

Diamonds v Nissanoff
2020 NY Slip Op 30894(U)
February 27, 2020
Supreme Court, Queens County
Docket Number: 714392/2017
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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KHUSHI DIAMONDS,

Index
No.: 714392/2017

Plaintiff(s),

Motion
Date: November 12, 2019

-against-

ITZHAK NISSANOFF, IDIDIA NISSANOV,
LARISA NISSANOFF, and ITZHAK NISSANOFF,
INC.

Motion
Cal. No.: 20

Defendant(s).

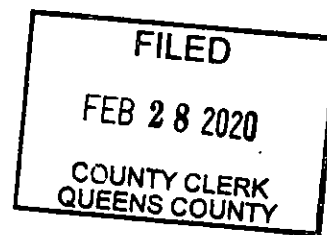
Motion
Seq. No.: 6

-----x
ITZHAK NISSANOFF, INC.,

Third-Party Plaintiff(s)

-against-

BRINK'S GLOBAL SERVICES USA, INC. and
DAVID DOE (The name will be substituted once
ascertained) and JANE DOE.



Third-Party Defendant(s)

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The following papers numbered 1 to 9 read on the motion of third-party defendant Brinks Global Services, USA (Brinks), for an order dismissing the third-party action pursuant to CPLR §3211 (a)(7); and on the cross-motion of third-party plaintiff for severance pursuant to CPLR §603.

	Papers Numbered
Notice of Motion - Affs-Exhs.-Service.....	1-4
Notice of Cross Motion - Affs-Exhs.-Service.....	5-7
Reply Affidavit.....	8-9

Upon the foregoing papers, it is ordered that the motion is granted and the cross-motion is denied as moot.

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In the main action, plaintiff Khushi Diamonds (Khushi), seeks to recover for the alleged conversion of a diamond. By prior order of this court, dated September 18, 2018, it was determined that the appropriate forum for the claims between plaintiff and the defendants was through an established arbitration protocol for claims of this nature. In the third-party action, defendant/third-party plaintiff seeks to recover from Brinks for a single count of conversion, and Brinks brings this motion to dismiss.

It is long established that on a motion to dismiss pursuant to CPLR §3211(a)(7), the court should “accept the facts alleged in the complaint as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “On a motion to dismiss pursuant to CPLR §3211 (a) (7), the Court must accept as true not only the allegations, but whatever can be reasonably inferred therefrom in favor of the pleader” (*PT Bank Cent. Asia v ABN AMRO Bank NY*, 301 AD2d 373 [2003]). The standard is “not whether a complaint states a cause of action, but whether plaintiff has a cause of action” (*Leon v Martinez, supra*). In ruling on a motion to dismiss, the court is not authorized to assess the merits of a claim or the factual allegations, but only to determine, if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*PT Bank Cent. Asia v ABN AMRO Bank NY, supra*).

Third-party plaintiff Itzhak Nissanoff, Inc. (Nissanoff, Inc.) engages in commerce in the diamond industry, in that it buys, sells and treats diamonds. It is alleged that a certain diamond was shipped from a processing center in Utah, through a Brinks office in New York, for further shipment to Mumbai, India. The box containing the diamond was allegedly found to be empty upon arrival to Mumbai. The third-party complaint alleges that, on or about August 14, 2017, Nissanoff, Inc., received the diamond from the Utah facility and that “David,” an employee of Brinks, called ‘Nissanoff’¹ demanding that Nissanoff return the diamond for shipment back to Khushi. Further, that “on or about August 14, 2017, Nissanoff “was very busy at work....[and] requested his wife...to take the diamond to Brinks and ship it to Khushi.” The allegations, being somewhat inartfully pleaded, state that David “had a personal interest” in the diamond. Specifically, the third-party complaint reads: “could be that David might not have followed Khushi’s instruction not to release the diamond to Nissanoff and had attempted to rectify the situation, or because of another interest such as conversion of the diamond.” The third -party complaint further alleges that Brinks is liable under the theory of respondeat superior for the actions of David and a “girl” in the Brinks office. It alleges that “Brinks had a personal involvement in the matter.... perhaps in an attempt to transfer the guilt to another and profit from the fruits of their plan.”

¹ The third-party complaint is made by Itzhak Nissanoff, Inc. However, the complaint refers in many instances to Itzhak Nissanoff the individual.

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Brinks, in support of its motion to dismiss, maintains that Nissanoff cannot sustain a claim of conversion insofar as the role of Nissanoff, Inc. was to ship the diamond to plaintiff Khushi. A party seeking to establish a claim of conversion must show legal ownership or an immediate, superior right of possession of the specific identifiable thing, and that defendant exercised an unauthorized dominion over the item to the exclusion of plaintiff's right (*Castaldi v 39 Winfield Assocs.*, 30 AD3d 459 [2006]; *N.Y. Mediscan, LLC v JC-Dugan, Inc.*, 40 AD3d 536 [2007]). Here, neither Nissanoff, Inc., nor Nissanoff individually, allege legal ownership of what the complaint describes as "Khushi's diamond." Nowhere in the complaint is it alleged that 'Nissanoff' had a superior right over the property concededly owned by Khushi. Even taking the allegations in the third-party complaint to be true, any actions by Brinks were not to the exclusion of Nissanoff's rights (*see, N.Y. Mediscan, LLC v JC-Dugan, Inc., supra; Castaldi v Winfield Assocs., supra*).

As further indicia of Nissanoff's lack of a right to recovery is the established measure of damages for conversion. The function of an award for damages in a conversion is to indemnify the injured party by awarding him the fair market value of the goods at the time of conversion (*Ashare v Mirkin, Barre, Saltstein & Gordon, PC*, 106 Misc2d 866 [1980]; and *see, Fantis Foods v Standard Importing, Co.*, 49 NY2d 122 [1980]). Here, Nissanoff does not allege that it seeks the fair market value of the diamond, which are damages that would more rightfully flow to Khushi, the conceded owner. Moreover, Nissanoff the individual appears to seek recovery for the emotional distress caused by his arrest and his unspecified medical damages. However, in the absence of malicious intent, something not pleaded by the sole, corporate, third-party plaintiff Nissanoff, Inc., generally, there can be no recovery for damages for emotional distress or emotional upset caused by an alleged conversion (*see, Cauverien v De Metz*, 20 Misc2d 144 [1959]). While special or punitive damages may be awarded in cases where malicious intent can be established, such causes of action are not even pleaded in the third-party complaint.


The allegation that Brink's is liable under the theory of respondeat superior must also fail. An employer cannot be held liable for actions taken by an employee not in the course of his or her employment and where the employee acts in furtherance of a personal interest (*Manno v Minone*, 249 AD2d 372 [1998]). The claims against the Brinks' employees in no way demonstrate that the employees were acting in the scope of their employment. Rather, the allegations are vague and speculative, which will not support a claim of respondeat superior, particularly in cases of claimed theft or conversion by employees (*Island Assoc. Coop. v Hartmann*, 118 AD3d 830 [1986]; *Benzaken v Verizon Comm., Inc.*, 21 AD3d 864 [2005]).

In viewing the third-party complaint as a whole, it is noted that vague and conclusory allegations cannot withstand a motion to dismiss (*Ribak v Margulis*, 43 AD3d 1023 [2007]; *Rios v Tiny Giant Daycare*, 135 AD3d 345 [2016]). Here, the primary allegations, prefaced with terms such as "perhaps" and "could be" are facially insufficient and furthermore do not

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meet the elements of a conversion claim, that being the sole claim alleged in the third-party complaint. It follows that the claims premised upon respondeat superior, speculative in and of themselves, must also fail. Accordingly, the motion to dismiss the third-party complaint is granted and the cross-motion for severance is denied as moot.

Dated: **FEB 27 2020**



MARGUERITE A. GRAYS
J.S.C.

FILED
FEB 28 2020
COUNTY CLERK
QUEENS COUNTY