SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

----------x

HARRY WEISS, INC.,

Plaintiff,

-against-

Index No.
157888/2014

DIAMOND STAR JEWELRY, INC., LEAH FTEHA, a/k/a LEAH FATEHA, and JOSEPH FTEHA a/k/a JOSEPH FATEHA,

Defendants.

----------x

**Robert R. Reed, J:**

Motion seq. nos. 004 and 005 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

This is a dispute over eight diamonds, worth over $2 million, owned by plaintiff and purportedly sold to defendant Diamond Star Jewelry, Inc. (Diamond Star) in August and September 2008, through a non-party broker, Mendez Moskowitz (Moskowitz). Plaintiff asserts that Diamond Star took possession of the stones, did not return them, and then refused to fully pay for them, paying only $370,859.00, leaving $1,972,558.50 as an outstanding balance. Defendants claim that they never received the diamonds, never did any business with plaintiff, only with Moskowitz, and that any checks they made out to plaintiff were just given for security, not for payment. Defendants move to amend their answer to assert the statute of frauds in UCC § 2-201 as an affirmative defense, and then seek dismissal of the complaint based on that defense. They also seek discovery sanctions, asserting that plaintiff failed to appropriately respond to their post-EBT demands. Plaintiff seeks partial summary judgment against Diamond

Star on four dishonored checks, that Diamond Star admittedly signed and failed to make payment on, and plaintiff contends that it is a holder in due course, which takes free of any defenses.

## ***BACKGROUND***

Plaintiff is engaged in the buying and selling of diamonds on 47th Street in Manhattan's Diamond District (affidavit of Robert Weiss, dated October 13, 2016 [Weiss 2016 aff], ¶ 1). Defendant Diamond Star was a buyer of diamonds and gemstones for its clients, and Joseph Fteha was the owner and principal of Diamond Star. Defendant Leah Fteha is Joseph's wife.

In August 2008, plaintiff, through broker Moskowitz, negotiated with Joseph Fteha for the sale of eight diamonds, owned by plaintiff and to be purchased by Diamond Star, which were of various sizes, qualities, and values (*see* exhibit B to plaintiff's notice of motion [plaintiff's motion], amended complaint, ¶¶ 9-10; Weiss 2016 aff, ¶ 3). The diamonds were shown to Mr. Fteha on memorandum for examination and inspection only, which was standard for the diamond business (Weiss 2016 aff, ¶ 4). Plaintiff asserts that the parties agreed on prices for each of the eight diamonds, and invoices were generated by plaintiff in the usual course of business (*id.*, ¶¶ 4-5; *see* exhibit E annexed to plaintiff's motion, invoices and Gemological Institute of America [GIA] certificates). Plaintiff asserts that the invoices were hand delivered to Mr. Fteha (Weiss 2016 aff, ¶ 6). The total price for the eight diamonds was $2,343,417.50 (affirmation of Michelle Holman in support, dated February 15, 2018 [Holman affirmation in support] ¶16). Defendants paid plaintiff $370,859, and the amount outstanding is $1,972,558 (exhibit B to plaintiff's motion, amended compl, ¶ 11). Diamond Star failed to pay this outstanding amount, and failed to return the diamonds (*id.*, ¶ 10). Plaintiff alleges that Diamond Star may have

pawned some of the diamonds to a man named Mr. Weider at a company called Gem Cap (Weiss 2016 aff, ¶ 11).

Diamond Star issued the following checks, made payable to plaintiff:

| | | | |
|---|---|---|---|
| October 6, 2008 | Check #267 | $200,000 | Payment Stopped by Diamond Star |
| October 7, 2008 | Check #271 | $200,000 | Payment Stopped by Diamond Star |
| October 31, 2008 | Check #993 | $200,000 | Returned Insufficient Funds |
| November 3, 2008 | Check #994 | $200,000 | Payment Stopped by Diamond Star |
| November 21, 2008 | Check #350 | $200,000 | Returned (no details on check) |
| November 28, 2008 | Check #232 | $200,000 | Returned Insufficient Funds |
| March 13, 2009 | Check #1032 | $5,000 | Returned Insufficient Funds |

(Holman affirmation, ¶ 16; *see* exhibit B to plaintiff's motion, amended compl, ¶ 12, and exhibit F (copies of checks).

***Procedural History***

On August 11, 2014, plaintiff commenced this action, and seeks recovery for four causes of action: fraud; breach of contract; dishonored checks as instruments for the payment of money only; and violations of the New York Debtor and Creditor Law §§ 274-276 (exhibits A and B to plaintiff's motion, complaint and amended complaint). On December 5, 2014, defendants answered the amended complaint, denying the material allegations, and asserting various affirmative defenses, including that they never received the goods (exhibit C to plaintiff's motion).

On October 17, 2016, plaintiff moved for summary judgment, and defendants cross-moved for partial summary judgment (NYSCEF Doc no. 37-45, 50-59). On February 2, 2017, this court denied both the motion and cross motion (exhibit D to plaintiff's notice of motion).

On June 27, 2017, plaintiff filed its note of issue (NYSCEF Doc. no. 70) as directed by the court in its February 2, 2017 order (exhibit E to plaintiff's opposition to motion seq. no. 004).

On July 3, 2017, defendants moved to strike the note of issue, contending that discovery was not completed as certain depositions were still outstanding. Plaintiff cross-moved to strike defendants' answer and/or to compel them to participate in discovery, asserting that defendants had refused to proceed with depositions, claiming that they had a "tight schedule," had not served any discovery demands, and had failed to respond to plaintiff's demands (NYSCEF Doc. Nos. 71-77, 79-95). On September 14, 2017, the parties entered into a stipulation that was so-ordered by this court, denying defendants' request to strike the note of issue, and ordering that party depositions be completed by December 15, 2017, that post-deposition discovery demands be served by December 31, 2017, with responses served 20 days after receipt; and that summary judgment motions, if any, be e-filed by February 15, 2018 (exhibit A to defendants' notion of motion [motion seq. no. 004]).

On December 20, 2017, plaintiff's president and sole owner, Robert Weiss, was deposed. On January 8, 2018, defendants served post-deposition demands on plaintiff, including a demand for Bill of Particulars, a demand for witnesses, and a demand for documents (exhibit J to defendants' notice of motion). On January 15, 2018, defendant Joseph Fteha was deposed (exhibit I to plaintiff's opposition to motion seq. no. 004). On February 9, 2018, plaintiff served its response to defendants' post-deposition combined demands (exhibit A to plaintiff's opposition to motion seq. no. 004). Defendants rejected plaintiff's response as inadequate (NYSCEF Doc. No. 104).

In their motion, defendants seek to amend their answer to assert an affirmative defense based on the statute of frauds in UCC § 2-201. They contend that the existence of a written

agreement did not come into question until plaintiff's deposition, and its failure to respond to defendants' discovery demands. They argue that plaintiff has not suffered any prejudice by the mere delay. Defendants also seek dismissal of the complaint based on this affirmative defense, contending that plaintiff can neither establish nor raise any issue of fact as to the non-existence of a binding enforceable agreement. In addition, defendants seek dismissal of the complaint against defendant Leah Fteha, as her deposition testimony clearly demonstrated that she was not a corporate officer or an agent for Diamond Star, and that she did not work in any capacity for the company (exhibit L to defendants' notice of motion). Finally, defendants seek discovery sanctions against plaintiff (CPLR 3126), based on plaintiff's purportedly inadequate response to defendants' post-deposition demands. They maintain that plaintiff's responses that the questions were interrogatory in nature, were seeking evidentiary material more appropriate in a pre-trial order, and that the document demands were overly broad and burdensome, constituted a willful refusal to disclose. Defendants urge that plaintiff be precluded from presenting any evidence or be subject to an adverse inference at trial.

In opposition, plaintiff argues that leave to amend be rejected because the amendment is untimely and prejudicial. It asserts that, at the latest, defendants were aware of their defense when Joseph Fteha stated in his affidavit in January 2017 that he did not sign any of the invoices or memoranda. The amendment is prejudicial because all discovery is complete, and the note of issue has long been filed. Plaintiff contends that there is no basis to preclude because discovery and depositions were repeatedly delayed by defendants, not plaintiff, and it was defendants who had to be ordered by the court numerous times to provide discovery responses and to schedule depositions. With respect to defendants' post-deposition demands, they were only permitted to seek discovery that arose from Weiss' deposition, not to serve a Demand for a Bill of Particulars,

a Demand for Witnesses, and boilerplate demands for documents, as if the case were just beginning when it already was post-note of issue. Further, back in March 2015, plaintiff had already provided all relevant documents in its possession. Weiss submits an affidavit in which he affirms that he searched through all of plaintiff's files and did not find any documents related to this case or in response to defendants' demands, other than those previously provided to his counsel and that were marked at his deposition (affidavit of Robert Weiss, dated April 11, 2018, ¶¶ 2, 6).

In moving for partial summary judgment, plaintiff seeks recovery on four dishonored checks written by defendants, made payable to plaintiff, in the total amount of $605,000. Plaintiff points to Fteha's testimony in which he admits that he wrote and signed the dishonored checks. It submits proof that Weiss made repeated efforts to collect payment on those checks, but that while Fteha never disputed the amounts in the checks and promised to make full payment thereon, he never did. Defendants contend that plaintiff's proof cannot establish an enforceable agreement between the parties, and the checks fail to show their purpose (i.e., that they are part of the transactions upon which plaintiff sues), and that plaintiff cannot show that defendants or Moskowitz ever possessed the diamonds in question.

***DISCUSSION***

The defendants' motion (motion seq. no. 004) is granted only to the extent of dismissing the claims against defendant Leah Fteha, and is otherwise denied. Plaintiff's motion (motion seq. no. 005) for partial summary judgment in the amount of $605,000 plus interest for four dishonored checks, as instruments for the payment of money only, is granted.

The branch of defendants' motion seeking dismissal of the complaint as against defendant Leah Fteha is granted. Defendants made a prima facie showing that there is no basis

for the claims against her, and plaintiff does not oppose such dismissal (affidavit of Michelle Holman, dated April 11, 2018, ¶ 47).

The branches of defendants' motion for leave to amend, and for dismissal based on that amendment, are denied. A motion for leave to amend, pursuant to CPLR 3025 (b), is committed to the broad discretion of the trial court (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [1st Dept 2004]). In the absence of prejudice or surprise, leave to amend is freely granted (see CPLR 3025 [b]). Prejudice may be demonstrated where the opposing party is hindered in its preparation of its case, where there is a significant expansion of the claims, or where the amendment is sought after discovery has been completed (*see e.g. Lattanzio v Lattanzio*, 55 AD3d 431, 432 [1st Dept 2008] [leave denied where prejudice shown because discovery had been closed]; *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d at 293 [party's preparation hindered, and was prevented from taking measure in support of its position]; *Moon v Clear Channel Communications*, 307 AD2d 628, 629-630 [3d Dept 2003] [prejudice after the completion of discovery]; *Thibeault v Palma*, 266 AD2d 616, 617 [3d Dept 1999] [significant expansion of claims with new theories]). In exercising its discretion, the court will consider whether the moving party offers a reasonable excuse for the delay in asserting the amendment, and how long that party was aware of the substance of the proposed amendment at the time it served the pleading it seeks to amend (*see Lattanzio v Lattanzio*, 55 AD3d at 432 [no reasonable excuse for delay, was known at time of answer, did not move to amend until after plaintiff moved for summary judgment]; *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d at 293; *see also Wassfam L.L.C. v Palacios*, 107 AD3d 493, 493 [1st Dept 2013]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22-23 [1st Dept 2003] [motion denied where no explanation for

inordinate delay]; *Inwood Tower v Summit Waterproofing & Restoration Corp.*, 290 AD2d 252, 252-253 [1st Dept 2002 ] [same]; *Hanford v Plaza Packaging Corp.*, 284 AD2d 179, 180 [1st Dept 2001] [no excuse for plaintiff's long delay, amendment sought only after defendant moved for summary judgment, proposed amendment discoverable at time of original complaint]; *Birdsall v City of New York*, 60 AD2d 522, 522 [1st Dept 1977] [two year delay, facts were known at time of original answer]). When the action has already been certified ready for trial, by the filing the note of issue, judicial discretion in allowing amendments should be cautious, prudent, and circumspect (*see Tabak v Shaw Indus., Inc.*, 149 AD3d 1132, 1133 [2d Dept 2017] ["when . . . leave is sought on the eve of trial, judicial discretion should be exercised sparingly"] [internal quotation marks and citation omitted]; *Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

Under the circumstances here, leave to amend is denied. Defendants were aware of the substance of their proposed statute of frauds defense long before this date. The parties moved and cross-moved for summary judgment back in October 2016 (*see* NYSECF Doc #s 37-45, 50-59). In opposition to plaintiff's motion, defendant Joseph Fteha submitted an affidavit in which he attested that he reviewed plaintiff's invoices and memoranda attached to its motion papers, and that he did not see any signatures, let alone his own signature on any of the documents (affidavit of Joseph Fteha, dated January 2, 2017, ¶ 5). He continued that he was the only person working at Diamond Star that was authorized to and signed for any deliveries or goods on consignment, and that his signature did not appear on any of plaintiff's documents (*id.*). Thus, as far back as January 2017, defendants were aware of the alleged facts upon which they base their proposed amendment. In fact, plaintiff had disclosed to defendants, back in March 2015, all the documents it is relying upon, the invoices and memoranda, and defendants should have been

aware of the substance of the proposed amendment at that time (*see Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557). Defendants offer no excuse, much less a reasonable one, for waiting until now, after discovery has been closed, the note of issue has been filed, and the case is trial ready, to seek leave to amend. The fact that they themselves delayed taking plaintiff's deposition until December 2017, after being repeatedly ordered by this court to do so earlier, does not provide an excuse for their delay in moving to amend. Their argument that they could only deduce this affirmative defense after they finally took plaintiff's deposition, is belied by Mr. Fteha's January 2017 affidavit. Clearly, defendants waited an extensive and unexplained period before seeking this relief (*see e.g. Wassfam L.L.C. v Palacios*, 107 AD3d 493 [extensive delay where defendant moved to amend answer after note of issue filed and one year after filing original answer]; *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc., LLC*, 4 AD3d 290, 293 [plaintiffs delayed two and half years before moving to amend]). Defendants' argument that they could not be faulted for waiting until all relevant disclosure was completed is disingenuous. They were obligated to seek amendment when they were aware of the facts giving rise to their statute of frauds defense, which clearly, at the latest, was on January 2, 2017. Taken to its end, defendants' argument would mean that every party would be entitled to wait until the close of discovery before they must move to amend.

Plaintiff would be significantly prejudiced if defendants were permitted to amend their answer at this late stage of the litigation -- that is, where discovery has been completed, a note of issue has been filed, and the parties have moved for summary judgment (*see e.g. Lattanzio v Lattanzio*, 55 AD3d 431, 432 [prejudice demonstrated where discovery had been closed]; *Arias-Paulino v Academy Bus Tours, Inc.*, 48 AD3d 350, 350 [1st Dept 2008] [leave denied where two and half year delay, matter already litigated extensively]). Defendants improperly waited until

the very last minute to seek to assert this affirmative defense against plaintiff and did so in a manner that precluded plaintiff from obtaining any further discovery on the defense. The court already has granted the parties multiple discovery deadline extensions and will not permit any further extensions.

For these reasons, defendants' motion for leave to amend their answer is denied. Consequently, the branch of defendants' motion seeking dismissal, pursuant to CPLR 3211 (a) (1) and (3), which is based on the proposed statute of frauds affirmative defense, also is denied (*see Wassfam L.L.C. v Palacios*, 107 AD3d 493). By failing to assert the statute of frauds defense in their answer, defendants have waived this defense and the court will not consider these arguments in defendants' motion or in their opposition to plaintiff's motion for partial summary judgment (*see* CPLR 3018 [b]; *Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]).

The branch of defendants' motion seeking to preclude plaintiff from offering evidence or granting an adverse inference charge against plaintiff at trial (CPLR 3126), also is denied. A sanction imposed on a motion pursuant to CPLR 3126 is within the broad discretion of this court (*Westervelt v Westervelt*, 163 AD3d 1036, 1037 [2d Dept 2018]). Plaintiff has responded to defendants' various demands in a timely manner (*see* exhibit A to plaintiff's affirmation in opposition).

Defendants contend that plaintiff's response was insufficient. In its demand, defendants repeatedly asked plaintiff to set forth "with specificity and details the factual basis or information in the possession of the Plaintiff it intends to use at the trial of this matter in support of the allegations made by plaintiff" for each substantive paragraph of the complaint (exhibit J to defendants' notice of motion). Plaintiff's response stated that it objected to defendant's demand as interrogatory in nature, seeking evidentiary material improper for a bill of particulars, and that

the demands were post-EBT, and were not supposed to be blanket discovery demands (exhibit K to defendants' notice of motion). It also provided specific responses to questions about the brokers it used and the name and address of its accountant (*see* exhibit A to plaintiff's opposition, plaintiff's combined response to demands, ¶¶ 32-33).

The purpose of a bill of particulars is "to amplify the pleadings, limit the proof, and prevent surprise at trial" (*see Flores v New York City Hous. Auth.*, 151 AD3d 695, 696 [2d Dept 2017] [internal quotation marks and citation omitted] [intended to provide adversary with more detailed picture of the claim]; *Paterra v Arc Dev. LLC*, 136 AD3d 474, 475 [1st Dept 2016] [purpose is to amplify pleading, not to supply allegations essential to a claim but missing from a pleading]). While it is intended to provide the adverse party with a more detailed picture of the claims, it is not intended or required that the responding party divulge its entire trial strategy (*see Flores v City of New York*, 151 AD3d at 696). So long as plaintiff provided general statements of the parties' contracts, their performances and breach, that is sufficient. Here, plaintiff's responses were sufficient, particularly where it had already turned over, nearly three years before, the documents in its possession evidencing the parties' contracts, all depositions had already been conducted, and there had already been a motion and cross motion for summary judgment in which the parties laid bare their proofs (*see Monzon v Chiaramonte*, 140 AD3d 1126, 1129 [2d Dept 2016] [general statements of acts and omission constituting the negligence of each defendant, including the defendants' failed to diagnose, improperly treated, or failed to treat are sufficient]). Moreover, these post-EBT demands were intended to cover only outstanding discovery that was referenced in the EBT in December 2017. They were not intended to be a blanket demand as if this case had just commenced and no other disclosure had been conducted. Further, Robert Weiss clearly states in his affidavit in opposition that he

searched all of plaintiff's files and that he did not find any other documents related to this case or in response to defendants' counsel's demands other than those he previously provided to his counsel, which were marked as exhibits at his deposition (affidavit of Robert Weiss, dated April 11, 2018, ¶ 6). Thus, this court finds that plaintiff did not refuse to obey an order for disclosure, or willfully fail to disclose information which this court finds ought to have been disclosed (*see* CPLR 3126), nor fail to provide particulars which ought to have been provided (*see* CPLR 3042 [d]). The defendants' request for discovery sanctions is denied.

Plaintiff's motion for partial summary judgment seeks an order granting it judgment in the amount of $605,000.00 on four dishonored checks (check #993 for $200,000; check #350 for $200,000; check #232 for $200,000; and check #1032 for $5,000 = total $605,000) written by defendant Diamond Star, as drawer, to Harry Weiss Inc., as payee, as instruments for the payment of money only. Each of the four checks were returned by the bank for insufficient funds. A check is a "prototypical example" of an instrument for the payment of money only (*Thunderball Mktg. v Riemer*, 273 AD2d 29, 30 [1st Dept 2000] [internal quotation marks and citation omitted]; *see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996])

To be entitled to summary judgment on these checks made by Diamond Star, plaintiff must establish execution, delivery, demand and the failure to pay (*see Ocean View Realty Co. v Ziss*, 90 AD3d 872, 873 [2d Dept 2011]; *Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]; *Solomon v Langer*, 66 AD3d 508 [1st Dept 2009]).

Plaintiff, here, meets that burden by presenting proof of the existence and genuineness of the instruments with testimony by defendant Joseph Fteha, who admits that he wrote and signed the checks (exhibit B to defendants' opposition, deposition of Joseph Fteha, at 92, 96-98; exhibit G to plaintiff's notice of motion at 76), and the affidavit of Robert Weiss, the president and sole

owner of plaintiff, who attests that the checks were presented for payment, but Diamond Star failed to make the payments thereunder (affidavit of Robert Weiss, dated October 13, 2016, ¶ 8; *see* exhibit F to plaintiff's notice of motion). This is sufficient (*see First Interstate Credit Alliance v Sokol*, 179 AD2d 583, 583 [1st Dept 1992]).

Diamond Star fails to raise a triable issue with regard to a bona fide defense to nonpayment to avoid summary judgment (see UCC § 3-307; *Ocean View Realty Co. v Ziss*, 90 AD3d at 873; *Larry Lawrence IRA v Exeter Holding Ltd.*, 84 AD3d 1175, 1176 [2d Dept 2011]). Once plaintiff presented its prima facie proof, the burden shifted to Diamond Star to demonstrate lack of consideration as a defense (*Carlin v Jemal*, 68 AD3d at 656). Joseph Fteha's deposition testimony that he did not receive anything of value from plaintiff in exchange for the checks amounting to more than $600,000.00 is inherently incredible (*see DeMayo v Yates Realty Corp.*, 35 AD2d 700, 701 [1st Dept 1970], *affd* 28 NY2d 894 [1971]). While he claims that he gave those checks to Mendy Moskowitz, the broker, simply as "security" for various transactions, he fails to explain why he would give such large checks, fully signed and not post-dated, without receiving any specific gemstones or diamonds for them. He also fails to explain why the checks were not made out to Moskowitz, but to plaintiff, and how they ended up being made payable to and then deposited into plaintiff's account. He claims he never purchased any diamonds from plaintiff, but fails to provide a reasonable explanation for why, in October 2008, he made several substantial direct wire transfers into plaintiff's account in the amounts of $50,000, $75,000 and $125,000 (*see* exhibit J to plaintiff's affirmation in opposition), or for why he personally issued and signed seven checks, totaling $1,205,000 and made payable to plaintiff. His proffered explanation -- that he did so simply because Moskowitz told him to -- makes no sense. His further assertion -- that he did not believe the checks were a promise to pay because that's not

how it is in the "nature of our business" -- is not a defense. His unsupported claim that he did not purchase any diamonds or gemstones from plaintiff, particularly in light of the overwhelming documentary evidence submitted by plaintiffs, including the invoices and memoranda showing otherwise, as well as the various other payments he made to plaintiff for the diamonds, also fails to provide a bona fide defense to these checks.

The court rejects Diamond Star's contention that the checks are not valid on their face because they do not contain any notation identifying their purpose. There is no requirement that to qualify as an instrument for the payment of money only the checks needed to identify a purpose or be directly connected to plaintiff's invoices. Plaintiff is not seeking summary judgment on the invoices, just on the checks Diamond Star wrote to plaintiff, and which were dishonored. Diamond Star's reliance upon *Matas v Alpargatas S.A.I.C.* (274 AD2d 327, 328 [1st Dept 2000]) is unpersuasive, as that case is distinguishable on the facts. In *Matas*, the plaintiff purchased "custodial receipts" representing a beneficial interest in a portion of certain bonds. The certificates of ownership of the "custodial receipts" were not subscribed by defendant, and, thus, did not demonstrate that plaintiffs were registered holders of the securities issued by the defendant (*id.*). The plaintiffs had failed to obtain the actual bond certificates. Therefore, the court found that it could not ascertain from the face of the "custodial receipts," without regard to extrinsic evidence, if plaintiffs had the right to repayment. Thus, it concluded that those receipts were not instruments for the payment of money only. Here, in contrast, plaintiff relies upon checks, admittedly signed by Diamond Star, and made payable directly to plaintiff. The checks demonstrate, without any extrinsic evidence, that plaintiff had the right to repayment, and clearly qualify as instruments for the payment of money only. Similarly, *Dresdner Bank AG. (NY Branch) v Morse/Diesel, Inc.* (115 AD2d 64, 68-69 [1st Dept 1986]), also relied upon by

defendant, is distinguishable, as it involved a construction agreement which included a guarantee of both payment and performance within its terms. Since it included performance obligations other than repayment, it is factually distinguishable from the checks at issue in the instant case. The issue of whether plaintiff was a holder in due course need not be reached, since Diamond Star fails to raise a defense to the checks. Therefore, partial summary judgment is granted to plaintiff on the four dishonored checks in the total amount of $605,000 plus interest.

Accordingly, it is

ORDERED that the defendants' motion (motion seq. no. 004) is granted only to the extent that the amended complaint is dismissed in its entirety as against defendant Leah Fteha, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant Leah Fteha; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendant Leah Fteha shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre St, Room 141B) and the Clerk of the General Clerk's Office (60 Centre St, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-

Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the plaintiff's motion for partial summary judgment (motion seq. no. 005) is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant Diamond Star Jewelry, Inc. on the third cause of action in the amount of $605,000, together with interest at the statutory rate from the date of the decision on this motion, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the third cause of action is severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the first, second and fourth causes of action as against defendant Diamond Star Jewelry, Inc. and Joseph Fteha.

Dated: December 28, 2018

ENTER:

J.S.C.