

Sarkis v Global Diamond Group Ltd.
2021 NY Slip Op 32796(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 653721/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

RUDY SARKIS,

Plaintiff,

- v -

GLOBAL DIAMOND GROUP LTD., JOHN KABBANI

Defendants.

-----X

INDEX NO. 653721/2021

MOTION DATE 10/07/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISS.

The following read on plaintiff's motion to dismiss, CPLR 3211(a)(7) – failure to state a cause of action, defendants' counterclaims of i) declaratory judgment, and ii) abuse of process; and defendants' cross-motion for leave to file an amended answer. Defendants' cross-motion seeks leave to file an amended answer with counterclaims of i) declaratory judgment, ii) breach of contract, iii) specific performance, and iv) abuse of process.

This litigation involves the alleged sale of a new Rolex Daytona Rose Gold watch with Baguette Diamond Dial, bearing Serial Number S40L0956 and Reference Number 116505.

A verified complaint states causes of action for i) "demand for return of property," ii) "conversion through the unauthorized sale of goods," iii) "refusal to account for sale proceeds," iv) "sale without consent," v) "negligence through the taking and sale of personal property," vi) "conversion through the taking and sale of personal property," and vii) "conversion through the unlawful taking and sale of merchandise."

An answer was submitted with counterclaims of i) declaratory judgment, and ii) abuse of process.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

The complaint verified by named plaintiff Rudy Sarkis affirms, “Kabbani of GDG agreed with Sarkis via text message to take the new Rolex Daytona Rose Gold watch, in exchange for the agreed-upon price of forty-five thousand five hundred (\$45,500.00) dollars, so that GDG could proceed to sell the new Rolex Daytona Rose Gold watch to its customer” (see NYSCEF Doc. No. 1 Par. 11).

Defendant’s first counterclaim seeks a declaratory judgment. “Generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone. Rather, a Court should only reach the merits of a declaratory judgment action upon a motion to dismiss in the event there are no questions of fact presented” (see *Matter of Nappi v. N.Y.C. Dep’t of Homeless Servs.*, 2020 NY Slip Op 33812(U) [Sup. Ct. NY County Nov. 10, 2020]).

Defendants’ second counterclaim seeks abuse of process. Abuse of process has “three essential elements: 1) regularly issued process, either civil or criminal, 2) an intent to do harm

without excuse or justification, and 3) use of the process in a perverted manner to obtain a collateral objective” (see *Curiano v. Suozzi*, 63 N.Y.2d 113 [1984]).

Through a review of the documents, the threat of litigation of a party’s previous attorney, does not meet the abuse of process standard.

Provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR 3025(b) should be freely granted (see *United States Fid. & Guar. Co. v. Delmar Dev. Partners, LLC*, 803 NYS2d 254, 257 [3d Dep’t 2005]).

Defendant seeks to add the second counterclaim of breach of contract, “[a]lternatively, that in or about August 2020, the parties entered into an oral agreement for the sale of the Rose Gold Rolex Daytona from Plaintiff to Global for an agreed upon price of \$35,500. That Plaintiff breached the parties’ oral agreement by failing to deliver to Defendant the original Rolex Warranty document” (see NYSCEF Doc. No. 15 Pars. 115 – 116); and the third counterclaim of specific performance, “[w]ithout the original Rolex Warranty document, the Rose Gold Rolex Daytona is practically worthless, as it is unrecognized and unserviceable by Rolex. That as a result of the wrongful refusal of the Plaintiff, to transfer deliver to Defendant the original Rolex Warranty document, despite Defendants’ entitlement to same, Defendant has suffered an irreparable injury not compensable in money damages, due to the refusal of Rolex to service the subject watch without the same” (see NYSCEF Doc. No. 15 Pars. 121 – 122).

The plaintiff does submit a verified complaint however there remains questions of fact in this litigation, specifically the details of the contract, and whether an oral contract or a written contract existed. Defendants have failed to submit any verified pleadings.

Defendant submits a proposed amended answer with redlining which is defective for this court and improper. (see NYSCEF Doc. No. 15).

ORDERED that Defendants motion for leave to file an amended answer is DENIED with leave to renew; and it is further

ORDERED that plaintiff's motion to dismiss defendants' first counterclaim for a declaratory judgment is DENIED; and it is further

ORDERED that plaintiff's motion to dismiss defendants' second counterclaim of abuse of process is GRANTED.

<u>12/20/2021</u>			
DATE		LAURENCE LOVE, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE