

**Chintamani USA Inc. v Roxx Alison Ltd.**

2018 NY Slip Op 30618(U)

April 9, 2018

Supreme Court, New York County

Docket Number: 159372/2016

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
CHINTAMANI USA INC.,

**DECISION/ORDER**

Plaintiff,  
  
-against-

Index No.: 159372/2016

Mot. Seq. 003

ROXX ALISON LTD.,

Defendants.

-----X  
HON. CAROL R. EDMOND, J.S.C.:

**MEMORANDUM DECISION**

In this action for, *inter alia*, goods sold and delivered, account stated, and conversion, plaintiff, Chintamani USA Inc. (Plaintiff), now moves pursuant to CPLR 3212 for summary judgment of its first and second causes of action contained in the complaint (Complaint), and in the alternative, Plaintiff further moves pursuant to CPLR 3212(e) for partial summary on its fourth cause of action.

In its first cause of action for goods sold and delivered, Plaintiff alleges that on May 23, 2016, it sold and delivered various diamonds to defendant, Roxx Aison LTD. (Defendant) at the price of \$95,600 (Compl., ¶3).<sup>1</sup> Plaintiff claims that on May 24, 2016, Defendant returned some of the diamonds for a credit of \$54,558.34, leaving an outstanding balance of \$41,041.66. Plaintiff indicates that the current outstanding balance for the diamonds retained is \$21,041.66.<sup>2</sup> Plaintiff's second cause of action alleges a claim for account stated (*see id.*, ¶5). Finally, in its fourth cause of action, Plaintiff alleges conversion of chattel (*id.*, ¶¶14-18).

<sup>1</sup> The Court notes that the parties did not enter into a written agreement concerning the initial transaction.

<sup>2</sup> On April 25, 2017, the Court granted Plaintiff's motion for partial summary judgment of its fifth cause of action (motion sequence 001) in the amount of \$20,000.

*Plaintiff's Motion*

In support its motion for summary judgment, Plaintiff argues that it furnished Defendant with a "Memo" and "Statement of Account and Sales Invoice," which defendant retained without objection. Plaintiff submits the Memo, dated May 23, 2016, which indicates that Plaintiff sold Defendant the diamonds for \$95,600.34 (Shah Aff., Ex. 3). Plaintiff also submits the Statement of Account, dated October 17, 2016, which it indicates a balance of \$41,041.66 (*id.*, Ex., 4). Plaintiff further argues that on May 24, 2016, it entered into an agreement with Defendant, wherein Defendant acknowledged the balance owed in the amount of \$41,041.66 and agreed to pay Plaintiff in four monthly installments of \$10,260.50 (*id.* Ex. 5) Further, Plaintiff argues that Defendant sold a portion of the diamonds remaining in its possession "at a sale price of 30-40% of the remaining \$21,042.66," and that it is entitled to the proceeds from that sale (Shah Aff., ¶28). Finally, Plaintiff argues that there is no evidence that half of the of the diamonds sold to Defendant were man-made and had to be replaced.

*Defendant's Opposition*

In opposition, Defendant argues that Plaintiff is not entitled to summary judgment of its claim for goods sold and delivered because some of the subject diamonds were non-conforming. Specifically, Defendant indicates that Plaintiff represented the diamonds sold in the May 2016 transaction to be "natural polished diamonds," but that in September 2016 Defendant determined that approximately half of the diamonds Defendant retained were "man-made." Defendant states that the value of man-made diamonds to Defendant is 40% of the value of natural diamonds. Defendant contends that it advised Plaintiff that the subject diamonds were non-conforming. Defendant further contends that it had to purchase natural diamonds from another dealer to replace the alleged man-made diamonds. Next, Defendant argues that Plaintiff is not entitled to

summary judgment of its account stated claim, since Plaintiff failed to show that it mailed statements to Defendant on a monthly basis or that Plaintiff generated account statement for Defendant in the regular course of business. Further, Defendant argues that the branch of Plaintiff's motion for summary judgment of its conversion claim should be denied, as the damages Plaintiff seeks in its motion is different from the damage it seeks pursuant to the Complaint.

*Plaintiff's Reply*

In reply, Plaintiff reiterates that the Court should disregard Defendant's claims that the diamonds delivered were man-made, since Defendant's evidence is not credible. Specifically, Plaintiff argues that the invoice for the diamonds Defendant claims to have purchased to replace the non-conforming subject diamonds is dated prior May 13, 2016, which is prior to the sale in question. Moreover, Plaintiff argues that Defendant had an opportunity to inspect the diamonds.

*Discussion*

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*id.*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v. City of New York*, 86 A.D.3d 452 [1st Dept 2011], citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Plaintiff's motion for summary judgment of its claim for goods sold and delivered is denied, as there is an issue of fact as to the conformity of the subject diamonds. Defendant affirms that it notified Plaintiff that the subject diamonds were non-conforming in September 2016, once it realized that the subject diamonds were not natural diamonds (*Jonathan Cass, Ltd v. Wal-Mart Stores, Inc.*, 216 A.D.2d 31, 31 [1st Dept 1995] [finding that the "court, properly determined that summary judgment was precluded by triable issues of fact, including issues as to the parties' credibility and intent raised by their conflicting affidavits, with respect to [*inter alia*] the conformity of the goods sold . . . ."]. Additionally, denial is warranted in light of the fact that Defendant has interposed a counterclaim for breach of the underlying agreement, wherein Defendant alleges that the delivered diamonds were non-conforming (*see Created Gemstones v. Union Carbide Corp.*, 47 N.Y.2d 250 [1993] [holding that "a buyer may defeat or diminish a seller's substantive action for goods sold and delivered by interposing a valid counterclaim for breach of the underlying sales agreement"]; *see Elmo Mfg. Corp. v. Am. Innovations, Inc.*, 44 A.D.3d 703, 704 [2d Dept 2007]).

Moreover, Plaintiff's argument that Defendant's evidence should not be considered is meritless, as the issue of credibility may not be resolved by the Court on a motion for summary judgment (*see e.g., Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631 [1997]). Moreover, a trier of fact could determine that Defendant purchased replacement diamonds from another dealer after it determined that the subject diamonds were non-conforming (*see Shah Aff.*, Ex. 7, November 11, 2016 Invoice).

The branch of Plaintiff's motion for summary judgment of its account stated is likewise denied. As addressed above, Defendant's objection to the non-conformity of the subject diamonds raises an issue of fact sufficient to rebut the implicit agreement to pay (*Jaffe & Asher*,

*LLP v. Gushing*, 289 A.D.2d 17, 17 [1st Dept 2001] [holding that the “motion was properly denied on the ground that an issue of fact exists as to whether defendant orally objected to plaintiff’s bills”]; see *Cohen Singer & Weinstein, LLP v. Waters*, 13 A.D.3d 51, 52 [2004]).

Further, Plaintiff’s motion for partial summary judgment of its claim for conversion is denied, as Plaintiff fails to meet its *prima facie* burden. The Complaint seeks damages for the alleged conversion in the amount of \$41,041.66. However, Plaintiff’s moving papers seeks damages in the amount of \$7,364.58, which Plaintiff claims is 35% of the value of the diamonds retained, and subsequently sold by Defendant. Plaintiff neither cites to any case law, nor documentary evidence supporting its claim.

#### CONCLUSION

Accordingly, it is hereby

**ORDERED** that the motion of plaintiff, Chintamani USA Inc., for summary judgment of the Complaint is denied. It is further

**ORDERED** that plaintiff, Chintamani USA Inc., shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

Dated: April 9, 2018



Hon. Carol Robinson Edmead, J.S.C

**HON. CAROL R. EDMEAD**  
J.S.C.