

<b>Eskay Diamonds LLC v MGA Diamond Inc.</b>
2013 NY Slip Op 30342(U)
January 22, 2013
Sup Ct, New York County
Docket Number: 114619/2010
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BELLINOS  
J.S.C.

PART 46

Index Number : 114619/2010  
**ESKAY DIAMONDS LLC.**  
VS.  
**MGA DIAMOND INC.**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1
2, 4
3, 5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

*The court denies plaintiff's motion for summary judgment, pursuant to the accompanying decision.*

**FILED**

FEB 15 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/22/13

Lucy Bellinos  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

ESKAY DIAMONDS LLC,

Index No. 114619/2010

Plaintiff

- against -

DECISION AND ORDER

MGA DIAMOND INC. and GABRIEL ABRAMOV

Defendants

**FILED**  
FEB 15 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover the unpaid balance for diamonds plaintiff delivered to defendants. It moves for summary judgment on its claims for an account stated, breach of contract, conversion, and breach of guaranty. C.P.L.R. § 3212(b). For the reasons explained below, the court denies plaintiff's motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment on plaintiff's claims, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiff satisfies this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues.

Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for plaintiff's motion, the court must construe the evidence in the light most favorable to defendants and accept their version of the facts as true. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

### III. PLAINTIFF'S CLAIMS

#### A. First Claim for an Account Stated

The key element of a prima facie account stated claim is transmission of an invoice to defendants, forming the predicate for their failure to object to the invoice within a reasonable time. Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421 (1st Dep't 2009); RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Graubard Miller v. Nadler, 60 A.D.3d 499 (1st Dep't 2009); Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d 206, 207 (1st Dep't 2007). See Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005). Failure to object constitutes an assent to pay the invoice. Risk Mgm't Planning Group, Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421; Graubard Miller v. Nadler, 60 A.D.3d 499; Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d at 207. See A.O Textile Inc. v. SEP Plus Inc., 57 A.D.3d 397 (1st Dep't 2008).

Snehal Kothari, plaintiff's officer, who attests simply that "Plaintiff issued invoices to Defendants reflecting amounts due

and owing pursuant to the memorandum consignment agreements" does not indicate personal knowledge that the bills were mailed or otherwise transmitted to defendants or attest to any regular business mailing procedures that plaintiff followed. Aff. of Snehal Kothari ¶ 5. Nor does the record of invoices itself indicate they were mailed or otherwise transmitted to defendants. People v. Torres, 99 A.D.3d 429, 430 (1st Dep't 2012); Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d at 162. See California Suites, Inc. v. Russo Demolition Inc., 98 A.D.3d 144, 152 (1st Dep't 2012); Goldberg, Wepron & Ustin, LLP, 83 A.D.3d 554, 555 (1st Dep't 2011); Roth Law Firm, PLLC v. Sands, 82 A.D.3d 675, 676 (1st Dep't 2011). None of the invoices is addressed to Abramov. See Roth Law Firm, PLLC v. Sands, 82 A.D.3d at 676. While Kothari attests that defendants paid \$10,723.00 of the amount billed, without evidence of when defendants made the payment in relation to the invoices, the payment may not have been against them, but may have preceded them or been prompted by other circumstances, such as service of this action. See LePatner & Assoc., LLP v. Horowitz, 81 A.D.3d 472 (1st Dep't 2011); Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 A.D.3d 604, 605 (1st Dep't 2010); RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc., 61 A.D.3d at 619. Absent admissible evidence either that plaintiff transmitted its bills to defendants or that it made any partial payment on the bills, plaintiff fails to establish a prima facie account stated claim. Risk Mgm't Planning Group,

Inc. v. Cabrini Medical Ctr., 63 A.D.3d 421; RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc., 61 A.D.3d at 619; Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d at 162; Bartning v. Bartning, 16 A.D.3d 249, 250 (1st Dep't 2005).

B. Second Claim for Breach of Contract

To establish breach of a contract, plaintiff must show a contract, that plaintiff performed and defendants breached it, and that defendants' breach caused plaintiff to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiff must plead the specific terms of the agreement that defendants breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003).

Kothari supports plaintiff's claim for breach of contract against defendant MGA Diamond by attesting that plaintiff provided diamonds to defendants, according to three memoranda dated January 14, January 20, and February 20, 2010, which are addressed only to MGA Diamond. Each memorandum indicates the diamonds' cost, totaling \$74,202.00, which is reflected in the invoices also addressed only to MGA Diamond. Kothari further attests that defendants paid \$10,723.00 of this amount, but made no further payments, failed to return the diamonds, and never objected to them.

Although Kothari recounts a breach, the memoranda supporting plaintiff's motion, the contracts claimed to be breached, are unauthenticated and therefore inadmissible. Colbourn v. ISS Intl. Serv. Sys., 304 A.D.2d 369, 370 (1st Dep't 2003); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003); Bank of New York v. Dell-Webster, 23 Misc. 3d 1107 (Sup. Ct. Bronx Co. 2008). See Yonkers Ave. Dodge, Inc. v. BZ Results, LLC, 95 A.D.3d 774 (1st Dep't 2012); 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Bell Atl. Yellow Pages Co. v. Padded Wagon, 292 A.D.2d 317, 318 (1st Dep't 2002). Only in his affidavit replying to defendants' opposition does Kothari attest that he observed Abramov receive the diamonds and sign each of the memoranda. Schultz v. Gershman, 68 A.D.3d 426 (1st Dep't 2009); McNair v. Lee, 24 A.D.3d 159, 160 (1st Dep't 2005); Morris v. Solow Mgt. Corp., 8 A.D.3d 126, 127 (1st Dep't 2004); Jackson v. Bronx Lebanon Hosp. Ctr., 7 A.D.3d 356, 357 (1st Dep't 2004). See Jain v. New York City Tr. Auth., 27 A.D.3d 273 (1st Dep't 2006).

Even were the court to consider the memoranda as authenticated, however, plaintiff's evidence raises an issue regarding the terms of the parties' agreement. The memoranda provide that "ALL MERCHANDISE REMAINS THE PROPERTY OF ESKAY DIAMONDS LLC UNTIL FULL & FINAL PAYMENT IS RECEIVED. THIS IS A SECURED AGREEMENT UNDER U.C.C." Kothari Aff. Ex. A. Yet Kothari

attests that the parties entered a consignment agreement, which is not a secured transaction, but is instead an agency with a bailment of property. Rahanian v. Ahdout, 258 A.D.2d 156, 159 (1st Dep't 1999). The factual issue thus raised, as to whether the parties' agreement was a "SECURED AGREEMENT" or transaction, Kothari Aff. Ex. A, precludes summary judgment on the breach of contract claim. Rahanian v. Ahdout, 258 A.D.2d at 160. See Goldmuntz v. Schneider, 99 A.D.3d 544, 545 (1st Dep't 2012); Gem Source Intl. v. Gem-Works N.S., L.L.C., 258 A.D.2d 373, 374 (1st Dep't 1999). Moreover, if the agreement was a consignment as plaintiff maintains, no evidence establishes that plaintiff ever demanded return of the diamonds, as is essential to recovery based on a consignment agreement. See Rahanian v. Ahdout, 258 A.D.2d at 159.

C. Fifth Claim for Conversion

A conversion claim requires evidence of plaintiff's possessory interest in the diamonds delivered to defendants and their intentional and unauthorized dominion over or interference with the property in derogation of plaintiff's right. Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 49-50 (2006); Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). See Pappas v. Tzolis, \_\_\_ N.Y.3d \_\_\_, 2012 WL 5906685 at \*1 (Nov. 27, 2012). Defendants' alteration or relocation of the diamonds without notice to or approval by plaintiff may constitute unauthorized dominion and control over the property. AGFA Photo USA Corp. v. Chromazone, Inc., 82 A.D.3d 402, 403 (1st



Dep't 2011).

Plaintiff bases its conversion claim on the fact that its agreement with defendants is a consignment agreement. Since its evidence raises a question whether the agreement is in fact a consignment agreement, this factual issue also precludes summary judgment on the conversion claim. Plaintiff's reliance on the agreement for its conversion claim and particularly the condition on the memoranda's reverse side that "Any such action taken in contravention of this agreement shall be considered a conversion of said goods, Kothari Aff. Ex. A, further evince that the conversion claim merely duplicates plaintiff's breach of contract claim. Kopel v. Bandwith Tech. Corp., 56 A.D.3d 320 (1st Dep't 2008); M.D. Carlisle Realty Corp. v. Owners & Tenants Elec. Co. Inc., 47 A.D.3d 408, 409 (1st Dep't 2008); Fesseha v. TD Waterhouse Inv. Servs., 305 A.D.2d 268, 269 (1st Dep't 2003). See Sebastian Holdings, Inc. v. Deutsche Bank AG, 78 A.D.3d 446, 447-48 (1st Dep't 2010). Equally fatal to the conversion claim, moreover, is the absence of any evidence showing plaintiff demanded the diamonds' return. J Squared Software, LLC v. Bernette Knitware Corp., 48 A.D.3d 351 (1st Dep't 2008). See Close-Barzin v. Christie's, Inc., 51 A.D.3d 444 (1st Dep't 2008).

D. Sixth Claim for Breach of Guaranty by Defendant Abramov

The memoranda provide that the "merchandise is subject to all the conditions, terms and provisions printed on the reverse side of this memorandum." Kothari Aff. Ex. A. Among the provisions on each memorandum's reverse side is that the

"individual signing on behalf of the consignee hereby personally guarantees payment of all consignee's obligations hereunder."

Id. Plaintiff bases its breach of guaranty claim on Abramov's signature on the memoranda.

An agent for a disclosed principal is not personally liable without clear and explicit evidence of the agent's intent to substitute or add his liability to the principal's liability. Ho Sports, Inc. v. Meridian Sports, Inc., 92 A.D.3d 915, 916-17 (1st Dep't 2012); Star Video Entertainment v. J & I Video Distrib., 268 A.D.2d 423, 424 (1st Dep't 2000). While the parties do not dispute that Abramov was an officer of MGA Diamond, plaintiff presents no evidence that Abramov signed separately to indicate his consent to liability for MGA Diamond's obligation. Citibank, N.A. v. Uri Schwartz & Sons Diamonds Ltd., 97 A.D.3d 444, 447 (1st Dep't 2012); 150 Broadway N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 8 (1st Dep't 2004); PNC Capital Recovery v. Mechanical Parking Sys., 283 A.D.2d 268, 270 (1st Dep't 2001). No clear and explicit evidence demonstrates, as a matter of law, that Abramov intended to be personally liable rather than to sign on behalf of MGA Diamond, the corporation for which, as its officer, he undisputedly was acting, particular where the guaranty provision is buried among various other conditions. H&H Custom Homes, Inc. v. Kossoff, 96 A.D.3d 445, 446 (1st Dep't 2012); Ho Sports, Inc. v. Meridian Sports, Inc., 92 A.D.3d at 917; Star Video Entertainment v. J & I Video Distrib., 268 A.D.2d at 424.

IV. CONCLUSION

Since plaintiff has failed to establish its claims for an account stated, breach of contract, conversion, and breach of a personal guaranty, the court denies plaintiff's motion for summary judgment on those claims. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: January 22, 2013



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

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