Arnon Ltd (IOM) v Beierwaltes
2017 NY Slip Op 31605(U)
August 1, 2017
Supreme Court, New York County
Docket Number: 650371/2013
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

x

ARNON LTD (IOM),

Index No. 650371/2013

Plaintiff,

Decision/Order

– against –

WILLIAM BEIERWALTES, LYNDA BEIERWALTES, PHOENIX ANCIENT ART S.A., HICHAM ABOUTAAM AND ALEXANDER GHERARDI,

Defendants.

x

This is a breach of contract action based on defendants' alleged wrongful refusal to sell an ancient Greek statue—a Kore—to plaintiff Arnon Ltd (IOM) (Arnon). Defendants William Beierwaltes, Lynda Beierwaltes, Phoenix Ancient Art S.A. (Phoenix), and Hicham Aboutaam move (in Motion Seq. No. 4), pursuant to CPLR 3212, for summary judgment dismissing the complaint and awarding them judgment on their first counterclaim for a declaratory judgment and their sixth counterclaim for damages allegedly incurred as a result of a preliminary injunction previously issued in this case. Plaintiff cross-moves for leave to amend the complaint to add David Sofer as a plaintiff.[1] Plaintiff separately moves (in Motion Seq. No. 5), pursuant to CPLR 3212, for summary judgment awarding plaintiff judgment on its first and second causes of action for breach of contract and replevin, respectively, and dismissing defendants' first counterclaim for a declaratory judgment, second counterclaim for breach of contract, sixth

[1] The cross-motion also seeks leave to amend to "reflect[] that Gherardi is no longer a party." By stipulation dated June 18, 2015, plaintiff discontinued all claims against defendant Gherardi without prejudice.

counterclaim for damages from the preliminary injunction, and seventh through tenth counterclaims for conversion, unjust enrichment, quantum meruit, and breach of contract stemming from a separate transaction.

Background

Plaintiff Arnon is "a corporation duly organized and existing under the laws of the Isle of Man and resident in the Isle of Man." (Joint Statement of Material Facts [Joint Statement] ¶ 1.) Arnon is "owned by Arnon River Trust [Arnon Trust], a trust organized and existing under the laws of the Isle of Man and resident in the Isle of Man, which was settled by, and for the benefit of, David Sofer." (Joint Statement ¶ 1.) The alleged "sole purpose" of Arnon "is to own the artwork collection of David Sofer." (Compl. ¶ 2.)[2] As attested by Mr. Sofer, and not disputed by defendants, Mr. Sofer is not an employee, officer, or director of Arnon; rather, Arnon is controlled by "independent directors who act in their discretion." (Aff. of David Sofer, dated July 29, 2015, ¶ 2 [7/29/15 Sofer Aff.].) These directors are Marion Louis de Carte and Gordon Mundy. (de Carte Dep. at 6-8 [Bergman Aff., Exh. K].) Ms. de Carte is an employee, and Mr. Mundy is a director, of Trident Trust Company (Trident), another Isle of Man corporation, which serves as the trustee to Arnon Trust as well as the secretary of Arnon. (Id. at 11-12, 15.)[3]

The Beierwaltes are residents of Colorado and owners of the Kore. (Joint Statement ¶ 5.) "At all relevant times, Phoenix was the agent of the Beierwaltes with full and exclusive power to enter into a contract for, and conclude a sale of, the Kore." (Id. ¶ 6.) Phoenix is a Swiss

[2] One of Arnon's directors, Ms. Marion Louis de Carte testified that Arnon's "corporate purpose" is "far broader than just owning fixed assets or antiquities. It owns property and it has a large investment portfolio." (de Carte Dep. at 66:15-18 [Bergman Aff., Exh. K].)

[3] The court notes that neither party submits relevant documents regarding the governance of either Arnon or the Arnon Trust. Ms. de Carte testified that Arnon "has a Memorandum and Articles of Association." (de Carte Dep. at 66:2-3.)

corporation and resident in the Canton of Geneva. (Id. ¶ 2.) At the time of the disputed sale, Phoenix's agent in New York was Petrarch LLC, d/b/a Electrum. (Id. ¶ 3.) Mr. Hicham Aboutaam and Mr. Gherardi "were employees of Electrum." (Id. ¶ 4.)

It is undisputed that on or about January 4 or 5, 2013, Mr. Sofer visited Phoenix's New York gallery and offered to purchase the Kore. (H. Aboutaam Aff. ¶ 9 [Bergman Aff., Exh. F]; Sofer Dep. at 96:4-97:14 [Bergman Aff., Exh. L].) No agreement was reached that day; but both Mr. Sofer and Mr. Aboutaam testified that by the end of the weekend, they settled on a purchase price of $650,000. (Sofer Dep. at 96:14-97:18; H. Aboutaam Dep. at 80:9-81:23 [Bergman Aff., Exh. M].)

The parties sharply dispute the details of the conversations that took place between Mr. Sofer and Mr. Aboutaam regarding the terms of the sale. Their dispute centers on whether Mr. Aboutaam "stress[ed] that time would be of the essence," and whether Mr. Sofer agreed to pay within four days. (H. Aboutaam Aff. ¶ 9; Sofer Aff., dated Feb. 25, 2013, ¶ 14 [2/25/13 Sofer Aff.] [Bergman Aff., Exh. I].) In the period between January 10, 2013 and January 22, 2013, the parties engaged in extensive communications by email as to the time for payment, the identity of the party to which payment would be made, wiring instructions, and the need for written documentation including a formal agreement and invoice. These emails commenced with a January 10 email from Ms. Beierwaltes to Mr. Sofer at his personal email address, stating that "I'm so pleased you are buying our wonderful kore," and that "Hicham [Aboutaam] has total [sic] me you will be wiring funds within four days of receipt of invoice. . . ." (Bergman Aff., Exh. HH.) This email was followed by an email from Mr. Sofer to Ms. Beierwaltes, dated January 12, 2013, which was copied to Mr. Hicham Aboutaam and Ms. de Carte, and which stated in full:

> "Hi Lynda,
> Arnon Ltd. (IOM), is part of my trust and is managed by independent directors.
> It will be easier and faster if all the logistics of the sale (formal short agreement, invoice with photos etc.) be done by Phoenix Ancient Art and Hicham Aboutaam. I will send Hicham a copy of this email, and ask him to take care of it.
> It is Arnon Ltd. [sic] intention that your wonderful Kore will be exhibited for a long term at the Metropolitan Museum in New York.
> Thank you for your email. I hope that when you and bill come to London I will have the opportunity to meet you and to show you my collections.
> Best wishes,
> David"

(Bergman Aff., Exh. AA [format in original].) These emails were followed by emails further discussing the terms. (Id., Exhs. JJ, II, X; Gette Aff., Exh. L.) By email dated January 25, 2013, from Hicham Aboutaam to Mr. Sofer, entitled "Sale Cancellation," Mr. Aboutaam informed Mr. Sofer "that the sale is cancelled because the conditions have not been met." (Bergman Aff., Exh. Z.) The unsatisfied conditions were not specified. This action was commenced shortly afterward, on or about February 4, 2013.

Contentions

In moving for summary judgment dismissing plaintiff's breach of contract cause of action, defendants contend, as a threshold matter, that Mr. Sofer did not have authority to enter into a contract for the Kore, and that Arnon never ratified the contract. (Defs.' Memo. In Supp. at 1-6.)[4] In the alternative, defendants contend that plaintiff and defendants never reached a

[4] In the email exchange by which the parties discussed the terms of the sale, defendants did not challenge Mr. Sofer's authority to enter into the contract.

meeting of the minds on "the time and method of payment" or that, if a contract was made, it was cancelled for breach of the payment terms. (Id. at 6-9.)[5]

In opposition to defendants' motion and in support of its own motion for summary judgment on its breach of contract cause of action, Arnon does not dispute that "Sofer did not have formal agency powers for Arnon generally." (Pl.'s Memo. In Opp. at 6.) Rather, Arnon contends that "in this one instance, Sofer had authority to bind Arnon." (Id. at 5.) Arnon claims that "questions of implied actual and apparent authority are relevant in cases such as this one when there is no express appointment of the agent." (Id. at 6.) In addition, Arnon contends that the parties reached an agreement on material terms, that Mr. Sofer never agreed to a four day deadline and, alternatively, that any such deadline was waived. (Id. at 11-18.)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "On a motion for summary judgment, facts must be viewed in

[5] In this decision, Defs.' Memo. In Supp. and Defs.' Reply Memo. refer to memoranda of law submitted by defendants in connection with defendants' own motion for summary judgment (Motion Seq. No. 4). Pl.'s Memo. In Opp. refers to plaintiff's memorandum in opposition to defendants' motion.

Pl.'s Memo. In Supp. and Pl.'s Reply Memo. refer to memoranda of law submitted by plaintiff in connection with plaintiff's own motion for summary judgment (Motion Seq. No. 5). Defs.' Memo. In Opp. refers to defendants' memorandum in opposition to plaintiff's motion.

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].) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

It is further settled that "[a] principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act, even where the agent is acting as a volunteer." (Art Fin. Partners, LLC v Christie's Inc., 58 AD3d 469, 471 [1st Dept 2009] [internal quotation marks and citation omitted].) Agency may be based on actual or apparent authority of the agent to act on behalf of the principal. Actual authority, in turn, may be based on an express or direct grant of authority to the agent or may be implied based on the principal's "manifestations which, though indirect, would support a reasonable inference of an intent to confer such authority." (Greene v Hellman, 51 NY2d 197, 204 [1980].) Implied actual authority must be based on a showing that the principal "performed verbal or other acts that gave [the agent] the reasonable impression that he had authority to enter into the [contract]." (Site Five Hous. Dev. Fund Corp. v Estate of Bullock, 112 AD3d 479, 480 [1st Dept 2013].) Apparent authority must be based on "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority." (Hallock v State of New York, 64 NY2d 224, 231 [1984].) "Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." (Id.)

As the Court of Appeals has explained:

> "As with implied actual authority, apparent authority is dependent on verbal or other acts by a principal which reasonably give an appearance of authority to conduct the transaction, except that, in the case of implied actual authority, these must be brought home to the agent while, in the apparent authority situation, it is the third party who must be aware of them."

(Greene, 51 NY2d at 204.)

BREACH OF CONTRACT CLAIMS

Mr. Sofer's Authority to Bind Arnon to the Contract

Arnon and defendants agree that the issue of whether Mr. Sofer had authority to enter into a contract for the Kore on behalf of Arnon is one of law for the court. (Oral Argument Transcript at 8-9.)

In claiming that Mr. Sofer lacked authority to enter into the contract, defendants cite extensive deposition testimony from both Mr. Sofer and Ms. de Carte in which they repeatedly confirmed that Mr. Sofer recommended purchases but that only Arnon had the authority to contract for the purchases.

Specifically regarding the purchase of the Kore, Mr. Sofer testified: "Q. Who made the decision that Arnon would buy the Kore? A. The trustees. Q. What was your role in that decision? A. Recommending them to buy it." (Sofer Dep. at 18:6-10.) This testimony was consistent with Mr. Sofer's testimony about past purchases of antiquities, in which he repeatedly stated that he made recommendations to Ms. de Carte, but that Arnon or the Arnon directors did the buying.[6]

[6] Mr. Sofer's testimony as to past purchases included:

Mr. Sofer was also asked several general questions about his authority and testified consistently as follows: "Q. Can you tell the trustees what to do? A. No. Q. Is it correct to say that the only thing you can do with respect to these trusts is put things in them? A. I can recommend or express my wish. Q. Do the trustees listen? A. Sometimes." (Sofer Dep. at 13:20-14:3.) In an affidavit, Mr. Sofer similarly stated: "I provide the assets that the Trust uses to acquire artwork through Arnon, but the trustees who oversee Arnon are independent." (Sofer Aff., dated Feb. 4, 2013, ¶ 5 [2/4/13 Sofer Aff.] [Bergman Aff., Exh. L.) He also averred that "Arnon is owned by a trust of which my family and I are beneficiaries. Arnon has independent directors who act in their discretion. But, because my recommended acquisition of antiquities reflects my tastes and interests, they have never refused to purchase any items I have recommended." (7/29/15 Sofer Aff. ¶ 2.)

- "Q. Who was involved in the purchase of it; you? A. I don't know what you mean involved. I definitely recommended to Arnon to buy it. . . . Arnon paid for it." (Sofer Dep. at 32:21-33:3);
- "Q. Who did the buying; you? A. Arnon. Q. Who did the shopping? A. I was doing the recommendation. The shopping was done by Arnon. Q. Who negotiated the deal? A. I am sure I helped. Q. Who else was involved and who did you help? A. Marion de Carte. Q. Who decided to by [sic] this stuff? A. Marion de Carte. Q. It was her decision? A. Yes. Q. Did you make a recommendation to her? A. Yes." (id. at 37:20-38:11);
- "Q. Who did the buying? A. Arnon. . . . A. I recommended after consulting. . . . A. With experts." (id. at 40:11-17);
- "Q. Which human being on behalf of Arnon made the buy? A. I recommended it." (id. at 52:9-10);
- "Q. Who did the buying, you? A. Arnon. . . . A. I recommended it to Arnon." (id. at 59:8-12);
- "Q. Which human being did the buying? You? A. I was the person who visited the gallery and recommended it to my trustees to buy it." (id. at 60:10-12);
- "Q. Did Arnon buy these pieces? A. Yes. . . . A. The buying was done by Arnon directors and the recommendation was done by me." (id. at 61:21-62:6);
- "Q. Who is the human being who did the buying of these pieces; you? A. I don't do the buying. Arnon did the buying and I did the recommendation." (id. at 68:21-24); and
- "Q. Who made the purchases at the auctions, Ms. de Carte or Mr. Gordon? A. Arnon directly. Q. Who was the human being who went and participated in auctions to buy Arnon's holdings? A. Arnon never goes to an auction, and myself seldom. Sometimes, but mostly it's done over the phone or in a pre-bid. Q. When it's done on the phone or in a pre-bid, who is on the other end of the phone and who is making the bid? A. Mostly myself." (id. at 21:9-20.)

Ms. de Carte's testimony supports Mr. Sofer's testimony that he recommended but could not direct purchases. She testified that her position at Arnon as director "entails entering into agreements, [and] writing up Minutes, making payments, general administration." (de Carte Dep. at 15:22-16:4). She also testified that she signs contracts on behalf of Arnon (id. at 17:17) and, with respect to the terms, is "guided by David Sofer" (id. at 16:12) or "take[s] some guidance from David Sofer from time to time." (Id. at 17:5-6.) She insisted, however, that she "would never just sign something if something's placed in front of me… I would always read it and apply my mind to it." (Id. at 18:1-3.)

Ms. de Carte acknowledged that her position as trust and company administrator at Trident (the trustee of Arnon Trust and the secretary of Arnon), is "clerical" in nature (id. at 11:24-12:4, 15:19-16:4, 19:22-24); that Mr. Sofer, not she, has the expertise in antiquities (id. at 37:7-9); and that he would advise Arnon regarding which antiquities to acquire. (Id. at 36:20-23.) Like Mr. Sofer, Ms. de Carte testified that she could not recall an instance when Arnon had turned down one of Mr. Sofer's recommendations. (Id. at 36:24-37:2.) She denied, however, that Mr. Sofer had the power to contract on behalf of Arnon (id. at 56:14-16), and further explained that for a payment for a purchase to be authorized, the request must first be checked by "Compliance" and must then be approved by two of ten authorized signatories and, if the purchase is over £ 50,000, by the compliance manager. (Id. at 31:18-32:21.) When explicitly asked by defendants' counsel whether the signatories' decision to sign or not was "discretionary with these ten people," she initially nodded in agreement. To the follow-up question "So nobody can instruct them to sign?," she responded "Correct." To the further question "All right. So the answer is, yes, it's within their discretion, they do hold fiduciary positions and they have to act responsibly," she answered "Correct." (Id. at 35:24-36:19.)

As to the purchase of the Kore in particular, Ms. de Carte was asked the following question: "But there hadn't been, if I understand your testimony correctly, . . . any decision on the part of Arnon to actually acquire this piece?" (Id. at 57:3-5.) She responded: "Arnon would have acquired the piece had we had an invoice and documents to back it up. We knew that the intention was there to buy it." (Id. at 57:7-9.) She then gave the following testimony: "Q. But was there a contract to buy it? Did Arnon agree that it was going to pay this money?" "A. I didn't see a contract. . . . The answer is no, I didn't see a contract." (Id. at 57:11-12, 58:1-7.)[7]

In claiming that Mr. Sofer was authorized to enter into the contract for the Kore on Arnon's behalf, Arnon does not dispute this testimony. Nor does Arnon contend that express authority to acquire the Kore was conferred by Arnon upon Mr. Sofer. Rather, as noted above, Arnon argues that "in this one instance, Sofer had authority to bind Arnon." (Pl.'s Memo. In Opp. at 5.) In support of this contention, Arnon relies on the January 12, 2013 email and on prior dealings between the parties.

The January 12 email (Bergman Aff., Exh. AA, quoted supra at 4) from Mr. Sofer to Ms. Beierwaltes was copied to Mr. Hicham Aboutaam and Ms. de Carte at mdecarte@tridenttrust.com. In this email, which responds to Ms. Beierwaltes' prior email congratulating Mr. Sofer on buying the Kore, Mr. Sofer advises her that Arnon is part of his trust and is managed by independent directors, and that the sale should be made by Phoenix to Arnon. Arnon contends that Ms. de Carte's "non-response" to the email "was sufficient to cloak Sofer with authority for this transaction." (Pl.'s Memo. In Opp. at 6.)

[7] Plaintiff contends that Ms. de Carte's "layman's opinion" as to what constitutes a contract should not be considered. (Pl.'s Memo. In Opp. at 4.) The court considers this testimony not for any legal conclusion by Ms. de Carte as to whether a contract was made, but rather as a statement of fact that Ms. de Carte did not see a written contract document.

In discussing the effect of Ms. de Carte's silence in response to the email, Arnon does not distinguish between implied actual authority and apparent authority, and does not cite legal authority on the effect of such silence on these separate bases for authority. There is case law that silence may, under appropriate circumstances, manifest authority, although New York law on this issue does not appear to be extensive. (See Restatement [Third] of Agency § 1.03, Comment b [2006] [stating that a manifestation of the principal's assent to the agent may create implied actual or apparent authority, and that "[s]ilence may constitute a manifestation when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence. Failure then to express dissent will be taken as a manifestation of affirmance"]; see also Hillair Capital Invs., LP v Smith Sys. Transp., Inc., 640 Fed Appx 49, 52 [2d Cir 2016] [citing New York law on creation of apparent authority].)

Here, however, the silence of Ms. de Carte in response to the January 12 email is insufficient as a matter of law to manifest either implied actual or apparent authority. Ms. de Carte is neither directly addressed in the email, nor identified as a representative of Arnon. The email address used for Ms. de Carte is a Trident, not Arnon, address, and there is no indication in the email that Trident and Arnon are interrelated entities. As defendants correctly point out, "there is nothing on the face of the email to connect Ms. de Carte with Arnon." (Defs.' Reply Memo. at 4.) Further, the email does not detail the terms of the sale of the Kore, and it affirmatively states that Arnon is part of Mr. Sofer's trust and is managed by independent directors. Ms. de Carte's failure to respond, within a very short time frame, to such an email could not have led a reasonable person in defendants' position to conclude that Ms. de Carte, and

through her, Arnon, bestowed on Mr. Sofer the authority to bind Arnon to a $650,000 contract.[8] Ms. de Carte's silence in response to the January 12 email thus fails to raise a triable issue of fact as to apparent authority.

Ms. de Carte's silence in response to this email similarly fails to raise a triable issue of fact as to Arnon's claim that Arnon bestowed implied actual authority on Mr. Sofer for the one Kore transaction. As discussed at length above (supra at 7-10), Mr. Sofer and Ms. de Carte repeatedly testified that Mr. Sofer recommended purchases but that only Arnon had the power to contract for them, and that formal approval was required. In the face of this testimony, Ms. de Carte's non-response to the January 12 email could not have given Mr. Sofer "the reasonable impression" that he had authority to enter into this one contract. (See Site Five Hous. Dev. Fund Corp., 112 AD3d at 480.)[9] At most, Ms. de Carte's silence could be interpreted as manifesting

[8] Although not binding on this court, Berliner v Crossland Federal Savings Bank (886 F Supp 325, 330 [SD NY 1994]) is instructive. There, the Court, applying New York law, found that the third party, who was experienced in his field, had not "sufficiently allege[d] that he had any justifiable reason outside of [the agent's] own statements for believing that [the agent] had been placed in a position that empowered him to unilaterally bind [the principal]." The agent had notified the third party of the existence of an Executive Committee and the need for its approval before the transaction could take place. In granting summary judgment dismissing a breach of contract claim brought on an apparent authority theory, the Court concluded: "Even taking [the third party's] allegation that [the agent] led him to believe that the Executive Committee would rubber stamp [the agent's] recommendation on its face, no reasonable person, let alone experienced [person in the industry], could conclude that [the agent] could bind [the principal] to the bid without Executive Committee approval." On similar facts, this court reaches the same result.

[9] Arnon argues that rather than responding to the January 12 email by telling Mr. Sofer or defendants "to wait" until the directors formally approved the purchase, "[d]e Carte took only one step in response to this email: she contacted a colleague who was updating Arnon's schedule of antiquities to alert him to be aware that there was 'another asset' on the way." (Pl.'s Memo. In Opp. at 5, citing de Carte Dep. at 53; see email from de Carte to Munusami, Veekesh [Trident's accountant], dated January 14, 2013, with no text but subject line entitled "FW: Invoice for Terra Cotta Kore" [Bergman Aff., Exh. BB] [internal email].) To the extent that Arnon contends that this internal communication manifested to Mr. Sofer that Arnon gave him authority to purchase the Kore, this contention is also unavailing. Mr. Sofer was not copied on the internal email, and there is no claim that he was aware that the January 12 email had been forwarded. Moreover, the accountant was not among the individuals identified by Ms. de Carte as those with authority to approve a contract for a purchase. (de Carte Dep. at 31-34.) In any event, although the internal email supports Ms. de Carte's testimony, discussed above, that Arnon would have purchased the Kore if it had had proper documentation, the email does not negate Ms. de Carte's and Mr. Sofer's repeated testimony that a formal approval process by Arnon was required in order to make a purchase.

agreement that Mr. Sofer was authorized to engage in intermediary discussions or negotiations, but that the independent directors referred to in the January 12, 2013 email must still make the final decision as to whether to bind Arnon to the purchase and must approve a formal written contract.[10]

Arnon's reliance on prior dealings is also insufficient to raise a triable issue of fact as to Mr. Sofer's apparent authority to bind Arnon to the one Kore transaction. As a general rule, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation. An agent's power to bind his principal is coextensive with the principal's grant of authority." (Ford v Unity Hosp., 32 NY2d 464, 472 [1973] [internal citations omitted].) Further, "the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal—not the agent." (Id. at 473; accord Hallock, 64 NY2d at 231.)

Arnon asserts that defendants "knew from previous experience that Sofer conducted business through Arnon." (Pl.'s Memo. In Opp. at 7.) This vague assertion is not supported by any evidence that Arnon at any time made a representation or otherwise engaged in misleading conduct that gave any of the defendants the impression that Mr. Sofer had the authority not merely to negotiate transactions but also to bind Arnon to purchases.[11]

[10] "Parties routinely allow brokers, attorneys, or other third parties to negotiate deals without granting the negotiators the authority to bind them." (Economist's Advocate, LLC v Cognitive Arts Corp., 2004 WL 728874, *6, 2004 US Dist LEXIS 5649, *7 [SD NY, No. 01 Civ. 9468, Apr. 6, 2004]; see 1058 Corp. v Ergas, 174 AD2d 415, 417 [1st Dept 1991] [holding that a broker lacked apparent or actual authority to bind a seller, where the broker was "authorized to enter into negotiations but not authorized to sell or convey the apartments"].)

[11] Arnon does not submit any details as to the representations made during prior transactions as to the scope of Mr. Sofer's authority to act on behalf of Arnon. Moreover, as stated by Mr. Aboutaam, and not disputed by plaintiff, Phoenix did not enter into any transactions with Mr. Sofer between approximately 2002 and January 2013. (Aff. of

To the extent that Arnon further contends that defendants are bound because they failed to ask Mr. Sofer or Arnon for confirmation that Arnon had formally approved the contract for the Kore (see Pl.'s Memo. In Opp. at 7), this contention is unavailing. Arnon cites no authority that a defendant has an obligation to "make the necessary effort to discover the actual scope of [the agent's] authority" absent a factual showing—which is lacking here—"that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal. . . ." (See Ford, 32 NY2d at 472-473.)

Nor does Arnon cite prior dealings with Mr. Sofer sufficient to raise a triable issue of fact as to whether he had implied actual authority to bind Arnon to the purchase of the Kore. There is legal authority that prior dealings between a principal and an agent may be relied upon to establish an agent's authority to perform similar acts in the future. (See e.g. Restatement [Third] of Agency § 1.03, Comment e [2006] ["Between particular persons, prior dealings or an ongoing relationship frame the context in which manifestations are made and understood"]; Restatement [Second] of Agency § 43 [2] [1958] ["Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future"]; Beattie v Delaware, Lackawanna, & W. R.R. Co., 45 Sickels 643, 90 NY 643 [1882] [Agency "might be established by circumstances, and among others the recognition by the defendant [principal] of acts on his [the agent's] part similar in character to those in controversy"]; Skutt v Goodwin, 251 AD 84 [4th Dept 1937] ["[W]here an agency is sought to be established by a prior course of dealing, such conduct determines the extent of the agency as well as its existence"].)

In claiming implied actual authority based on prior dealings, Arnon relies merely on the

H. Aboutaam ¶ 5 [Bergman Aff., Exh. F].) Arnon does not cite any legal authority that even if Mr. Sofer had apparent authority in those prior transactions to enter into contracts, that authority could be relied on over a decade later.

following conclusory assertion: "It is clear that Sofer acted for and bound Arnon in connection with numerous loan agreements to museums he entered into for antiquities owned by Arnon. Sofer also committed to purchases at auctions he attended." (Pl.'s Memo. In Opp. at 6 [internal citations omitted].) Arnon makes no factual showing as to the process by which Mr. Sofer was authorized to make contracts for loans to museums or to bid at auctions. Nor does Arnon make any showing that Mr. Sofer's acts in connection with either the museum loans or the auctions were comparable in any respect to entry into contracts with third parties for purchases. These acts therefore fail to support Arnon's claim of implied actual authority.[12]

In sum, the court finds on this record that Arnon fails to demonstrate that, or to raise a triable issue of fact as to whether, Mr. Sofer had apparent or implied actual authority to purchase the Kore on Arnon's behalf.[13] At most, the evidence supports a finding that Arnon bestowed on Mr. Sofer authority to recommend artworks to Arnon, but not to bind Arnon to the purchases.

In so holding, the court notes the testimony of both Mr. Sofer and Ms. de Carte that there was no occasion on which Mr. Sofer recommended a purchase that Arnon declined to approve. The court also notes that Arnon would likely have approved his recommendation on this occasion as well, as indicated by Ms. de Carte's testimony that "Arnon would have acquired the piece had we had an invoice and documents to back it up. We knew that the intention was there to buy it." (de Carte Dep. at 57:7-9.) The court, however, rejects Arnon's contention that this evidence demonstrates Arnon's intention to authorize Mr. Sofer to contract for the Kore on

[12] It is also noted that there is no evidence that the museum loans or bids were made in Mr. Sofer's rather than Arnon's name.

[13] In view of this holding, the court does not reach defendants' claim that the doctrine of apparent authority may only be asserted by a third party who seeks to hold a principal liable for the acts of its agent, and not by the principal itself against the third party. (See Defs.' Reply Memo. at 2-3.)

Arnon's behalf. Relying on this evidence and the general precept that it is the court's role in interpreting a contract to ascertain the parties' intentions at the time of contracting, Arnon concludes: "That Sofer had authority for Arnon in this situation is consistent with the intentions of the parties." (Pl.'s Memo. In Opp. at 7, quoting AQ Asset Mgt LLC v Levine, 111 AD3d 245, 256 [1st Dept 2013]; Pl.'s Memo. In Opp. at 4-5, quoting Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp., 41 NY2d 397, 399] [1977].)

Arnon's argument ignores the overwhelming testimony of Mr. Sofer and Ms. de Carte that only Arnon had authority to enter into a contract for purchases of antiquities (even if Arnon may have effectively acted as a rubber stamp for Mr. Sofer's recommendations). Significantly, neither Mr. Sofer nor Ms. de Carte ever testified that Mr. Sofer was authorized, or that they even believed him to be authorized, to contract on Arnon's behalf in this situation involving the Kore. Arnon's self-serving declaration in its brief that it was Arnon's intention to bestow authority on Mr. Sofer's authority for this one transaction cannot excuse Arnon from demonstrating that, under the doctrines of apparent and implied actual authority, Arnon manifested assent to Mr. Sofer's authority to enter into the contract for this transaction at the time it was made.

Finally, this court notes that evidence in the record suggests that defendants may have cancelled the contract due to the potential for a more desirable offer of $750,000 from another buyer during the time plaintiff was making arrangements to pay the $650,000 that Mr. Sofer had offered. (See Gette Aff. In Opp. ¶ 20 [stating that on January 20, 2013 Baron Thyssen was shown the Kore and agreed to recommend purchase for his daughter's trust for $750,000].) The court cannot ignore, however, that Mr. Sofer created a trust under which he was required to obtain Arnon's approval of contracts for purchases in order to avail himself of the benefits (undiscussed on these motions) of the trust structure, and that he failed to do so before

defendants cancelled the contract for the Kore.

Ratification

In moving for summary judgment, defendants also contend that Arnon did not ratify the alleged contract for the Kore. (Defs.' Memo. In Supp. at 4.) Arnon does not expressly address ratification in its papers, instead resting on its claim that Mr. Sofer had the authority to act for it. (See Pl.'s Memo. In Opp. at 4-7.) In any event, Arnon does not submit evidence on this motion that would be sufficient to raise a triable issue of fact as to whether Arnon ratified the contract made by Mr. Sofer.

It has long been held that "[o]ne may ratify the acts of another purporting to be made on his behalf whether that other is an agent exceeding his authority or no agent at all." (Ramsay v Miller, 202 NY 72, 75-76 [1911].) Ratification may be made "by affirmative acts, and even by silence." (Id. at 76; see generally Matter of Cologne Life Reins. Co. v Zurich Reinsur. (N. Am.), Inc., 286 AD2d 118, 126-128 [1st Dept 1991].)[14]

There is authority that ratification will be effected by the principal's prolonged failure to object to the allegedly unauthorized act of an agent. (See e.g. Clark v Bristol-Myers Squibb & Co., 306 AD2d 82, 85 [1st Dept 2003] [holding that "plaintiff implicitly ratified the settlement by making no formal objection for months after she was told about it"]; 1420 Concourse Corp. v Cruz, 175 AD2d 747 [1st Dept 1991] [holding that "silence and acquiescence constituted a ratification" of a stipulation of settlement, where the party did not claim, until years after the

[14] A principal may overtly ratify an agreement through payment or partial payment on the contract (see Mulitex USA, Inc. v Marvin Knitting Mills, Inc., 12 AD3d 169, 170 [1st Dept 2004]) or by retaining the benefits of an unauthorized transaction with knowledge of material facts. (La Candelaria E. Harlem Community Ctr., Inc. v First Am. Tit. Ins. Co. of N.Y., 146 AD3d 473, 473 [1st Dept 2017].) Neither party alleges that Arnon took any such overt steps to ratify the contract.

stipulation had been entered into, that its attorney and employee/agent did not have authority to sign the stipulation].) Here, however, only two weeks elapsed between Mr. Sofer's January 12 email and Mr. Aboutaam's January 25 email cancelling the sale.[15]

Further, as held by the Court of Appeals, "ratification of an agent's acts requires knowledge of material facts concerning the allegedly binding transaction." (Matter of N.Y. State Med. Transporters Assn., Inc. v Perales, 77 NY2d 126, 131 [1990].) The January 12, 2013 email does not outline any details of the alleged agreement but, rather, explicitly anticipates a future document that would contain "the logistics of the sale (formal short agreement, invoice with photos etc.)." (Bergman Aff., Exh. AA.) Knowledge of the material terms of the alleged agreement therefore cannot be imputed to Arnon based on this email.

More important, any claim of ratification based on Ms. de Carte's silence in response to the January 12 email would be plainly inconsistent with Ms. de Carte's repeated testimony (discussed supra at 8-10), that Arnon required compliance with a formal process in order to approve the contract.

Arnon also cannot be found to have ratified the contract based on the filing of this lawsuit. The complaint was filed on February 4, 2013, but defendants had cancelled the sale ten days earlier on January 25, 2013. (Bergman Aff., Exh. Z.) A third party may withdraw from an agreement before ratification takes place. (See Restatement [Third] of Agency § 4.05 ["A ratification of a transaction is not effective unless it precedes the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third

[15] The court notes that Mr. Aboutaam testified that, prior to sending the January 25 email, he had told Mr. Sofer that the sale of the Kore had been cancelled "[o]ver one of the phone calls with him when the money did not arrive to the account." (H. Aboutaam Dep. at 13:16-25.) As the record is unclear as to when these calls took place and exactly what was said, the court relies on the January 25 email for evidence of the cancellation.

parties" including "any manifestation of intention to withdraw from the transaction made by the third party"]; id. at Comment c ["[A] third party [can] withdraw from a transaction when the third party is not bound because the agent acted without actual or apparent authority, so long as the third party manifests an intention to withdraw prior to the principal's ratification"]; 12 Richard A. Lord, Williston on Contracts § 35:28 [4th ed 1990, rev 2017] ["[I]t is generally held that withdrawal at any time prior to the ratification is effectual"].)

Arnon's Claim to Third Party Beneficiary Status and Motion for Leave to Amend

In the alternative, plaintiff argues that "[i]f Arnon did not have a contract, Sofer did," and that Arnon has rights as a third party beneficiary of Mr. Sofer's contract. (Pl.'s Memo. In Opp. at 8.) Arnon seeks leave to amend the complaint to assert its breach of contract and other claims on behalf of "Arnon and/or Sofer." (Id. at 8-9; Proposed Am. Compl. [Gette Aff., Exh. B].)

A party asserting rights as a third party beneficiary must first show that a valid and binding contract existed between other parties, in this case between defendants and Mr. Sofer. (See State of Cal. Pub. Empls.' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-435 [2000].) Before Arnon's third party beneficiary claim can be considered, the court must accordingly determine whether Arnon should be granted leave to amend the complaint to plead that Mr. Sofer contracted for the Kore.

It is well settled that the decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983].) In general, leave to amend a pleading should be freely granted absent prejudice or surprise resulting from the delay. (CPLR 3025 [b]; Thomas Crimmins Contr. Co. Inc. v City of New York, 74 NY2d 166, 170 [1989].) Leave to amend should, however, be denied if the amendment is plainly lacking in merit. (Id. at 170; Herrick v Second Cuthouse,

Ltd., 64 NY2d 692, 693 [1984].) It is the movant's burden to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit." (See MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010]; accord Caso v Miranda Sambursky Sloane Sklarin Ver Veniotis LLP, 150 AD3d 422, 423 [1st Dept 2017].)

As held above in connection with Arnon's breach of contract claim, Mr. Sofer's and Ms. de Carte's deposition testimony and the documentary evidence clearly show that Mr. Sofer's role in the transaction was that of purchasing advisor; that he merely recommended that Arnon purchase the Kore; and that Arnon was the entity that was required to contract for the purchase. The claim that Mr. Sofer contracted to buy the Kore is plainly inconsistent with, and refuted by, the deposition testimony and documentary evidence. Plaintiff's motion to amend the complaint will accordingly be denied as palpably without merit. As plaintiff cannot show that a contract existed between defendants and Mr. Sofer, plaintiff's third party beneficiary claim must also fail.

Relief Awarded on the Breach of Contract Claims as to the Kore

In conclusion, the court holds that plaintiff fails to demonstrate any basis for its claim that it had an enforceable contract for the Kore.[16] Plaintiff's claims based on the alleged contract for the Kore are set forth in its first cause of action for breach of contract (Compl. ¶¶ 30-35), its second cause of action for replevin (id. ¶¶ 36-38), and its third cause of action against Mr. Aboutaam which, although not expressly so denominated, appears to seek damages for tortious interference with contract (id. ¶¶ 39-42). Plaintiff moves for summary judgment as to liability on the first and second causes of action, and for summary judgment dismissing defendants' first and second counterclaims. Defendants' first counterclaim seeks a declaration that plaintiff does not

[16] In view of this disposition, the court does not reach defendants' claim that if a contract was made, Arnon breached the contract by failure to make payment according to its terms.

have a contract with defendants for the purchase of the Kore. (Answer and Counterclaims ¶ 30 [Answer].) The second counterclaim alternatively seeks damages for breach of any contract that was made for such purchase, based on plaintiff's alleged failure, among other things, to make timely payment. (Id. ¶ 33.) Defendants move for summary judgment dismissing the complaint in its entirety and for summary judgment on their first and second counterclaims.

Based on this court's finding that an enforceable contract for the sale of the Kore was not made, plaintiff's motion for summary judgment on its first and second causes of action and for dismissal of defendants' first and second counterclaims will be denied. Defendants' motion for summary judgment will be granted to the extent that it seeks dismissal of the complaint with prejudice, and denied as moot to the extent that it seeks judgment on its first and second counterclaims. The court accordingly turns to the remaining branches of the parties' motions, which relate to the counterclaims.

COUNTERCLAIMS

Defendants asserted ten counterclaims. The first and second, which relate to the Kore, have been addressed above. The third through fifth counterclaims, seeking damages for defamation, tortious interference with prospective economic relations, and fraudulent inducement, respectively (Answer ¶¶ 35-47) were dismissed by decision and order of this court, dated October 24, 2013. The Appellate Division affirmed the dismissal of the fourth and fifth counterclaims on an appeal as to those counterclaims. (Arnon Ltd [IOM] v Beierwaltes, 125 AD3d 453 [1st Dept 2015].) The sixth counterclaim seeks damages resulting from the injunction previously issued in this action. (Answer ¶¶ 48-50.) The seventh through tenth counterclaims seek damages for conversion (id. ¶¶ 51-57), unjust enrichment (id. ¶¶ 58-60), quantum meruit

(id. ¶¶ 61-63), and breach of contract (id. ¶¶ 64-68), respectively, all arising out of a series of transactions, prior to the Kore transaction, involving other antiquities.

Sixth Counterclaim

Defendants' sixth counterclaim alleges that "[p]laintiff was not entitled to the restraints and injunction heretofore issued in this action" and that, "[b]y reason of the aforesaid restraints and injunction," Phoenix was damaged in the amount of $ 80,000,000. (Answer ¶¶ 48-50.) Defendants move for summary judgment as to liability on this counterclaim, while plaintiff moves for summary judgment dismissing the counterclaim. Defendants merely assert that the counterclaim "seeks damages for Arnon's having improperly obtained stays which prevented the sale of the Kore to ACL [Augustus Collection, Ltd.]," and is "ripe for at least partial determination on this motion." (Bergman Aff. In Supp. ¶ 17; Defs.' Memo. In Supp. at 25.) Plaintiff merely asserts that the sixth counterclaim "is redundant to the relief provided in CPLR 6315." (Gette Aff. In Supp. at 2.)

Neither party makes any legal arguments or submits any legal authority in support of the requested relief. In particular, the parties fail to address a substantial body of law on the circumstances in which damages will be awarded where a party prevails on a motion for a preliminary injunction but not on the merits. (Compare e.g. J.A. Preston Corp. v Fabrication Enters. Inc., 68 NY2d 397 [1986] with Margolies v Encounter, Inc., 42 NY2d 475 [1977].) They also wholly fail to address the availability of damages resulting from the injunction under the circumstances of this case. These circumstances include that the issue of whether plaintiff was entitled to the injunction was never litigated. Rather, the parties stipulated to the grant of the injunction, although defendants purported to preserve their right to "recover of Plaintiff (and receive payment from Plaintiff and/or the Undertaking) to the extent of the provable damages,

costs and reasonable counsel fees sustained and incurred by them to the extent permitted by law. . . ." (Stipulation, dated Mar. 5, 2013, ¶ 3 [NYSCEF Doc No 43].) In addition, although the court did not decide the issue because the motion for a preliminary injunction was resolved by stipulation, plaintiff appears to have had a strong claim that the Kore is unique and therefore presented a particularly compelling case that plaintiff would suffer irreparable harm absent an injunction.

As defendant fails to discuss the impact of these circumstances on the availability of damages or otherwise to make any showing as to the merit of this counterclaim, the counterclaim will be dismissed. The dismissal will, however, be without prejudice to defendants' right to seek damages on a showing of their legal availability and in a reasonable amount, pursuant to CPLR 6315.[17]

Defendants' Seventh Through Tenth Counterclaims

The parties also dispute a series of transactions years before the Kore transaction. Defendants allege that in the period between 2001 and 2003, Arnon "came into possession of various antiquities owned by Phoenix," described in "Schedule A" to its answer (Schedule A Items or Items). (Answer ¶ 52, Exh. A.) The Schedule A Items are the subject of the four counterclaims. Mr. Sofer claims that the Schedule A Items were given to him as a form of "discount for my big purchases." (Sofer Dep. at 87:16-17.) Defendants claim that Phoenix gave the Items to Arnon on consignment. (H. Aboutaam Dep. at 158:6-160:4, 163:16-164:12.)

The seventh counterclaim for conversion pleads that "Phoenix consented to allow Plaintiff to retain possession of the Glass, Jewelry, Bowls and Seal up until such time as Phoenix

[17] The ad damnum clause for the counterclaim—$ 80,000,000 resulting from the inability to sell a Kore for which defendants had accepted a $650,000 offer—was grossly disproportionate to any damages that defendants could conceivably recover.

withdrew such consent," and that Phoenix withdrew its consent in 2011. (Answer ¶¶ 54-55.) The tenth counterclaim for breach of contract alleges that plaintiff "was given possession of [the Items] on 'on approval' terms pursuant to which it was required to pay for said merchandise or return it to Phoenix upon Phoenix's demand therefor," and that plaintiff did not pay for or return the Items. (Id. ¶¶ 65-67.) The eighth and ninth counterclaims allege unjust enrichment and quantum meruit based on the conversion allegations.

In moving for summary judgment, plaintiff in effect contends that the parties' dispute as to the circumstances under which Mr. Sofer came into possession of the Schedule A Items is irrelevant, and that all of defendants' claims are barred by the statute of limitations. (Pl.'s Memo. In Supp. at 1.)[18] Plaintiff contends that the counterclaims accrued in 2003 and are therefore time-barred (id. at 6-10), while defendants contend that the claims are timely because they did not accrue until 2011 when defendants served a written demand. (Defs.' Memo. In Opp. at 18-19.)

The parties do not dispute that the 2011 demand was made in the form of an email by Jeff Suckow[19] to Mr. Sofer, dated September 6, 2011, which was copied to Ali Aboutaam (Hicham Aboutaam's brother) and stated in pertinent part: "I [am] writing regarding the items you have on consignment from us since 2002 and 2003. . . . Nine years is a descent [sic] period

[18] Defendants assert their seventh through tenth counterclaims against plaintiff Arnon. As plaintiff points out, "there is considerable uncertainty as to the correct parties to the counterclaims. The Schedule A Items were delivered to Sofer who is technically not a party to this action. Many of the items appeared not even to be owned by Phoenix at the time they were given to Sofer." (Pl.'s Memo. In Supp. at 5.) Plaintiff does not, however, move for summary judgment on the ground that the suit names the wrong party. Rather, both parties brief the statute of limitations issue on the apparent assumption that the real party at interest was named, and the court will decide the issue accordingly. In addition, as also noted by plaintiff, it is unclear from the record which acts relevant to the delivery of the Schedule A Items to Sofer occurred in New York. (Pl.'s Memo. In Supp. at 7 n 2.) However, as both parties brief the statute of limitations issues under New York law, and neither party objects to its application, the court will decide the issues under New York law.

[19] As H. Aboutaam testified, Mr. Suckow is affiliated with Inanna, "an art service company" used by Phoenix. (H. Aboutaam Dep. at 168:18-24; 156:2-9.)

for a consignment. It is a good time to close this matter." This email also requested instructions for collection of the Items. (H. Aboutaam Aff., ¶¶ 6-7 & Exh. C [September 6, 2011 demand].) The parties dispute whether that demand was effective to commence the running of the statute of limitations for the four counterclaims.

Conversion

As the Appellate Division of this Department has recently held, in summarizing an extensive body of law on the statute of limitations for conversion:

> "Under CPLR 214 (3), the statutory period of limitations for conversion and replevin claims is three years from the date of accrual. The date of accrual depends on whether the current possessor is a good faith purchaser or bad faith possessor. An action against a good faith purchaser accrues once the true owner makes a demand and is refused (see Solomon R. Guggenheim Found. v Lubell, 77 NY2d 311, 317-318 [1991], affg 153 AD2d 143 [1st Dept 1990]). This is 'because a good-faith purchaser of stolen property commits no wrong, as a matter of substantive law, until he has first been advised of the plaintiff's claim to possession and given an opportunity to return the chattel' (153 AD2d at 147). By contrast, an action against a bad faith possessor begins to run immediately from the time of wrongful possession, and does not require a demand and refusal (see State of New York v Seventh Regiment Fund, 98 NY2d 249 [2002]; Davidson v Fasanella, 269 AD2d 351 [2d Dept 2000])."

(Swain v Brown, 135 AD3d 629, 631 [1st Dept 2016].) "A demand need not use the specific word 'demand' so long as it clearly conveys the exclusive claim of ownership. . . . By the same reasoning, a refusal need not use the specific word 'refuse' so long as it clearly conveys an intent to interfere with the demander's possession or use of his property." (Feld v Feld, 279 AD2d 393, 394-395 [1st Dept 2001], lv denied 96 NY2d 717.) "Naturally, if demand would be futile because the circumstances show that the defendant knows it has no right to the goods, demand is

not required." (Seventh Regiment Fund, Inc., 98 NY2d at 260; see also McGough v Leslie, 65 AD3d 895, 896 [1st Dept 2009].)

It is further settled that where a demand is required, "the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property." (Lubell, 77 NY2d at 319, citing Heide v Glidden Buick Corp., 188 Misc 198, 198-199 [1st Dept 1947]; accord Martin v Briggs, 235 AD2d 192, 198 [1st Dept 1997].) Otherwise "there is a potential for a plaintiff to indefinitely extend the statute of limitations by simply deferring the making of the requisite demand." (Matter of Peters v Sotheby's Inc., 34 AD3d 29, 36 [1st Dept 2006], lv denied 8 NY3d 809 [2007].)

Applying this standard, the court holds that the statute of limitations for the conversion claim has passed. In reaching this result, the court notes that in the affidavit submitted on this motion, Mr. Hicham Aboutaam described the Schedule A transaction as follows: "In or around 2002, Phoenix made a consignment of the Oinochoe to Arnon, along with several other antiquities. Because it was pursuant to a consignment agreement, Arnon took possession without paying anything pending a further sale to a third party or its own purchase. Although it can often take years to sell an antiquity, by 2011 Phoenix felt that it was time to end the consignment inasmuch as no sale had been made by Arnon." (H. Aboutaam Aff. ¶ 6.) According to Mr. Aboutaam, Phoenix then made the September 6, 2011 demand for the Items. (Id. ¶ 7.) Mr. Aboutaam's claim that the consignment persisted until the September 6, 2011 demand was made is, however, plainly inconsistent with his deposition testimony and that of his brother, Ali Aboutaam, who was also involved in the alleged consignment of the Schedule A Items to Mr. Sofer.

In their depositions, the Aboutaam brothers repeatedly testified that Mr. Sofer had been a good payer on significant purchases of antiquities, but that at some point around 2003, the Aboutaams broke off business relations with Mr. Sofer because of his failure to pay for or return the Schedule A Items.

Hicham Aboutaam testified that Mr. Sofer "started very good" on the other transactions, but there was then "the dispute with the . . . pieces that he did not pay for and . . . this is when we ended the relationship, became almost hopeless. . . . [I]t's not enough if a client buys and pays quickly. This is . . . good, but if some bills they do not pay or they try to convert objects, then we don't want the whole relationship." (H. Aboutaam Dep. at 156:14-24.) When asked whether Phoenix had ever requested return of the Items prior to the September 6, 2011 demand, he answered unequivocally: "Many times, but there's no records that we could find to satisfy, you know, lawyers and the legal system." (Id. at 176:5-11.) He further testified: "How can people hold objects without title, without piece of paper confirming that? And the fact that . . . since 2003 we stopped a good payer, at the time he paid good prices, we just stopped the whole relationship for ten or eleven years, it means we're upset about these objects. Why would we lose a client who pays, you saw the bills, $1 million, $400,000.00. It's not money. It's the principle. It's theft. We stopped it because of that." (Id. at 181:2-12.)

Similarly, Ali Aboutaam testified: "[W]e claimed them many times, and he gave one, and then . . . it was very difficult to get these pieces out of him. And then in turn, I told him, 'I cannot do business with you this way; you know, you have to pay for these -- all the things, or give them back." (A. Aboutaam Dep. at 20:4-9 [Bergman Aff., Ex. P].) He further testified that he stopped doing business with Mr. Sofer in 2002 or 2003 due to his failure to return the objects. (Id. at 8:10-11; 9:4-5; 80:15-23.)

In opposing plaintiff's summary judgment motion, defendants rely on the conclusory allegation in their counterclaim that Phoenix consented to plaintiff's retention of the Schedule A Items until 2011 when it withdrew its consent. (Defs.' Memo. In Opp. at 18, citing Answer ¶¶ 54-55.) Defendants do not dispute that the Aboutaams' deposition testimony was to the contrary. (See Defs.' Memo. In Opp. at 18-19.) To the extent that they rely on Hicham Aboutaam's contrary affidavit stating that "by 2011 Phoenix felt that it was time to end the consignment" (H. Aboutaam Aff. ¶ 6), this reliance is unavailing. Self-serving affidavits submitted by a party that contradict the party's own deposition testimony and "can only be considered to have been tailored to avoid the consequences of [] earlier testimony . . . are insufficient to raise a triable issue of fact to defeat [a] motion for summary judgment." (Phillips v Bronx Lebanon Hosp., 268 AD2d 318, 320 [1st Dept 2000]; see also Perine Intl. Inc. v Bedford Clothiers, Inc., 143 AD3d 491, 492 [1st Dept 2016].)

Here, on any version of the undisputed facts testified to by the Aboutaams, the conversion cause of action must be found to have accrued in 2003, when the Aboutaams stated they stopped doing business with him as a result of his failure to pay for or return the Schedule A Items.

If Mr. Sofer was a "bad faith possessor" by 2003, as the Aboutaams' testimony indicates they—and through them, Phoenix—considered him to be, no demand was required. On the above authority (supra at 25), the cause of action accrued at the time of the bad faith possession in 2003.

Alternatively, as the Aboutaams testified, Mr. Sofer came into possession of the Schedule A Items legally. Assuming that a demand was therefore required, the Aboutaams also testified that they made many requests for return of the Items by 2003. On the above authority (supra at

25), the demand was not required to take any particular form. The cause of action therefore accrued by 2003, when the Aboutaams requested that Mr. Sofer return the Items, and he failed to do so.

Finally, even assuming that the Aboutaams' requests for return of the Items did not rise to the level of a demand necessary to trigger the statute of limitations, they repeatedly testified that they knew by 2003 that Mr. Sofer had no right to retain the Items. On the above authority (supra at 26), they had all the information they needed to make a demand by 2003 and could not unreasonably delay in making the demand.

On any of these scenarios, the three year statute of limitations for the conversion counterclaim began to run in 2003 and could not be extended by the September 6, 2011 demand. The interposition of the counterclaims in this action in 2013 was untimely. The conversion claim will accordingly be dismissed.

Breach of Contract

The court also finds that defendants' tenth counterclaim for breach of contract is untimely. This counterclaim pleads that plaintiff was given the Schedule A Items "on 'on approval' terms," requiring it to pay for the Items or return them "upon Phoenix's demand." (Answer ¶¶ 65.) In opposing plaintiff's summary judgment motion, defendants argue that the statute of limitations for this breach of contract counterclaim, like that for the conversion counterclaim, runs from plaintiff's refusal to return the Items in response to the September 6, 2011 demand. (Defs. Memo. In Opp. at 19.)

CPLR 213 (2) provides for a six year statute of limitations for "an action upon a contractual obligation or liability, express or implied." UCC § 2-725 (1) provides that an action for breach of contract for the sale of goods "must be commenced within four years after the

cause of action has accrued." Whether the CPLR or the UCC statute of limitations applies—an issue this court need not decide on this motion—the action is time barred.

"'In New York, a breach of contract cause of action accrues at the time of the breach,' even if no damage occurs until later." (Chelsea Piers L.P. v Hudson Riv. Park Trust, 106 AD3d 410, 412 [1st Dept 2013], quoting Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993].) Where a demand is a "substantive demand"—that is, "an essential element of the plaintiff's cause of action"—the breach of contract does not occur until the demand is made and refused. (Continental Cas. Co. v Stronghold Ins. Co., Ltd., 77 F3d 16, 21 [2d Cir 1996] [applying New York law].) In the case of such a demand, the plaintiff cannot be permitted to indefinitely extend the running of the statute of limitations. Rather, as in the conversion context, the plaintiff may not unreasonably delay in the making of the demand. (Id.; see also U.S. Bank Natl. Assn v Greenpoint Mtg. Funding, Inc., 2015 WL 915444, * 3-4 [Sup Ct, NY County Mar. 3, 2015] [this court's prior decision discussing substantive and procedural demands], affd 147 AD3d 79 [1st Dept 2016].) For the reasons stated in connection with the conversion counterclaim, the cause of action accrued in 2003 and the statute of limitations was not extended by defendants' September 6, 2011 demand.

Quasi Contract Claims

The statute of limitations has similarly run on defendants' eighth and ninth counterclaims. Defendants fail to directly address the timeliness of their unjust enrichment and quantum meruit claims, choosing instead to rely on their argument that the limitations period did not begin until "the date of the demand for the return of the objects [on] September 6, 2011" and that therefore "the shortest statute of limitations urged by Arnon, three years, has been fully complied with." (Defs.' Memo. In Opp. at 19.) These counterclaims are based on the same facts

as the conversion and/or breach of contract counterclaims and are therefore governed by the same statute of limitations. (See e.g. Yarbro v Wells Fargo Bank, N.A., 140 AD3d 668, 669 [1st Dept 2016]; Maya NY, LLC v Hagler, 106 AD3d 583, 585 [1st Dept 2013].) As the court has held that the counterclaims for conversion and breach of contract are time-barred because they accrued in 2003, not 2011, defendants' counterclaims for unjust enrichment and quantum meruit are also time-barred.

It is accordingly hereby ORDERED that the motion by defendants William Beierwaltes, Lynda Beierwaltes, Phoenix Ancient Art S.A., and Hicham Aboutaam for summary judgment is granted to the following extent: The complaint is dismissed in its entirety with prejudice; and defendants' first and second counterclaims are dismissed as moot; and it is further

ORDERED that the cross-motion by plaintiff Arnon Ltd (IOM) to amend the complaint is denied with prejudice; and it is further

ORDERED that the motion by plaintiff Arnon Ltd (IOM) for summary judgment is granted to the following extent: Defendants' sixth counterclaim is dismissed without prejudice, pursuant to the terms of this decision; and defendants' seventh through tenth counterclaims are dismissed with prejudice; and it is further

ORDERED that the preliminary injunction shall be deemed vacated five days after service of a copy of this order with notice of entry, such service to be made by personal delivery or overnight mail; and it is further

ORDERED that the undertaking shall be released unless defendants move by order to show cause, pursuant to CPLR 6315, within ten days after service of a copy of this order with notice of entry, for damages allegedly resulting from the preliminary injunction. Nothing herein

shall be construed as suggesting that such damages have been incurred or are legally available.

This constitutes the decision and order of the court.

Dated: New York, New York
August 1, 2017

MARCY FRIEDMAN, J.S.C.