

J. Nazmiyal, Inc. v Damoka USA, Inc.

2023 NY Slip Op 30442(U)

February 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652900/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

J. NAZMIYAL, INC.,

Plaintiff,

- v -

DAMOKA USA, INC., SHAHAB KARMELY, and DAVID
KARMELI,

Defendants.

-----X

INDEX NO. 652900/2020

MOTION DATE 11/23/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ORDERED that so much of the motion as seeks to dismiss the complaint against defendant David Karmeli (“David”) for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 21, 25, 32) and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, jurisdiction under the long-arm statute requires that “the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]). Here, the sole transaction alleged in the complaint as a basis for jurisdiction is that plaintiff paid David pursuant to an agreement between plaintiff and nonparties Mr. and Mrs. Albert Karmely (the “Karmelys”), and the money was deposited in an account with JP Morgan Chase Bank, N.A., at a branch in New York. The complaint fails to allege that David ever traveled to New York to open the account; that he chose to use the New York Branch; or

that he ever otherwise availed himself of the privilege of conducting business in New York. The use of a New York bank, standing by itself, is not a basis for jurisdiction under CPLR 302(a)(1) (*Al Rushaid*, 28 NY3d at 325).

AND IT IS FURTHER

ORDERED that so much of the motion to dismiss the complaint on documentary evidence and for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (a)(7) is also granted to the following extent, upon the above-cited papers, in which the court concurs as follows. The first cause of action for an account stated must be dismissed because plaintiff contends that enforceable contracts govern its right to recovery and “[a] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract” (*Sabre Intern. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]). The second cause of action for breach of an alleged oral agreement by which plaintiff advanced funds to a nonparty on defendant Damoka USA, Inc.’s (“Damoka”) behalf is based on an unenforceable oral modification of the consignment agreement between the parties, which contains a “no oral modifications” clause (consignment agreement, NYSCEF Doc. No. 22, ¶ 9), and plaintiff fails to sufficiently allege facts entitling it to claim partial performance or equitable estoppel. The fifth cause of action for breach of a risk of loss agreement must be dismissed because it predates the consignment agreement, and is thus superseded by it pursuant to the consignment agreement’s merger clause, given that the consignment agreement does not specifically contemplate integrating the risk of loss agreement (*Schron v Troutman Saunders LLP*, 97 AD3d 87, 93 [1st Dept 2012], *affd sub nom. Schron v Troutman Sanders LLP*, 20 NY3d 430 [2013] [“The merger and integration clauses are explicit and therefore bar the use . . . of any other agreements or understandings”]).

Separately, the third cause of action for breach of an alleged agreement to pay David fails because the purported agreements are only signed by the Karmelys, and none of the defendants are signatories (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 121 [1st Dept 2020] [“It is a general principle that only the parties to a contract are bound by its terms”]). Further there is no indication that Albert Karmely was signing the purported agreements in his corporate capacity as Damoka’s then principal. Finally, the sixth cause of action for unjust enrichment against David and defendant Shahab Karmely (“Shahab”) must also fail. Plaintiff alleges that David and Shahab are liable for payments made on Damoka’s behalf because they are successors in interest to or members of Damoka. There is no indication in the record in support of the legal conclusion that David and Shahab were successors in interest to Damoka (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994] [bare legal conclusions not entitled to presumption of truth on motion to dismiss]). Nor is there any evidence that Shahab, the only remaining individual defendant, personally benefitted from plaintiff and Damoka’s relationship. In any case: where, as here, the existing agreements between the parties bar recovery in contract, an unjust enrichment claim based on the same subject matter also fails (*e.g. Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-92 [2d Dept 2011]); and it is further

ORDERED that the first through third, fifth, and sixth causes of action are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor defendants Shahab Karmely and David Karmeli dismissing the complaint against them; and it is further

ORDERED that the fourth cause of action is severed and the balance of the claims against defendant Damoka USA, Inc. are continued; and it is further

ORDERED that defendant Damoka USA, Inc. is directed to serve an answer to the amended complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on March 15, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER

<u>2/10/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE