Essex Global Trading, Inc. v Olympic Diamond Asia Ltd.
2020 NY Slip Op 32201(U)
July 7, 2020
Supreme Court, New York County
Docket Number: 654444/2018
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 54EFM

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ESSEX GLOBAL TRADING, INC.,

Plaintiff,

- v -

OLYMPIC DIAMOND ASIA LIMITED, NISSAN PERLA, OLYMPIC DIAMOND CORP.,

Defendants.

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INDEX NO. 654444/2018

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53-59, 61, 67-68, 70-71, 73-74

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that plaintiff's motion for partial summary judgment is GRANTED on its first cause of action for breach of contract against Olympic Diamond Asia Limited (ODA) and on its third cause of action for breach of the payment guaranty against Nissan Perla, and the Clerk is directed to enter judgment against them jointly and severally in the amount of $950,000 with prejudgment interest from September 13, 2015 and postjudgment interest after entry of judgment.

It is further ORDERED that the second cause of action is dismissed as duplicative and the fourth cause of action is dismissed as there is no independent cause of action for "alter ego liability."

It is further ORDERED that the above causes of action are all severed and the case shall continue with the only cause of action remaining being breach of contract as to defendant Olympic Diamond Corp. based on a veil-piercing theory.

Plaintiff met its very heavy burden of establishing entitlement to summary judgment for breach of contract as to ODA and for breach of the guaranty as to Nissan Perla. It established that ODA agreed to pay $4.5 million for a diamond and that Perla, by signing the invoice payable on September 13, 2015, took "full PERSONAL responsibility/liability for paying off [the] invoice on time Total of US$4,5000,000.00" (Dkt. 58). Plaintiff also proved—and it is unrefuted by any meaningful evidence—that ODA made payments toward the invoice and that the remaining balance is $950,000 (Dkt. 57 at ¶¶ 9-12).

Perla's sworn statements in response are insufficient to raise any triable issues. The invoice created a binding obligation that Perla personally guaranteed. His self-serving, subjective statement that he signed solely as president of ODA and not personally (Dkt. 70 at ¶ 29) is insufficient in light of the explicit agreement that he executed. Likewise, his self-serving statements that "an invoice simply does not create an obligation to pay a fixed amount" and is "essentially a starting point for negotiations," with "the ultimate price paid being determined in part by the ultimate selling price" (Dkt. 70 at ¶ 2) lack probative value of any course of performance, course of dealing, or usage of trade (*see* UCC §2-202) to vary the terms of the express writing signed by him. Indeed, Perla fails to attest to his own "ultimate selling price" or to specify the terms for what he alleges was the true "handshake" agreement between the parties. Perla's statements amount to no more than a bare denial that any enforceable contract existed and are unavailing in the face of the express, signed writing.

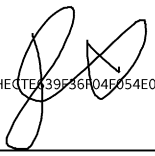
Nor are Perla's other defenses able to defeat summary judgment. Defendants do not dispute that a purchase price of $4.5 million was agreed upon, that the diamond was

accepted and that partial payments were made toward the invoice. Perla attests that at some undisclosed time, he learned that the diamond was worth less than the $4.5 million invoice price; "[i]n other words," he attests, "Mr. Paul lied to me about the price of the Diamond (Dkt. 70 ¶ 9). Perla asserts that the $4.5 million purchase price was "premised upon a material misrepresentation by Plaintiff" (Dkt. 70 ¶ 11). He claims that ODA was damaged because "it was unable to sell the Diamond for a price that took into account the higher, and fallacious value" (Dkt. 70 ¶ 14).

Significantly, however, Perla does not state ***when*** Paul made any alleged misrepresentation to him in relation to execution of the invoice. Nor does Perla explain ***what*** misrepresentation Paul made regarding the value of the diamond. Nor does Perla assert that Paul owed Perla a ***duty***, fiduciary or otherwise, to disclose the diamond's true value (*see EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 219 [1st Dept 2011]). In sum, Perla's statements are too general and too conclusory to defeat summary judgment.

Additionally, there is no indication that Perla lacked access to David Sara (who sold the diamond to plaintiff, which resold it to ODA) before signing the invoice, that he was unable to ascertain the diamond's value or how much plaintiff paid or that it even mattered to him before committing to the terms of the invoice. In the end, all of Perla's self-serving, conclusory statements, including but not limited to those about unspecified "setoffs, recoupments and outright payments" and being owed "millions of dollars," are entirely unsupported and involve information that would be in defendants' possession.

A telephonic status conference with chambers will be held on August 12, 2020 at 3:30PM, and plaintiff is to provide counsel and the court with a dial-in number by email (ekimmel@nycourts.gov) no later than one hour before the conference time.



7/7/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE