Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.
2018 NY Slip Op 30674(U)
April 16, 2018
Supreme Court, New York County
Docket Number: 160007/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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KAHAN JEWELRY CORP. and BULLION TRADING LLC,

Index No.: 160007/2013

Plaintiffs,

DECISION & ORDER

-against-

COIN DEALER OF 47TH ST. INC. d/b/a COIN DEALER OF 47TH STREET INC., B.A. COIN DEALER INC. d/b/a B.A. COIN INC., DAVID YUSUPOV, and BORIS ARONOV,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 011 and 012 are consolidated for disposition.

Defendants B.A. Coin Inc. (BA Coin) and Boris Aronov (Seq. 011), and Coin Dealer of 47th St. Inc. (Coin Dealer) and David Yusupov (Seq. 012), separately move, pursuant to CPLR 3212, for summary judgment on all claims asserted against them by plaintiffs Kahan Jewelry Corp. (Kahan Jewelry) and Bullion Trading LLC (Bullion). Plaintiffs oppose the motions. For the reasons that follow, BA Coin's and Aronov's motion is granted, and Coin Dealer's and Yusupov's motion is granted in part and denied in part.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.

The parties are all New York-based merchants and corporations engaged in the precious metals trade. *See* Dkts. 178 (Aronov Dep.) at 9-10; 181 (Kahan Dep.) at 10-11; 182 (Yusopov Dep.) at 8.[1] Kahan Jewelry principally deals in bulk transactions with manufacturers and dealers

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Citations are to the pdf pagination on

in the precious metals industry, as well as in the refining of scrap metals. Bullion is owned by Yitzchok Kahan (Kahan), an officer of Kahan Jewelry, but operates as a separate retail business dealing mostly in individual coins. Kahan Dep. at 9-11, 99-100. Between 2005 and 2013, Kahan Jewelry maintained a regular business relationship with BA Coin, buying and selling precious metals. *Id.* at 36, 39-40; Aronov Dep. at 46-47. These transactions were primarily conducted between Kahan and defendant Boris Aronov, who is now president of BA Coin but claims to have been an unpaid consultant for the company during the period in question. Kahan Dep. at 9, 45-46; Aronov Dep. at 7-10.

Coin Dealer was founded in 2011 by Aronov's son-in-law, defendant David Yusopov, who continues to own and operate the company. Yusopov Dep. at 7 & 9. Up until 2013, Coin Dealer also maintained a regular business relationship with Kahan Jewelry, buying and selling precious metals. *See id.* at 24-25; Kahan Dep. at 33. Although Aronov denies that he ever conducted business on Coin Dealer's behalf, both Kahan and Yusopov claim that he transacted most of Coin Dealer's business with Kahan Jewelry, with Yusopov's permission. *See* Yusopov Dep. at 44-51, 54, 56, 63-67, 76-77; Kahan Dep. at 38, 45, 53-54, 160, 165-66, 168-69; Aronov Dep. at 186. Further, both Kahan and Yusopov describe Aronov as having effectively controlled the operations of both BA Coin and Coin Dealer during the period in question, though Yusupov stated that he alone controlled Coin Dealer's bank account, to which Aronov had no direct access. *See* Yusopov Dep. at 46-50, 63-64, 67, 76-77; Kahan Dep. at 169.

Between August and October 2012, Kahan Jewelry issued six checks to Coin Dealer, each in the amount of $100,000. *See* Dkt. 180 (Checks); Kahan Dep. at 53-54, 58, 60-65, 160,

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NYSCEF.

168; Yusopov Dep. at 53-54, 63, 73. Kahan and Yusopov agree that these checks resulted from a transaction arranged by Aronov. Kahan Dep. at 53-55, 60-63, 160, 168; Yusopov Dep. at 53-54, 63, 66-67. Kahan testified that he issued these checks as loans, secured by precious metals held as collateral, subject to a verbal agreement with Aronov, which required that Kahan Jewelry receive 1.5% monthly interest payments on the loans.[2] Kahan Dep. at 53-55, 60-64, 123-25, 160, 168. Yusupov claimed that the checks were payment for merchandise sold to Kahan Jewelry, though he was unable to account for the absence of standard documentation recording such a sale.[3] Yusupov Dep. at 53-55, 60-62. Though Kahan acknowledged that the six checks in question were issued solely to Coin Dealer, he believed that his agreement was ultimately with Aronov, who he understood to be in control of both corporate defendants. Kahan Dep. at 53-54, 160, 168-69.

Yusupov testified that he deposited the $600,000 received from Kahan Jewelry into Coin Dealer's company account, and that, at Aronov's direction, he subsequently used those funds to pay the company's bills and to purchase new merchandise. Yusupov Dep. at 63-65, 67-68. This new merchandise was then resold, and Aronov, who arranged the resale transactions, kept at least some of the resulting profits. *Id.* at 68. However, none of the funds received from Kahan Jewelry were transferred directly to either Aronov or BA Coin, nor were those funds diverted to profit Yusupov personally. *Id.* at 70, 74-75.

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[2] Aronov was not asked about the checks issued to Coin Dealer at his deposition. The deposition focused almost exclusively on the business he transacted on behalf of BA Coin. However, Aronov variously denied, or claimed to have no memory of, BA Coin collateralizing loans with Kahan Jewelry, or receiving a $100,000 check from it. Aronov Dep. at 48-49, 124, 171, 179.

[3] When asked directly, Yusupov could not recall whether Kahan Jewelry ever issued checks as loans to Coin Dealer. Yusupov Dep. at 53.

With respect to the collateral held by Kahan Jewelry, Kahan testified that he personally inspected the precious metals brought to him by Aronov, which he was assured were worth at least as much as the loans they secured, but he never actually verified their value. Kahan Dep. at 55, 60, 64, 66. Kahan further testified that, after a few months of paying interest, the defendants defaulted by ceasing payment of interest due on the alleged loans, at which point he liquidated the collateral. *Id.* at 66-67, 123-25, 133-35. However, Kahan had no recollection or record of the price he received for the sale of the collateral, the date on which he sold it, or to whom the sale was made. *Id.* at 66-67, 134-35. Because it is undisputed that the price of the precious metals held as collateral fluctuated daily, the value of the collateral upon liquidation is uncertain.

Plaintiffs commenced this action in October 2013 by filing a petition to compel arbitration. Dkt 1. In August 2014, the court denied the petition because there was no proof of any agreement to arbitrate and ordered an immediate preliminary conference for discovery on the substantive claims raised by the petition. Dkts. 21, 22, 51 at 12. On September 24, 2015, the court entered an order awarding Kahan Jewelry (but not Bullion) default judgment against BA Coin for non-payment of invoices annexed to the original petition. Dkt. 96 at 5-8. The court also granted plaintiffs leave to file an amended complaint (the AC), determining, as relevant here, that the proposed causes of action for breach of contract, money had and received, and promissory estoppel were not insufficient as a matter of law. *Id.* at 8-9.

The AC, filed on January 4, 2016, alleges that the defendants never repaid $300,000 of the $600,000 loaned to them, and that they also failed to pay for the sale and delivery of precious metals, as well as for services rendered. Dkt. 109 (AC) ¶¶ 21, 32, 35-37, 45-50; *see also* Dkt. 179 (invoices and pickup slips for the sale of gold and silver addressed to BA Coin and Coin Dealer). The AC asserts six causes of action, numbered here as in the pleading: (1) goods sold

and delivered, and services provided, against Coin Dealer, Yusopov, and Aronov, based on the alleged non-payment of invoices addressed to Coin Dealer and BA Coin; (2) money had and received against all defendants, based on the alleged failure to repay the outstanding $300,000 loan principal; breach of contract against (3) BA Coin and Aronov, and (4) Coin Dealer, also based on the alleged unpaid loans; (5) breach of guaranty against Yusupov, based on an alleged personal guaranty that he executed with the plaintiffs (the AC does not state what was guaranteed but seeks recovery under this claim for the alleged unpaid loans, *see* ¶¶ 33, 65-66); and (6) promissory estoppel against all defendants, based on the same allegations underpinning the foregoing claims. ¶¶ 44-71. Except for the fifth cause of action for breach of guaranty, plaintiffs appear to base their claims against Yusupov and Aronov personally upon a veil piercing theory. *See* ¶¶ 10-20, 24-31, 38-42.

Defendants separately moved for summary judgment on July 20, 2017. Dkts. 174, 184. In support of their motion, BA Coin and Aronov argue that: (1) the claims against Aronov personally should be dismissed because he only acted as an agent for BA Coin and received no improper personal benefit from any of the transactions at issue; (2) Bullion should be dismissed for lack of standing; (3) Kahan Jewelry should be precluded from maintaining any claims pertaining to the alleged loans because, by issuing said loans, it acted unlawfully as an unlicensed "collateral loan broker"; (4) the claim for money had and received should be dismissed as against BA Coin and Aronov because they did not receive the alleged loans, which were issued solely to Coin Dealer, and that the claim otherwise fails because any debt owed to Kahan Jewelry with respect to the alleged loans was satisfied by its liquidation of the collateral; (5) the breach of contract claim fails because there is no evidence demonstrating the existence of a valid oral contract, and because there is insufficient evidence to establish plaintiffs' damages;

and (6) the promissory estoppel claim fails because the terms of the alleged loan agreement are not clear, there is no evidence substantiating the allegation of reasonable reliance, the claim is duplicative of the breach of contract cause of action, and Kahan Jewelry has suffered no injury because it was made whole by its liquidation of the collateral. Coin Dealer and Yusupov adopt these arguments in their entirety, adding only that Yusupov, too, acted exclusively as an agent of Coin Dealer.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. Bullion's Standing

"Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." *Caprer v Nussbaum*, 36 AD3d 176, 182 (2006). "[A] plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact . . . that he or she will actually be harmed by the challenged action . . . ." *Id.* at 183. This case arises entirely from the business dealings between defendants and Kahan Jewelry. Bullion, though owned by Kahan, is a separate entity. There is no evidence demonstrating that it was a party to any of the transactions presently in dispute. The only evidence in the record at all related to Bullion are an identical pair of "Hedge/Metal Transaction Agreement[s]" that Yusupov executed with the company in his own name and on behalf of Coin Dealer. *See* Dkt. 5. Kahan testified that he intended these agreements to personally obligate Yusupov to some part of the debts Coin Dealer owed to Kahan Jewelry. Kahan Dep. at 75-76. However, the agreements, by their express terms, relate *only* to Yusupov's and Coin Dealer's transactions with Bullion, not Kahan Jewelry. Dkt. 5. There is no ambiguity on the face of the contracts. Thus, plaintiffs may not use parol evidence to create an ambiguity and reinterpret the agreements. *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 (1990). Bullion is dismissed for lack of standing.

B. Claims Against Aronov & Yusupov

With one exception, discussed further below, Kahan Jewelry's claims arise exclusively from its alleged dealings with the corporate defendants, specifically, its provision of goods and services for which it was not paid and its issuance of loans that remain outstanding. AC ¶¶ 21, 32, 35-36. Kahan Jewelry does not allege, and there is no evidence to suggest, that either Aronov or Yusupov engaged in these transactions in their personal capacities rather than as

agents of either BA Coin or Coin Dealer. The claims against the individual defendants are based solely upon a veil piercing theory.

Under New York law, "[t]he concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." *Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993). "In order to pierce the corporate veil, a plaintiff must show [1] that the dominant [owner or] corporation exercised complete domination and control with respect to the transaction attacked, and [2] that such domination was used to commit a fraud or wrong causing injury to the plaintiff." *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009). In other words, the plaintiff must show *both* an abuse of the corporate form (the domination prong) *and* that such abuse was committed for the purpose of defrauding plaintiff (the fraud prong). *TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 (1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance."); *see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012); *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 (1st Dept 2006) ("The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil.").

Corporate form abuse is to be determined on a case-by-case basis by analyzing the presence of certain well-established factors, such as adherence (or lack thereof) to corporate formalities, inadequate capitalization, intermingling of funds, overlap in ownership, officers,

directors and personnel, common office space or telephone numbers, the degree of discretion demonstrated by the alleged dominated corporation, whether the corporations are treated as independent profit centers, and the payment or guarantee of the corporation's debts by the dominating entity. *See Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013). Here, there is ample testimony concerning Aronov's domination and control of BA Coin and Coin Dealer, which arguably militates in favor of alter ego liability.[4] Nonetheless, the court will not devote much attention to the domination prong. First, it is questionable whether veil piercing may properly be invoked to impute liability to Aronov, who was not an owner of either corporate defendant during the period in question. *See Bd. of Managers of 325 Fifth Ave. Condo. v Cont'l Residential Holdings LLC*, 149 AD3d 472, 475 (1st Dept 2017) (refusing to impute liability to individuals who lacked ownership interest in corporate defendant because "[t]he party seeking to pierce the corporate veil must establish that the *owners*, through their domination, abused . . . the corporate form") (emphasis in original), quoting *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 (2011). Second, regardless of whether Kahan Jewelry has demonstrated domination, it fails to satisfy the fraud prong with evidence upon which a reasonable finder of fact could conclude that Aronov abused the corporate form of either corporate defendant ***for the purpose*** of harming Kahan Jewelry. *See TNS Holdings, Inc.*, 92 NY2d at 339.

[4] Yusupov testified that he effectively functioned as a salaried employee of Aronov, who controlled both Coin Dealer and BA Coin, which shared a location, as well as personnel and customers, and did not deal with each other at arms' length; that Aronov conducted almost all of Coin Dealer's transactions; and that Aronov profited from those transactions by keeping precious metals that Yusupov purchased with Coin Dealer's funds. *See* Yusupov Dep. at 12-13, 17-18, 20, 46-50, 76-77; *see also* Aronov Dep. at 38-40, 42-46, 112, 127-29, 159-60. By contrast, there is no evidence of domination with respect to Yusupov. Kahan Jewelry points to evidence that Yusupov submitted to Aronov's control of Coin Dealer, but this does not demonstrate that Yusupov himself abused the corporate form.

Kahan Jewelry alleges that Aronov abused the corporate form to evade his creditors by conducting his personal business through the corporate defendants, knowing that they lacked sufficient capital to repay their debts. AC ¶¶ 13-15, 26, 37. It proffers no evidence to substantiate this claim, as is required to defeat summary judgment. *See Zuckerman*, 49 NY2d at 562. Evidence that BA Coin and Coin Dealer failed to pay for the provision of goods and services, or that they did not repay loans issued to them, without more, is insufficient to satisfy the fraud prong. By itself, such evidence does not establish that either company was undercapitalized, let alone that they were kept so intentionally. Moreover, it is well settled that the fraud prong must be established with proof distinct from an underlying breach of contract. *See Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 (1st Dept 2016) ("a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil."), quoting *Bonacasa Realty Co. v Salvatore*, 109 AD3d 946, 947 (1st Dept 2013). Because Kahan Jewelry fails to proffer evidence sufficient to satisfy the fraud prong, the veil piercing claims against Aronov and Yusupov are dismissed.[5]

The only claim against either individual defendant not premised on veil piercing is the fifth cause of action against Yusupov for breach of guaranty. Kahan Jewelry alleges that Yusupov "executed a personal, unlimited, unconditional, continuing guaranty to the Plaintiffs[,]"

[5] To the extent that Kahan Jewelry asserts claims against either BA Coin or Coin Dealer based on a theory of alter ego liability, these claims fail for the same reason. *See* AC ¶¶ 25 & 27 (alleging that "the Corporate Defendants have acted as the alter ego of each other"). Neither corporate defendant was a subsidiary of the other, and, even aside from the lack of ownership, such claims cannot be maintained absent evidence to satisfy the fraud prong. Similarly, insofar as Kahan Jewelry invokes successor liability with respect to Coin Dealer, such allegations are also without merit because there is no evidence that Coin Dealer purchased the business assets of BA Coin. *See* AC ¶¶ 28-30 (alleging a "*de facto merger* of the Corporate Defendants," and that Coin Dealer is "a successor in interest to" and "a mere continuation of" BA Coin).

that he subsequently "breached and defaulted under the terms of the Guaranty[,]" and that he is therefore personally liable for the $300,000 balance due on the loans allegedly issued to Coin Dealer. AC ¶¶ 33, 65-66. This claim appears to be based on the "Hedge/Metal Transaction Agreement" that Yusupov executed with Bullion; no other document in the record matches the description of Yusupov's alleged personal guaranty.[6] However, as already discussed, Yusupov's agreement with Bullion does not cover the transactions with Kahan Jewelry that form the basis for the present dispute. Consequently, the claim for breach of guaranty against Yusupov is also dismissed.

C. Goods Sold & Delivered, & Services Provided

Coin Dealer's motion papers do not address the first cause of action for goods sold and delivered, and services provided, other than to adopt the argument advanced by its codefendants, which is limited to the issue of Aronov's personal liability. Therefore, Coin Dealer's motion is denied with respect to this claim because it has failed to make a *prima facie* showing of entitlement to summary judgment.

D. Loan Claims

The second cause of action for money had and received, and the third and fourth causes of action for breach of contract, all relate to the alleged $300,000 in loans issued by Kahan Jewelry. BA Coin and Coin Dealer argue that these claims should be barred because, in issuing the alleged loans, Kahan Jewelry acted unlawfully as an unlicensed "collateral loan broker." They premise this argument on Article 5 of the General Business Law (GBL), which concerns

[6] Documentary evidence is necessary to maintain the claim for breach of guaranty because a verbal guaranty to answer for the debt of another—in this instance, Coin Dealer—is unenforceable. *See* General Obligations Law § 5-701(a)(2).

the regulation of "collateral loan brokers," otherwise known as pawnbrokers.

As used in Article 5, the term "collateral loan broker" is construed to include any person or entity:

> (1) loaning money on deposit or pledge of personal property, other than securities or printed evidences of indebtedness; or (2) dealing in the purchasing of personal property on condition of selling back at a stipulated price; or (3) designated or doing business as furniture storage warehousemen, and loaning and advancing money upon goods, wares or merchandise pledged or deposited as collateral security.

GBL § 52. The statute prohibits one from "carry[ing] on the business of a collateral loan broker" without a license, and imposes a series of regulatory requirements on license holders. §§ 40-41; *see* §§ 41a-50. Willful violation of any provision of Article 5 is a misdemeanor offense. § 54.

The court rejects the contention, for which no authority is cited, that the loans allegedly issued to defendants suffice to bring Kahan Jewelry within the ambit of Article 5. The argument is premised on an obvious misreading of the statute. Defendants assert that, because Kahan Jewelry allegedly loaned them money upon merchandise pledged as collateral, it falls within the third prong of the statutory definition of "collateral loan broker" which concerns those who "loan[] and advance[] money upon goods, wares or merchandise pledged or deposited as collateral security." *See* Dkt. 176 at 11 (emphasizing this statutory language). Defendants ignore that, by its express terms, this language relates only to those "designated or doing business as furniture storage warehousemen," a definition inapplicable to Kahan Jewelry. § 52.

Moreover, even if the alleged loans satisfied another prong of the statutory definition, such as the first portion concerning those who "loan[] money on deposit or pledge of personal property, other than securities or printed evidences of indebtedness[,]" this alone would not render Kahan Jewelry a collateral loan broker subject to regulation. The statute's licensing requirement applies only to those who "carry on the business" of a collateral loan broker. §§ 40

& 41. To "carry on" a business requires more than a single transaction. *Cooper Mfg. Co. v Ferguson*, 113 U.S. 727, 734-35 (1885) (holding that single act does not constitute carrying on of business); *see New York Architectural Terra Cotta Co. v Williams*, 102 AD 1, 7 (1st Dept 1905), *aff'd*, 184 NY 579 (1906) ("'Doing business' evidently means . . . carrying along a regular business of some kind. A single act cannot . . . constitute doing business."). The phrase denotes a routine and continuous involvement in business activity. *See Cooper Mfg. Co*, 113 U.S. at 734-35 ("The meaning of the phrase 'to carry on,' when applied to business, is well settled. . . . [it means] 'To prosecute, to help forward, to continue: as to carry on business.'"). Defendants offer no evidence to demonstrate that Kahan Jewelry routinely engaged in the business of a collateral loan broker, and Kahan's unrebutted testimony is that his company did not regularly extend loans secured by a pledge of collateral. Kahan Dep. at 116.

1. Breach of Contract

The corporate defendants argue that the breach of contract claims fail because the evidence is insufficient to establish a proper measure of damages absent proof of the sale price for which Kahan Jewelry liquidated the collateral securing the alleged loans, which cannot be ascertained on the current record. Summary judgment is not warranted on this basis. Even assuming that Kahan Jewelry is ultimately unable to prove its alleged damages, "nominal damages are always available in breach of contract actions[.]" *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 (1993), quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 (1993).

The corporate defendants next argue that the breach of contract claims should be dismissed because there is no evidence of a valid oral agreement. The court disagrees. Examined in the light most favorable to Kahan Jewelry, the evidence is sufficient to raise a material issue of fact as to the existence of the alleged loan agreement.

It is undisputed that Kahan Jewelry issued checks to Coin Dealer for $600,000, which Coin Dealer deposited into its company account. Though Aronov stated that he never acted as an agent for Coin Dealer, both Kahan and Yusupov claimed that these checks were issued at the direction of Aronov, who was authorized to conduct business on Coin Dealer's behalf. Kahan testified that the checks were issued as loans subject to a verbal agreement with Aronov, which required that Kahan Jewelry receive monthly interest payments on the loans. Kahan and Yusupov both testified that Kahan Jewelry took possession of roughly $600,000 worth of gold and silver in exchange for the checks issued to Coin Dealer. Kahan claimed that this merchandise was delivered by Aronov as collateral to secure the alleged loans, though he admitted that he did not know whether the merchandise belonged to Coin Dealer or BA Coin. *See* Kahan Dep. at 70. Yusupov, however, testified that the merchandise came from Coin Dealer, and, though he claimed that said merchandise was sold to Kahan Jewelry by Aronov rather than delivered as collateral for the alleged loans, he was unable to account for the absence of standard documentation recording such a sale. The record also contains a hand-written note that Kahan claimed to have used to keep track of the monthly interest payments made on the alleged loans. "Coin Dealer 47" appears at the top of the note, below which is written "paid till 9/1/12, 10/1/12, 11/1/12, 12/1/12, 1/1/12[.]" *Id.* at 61, 144-45; Dkt. 179 at 48. On this record, a reasonable finder of fact could conclude that Aronov contracted for the alleged loans as an agent of Coin Dealer. Hence, summary judgment is denied to Coin Dealer as to the breach of contract claim against it.

Summary judgment is granted, however, to BA Coin on the breach of contract claim. Even when examined in a light most favorable to Kahan Jewelry, the record is devoid of evidence demonstrating the existence of a valid agreement between Kahan Jewelry *and BA Coin*

with respect to the alleged loans. Although Kahan plainly believed Aronov, BA Coin, and Coin Dealer to be interchangeable, he did not testify that Aronov held himself out as an agent of BA Coin when transacting the alleged loan agreement, or that Aronov said or did anything to suggest that the loan agreement related to BA Coin in any way. Nor is there any basis upon which to infer that Aronov did so. To the contrary, the most reasonable inference to be drawn from the record is that Aronov contracted on behalf of Coin Dealer, to whom the alleged loans were issued. Similarly, Aronov's delivery of the collateral securing the loans does not establish that BA Coin was a party to the alleged loan agreement. Again, there is no evidence from which to infer that Aronov took this action on behalf of BA Coin, or that the merchandise he delivered originated with it. Because the record is devoid of evidence demonstrating that BA Coin entered into any sort of agreement with Kahan Jewelry concerning the alleged loans, let alone that it agreed to be liable for a breach of the loan agreement and repayment of the outstanding principal, the breach of contract claim against BA Coin is dismissed.

2. Money Had & Received

A cause of action for money had and received requires proof that "'one party possesses money that in equity and good conscience it ought not to retain and that belongs to another.'" *Melcher v Apollo Med. Fund Mgmt. L.L.C.*, 105 AD3d 15, 27 (1st Dept 2013), quoting *Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 (1991). "The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money." *Litvinoff v Wright*, 150 AD3d 714, 716 (2d Dept 2017) (internal quotation marks

omitted). Here, the claim is premised on the $300,000 checks issued to Coin Dealer pursuant to the alleged loan agreement, which Kahan Jewelry contends has not been repaid.

Summary judgment is granted to BA Coin with respect to this claim because the record is devoid of evidence that *BA Coin* received or benefitted from any portion of the funds at issue. Yusupov testified that he deposited the funds received from Kahan Jewelry into Coin Dealer's company account, to which he alone had access, and that he subsequently spent those funds in their entirety to pay the company's bills and to purchase new merchandise. He further testified that none of the funds received from Kahan Jewelry were ever transferred to BA Coin. Although Yusupov claimed that Aronov made a profit on the resale of the merchandise purchased with the funds in question, and that Aronov generally profited from Coin Dealer's transactions by keeping merchandise bought with money drawn from Coin Dealer's account, this does not establish that either the profits or the merchandise retained by Aronov were used to benefit BA Coin. On this record, there is no basis upon which to infer that BA Coin received the disputed funds from Kahan Jewelry or that it derived even an indirect benefit therefrom. The claim for money had and received, therefore, is dismissed as against BA Coin.[7]

[7] To the extent that the claim for money had and received against the individual defendants does not rely on a veil piercing theory, but is based, instead, on allegations that Yusupov and Aronov improperly diverted the alleged loan funds to their personal benefit, the claim is similarly lacking in evidentiary support. Yusupov's unrebutted testimony is that no part of the funds received from Kahan Jewelry were diverted to benefit him personally, nor were any of those funds directly transferred to Aronov. Further, although Yusupov *did* testify that Aronov retained profits from Coin Dealer's resale of merchandise purchased with the funds received from Kahan Jewelry, this does not establish that such profits rightfully belong to Kahan Jewelry, or that equity and good conscience require their return. It is not alleged, and there is no evidence to suggest, that any restrictions attached to Coin Dealer's use of the funds received from Kahan Jewelry, and there is nothing inherently suspect or illegitimate about allowing Aronov to share in the profits from sales he facilitated. Even assuming that a creditor on a loan may properly lay claim not just to the loan principal and interest, but to excess profits legitimately earned through the use of loan proceeds, the only theory articulated here as to why such profits rightfully belong

Summary judgment is denied on the claim for money had and received as against Coin Dealer. Coin Dealer argues that it is no longer in possession of money belonging to Kahan Jewelry because any debt owed with respect to the funds it received was satisfied by Kahan Jewelry's liquidation of the collateral. It proffers no evidence, however, demonstrating that the value of the collateral upon liquidation was equal to its outstanding debt, thereby failing to make out a *prima facie* case of entitlement to summary judgment. Although there is evidence that Kahan believed that the collateral he received was roughly equivalent in value to the disputed funds when those funds were first issued to Coin Dealer, that belief was never independently verified. Moreover, it is undisputed that the collateral's value fluctuated daily. There, thus, is a material issue of fact as to whether the value of the collateral upon liquidation was sufficient to satisfy Coin Dealer's alleged debt to Kahan Jewelry.

E. Promissory Estoppel

Summary judgment is granted to BA Coin on the final claim for promissory estoppel. Insofar as the claim is premised on the failure to pay for the provision of goods and services, it is duplicative of the contractual claim for non-payment of invoices on which Kahan Jewelry has already been awarded default judgment. *See* Dkt. 96 at 5-8; *Clark–Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for

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to Kahan Jewelry is that Aronov engineered the alleged loans to Coin Dealer with the intention of diverting the loan funds to his own benefit, knowing that Coin Dealer would be left without sufficient capital to repay its debts. This is the same argument already discussed and found wanting with respect to the veil piercing allegations. There is no evidence that Coin Dealer was intentionally left undercapitalized (or, for that matter, that it was undercapitalized at all). The fact that Coin Dealer may have breached an obligation to repay the alleged loans at issue does not render Aronov's retention of profits from legitimate transactions that made use of loan proceeds unjust or inequitable with respect to Kahan Jewelry.

events arising out of the same subject matter."). To the extent the claim relates to the alleged loan agreement, the record is devoid of evidence demonstrating a clear and unambiguous promise of repayment *by BA Coin* upon which Kahan Jewelry reasonably relied to its detriment. *See Castellotti v Free*, 138 AD3d 198, 204 (1st Dept 2016) ("The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance."). Accordingly, the promissory estoppel claim against BA Coin is dismissed.

As to Coin Dealer, summary judgment on the promissory estoppel claim is denied. Coin Dealer argues, without elaboration or analysis, that the claim fails because the terms of the alleged loan agreement are not clear and unambiguous, there is no evidence substantiating the allegation of reasonable reliance, and the claim is duplicative of the breach of contract cause of action. Such conclusory assertions are insufficient to make out a *prima facie* case for summary judgment. *See Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (bare conclusory assertions insufficient to entitle defendants to summary judgment). Furthermore, these contentions, which are, in effect, attacks on the sufficiency of the pleadings, were already considered in the court's order granting leave to amend. *See* Dkt. 96 at 8-9. The court determined that where, as here, the existence of an express contract is in doubt, promissory estoppel may be pleaded in the alternative to breach of contract, and that this particular claim is not "palpably devoid of merit" because Kahan Jewelry "sufficiently alleged that in reliance on promises to pay, [it] leant money, provided services and parted with precious metals, but received nothing back in return." *Id.* Coin Dealer tenders no evidence sufficient to alter these determinations. To the contrary, while there remains a question of fact as to the existence of a valid oral loan agreement between Kahan Jewelry and Coin Dealer, there is ample

evidence to support an inference that Kahan Jewelry loaned money to Coin Dealer in reliance on promises of repayment that it received from Aronov on Coin Dealer's behalf.

Coin Dealer also argues that Kahan Jewelry has suffered no injury because it was made whole by its liquidation of the collateral securing the alleged loans. However, as already discussed with respect to the claim for money had and received, there is a material issue of fact as to whether the value of the collateral upon liquidation was sufficient to satisfy Coin Dealer's alleged debt to Kahan Jewelry. Accordingly, it is

ORDERED that (1) Aronov and BA Coin are granted summary judgment on all causes of action asserted against them in the AC, and the veil piercing claim asserted against Aronov, and the portions of the first cause of action for goods sold and delivered and services provided, the second cause of action for money had and received, and the sixth cause of action for promissory estoppel asserted against BA Coin and/or Aronov personally, as well as the entirety of the third cause of action for breach of contract, are dismissed with prejudice; (2) Yusupov is granted summary judgment on all causes of action asserted against him in the AC, including the veil piercing claim, and the portions of the first, second, and sixth causes of action asserted against him personally, and the entirety of the fifth cause of action for breach of guaranty, are dismissed with prejudice; and (3) Yusupov's and Coin Dealer's motion is otherwise denied; and it is further

ORDERED that Bullion is dismissed from this action for lack of standing, and the caption in this action shall no longer include Bullion as a plaintiff.

Dated: April 16, 2018

ENTER:

J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.