B. & R. Dora Intl. DMCC v Lunadiam NYC, LLC
2021 NY Slip Op 30285(U)
January 27, 2021
Supreme Court, New York County
Docket Number: 654721/2019
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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B. & R. DORA INTERNATIONAL DMCC,

Plaintiff,

- v -

LUNADIAM NYC, LLC and SAMER HALIMEH,

Defendants.

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INDEX NO. 654721/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 15, 21, 23, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64
were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

This action arises out of a dispute between the parties as to their possessory rights in a 9.16 Carat Fancy Vivid Blue Oval Diamond (the Diamond or Blue Diamond). Plaintiff B. & R. Dora International DMCC (Dora) purchased the Diamond in 2008 from Chopard & Cie. S.A. (Compl. [NYSCEF Doc. No. 2], Exhs. 3-4.) Dora entered into a Partnership Agreement, dated February 6, 2014, with Linadiam International Offshore S.A.L. (Linadiam Offshore). (Id., Exh. 5.) This Partnership Agreement was signed by Samer Halimeh, the individual defendant in this action, on behalf of Linadiam Offshore. Linadiam Offshore paid $8,000,000 for its partnership interest. (Id., Exh. 6.) The Partnership Agreement authorized Halimeh to "collect the Blue Diamond for sale, showing, exhibition, or any other sale purposes. . . ." (Id., Exh. 5, ¶ 3.A.) It further provided that the "[s]elling price shall be equally divided between partners. (Id., ¶ 3.C.) The invoice for Halimeh's $8,000,000 payment provided: "The title of the above goods remains with the seller until paid for in full plus 50% of profit on sale value." (Id., Exh. 6.) The Diamond was transferred between the parties through documents on Dora letterhead, which

contain the notation "On Consignement Out / On Approval" (Consignment Agreement). (Id., Exh. 2 [Consignment Agreement, dated April 23, 2015, from Dora to "Lunadiam NYC, LLC Mr. Samer Halimeh"]; Exh. 7 [Consignment Agreement, dated February 22, 2014, from Dora to "Linadiam International Offshore S.A.L. Mr. Samer Halimeh"].) There is also a document on Halimeh letterhead transferring the Diamond. (Samer Halimeh Aff., Exh. I [Document, apparently dated November 4, 2014] [NYSCEF Doc. No. 26].)

After Dora transferred the Diamond to Lunadiam NYC, LLC (Lunadiam NYC) by means of the April 23, 2015 Consignment Agreement, Dora decided "to withdraw the consignment" of the Diamond. (Declaration of Abdoul Bachir Hamidou [Dora's Chairman and Director], ¶ 30 [NYSCEF Doc. No. 9].) In June 2015, Hamidou requested that Lunadiam NYC and Halimeh return the Diamond. (Id.) According to Hamidou, they refused to respond to numerous requests between July and September. (Id., ¶¶ 31-36.) On September 2, 2015, Halimeh and Lunadiam NYC made an agreement as of September 2, 2015, with Hamidou and Dora which provided for the Diamond to be shown to a prospective purchaser of Hamidou at the Diamond Dealers Club; that "at the conclusion of the examination. . . the DIAMOND shall be immediately delivered and returned into the possession of HALIMEH"; and that "[t]his agreement is without prejudice to any rights, remedies or defenses under any other agreement between the parties." (Compl., Exh. 17.) After the September Agreement was made, Dora continued to request the return of the Diamond without success. (Hamidou Declaration, ¶ 39.)

In this action, Dora asserts causes of action for breach of contract, replevin, and conversion, claiming that it is entitled to possession of the Diamond pursuant to the April 23, 2015 Consignment Agreement. (Compl., ¶¶ 59-94.) Lunadiam NYC and Halimeh claim, among other things, that extensive litigation in Dubai over the period from 2015 to 2019 between

Hamidou, Dora, Linadiam Offshore, and Halimeh precludes Dora's maintenance of the claims in this action. (Defs.' Memo. In Opp., at 2-3 [NYSCEF Doc. No. 28].) Dora moves for a preliminary injunction and appointment of a temporary receiver. (Order to Show Cause [NYSCEF Doc. No. 21].) Lunadiam NYC and Halimeh oppose the motion and cross-move, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7), and (a) (10) to dismiss the action and for sanctions. (Notice of Cross-Motion [NYSCEF Doc. No. 24].)

The Dubai Proceedings

Given the critical issue of whether the Dubai proceedings preclude the maintenance of this action, the court will review those proceedings at the outset of this decision. The translations of the Dubai Courts' decisions are unaccompanied by affidavits of the translators attesting to the accuracy of the translations. Extensive portions of the translations are also largely incomprehensible. The decisions will have to be re-translated prior to any final holding as to their preclusive effect. Nevertheless, based on review of the decisions, with the benefit of the parties' experts' and counsels' (albeit, cursory) reading of the decisions, the court is able, for the purpose of these motions, to determine the issues apparently reached and the findings apparently made in these decisions.

As discussed further below, on October 29, 2015, Dora filed a criminal complaint against Halimeh in Dubai. A judgment in the criminal case against Halimeh was issued by the Court of First Instance on June 29, 2016. That decision was appealed by Dora, and the Court of Appeals issued its decision on October 11, 2016. A civil case was later filed by Halimeh against Hamidou, and Hamidou filed a counterclaim that brought Linadiam Offshore and Dora into the matter as parties. The Court of First Instance issued its decision on March 28, 2018. That

decision was appealed first to the Court of Appeals, which issued its decision on April 11, 2019, and then to the Court of Cassation, which issued its decision on August 1, 2019.

More particularly, Hamidou avers that in October 2015, Dora filed a criminal complaint against Halimeh with the Public Prosecution for, among other things,[1] breach of trust (apparently, embezzlement or misappropriation) of the Diamond. (Hamidou Declaration, ¶ 40; Decision of Dubai Court of First Instance, dated June 29, 2016, Samer Halimeh Reply Aff., Exh. AA [NYSCEF Doc. No. 52].) The Public Prosecution ordered the Diamond brought to Dubai and deposited at BRINKS. Halimeh complied with that order on November 10, 2015. (Hamidou Declaration, ¶ 40.) The Public Prosecution did not bring the breach of trust crime regarding the Diamond before the Court of First Instance, having determined that the issue of the Blue Diamond was "a solely civil dispute, which should be referred to the civil jurisdiction. . . ." (Public Prosecution Order, Samer Halimeh Aff., Exh. O, at 6.) The Public Prosecution, however, kept the Diamond in storage at BRINKS. (Samer Halimeh Reply Aff., Exh. AA, at 7.) The Court of First Instance accordingly did not make a ruling regarding breach of trust as to the Diamond but noted that if there was a dispute over possession of the Diamond, the Public Prosecutor should present the issue to a competent court—i.e., the Court of Appeals. (Id., at 9-10.)

The Court of Appeals heard the appeal of the decision of the Public Prosecution not to file a criminal case for breach of trust as to the Diamond. The appeal of the Public Prosecution's decision was challenged as untimely, but the Court of Appeals disagreed. (Court of Appeals Decision, dated October 11, 2016, Samer Halimeh Aff., Exh. R, at 7.) The Court held that the crime of breach of trust exists where the movable property at issue is "owned by a third party and

[1] The criminal complaint also included an embezzlement charge regarding a platinum ring that is not at issue in the present action.

a culprit receives this movable property under trust contracts . . . with the intention to own and transfer such movable property to his own possession." (Id.) The Court further found that the Partnership Agreement between Dora and Linadiam Offshore was still valid and noted that, in that Partnership Agreement, "it is stated that they are partners in the diamond, [which is the] subject matter of the Case. . . ." (Id.) In addition, the Court found that there was no evidence "that the Defendant intended to embezzle the Plaintiff's share in the diamond," and dismissed the appeal as "merely a paper dispute between the two parties with regard to the ownership of the diamond and the partnership therein." (Id., at 8.) In upholding the decision of the Public Prosecution not to prosecute, the Court reasoned that it had jurisdiction only to hear civil claims arising out of criminal cases, and that where, as there, the civil claim was independent of the criminal case, the Court had "no jurisdiction to consider the civil claim." (Id.) The issue of delivery of the Diamond from BRINKS was not taken up by the Court of Appeals.

In June 2014, Halimeh "caused the Blue Diamond to be re-cut and re-polished. . . ." (Samer Halimeh Aff., ¶ 13.) The cost for the re-cutting and re-polishing was $800,000, which Halimeh claimed the parties to the Partnership Agreement were to split evenly. (Id., ¶ 15.) Halimeh filed a civil case against Hamidou in Dubai for half of the cost of re-cutting and re-polishing. (See Decision of Court of First Instance, dated March 28, 2018, Exh. F to Pl.'s Expert Legal Opinion, at 1 [NYSCEF Doc. No. 48].) Hamidou filed a counterclaim to "terminate the partnership agreement dated 6 February 2014 and return the Diamond to the Claimant of the counter claim [Hamidou] . . ." and for the $8 million paid by Linadiam Offshore to Dora under the Partnership Agreement to be retained by Dora as "compensation of lost profits." (Id., at 1-2.) Dora and Linadiam Offshore were brought into the action as intervention parties. (Id., at 1.) As defendants acknowledge, the counterclaim was brought on the ground that the carats of the

diamond were impermissibly reduced by the re-cutting and re-polishing undertaken by Halimeh. (Defs.' Reply Expert Legal Opinion, ¶ 2.9 [NYSCEF Doc. No. 58].) The Court of First Instance denied both the claim and the counterclaim. (Exh. F to Pl.'s Expert Legal Opinion, at 11.)

The decision of the Court of First Instance was appealed to the Court of Appeals. The Court of Appeals delegated an expert to assist in making its determination. (Court of Appeals Decision, dated April 11, 2019, Halimeh Aff., Exh. T, at 7-8.) The expert found that the specifications of the Diamond after it was re-cut and re-polished were "very rare which doubles its value" and that the loss in weight from 9.33 Carats to 9.16 Carats "is a normal thing for this process." (Id., at 8; see Samer Halimeh Aff., ¶ 57.) The Court explained that, in order to find contractual liability, there must be fault, damage, and a reasonable relationship between the two. (Id., at 10.) Thus, although the weight of the Diamond fell below the allowed 9.25 Carats, there was no damage, because the value of the Diamond doubled. (Id., at 11-12.) The Court accordingly concluded that there was no violation of the Partnership Agreement that would support its annulment. (Id., at 12.) Relying on the February 6, 2014 Partnership Agreement and the September 2, 2015 Agreement, the Court of Appeals also apparently found that Dora and Linadiam Offshore were equal owners in the Diamond. (Id., at 14.) The Court noted that, under Dubai law, "each partner . . . has the right to implement any means which preserve him the common money, even without the approval of the rest of the partners." (Id., at 13.) Thus, Halimeh was permitted to pay for the re-cutting and re-polishing of the Diamond without conferring with Hamidou or Dora about the price, and then to demand payment for half of the cost. (Id., at 14.) The Court of Appeals reversed the decision of the Court of First Instance regarding the claim for half of the re-cutting and re-polishing fee and upheld the decision not to annul the Partnership Agreement. (Id., at 15.)

The decision of the Court of Appeals was appealed to the Court of Cassation. The Court of Cassation also relied on the expert report provided to the Court of Appeals, as it was "convinced by its reasons and considers it complementary to its reasons" in making its decision. (Decision of Court of Cassation, dated August 1, 2019, Halimeh Aff., Exh. H, at 9-10.) The Court of Cassation adhered closely to the reasoning of the Court of Appeals in coming to the same conclusion. The Court found that, after the re-cutting and re-polishing process, the Diamond had "very rare universal specifications, and its value was doubled" and that the lost weight from the process "is considered a normal percentage" for the process. (Id., at 9.) Due to the increased value of the Diamond, the Court determined that "the alleged breach by [Halimeh]" that would justify annulling the Partnership Agreement "is absent." (Id., at 10.) The Court further held that the $800,000 "for the expenses of cutting and polishing are considered normal" and that Halimeh "has the right to demand" $400,000 as half of that cost. (Id., at 11.) Finally, the Court of Cassation chose to reject the cassation, upholding the decision of the Court of Appeals.

Preclusive Effects of the Dubai Proceedings

This court must determine whether plaintiff is precluded, by the Dubai Courts' decisions, from bringing any or all of the claims in the present action. The parties agree that comity should be afforded to the judgment of a foreign court where the foreign court's judgment would have a res judicata effect on any future litigation in the foreign court as to the subject matter of the judgment. (See Watts v Swiss Bank Corp., 27 NY2d 270, 275 [1970] [applying to extranational judgments, the precept that "the law of the rendering jurisdiction, insofar as it limits the effect of its own judgments, would also limit elsewhere the preclusive effect of the judgment and the definition of the parties bound"].) The parties disagree, however, as to the standards for

application of the res judicata doctrine by the Dubai Courts and, in particular, as to the expansiveness of the doctrine. The parties' experts thus differ sharply as to the preclusive effects of the Dubai decisions. (See Defs.' Memo. In Opp., at 10-13; Pl.'s Reply Memo, at 23-28 [NYSCEF Doc. No. 49]; compare Pl.'s Expert Legal Opinion, ¶ 109, with Defs.' Reply Expert Legal Opinion, ¶¶ 2.3-2.4.)

"The burden of proof in establishing the conclusive effect in the rendering jurisdiction of a prior judgment is upon the party asserting it." (Watts, 27 NY2d at 275.) Defendants, as the parties asserting the preclusive effect of the Dubai judgments, have the burden of proof. The court finds that on this record, defendants do not persuasively demonstrate that the issues in the present action are identical to those that were decided in the Dubai proceedings or arise out of the same transaction or series of transactions that were the subject of the Dubai Courts' decisions. The assessment of the expert opinions involves issues of credibility that cannot be determined on this record. As held above, the translations of the Dubai Court decisions are also seriously deficient.

The court holds, however, based on its reading of the Dubai Courts' decisions, that it appears to be highly questionable that the issues in the present action are identical to those that were, or should have been, raised in the Dubai proceedings. Most importantly, it does not appear that the Courts made any decision as to the possession of the Diamond. In the criminal cases, as discussed above, the Court of First Instance did not hear the issue of possession because the issue of breach of trust, which implicated the right to possession, was not presented to it by the Public Prosecution. The Court of Appeals upheld the decision of the Public Prosecution not to bring a criminal case for breach of trust as to the Diamond, holding in effect that the parties' dispute was not a criminal matter but, rather, concerned ownership of the Diamond. Thus, it appears that no

determination as to possession was made in the criminal cases. In the civil cases, as discussed above, all three Courts heard arguments regarding payment for the re-cutting and re-polishing process and regarding annulment of the Partnership Agreement based on the loss of weight of the Diamond as part of that process. Again, no determination as to possession appears to have been made.

Defendants' expert opines that, because the decision of the Public Prosecution not to bring a criminal case for breach of trust was confirmed by the Court of Appeals, a civil court would be precluded from hearing a case on the same factual and legal basis. (Defs.' Reply Expert Legal Opinion, ¶ 2.17.) This opinion is seemingly inconsistent with the holding of the Court of Appeals that it lacked jurisdiction to hear the civil claim because it did not arise out of a criminal case.

Defendants' expert also opines that, because Hamidou argued for dissolution of the Partnership Agreement and return of the Diamond pursuant to the April 23, 2015 Consignment Agreement, the issue has already been decided. (Id., ¶ 2.9.) As also discussed above, the Courts' determination of Hamidou's counterclaim for annulment of the Partnership Agreement and of his request for return of the Diamond was based on defendants' alleged wrongful re-cutting and re-polishing of the Diamond, and not on an asserted right to possession of the Diamond under the Consignment Agreement. The Dubai Courts appear to have referenced the April 23, 2015 Consignment Agreement to show a course of dealing between the parties. For example, the Court of First Instance in the criminal action noted that on April 23, 2015 Halimeh "received the diamond once again under receipt that proves that he had received the diamond on trusteeship. . . ." (Halimeh Reply Aff., Exh. AA, at 3.) The Court of Appeals in the civil action similarly noted that the Diamond had been delivered to Halimeh "by virtue of a deed dated

23.04.2015. . . ." (Halimeh Aff., Exh. T, at 3.) The Dubai Courts thus do not appear to have reached a decision on the issue of possession of the Diamond under the April 23, 2015 Consignment Agreement. Here, in contrast, the very issue is the right to possession based on that Consignment Agreement.

In sum, on this record, this court does not find that the decisions of the Dubai Courts preclude the court from making a determination as to possession.

Preliminary Injunction

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; CPLR 6301.) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

As to likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action. While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations, brackets and quotation marks omitted].) "A likelihood of success on the merits may be sufficiently

established even where the facts are in dispute and the evidence need not be conclusive." (See Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d 430, 431 [1st Dept 2016]; Four Times Sq. Assocs., L.L.C. v Cigna Invs., Inc., 306 AD2d 4, 5 [1st Dept 2003].) Where "the facts are in such sharp dispute that it cannot be said that the [movant] established a clear right to preliminary injunctive relief," the motion will, however, be denied. (Omakaze Sushi Rest., Inc., v Lee, 57 AD3d 497, 497 [2d Dept 2008].)

Here, plaintiff makes a sufficient showing to warrant the grant of a preliminary injunction. Plaintiff pleads causes of action for breach of contract, conversion, and replevin, based on allegations that Dora has a right to possession of the Diamond and that defendants have failed to return the Diamond upon Dora's demand. (Compl., Breach of Contract Cause of Action, ¶¶ 63-64; Replevin Cause of Action, ¶¶ 73-77; Conversion Cause of Action, ¶¶ 84-92.) Plaintiff makes a sufficient showing of a likelihood of success on the merits of its claims that defendants have wrongfully denied Dora possession of the Diamond. The April 23, 2015 Consignment Agreement under which plaintiff brings this action provides, on its face, that the Diamond remains the property of Dora and that, upon demand, Lunadiam NYC is required to return the Diamond to Dora. (Apr. 23, 2015 Consignment Agreement, Compl., Exh. 2.) Defendants do not dispute that they have not returned the Diamond in response to Dora's demands. Rather, defendants argue that the parties' relationship is governed by the Partnership Agreement and the September 2, 2015 Agreement, not the April 23 2015 Consignment Agreement. (Defs.' Memo. In Opp., at 14 ["the parties entire relationship includes the Partnership Agreement and September 2015 Agreement – which supersedes the April 23, 2015 Consignment"].) This contention ignores that, although the September 2, 2015 Agreement provides for return of the Diamond to Halimeh and Lunadiam NYC upon the conclusion of the

inspection of the Diamond by Hamidou's prospective customer at the Diamond Dealer's Club, it also unequivocally provides: "This agreement is without prejudice to any rights, remedies or defenses under any other agreement between the parties." (Sept. 2, 2015 Agreement, Compl., Exh. 17, ¶¶ 2, 3.) Moreover, there is nothing in the express language of the Partnership Agreement which grants exclusive possession of the Diamond to Halimeh or either Linadiam Offshore or Lunadiam NYC pending the sale of the Diamond. (See Partnership Agreement, Compl., Exh. 5.) Upon the ultimate resolution of this action, the parties must address the interplay between and among the several agreements they have executed, and their effect on the right of the parties to share possession of the Diamond pending its sale. On the record of these motions, neither party has comprehensively addressed this issue. Based on the terms of the Agreements, however, plaintiff makes a sufficient showing at this juncture of a likelihood of success on the merits of its claims.

Plaintiff also makes a sufficient showing that it will suffer irreparable harm without a preliminary injunction. Plaintiff claims that the Diamond is a unique item for which money damages would be insufficient. (Pl.'s Memo. In Supp., at 14 [NYSCEF Doc. No. 8].) Defendants argue that, while the Diamond is unique, the partnership between the parties exists to sell the Diamond and money damages are therefore a sufficient remedy. (Defs.' Memo. In Opp., at 16.) The court is persuaded that maintenance of the status quo is appropriate to prevent irreparable harm. (See Danae Art Intl. Inc. v Stallone, 163 AD2d 81, 82 [1st Dept 1990] [painting]; accord Republic of Lebanon v Sotheby's, 167 AD2d 142, 145 [1st Dept 1990] [antique silver pieces]; see CPLR 7109 [a].)

The balance of the equities also favors plaintiff in this case. The court rejects defendants' contention that plaintiff comes to this court with unclean hands because plaintiff

failed to inform the court that it has already litigated its rights under the Consignment Agreement in Dubai. (See Defs.' Memo. In Opp., at 17.) As held above, this court is not persuaded that the issues in this action were litigated and decided against plaintiff in Dubai. The court is similarly unpersuaded by defendants' contention that plaintiff has blocked the sale of the Diamond "by tying it up in litigation in Dubai for the past 4 year. . . ." (Id.) This contention ignores that the civil claim in Dubai was filed by defendant Halimeh. In contrast, plaintiff asserts a colorable claim not merely to an ownership interest but to a possessory interest in the Diamond, which defendants have steadfastly refused to acknowledge.

Undertaking

Defendants assert that the undertaking should be set in the amount of $25,000,000, while plaintiff requests an undertaking of $500,000. (Defs.' Memo. In Opp., at 19-20; Pl.'s Reply Memo., at 18-19.) Contrary to defendants' contention, the purpose of the undertaking is not to provide security for payment of a potential judgment. (See Defs.' Memo. In Opp., at 19) Rather, the undertaking must be "rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted." (1414 Holdings, LLC v BMS-PSO, LLC, 116 AD3d 641, 643-644 [1st Dept 2014].) The undertaking will accordingly be set at $750,000.

Temporary Receiver

A temporary receiver should not be appointed unless the moving party "has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests." (Suissa v Baron, 107 AD3d 689, 689 [2d Dept 2013].) Dora moves for appointment of the Gemological Institute of America (GIA) as a temporary receiver.

GIA stated on the record that it did not want to take on a traditional receivership role and to be involved in valuing or selling the Diamond, but that it was willing to act as custodian of the Diamond and to make it available for showing if the parties were to agree to try to sell the stone. (See Tr. of October 28, 2019 Proceedings, at 51-52 [NYSCEF Doc. No. 66].) Plaintiff agreed on the record that if the motion for a preliminary injunction were granted, GIA could act as a custodian for the Diamond and hold the Diamond for the pendency of this action. (Id.)[2]

The court is not aware of any authority for appointing a mere "custodian" under the circumstances presented. Moreover, the court is satisfied that the standards for appointment of a receiver are met, given the complete breakdown of the parties' relationship. The court will, however, limit the duties of the receiver so as not to require the receiver to value or sell the Diamond. If the GIA is nevertheless unwilling to serve as a receiver, the court will appoint a different receiver.

Cross-Motion to Dismiss

Defendants' cross-motion seeks dismissal of the complaint, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7), and (a) (10).

The branch of the motion pursuant to CPLR 3211 (a) (1) and (a) (7), based on documentary evidence and failure to state a cause of action, is without merit. It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98

[2] While defendants sought release of the Diamond, they had no objection to GIA's holding the Diamond as custodian, at least during the pendency of the decision.

NY2d 144 [2002].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88.)

In seeking dismissal of the cause of action for breach of contract, defendants argue that plaintiff's claim to possession of the Diamond under the April 23, 2015 Consignment Agreement "is conclusively rebutted by the terms and conditions of the Partnership Agreement and September 2015 Agreement." (Defs.' Memo. In Opp., at 15.) The court has rejected this claim above. As defendants seek dismissal of the conversion and replevin causes of action on similar grounds, this basis for the motion is also without merit. (Id., at 15-16.) To the extent that these causes of action are duplicative of the breach of contract cause of action, they are nevertheless maintainable at the pleading stage.

The branch of the motion to dismiss the complaint, as barred by res judicata, pursuant to CPLR 3211 (a) (5) (see Defs.' Memo. In Opp., at 10-13), is denied for the reasons stated above.

The branch of the motion to dismiss the complaint for failure to join an indispensable party, pursuant to CPLR 3211 (a) (10) (see Defs.' Memo. In Opp., at 7-10), is also denied. Defendants contend that this action must be dismissed because Linadiam Offshore is a necessary party to the action and was not named as a defendant in this case. (Defs.' Memo. In Opp., at 7.) The court is not persuaded that Linadiam Offshore is a necessary party. As plaintiff notes, Lunadiam NYC, not Linadiam Offshore, is a party to the Consignment Agreement under which this action is brought. (Pl.'s Reply Memo., at 28.) Further, as discussed above, this action concerns possession of the Diamond and does not implicate Linadiam Offshore's ownership interest. It is also undisputed that the Diamond was in the possession of Lunadiam NYC, not Linadiam Offshore. No determination is sought in this action as to the respective ownership

interests of Dora and Linadiam Offshore under the Partnership Agreement. Nor do defendants otherwise make any showing that this possessory dispute between Lunadiam NYC and Dora would affect the rights of Linadiam Offshore.

Sanctions

Finally, defendants seek sanctions, pursuant to 22 NYCRR Part 130. They claim in effect that this action is frivolous because it is barred by the decisions of the Dubai Courts. (See Defs.' Memo. In Opp., at 20.) This branch of the motion is denied as without merit.

ORDER

It is hereby ORDERED that the motion of plaintiff B. & R. Dora International DMCC (Dora) for a preliminary injunction is granted to the following extent: Defendants Lunadiam NYC, LLC and Samer Halimeh and non-party Gemological Institute of America, Inc. (GIA) are hereby enjoined and restrained, pending the hearing of this action, from transferring, selling, pledging, assigning or otherwise disposing of the 9.16 Carat Fancy Vivid Blue Oval Diamond (the Diamond); moving the Diamond outside of New York and the United States; or otherwise moving the Diamond from its current location at the GIA; and it is further

ORDERED that the aforesaid injunction shall not preclude the parties from agreeing to seek to sell the Diamond and to permit inspection of the Diamond by potential purchaser(s) at the office of the GIA. Provided that: Any such inspection shall be at the GIA's employees' convenience, and shall be conducted in the presence of and in the unobstructed view of the GIA's employees; and, during any such inspection, the Diamond shall remain in the custody and possession of the GIA at all times; and it is further

ORDERED that the branch of plaintiff's motion for the appointment of a temporary receiver is granted to the following extent: Subject to its acceptance of the appointment, GIA is

appointed as the temporary receiver of the Diamond. In its capacity as temporary receiver, GIA shall have no obligation to value or sell the Diamond and shall hold custody of the Diamond; and it is further

ORDERED that if GIA accepts the appointment, it may apply to this court for compensation, and will be subject to Part 36 of the Rules of the Chief Judge; and it is further

ORDERED that, pursuant to Section 36.1(a) (10) of Part 36 of the Rules of the Chief Judge, the Receiver is not authorized to hire counsel, an accountant, auctioneer, appraiser, property manager, or real estate broker (secondary appointees) without further order of this court, and that the Receiver is not authorized to pay fees to any secondary appointee without further order of this court; and it is further

ORDERED that, pursuant to Section 36.2 (c) (8), no or Receiver shall be appointed as his or her own counsel and no person associated with a law firm of that Receiver shall be appointed as counsel to that Receiver unless there is a compelling reason to do so; and it is further

ORDERED that, compensation for every secondary appointee is subject to prior court approval upon submission of an affirmation showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, and challenges presented and results achieved; and it is further

ORDERED that if GIA rejects the appointment, it shall promptly notify the parties who shall then confer with a view to attempting to reach agreement on a different receiver. The parties shall seek confirmation of the appointment from the court or, in the event agreement cannot be reached, plaintiff may seek court approval for a receiver.

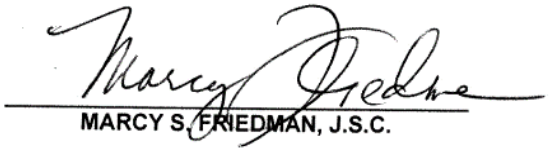
ORDERED that defendants' cross-motion to dismiss is denied; and it is further

ORDERED that defendants' request for sanctions is denied; and it is further

ORDERED that the undertaking is fixed in the sum of $750,000.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the parties shall appear for a preliminary conference at a Part of this Court to be assigned on February 25, 2021, at 2:30 p.m.

This constitutes the decision and order of the court.



1/27/2021
DATE

MARCY S. FRIEDMAN, J.S.C.

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