

Koblence v Aster Jewels, Inc.
2021 NY Slip Op 31748(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 656288/2017
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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RAFAEL KOBLENCE, RAFKA & COMPANY, LTD,

Plaintiff,

- v -

ASTER JEWELS, INC., JANE DOES, JOHN DOE
CORPORATION, 1-10, JOHN DOE ENTITIES 1-10

Defendant.

INDEX NO. 656288/2017

MOTION DATE 01/22/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 99, 100

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Plaintiffs Rafael Koblence and Rafka & Company, Ltd. ("Rafka") hereby move pursuant to Rules 3211(a)(1), (a)(5) and (a)(7) of the New York Civil Practice Law and Rules ("CPLR"), to dismiss the Counterclaims (the "Counterclaims") of Defendants Aster Jewels, Inc. ("Aster") and/or Ajay Jain ("Jain"). In its Answer to the Amended Complaint and Counterclaims (NYSCEF Doc. 63 at 5-11), Aster pleaded four counterclaims, alleging that: (1) Rafka breached the loan agreement by failing to repay the loan (First Counterclaim- Breach of Contract); (2) Aster is entitled to a deficiency payment of not less than \$1,695,000 pursuant to New York Uniform Commercial Code § 9-615(d)(2) (Second Counterclaim- Deficiency); (3) Koblence and Rafka fraudulently induced Aster to make the loan (Third Counterclaim- Fraudulent

Inducement); and (4) Rafka must account to it for any proceeds from the sale of certain emeralds purchased with proceeds of the loan (Fourth Counterclaim- Accounting).¹

Mr. Koblence and Rafka filed this lawsuit against Aster for rescission based on violations of Article 5 of the General Business Law (first cause of action), breach of contract (second cause of action), conversion (third cause of action), and violations of General Business Law §§ 46, 48, and 349 (fourth cause), alleging that Aster wrongfully sold certain items of jewelry that had been deposited with Aster by Rafka as collateral for a \$1.7 million loan to finance the acquisition of 17 cut emeralds (NYSCEF Doc. No. 32).²

Analysis

Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]; see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

Pursuant to CPLR §3211(a)(5), dismissal is appropriate if the cause of action may not be maintained because of "arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Alden Global Value Recovery Master Fund, L.P. v KeyBank*

¹ Plaintiffs have withdrawn the portion of their motion to dismiss the first counterclaim (NYSCEF Doc. 100). Accordingly, that counterclaim will not be addressed in this decision.

² The first and fourth causes of action have been dismissed pursuant to prior court decision (NYSCEF Doc. 97) 656288/2017 KOBLENCE, RAFAEL vs. ASTER JEWELS, INC. Motion No. 004

National Association, 159 AD3d 618, 621-22 [2018]). In addition, “on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (Id. at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (see, *Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

Second Counterclaim

Rafka seeks dismissal of the Second Counterclaim under CPLR §3211(a)(1), arguing that documentary evidence contradicts Aster's allegation that the collateral sale was insufficient to satisfy Rafka's debt. In support, Rafka contends that the alleged deficiency in the amount of \$1,695,000 fails to account for the third item that Rafka deposited with Aster, the Zambian diamonds, which have an agreed value of \$2,000,000 as evidenced by the June 24, 2013 “Rafka

Memo" (NYSCEF Doc. 66). Rafka argues that this value is \$305,000 more than the alleged deficiency, and therefore a deficiency counterclaim cannot be sustained.

In opposition, Aster contends that no documentary evidence exists that substantiates Plaintiffs' allegation that the fair market value of the Zambian diamonds was \$2,000,000 at the time of sale.

There remain significant issues of fact in regard to the fair market value of the Zambian diamonds, which Aster remains in possession of. Accordingly, Rafka's motion to dismiss the deficiency counterclaim is denied.

Third Counterclaim

Plaintiff contends that Aster's Third Counterclaim alleging that Koblence and Rafka fraudulently induced Aster to make the loan must be dismissed because under settled New York law, none of the purported misrepresentations alleged to have fraudulently induced Aster are actionable, and even if they were, Aster has alleged no facts showing that Rafka or Koblence had any present intent not to perform.

The elements of a fraudulent inducement or misrepresentation claim are: (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, and (4) there was justifiable reliance on the part of the plaintiff resulting in an injury for which compensable damages are sought (*see Connaughton v Chipolte Mexican Grill*, 29 NY3d 137, 142 [2017]; *McSpedon v Levine*, 158 AD3d 618, 620 [2d Dept 2018]; *Mariano v Fiorvante*, 118 AD3d 961, 962 [2d Dept 2014]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

Specifically, Aster contends that it was fraudulently induced by Rafka to make the Loan by fraudulently representing to Aster's principal, Ajay Jain ("Jain") that the Loan would be

repaid in 12 months, that the Emeralds and Jewelry were readily marketable, and that several pieces of Jewelry were going to be given to Christie's and Sotheby's to be auctioned at upcoming jewelry auctions. (NYSEF Doc. No. 85, ¶¶ 71-74).

Giving Aster the benefit of every inference, the counterclaim states a cause of action for fraudulent inducement by alleging that Jain knowingly misrepresented a present fact in order to induce plaintiffs to enter into the agreement (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81, 915 NYS2d 521 [1st Dept 2010], *lv. dismissed* 17 NY3d 782, 929 NYS2d 83 [2011]; *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549, 5 NYS3d 373, 375 [2015]). Accordingly, Rafka's motion to dismiss the counterclaim for fraudulent inducement is denied.

Fourth Counterclaim

Plaintiff contends that Aster's Fourth Counterclaim, seeking an accounting from Rafka for any proceeds from the sale of certain emeralds purchased with proceeds of the loan, should be dismissed because Aster failed to adequately allege three of the four elements required for such a claim -- (1) a relationship of a fiduciary or confidential nature; (2) money or property entrusted to the defendant imposing upon him the burden of accounting; and (3) the absence of an adequate legal remedy. In opposition, Aster argues that in accordance with the terms of the Loan all sale proceeds realized from the sale of the Emeralds and Jewelry would be paid to Aster to reduce the outstanding principal balance of the Loan and accrued interest, and further, that Aster was entitled to 10% of the profits realized by Rafka from the sale of the Emeralds and Jewelry. Aster relies upon these allegations as supporting a fiduciary relationship between the parties.

To maintain a cause of action for an accounting "four factors [must] exist [:] (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a


demand and refusal of an accounting' “ (*Litchfield Fin. Corp. v N. Hotels Corp.*, 51 Misc 3d 1208(A), 37 NYS3d 207 [2016]; *Matter of Mary XX.*, 33 AD3d 1066, 1068 [2006], quoting *Matter of Kent*, 188 Misc2d 509, 510 [2001]; see *300 Broadway Realty Corp. v Kommit*, 37 Misc.2d 325, 325 [1962]). Further, a fiduciary relationship does not generally exist in regards to transactions between debtors and creditors (*Litchfield Fin. Corp.*, 51 Misc. 3d 1208(A) [2016]; *Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1286 [2007]; see *Trustco Bank, N.A. v Cannon Bldg. of Troy Assoc.*, 246 A.D.2d 797, 799 [1998]; *Landes v Sullivan*, 235 A.D.2d 657, 660 [1997]). Aster has failed to demonstrate that a fiduciary relationship exists and accordingly, the fourth counterclaim is dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted in part and the fourth counterclaim for an accounting is; and it is further

ORDERED that the motion to dismiss is denied as to the second and third counterclaims; and it is further

ORDERED that counsel are directed to appear for a remote compliance conference on September 21, 2021 at 12:00pm.

<u>5/21/2021</u> DATE	 SHAWN TIMOTHY KELLY, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT