

Michael Gross Diamonds, Inc. v Vaknin

2023 NY Slip Op 32584(U)

July 26, 2023

Supreme Court, New York County

Docket Number: Index No. 651396/2014

Judge: Barry R. Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS 61EF

Justice

Table with 2 columns: Case details (MICHAEL GROSS DIAMONDS, INC., Plaintiff, - V - YISHAI VAKNIN, SV&V CORPORATION and SV&V DIAMOND CORPORATION, Defendants.) and Motion details (INDEX NO. 651396/2014, MOTION DATE, MOTION SEQ. NO.). Includes 'DECISION AFTER TRIAL' label.

HON. BARRY R. OSTRAGER

On July 18 and July 20, 2023, the Court conducted the bench trial of this 2014 case remotely via Microsoft Teams. During the course of the trial, plaintiff Michael Gross Diamonds, Inc. ("MGD") presented three witnesses and defendants SV&V Corporation, SV&V Diamond Corporation (collectively, "SV&V") and Yishai Vaknin presented two. Plaintiff's witnesses were Michael Gross, the principal of MGD; Chaim Brachfeld, an expert in the diamond industry; and Nicole Annunziata, a representative of HSBC Bank. Defendants presented Yishai Vaknin, the principal of defendants SV&V, and handwriting expert Donald Frangipani. Direct testimony of Michael Gross, Yishai Vaknin, and Chaim Brachfeld was done via affidavit (NYSCEF Doc. Nos. 156, 157, 170), and cross-examinations of the witnesses who submitted direct testimony affidavits occurred during the Microsoft Teams trial. The handwriting expert Mr. Frangipani provided an expert report and an affidavit certifying to his expertise (NSYCEF Doc. Nos. 176, 183, 186) and was also cross-examined during the virtual trial. Finally, both the direct and cross-examinations of Nicole Annunziata were conducted via Microsoft Teams.

For the reasons that follow, the Court finds in favor of the defendants, finds the testimony of plaintiff's principal, Michael Gross, unworthy of belief, and finds defendants' principal Yishai Vaknin credible. The Court also finds that memoranda purportedly signed by Vaknin and

purportedly reflecting indebtedness to MGD by Vaknin were unreliable as the defendants creditably claimed to have either paid for the items referenced in the memoranda or returned the merchandise for which the memoranda were issued. In this regard, the Court specifically found MGD's record-keeping incomprehensible. To the extent Vaknin claimed his signature on some of the memoranda were forgeries, the Court is not basing its decision on that testimony because the Court found all of Vaknin's other testimony to be entirely credible. In all events, plaintiff failed to carry its burden of proof and accordingly, the complaint is dismissed.

Plaintiff seeks recovery based on three separate claims. The first claim relates to a necklace and three memoranda for merchandise MGD consigned to SV&V that plaintiff alleges were returned to SV&V in exchange for the necklace. The second claim relates to eight additional memoranda allegedly memorializing the consignment of diamonds from MGD to SV&V, unrelated to the necklace, which memoranda plaintiff contends remain outstanding because SV&V allegedly neither returned the diamonds nor paid for the diamonds in full. The third dispute relates to a \$140,000.00 bounced check from SV&V to MGD related to other transactions among the parties.

The case appears to have been precipitated by a transaction that was adjudicated in a related case captioned *Blue River Gems, Inc. v. S.V. & V Diamond Corp., Michael Gross Diamonds Inc.*, Index No. 151453/2015 (hereinafter, the "Blue River Action"). In that case, another Justice of this Court found that MGD had wrongly converted a necklace belonging to Blue River Gems, Inc. ("Blue River") that had been consigned to SV&V, and summary judgment was entered against MGD for \$260,000.00 Trial Exhibit 3, NYSCEF Doc. No. 133. That decision was affirmed by the Appellate Division, First Department. *See Blue River Gems Inc. v. S.V.&V. Diamond Corp.*, 190 A.D.3d. 581 (1st Dept. 2021). The judgment in the *Blue River* case is unsatisfied and, with accruing interest, exceeds \$450,000.00.

This case was originally filed on May 6, 2014. The case was struck from the Court's docket on August 7, 2018 for non-prosecution because the case had been inactive since 2015. NYSCEF Doc. No. 28. After the case was restored to the Court's calendar by Order dated October 2, 2020 (NYSCEF Doc. No. 52), the case was sporadically prosecuted from 2020 until a Note of Issue was filed on January 9, 2023. NYSCEF Doc. No. 98. No depositions were ever conducted in this case, and it is unclear if any meaningful pre-trial discovery was ever conducted. In any event, the parties proceeded to trial with many confusing and questionable exhibits—most notably, plaintiff's Trial Exhibit 1, which included a copy of Memorandum No. 4830 containing many handwritten notations that plaintiff could not adequately explain, the Court could not decipher, and which notations appear to have been made after the document had allegedly been presented to and signed by Vaknin. NYSCEF Doc. No. 131. The Court notes that Memorandum No. 4830 is disputed by defendant as being a forgery. It is telling that during the nine-year pendency of this case in which plaintiff is claiming that defendants owe plaintiff more than a million dollars exclusive of prejudgment interest from 2013, the case has been prosecuted with an extreme lack of urgency given that the alleged acts about which plaintiff complains largely took place more than ten years ago.

1. The Dispute Surrounding the Necklace

The proof in this case established that non-party Blue River consigned the necklace to defendant SV&V on memorandum. Trial Exhibit B, NYSCEF Doc. No. 151. By virtue of the consignment on memorandum, Blue River retained ownership of the necklace and SV&V was obligated to either return the necklace or pay the \$340,000.00 asking price for the necklace. The memorandum between Blue River and SV&V clearly provides that SV&V

acquire[d] no right or authority to sell, hypothecate or otherwise dispose of the merchandise, or any other part thereof, by memorandum or otherwise.... A sale of all or any portion of the merchandise shall occur only if and when we agree and you shall have

received from us a separate invoice.

In the event SV&V sold the necklace for Blue River, SV&V would earn a commission.

SV&V and MGD, who had a significant historic relationship, became enmeshed in the business of the necklace, despite the fact that SV&V never acquired title to the necklace. Vaknin, whose testimony regarding the necklace is credited by the Court, testified that SV&V deviated from normal custom and practice in the industry by consigning the necklace to MGD on August 22, 2013. Trial Exhibit A, NYSCEF Doc. No. 150. Vaknin testified that he agreed to consign the necklace to MGD based on Michael Gross' representation that Gross had a customer for the necklace, a sale to whom would enable Messrs. Gross and Vaknin to split a commission on the sale. Vaknin Direct Testimony Affidavit, NYSCEF Doc. No. 170. It was essentially undisputed at trial that MGD retained possession of the necklace for an extended period of time despite Vaknin's request for the return of the necklace, and that MGD eventually sold the necklace for \$250,000.00 to a buyer in California and retained the \$250,000.00 in sales proceeds. Vaknin Direct Testimony Aff., NYSCEF Doc. No. 170; Gross Direct Testimony Aff., NYSCEF Doc. No. 156; *see also* Exhibit 8, NYSCEF Doc. No. 138. Michael Gross conceded at trial that he sold the necklace without confirming that he could transfer title to it. The Court credits Vaknin's version of the facts. And, the Appellate Division affirmed the finding in the *Blue River* case that MGD converted the necklace. *See Blue River Gems Inc.*, 190 A.D.3d. 581.

Michael Gross testified during trial that he obtained the necklace from SV&V in exchange for three outstanding consignment memos worth approximately \$340,000.00, that Gross knew Blue River claimed to have an ownership interest in the necklace at the time he sold it, but that Gross believed that the necklace belonged to MGD as a result of the exchange between MGD and SV&V. Gross Direct Testimony Aff., NYSCEF Doc. No. 156; *see also* Trial

Exhibit 2, NYSCEF Doc. No. 132. Vaknin vigorously disputed Gross' testimony concerning the alleged exchange. Vaknin Direct Testimony Aff., NYSCEF Doc. No. 170.

Plaintiff failed to satisfactorily explain why he felt privileged to convert the necklace at the time he sold it. Indeed, MGD transferred the necklace to a California buyer without title. The Court does not find Michael Gross's testimony about his possessory interest in the necklace to be credible. As Judge Cohen found in the Blue River Action, "MGD failed to take any action to ascertain true ... ownership of the Necklace, and then failed to adhere to custom by obtaining an invoice or other proof of ownership." 151453/2015, NYSCEF Doc. No. 44. The evidence in this trial is consistent with Judge Cohen's finding in the Blue River Action. Further, as Vaknin noted in his testimony, if Michael Gross actually exchanged \$340,000.00 in memoranda for the necklace, why would Michael Gross sell it for only \$250,000.00.

2. Eight Memoranda

Plaintiff's expert on the diamond industry, Chaim Brachfeld, testified at length regarding the customs and practices of the diamond industry. It is the custom and practice among jewelers in the diamond industry to issue a memorandum reflecting merchandise consigned to other jewelers, and receipt of the consigned merchandise is acknowledged by the consignee by signing the memorandum. Brachfeld Direct Testimony Aff., NYSCEF Doc. No. 157. MGD relies on this testimony to support his position on the three memoranda allegedly related to the necklace and to recover amounts allegedly due on eight other memoranda reflecting other transactions between MGD and SV&V, as all eleven memoranda are purportedly signed by Vaknin. Trial Exhibit 1, NYSCEF Doc. No. 131. Defendants assert that they do not owe plaintiff any money on any memoranda, and further assert that Mr. Vaknin's signature is forged on six of the memoranda. Defendants produced a handwriting expert report in support of this contention.

NYSCEF Doc. Nos. 176, 183, 186.¹ Defendants' expert report cast some doubt about the legitimacy of the six disputed memos.

The handwriting expert's report was untimely, but plaintiff declined the opportunity to continue the trial in order to offer a rebuttal handwriting expert. Instead, plaintiff cross-examined the handwriting expert during trial. Although plaintiff's cross-examination of defendant's handwriting expert raised concerns with the usefulness or reliability of the samples relied upon by the expert report, the expert's report is not dispositive on any issue in this case, because plaintiff failed to meet its burden of proof as to the claims related to the eight memoranda. The memoranda relied upon by plaintiff as proof that the diamonds were not returned or paid for were unclear and did not correspond to other documents sponsored by plaintiff at trial. Nor did plaintiff's testimony clearly support plaintiff's version of the facts: it strains credulity that eight memoranda were issued and no serious attempt was made to collect upon them for nine years, or that plaintiff would issue so many memoranda if defendant had failed to return or pay for merchandise associated with previously issued memoranda. Accordingly, plaintiff is not entitled to any recovery against defendants for the claims based on the eight memoranda.

3. Bounced Check

The proof in this case established that, on August 6, 2013, SV&V delivered a check to MGD in the amount of \$140,000.00 in payment of certain invoices, but that check bounced on August 12, 2013 due to insufficient funds. Trial Exhibit 4, NYSCEF Doc. No. 134. Mr. Vaknin

¹ The Court notes the confusing state of the docket in this case, especially as it pertains to defendant's expert submissions. First, the report was submitted late. Second, there are various filings on the docket related to the expert's report with various changes to each (i.e., attaching an affidavit or attaching exemplars of the comparison signatures). Third, Mr. Frangipani, the handwriting expert, alluded during cross-examination to a "revised report," and it is unclear whether Mr. Frangipani was referring to one of the various editions of the report filed on the docket, or to a different report altogether not presented to the Court.

also testified that, at some point after the check had bounced, it had also been “stopped” by defendants. Vaknin Direct Testimony Aff., NYSCEF Doc. No. 170. Vaknin acknowledged that the \$140,000.00 was never paid directly to MGD because Vaknin contends that defendants have satisfied their debt to plaintiff through other means in connection with the Blue River Action.

Vaknin testified that, as a show of good faith to Blue River and so as to preserve the relationship between Blue River and SV&V, SV&V paid \$140,000.00 to Blue River in partial settlement of the Blue River Action. Vaknin Direct Testimony Aff., NYSCEF Doc. No. 170. As a result of SV&V paying the \$140,000.00 to Blue River, which amount appears to have been credited to the judgment against MGD in the Blue River Action, Vaknin now claims the defendants are entitled to a set-off in that amount. Vaknin Direct Testimony Aff., NYSCEF Doc. No. 170. Vaknin’s testimony regarding the \$140,000.00.00 check is consistent with the decision in the *Blue River* Action.

In the Blue River Action, Blue River obtained summary judgment on liability against MGD for conversion of the necklace. 151453/2015, NYSCEF Doc. No. 44. Subsequently, Blue River filed a second motion for summary judgment to address the amount of damages suffered for MGD’s conversion of the necklace. Blue River claimed the necklace was valued at approximately \$400,000.00 but credited a \$140,000.00 payment by SV&V for partial payment of the necklace. 151453/2015, NYSCEF Doc. No. 135. The Court granted Blue River’s motion for summary judgment on default in the amount of \$260,000.03 (the value of the neckless less the \$140,000.00 payment by SV&V). 151453/2015, NYSCEF Doc. No. 141. Judgment was entered in the amount of \$309,907.43 in January of 2019. Trial Exhibit 3, NYSCEF Doc. No. 133.

Accordingly, while the record establishes that SV&V never directly paid plaintiff the \$140,000.00, the Court is satisfied that this \$140,000.00 debt was satisfied in connection with the

Blue River Action. Plaintiff's claims seeking recovery for the \$140,000.00 therefore lacks merit and is denied.

For all these reasons, the Clerk is directed to enter judgment in favor of defendants dismissing this action with prejudice.

Dated: July 26, 2023



BARRY R. OSTRAGER, J.S.C.