Joseffer v Lindsay Wolf, Inc.
2015 NY Slip Op 31929(U)
October 16, 2015
Supreme Court, New York County
Docket Number: 150556/14
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 63

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ANDREA JOSEFFER & JEROME KLEIN, MD,

Plaintiffs,

Index No. 150556/14
Decision and Order

-against-

LINDSAY WOLF, INC., LINDSAY WOLF, LLC, OCTAN LIMITED, STEPHEN LINDSAY, and ABRAHAM "HESHE" WOLF,

Defendants.

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ELLEN M. COIN, J. :

Defendants Lindsay Wolf, Inc. (LWI), Lindsay Wolf, LLC (LWL), Octan Limited (OL), Stephen Lindsay (Lindsay) and Abraham "Heshe" Wolf (Wolf), move pursuant to CPLR 3211 (a) (1), (4) and (7), CPLR 327, and CPLR § 3016 (b), to dismiss the complaint.

In this action plaintiffs Andrea Joseffer (Joseffer) and Jerome Klein (Klein) allege, among other things, that they entered into a series of agreements with the defendants for the purchase and sale of certain gemstones (complaint, ¶ 23), beginning in March 2008 and continuing through March 2009. They assert that their purchases from defendants included, in part, four gemstones purchased in March 2008, referred to as the "Assorted Collection," consisting of: (1) a 3.56 carat H VSI E/C Diamond (hereinafter the Emerald Cut Diamond); (2) a 1.02 RAD S11 Fancy Intense Orange Pink Diamond (hereinafter the Orange-Pink Diamond); (3) a 6.96 carat Vivid AS diamond (hereinafter the Vivid AS Diamond); and (4) a 2.94 carat Fancy Intense Vivid Yellow diamond (Fancy Yellow Diamond) (*id.*, ¶ 25) (*id.* at ¶¶ 27, 30, 35 & 38; exs A, B). Plaintiffs paid an aggregate sum of $752,000 for the Assorted Collection (*id.*, ¶¶ 26, 33, 41).

Plaintiffs further assert that in May 2008, they began discussions with defendants

regarding the potential purchase of other gemstones as a joint venture investment (*id.*, ¶ 42), after which they exchanged a preliminary contract outlining the general terms of the parties' agreement (*id.*, ¶ 43). Based upon their agreement, plaintiffs allege that they entered into the following transactions:

(1) in May 2008, they wired two payments totaling $380,000 to LWI for the purchase of various pink diamonds (hereinafter referred to as the Pink Collection) (*id.*, ¶¶ 44, 45), upon which they received a bill of sale dated May 13, 2008, reflecting that the Pink Collection was owned under a partnership, 79.166% by plaintiffs and 20.833% by LWI (*id.*, ¶ 47; ex. D, LWI invoice dated May 13, 2008);

(2) in February 2009, they wired $1,250,000 to LWI for the purchase of a 10.01 carat yellow oval diamond (the 10.01 Carat Diamond) (complaint at ¶ 51), upon which LWI issued a bill of sale dated March 30, 2009, reflecting that the 10.01 Carat Diamond was owned 50% by plaintiffs and 50% by LWI (*id.*, ¶ 54; ex F); and

(3) on December 28, 2008, and January 22, 2009, respectively, plaintiffs wired $23,610 to LWI for the purchase of a 31.48 carat Blue Tanzanite, and $11, 500 to LWI for the purchase of a 1.33 carat round brilliant diamond ring (*id.* at ¶¶ 56, 57), which gemstones were later sold back to LWI for their original purchase price; with these funds, plus additional funds from plaintiffs aggregating the sum of $284,640, plaintiffs purchased a 91.4286% interest in a 9.13 Fancy Intense Yellow diamond was purchased (the 9.13 Carat Diamond) (*id.*, ¶ 58) in partnership with LWI, which held an interest of 8.5741% (*id.* at ¶¶ 59,60; ex G, bill of sale dated February 20, 2009).

Pursuant to the parties' alleged agreement, these gemstones were to be marketed and sold

jointly, with the expected sale price to be in conformity with the resale amounts stated to plaintiffs by defendants plaintiffs' transfers of funds were made (*id.* at ¶ 65). All of the gemstones plaintiffs purchased, except for the Vivid AS Diamond (part of the Assorted Collection) were kept in defendants' exclusive possessions from the time of the purchase until mid-2013, when control of all the gemstones was transferred to plaintiffs (*id.* at ¶ 68). Upon receiving possession of the gemstones, plaintiffs purportedly learned that the gemstones were worth well under the values appraised and suggested by defendants during the initial negotiations of their partnership, contract and purchase (*id.* at ¶ 69).

On January 17, 2014, five days prior to the commencement of this action, LWI commenced an action in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, entitled *Lindsay Wolf, Inc. v Jerome Klein and Andrea Jossefer*, under case No. 502014CA000678 (the Florida Action), which asserts six counts: for partition of the Pink Collection, the 9.13 Carat Diamond, and 10.01 Carat Diamond (count I); an injunction (count II); dissolution of the partnership/joint venture regarding the Pink Collection (count III), the 9.13 Carat Diamond (count IV), and the 10.01 Carat Diamond (count V); and replevin of the 10.01 Carat Yellow Diamond (count VI).

The instant complaint, filed on January 22, 2014, asserts nine causes of actions: the first four are for fraud relating to the 10.01 Carat Diamond (first), the Pink Collection (second), the 9.13 Carat Diamond (third), and the Assorted Collection (fourth); violation of New York General Business Law § 349 (fifth); tortious interference with contract (sixth); breach of contract (seventh); breach of fiduciary duty (eighth); and for a declaratory judgment that the agreements are void for fraudulent inducement (ninth).

Discussion

Another action pending; forum non conveniens

Defendants seek dismissal of the complaint, pursuant to CPLR 3211 (a) (4), on the ground that there is another action pending between the same parties for similar relief in another jurisdiction, and pursuant to CPLR 327, for forum non conveniens. In support, defendants note that defendant LWI commenced the Florida Action prior to the commencement of the instant action, and contend that the Florida Action involves the identical dispute complained of here. Additionally, defendants argue that the parties' dispute should be litigated in Florida, since plaintiffs are residents of Florida; the damage, if any, was suffered by plaintiffs in Florida, where they reside and where the subject gemstones are presently located; there is another forum available in Florida; and that defendants should not be required to litigate the parties' dispute in a different state other than Florida, their choice of forum.

In opposition, plaintiffs contend that a review of the complaints in both actions demonstrates that the Florida Action only seeks equitable relief, while the instant action seeks damages for, among things, fraud and breach of contract. They also maintain that they have a forum non conveniens motion pending in Florida,[1] wherein they alleged that all meetings with defendants occurred in New York City in offices located at 580 5th Avenue, Suite 311, New York, NY (the Fifth Avenue Address), that the gemstones at issue were negotiated, and purchased at the New York City office, and the gemstones were stored within the vault at this location (affidavits of Joseffer and Klein, sworn to February 12, 2014; ex B to the Affirmation of

[1] This court notes that none of the parties have provided the court with information as to the status of the plaintiffs' forum non conveniens motion in the Florida Action.

Michael V. Longo dated January 2, 2015). Additionally, they argue that defendants reside in New York, inasmuch as OL is a New York corporation with its business at the Fifth Avenue Address; Wolf, President of LWI and principal of OL, is a Kings County resident; and LWI, through its website, dealings with plaintiffs, and its own statements, maintains an office, including a vault with products, at the Fifth Avenue Address. Plaintiffs submit a printout from the website of LVI, which lists a New York office and telephone number (ex C to the Longo Aff). Plaintiffs note that Lindsay, an officer of LWI, was served by substituted service at the Fifth Avenue Address, his last and usual place of business. Plaintiffs argue that, since all dealings and negotiations with defendants occurred in New York, and the purported fraudulent activities took place in New York, New York is the proper venue. They also maintain that Florida would not be a viable alternate forum, since OL, Wolf, and Lindsay would likely not be subject to the jurisdiction of the Florida Courts, and LWI is the only defendant from this action that is a party in the Florida Action.

Additionally, plaintiffs' counsel avers that on two occasions prior to the filing of the Florida Action, he personally spoke to Wolf, who requested that plaintiffs refrain from filing the instant complaint until he and Lindsay had a chance to review it and respond. He maintains that he attempted to email the complaint to Wolf on January 16, 2014, but the email was return as undeliverable and his subsequent calls to Wolf for a different delivery method went unanswered. Counsel alleges that the filing of the instant complaint was delayed in good faith with the hope that the parties' disputes could be settled without litigation. He notes that the instant complaint is dated January 16, 2015, the day before the date of the complaint in the Florida Action. He also notes that plaintiffs only became aware of the Florida Action after they were served with its

complaint on January 24, 2014, two days after the instant complaint was filed. Counsel argues that Wolf's requests were made to allow LWI to file its complaint in the Florida Action prior to plaintiffs' filing of the instant action.

In reply, defendants reiterate their prior arguments in support of dismissal of the complaint: that plaintiffs reside in Florida, and both actions concern the same dispute. They also maintain that in April 2014, plaintiffs rejected defendants' proposal that defendants submit to personal jurisdiction in the Florida Action in exchange for dismissal of the instant action. Additionally, Lindsay, who admits to an ownership interest in LWI, claims that LWI does not maintain any office or have any physical presence in New York. He concedes, however, that "because New York is such an important center in the jewelry industry, many companies such as LWI find it useful to give the appearance, on Internet websites or otherwise, of a New York presence, despite the fact that there really is no physical location in New York" (Lindsay reply aff sworn to January 8, 2015 ¶ 7). He further acknowledges that "[t]he reference in the LWI website to a New York office actually refers to the location of [OL]" (*id.*, ¶ 7). He notes that OL is owned by Wolf, who is also a part owner of LWI. He admits that LWI has purchased precious stones from OL to resell to its customers, and on some occasions arranged for OL to retain custody of these stones so that they can be available for viewing by potential customers in New York.[2]

Dismissal may be granted under CPLR 3211 (a) (4) when "there is another action pending

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[2]This court will not consider the purported Reply Affirmation of Abraham Wolf dated January 9, 2015, as there is no indication that he is authorized to provide a statement by affirmation. CPLR 2106.

Similarly, the court will not consider plaintiffs' unauthorized surreply.

between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." Dismissal is warranted when the relief sought is "the same or substantially the same" with respect to the two pending actions (*White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997] [internal quotation marks and citation omitted]). It is further "necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions" (*id.* at 93).

New York's forum non conveniens statute, CPLR 327 (a), provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court . . . may stay or dismiss the action in whole or in part on any conditions that may be just." The decision as to forum non conveniens is a matter of discretion, and the party challenging the forum bears the burden of demonstrating inconvenient forum (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984]). "[T]he court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not" (*id.* at 479). These factors include, among other things, the burden on the New York courts, the potential hardship to the defendant, the unavailability of an alternative forum in which plaintiff may bring suit, that both parties to the action are nonresidents, or that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*see id.*). The analysis for determining a motion to dismiss based on the pendency of another action is similar to that employed in entertaining a motion predicated on forum non conveniens (*White Light Prods. v On the Scene Prods.*, 231 AD2d at 93).

Defendants argue that the Florida Action should take precedence over the instant one

because it was filed first. "New York courts generally follow the first-in-time rule, which instructs that 'the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere'" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007] [citation omitted]). However, "[w]hile technical priority in the commencement of actions is a factor . . . , it is not necessarily dispositive" (*Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005]). Deviation from the first-in-time rule may be warranted, "where one party files the first action preemptively, after learning of the opposing party's intent to commence litigation" (*L-3 Communications Corp. v Safenet, Inc.*, 45 AD3d at 8 [citation omitted]; *see also White Light Prods. v On the Scene Prods.*, 231 AD2d at 100).

While the record is devoid of any stamped copy of the pleadings in the Florida Action reflecting the day of filing,[3] there is no dispute between the parties that the Florida Action was filed first, i.e., on January 17, 2014, with the filing of the instant action six days later, i.e., on January 22, 2014. While this court cannot determine, on the record before it, whether the timing of the Florida Action was procedural gamesmanship, plaintiffs' counsel indisputably alleges that defendants were aware that plaintiffs intended to file the instant action, and that defendants commenced the Florida Action preemptively. Further, a review of the instant complaint discloses that it was dated and executed by plaintiffs' counsel on January 16, 2014, a day prior to the date and the filing of the complaint in the Florida Action. Thus, "'[w]hile priority in the bringing of actions is a factor to be considered in choice of forum litigation, it is not controlling,

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[3] Defendant's submission of the complaint in the Florida Action does not reflect the case number of the action or the date of filing.

especially when commencement of the competing action[s] has been reasonably close in time'" (*White Light Prods. v On the Scene Prods.*, 231 AD2d at 99 [citation omitted]).

Further, defendants have failed to show that both actions seek the same or substantially the same relief. In the instant action, in addition to seeking declaratory relief relating to the purported partnership/joint venture agreement between them and defendants, plaintiffs seek to recover damages for, among other things, fraud and breach of contract regarding all the gemstones they purchased from defendants that are indisputably solely owned by them, as well as gemstones purchased as part of the joint venture agreement. In the Florida Action, defendants seek declaratory relief and partition only with respect to the gemstones purchased as part of the purported partnership/joint venture agreement. Thus, while there is some overlap of the claims relating to the partnership/joint venture agreement, there are additional parties in the instant action who are not part of the Florida Action, as well as different claims and relief that are related to the gemstones solely owned by plaintiffs.

Moreover, while defendants argue that they do not reside in New York, it appears from the record that defendants Wolf, OL and LWI,[4] the domestic corporate entity, are residents of New York. The court notes that defendants seek dismissal of the complaint against LWI, the domestic corporate entity, based solely on the fact that it was dissolved on June 30, 2004, approximately six years prior to the commencement of this action. However, it is well settled that a corporation may be held liable on a cause of action that accrues after dissolution if the corporation continued its operations, operated its premises, and held itself out as a de facto

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[4] LWI was sued as a domestic New York corporation, as a foreign corporation doing business in New York, and as a foreign corporation licensed to do business in New York.

corporation, notwithstanding the dissolution (*Bruce Supply Corp. v New Wave Mech.*, 4 AD3d 444, 445 [2d Dept 2004]; Business Corporation Law § 1006 [a] [4]). Here, plaintiffs allege that all meetings involving the negotiation and purchase of the subject gemstones occurred at LWI's New York City office at the Fifth Avenue Address, where the subject gemstones were primarily stored in a vault. Further, a review of plaintiff's complaint and exhibits discloses an unsigned confidentiality agreement between plaintiff Klein and LWI, which includes two addresses for LWI, the Fifth Avenue Address, as well as 1136 Centre Street, Suite # 203, Thornhill, Ontario (the Canadian Address) (complaint, ex C). Additionally, plaintiffs submit copies of two UCC statements purportedly filed by Wolf with the New York Department of State on March 23, 2010 and March 24, 2010, which names LWI as the debtor, and Klein as the secured party, covering collateral consisting of 50% of the 10.01 Carat Diamond (ex D to the Longo Aff.).

While Lindsay claims that LWI does not maintain an office in New York and that its office is located at the Canadian Address, he acknowledges that LWI found it useful to give the appearance of a New York presence and that LWI's website refers to the Fifth Avenue Address as its New York office. Lindsay further acknowledges that LWI arranges viewing by potential customers in New York at the Fifth Avenue Address. A review of LWI's website page discloses that it "maintain(s) offices in the USA and Canada" and that its "USA office is located in New York" (plaintiff's opposing papers, exhibit C, LWI's website page). Lindsay also admits that some of the subject diamonds, in which LWI has a joint ownership with plaintiffs, were maintained in LWI's custody in OL's vault located at the Fifth Avenue Address, until plaintiffs' request for them approximately three to four years after the purchases. Thus, it appears from Lindsay's own admissions that LWI continued its operations at the Fifth Avenue Address, and

held itself out as a de facto corporation, notwithstanding the dissolution. Therefore, most of the defendants in this action, including LWI, are residents of New York.

Additionally, contrary to defendants' argument, the mere fact that LWI filed the Florida Action does not, in and of itself, demonstrate that Florida is a more convenient venue, or that defendants will suffer any hardship if the litigation remains in New York. Defendants fail to allege any ties to Florida other than plaintiffs' residence and the location of the gemstones, which are insufficient to establish that Florida is a better alternative. Thus, it appears from the above noted factors, that New York has more of a nexus to the subject transactions than does Florida. Furthermore, defendants make no showing that retention of the instant action would unduly burden the New York courts (*Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479).

Consideration of all of the relevant factors leads this court to conclude that plaintiffs should not deprived of their chosen forum. Therefore, so much of defendants' application as seeks dismissal of the complaint pursuant to CPLR 3211 (a) (4) and CPLR 327 (a) is denied.

Although in the preamble of their supporting memorandum of law, defendants seek dismissal of the complaint pursuant to CPLR 3211 (a) (8), they fail to proffer any specific arguments in support thereof. The only request they make that could be possibly be viewed as such is that seeking dismissal of the complaint against defendant LWI, to the extent that it was sued as a domestic corporation, and as against defendant LWL, to the extent that it was sued as a foreign corporation, based on the sole ground that these entities were dissolved prior to the commencement of this action. Defendants submit a NYS Department of State entity information form dated December 12, 2014, and an undated Florida Department of State detail by entity name form reflecting that these entities were dissolved on June 30, 2004, and September 28, 2001,

respectively (*see* moving papers, exs 4 & 5).

"'As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue'" (*Doe v McCormack*, 100 AD3d 684, 684 [2d Dept 2012][citation omitted]). "However, 'in opposing a motion to dismiss pursuant to CPLR 3211 (a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth "a sufficient start, and show[] their position not to be frivolous"'" (*id.* at 684 [citation omitted]).

As noted, LWI can be liable on a cause of action that accrued after its dissolution, since there is sufficient evidence in the record that it continued its operations at the Fifth Avenue Address, and, thus, held itself as a de facto corporation (*Bruce Supply Corp. v New Wave Mech., Inc.*, 4 AD3d at 445). Therefore, the mere fact that the claims accrued after its dissolution does not warrant dismissal of the complaint against it.

Further, "it is well settled that personal jurisdiction over a dissolved corporation 'may be obtained through service upon the Secretary of State" (*id.*). Here, LWI was served by service upon the Secretary of State on April 1, 2014 (Longo Aff., ex A), prima facie evidence of proper service (*see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]). Since service was not challenged or disputed "with any factually specific, detailed evidence to rebut the presumption of valid service" (*Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 111 AD3d 800, 800 [2d Dept 2013], defendants' application for dismissal of the complaint against LWI pursuant to CPLR 3211 (a) (8) for lack of jurisdiction is denied.

With respect to LWL,[5] "[u]nder New York's long-arm jurisdiction statute, a court may exercise jurisdiction over a nondomiciliary who, in person, or through an agent, 'transacts any business within the state . . .'" (*Grimaldi v Guinn*, 72 AD3d 37, 43 [2d Dept 2010]; CPLR 302 [a] [1]). In their complaint, plaintiffs allege, among other things, that LWL was a domestic and foreign limited liability company doing business in New York with its principal place of business located at the Fifth Avenue Address (complaint, ¶¶ 6, 7); that, in May 2008, plaintiffs began discussing the joint venture investment with all defendants, including LWL (*id.* at ¶ 42); and that they entered into an agreement with LWL, among others, regarding the gemstones purchased as part of the joint venture (*id.* at ¶¶ 189, 193, 197). In their memorandum of law, plaintiffs maintain that LWL's letterhead was used for some of the transactions, and argue that to the extent that the individual defendants held themselves out to be transacting business as LWL, plaintiffs' claims should survive this initial inquiry.

Here, plaintiffs sufficiently demonstrate that "facts 'may exist' to exercise personal jurisdiction over [LWL], and [have] made a 'sufficient start' to warrant disclosure on the issue of personal jurisdiction (*Doe v McCormack*, 100 AD3d at 684 [citations omitted]). Therefore, that branch of defendants' application for dismissal of the complaint against LWL, pursuant to CPLR 3211 (a) (8), is denied, with leave to renew upon the completion of discovery.[6]

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[5] In the absence of the submission by defendants of Florida case law regarding an action commenced against a dissolved corporation, this court applies New York law.

[6] This court need not address defendants' arguments for dismissal of the complaint against Lindsay pursuant to CPLR 3211 (a) (8), raised for the first time in their reply papers (*Pinkston v Weiss*, 238 AD2d 393, 393 [2d Dept 1997]; *see also Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]). "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds, for the motion" (*Dannasch v Bifulco*,

This court now considers so much of defendants' application as seeks dismissal of the complaint pursuant to CPLR 3211 (a) (1), (7), based on documentary evidence and failure to state a cause of action, and CPLR 3016 (b), for failure to plead with particularity. "On a motion to dismiss pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory" (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]). Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious, claims (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). "[D]ismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted 'utterly refutes plaintiff's factual allegations'" (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015] [citation omitted]); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendants initially argue that plaintiffs' breach of contract claim should be dismissed, pursuant to CPLR 3211 (a) (1) as against all defendants other than LWI. They rely on a document dated February 23, 2010, which their counsel claims is the purported contract between plaintiffs and LWI (Affirmation of Robert D. Piliero dated December 17, 2014, ex 2 [ex A to complaint in the Florida Action, "Inventory item list as of February 23, 2010"]). They also rely on exhibits A, B, D, E, F and G to the instant complaint, consisting of the bills of sale, wire transfer instructions, and UCC filings (ex 1 to the Piliero Aff.). These documents, they contend, establish that plaintiffs purchased the subject diamonds from LWI, and that all transactions

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184 AD2d 415, 417 [1st Dept 1992]).

underlying plaintiffs' breach of contract claim were between plaintiffs and LWI.

Defendants also argue that the breach of contract claim against LWI should be dismissed pursuant to CPLR 3211 (a) (7), for failure to plead two required elements: full and faithful performance of plaintiffs' own obligations under the contract, and damages suffered by plaintiffs as a result of the breach.

In opposition, plaintiffs note that in the complaint in the Florida Action, LWI alleges that the Inventory item list memorialized the interests of LWI and plaintiffs in the gemstones (ex 2 to the Piliero Aff., Florida Action complaint, ¶ 13). Thus, plaintiffs argue that the Inventory item list is not a contract, but instead an inventory dated two years after the subject transactions were made, which is devoid of any terms, conditions or contract language. They also point to a document entitled "Confidentiality Understanding" and an email dated May 15, 2008, from "Lindsay Wolf" to plaintiffs, stating that "[a]ll stones are held in the safe of [OL]/LWI at [the Fifth Avenue Address]" and that "such language" should be included in the agreement between LWI, OL and plaintiffs (ex C to ex 1 annexed to the Piliero Aff.). Thus, they maintain that the documentary evidence defendants rely upon is insufficient to warrant dismissal under CPLR 3211 (a) (1). Additionally, they maintain that their breach of contract claim is sufficiently alleged.

Defendants' documents do not indisputably demonstrate that the subject transactions were solely between plaintiffs and LWI. The Inventory item list sets forth an inventory of the subject gemstones, plaintiffs' interests in each of the gemstones, and whether the individual gemstones were in the custody of LWI or plaintiffs. However, this document is devoid of any information as to the underlying transactions regarding the purchase of the gemstones, or the

ownership of the remaining interests in them. Further, while it appears to be executed by plaintiffs, there is no indication thereon as to the identity of the third signatory on the document.

As defendants note, the invoices contained in exhibits A, D and F to the instant complaint reflect only plaintiffs' partnership with LWI. Exhibit E, on which defendants also rely, is a memorandum from OL to Klein which mentions the LWI-plaintiffs' partnership, but fails to state which of the "following stones" are the subject of that partnership (complaint, ex E, memorandum dated 11/15/2012). Moreover, the email from "Lindsay Wolf" to plaintiffs refers to a proposed agreement among plaintiffs, LWI and OL, with language indicating that "Lindsay Wolf Inc./Octan Ltd.'s principals have the ability to market all the items" (complaint, ex C, email from "Michal" to plaintiffs dated May 15, 2008). Therefore, contrary to defendants' argument, their documentary evidence fails to refute plaintiffs' allegations that the underlying transactions were between plaintiffs and defendants other than LWI. Accordingly, so much of defendants' application as seeks dismissal of the breach of contract claim against all parties except LWI, pursuant to CPLR 3211 (a) (1), is denied.

Plaintiffs sufficiently allege a breach of contract claim against LWI. The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, plaintiffs allege, among other things, that the parties agreed that the subject gemstones "were to be marketed and sold jointly, with the expected sale priced to be in conformity with the resale amounts stated to plaintiffs before the wire transfers and purchases were made" (complaint, ¶ 65); that the subject gemstones were to be sold expeditiously (*id.*, ¶ 66); and that the "parties were to work together on moving the

gemstones as soon as possible, and at the prices represented to the plaintiffs as a means to induce plaintiffs to enter into an agreement and wire substantial funds to [LWI]" (*id.*, ¶ 66). They further allege that "the intended contract, process, purchase and agreement was frustrated by defendants' refusal to market or sell the gemstones" (*id.*, ¶ 67); and that "the subject gemstones were kept in the exclusive possessions of the defendants from the time of purchase until mid 2013 when control of all gemstones were transferred to plaintiffs" (*id.*, ¶ 68). Additionally, they assert that LWI breached the contract by "failing to deliver or make available the gemstones in a timely manner" (*id.*, ¶ 162), "materially misrepresenting the cost and value of the subject gemstones" (*id.*, ¶ 163), and "failing to abide by the terms of the contract" (*id.*, ¶ 164). They aver that they suffered damages, including lost profits and lost interest on monies invested, as well as the loss of monies paid in excess of the value and cost of the items purchased (*id.*, ¶ 166).

Contrary to defendants' contention, the complaint sufficiently alleges plaintiffs' performance of their obligations under the agreement, including the marketing of the subject gemstones (*id.*, ¶ 69-71), and damages (*id.*, ¶ 166). Therefore, in liberally construing the complaint, plaintiffs' cause of action for breach of contract is sufficiently alleged, and that branch of defendants' motion for dismissal of this claim as against LWI pursuant to CPLR 3211 (a) (7) is denied.

Next, defendants argue that plaintiffs' fraud claims are duplicative of the contract cause of action, and are not pleaded with the specificity required by CPLR 3016. "To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury" (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 [1999]). "The circumstances constituting the fraud must be stated in detail" (*id.*, citing CPLR

3016 [b]; *see also Megaris Furs v Gimbel Brothers*, 172 AD2d 209, 212 [1st Dept 1991]).

Here, plaintiffs sufficiently allege fraud claims, in that they assert that defendants knowingly made false representations, prior to plaintiffs' entry into the individual transactions and wiring of the funds, regarding the value and cost of the subject diamonds (complaint, ¶¶ 27-41; 49; 53; 63; 86-94; 101-108; 114-121; 127-134), and their alleged resale value (*id.*, ¶¶ 29; 32; 37; 40; 50; 55; 64; 89-91; 103-105; 116-118; 129-131), upon which they justifiably relied upon (*id.*, ¶¶ 29; 32; 37; 40; 95; 109; 122; 135), and suffered resulting damages (*id.*, ¶¶ 41, 96-97; 110-111; 123-124; 136-137).

Contrary to defendants' contention, "[a] fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011] [citation omitted]). "[I]n order to sustain the fraud cause of action, there must be a breach of duty separate from or in addition to the contract duty" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). "[A] misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]). "For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim" (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]).

Here, plaintiffs sufficiently plead fraud claims independent of the contract claims, alleging that defendants made misrepresentation of present facts, and not future intent, with respect to the value, cost and resale value of the subject gemstones with the intent to induce plaintiffs to purchase them. Therefore, defendants' motion for dismissal of the fraud claims pursuant to CPLR 3211 (a) (7) is denied.

With respect to plaintiffs' claim based on General Business Law § 349, defendants claim that private disputes, like those alleged here, are not actionable under this statute, and thus, this claim should be dismissed.

General Business Law § 349 (a) provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." A private right of action is available to "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]). Under this section, "a prima facie case requires . . . a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002][citation and interior quotation marks omitted]). The allegedly deceptive acts, representations or omissions must be misleading to a 'reasonable consumer'" (*id.*). "The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; '[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995] [citation omitted]).

Here, plaintiffs do not sufficiently plead a claim under General Business Law § 349, inasmuch at it fails to allege "a broad impact on consumers at large" (*Bhandari v Ismael Leyva*

Architects, P.C., 84 AD3d 607, 608 [1st Dept 2011]). The gravamen of plaintiffs' claim concerns purported misrepresentations defendants made to them regarding the cost and value of the subject diamonds and their ability to sell them, which are specific to them and their investment in the diamonds. Therefore, plaintiffs' cause of action under General Business Law § 349 is dismissed pursuant to CPLR 3211 (a) (7) for failure to state a claim.

With respect to plaintiffs' claim for tortious interference with contract, defendants argue that such a claim cannot be made against the contracting party, as only a stranger to a contract can be liable for tortious interference. Additionally, they argue that to the extent that the claim is directed to the individual defendants as principals of a defendant corporation, the pleading fails to allege that they engaged in separate tortious conduct or derived any personal profit so as to state such a claim against them.

In opposition, plaintiffs argue that in the event that it is determined that an agreement existed only between plaintiffs and a corporate entity, plaintiffs should be allowed to hold the individual defendants liable for interfering with such agreement.

The elements of a cause of action to recover damages for tortious interference with a contract are the existence of a valid contract between the plaintiff and a third party, the "defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *see also Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [1st Dept 2002]), which require the plaintiff to

"plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship" (*id.* at 109-110 [citations omitted]), including "allegations that the acts of the corporate officers were done with motive for personal gain as distinguished from gain to their corporations" (*id.* at 110).

Here, plaintiffs claim that defendants interfered with the performance of the agreement (complaint, ¶ 153), by, among other things, delaying the resale of the gemstones (*id.* at ¶ 154); intentionally and willfully misrepresenting the value of the gemstones (*id.* at ¶ 155); by failing to cooperate in the resale of the gemstones, including a failure to provide access thereto (*id.* at ¶ 156); and failing to deliver and make available to plaintiffs the gemstones at issue (*id.* at ¶ 157). "Plaintiffs seek all damages permissible by law for all losses incurred as a result of defendants' tortious actions" (*id.* at ¶ 158).

A cause of action for tortious interference with a contract must allege the existence of a valid contract between plaintiff and a third party, which this claim fails to state. Further, this claim is devoid of any allegation that the individual defendants were acting for their own personal interests, rather than for the corporate interests (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d at 109; *see also Petkanas v Kooyman*, 303 AD2d 303 [1st Dept 2003]). Therefore, so much of defendants' motion as seeks dismissal of plaintiffs' claim for tortious interference with a contract, pursuant to CPLR 3211 (a) (7), is granted.

With respect to plaintiff's breach of fiduciary duty claim, defendants argue that plaintiffs fail to state a basis for finding a fiduciary relationship between the parties.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages

caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotation marks and citation omitted). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*id.* at 19). "A fiduciary relationship . . . is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, . . . where confidence is based upon prior business dealings (*Apple Records v Capitol Records*, 137 AD2d 50, 57 [1st Dept 1988] [citations omitted]).

The complaint contains allegations that plaintiffs were induced into entering an agreement and investment opportunity with defendants, by relying on defendants' expertise in the field of jewelry (complaint, ¶ 169- 170), and placing their confidence in, and trusting that, the representations made by them, regarding the costs of the gemstones and the projected resale values of the gemstones, were true (*id.*, ¶¶ 171- 174). Plaintiffs assert that the "relationship between the plaintiffs and defendants rose to the level of a fiduciary relationship, in that the plaintiffs trusted and relied upon the defendants' expertise in the jewelry business through the transactions" (*id.*, ¶ 175). Accepting the complaint's allegations as true, as the court must at this stage, plaintiffs sufficiently plead the existence of a fiduciary relationship between them and defendants.

They also sufficiently allege a claim for breach of fiduciary duty, in that they assert that

defendants breached their fiduciary duty to them by, among other things, intentionally and willfully misrepresenting the costs and project resale values of the gemstones and the projected resale values of the gemstones resale, which caused them damages. Therefore, that branch of defendants' motion for dismissal of plaintiffs' breach of fiduciary duty claim, pursuant to CPLR 3211 (a) (7), is denied.

As for plaintiffs' claim for a declaratory judgment, defendants allege that since plaintiffs have asserted other forms of action, this cause of action is unnecessary. "The sole consideration in determining a pre-answer motion to dismiss a declaratory judgment action is 'whether a cause of action for declaratory relief is set forth, not . . . whether the plaintiff is entitled to a favorable declaration'" (*Palm v Tuckahoe Union Free School Dist.*, 95 AD3d 1087, 1089 [2d Dept 2012] [citations omitted]). "Therefore, the allegations must demonstrate the existence of a bona fide justiciable controversy, defined as 'a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect'" (*id.* [citations omitted]). Further, "a cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d at 54).

Here, plaintiffs' cause of action for a declaratory judgment seeks the following declarations: that the agreement between plaintiffs and defendants is deemed void, that plaintiffs are entitled to 100% ownership of the gemstones, and that defendants have no ownership rights in the gemstones. This claim presents justifiable controversies sufficient to invoke this court's power to render a declaratory judgment (CPLR 3001). Additionally, since plaintiffs' other causes of action will not provide the relief sought in this declaration, this cause of action for a

declaratory judgment is appropriate. Therefore, that branch of the defendants' motion for dismissal of plaintiff's cause of action for a declaratory judgment, pursuant to CPLR 3211 (a) (7), is denied.

Accordingly, it is

ORDERED that so much of defendants' motion as seeks dismissal of the complaint against Lindsay Wolf, Inc. pursuant to CPLR 3211 (a) (8), for lack of jurisdiction, is denied, without prejudice to renewal upon completion of discovery; and it is further

ORDERED that so much of defendants' motion as seeks dismissal of the Fifth and Sixth Causes of Action in the complaint, pursuant to CPLR 3211 (a) (1), (7), and CPLR 3016 (b), is granted, and the Fifth and Sixth Causes of Action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: October 16, 2015

ENTER:

A.J. S. C.
HON. ELLEN M. COIN