

**Kahn v Leo Schachter Diamonds, LLC**

2016 NY Slip Op 33220(U)

November 18, 2016

Supreme Court, New York County

Docket Number: Index No. 654542/12

Judge: Anil C. Singh

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

PRESENT: Hon. Anil C. Sinsh  
Justice

PART 45

Index Number : 654542/2012  
KAHN, RICHARD  
vs.  
LEO SCHACHTER DIAMONDS, L.L.C.  
SEQUENCE NUMBER : 006  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 11/18/16

ACS, 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 45

-----X  
RICHARD KAHN,

Plaintiff,

-against-

LEO SCHACHTER DIAMONDS, LLC,  
LEO SCHACHTER DIAMONDS LTD.,

Defendants.  
-----X

Index No. 654542/12

DECISION AND ORDER  
Motion Sequence No. 006

**HON. ANIL C. SINGH, J.:**

This action was filed on December 27, 2012 by plaintiff Richard Kahn (“Kahn” or “plaintiff”) to recover compensation for his alleged work in introducing and selling defendants’ diamond products in Brazil and other South American and Central American countries. Leo Schachter Diamonds, LLC (“LSD NY”) and Leo Schachter Diamonds, Ltd (“LSD Israel,” with LSD NY, “Defendants” and together with Plaintiff, the “Parties”) move for summary judgment pursuant to CPLR § 3212(b). Plaintiff opposes.

**Background**

It is alleged by plaintiff that he and Elliot Tannenbaum (“Tannenbaum”), the “managing member of defendants” met in March 2011 about doing business together. Compl. ¶ 14. Plaintiff allegedly began consulting for defendants in April 2011, and devoted substantial time and effort on defendants’ behalf through May

2012. He made several trips to Brazil and introduced defendants' representatives to his contacts, including MG Gold. Plaintiff alleges that this relationship with MG Gold allowed defendant to ship their merchandise to MG Gold's facility in Manaus, which is a duty free region in Brazil. Plaintiff contends that it is this relationship that gave defendant access to the marketplace and a competitive advantage over other competitors. In May 2012, defendants terminated their relationship with plaintiff. Plaintiff claims that he has not been fully compensated by defendants. See id. ¶ 21-32.

The complaint asserts the following seven cause of action against the defendants: (i) failure to pay sales commissions in violation of New York Labor Law § 191-c (Count 1); (ii) breach of contract for failure to pay, pre-termination, "2% gross on all sales in Brazil, Argentina, and other Central and South American territories for which plaintiff introduced clients for defendants" ("the 2% Commission") (Compl. ¶ 47) (Count 2); (iii) breach of contract for failure to pay the 2% Commission post-termination (Count 3); (iv) declaratory judgment that defendants own plaintiff the 2% Commission for five years following his termination (Count 4); (v) unjust enrichment (Count 5); (vi) an accounting (Count 6); and (vii) fraud (Count 7). Counts 1 (Labor Law) and Count 7 (fraud) were subsequently dismissed by this Court.

The original complaint also alleged the parties agreed that plaintiff would be “a partner in the Brazil Partnership” (Compl. ¶ 17), and that plaintiff would own a “15% interest” in any partnership or joint venture that defendants developed in South and Central America. Compl. ¶ 18. In the decision and order dated July 5, 2016, this court rejected plaintiff’s argument and held that “there was no agreement between plaintiff and defendants with respect to the 15% long term interest.” Kahn v. Leo Schachter Diamonds, LLC, index no. 654542/2012 (Sup. Ct. N.Y. Cnty. Jul. 5, 2016).

Defendant asserts two counterclaims in their Memorandum of Law, one for breach of contract and one for conversion. These claims are based on an alleged agreement between the parties in which plaintiff allegedly agreed to travel to Brazil to retrieve certain diamonds in exchange for payment.

### **Analysis**

#### Legal Standard

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. See 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. See 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. See 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).

Defendant’s Motion for Summary Judgment on Plaintiff’s Second Cause of Action for Breach of Contract

The crux of defendant’s motion centers around two alleged agreements. The first was an agreement between plaintiff and defendant wherein plaintiff would assist in building a marketplace for defendant’s diamonds in Brazil through sales. Plaintiff was allegedly to be compensated in the amount of 2% commissions on the gross of South American sales together with a \$10,000 per month salary<sup>1</sup> (the “short term

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<sup>1</sup> The parties dispute whether there was a threshold amount that needed to be exceeded in order for plaintiff to earn the 2% commission for two accounts that preceded this agreement. These accounts were the Amsterdam Sauer and Sarajoias accounts.

upside”). In the second alleged agreement, plaintiff was to create an infrastructure by creating a partnership between defendant and a Brazilian company that would provide tax exemptions for all diamond related imports (the “long term upside”). Plaintiff believes that for this work he would receive 15% profit participation in defendant’s Brazilian platform.

### *The Long Term Upside Agreement*

This court has already decided all issues relating to the long term upside agreement. In this court’s decision and order dated July 5, 2016, this court held

It is clear from the evidence that there was no agreement between plaintiff and defendants with respect to the 15% long term interest. Plaintiff’s own email acknowledges that the relevance of the 15% interest is at least one year away, and that both parties agreed to table the issue until a later date. See Ex. 19, Email Correspondence, at LSD00001046-47. Plaintiff also wrote that “I’ve already offered powerful compromises from my Side [sic] (forgetting about 15% partnership and security of long term contract).” Ex. 20, Email Correspondence, at LSD00002012.... Plaintiff has failed to raise a triable issue of fact as to whether there was an agreement between the parties regarding the 15% interest.

Kahn v. Leo Schachter Diamonds, LLC, index no. 654542/2012 (Sup. Ct. N.Y. Cnty.

Jul. 5, 2016). As this court has already held that plaintiff does not have a plausible cause of action regarding the long term upside agreement, defendant’s motion for summary judgment relating to this agreement is granted.

### *The Short Term Upside Agreement*

Defendants motion for summary judgment on plaintiff’s second cause of action for breach of contract is denied. The elements of a breach of contract are

formation of a valid contract, a breach, performance and damages resulting from the breach. See Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426 (1st Dept 2010); Kowalchuk v. Stroup, 61 A.D.3d 118 (1st Dept 2009). The parties agree that there was a Short Term Agreement. See Plaintiff's Opp. Memo., p. 5; Defendant's Memo. in Support, p.10-11. Therefore, there was a sufficient meeting of the minds sufficient to give rise to an enforceable and binding contract regarding the Short Term Agreement. See e.g. Silber v. New York Life Ins. Co., 92 A.D.3d 436 (1st Dept 2012); see e.g. Richbell Info. Servs., Inc. v. Jupiter Partners, LP, 309 A.D.2d 288 (1st Dept 2003).

Defendant argues that the contract is clear and unambiguous. A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v. Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573 (1986). Usually, the construction of an ambiguous contract is a matter for the fact finder and summary judgment is inappropriate. China Privatization Fund (Del), L.P. v. Galaxy Entertainment Group Ltd., 95 A.D.3d 769, 770 (1st Dept 2012).

Where determination of the parties' intent depends on items such as credibility and/or extrinsic evidence of the parties' intent, then construction is for the trier of

fact and not to be determined in the context of a pre-trial motion. Amusement Bus. Underwriters v. American Intl. Group, 66 N.Y.2d 878, 880-881 (1985); Noho Light. & Elec. Supply Co. v. Simon, 45 A.D.3d 391, 392 (1st Dept 2007).

Contrary to defendant's argument, there is an ambiguity in the Short Term Agreement between the parties regarding commissions. Plaintiff contends that the original Short Term Agreement was for \$10,000 per month plus an additional 2% commission of all the South American gross income. See Plaintiff's Memo. in Opp., p. 9; Kahn Aff. ¶56. Plaintiff allegedly agreed to modify this agreement<sup>2</sup> to include a reduced monthly draw and to only receive a commission on gross sales in excess of \$300,000 for two of defendant's pre-existing customers, Amsterdam Sauer and Sarajoais. Kahn Aff. ¶62. Plaintiff alleges that this modification was only in effect for 2011 and the parties would revert to the original Short Term Agreement beginning in 2012. Id.

Although the parties agree that the modified Short Term Agreement was in effect until January 1, 2012, defendants contend this modification was not temporary and that the parties agreed that the commission was only to be paid if the gross sales for Amsterdam Sauer and Sarajoais exceeded \$300,000. See Defendant's Reply Memo, p. 3 n. 6. Although defendant is correct that "when an agreement expires by

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<sup>2</sup> Both parties refer to multiple modifications to the Short Term Agreement. The end result of these modifications is that plaintiff accepted less money on a monthly basis and agreed to only take a commission over the \$300,000 threshold for Amsterdam Sauer and Sarajoais. The issue is whether this modification extended into 2012.

its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old”, this presumption is inappropriate at the summary judgment phase and is a matter for trial. N. Am. Hyperbaric Ctr. V. City of N.Y., 198 A.D.2d 148, 149 (1st Dept 1993); see also China Privatization Fund, 95 A.D.3d at 770.

As there is an ambiguity as to whether plaintiff is entitled to its commission for all gross sales in South America from January 2012 until plaintiff’s termination, defendant’s motion for summary judgment is denied.

Defendant’s Motion for Summary Judgment on Plaintiff’s Third and Fourth Causes of Action for a Declaratory Judgment and Damages for Post-Termination Commissions

Defendant’s motion for summary judgment on plaintiff’s third and fourth causes of action is granted. Plaintiff alleges in its third cause of action that defendant breached its agreement to pay plaintiff 2% gross on all sales in the Central and South American territories for a period of five years after plaintiff’s termination. See Compl. ¶¶50-53. In its fourth cause of action, plaintiff seeks a declaratory judgment that defendant’s owe plaintiff 2% gross on all sales in the Central and South American territories. See Compl. ¶54-55. As these causes of action are related, they have been consolidated for purposes of this decision.

The court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable

controversy whether or not further relief is or could be claimed.” CPLR §3001. In its complaint, plaintiff alleges that there was an agreement between the parties that if the plaintiff was terminated for any reason, plaintiff would receive 2% commissions on all gross sales for five years for all Brazilian and Argentinian clients. See Compl. ¶31. However, in its moving papers, plaintiff concedes there was never any separation agreement executed by the parties and that the only relevant portion of the agreement is that it “proves that the Parties had an Agreement that included a Long Term Upside for Khan.” Plaintiff’s Memo. of Law in Opp., p. 15.

Plaintiff has failed to provide any information regarding any post-termination agreement and continues to argue that there was a Long Term Agreement for a 15% interest in profits. As discussed *supra*, there is no evidence supporting this Long Term Agreement. As plaintiff admits that there was not an agreement for post-termination profits, defendant’s motion for summary judgment is granted as to the third and fourth causes of action<sup>3</sup>.

Defendant’s Motion for Summary Judgment on Plaintiff’s Fifth Cause of Action  
for Unjust Enrichment

Defendant’s motion for summary judgment of plaintiff’s fifth cause of action for unjust enrichment is denied. The basis of a claim for unjust enrichment is that

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<sup>3</sup> Defendant argues that plaintiff has abandoned its fourth cause of action on the grounds that defendant has failed to defend the claim. See Ass’n of Secretaries v. Office of Court Admin., 151 A.D.2d 420, 421 (1st Dept 1989); Gary v. Flair Beverage Corp., 60 A.D.3d 413 (1st Dept 2009). However, in reading plaintiff’s reply papers as a whole, it is clear that plaintiff has not abandoned the claim, but instead argues that plaintiff is entitled to future profits based upon the Long Term Agreement. This court finds that this is not an abandonment of the claim.

the defendant has obtained a benefit which in “equity and good conscience” should be paid to the plaintiff. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011) quoting Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 (1972). However,

Unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled.

Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 791 (2012); see also Markwica v. Davis, 64 N.Y.2d 38 (1984); Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C., 15 A.D.3d 233 (2005). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382 (2005).

For the purposes of a pre-trial motion in which the court must view all of the facts in the light most favorable to the non-moving party, plaintiff has adequately established a cause of action for unjust enrichment. Where there is not a contract between the parties, a cause of action for unjust enrichment may be maintained. See IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 (2009) (unjust enrichment “is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.”); Reade v. Cardinal Health, Inc., 12 A.D.3d 224 (1st Dept 2004). Plaintiff alleges that there is an adequate claim

for unjust enrichment regarding the unpaid commission and for its right to profit participation.

Defendant argues that there is no dispute concerning the existence of a valid contract governing the relationship between the parties that provided for Kahn's salary and commissions during the term of his employment. See Defendant's Reply Memo., p. 6. However, there is an ambiguity as to whether plaintiff is entitled to a commission for all of the sales in Brazil and Argentina for 2012 or for only those sales in excess of \$300,000. See supra. Therefore, there is a question as to whether there is a valid contract governing these rights. If there is not a valid contract, defendant would be enriched by not compensating plaintiff for the commissions that plaintiff is allegedly entitled to through the sales of diamonds to Amsterdam Sauer and Sarajoais. Therefore, plaintiff has pled a valid cause of action for unjust enrichment regarding its salary and commissions during the term of his employment.

This court has determined, *supra*, that there was not a contract regarding plaintiff's right to profit participation. Plaintiff has adequately pled a claim for unjust enrichment regarding defendant's profits after plaintiff's termination. Plaintiff has adequately shown that defendant has obtained a benefit. Prior to plaintiff's involvement in the Brazilian marketplace, defendant could not establish a foothold in the diamond industry in Brazil. This was due to defendant's inability to find a proper distribution partner coupled with Brazil's high import tax and strict

regulations. See Kahn Aff. Ex. E. Since plaintiff's termination, defendant has allegedly nearly doubled their business in Brazil. Id. at Ex. A. Plaintiff asserts that this boon in business was directly due to plaintiff's close personal ties with the head of MG Gold, an import/export company in Manaus, which is a tax free zone. Id. at ¶39. This allegedly gave defendant a valuable advantage over competitors in the marketplace.

Defendant's reliance on Lapine v. Seinfeld, 31 Misc.3d 726 (Sup. Ct. N.Y. Cnty 2011) is misplaced. In Lapine the court held that ideas within the public domain are not novel and therefore, according to defendant, Kahn's strategy of shipping through Manaus is not a benefit conferred on defendant as it was well known through the industry. However, here, plaintiff did more than simply suggest that defendant ship their products through Manaus. Instead, plaintiff allegedly fostered a relationship between defendant and MG Gold, which afforded defendant access to Manaus, something that defendant had been unable to achieve. Plaintiff's benefit therefore, went well beyond the idea of using the Manaus market, but brokered a deal to bring this idea to fruition. This allegedly had value to defendants and withholding this economic benefit from plaintiff would be unjust. Similarly, defendant does not offer any proof for their assertion that the Short Term Agreement incorporated the partnership with MG Gold and the shipment of diamonds into Manaus.

Defendant also argues that plaintiff's claim for unjust enrichment is barred by the Statute of Frauds. Defendant is correct that the Statute of Frauds is a defense to a claim for unjust enrichment. See Levine v. Zadro Products, Inc., 2003 WL 21344550 (S.D.N.Y. Jun. 9, 2003). The Statute of Frauds requires an agreement to be in writing and signed by the parties if "by its terms it is not to be performed within one year from the making thereof." N.Y. Gen. Oblig. Law § 5-701(a)(1). However, a party must plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading, including the Statute of Frauds. CPLR 3018(b). The Statute of Frauds is an affirmative defense, which is waived if it is not plead in the answer. See Ryan v. Kellogg Partners Institutional Services, 79 A.D.3d 447 (1st Dept 2010). Defendant has not raised the Statute of Frauds as an affirmative defense in his answer and it is therefore waived.

Therefore, defendant's motion for summary judgment on plaintiff's fifth cause of action for unjust enrichment is denied.

Defendant's Motion for Summary Judgment on Plaintiff's Sixth Cause of Action  
for an Accounting

Defendant's motion for summary judgment on plaintiff's sixth cause of action is granted. "The right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue." Town of New Windsor v. New Windsor Volunteer Ambulance Corps, Inc., 16 A.D.3d 403, 404

(2d Dept 2005); see Akkaya v Prime Time Transp., Inc., 45 A.D.3d 616 (2d Dept 2007). A fiduciary relationship arises when one is “under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” Oddo Asset Mgt. v Barclays Bank PLC, 19 N.Y.3d 584, 592-593 (2012), quoting Roni LLC v Arfa, 18 N.Y.3d 846, 848 (2011) (internal quotation marks omitted). It is “grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions.” EBC I, Inc. v Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005).

A conventional business relationship, without more, is insufficient to create a fiduciary relationship. See AHA Sales, Inc. v Creative Bath Prods., Inc., 58 A.D.3d 6, 21 (2d Dept 2008). Rather, a plaintiff must make a “showing of ‘special circumstances’ that could have transformed the parties’ business relationship to a fiduciary one, such as control by one party of the other for the good of the other.” L. Magarian & Co. v Timberland Co., 245 A.D.2d 69, 70 (1st Dept 1997); see AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d at 21.

Plaintiff contends that a special relationship existed between the parties such that there was a duty that ran from defendant to plaintiff. However, there is no evidence that this special relationship existed. There was never a partnership or joint venture agreement between the parties. In addition, this court has rejected plaintiff's contention that plaintiff had an agreement for a 15% profit partnership with

defendant. See supra. As a result, defendant's motion for summary judgment is granted.

Summary Judgement on Defendant's Counter-Claims for Conversion and Breach of Contract

Defendant's motion for summary judgment on its breach of contract claim is granted, while its motion for summary judgment on its conversion claim is denied. The elements of a breach of contract are formation of a valid contract, a breach, performance and damages resulting from the breach. See Harris, 79 A.D.3d 425, 426; Kowalchuk, 61 A.D.3d 118. There must be a sufficient meeting of the minds sufficient to give rise to an enforceable and binding contract. See e.g. Silber, 92 A.D.3d 436; see e.g. Richbell Info. Servs., Inc., 309 A.D.2d 288.

In order to determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s., 243 A.D.2d 1, 6 (1st Dept 1998). When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide. Ashwood Capital, 99 A.D.3d 1.

Here, there is a contract between the parties regarding the retrieval of certain diamonds from Brazil. Defendant alleges that on July 13, 2012, plaintiff offered to travel to Brazil to retrieve specific diamonds in exchange for a payment of

\$23,201.14. See Tannenbaum Aff., ex. 27. Tannenbaum replied in an email to plaintiff's email stating that "the \$15,000 you list as part of the \$23,201.14 as separation payment is something we are not obligated to pay...nevertheless as a gesture of good will and also since you are conditioning your trip to Brazil on receiving the payment, we are willing at this time to transfer this amount." Id. Plaintiff alleges that this payment was "not consideration in exchange for him to return diamonds to LSD, but as a show of good faith." Plaintiff's Memo. in Opp., p. 26. However, plaintiff conditioned the trip to Brazil on receiving the payment. The specific purpose of the trip to Brazil was to retrieve the diamonds. This trip was not merely a showing of good faith on the part of the plaintiff, but rather was payment for retrieval of the diamonds.

Plaintiff also alleges that if the court finds that there is a contract, then there could not have been a breach because the diamonds could not easily be exported. However, plaintiff is an expert in Brazil's tariff regulations and duty-free zones and was told by Tannenbaum to leave the diamonds in Brazil with Jackie or Gracie Magid. See Kahn Aff ¶ 16-21; Tannenbaum Aff. ¶¶ 5-12; see also Defendant's Reply Memo., p. 14. As a result, plaintiff breached its contract by not retrieving the diamonds for defendant.

Defendant's motion for summary judgment for conversion is denied. The 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." Pappas v. Tzolis, 20 N.Y.3d 228, 234 (2012) quoting Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 50 (2006). However, "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." Mandelblatt v. Devon Stores, 132 A.D.2d 162, 167-168 (1st Dept 1987); Phipps Houses Services, Inc. v. New York Presbyterian Hosp., 139 A.D.3d 480, 481 (1st Dept 2016) (In order to have a claim for conversion, a party must breach a legal duty independent of the contract.)

Defendant's reliance on Pacific M. Int'l Corp. v. Raman Int'l Gems Ltd., 888 F.Supp.2d 385 (S.D.N.Y. 2012) is misguided. Although some of the facts are analogous to the case at hand, there is a key distinction. In Raman, the court held that summary judgment was denied as it related to the underlying contract because it was impossible to ascertain the meaning of the agreement. Id. at 395. Therefore, the court did not decide whether a conversion claim was precluded by a valid breach of contract claim. Here, this court has granted defendant's motion for summary judgment as to its breach of contract claim. See supra. As defendant's claims for conversion rests entirely on its breach of contract claim and it has not pled any facts

which breaches a legal duty independent of the contract, defendant's motion for summary judgment on the conversion claim is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment on Plaintiff's second cause of action for breach of contract is denied; and it is further

ORDERED that Defendants' motion for summary judgment on Plaintiff's third cause of action for declaratory judgment is granted; and it is further

ORDERED that Defendants' motion for summary judgment on Plaintiff's fourth cause of action for damages for post-termination commissions is granted; and it is further

ORDERED that Defendants' motion for summary judgment on Plaintiff's fifth cause of action for unjust enrichment is denied; and it is further

ORDERED that Defendants' motion for summary judgment on Plaintiff's sixth cause of action for an accounting is granted; and it is further

ORDERED that Defendants' cross-motion for summary judgment for breach of contract is granted; and it is further

ORDERED that Defendants' cross-motion for summary judgment on its claim for conversion is denied.

Date: November 18, 2016  
New York, New York

  
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Anil C. Singh