

**Lerch v Astro Gallery of Gems, Inc.**

2023 NY Slip Op 33058(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651758/2020

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*

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ROBERT LERCH,

Plaintiff,

- v -

ASTRO GALLERY OF GEMS, INC., and DENNIS  
TANJELOFF,

Defendants.

-----X

INDEX NO. 651758/2020

MOTION DATE 11/10/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, and 22

were read on this motion to

DISMISS

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion to dismiss the complaint is denied. In this breach of contract action, plaintiff asserts claims for breach of oral contracts to sell on consignment certain gemstones and minerals over a number of years, with defendant Astro Gallery of Gems, Inc. (“Astro”), and its principal, defendant Dennis Tanjeloff (“Tanjeloff”). Plaintiff asserts: breaches by Tanjeloff of the original oral contracts; a claim against both defendants for breach of a separate Acknowledgement of Debt Agreement (the “Agreement”); and a claim against Tanjeloff for unjust enrichment. Tanjeloff now moves to dismiss the complaint as against him based on: documentary evidence (CPLR 3211[a][1]); the statute of limitations (CPLR 3211[a][5]); failure to state a cause of action (CPLR 3211[a][7]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable

inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.*, at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

So much of the motion as seeks dismissal of the complaint based on the six-year statute of limitations which applies to breach of contract claims (CPLR 213[2]) is denied. “In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired” (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept] [citations omitted], *lv denied* 34 NY3d 1010 [2019]). Tanjeloff displaces his initial burden of proof by placing the onus on plaintiff to demonstrate in the first instance that the causes of action *have not* expired (*see*, Moving Memorandum [NYSCEF Doc. No. 17] at 5 [“The complaint fails, through its lack of specificity on dates, to make claims not barred by the statute of limitations”]). That is not the standard. Because Tanjeloff fails to establish, *prima facie*, that any of plaintiff’s claims are time-barred (*MTGLQ Investors, supra*), he has gone no distance in trying to secure a dismissal on statute of limitations grounds.

So much of the motion as seeks dismissal of the first and second causes of action (breach of the original oral contracts and breach of the Agreement, respectively) on the basis of

language contained in the Agreement, is also denied. Tanjeloff's affidavit (NYSCEF Doc. No. 15) points to various indicia in the Agreement (which is not countersigned by plaintiff) which, Tanjeloff asserts, indicate that, going forward, the indebtedness to plaintiff had been exclusively assumed by the corporate defendant.<sup>1</sup> However, there is also language within the Agreement which makes reference to Tanjeloff individually, in reciting that the purchases were "done by Dennis Tanjeloff with [plaintiff]" (Agreement, NYSCEF Doc. No. 12). Thus, the ambiguity contained within the Agreement itself (which is unilaterally signed by Tanjeloff, and bearing no countersignature of plaintiff) gives rise to factual issues that cannot be resolved on a motion to dismiss (*Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Finally, given the ambiguous state of the Agreement (discussed immediately above), and given remaining allegations of the complaint alleging the existence of only *oral* contracts entered into prior to the Agreement, which are subject to proof, the court is not prepared to summarily impair plaintiff's right to plead a cause of action sounding in unjust enrichment in the alternative to breach of contract (CPLR 3014; *Cohn v Lionel Corp.*, 21 NY2d 559 [1968]).

Accordingly, it is hereby,

ORDERED that the motion to dismiss the complaint as against defendant Dennis Tanjeloff is denied; and it is further

ORDERED that defendant Dennis Tanjeloff is directed to serve an answer to the 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 October 4, 2023, at 2:15 PM.

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<sup>1</sup> The Agreement is on Astro's letterhead; it states that the balances due will "be confirmed against payments made by Astro Gallery of Gems bookkeeper" (Agreement, NYSCEF Doc. No. 12); and it is signed by Tanjeloff above the script "Astro Gallery of Gems" (*id.*).

This constitutes the decision and order of the court.

ENTER:

*Louis L. Nock*

<u>9/5/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE