

Basal Trading & Sons Ltd. v M&G Diamonds, Inc.

2025 NY Slip Op 30812(U)

March 11, 2025

Supreme Court, New York County

Docket Number: Index No. 651740/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

BASAL TRADING AND SONS LTD.,
Plaintiff,

INDEX NO. 651740/2020

MOTION DATE 11/18/2024¹

MOTION SEQ. NO. 002

- v -

M&G DIAMONDS, INC., M&G DIAMOND CO., ROMAN
MALAKOV DIAMONDS LTD., and ROMAN MALAKOV,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

M&G DIAMONDS, INC.

Third-Party
Index No. 595122/2023

Third-Party Plaintiff,

-against-

EFRIM BASAL, BENZION BASAL, SHAY BASAL, DAVID
BASAL

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38,
39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks summary judgment
on its breach of contract claim, the motion, pursuant to CPLR
3212, of plaintiff is granted; and it is further

¹Date transcript of motion oral argument available to the court.

ORDERED to the extent that it seeks summary judgment on its claim for unjust enrichment, the motion, pursuant to CPLR 3212, of plaintiff is denied; and it is further

ORDERED that to the extent that it seeks summary judgment dismissing all affirmative defenses and counterclaims asserted by defendants, the motion of plaintiff is granted, and such affirmative defenses and counterclaims are hereby dismissed, with prejudice; and it is further

ORDERED that to the extent that it seeks summary judgment dismissing the third-party complaint of Third-Party Plaintiff M&G Diamonds, Inc., the motion of plaintiff is granted, and the third party complaint is hereby dismissed with prejudice; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$ 408,916.67, together with interest at the statutory rate the date of December 17, 2019, until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

DECISION

In this contractual dispute, plaintiff alleges that it entered into an agreement with defendants to form a partnership that would hold a one-third interest in another partnership

that, in turn, would purchase three diamonds in "rough" form for polishing and resale. Plaintiff alleges that the partnership agreement with defendants provided that plaintiff and defendants each held a 50% interest, which would entitle each of them to receive one-sixth of the proceeds of the sales of the three diamonds. Pursuant to the alleged agreement, plaintiff contributed over \$509,000 for the purchase price and related expenses of the three diamonds. Although plaintiff received its share of the proceeds from the sale of the first two diamonds, when the third diamond was sold in 2019, defendants refused to distribute to plaintiff its half.

Plaintiff now moves for summary judgment, pursuant to CPLR 3212, on its breach of contract and unjust enrichment claims, and for dismissal of defendants' counterclaims and third-party complaint.

Defendants, in its counterclaim and third-party action, allege that plaintiff breached its portion of the contract by failing to (i) provide "high quality referrals to M & G Diamonds, Inc."; (ii) invest its profit from the Diamond transaction at issue in such further deals with M&G Diamonds, Inc.; and (iii) the latter "would be paid on such other deals according to the same terms agreed to with respect to the sale of the three other

diamonds as set forth in the Complaint" (third party complaint, NYSCEF Doc No. 27 ¶ 9).

I. Procedural Posture

This court granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a) (5) and (7) on December 7, 2021. On appeal, the First Department modified that portion of the order granting reinstatement of the first and second causes of action sounding in breach of contract and unjust enrichment and otherwise affirmed (see Basal Trading & Sons Ltd. v M&G Diamonds, Inc., 212 AD3d 551, 552-553 [1st Dept 2023]).

II. Plaintiff's Summary Judgment Motion

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The motion must "demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" (Aimatop Rest. v Liberty Mut. Fire Ins. Co., 74 AD2d 516, 517 [1st Dept 1980]). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to

furnish evidence in admissible form sufficient to raise a material issue of fact (Alvarez, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (id.).

Breach of Contract

"The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Noto v Planck, LLC, 228 AD3d 516, 516 [1st Dept 2024] [internal quotation marks and citation omitted]). Under those circumstances where the agreement is ambiguous, the use of extrinsic evidence may be required to establish the intent of the parties raising a material issue of fact necessitating the denial of the summary judgment motion (see American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990])

To establish the existence of an oral contract, "the conduct of the parties [must evince] 'mutual assent sufficiently definite to assure that the parties [were] truly in agreement with respect to all material terms'" (Carlsen v Rockefeller Ctr. N., Inc., 74 AD3d 608, 609 [1st Dept 2010], quoting Express Indus. & Terminal Corp. v New York State DOT, 93 NY2d 584, 589 [1999]).

Plaintiff alleges that defendants breached an oral agreement to share the proceeds of the sale of three diamonds. Although defendants properly distributed proceeds from the sale of the first two diamonds, when the third and final diamond was sold in 2019, according to plaintiff, defendants improperly withheld \$408,916.67. Plaintiff contends that defendants have admitted to the existence of an oral agreement in its third-party complaint, which states:

“Malakov on behalf of M&G Diamonds, Inc. sought advice from Basal and the Basal Family concerning three rough, uncut colored diamonds M&G Diamonds, Inc. was going to purchase as Basal was an expert in colored diamonds. Basal and the Basal Family approved of the purchase price for those diamonds and then indicated that they wanted in on the purchase. It was agreed that, upon a sale by M&G Diamonds, Inc., M&G Diamonds, Inc. would remit monies to Basal and the Basal Family with considerable interest from M&G Diamonds, Inc.'s profits from the sale”

(answer with counterclaims, NYSCEF Doc No. 24 at 5).

Having admitted its mutual assent to the above terms, defendants cannot now repudiate their contractual obligations or assert a lack of enforceability (see General Obligations Law § 5-701[b][3] [“There is sufficient evidence that a contract has been made if [t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made”]). Furthermore, defendants do not deny the existence of a contract, or that plaintiff Basal made payments totaling \$509,622.41 for the purchase price and related expenses

of the three diamonds. Nor do defendants deny that the last diamond was sold for \$2,453,500, or that it has failed to remit to plaintiff its rightful portion of the proceeds for \$408,916.67. Having demonstrated each of the elements of a breach of contract claim, along with submission of invoices and payments, plaintiff has sufficiently established its prima facie entitlement to summary judgment.

Defendants argue that their counterclaims alleging plaintiff also breached a portion of the oral agreement, whereby plaintiffs would refer business to defendants and invest profits from the sale of the three diamonds in further deals with defendants is sufficient to raise a question of fact precluding summary judgment ("side agreement"). However, this court disagrees with defendants, as "[t]he mere assertion of a counterclaim, unsupported by proof that it is meritorious, does not bar relief to a plaintiff who is otherwise entitled to summary judgment" (Nopco Chemical Co. v Milner, 12 AD2d 942, 942 [2d Dept 1961]).

Here, defendants have failed to set forth the basic terms necessary to evidence the side agreement. As the party seeking to enforce the side agreement, defendants bear the burden of establishing that a binding agreement was made and to prove the terms of the contract (Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc., 206 AD2d 166, 169 [1st Dept 1994]). Before a

court will impose a contractual obligation, it must ascertain that its terms are definite (Charles Hyman, Inc. v Olsen Indus., Inc., 227 AD2d 270, 275 [1st Dept 1996] citing Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475, 482 [11989], cert. denied 498 US 816, 816 [1990]). Here, the purported "terms" of the side agreement are ambiguous, indefinite, and lacking in specificity, *i.e.* what type of business would be referred, the amount that would be invested, for what duration and remuneration. Defendants have not advanced sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), let alone raise an issue of fact. Short of a self-serving affidavit from Defendant Malakov and owner of M&G Diamonds, Inc. and M&G Diamonds Co., defendants have failed to submit any evidence contemporaneous with alleged side agreement that would demonstrate its existence.

Assuming *arguendo* a binding agreement was made as defendants claim, the agreement would be void for violating the Statute of Frauds. Pursuant to General Obligations Law § 5-701(a)(10), to be enforceable, an agreement to pay compensation for services rendered in negotiating the purchase or sale of a business or interest therein must be contained in a writing

subscribed by the party to be charged (see Intercontinental Planning v Daystrom, Inc., 24 NY2d 372, 378 [1969]); Herkert v Temco Servs. Indus., 272 AD2d 161, 161 [1st Dept 2000]). While defendants attempt to circumvent the Statute of Frauds by characterizing the side agreement as a joint venture between partners, they fail to set forth any evidence to establish their contribution of property, skills, or control over a venture or a sharing of possible financial losses (see Langer v Dadabhoj, 44 AD3d 425, 426 [1st Dept 2007], lv denied 10 NY3d 712, 712 [2008]).

As the Court of Appeals stated in Steinbeck v Gerosa, 4 NY2d 302, 317 [1958]),

"The ultimate inquiry [of whether there is a joint venture] is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit."

Instead, here, the alleged side agreement was to "provide high quality referrals" and to "invest...in other deals [with] M&G" (NYSCEF Doc No. 27, Third Party Complaint ¶¶ 7, 9), which as plaintiff rightfully points out, would be an agreement for a contract to procure an introduction to a party to a transaction, or to assist in the negotiation of that transaction, both of which would be subject to the Statute of Frauds (General

Obligations Law §5-701 (a) (10); Baytree Assoc, Inc. v Forster, 240 AD2d 305, 306 [1st Dept 1997] ["(t)he alleged oral agreement was nothing more than a finder's agreement, void under the Statute of Frauds at General Obligations Law § 5-701 (a) (10)), and plaintiffs' attempts to characterize, alternatively, as a shareholders', partnership or joint venture agreement. . . (was) to no avail"]; see also Andrews v Cerberus Partners, 271 AD2d 348, 348 [1st Dept 2000] [holding that the plaintiff failed to establish an agreement to enter into a joint venture and that plaintiff's claim that it was entitled to an equity interest was barred by GOL § 5-701 (a) (10)]).

Finally, defendants' contention that summary judgment is premature because discovery has not been completed is without merit, as defendants have failed to identify what documents or other evidence in plaintiff's exclusive possession would enable them to successfully oppose the motion (see Goldmuntz v Schneider, 99 AD3d 544, 545 [1st Dept 2012] [motion was not prematurely decided before discovery because defendants could have opposed the motion based on its own documents, and "point to no facts essential to opposition that are in plaintiff's control"]; see also A&W Egg Co., Inc. v Tufo's Wholesale Dairy, Inc., 169 AD3d 616, 617 [1st Dept 2019] [finding that "the motion was not prematurely decided before discovery"]).

"In order to defeat plaintiff's motion, it was necessary for the defendant to assemble and reveal his proof in support of the alleged counterclaim" (M & S Mercury Air Conditioning Corp. v Rodolitz, 24 AD2d 873, 874 [2d Dept 1965], affd, 17 NY2d 909 [1966]). In view of defendant's failure to do so, plaintiff's motion for summary judgment on its breach of contract claim is granted.

Unjust Enrichment

"The doctrine of unjust enrichment invokes an 'obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (Pappas v Tzolis, 20 NY3d 228, 234 [2012], rearg denied 20 NY3d 1075, 1075 [2013] [citation omitted]). That said, a party cannot recover in unjust enrichment if a valid contract that governs the dispute exists (id.; Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012], rearg denied 19 NY3d 637 [2012] [unjust enrichment unavailable if the claim merely duplicates a breach of contract claim]).

An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (Corsello, 18 NY3d at 790 [2012]).

Here, having granted plaintiffs' breach of contract claim with the same underlying facts, circumstances and damages, this court must dismiss plaintiff's unjust enrichment claim as duplicative.

Debra A. James

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3/11/2025

DATE

DEBRA A. JAMES, 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