valid contract with a third party; 2) the defendant's knowledge of that contract; 3) interference with the agreement that causes a breach; 4) such interference was intentional and improper; and 5) damages (Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 [1996]; see also Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 [1993]).

It is axiomatic that if there is no valid existing contract, there can be no breach of an existing contract that may give rise to interference with contractual relations (see Jim Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 A.D.3d 1094 [4th Dept., 2005]). Plaintiff must also "allege that the contract would not have been breached 'but for' the defendant's conduct" (Burrowes v. Combs, 25 AD3d 370, 373 [1st Dept. 2006]) (internal citations omitted).

Here, defendants fail to allege the existence of any contract that has been breached. Accordingly, defendants have failed to allege a key element of a cause of action for tortious interference with existing business relations.

Under New York law, a separate and more demanding set of elements apply to claims for interference with pre-contractual or prospective economic advantage. The essential elements of a cause of action for tortious interference with prospective contractual relations are "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the

defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 [1st Dept., 2009]).

Here, the defendants have failed to allege wrongful conduct. As the Court of Appeals explained in Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189 [2004]:

> [T]he degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.

The interference employed by defendants must be by wrongful means or with malicious intent. "Wrongful means include physical violence, fraud or misrepresentation" (Id. at 191). "Extreme and unfair economic pressure" may amount to wrongful means (Id. at 192-3). The allegations in the counterclaim fail to meet these standards.

Defamation is among the wrongful acts that may constitute wrongful means (Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 [1st Dept., 2009],

leave to appeal dismissed in part, denied in part, 14 N.Y.3d 736 [2010] ("defamation is a predicate wrongful act for a tortious interference claim"); Butler v. Delaware Otsego Corp., 218 A.D.2d 357 [3d Dept., 1996]; but see J.M. Builders & Associates, Inc. v. Lindner, 67 A.D.3d 738 [2d Dept., 2009] (complaint failed to plead that the defendants' actions were motivated solely by malice where it alleged that defendants' interfered with plaintiff's business and contract rights by "badmouthing" plaintiff).

Here, the counterclaim fails to allege that plaintiffs acted with malicious intent. Accordingly, the counterclaim fails to allege an essential element of a cause of action for tortious interference with prospective business relations.

Slander

The cause of action for slander is set forth at paragraphs 170-186 of the second amended verified answer with counterclaims. Defendants allege that in or about November 2013, counterclaim defendant Pankaj Desai approached defendant Mewani's brother-in-law Tony Kheskwani on a bus between New York and New Jersey and falsely advised him that defendant Chandra "wasn't paying the invoices" and further falsely advised Mr. Kheskwani that defendant Mewani was "running away with everyone's money"; Pankaj Desai was accompanied by another man whose identity is unknown; the statement was false and was known

by plaintiffs to be false; in or about December 2013, defendant Pankaj Desai approached defendant Mewani's father at the Palisades Mall and told him that "Philip [defendant Mewani] owes him money" and that "Philip [defendant Mewani] has taken money from other people and was not paying"; in or about December 2013 Pankaj Desai went to defendant Chandra's office in Englewood Clifffs, New Jersey and approached defendant Chandra's secretary Marilyn Lalusin and falsely advised her that "Philip [defendant Mewani] owes me three years of payments" and also told Ms. Lalusin that he was "going to commit suicide" but she should "not tell Philip that he was going to do that [commit suicide]; in or about January 2013, Pankaj Desai went to defendant Chandra's office and approached defendant Chandra's secretary Jill Gonzalez and falsely advised her that "Philip [defendant Mewani] owes him payment for the past three years" and also told Ms. Gonzelez and that he "is starting to think of suicide"; in or about February 2014, Jawahar Rupani, employee of plaintiffs and the counterclaim defendants, approached Mr. Arjan and Mr. Sunal, who are prominent members of the New Jersey Indian community, and falsely advised them that "Philip was running away with people's money."

The elements of a cause of action for commercial defamation are: 1) a false and defamatory statement of fact, that is not protected as an expression of opinion;

2) of or concerning an existing business; 3) that is published to a third party with the requisite degree of fault; and 4) that is the proximate cause of damage to the reputation of that business (see, e.g., Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235 [1991]). The actual defamatory statements must be set forth in the complaint with particularity (CPLR 3016(a)). Accordingly, a complaint must allege not only the actual statements, but also the persons, dates, times and places (Bell v. Alden Owners, 299 A.D.2d 207, 208 [1st Dept., 2002]). Allegations that would tend to injure a plaintiff in his or her trade, business or profession are considered defamatory per se (Liberman v. Gelstein, 80 N.Y.2d 429 [1992]).

Here, the allegedly defamatory statements are a direct attack on the corporation's management. Accordingly, the Court finds that defendant sets forth the elements of a cause of action for slander with the requisite specificity.

Declaratory Judgment and Equitable Relief

Defendants' final counterclaim alleges a cause of action for declaratory judgment in paragraphs 187-190 of the second amended verified answer with counterclaims. Defendants allege that plaintiffs are required to return the diamonds to defendant Chandra; there is no adequate remedy at law; and the Court should issue a judgment declaring that plaintiffs and the named counterclaim defendants are required to return the diamonds.

Plaintiffs contend that: a) the cause of action for a declaratory judgment is duplicative of the cause of action for breach of contract; and b) such claim is unnecessary as money damages would provide an adequate remedy at law.

In response, defendants contend that, absent a declaration that Chandra is entitled to return of the diamonds, it will have no adequate remedy at it will have no way of getting back the diamonds it entrusted to plaintiffs. Defendants contend further that, if the plaintiffs have rendered themselves judgment-proof, the return of the diamonds may be the only practical way that defendants can recover even a portion of their due compensation in this matter.

At its core, the instant matter is an action for breach of contract for which monetary damages are generally an adequate remedy. As such, the Court finds that the cause of action for a declaratory judgment is redundant, duplicative and must be dismissed.

Motion to Dismiss of the Counterclaim Defendants

The counterclaim defendants argue that all of the counterclaims against the individual defendants – namely, Pankaj, Maulesh, and Nitish Desai (the "Sonali brothers") and Sonali Desai – should be dismissed because defendants fail to state a claim to pierce the plaintiff corporations' veils.

Defendants raise two arguments in opposition. First, defendants contend

that personal liability on the part of the Sonali brothers exists irrespective of any theory based on piercing the corporate veil. Second, defendants assert that the allegations in the second amended verified answer and counterclaims are sufficient to state a claim for piercing the corporate veil.

Paragraph 55 of the second amended verified answer with counterclaims alleges that during the summer of 2010, defendant Mewani met with Pankaj and Maulesh Desai several times to discuss the terms of the prospective agreement. Defendants allege that Sonali Desai was present, participated, and showed jewelry samples at the meetings.

Paragraphs 57 and 58 of the second amended verified answer with counterclaims alleges that Pankaj and Maulesh Desai executed the agreement in their individual capacity, as well as on behalf of Nitish Desai, who was not present to execute the agreement because his primary residence is in India.

The Court has examined the written contract carefully (NYSCEF Doc. No. 153). The disorganized contract consists of handwritten notations and some printed words and phrases. The names of the contracting parties are not set forth in handwriting nor in print. Indeed, the word "corporation" does not appear anywhere on the face of the contract. Signatures appear, but it is unclear whether the individuals signed the agreement in their individual capacity, in their corporate

capacity, or both.

Based on the Court's analysis of the documentary evidence and defendants' allegations, the Court finds that defendants sufficiently state a claim against the counterclaim defendants in their individual capacity.

Next, we turn to the issue of whether defendant has stated a sufficient basis for piercing the corporate veil.

As a general rule, courts will permit piercing sufficient to impose liability on the corporate owners upon a showing that: 1) the owner's exercised complete domination of the corporation; and 2) the owner's domination of the corporation was used to commit a fraud or wrong against plaintiff that injured plaintiff (TNS Holdings v. MKI Sec. Corp., 92 N.Y.2d 335 [1998]). Factors to be considered in determining whether the corporation's owners have abused the privilege of doing business in the corporate form include: 1) a failure to adhere to corporate formalities; 2) inadequate capitalization; 3) a commingling of assets; and 4) application of corporate funds for personal use (East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 66 A.D.3d 122 [2d Dept., 2009]).

Defendants allege that neither any of the plaintiffs nor the counterclaim defendant Tapti Imports follow any corporate formalities required by law; there is a commingling of accounts by and between plaintiffs, Tapti Imports, and the Desai

counterclaim defendants; the Desai counterclaim defendants are alter egos of plaintiffs and Tapti Imports; the Desai counterclaim defendants have dominated plaintiffs and Tapti Imports; and the "corporate shields" of the plaintiffs and counterclaim defendant Tapti Imports are fictions designed to shield the malfeasant activities of the named counterclaim defendants (Second Amended Verified Answer with Counterclaims, p. 5, paras. 43-47).

In short, the Court finds that allegations are sufficient to survive a motion to dismiss.

Cross-Motion to Amend the Answer and Counterclaims

CPLR 3025(b) provides that leave to amend shall be freely granted.

"While it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions" (Heller v Louis Provenzano, Inc., 303 AD2d 20, 22 [1st Dept 2003]). Plaintiff must show that the proffered amendment is not palpably insufficient or clearly devoid of merit (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010]).

In short, it is clear to the Court that the granting of defendants' motion for leave to amend will not result in any prejudice or surprise. Accordingly, it will be

granted.

Plaintiffs' Motion for Summary Judgment (Mot. Seq. 004)

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v. Twentieth Century-Fox Film

Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (Branch Services, Inc v. Cooper, 102 A.D.3d 645, 646 [2d Dept., 2013] (internal quotation marks omitted)). It is well settled that the receipt and retention of an invoice without objection within a reasonable period of time may give rise to an account stated claim (Werner v. Nelkin, 206 A.D.2d 422 [2d Dept., 1994]); Rockefeller Group, Inc. v. Edwards & Hjorth, 164 A.D.2d 830 [ast Dept., 1990]).

"A claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., 95 A.D.3d 434, 438 [1st Dept., 2012]); see also Simplex Grinnell v. Ultimate Realty, LLC, 38 A.D.3d 600 [2d Dept., 2007]). "Allegedly unfulfilled contractual conditions precedent to a defendant's payment obligation negate any inference of an implied agreement by the defendant that the amounts claimed in plaintiff's invoices were then due, and preclude the existence of an account stated" (id.).

Plaintiffs exhibit the sworn affidavit of Maulesh Desai, who states that he is a 50% owner of plaintiff Jash Diamonds, Inc., and a 50% owner of plaintiff Sonali

Enterprises, Inc. He contends that Jash Diamonds, Inc., and counterclaim defendants Tapti Imports, Inc., Sonali Enterprises, Inc., and Tapti Diamonds PVT Ltd. (collectively, the "Jash parties") provided all of the goods and services requested by defendants, but defendants have failed to pay the amounts due for the goods and services provided to them by the Jash parties. Mr. Desai states that defendants made some payments against the balance that was due and owing by them to the Jash parties, and their account was credited for those payments, as well as for returns and other discounts and credits agreed to by the parties. Specifically, he contends that $263,688.05 was credited by the Jash parties against the total amount that was invoiced to defendants, leaving a balance due of $316,279.75. Further, Mr. Desai asserts that defendants received and retained the invoices and statements of account from the Jash parties, and defendants never objected to the invoices or the statements of account. In addition, Mr. Desai contends that, in response to emails from the Jash parties demanding payment, defendant Dilip Mewani sent emails to the Jash parties that acknowledged that defendants were behind with payment and provided assurances that defendants would pay what was owed, offering as an excuse for their late payment that business had been slow.

In opposition, defendants exhibit the sworn affidavit of defendant Dilip

Mewani, who states that he is the sole owner of co-defendant Diamond Marquise d/b/a Chandra Corporation. Mr. Mewani asserts that the Jash parties double billed defendant Chandra for gold and labor and that the charges in the invoices are inaccurate and inflated based on the fact that the gold and labor being charged to defendant Chandra were far higher than those being charged to Chandra's client, Diamond Fort Street, Ltd.

Mr. Mewani asserts that defendant Chandra repeatedly objected to the invoices and statements of account. He contends that, except for the meeting at which they signed the contract in or about September 2010, he seldom met with Maulesh Desai. Mr. Mewani asserts that he sent repeated emails and engaged in numerous telephone conferences with Pankaj Desai about the invoices and problems with their business relationship in general. Mr. Mewani argues that the sworn affidavit of Maulesh Desai is of no probative value and should be disregarded as Maulesh Desai has no personal knowledge of the communication which Mr. Mewani had with Pankaj Desai. Finally. Mr. Mewani contends that plaintiffs could not interpose an affidavit from Pankaj Desai in support of their motion as Pankaj Desai would not be able to truthfully state that there had been no objections to the invoices and statements of account.

In short, the Court finds that the sworn affidavit of Mr. Mewani is sufficient

to show the existence of a genuine issue of material fact regarding whether defendants ever objected to the invoices and statements of account.

Accordingly, it is

ORDERED, that the motions to dismiss are granted, and the third, fourth, fifth, sixth, seventh, and ninth counterclaims of the second amended verified answer with counterclaims are dismissed; and it is further

ORDERED that defendants' cross-motion for leave to amend the first amended verified answer with counterclaims is granted, and defendants are granted leave to file and serve a second amended verified answer with counterclaims; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

Date: March 24, 2016
New York, New York

Anil C. Singh